FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No. : 1053/2012

In the matter between:-

MOTHAPO CONSULTING ENGINEERS (PTY) LTD t/a MOTHAPO PROJECTS — Applicant

and

NALA LOCAL MUNICIPALITY — Respondent

HEARD ON: 26 APRIL 2012

JUDGMENT BY: DAFFUE, J

DELIVERED: 21 JUNE 2012

INTRODUCTION

[1] Applicant is Mothapo Consulting Engineers (Pty) Ltd t/a Mothapo Projects, a company that carries on business as a provider of consulting, engineering and project management services. Respondent is the Nala Local Municipality with its principal office situated in Bothaville, Free State Province.

[2] Applicant seeks final orders in terms whereof

2.1 it is declared that its appointment to respondent's panel of professional service providers evidenced by respondent's letter of appointment dated 22 November 2011 and the Service Level Agreement ("SLA") concluded between the parties pursuant thereto on 24 November 2011 are in existence and binding on them;

2.2 respondent shall forthwith resume its performance of the agreements in accordance with the terms thereof and shall permit applicant to do likewise;

2.3 respondent be interdicted from taking any further steps in relation to tender notices and invitations to tender in relation to certain defined projects;

2.4 respondent be ordered to pay the costs of the application.

[3] Respondent opposes the application and the relief sought. It also filed a conditional counter-application, relying on the same facts set out in its answering affidavit to the main application in terms whereof it seeks a declaratory order that the SLA only is invalid *ab initio*, unlawful and unenforceable. The conditional counter-application starts of as follows:

> "Kindly take notice that the respondent intends making a conditional counter-application to the above Honourable Court on the date and time of set down of the main application if it being found that the

> respondent cancelled the contract between the parties as referred to in annexure ELM2 (the SLA) to the founding papers, without recourse to a court of law, for an order in the following terms..."

It needs to be recorded that although respondent now only seeks a declaratory order that the SLA is invalid *ab initio* unlawful and unenforceable, this counter-application also contains a prayer 2 which reads as follows: *"That respondent's cancellation of the aforementioned contract be ratified and confirmed."* Mr. Zietsman, who appeared on behalf of respondent with Mr. Mene, conceded in oral argument that only a valid contract can be cancelled in certain circumstances. *In casu* it is respondent's case that the SLA is invalid *ab initio* and Mr. Zietsman accordingly indicated that he would not be asking for the relief contained in prayer 2.

THE INVITATION TO TENDER AND THE CONTRACTS CONCLUDED

[4] Respondent invited bidders to submit bids in respect of four separate tenders, the only one relevant *in casu* being bid number 01/2011-1 which was advertised as follows:

> "Bidders are hereby invited from experienced and qualified service providers to submit detailed proposals for the request for proposals (RFP's).
>
> 1. Bid number 01/2011-1
>
>   Appointment of consultants to a panel of professional service providers for a period of three years. (Technical and financial proposal)."

The closing date was 9 November 2011.

[5] Pursuant hereto and on 22 November 2011 respondent appointed applicant in writing to its panel of professional service providers for a period of three years which appointment was duly accepted. In order to ascertain the scope of applicant's appointment the relevant parts of the letter are quoted:

> "Your company is hereby appointed for the planning, designs and implementation, turnkey construction including construction management and management and implementation of the project management unit of the municipality and supervision of the sub-consultants for the Bothaville/Kgotsong and Wesselsbron/Monyakeng municipal area as per the approved Municipal Infrastructure Grant projects as per the annexure "A" of the Service Level Agreement for a period of three years from 23

November 2011 to 30 June 2014.

a. Project Management Unit

Your company has been appointed and awarded the bid required services as a lead consultant for the management of the municipality Project Management Unit and for a period starting from 23 November 2011 to 30 June 2014 for the approved and funded projects as per the Capital Budget.

b. Planning and design of the approved and funded projects as per the Capital Budget.

Your company has been appointed and awarded the bid required services for planning and design of the approved and funded projects as per the Capital Budget for the period starting from 23 November 2011 to 30 June 2014.

c. Construction evaluation, appointment and implementation, turnkey construction and construction management.

Your company has been appointed and awarded the bid for required services for construction of the turnkey projects for approved and funded projects as per the Capital Budget for the period starting from 23 November 2011 to 30 June 2014.

d. Capital projects for the period starting from 1 July 2011 to 30 June 2014 as per the Table A. This projects as per Table A are allocated to Mothapo Projects (Pty) Ltd as per the required services."

