IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, GRAHAMSTOWN

CASE NO: 1962/2018

DATE HEARD: 28/03/2019

DATE DELIVERED: 07/05/2019

In the matter between

COCHRANE PROJECTS (PTY) LTD	**APPLICANT**
and	
KOUGA LOCAL MUNICIPALITY	**FIRST RESPONDENT**
YONKE IMIHLA BUILDING SOLUTIONS CC t/a JB FENCING & CIVILS	**SECOND RESPONDENT**

JUDGMENT

ROBERSON J:-

[1] The first respondent (Kouga) invited tender bids for the fencing of existing cemeteries in its locality. The applicant (Cochrane) tendered but its bid was found to be non-responsive. The tender was awarded to the second respondent (Yonke).

[2] In this application Cochrane seeks an order reviewing and setting aside Kouga's decision to disqualify its bid and to award the tender to Yonke. Kouga opposed the application. The application falls within the provisions of the Promotion of Administrative Justice Act 3 of 2000 (PAJA).

[3] The tender conditions in this tender are contained in annexure F to the Standard for Uniformity in Construction Procurement issued in terms of sections 4(f), 5(3)(c) and 5(4)(b) of the Construction Industry Development Board Act 38 of 2000 (the CIBD Act). I shall refer to the Construction Industry Development Board as the CIBD. In order to be able to submit a bid, prospective bidders had to have a CIBD grading of 4SQ or higher.

[4] Clause F.2.8 of the tender conditions provides:

> "Seek clarification
>
> Request clarification of the tender documents, if necessary, by notifying the employer at least five working days before the closing time stated in the tender data."

Clause F.2.12 provides:

> "F.2.12 Alternative tender offers
>
> F.2.12.1 Unless otherwise stated in the tender data, submit alternative tender offers only if a main tender offer, strictly in accordance with all the requirements of the tender documents, is also submitted as well as a schedule that compares the requirements of the tender documents with the alternative requirements that are proposed.
>
> F.2.12.2 Accept that an alternative tender offer may be based only on the criteria stated in the tender data or criteria otherwise acceptable to the employer.
>
> F.2.12.3 An alternative tender offer may only be considered in the event that the main tender offer is the winning tender."

[5] The specifications for the fencing included that the panels were to be "3510 Singleskin™ ….. 2.4 m high -PVC coated" and that the underdig was to be "3510 Singleskin™". It was not in dispute that "3510 Singleskin™" is the registered

trademark in class 6 of a fencing company Betafence South Africa (Pty) Ltd (Betafence). In the pricing schedule the item "Fencing" is described as:

> ""Betaview" similar or equally approved ZincAlu and PVC coated security fencing, gates, etc and setting out."

It was not in dispute that "Betaview" is a registered Betafence trademark in class 6.

[6] Cochrane did not submit a main tender which complied with the tender specifications nor did it submit a schedule which compared these specifications with its proposed alternative requirements. In particular its tender bid did not include PVC coated panels.

[7] On 3 August 2017 Cochrane and the other bidders were advised that the successful tenderer was Yonke.

[8] Kouga's opposition to this application is based on two narrow grounds: delay and non-compliance with the provisions of clause F.2.12 of the tender conditions. In order to explain Cochrane's challenge to the award of the tender to Yonke, I believe it is necessary to set out in some detail the contents of the record of decision and Cochrane's contentions.

[9] In dealing with the documents contained in the record of decision I shall refer to the Bid Specification Committee as the BSC, the Bid Evaluation Committee as the BEC and the Bid Adjudication Committee as the BAC. In the minutes of the BEC meeting on 12 June 2017 it is recorded that the contract for fencing was to be awarded to the Moloi Group of Companies, which scored the highest points. (It

seems that this was the recommendation of the leading department.) It is further recorded that it was resolved to recommend that the contract "be referred back to the leading department and be requested to determine and verify whether option 1 meets the tender specifications as contained in the tender document for the highest scoring bidder." (Option 1 referred to Cochrane's bid.)

[10] In the minutes of a BEC meeting on 19 June 2017 it is recorded that the BEC confirmed that Option 1 of the preferred highest scoring bidder as per the pricing schedule met all the tender requirements and it was resolved to recommend that the contract be awarded to the highest scoring bidder, namely Cochrane. The deponent to Cochrane's founding and supplementary affidavit, Mr Thomas Kamba, a director of Cochrane, explained that the reference to option 1 or option 2 referred to the options that Cochrane submitted in its bid. A score sheet was annexed which reflected that Cochrane's two options scored the highest points.

[11] In the minutes of the meeting of the BAC held on 26 June 2017, the following is recorded:

> "BEC chairperson said Moloi who was recommended by the leading department scored lower than the recommended bidder by BEC, [the Chairperson of the BAC] does not understand why the leading department recommended Moloi as he is not the highest scoring bidder whilst the score sheets do not support Moloi recommendation. He then stated that the leading department representative stated that both option 1 and option 2 meet the requirements of the specification.
>
> The Chairperson said the BEC is supposed to evaluate and determine whether the bidder meets the requirements of the specification or not, it is not up to the leading department to motivate."

