

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MAKHANDA)**

Of interest
CASE NO. 4495/2023

In the matter between:

ZEN JV

Applicant

and

**THE DEPARTMENT OF TRANSPORT:
PROVINCE OF THE EASTERN CAPE**

First respondent

**THE MEC OF THE EASTERN CAPE PROVINCE
DEPARTMENT OF TRANSPORT
AND COMMUNITY SAFETY**

Second respondent

DOWN TOUCH INVESTMENTS (PTY) LTD

Third respondent

JUDGMENT

LAING J

[1] This matter concerns a dispute over the first respondent's decision to award a tender for the upgrading of a 20 kilometre stretch of road, via the village of Clarkebury, in the Engcobo district of the Eastern Cape. The applicant obtained an interdict on 28 December 2023 to prevent the further implementation of the award to the third respondent, pending the review of the first respondent's decision. The matter presently before the court is the review itself.

Background

[2] The first respondent advertised a tender for the above construction project and stipulated the tender conditions that would apply. These included the qualifying or eligibility requirements for any potential bidder as well as the criteria that the first respondent would use for the evaluation and adjudication of the bid itself.

[3] The applicant is a joint venture ('JV').¹ It submitted a bid for the goods and services to be supplied, quoting a price of R 327,628,259. This was the lowest price of the 22 bids that the first respondent received. Having calculated that it would consequently obtain the maximum of 90 points for price, as well as a maximum of ten points for specific goals,² the applicant was confident that it would secure the tender.³ Much to the applicant's surprise, it subsequently learnt that the first respondent had awarded the tender to the third respondent. The successful bidder's price, however, was R 363,528,290. This was approximately R 36 million more expensive than the applicant's.

[4] The first respondent's tender required a bidder to propose a construction health and safety officer ('CHSO') for the construction work to be carried out. Importantly, he or she needed a minimum of five years' experience in such capacity on surfaced road projects. When determining whether the applicant had met the eligibility requirements, the first respondent's Bid Evaluation Committee ('BEC') found that it had failed to comply; the proposed CHSO, Ms Zandile Ndamase, had only four years' experience.

¹ The JV consisted of two members: Rumdel (Pty) Ltd and Lik'themba Building and Construction CC. Both entities are based in East London.

² The specific goals and the points that can be allocated are those envisaged under section 2(1) of the Preferential Procurement Policy Framework Act 5 of 2000. These include contracting with persons or categories of persons who have been historically disadvantaged by unfair discrimination because of race, gender, or disability.

³ The combined scores for price and specific goals, as calculated by the applicant, totalled 100 points. This was the maximum that could be achieved.

Consequently, the BEC disqualified the applicant's bid from further evaluation and adjudication.

[5] The applicant pointed out that Ms Ndamase had been employed by Rumdel (Pty) Ltd as a CHSO for several years.⁴ She had worked on various surfaced road projects, including: the upgrading of the N2 from Tetyana to Sithebe Komkhulu, from 2016 until 2019; the upgrading of the road from St Barnabas Hospital to the Hluleka Nature Reserve, from 2019 until 2022; and the upgrading of the R63 from Fort Beaufort to Alice, from 2022 until present. This was a period of more than the five years' experience stipulated for the tender. In the circumstances, the applicant contended that it had met the eligibility requirements. The first respondent's decision to disqualify its bid was unlawful.

Applicant's supplemented case

[6] The applicant supplemented its founding papers pursuant to the delivery of the record. It indicated that it had completed a *pro forma* document included in the tender and described as 'returnable schedule E', setting out Ms Ndamase's experience. The applicant had also attached a copy of her *curriculum vitae* ('CV'). Read together, the documents demonstrated that Ms Ndamase had been a CHSO for surfaced road projects from 2016 until 2023, when the bid was submitted. The applicant asserted that it had met the eligibility requirements.

[7] It went on to refer to the minutes of a BEC meeting from which it was apparent that the BEC had resolved to seek clarity from some of the bidders about the experience of key personnel. The BEC sought approval in this regard from the Director: Supply Chain Management, Mr Phumlani Hani. He refused, saying that this would give an unfair advantage to the bidders in question. The experience of the applicant's

⁴ Rumdel (Pty) Ltd is one of the members of the JV. See n 1 above.

proposed CHSO had not been properly quantified; its bid had to be disqualified. The BEC accepted and implemented Mr Hani's advice.

[8] The applicant contended that it was quite apparent from schedule E, read with Ms Ndamase's CV, that she had the necessary experience. If clarity was required, then both the tender conditions and the first respondent's Supply Chain Management Policy ('SCMP') permitted the BEC to have requested additional information with the prior approval of the accounting officer or delegated official. Furthermore, the applicant averred that it had a right to make representations to the first respondent before its bid was disqualified. This would have allowed it to draw the BEC's attention to the relevant documents, providing the clarity that had originally been sought.

Respondent's case

[9] In its supplemented answering papers, the first respondent set out the basis for its opposition. It argued that the applicant had failed to exhaust the available internal remedies; section 7(2) of the Promotion of Administrative Justice Act 3 of 2000 ('PAJA') precluded the court from reviewing the matter. Furthermore, the first respondent referred to the definition of an 'acceptable tender', provided in terms of section 1 of the Preferential Procurement Policy Framework Act 5 of 2000 ('PPPFA'), and averred that the applicant's bid did not comply with the specifications and conditions of the tender; the first respondent had no authority to condone such non-compliance.

[10] The first respondent dealt in greater detail with Ms Ndamase's experience, as reflected in the applicant's bid. It pointed out that there were apparent inconsistencies, contradictions, and deficiencies in the information supplied. The applicant had failed, for example, to stipulate project end dates and duration with sufficient particularity. The first respondent could not make assumptions. If schedule E and Ms Ndamase's CV were properly interpreted, then she had only 54 months and 11 days of experience. This fell short of the 60 months (five years) required. The first respondent noted, too, that Ms

Ndamase had failed to provide a supporting or confirmatory affidavit in relation to her actual experience.

[11] Regarding Mr Hani's involvement, the first respondent emphasised that he was delegated with authority to advise the BEC. He merely indicated to the BEC that the applicant had failed to comply with a mandatory requirement; it was unnecessary and impermissible for the BEC to seek clarity. The bid had to be disqualified.

In reply

[12] The applicant, in reply, asserted that no internal remedy was available. Moreover, the dispute concerned whether its bid was an 'acceptable tender', as defined, rather than whether any non-compliance could be condoned. What was at issue was a proper interpretation of the documentation submitted to demonstrate Ms Ndamase's experience. The applicant addressed, again, the details thereof and argued that the documentation indicated a period of six-and-a-half years, more than what was required.