[6] On 24 November 2011 the parties entered into the SLA

anticipated in the above letter of appointment. Annexure "A to this agreement sets out a description of work to be undertaken under the heading "Project and Construction Management Services – PMU Management and Consulting Services: Mothapo Consulting Engineers." It is clear from the document that project and consulting management services include the management of the construction process of works executed under multiple direct contracts from inception to completion, the administration of the construction processes on behalf of the employer from inception to completion and project management, being the management on behalf of the employer of the entire process necessary for the procurement of the design and the construction of the project from briefing through to commissioning and occupation. The basic services to be provided by the project manager are set out in detail in the document, whilst specific activities are also included.

THE ISSUES

[7] Two constitutional values need to be considered, namely

(a) the principle of legality with reference to section 217 of the Constitution read with other applicable legislation, regulations and respondent's Supply Chain Management

Policy ("SCMP"); and

(b) *Pacta servanda sunt*, i.e it is in the public interest that parties should comply with their contractual obligations.

It is applicant's case that the parties entered into the above contracts pursuant to a valid tender process. Respondent is of the view that the tender process was not in accordance with the statutory requirements and its own SCMP and that no valid and legally enforceable agreements were entered into between the parties. In its counter-application it does not seek the review and setting aside of the whole tender process and applicant's appointment evidenced by the letter of 22 November 2011. The validity of the SLA only is attacked. Applicant for the first time became aware of respondent's stance when it responded to the allegations in the founding affidavit. In its answering affidavit respondent relies on four factors in support of its case, i.e.

7.1 The closing date for submission of bids was less than 30 days as required by the Municipal Supply Chain Management Regulations and its SCMP. In this case a period 19 days only was allowed whilst there was no urgency or emergency or exceptional circumstances to deviate from the required period.

7.2 The tender committees (the Bid Evaluation Committee and the Bid Adjudication Committee) consisted of junior members contrary to respondent's SCMP.

7.3 Respondent's erstwhile Municipal Manager interfered with the recommendation of the Bid Adjudication Committee by amending its recommendations unilaterally and including additional functions which did not form part of the services required to be performed initially.

7.4 Applicant's prior engagement with respondent and its erstwhile Municipal Manager in particular insofar as applicant made recommendations and gave advice to respondent prior to the advertisement of the tender, prohibited applicant from tendering due to his intimate knowledge of the contract to be awarded.

BACKGROUND TO THE PRESENT DISPUTE

[8] During 2009 respondent was so dysfunctional due to alleged corruption, fraud, maladministration and financial mismanagement that the Free State Provincial Government intervened in terms of section 139 of the Constitution and appointed an administrator. The municipality stabilised and in

September 2011 the administration order was set aside. All powers and responsibility reverted back to the Municipal Manager at the time as accounting officer. In December 2011 KPMG, an auditing firm who was appointed by the administrator to do a forensic investigation, released its report whereupon the Municipal Manager and others were charged with misconduct. The Municipal Manager was eventually dismissed. With effect from 1 February 2012 the Free State Provincial Government intervened again and seconded the deponent to respondent's answering affidavit, Mr. Mokomela, to the municipality as acting Municipal Manager in terms of section 154 of the Constitution. On 9 February 2012 a meeting was convened by respondent which was attended by representatives of applicant and the two other consulting firms. Certain concerns were raised at the meeting, *inter alia* about applicant's perceived "conflict of interest". Hereafter a letter dated 21 February 2012 was addressed to applicant containing the following statement:

> "This communiqué serves to inform you that the previous engagement with regards to the abovementioned matter between yourself and the Nala Local Municipality has been nullified and is no longer in effect."

Apparently respondent relied on its cancellation of the agreements between the parties and not that the agreements and/or the tender process was void *ab initio.* Two letters to respondent from applicant and its attorneys respectively did not attract any response. It was *inter alia* communicated to respondent that its termination of the SLA was unlawful and a repudiation which was not accepted.

[9] On 29 February 2012 respondent published tender invitations for the construction of new roads. It is in respect of these tender processes and projects that applicant seeks an interdict to prevent respondent from appointing contractors and/or to proceed with the projects. Applicant's case is that it has been appointed to *inter alia* manage and supervise in respect of these projects as part and parcel of its services to be rendered. It is also its task to appoint appropriate contractors on behalf of respondent and this task is seen as one of the most crucial functions of the applicant as professional consultant.

[10] The 29 February 2012 invitation for tender did not allow for a period of 30 days as was the case with the 2011 invitation

which is the subject of dispute in this instance.

[11] Finally it should be mentioned that it is vaguely stated by respondent that the erstwhile Municipal Manager had previous engagement with applicant prior to the advertisement of the disputed tender, probably during September/October 2011. Apparently applicant was tasked to intervene and diagnose problems regarding respondent's infrastructure and to submit a report in that regard. It is alleged that such report was in fact received, but that it could not be traced for purposes of the application. It is then stated that applicant never declared the relationship that it had with respondent's Municipal Manager when it tendered. Applicant responded and confirmed that it was engaged by respondent to assist with conducting an independent business review and detailed turnaround implementation plan. This was in respect of various public works projects to be implemented in the financial year ending June 2012. It therefore denies that those instructions and the work done can be seen as a relationship other than a professional and legitimate one. Consequently there was nothing to declare.

LEGAL PRINCIPLES

[12] Section 217 of the Constitution prescribes that when an organ of state in the National, Provincial or Local Sphere of Government contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective. This is echoed in section 83(3) of the Local Government: Municipal Systems Act 32 of 2000. Section 112(1) of the Local Government: Municipal Finance Management Act, 56 of 2003 stipulates that the SCMP of a municipality must be fair, equitable, transparent, competitive and cost-effective and comply with a prescribed regulatory framework for municipal supply chain management. In this regard regulations were promulgated under GN R 868 in GG 27636 of 30 May 2005. Procurement law is prescriptive and not permissive. See **SANYATHI CIVIL ENGINEERING AND CONSTRUCTION (PTY) LTD v ETHEKWINI MUNICIPALITY AND OTHERS** 2012(1) BCLR 45 (KZP) paras 26 -36 and **TEB PROPERTIES CC v MEC, DEPARTMENT OF HEALTH AND SOCIAL DEVELOPMENT, NORTH WEST** [2012] 1 ALL SA 479 (SCA) para 31. Respondent has adopted its own SCMP, a complete version of which was attached to the answering

affidavit.

[13] The contract *in casu,* being in an amount in excess of R200 000,00, could only be procured through a competitive bidding process. See also **MUNICIPAL MANAGER: QAUKENI LOCAL MUNICIPALITY AND ANOTHER v FV GENERAL TRADING CC** 2010 (1) SA 356 (SCA) at para [13] p. 361D.

[14] In **QAUKENI**, *loc cit*, the SCA found as follows:

> "[16] I therefore have no difficulty in concluding that a procurement contract for municipal services concluded in breach of the provisions dealt with above which are designed to ensure a transparent, cost-effective and competitive tendering process in the public interest, is invalid and will not be enforced."

At p. 362G.

[15] Pertaining to the procedure to be adopted by a public body confronted with its own irregular administrative act, the SCA found in **QAUKENI**, *loc cit*, at para [26] p. 365F:

> "But it is unnecessary to reach any final conclusion in that regard (the review of the administrative action under PAJA). If the second appellant's procurement of municipal services through its contract with the respondent was unlawful, it is invalid, and this is a case in which the appellants were duty-bound not to submit to an unlawful contract, but to oppose the respondent's attempt to enforce it. This it did by way of its opposition to the main application and by seeking a declaration of unlawfulness in the counter-application. In doing so it raised the question of the legality of the contract fairly and squarely, just as it would have done in a formal review. In these circumstances, substance must triumph over form.

[16] In **PREMIER, FREE STATE, AND OTHERS v FIRECHEM FREE STATE (PTY) LTD** 2000 (4) SA 413 (SCA) the SCA set aside the contract concluded in secret in breach of provincial procurement procedures, holding that such a contract was "*entirely subversive of a credible tender procedure*" and that it would "*deprive the public of the benefit of an open competitive process*". See para [30] p. 429G-430A. Bolton, in his **The Law of Government Procurement in South Africa** at p. 182 states that "*Tenderers prepare their tenders based on the specifications laid down in a call for tenders. As a general rule, therefore, an organ of state should not be allowed to make changes to tender specifications after a*

call for tenders has been advertised…..To depart from tender specifications in any event gives one tenderer an unfair advantage over the other tenderers, who will have relied on the standard practice in submitting their own tenders, the amount of which will be based on the actual tender specifications."