Issues to be decided

[13] From the papers, the following issues emerge: (a) was an internal remedy available to the applicant; (b) did the applicant's bid comply in all respects with the specifications and conditions of the tender; (c) was the first respondent obliged to have requested clarity from the applicant; and (d) should the first respondent have given the applicant an opportunity to make representations prior to any decision to disqualify its bid? It might not be necessary to determine each issue conclusively; a finding in favour of the applicant regarding (b), above, could well decide the matter.

[14] Furthermore, given the divergent approaches that have developed in our jurisprudence in relation to the meaning of an 'acceptable tender', it is necessary to analyse this aspect more closely within the context of the present matter, notwithstanding that any remarks made in this regard could well be *obiter dicta*.

[15] An overview of the legal framework is set out below.

Legal principles involved

[16] For the sake of convenience, it is easier to deal separately with the regulatory framework, followed by the applicable case law.

Regulatory framework

[17] It is trite that public procurement decisions, such as the appointment or disqualification of a bidder, are examples of administrative action.⁵ They are subject to the just administrative action provisions contained in section 33 of the Constitution.⁶ In that regard, PAJA is the national legislation that was enacted to give effect thereto, allowing a person to challenge administrative action by means of the judicial review mechanism created in terms of section 6. To do so successfully, a litigant must rely on the review grounds listed thereunder.

[18] Public procurement itself is further subject to section 217 of the Constitution. More specifically, sub-section (1) stipulates that when an organ of state contracts for goods or services, it must do so in accordance with a system that is fair, equitable, transparent, competitive, and cost-effective.⁷ These are the cardinal principles of the procurement of goods and services by South African public entities.

⁵ In *Logbro Properties CC v Bedderson NO and others* 2003 (2) SA 460 (SCA), Cameron JA remarked, at paragraph [5], that this was obvious; the Supreme Court of Appeal had consistently applied the Constitution's administrative justice provisions to government tender processes. See *Umfolozi Transport (Edms) Bpk v Minister van Vervoer en Andere* [1997] 2 All SA 548 (SCA), at 552-3; *Transnet Ltd v Goodman Brothers (Pty) Ltd* 2001 (1) SA 853 (SCA), at 870; and *Olitzki Property Holdings v State Tender Board and Another* 2001 (3) SA 1247 (SCA), at paragraph [33].

⁶ Section 33(1) of the Constitution provides that everyone has the right to administrative action that is lawful, reasonable, and procedurally fair.

⁷ Section 217(2) permits an organ of state to implement a procurement policy providing for categories of preference in the allocation of contracts, and the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination. Section 217(3) requires national legislation to prescribe

[19] The first respondent, as a provincial department, is required to implement the above principles in accordance with the provisions of Public Finance Management Act 1 of 1999 ('PFMA'). The applicable system of procurement is not found directly in the above legislation but appears in the Treasury Regulations thereto, under the heading of supply chain management.⁸ In that regard, regulation 16A6.1 indicates that the procurement of goods and services must be achieved through either a quotation or a bidding process; regulation 16A6.3 indicates that tender documentation must include evaluation and adjudication criteria.

[20] The Supply Chain Management Policy ('SCMP') of the first respondent gives practical effect to the statutory and regulatory framework. The powers and functions of the first respondent's BEC are addressed under paragraph 10.8.2. Of relevance to the present matter is the following:

'If the bid committee requires additional information from a specific bidder for a sole purpose of seeking clarity, such communication must be done in writing with the prior approval by the Accounting Officer or delegated official. Such communication must not provide the relevant bidder with the opportunity to supplement, enhance or amend his/her/their bid.'⁹

[21] The evaluation of bids is addressed in terms of paragraph 10.8.3.2, which stipulates that bids must be evaluated according to the criteria set by the bid specification committee and contained in the tender documents. To that end, paragraph 10.8.4 requires the BEC to ensure that a bid complies 'in all respects' with such criteria.

[22] The dispute at the heart of the present matter is whether the applicant's bid satisfied the criteria contained in the first respondent's tender documents. This must be

a framework within which the above policy must be implemented. The PPPFA is the legislation in question.

⁸ GNR 225 of 15 March 2005.

⁹ Sic. At sub-paragraph v.

decided with reference to the definition of an acceptable tender in terms of section 1 of the PPPFA:

“ **acceptable tender**” means any tender which, in all respects, complies with the specifications and conditions of tender as set out in the tender document.’

[23] Arising from this is the question whether it was permissible, if not obligatory, for the BEC to have sought clarity from the applicant in circumstances where the information supplied was unclear.

Case law

[24] The first respondent’s case is essentially that the applicant failed to comply with the eligibility requirements. It was not a bid that complied in all respects with the specifications and conditions of tender, as set out in the tender documents.

[25] There is, of course, a continuum of compliance. At the one extreme is absolute compliance, i.e. a meticulously prepared bid from a bidder with an abundance of expertise and experience; at the other extreme is absolute non-compliance, i.e. a poorly prepared bid from a bidder with no expertise or experience. Along the continuum, however, is a range of partial compliance, marked by increasing levels of uncertainty. How would a procuring entity treat, for example, a bid where the bidder had previously completed a construction project to the value of R 149,999,999 instead of the stipulated minimum of R 150,000,000? Where to draw the line between adjacent points along the continuum is not straightforward.

[26] This was clearly recognised in *Metro Projects CC and another v Klerksdorp Local Municipality and others*,¹⁰ where Conradie JA remarked:

¹⁰ [2004] 1 All SA 504 (SCA).

‘There are degrees of compliance with any standard and it is notoriously difficult to assess whether less than perfect compliance falls on one side or the other of the validity divide. Whether or not there can in any particular case be said to have been compliance with “the specifications and conditions of tender” may not be an easy question to answer.’¹¹

[27] The question of what constitutes compliance is a vexing one and has given rise to two broadly divergent approaches in South African public procurement law. The meaning of an ‘acceptable tender’ has been subjected to either a strict approach,¹² on the one hand, or to a more flexible approach, on the other.

[28] In *Chairperson: Standing Tender Committee and others v JFE Sapela Electronics (Pty) Ltd and others*,¹³ Scott JA held as follows:¹⁴

‘The definition of “acceptable tender” in the Preferential 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”.¹⁵ In other words, whether “the tender in all respects complies with the specifications and conditions of tender as set out in the contract documents” must be judged against these values.’