[17] In **EASTERN CAPE PROVINCIAL GOVERNMENT AND OTHERS v CONTRACTPROPS 25 (PTY) LTD** 2001 (4) SA 142 (SCA) at paras [8] and [9] Marais JA discussed the mischief which our procurement legislation seeks to prevent and stated as follows:

> "[9] As to the consequences of visiting such a transaction with invalidity, they will not always be harsh and the potential countervailing harshness of holding the province to a contract which burdens the taxpayer to an extent which could have been avoided if the tender board had not been ignored, cannot be disregarded……. Such transactions are either all invalid or all valid. Their validity cannot depend upon whether or not harshness is discernible in the particular case."

[18] In **<u>FERNDALE CROSSROADS SHARE BLOCK (PTY) LTD AND OTHERS v JOHANNESBURG METROPOLITAN MUNICIPALITY AND OTHERS</u>** 2011 (1) SA 24 (SCA) at para [22] the court found that the effect of non-compliance with the provisions of section 79(18)(b) and (c) of the Local Government Ordinance, i.e. failure to *inter alia* publish a notice calling for objections to the proposed lease before exercising the power to let, is that the jurisdictional fact necessary for the council's exercise of its power to let immovable property belonging to it, was absent. In terms of section 79(18)(c) a council "*shall not exercise the power (to let immovable property) ... unless (it) has considered every objection*". The SCA found that in the absence of the necessary jurisdictional fact the respondent could not validly exercise the power with the result that the lease element of the agreement was *ab initio* invalid.

[19] Notwithstanding the above exposition of the law, it is also accepted that "*(n)ot every slip in the administration of tenders is necessarily to be visited by judicial sanction*" and "*considerations of public interest, pragmatism and practicality should inform the exercise of a judicial discretion whether to set aside an administrative act or not*." See **<u>CHIEF EXECUTIVE OFFICER, SOUTH AFRICAN SOCIAL</u>**

SECURITY AGENCY, AND OTHERS v CASH PAYMASTER SERVICES (PTY) LTD 2012 (1) SA 216 (SCA) at para [29] p. 225C with reference to **MOSEME ROAD CONSTRUCTION CC AND OTHERS v KING CIVIL ENGINEERING CONTRACTORS (PTY) LTD AND ANOTHER** 2010 (4) SA 359 (SCA) at para [21], p. 367C and **OUDEKRAAL ESTATES (PTY) LTD v CITY OF CAPE TOWN AND OTHERS** 2004 (6) SA 222 (SCA) at para [36]. See also **NOKENG TSA TAEMANE LOCAL MUNICIPALITY v DINOKENG PROPERTY OWNERS ASSOCIATION AND OTHERS** (518/09) [2010] ZASCA 128 (30 September 2010) and the following *dictum* at para [14]:

> "…the mere failure to comply with one or other administrative provision does not mean that the whole procedure is necessarily void. It depends in the first instance on whether the Act (*in casu* the Local Government Transition Act 209 of 1993) contemplated that the relevant failure should be visited with nullity and in the second instance on its materiality."

See also **METRO PROJECTS CC v KLERKSDORP LOCAL MUNICIPALITY** 2004(1) SA 16 (SCA) at paras [13] - [15] where it was stated that "*fairness must be decided on the circumstances of each* *case*", and "*there are degrees of compliance with any standard and that it is notoriously difficult to assess whether less than perfect compliance falls on one side or the other of the validity divide*.

[20] In **MEC FOR HEALTH, GAUTENG v 3P CONSULTING (PTY) LTD** 2012 (2) SA 542 (SCA) at para 25 it was found that the renewal of the SLA in that case did not give rise to a new agreement as it merely extended the duration of the SLA for a period of three years. There being no new SLA, it was not necessary to follow a competitive bidding process for the procurement of the required services. It is also to be noted that the appointment letter in terms whereof the service provider was appointed consequent upon a procurement process provided that it was subject to the signing of a service level agreement as *in casu.*

[21] In **ABSA BANK LTD v KERNSIG 17 (PTY) LTD** 2011 (4) SA 492 (SCA) the court found that section 38 of the Companies Act, 61 of 1973,

> "is fact-based and that, without the necessary facts, a court cannot make a finding on whether s 38 was contravened or not."

It concluded as follows

> "[24] In this matter it is plain that all the facts are not before court to enable the court to determine whether or not s 38 has been contravened."

See paras [23] and [24] p. 498J – 499E. The SCA also relied on the following dictum of Trollip JA in **YANNAKOU v APOLLO CLUB** 1974 (1) SA 614 (A) at 623G – H:

> "And if his defence is illegality, which does not appear *ex facie* the transaction sued on but arises from its surrounding circumstances, such illegality and the circumstances founding it must be pleaded.
> It is true that it is the duty of the court to take the point of illegality *mero motu*, even if the defendant does not plead or raise it; but it can and will only do so if the illegality appears *ex facie* the transaction or from the evidence before it, and, in the latter event, if it is also satisfied that all the necessary and relevant facts are before it."

[21] It is trite that it is in the public interest that parties should comply with their contractual obligations: p*acta servanda sunt.* As

stated in **<u>REDDY v SIEMENS TELECOMMUNICATIONS (PTY) LTD</u>** 2007 (2) SA 486 (SCA) at para [15] this principle reflects not only the common law, but constitutional values since "*contractual autonomy is part of freedom informing the constitutional value of dignity, and it is by entering into contracts that an individual takes part in economic life*."

[22] In **<u>WIGHTMAN t/a JW CONSTRUCTION v HEADFOUR (PTY) LTD AND ANOTHER</u>** 2008 (3) SA 371 (SCA) at para [13] p. 375G – 376B the court dealt with the manner in which applications for final relief should be adjudicated in the following manner:

> "[13] A real, genuine and *bona fide* dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed. There will of course be instances where a bare denial meets the requirement because there is no other way open to the disputing party and nothing more can therefore be expected of him. But even that may not be sufficient if the fact averred lies purely within the knowledge of the averring party and no basis is laid for disputing the veracity or accuracy of the

averment. When the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or countervailing evidence) if they be not true or accurate but, instead of doing so, rests his case on a bare or ambiguous denial the court will generally have difficulty in finding that the test is satisfied. I say 'generally' because factual averments seldom stand apart from a broader matrix of circumstances all of which needs to be borne in mind when arriving at a decision. A litigant may not necessarily recognise or understand the nuances of a bare or general denial as against a real attempt to grapple with all relevant factual allegations made by the other party. But when he signs the answering affidavit, he commits himself to its contents, inadequate as they may be, and will only in exceptional circumstances be permitted to disavow them. There is thus a serious duty imposed upon a legal adviser who settles an answering affidavit to ascertain and engage with facts which his client disputes and to reflect such disputes fully and accurately in the answering affidavit. If that does not happen it should come as no surprise that the court takes a robust view of the matter."

See also **MEC OF HEALTH** *loc cit* at para 28.

THE FACTS AND THE APPLICATION OF THE LEGAL PRINCIPLES THERETO

[24] Mr. Slon, applicant's counsel argued that the allegations contained in the answering affidavit were so vague that it was difficult to establish what exactly respondent's defence was. He initially argued that it was a matter of trial by ambush which ought not to be permitted, but later on conceded that notwithstanding vagueness, it was possible to establish the defence that respondent intended to rely upon. I must confess that I also had difficulties with the answering affidavit. It is expected of parties in motion procedure to set out all relevant facts in their affidavits: the applicant must set out a cause of action and the respondent a plea. The same applies to a counter-application. The evidence necessary to sustain the cause of action or the plea must be contained in the affidavits.

[25] There is no doubt that a municipality that intends to conclude a service delivery agreement with an external supplier at a contract amount in excess of R200 000,00 has to act openly and in accordance with a fair, equitable, competitive and cost-effective system and in terms of a Supply Chain Management Policy designed to have that effect. The failure to comply with

these precepts renders the contract invalid and open to nullification by a court. It is also clear that a court cannot make such a finding without the necessary factual foundation and on mere speculation or conjecture. In order to succeed with its allegation of illegality respondent must be successful in the factual enquiry, i.e. that the tender process followed and contracts concluded thereafter did not comply with section 217 of the Constitution, the other procurement legislation referred to above as well as respondent's SCMP.

[26] The test to be applied in adjudicating applications of this nature is set out in **WIGHTMAN** *loc cit* and also the well-known **PLASCON-EVANS**-judgment, 1984 (3) SA 623 (AD) at 634-5. It may be accepted that insofar as respondent raises illegality in order to succeed with its counter-application, the matter should be dealt with on the factual averments of applicant (respondent in the counter-application) together with the admitted facts in respondent's affidavit. Respondent as the applicant in the counter-application had the right to file a further affidavit (replying affidavit) to applicant's replying affidavit, but failed to do so. I also accept that allegations made by a respondent may

be so far-fetched or clearly untenable that a court may be justified in rejecting them merely on the papers. However it is not necessary *in casu* to come to a final conclusion as to how the two conflicting versions should be adjudicated and on whom the onus rests. Respondent's version in its answering affidavit as a whole are so sketchy, inconclusive and unsubstantiated that I am effectively precluded from making any finding on the strength thereof, let alone of finding in favour of respondent. Bearing in mind the vague and unsubstantiated version put forward by respondent, the following comments are made pertaining to what is either common cause or should be accepted based on the rules applicable to the adjudication of applications when final relief is sought:

1. The closing date for tenders was less than 30 days from the date of advertisement. This is in itself insufficient to declare the tender process or the contracts entered into pursuant thereto null and void. The respondent's SCMP must be considered.
2. The Municipal Manager at the time had the authority in terms of the SCMP to determine a shorter period than 30 days in cases of urgency, emergency or exceptional circumstances. Respondent failed to rely on credible,

admissible and reliable evidence of either the erstwhile Municipal Manager or anyone else – in particular senior personnel such as the Chief Financial Officer or the Director: Corporate Services - to prove that there was no justification for a shorter period *in casu*. It is clear from the minutes of the meeting of 9 February 2012 relied upon by respondent that it spent much less than it was entitled to during the applicable financial year. This was also the case in the previous year. Respondent's request for a roll-over of the unused funds to the next year was declined by the National Government although negotiations were on-going to retrieve these funds. Obviously respondent was hard pressed to utilise funds made available to it for its infrastructure projects as swiftly as possible. Invitations for tenders published on 29 February 2012 by the order of the acting Municipal Manager (and deponent of the answering affidavit) did not allow for the prescribed 30 days as well. In fact, the period provided to prospective bidders was a mere 16 days, even less than the previous year. The reasons advanced by applicant in its reply as to why the usual period was probably truncated by the former Municipal Manager in October 2011 are not only supported by the information contained in the aforesaid minutes, but are overwhelmingly in favour of urgency. It is apparent that there was a general lack of planning within respondent (it was under administration for a long time), that co-ordination of projects were not overseen and that only 10% of funds allocated for the financial year was spent at the time notwithstanding the fact that 50% of the year had already elapsed. Respondent cannot now be heard to say that its erstwhile Municipal Manager should not have truncated the period of 30 days, especially insofar as it failed to reply to applicant's version as it was entitled to do. There is no indication that other bidders or prospective bidders were negatively affected by the short period. If respondent was in possession of such written complainants or information in that regard, I would have expected its deponent to inform the court accordingly.

3. There is no indication that the Bid Evaluation and Bid Adjudication Committees were not properly composed in accordance with respondent's SCMP and no positive finding can be made in support of respondent's case.

Respondent failed dismally to inform the court in detail as to the composition of these two committees, save to say that the identified people were "among" others on the committees. There is also no evidence on record as to why it is alleged that the prescribed competency levels as provided for in section 119 of the Local Government: Municipal Finance Management Act have not been met. It is also not explained what is prescribed in this regard and how, when, where and when were employees of respondent tested for compliance purposes and who qualified. Respondent relies on vague and unsubstantiated allegations in this regard. A confirmatory affidavit by Mr. Moleko, an acting Technical Director, who was on respondent's version not supposed to be on the Bid Adjudication Committee, is attached to respondent's papers. No reason is advanced for this bald allegation. There is no explanation why respondent failed to rely on the evidence of its Chief Financial Officer or Director: Corporate Services at the time. The Chief Financial Officer did not have to chair the Bid Adjudication Committee as alleged and any other top senior management official could have been designated by the Municipal Manager. It is common cause that the Director: Corporate Services, obviously a senior manager, chaired that committee. This is in line with section 19.1 of the SCMP.

4. It is vaguely and speculatively alleged by respondent that applicant was tasked to intervene and diagnose the problems regarding infrastructure experienced by respondent and this being the case, there was "a relationship with the then municipal manager prior to the advertisement of the tender which was never declared" and therefore the Municipal Manager acted contrary to legislation to award the tender to applicant. These vague and unsubstantiated allegations are not sufficient to find any irregularity. Applicant explains its involvement in reply and in my opinion indicates persuasively that there was no relationship other than a professional and legitimate one and there was also nothing to declare.