[29] A few years later, in *Minister of Social Development and others v Phoenix Cash & Carry-Pmb CC*,¹⁶ the Supreme Court of Appeal made certain general observations about the circumstances that offended against the principles contained in section 217(1) of the Constitution. These remain pertinent. In that regard, Heher JA commented as follows:

¹¹ At paragraph [15].

¹² Some might say the strict approach is formalistic in nature. See n 30 below.

¹³ [2005] 4 All SA 487 (SCA).

¹⁴ At paragraph [14].

¹⁵ Sic. It is most probable that the term ‘cost-effective’ was intended, as used in section 217(1) of the Constitution.

¹⁶ [2007] 3 All SA 115 (SCA).

- (1) a tender process which depends on uncertain criteria lends itself to exclusion of meritorious tenderers and is opposed to fairness among tenderers, and between tenderers and the public body which supposedly promotes the public weal;
- (2) a process which lays undue emphasis on form at the expense of substance facilitates corrupt practice by providing an excuse for avoiding the consideration of substance; it is inimical to fairness, competitiveness and cost-effectiveness. By purporting to distinguish between tenderers on grounds of compliance or non-compliance with formality, transparency in adjudication becomes an artificial criterion. In saying this I do not suggest that the tender board is not entitled to prescribe formalities which, if not complied with, will render the bid invalid, provided both the prescripts and the consequences are made clear. What I am concerned to stress is the need to appreciate the difference between formal shortcomings which go to the heart of the process and the elevation of matters of subsidiary importance to a level which determines the fate of the tender.¹⁷

[30] Heher JA warned against the unwarranted elevation of form above substance, which impeded the effective application of the principles of fairness, competitiveness and cost-effectiveness. It was important to recognize the materiality of the non-compliance in question.

[31] Shortly afterwards, in *Millennium Waste Management (Pty) Ltd v Chairperson Tender Board: Limpopo Province and others*,¹⁸ the Supreme Court of Appeal dealt with a tender committee's disqualification of a bid for non-compliance with a certain administrative requirement, as it was termed. The bidder failed to sign a form titled 'declaration of interest'. Jafta JA found that the underlying regulations empowered the

¹⁷ At paragraph [2].

¹⁸ [2008] 2 All SA 145 (SCA).

tender board to accept bids even if they did not comply with the tender requirements.¹⁹ The learned judge went on to observe that:

‘Moreover, our law permits condonation of non-compliance with peremptory requirements in cases where condonation is not incompatible with public interest and if such condonation is granted by the body in whose benefit the provision was enacted (*SA Eagle Insurance Co Ltd v Bavuma*).²⁰ In this case condonation of the appellant’s failure to sign would have served the public interest as it would have facilitated competition among the tenderers. By condoning the failure the tender committee would have promoted the values of fairness, competitiveness and cost-effectiveness which are listed in section 217. The appellant had tendered to provide the needed service at a cost of R 444 244,43 per month whereas the consortium had quoted and was awarded the tender at the amount of R 3 642 257,28 per month.’²¹

[32] Jafta JA proceeded to address the meaning of an ‘acceptable tender’, pointing out that the definition provided in terms of the PPPFA had to be construed within the context of section 217 of the Constitution, in its entirety. At the same time, it was imperative to strive for an interpretation that promoted the spirit, purport and objects of the Bill of Rights, as required under section 39(2) of the Constitution.²² Jafta JA held as follows:

‘In this context the definition of tender cannot be given its wide literal meaning. It certainly cannot mean that a tender must comply with conditions which are immaterial, unreasonable or unconstitutional.’²³

¹⁹ At paragraph [16].

²⁰ 1985 (3) SA 42 (AD), at 49G-H.

²¹ *Millennium Waste*, at paragraph [17].

²² At paragraph [18].

²³ At paragraph [19].

[33] The court went on to say that, in the determination of whether the bidder's non-compliance rendered its bid unacceptable, regard had to be had to the purpose of the declaration of interest in relation to the tender process itself. It was not evident how the signing of the form would have safeguarded against corruption. What was of importance was the nature of the information furnished and not the signature.²⁴

[34] Several years later, in *Dr JS Moroka Municipality and others v Betram (Pty) Ltd and another*,²⁵ the Supreme Court of Appeal reached a watershed in the determination of what constituted an 'acceptable tender'. The court dealt with the crisp issue of whether a municipality could disqualify a bid supported by a copy of a tax clearance certificate when the tender had required an original document. The High Court previously held that an original tax clearance certificate was not a material requirement. Leach JA disagreed, saying that it was for the municipality and not the court to decide what should be the prerequisites for a valid bid. A failure to comply with prescribed conditions would result in the disqualification of a bid unless the conditions were immaterial, unreasonable, or unconstitutional.²⁶ To the argument that the municipality ought to have been satisfied with a copy of the tax clearance certificate and that the bidder's failure to have provided an original was something that could and should have been condoned, Leach JA held:²⁷

'The immediate difficulty I have with this argument relates to its underlying premise that there existed a discretion to condone a failure to comply with any of the minimum qualifying requirements set out in the tender invitation. The respondent was unable to point to such a discretion being afforded in any of the relevant legislation or regulations, and, as Brand JA said in *Pepper Bay*:

²⁴ At paragraph [20].

²⁵ [2014] 1 All SA 545 (SCA).

²⁶ At paragraph [10].

²⁷ At paragraph [12].

“As a general principle 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.”²⁸

[35] The court found that the tender documents afforded no discretion to the municipality. It could not condone a failure to comply with the prescribed minimum prerequisite of a valid and original tax clearance certificate. The bid was not an acceptable tender.²⁹ The court referred to the decision in *Millennium Waste* but seemed to reject the liberal approach adopted by Jafta JA. In that regard, the court commented that insofar as the decision might be construed as accepting that a municipal functionary could condone a failure to comply with a peremptory requirement of a tender, if he or she was of the view that it would be in the public interest to do so, it should be regarded as incorrect.

[36] The judgment has not escaped criticism.³⁰ It has, however, marked a distinct break from the approach taken in *Millennium Waste* and earlier judgments.

[37] The decision in *AllPay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer, South African Social Security Agency, and Others*³¹ was handed down at the same time as that in *Dr JS Moroka* and the contrasts are unmistakeable.