5. Bids were invited by respondent for the appointment of consultants to a panel of professional service providers for a period of three years. It is not clear whether the invitation referred to qualified people that could act as

consultants only and/or whether the bidders had to be professional service providers in respect of other fields as well in order to be appointed to the panel. It was for respondent, who is supposed to have intimate knowledge hereof and documentation to support its case, to provide the court with precise and detailed evidence as to what was required. All bids had to be submitted on the prescribed bid documentation prepared by respondent. This is clear from paragraph 3.7 of section 24 of the SCMP. It would be an easy task to attach these documents that must be in respondent's possession to its papers, but instead, respondent elected to attach a complete copy of its SCMP – a total of 94 pages - without even referring in its affidavit to the relevant clauses. Respondent again relies on vague allegations to the effect that the Municipal Manager rejected the report of the Bid Adjudication Committee and "*wanted to amend the report in order to advantage the applicant*." Immediately thereafter it is alleged as a fact that the Municipal Manager "*amended the report by redirecting 80% of the advertised services to the applicant*." The deponent carries on as follows: "*These* *inclusions amounted to interference with the supply chain management system of the respondent (contrary to section 118 of the MFMA Act). The inclusions also amounted to the new tender other than the one recommended and thereby contradicting the services that were put out on tender*." This is nonsensical and one must try to read between the lines to find out exactly what respondent wants to convey. In any event respondent, for reasons known to it only, elected not to attach the report or recommendation of the Bid Adjudication Committee which was allegedly amended completely. The court is again left in the dark. Later on it is stated that the amendment of the tender in effect meant that the applicant would be performing functions as a Project Management Unit as well as a consultant at the same time and that this could not be tolerated. It is also alleged that the whole spectrum of services to be rendered did not form part of the tender. The allegations are vehemently denied by applicant in its replying affidavit (which is also its answer to the counter-application), but respondent failed to respond thereto in a replying affidavit in the counter-application.

6. Applicant has performed work for respondent in terms of

the letter of appointment and SLA and an amount of R2 182 658,51 has already been paid to it.

7. In terms of the tender applicant was appointed as consultant together with two other consultants, i.e. Urban Renewal (Pty) Ltd and Thewo Consulting CC and these three consultants were then appointed and engaged in different capacities accordingly. The other two consultants were appointed pursuant to precisely the same process and the same tender adjudication provisions and they are still engaged by respondent in the same projects in which applicant is entitled to be engaged. Applicant was the lead consultant under whose auspices the other two consultants carried out their functions. In its founding affidavit applicant reserved the right to explain in detail the services to be rendered by it in terms of the agreements, should it become necessary by reason of what may be alleged by respondent in opposing the application. It should be recalled that the letter addressed to applicant in terms whereof the relationship was severed is not only contradictory, but does not reflect any reasons for its decision.

Furthermore respondent failed to respond at all to applicant's letters and in particular the letter of its attorneys.

8. Applicant's version in response to respondent's vague averments is crystal-clear. As already mentioned, respondent failed to deny it as it was entitled to do. According to applicant the purpose of the tender was to appoint consultant(s) to respondent's panel of consultants for a period in order for services such as project management and other management services to be rendered by such consultant(s) as set out in a SLA at a pre-agreed rate and as and when required. Like the SLA the scope of work entailed therein was not itself sent out on tender. The work to be performed in terms of the SLA was precisely the kind of work anticipated and which applicant had to show it was capable of conducting at the prices tendered. During the tender process the applicant had to show that it had the skill, expertise and financial ability to do the work to be entrusted to it from time to time, but most importantly, the rates and costs at which it was prepared to work had to be specified. The applicant's case is thus that no "amendment" of the tender

services occurred

[27] Despite setting out a series of legislation and policy provisions alleged to govern respondent's conduct, it does not state in terms of precisely what legislative or other provision it claims to be entitled to the relief claimed. Although the relief claimed by applicant is opposed, respondent does not apply in the counter-application for the review and setting aside of the whole tender process and applicant's appointment in terms of the letter of 22 November 2011 as being null and void *ab initio*. I accept for purposes hereof that this is respondent's intention although it is nowhere stated what it intends to do if successful, i.e. whether it intends to start a new tender process or whether it merely seeks to cut out applicant from being employed as either consultant or project manager.

[28] Respondent relies almost entirely on its own alleged non-compliance with legislation and its policy, but fails to provide the court with supporting documents and the firsthand evidence of witnesses such its erstwhile Municipal Manager, its Chief Financial Officer and/or its Director: Corporate Services. In stead it prefers to rely on the hearsay evidence of its acting

Municipal Manager confirmed to a certain extent by Mr. Moleko. It is insufficient if the case law referred to above and **WIGHTMAN** *loc cit* in particular is considered.