²⁸ *Minister of Environmental Affairs and Tourism and another v Pepper Bay Fishing (Pty) Ltd; Minister of Environmental Affairs and Tourism and another v Smith* [2003] 4 All SA 1 (SCA). In this matter, the court dealt with an application for fishing rights, made under section 18 of the Marine Living Resources Act 18 of 1998. A senior official rejected the application for want of compliance with the procedural requirements contained in a General Notice made in terms of the legislation in question. Brand JA held that the official's powers were derived from the enactment constituted by the General Notice; if the General Notice did not confer power to the official to condone defects in the application, then he had none. At paragraphs [31] to [35].

²⁹ *Dr JS Moroka*, at paragraph [16]. It is not apparent from the judgment that the provision of an original tax clearance certificate was a legislative requirement.

³⁰ The overall reasoning of the court has been described as ‘problematic’. See Bolton ‘Disqualification for non-compliance with public tender conditions’ *PER/PELJ* 2014(17)6, at 2340. It has also been referred to as ‘a retreat into formalism’. See Volmink ‘Legal consequences of non-compliance with bid requirements’ (2014) 1 *APPLJ* 41, at 54. More recently, the decision was criticised for being a ‘notoriously formalistic judgment’. In this regard, see Kohn ‘Time to go back to first principles: a critical analysis of the 2017 Procurement Regulations reveals them to be short of the legality-cum-rationality mark’ (2019) 6 *APPLJ* 1, at 28.

³¹ 2014 (1) SA 604 (CC).

AllPay has been described as a move away from strict adherence to formalities and the ‘endorsement of a more flexible context-sensitive methodology’.³²

[38] The Constitutional Court, in this regard, set out the proper legal approach to irregularities in a public procurement process. It held, *inter alia*, that the materiality of compliance with legal requirements depends on the extent to which the purpose of such requirements is achieved.³³ In an oft-quoted passage, Froneman J dealt with materiality as follows:

‘...Under the Constitution there is no reason to conflate procedure and merit. The proper approach is to establish, factually, whether an irregularity occurred. Then the irregularity must be legally evaluated to determine whether it amounts to a ground of review under PAJA. This legal evaluation must, where appropriate, take into account the materiality of any deviance from 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.

...Assessing the materiality of compliance with legal requirements in our administrative law is, fortunately, an exercise unencumbered by excessive formality. It was not always so. Formal distinctions were drawn between “mandatory” or “peremptory” provisions on the one hand and “directory” ones on the other, the former needing strict compliance on pain of non-validity, and the latter only substantial compliance or even non-compliance. That strict mechanical approach has been discarded. Although a number of factors need to be considered in this kind of enquiry, the central element is to link the question of compliance to the purpose of the provision. In this court O’Regan J succinctly put the question in *ACDP v Electoral Commission*³⁴ as being “whether what the

³² Kohn, n 30 above, at 29. The learned writer comments that the methodology essentially entails an assessment of the materiality of the non-compliance, as informed by the purpose of the condition or requirement.

³³ *AllPay*, at paragraph [22].

³⁴ 2006 (3) SA 305 (CC), at paragraph [25].

applicant did constitute compliance with the statutory provisions viewed in the light of their purpose". This is not the same as asking whether compliance with the provisions will lead to a different result.³⁵

[39] The Constitutional Court was careful to confirm, however, that compliance with the requirements for a valid public procurement process was still legally required.³⁶ Froneman J stated that:

'Once a particular administrative process is prescribed by law, it is subject to the norms of procedural fairness codified in PAJA. Deviations from the procedure will be assessed in terms of those norms of procedural fairness. That does not mean that administrators may never depart from the system put in place or that deviations will necessarily result in procedural unfairness. But it does mean that, where administrators depart from procedures, the basis for doing so will have to be reasonable and justifiable, and the process of change must be procedurally fair.'³⁷

[40] Notwithstanding the decision in *Millennium Waste*, and the flexible and purposive approach taken by the Constitutional Court in *AllPay*, the Supreme Court of Appeal has not, in general, departed from the strict approach adopted in *Dr JS Moroka*. This is evident from several recent decisions.

³⁵ *AllPay*, at paragraphs [28] and [30]. See, too, the Constitutional Court's confirmation, in paragraph [58], that the materiality of irregularities is determined chiefly by assessing whether the purposes of the tender requirements have been 'substantively achieved'.

³⁶ This is a well-established principle. In *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 (3) SA 121 (CC), Moseneke DCJ reiterated, at paragraph [60], that a procurement process 'compels strict and equal compliance by all competing tenderers on the closing day for the submission of tenders.' More recently, in *Westinghouse Electric Belgium Société Anonyme v Eskom Holdings (SOC) Ltd and another* [2016] 1 All SA 483 (SCA), Lewis JA held, at paragraph [43], that 'the tender invitation, which sets out the evaluation criteria, together with the constitutional and legislative procurement provisions, constitute the legally binding framework within which tenders have to be submitted, evaluated and awarded.' The learned judge emphasised that there was no room for departure from these.

³⁷ *AllPay*, at paragraph [40].

[41] In *Overstrand Municipality v Water and Sanitation Services South Africa (Pty) Ltd*,³⁸ the Supreme Court of Appeal considered a tender for the operation and maintenance of water and sewerage infrastructure. The tender stipulated certain minimum staffing requirements to ensure a water supply ‘at the right quality and quantity, as well as operations optimisation and asset preservation’.³⁹ The successful bid reflected a substantial shortfall in this regard. The award was challenged. Navsa JA held as follows:

‘I am alert to the debate concerning the possible sufficiency of substantial or adequate compliance with what, in conventional terms, is described as mandatory requirements. One should also guard against invalidating a tender that contains minor deviations that do not materially alter or depart from the characteristics, terms, conditions and other requirements set out in tender documents. In the present case the non-compliance is not of a trivial or minor nature. The tender by Veolia was not an “acceptable” one in terms of the Procurement Act, in that it did not “in all respects” comply with the specifications and conditions set out in the RFP.’⁴⁰

[42] The successful bid, submitted by Veolia, reflected a substantial shortfall in the number of process controllers required for the infrastructure in question. It is of some importance to note that the minimum staffing requirements, stipulated in the tender documents, were derived from regulation 2834 of the repealed Water Act 54 of 1956 but survived in terms of the National Water Act 36 of 1998. In other words, the requirements were regulated.

[43] In *WDR Earthmoving Enterprises v The Joe Gqabi District Municipality*,⁴¹ the Supreme Court of Appeal considered a tender in terms of which a bidder was required

³⁸ [2018] 2 All SA 644 (SCA).

³⁹ At paragraph [45].

⁴⁰ At paragraph [50].

⁴¹ 2018 JDR 1295 (SCA).

to have submitted audited financial statements for three financial years. The appellant, being a JV, failed to do so for all its members.⁴² Swain JA held:

‘...the obligation to furnish audited annual financial statements is found in the Municipal Supply Chain Management Regulations. The failure to provide the requisite audited annual financial statements cannot accordingly be regarded as trivial, or of a minor nature. Likewise, the requirement cannot be described as immaterial, unreasonable or unconstitutional.’⁴³

[44] As apparent from the facts of the case, the requirement in question was regulated; the Municipal Supply Chain Management Regulations stipulated the production of audited financial statements for the past three years. No authority was available to the municipality to condone non-compliance.

[45] The strict approach taken in *Dr JS Moroka* continues to influence public procurement jurisprudence. It runs like a thread through numerous judgments of the High Court.⁴⁴ In that regard, Bolton has commented:

‘...public procurement regulation in South Africa [has moved] to a point where procuring entities have very limited discretionary powers when evaluating compliance with tender conditions. They may exercise discretion when evaluating compliance with tender conditions only if the tender conditions imposed were “immaterial, unreasonable or unconstitutional” or if they reserved

⁴² Its first member did so; its second member, however, submitted audited financial statements for only two financial years, including interim financial statements for a portion of the third financial year.

⁴³ At paragraph [34].

⁴⁴ See *Mobile Telephone Networks (Pty) Ltd v Transnet Soc Ltd* [2018] ZAGPJHC 454 (18 June 2018); *Amandla GCF Construction CC v Municipal Manager, Saldanha Bay Municipality* 2018 (6) SA 63 (WCC); *DDP (Pty) Ltd v Rustenburg Local Municipality* [2019] ZANWHC 11 (28 February 2019); and *WBHO v Nelson Mandela University* [2019] ZAECPHC 68 (1 October 2019). The cases are mentioned in Hoexter and Penfold, *Administrative Law in South Africa* (Juta, 3ed 2021), at 411 n 400. See, too, most recently, *Afrivent Fleet (Pty) Ltd v Moqhaka Local Municipality and another* [2024] 1 All SA 85 (FB); and *Marothodi Metsi (Pty) Ltd v Uthukela District Municipality and others* [2024] 2 All SA 433 (KZP).

for themselves discretion in the tender invitation when evaluating compliance with tender conditions.⁴⁵

[46] Bolton's observations were made some ten years ago. The current landscape of South African public procurement law remains largely unchanged. It is necessary to emphasise, however, that the Constitutional Court has seen no need, yet, to revisit the approach adopted in *AllPay*. The more flexible and context-sensitive methodology⁴⁶ demonstrated therein remains good law.

[47] The regulatory framework and case law explored above comprise the set of legal principles according to which the present matter must be assessed. This will be done in the discussion below.

Application of principles to the facts

[48] There are several aspects to be considered. These will be treated under the sub-headings that follow.

Availability of an internal remedy

[49] It was the first respondent's argument that the applicant failed to exhaust the available internal remedy. The court could not review the decision to disqualify its bid.⁴⁷ In this regard, the first respondent referred to the dispute resolution mechanism in the Treasury Regulations, as well as paragraph 20.1 of its SCMP.

[50] Regulation 16A of the Treasury Regulations, dealing with supply chain management, is silent in relation to dispute resolution. Paragraph 20.1 of the SCMP provides as follows:

⁴⁵ Bolton, n 30 above, at 2347. The learned writer adds that 'this is an unfortunate state of affairs'.

⁴⁶ Kohn, n 30 above.

⁴⁷ The argument is based on the provisions of section 7(2) of PAJA.

'20.1 The Accounting Officer or delegated official will employ the content of Provincial Treasury ECSCM Circular 23 of 2010/11: Complaints Mechanism, which is a standard framework which allows for departments to recommend remedial actions to be instituted in cases of non-compliance with the prescribed SCM norms and standards, including criminal recourse in cases of corruption, fraud or other criminal offences.

20.2 Where an aggrieved party has declared a dispute during the subsistence of a contract, such dispute must be resolved through conciliation, mediation and/or arbitration by invoking the alternative dispute resolution mechanism to settle disputes amicably and reduces the need for formal proceedings.'

[51] The exact contents of Circular 23 of 2010/11, mentioned in paragraph 20.1, are unknown. They appear to address non-compliance by the first respondent's employees with the applicable norms and standards rather than serve as a dispute resolution mechanism for unhappy bidders. Insofar as paragraph 20.2 is concerned, the envisaged mechanism is clearly intended for disputes that arise during the subsistence of a contract and not during the evaluation and adjudication stages of the tender process.

[52] The first respondent did not pursue the issue any further in argument. Nothing more needs to be said in that regard.

Compliance with specifications and conditions of the tender

[53] The starting point for the discussion at this stage is to reiterate paragraph 10.8.4 of the first respondent's SCMP, which was applicable to the tender. This stipulates that:

‘[the BEC] shall evaluate compliance with bid specifications and the bidder’s ability to perform. Only bids that complied in all respects will proceed to the next phase.’⁴⁸

[54] The text indicates that a bid had to comply ‘in all respects’ with the specifications and conditions of the tender before it could be evaluated further. No discretion was afforded to the BEC. Turning to the tender documents themselves, the notice and invitation to tender provided that a bidder had to propose key personnel who met the minimum requirements contained in the section headed ‘T1.2 TENDER DATA’. This included a professionally registered CHSO with a minimum of five years’ experience on road projects. The same requirement was repeated elsewhere.

[55] Under T1.2 TENDER DATA, clause F2.1 addressed eligibility. In that regard, F2.1.1 stated as follows:

‘Tenderers must submit a tender offer that complies in all aspects to the conditions as detailed in this document. Only those tenders that comply in all aspects with the tender conditions, specifications, pricing instructions and contract conditions will be declared responsive.’

[56] The minimum requirements for a bidder’s key personnel were set out in more detail under F2.1.4.4. It read:

‘Key personnel

To be considered for a Contract in terms of this Tender, the tenderer must have in its employment or intend to employ, for the duration of the contract, the following key personnel who comply with the following minimum requirements:

⁴⁸ Sic.

1. ...
2. A suitably qualified and experienced full time Construction Health and Safety Officer(s) to manage the contractor's health and safety obligations on site who:
 - i. Is registered with SACPCMP as a Professional Construction Health and Safety Manager (Pr CHSM) or Professional Construction Health and Safety Officer (Pr CHSO);

AND

- ii. has a minimum of five (5) years' experience as a Construction Health and Safety Officer on surfaced road construction projects.