[29] I have considered Mr. Zietsman's arguments carefully. His legal arguments are unfortunately related to a factual matrix which is unsound and unacceptable for the reasons set out herein. He, *inter alia*, relies heavily on the erstwhile Municipal Manager's duties as accounting officer in the event of a so-called deviation and the fact that no records or documents could be found to prove that deviation was justifiable. However, the reliance on the SCMP to substantiate his argument is incorrect insofar as the official procurement process was not dispensed with *in casu*. In any event there is no evidence that a council meeting was held in the mean time and no minutes of any council meetings were attached. Insofar as notes to the annual financial statements are concerned, those statements probably still have to be drawn once the financial year has ended. We have not been informed fully in this regard. Mr. Zietsman is incorrect to argue that the appointment of the Bid Evaluation and Bid Adjudication Committees by the erstwhile Municipal Manager was *ultra vires* insofar as there is no

evidence whatsoever as to the number and identity of the people that were in fact appointed to these two committees, the qualifications of all of them and their training and expertise pertaining to the required competency levels. As mentioned there is no evidence as to either the prescribed competency levels or the actual competency levels of these members. Mr. Zietsman also argued that the erstwhile Municipal Manager amended the recommendations of the Bid Adjudication Committee and included functions that did not form part of the services required to be performed. On his version these additional services did not form part of the tender that was advertised and that this amounted to an unfair tender process which was not competitive and open to the public. The problem with this argument, as with all other arguments, is that there is no factual foundation for his submission for the reasons stated above.

[30] There is no room for a finding that the applicant's appointment and the subsequent SLA were done in secret and in breach of any of respondent's procurement procedures. Furthermore, respondent has not played open cards and did not place

tenable, reliable and credible evidence before the court to find in its favour that there was a material or even minor breach of its SCMP or any other procurement legislation. Applicant's appointment to respondent's panel of consultants and the subsequent letter of appointment read with the SLA appear to be exactly the type of procurement that one often experiences where local governments solicit bids from service providers such as attorneys. In order to be successful these firms of attorneys have to show that they comply with all relevant prescripts and what their fee structures would be in respect of work to be allocated to them in future. Such panels may consist of several firms of attorneys and the local government officials are then entitled to instruct any firm on the panel to do legal work anticipated in the tender without having to go through a further procurement procedure.

[31] Even if it is accepted in favour of respondent that the period of 30 days should not have been truncated or that inexperienced personnel also sat on the committees, this appears to be minor failures to comply with the relevant administrative provisions and this should not cause the whole tender procedure, applicant's appointment and subsequent SLA to be void. The matter *in casu* is certainly distinguishable from **PREMIER,**

FREE STATE, *loc cit*, **FERNDALE CROSSROADS**, *loc cit*, **MUNICIPAL MANAGER: QAUKENI LOCAL MUNICIPALITY**, *loc cit* and **CONTRACTPROPS 25**, *loc cit*. See again the judgment of Harms DP in **MOSEME ROAD CONSTRUCTION**, *loc ci,* para 21.

[32] Consequently, the main application must succeed and the counter-application be dismissed. Costs should follow the event.

ORDER

[33] Therefore the following orders do issue:

Main application:

1. It is declared that applicant's appointment to respondent's panel of professional service providers evidenced by respondent's letter of appointment dated 22 November 2011 and the Service Level Agreement concluded between the parties on 24 November 2011 are in existence and are binding on the parties.
2. Respondent shall forthwith resume its performance of the agreements in accordance with the terms thereof and

shall similarly permit the applicant to do so.

3. Respondent is hereby interdicted and restrained from taking any further steps in relation to the tender notices and invitations to tender, or in relation to all and any advancement or furtherance of the tendering processes or of the projects themselves, in respect of the following projects:

   3.1 Kgotsong: Paved roads Ph 4 (1.5 km);

   3.2 Monyakeng: Paved roads Ph 4 (2.1 km);

   3.3 Kgotsong: Paved Roads Ph 4(c) (1.5 km);

   3.4 Monyakeng: 1.5 km New Cemetery Road

   and in respect of any other project/s appearing in the schedule, a copy whereof is annexed as annexure "ELM5" to applicant's founding affidavit, until such time as respondent will fully have complied with the order set out in paragraph 2 above.

4. Respondent is ordered to pay the costs of this application.

Counter-application:

5. The counter-application is dismissed with costs.

J.P. DAFFUE, J

On behalf of applicant:	Adv. B.M. Slon Instructed by: McIntyre & Van der Post BLOEMFONTEIN
On behalf respondent:	Adv. P. Zietsman SC With him: Adv. B.S. Mene Instructed by: Bokwa Attorneys BLOEMFONTEIN

/sp