A completed returnable schedule E: TENDERER'S KEY PERSONNEL to be provided. Attach to each schedule proof of indicated professional registration with the specified professional body.'

[57] Inserted at the foot of F2.1.4.4 in bold text was the following:

'Failure to comply with the requirements of this clause and applicable returnable schedule will render the tender offer non-responsive.'

[58] This was emphasised later under F.3.13, which provided that a bid would only be acceptable if the conditions listed thereunder were met. This included the stipulation, under sub-clause (n), that a bidder had to meet the minimum eligibility requirements specified in terms of clause F2.1.

[59] Consequently, the applicant proposed Ms Ndamase as its CHSO. It submitted schedule E and included the information depicted in the table below:⁴⁹

Client & project name	Description of project	Project end date & duration	Value of project	Position held
SANRAL	Upgrade of R63, sect 13, between Fort Beaufort and Alice	Current	R 714 m	Safety Environmental Officer
SANRAL	Upgrade of N2, sect 18, from Tetyana to Sithebe Komkhulu	Sept 2016-April 2019	R 645 m	“

[60] In the top right corner of schedule E was the instruction, ‘See enclosed CV’. The applicant enclosed Ms Ndamase’s CV summary thereafter, indicating that she had 19 years’ experience as a CHSO with various construction companies and that her engagement date with Rumdel (Pty) Ltd was 20 October 2016. A table set out details of her experience, from which the following appears:⁵⁰

Company name	Dates employed	Position of employment	Major contracts	Approx. value	Brief description of contract
Rumdel Cape Construction ⁵¹	October 2016	Safety Environmental Officer	N2 Tetyana site	R 488 million	Upgrading of national route, N2, section 18,

⁴⁹ Only the relevant columns and rows are reflected.

⁵⁰ Only the relevant information has been included.

⁵¹ The applicant indicated in its founding affidavit that one of its members, Rumdel (Pty) Ltd, was previously registered under the name of Rumdel Construction (Cape) (Pty) Ltd.

					from Tetyana (KM24) to Sithebe Komkhulu (KM41)
Rumdel Cape Construction	2019-2022	Safety Environmental Officer	R61	R 214 million	Upgrading of the road from R61 at St Barnabas Hospital to the Hluleka Nature Reserve: 16 km
Rumdel Cape Construction	2022-present	Safety Environmental Officer	R63	R 714 million	Upgrading of R63 from Fort Beaufort to Alice

[61] The first respondent contended that there were inconsistencies in the information that Ms Ndamase furnished. For example, schedule E indicates that she worked on the upgrading of the N2 from Tetyana to Sithebe Komkhulu from September 2016 until April 2019, whereas her CV merely indicates October 2016; furthermore, the applicant indicated in table A to schedule D,⁵² for similar projects completed, that the upgrading of the R61 from St Barnabas Hospital to the Hluleka Nature Reserve had been for a period of 24 months, whereas Ms Ndamase's CV indicated a period of three years, i.e. '2019-2022'. The applicant disputed this in reply. The relevant documents had to be considered together in their entirety.

[62] The court is inclined to agree with the applicant. As Govindjee J found, when dealing with part A of the application:

⁵² The table appears under section D, requiring a bidder to list similar projects completed.

‘Consideration of “schedule E” together with the “CV summary” *prima facie* supports Zen JV’s submission that Ms Ndamase complied with the stipulated five-year requirement. This is so even if a strict interpretation is afforded to the discrepancy between “September 2016” and “October 2016”, so that the later date is utilised. That discrepancy certainly cannot, on its own, serve to disqualify the entire bid.’⁵³

[63] In keeping with the general approach to the interpretation of documents, context and language must be considered together, with neither predominating over the other.⁵⁴ For purposes of complying with the conditions of the tender, the applicant completed schedule E but amplified the information contained therein by including Ms Ndamase’s CV. There was no condition that prevented the applicant from doing so. It cannot be denied that the information would have given rise to a certain amount of ambiguity but, at worst for the applicant, a reasonable interpretation of the relevant documents reveals that the stipulated minimum of five years’ (or 60 months’) experience for a bidder’s proposed CHSO was indeed satisfied, if not exceeded. This can be seen from the rudimentary table below:

Project description	Duration	Total
Upgrading of N2, Tetyana to Sithebe Komkhulu	October 2016- April 2019 ⁵⁵	30 months
Upgrading of R61 from St Barnabas Hospital to Hluleka Nature Reserve	2020- 2022 ⁵⁶	24 months

⁵³ *Zen JV v Department of Transport: Province of the Eastern Cape and Others* (4495/2023) [2023] ZAECKMHC 140 (28 December 2023), at paragraph [25].

⁵⁴ *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] 2 All SA 262 (SCA), at paragraph [19].

⁵⁵ The later commencement date has been used, i.e. October 2016 instead of September 2016, considering Ms Ndamase’s date of engagement with Rumdel (Pty) Ltd. The first respondent’s calculation of 11 days, based on the period from the date of engagement until the end of the month, i.e. 20- 31 October 2016, is entirely unlikely and simply untenable when schedule E and the CV are read together.

⁵⁶ The lesser period of 24 months has been used, as set out by the applicant in table A to schedule D.

Upgrading of R63 from Fort Beaufort to Alice	2022- present ⁵⁷	18 months
Grand total		72 months⁵⁸

[64] It was also the first respondent's contention that the applicant failed to set out Ms Ndamase's experience with the required particularity. The format of schedule E required a bidder to stipulate project end dates and duration; the applicant merely stipulated 'current' in relation to the upgrading of the R63 from Fort Beaufort to Alice, while Ms Ndamase's CV stipulated '2022- present'. The applicant, said the first respondent, was supposed to have specified the applicable dates by month and year.

[65] The tender documents do not support the first respondent's argument. All that was required was for a bidder to provide a 'completed returnable schedule E'; no condition stated that a bidder was required to set out the relevant dates by month and year. Whereas the format of schedule E facilitated the calculation of the required experience, the tender documents did not indicate that a bidder was expected to complete the table precisely in accordance therewith.

[66] In *Premier of the Free State Provincial Government and others v Firechem Free State (Pty) Ltd*,⁵⁹ Schutz JA held that one of the requirements for a credible tender procedure is that:

'a tender should speak for itself. Its real import may not be tucked away, apart from its terms.'⁶⁰

⁵⁷ The reference to 'present' has been interpreted as the date upon which the bid was submitted, i.e. 27 June 2023. The first respondent accepted a period of 18 months for purposes of the calculations in its supplemented answering papers.

⁵⁸ The applicant contended in reply that the period was either six-and-a-half or five-and-a-half years, depending on the period allocated to the upgrading of the R61 from St Barnabas Hospital to the Hluleka Nature Reserve. This seems to be premised on the understanding that the upgrading of the R63 from Fort Beaufort to Alice involved a period of 12 months; the first respondent, in contrast, accepted a period of 18 months; see n 57 above.

⁵⁹ [2000] 3 All SA 247 (A).

⁶⁰ At paragraph [30].

[67] If the first respondent had intended the specification of experience in such detail to comprise a condition of the tender, then it was imperative for it to have said so. This cannot simply be assumed. In *Tekoa Consulting Engineers (Pty) Ltd v Alfred Nzo District Municipality*,⁶¹ the court stated:

‘The conditions of tender must spell out, clearly and unambiguously, what is required of a bidder. There must be no vagueness or lack of clarity about what constitute the “rules of the game”, so to speak.’⁶²

[68] On a reasonable interpretation of schedule E and Ms Ndamase’s CV, there can be no hesitation in stating that she met the requirement of five years. The issue of non-compliance simply does not arise. The decision to disqualify the applicant’s bid was not rationally connected to the information before the BEC,⁶³ alternatively it was so unreasonable that no reasonable person could have made it.⁶⁴ Consequently, the applicant has established the necessary grounds upon which the decision can be reviewed.

[69] The court is satisfied that the applicant’s bid, insofar as it pertained to the stipulated eligibility requirements for a CHSO, complied in all respects. The first respondent’s disqualification thereof was unlawful.

Purposive approach to determination of an acceptable tender

[70] The court has already found that the disqualification of the applicant’s bid was unlawful. It might be helpful, however, to examine the present matter further in light of

⁶¹ [2022] 3 All SA 892 (ECG).

⁶² At paragraph [57].

⁶³ Section 6(2)(f)(ii)(cc) of PAJA.

⁶⁴ Section 6(2)(h).

the divergent jurisprudential approaches that have emerged in relation to the meaning of an ‘acceptable tender’.

[71] The tender in the present matter involves the supply of goods and services of a considerable magnitude. The construction of a 20-kilometre stretch of tarred road will require a large work force, as well as reliance on heavy-duty construction machinery and equipment. The risk of an injury is not insignificant. Consequently, it is understandable why the first respondent stipulated eligibility requirements for key personnel such as the CHSO. It was not apparent, however, why the first respondent distinguished between experience on surfaced road projects and experience on other projects, e.g. the construction of low-cost housing or schools or water treatment works. The demands made on a CHSO’s expertise in the various scenarios described above are unlikely to be remarkably different. The distinction appears to have been made arbitrarily.

[72] The applicant proposed Ms Ndamase, who was a CHSO with 19 years’ experience at the time of the closing date for the tender. If a flexible and purposive approach was adopted by the BEC, in terms of which the question whether the applicant’s bid was an acceptable tender was construed and adjudicated in accordance with the principles contained in section 217(1) of the Constitution, then an immaterial shortfall in Ms Ndamase’s experience as a CHSO on surfaced road projects should not, on its own, have justified disqualification. However, from a reading of the case law as it stands, three important conditions must be recognised before a purposive approach could have been adopted: (a) the eligibility requirements for the tender must not have been immaterial, unreasonable, or unconstitutional;⁶⁵ (b) the tender documents must

⁶⁵ Considering the nature of the project, the eligibility requirements cannot be described as such.

have granted a discretion to the first respondent when evaluating compliance;⁶⁶ and (c) the eligibility requirements were not to have been statutorily derived.⁶⁷

[73] If the above conditions had been present, then the R 36 million price difference between the applicant's bid and that of the third respondent should also have militated against disqualification. The principles of competitiveness and cost-effectiveness ought not to be sacrificed too easily on the altar of disqualification to the gods of strict compliance.

[74] In *Afrent Fleet (Pty) Ltd v Moqhaka Local Municipality and another*,⁶⁸ the court warned against ignoring the relevance of the above principles. Cronjé AJ remarked, *obiter dicta*, that:

'The matter before us raises the important issue that government may, compared with other tenderers who may have lower B-BBEE points, pay much higher amounts for the same services when costs are not carefully considered. The constitutional values of competitiveness and cost efficiency should always be considered. This municipality may pay in excess of R 12 million more for the same service just on a points difference. I take no issue with the point system but this is an aspect that needs further consideration in public procurement.'⁶⁹

[75] Similar remarks could be made in the context of the present matter. The decision to disqualify the applicant's bid came at a cost of R 36 million; in a developing nation such as ours, with limited resources, this is a price that we can ill afford. At some point, common sense must prevail. In time, the right case with the right facts might warrant a

⁶⁶ They did not. Discretion could have been granted, possibly, by stipulating at the foot of clause F2.1.4.4 that a failure to comply with the eligibility requirements *might* render the tender offer non-responsive. This could have created the necessary authority.

⁶⁷ Importantly, if the eligibility requirements were indeed required by statute or otherwise regulated as such, then the principle of legality would have prevented any attempt on the part of the first respondent to condone non-compliance in the absence of an empowering legislative provision. This was the underlying principle that operated in both *Pepper Bay* and *Dr JS Moroka*.

⁶⁸ [2024] 1 All SA 85 (FB).

⁶⁹ At paragraph [73].

closer look at a more flexible and purposive approach to the determination of an 'acceptable tender'.

Request for clarity

[76] The circumstances under which the decision was made invite the question why the BEC did not ultimately seek clarity from the applicant. From the papers, it is evident that the BEC indeed prepared a letter, requesting clarity regarding Ms Ndamase's experience on the project for the upgrading of the N2, from Tetyana to Sithebe Komkhulu. This was never approved by the Director: Supply Chain Management. The applicant argued that Mr Hani's failure to approve the request also constituted one of the review grounds already mentioned; alternatively, if he was not authorised to do so by the empowering provision,⁷⁰ i.e. paragraph 10.8.2 of the first respondent's SCMP, then this was a further ground upon which the applicant based its challenge. Considering the findings reached earlier, it is unnecessary to explore the argument further. Nevertheless, the observation can be made that a simple request for clarity about the nature of Ms Ndamase's experience could have avoided the disqualification of the bid and the ensuing litigation, provided that the BEC never presented the applicant with an opportunity to supplement, enhance, or amend its bid.

[77] In *Logbro Properties CC v Bedderson NO and others*,⁷¹ Cameron JA referred to a public entity's ever-flexible duty to act fairly in relation to the implementation of a tender process.⁷² Similarly, in *Metro Projects CC and another v Klerksdorp Local Municipality and others*,⁷³ Conradie JA referred to *Logbro* and held that:

'Fairness must be decided on the circumstances of each case. It may in given circumstances be fair to ask a tenderer to explain an ambiguity in its tender; it may be fair to allow a tenderer to correct an obvious mistake; it may, particularly

⁷⁰ Section 6(2)(a)(i).

⁷¹ [2003] 1 All SA 424 (SCA).

⁷² At paragraph [8].

⁷³ [2004] 1 All SA 504 (SCA).

in a complex tender, be fair to ask for clarification or details required for its proper evaluation. Whatever is done may not cause the process to lose the attribute of fairness or, in the local government sphere, the attributes of transparency, competitiveness, and cost-effectiveness.⁷⁴

[78] Any reliance placed on a request for clarity, such as ought to have been done in the present matter, must be done fairly. When properly implemented, it can be a significant factor in decreasing the level of uncertainty along the continuum of compliance described earlier. The procuring entity must, however, do so in a way that does not contravene the principles listed in section 217(1) of the Constitution.

Opportunity to make representations

[79] The applicant contended that the first respondent failed to give it a reasonable opportunity to make representations prior to the decision to disqualify its bid. If this had been done, then the applicant would have provided the clarity that had been sought.

[80] Section 3(2) of PAJA indicates that the right to procedurally fair administrative action includes a reasonable opportunity to make representations.⁷⁵ Whereas the case law to which the applicant referred seems to support its contentions,⁷⁶ it is not clear how feasible it would be for the first respondent to make such opportunity available to all bidders whose bids fell to be disqualified in similar circumstances. Certainly, in relation to a tender that attracted multiple bidders, for a procuring entity to arrange a hearing for each bidder prior to taking a decision to disqualify would not be a sensible use of administrative capacity or resources.

[81] Section 3(4) permits an administrator to depart from the requirements mentioned in section 3(2) if it is reasonable and justifiable to do so. The administrator must,

⁷⁴ At paragraph [13].

⁷⁵ Section 3(2)(b)(ii).

⁷⁶ See *Logbro*, at paragraph [8]; *Metro Projects CC*, at paragraph [13]; and *Thebe Healthcare v NBC, Road Freight Industry* 2009 (3) SA 187 (WLD), at paragraphs [26] to [30].

however, consider all relevant factors, including, *inter alia*, the urgency of the matter, as well as the need to promote an efficient administration and good governance. Within the context of a tender process, where the supply of goods and services to the procuring entity or an affected community is often time-sensitive, it appears that it would be permissible for a procuring entity to dispense with a hearing, provided that a bidder was afforded a reasonable opportunity to make representations by other means, e.g. written submissions. In a situation where the procuring entity was uncertain about the bidder's compliance with a specification or condition of the tender, as was the case here, a request for clarity would have satisfied the requirements for procedurally fair administrative action, as envisaged under section 3(2), read with section 3(4) of PAJA. Mindful of the court's findings regarding compliance, however, it is unnecessary to investigate this aspect further.

Relief and order

[82] The applicant has demonstrated that there was no internal remedy available prior to its institution of these proceedings. It has also demonstrated that its bid complied in all respects with the specifications and conditions of the tender; this is so irrespective of whether a strict or a purposive approach is adopted in relation to the meaning of an 'acceptable tender'. Consequently, the court is persuaded that the applicant has successfully established one or more grounds under section 6(2) of PAJA upon which the first respondent's decision to disqualify the applicant's bid can be reviewed and set aside.

[83] Notwithstanding the above findings, the court is also satisfied that the first respondent ought to have requested clarity from the applicant before making its decision. There is merit, too, in the applicant's contention that the right to procedurally fair administrative action entailed, in these circumstances, the opportunity to make representations. The court is of the view that the first respondent's request for clarity would have met the requirements of section 3(2), read with section 3(4), of PAJA.

[84] The first respondent's decision to disqualify the applicant's bid was unlawful. The applicant did not, ultimately, seek a substitution of the decision; it merely sought the remittal of the matter back to the BEC. This is, to quote Heher JA in *Gauteng Gambling Board v Silverstar Development Ltd*,⁷⁷ almost always the prudent and proper course.

[85] The parties never addressed directly, in argument, the remainder of the relief sought. No basis was presented for the review and setting aside of any agreements concluded between the first and third respondents and arising from the award. It hardly needs stating, however, that an agreement concluded on the premise that the first respondent lawfully awarded the tender to the third respondent would be invalid and would be of no force or effect. The applicant's prayer for alternative relief suffices for the appropriate order to be made in that regard.

[86] The only remaining issue for determination is that of costs. The applicant, as the successful party in these proceedings, is entitled to the recovery of its expenses; the general rule must be applied. Mindful of the complexity and importance of the matter, entailing the evaluation of a multi-million Rand tender with significant consequences for the parties involved, as well as the communities dependent on the road in question, the court sees no reason why not to award the costs of junior and senior counsel. It would be reasonable to award such costs on Scales B and C, respectively.

[87] In the circumstances, the following order is made:

- (a) the first respondent's decision to disqualify the applicant's bid and its decision not to award to the applicant the tender for the appointment of a civil engineering contractor for the upgrading of road DR08034 from the N2 to the R61 via Clarkebury (20 km) Phase 1, under tender number SCMU10-23/24-0001, and its decision to award the tender to the third respondent, are hereby reviewed and set aside;

⁷⁷ 2005 (4) SA 67 (SCA), at paragraph [29].

(b) any agreements concluded between the first and third respondent because of the award of the tender are hereby declared invalid and set aside;

(c) the matter is hereby referred to the first respondent for adjudication of the tender *de novo*; and

(d) the first respondent is ordered to pay the costs of the review, including the costs of two counsel on Scales B and C respectively.

JGA LAING
JUDGE OF THE HIGH COURT

APPEARANCES

For the applicant: Adv De la Harpe SC with Adv Watt

Instructed by: Drake Flemmer & Orsmond Inc.
c/o De Jager Lordan
2 Allen Street
Makhanda
Email: Stuart@djlw.co.za
Ref: S Tarr/cb/R257/2005

For the respondents: Adv Ntsepe

Instructed by: State Attorney
29 Western Road
Central
GQEBERHA

Email: MSisilana@justice.gov.za

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