It is further recorded that:

> "Acting Manager Supply Chain said part of the technical clarification must be given by the leading department; BEC members evaluating tenders are not experts on certain issues and the leading department is the expert."

It seems at this stage the matter was referred back to the BEC.

[12] On 28 June 2017 an official from Kouga emailed Cochrane pointing out that it had offered a product other than that specified in the tender. Cochrane was asked to confirm its product's similarities with those specified in the tender. Cochrane responded and confirmed that its product complied with the tender specifications. A few days later Cochrane emailed Kouga's official attaching a document which contained a comparison between Cochrane's product and the tender specifications. In this document two of Cochrane's specifications were described as exceeding (presumably in quality) those in the tender specifications. Cochrane's specification for the panels was "2.4m high Marine Fusion Bond coated".

[13] An email dated 4 July 2017 from one Kouga official to another set out a number of types of coating and their qualities, including PVC coating, which was said to be the strongest, most durable and longest lasting wire coating available. The coating offered by Cochrane, namely Marine Fusion Bond was not mentioned. The author of the email said that he was not an expert and what was contained in the email was what he could find in relation to the differences between the products. A further Kouga internal email dated 12 July 2017 contained a description of fusion bond coating taken from Wikipedia. It turned out that the contents of the previous email containing the different types of coating was taken from Wikipedia. Fusion bond coating was not compared with the other types of coating.

[14] Seemingly in relation to Cochrane's document containing a comparison between its product and the specification, a Kouga internal email dated 6 July 2017 stated:

> "On the Bidder specifications there are 2 small differences with the Post and Top Rail, the specifications is (sic) acceptable and in line with our required specifications with a better security.
>
> And the sample they send (sic) is the same as the current fence we have."

[15] In an internal Kouga email dated 7 July 2017 the following was said:

> "With regard to specifications, it was stated to BEC that the recommended bidder meets the specification requirements. I have noted that the specifications require an opening of approximately 70mm while the recommended bidder provides for an opening of 85mm and also provides for marine fusion as wire covering. (While the marine fusion is more durable than the specified covering does it not meet the specification) BEC does require further comment on the matter of compliance with specifications relative to the recommended bidder." (sic)

[16] In the minutes of a meeting of the BEC on 13 July 2017 the following was recorded:

> "BEC also raised a concern that the bid specifications required that the bidders submit offers per item but it is not practically possible to award per item. Despite it being itemized, BEC cannot consider evaluating the tender per item and was unanimous to use the estimates done by the Bid Specification Committee taken for a given area and to evaluate on an estimated total price and not per item.
>
> Based on the tender requirements, it needs to be established which of the options tendered on by Cochrane is to be considered as the pricing schedule indicates a difference in the scoring schedule regarding the options. The alternative option by Cochrane did not show much of a difference between the two options. It was also pointed out that the tender document specifies galvanized wire with PVC coating but Cochrane offered marine fusion bond coated also known as fusion bond epoxy powder coated which is not the same as the specified galvanized wire with PVC coating.

> The award was made on 19 June 2017 by BEC based on the confirmation by the leading department that the product offered by Cochrane is the same or similar as the product/fence as per the tender specifications that the marine fusion coating was of similar quality or better. It has now been established that it is not of similar quality or better than the specified PVC coating therefore BEC was unanimous in that Cochrane will not be considered as they did not meet the tender specifications, specifically in terms of the PVC coating as both options for the panels were marine fusion bond coated with no alternative."

It was then resolved that the contract be awarded to Yonke, the highest scoring bidder.

[17] In the minutes of the BAC meeting of 25 July 2017 the BEC's change of mind is recorded. The BSC chairperson said that he had submitted to the BEC the difference between PVC coating and Cochrane's coating, based on expert opinion following research, and that there was a clear difference. Two paragraphs from these minutes need to be quoted:

> "The BSC chairperson said there is a process that has to be followed in terms of alternative bids offered. CIDB stipulates that one must tender on the specifications and if you are the recommended bidder, only then can you consider offering alternative options and Cochrane did not do that. They tendered alternative options to the specifications, which is a material deviation according to CIDB, which means that the Municipality should find Cochrane non-responsive.
>
> BSC chairperson said that Cochrane should have tendered on what was required by the specification and when recommended for award they could have then submitted the alternative options."

[18] After the announcement of the winning bidder, a great deal of correspondence took place between Cochrane and Kouga. Cochrane wrote to Kouga lodging its objection to the award of the tender to Yonke and stating that the original specification was uncompetitive as it precluded Cochrane's products. Cochrane's

own product, Clearvu Invisible Wall, qualified in every technical respect and surpassed many of the tender specifications. Cochrane also offered the lowest bid for a compliant product. Kouga responded on 21 August 2017 pointing out, inter alia, that the specifications made provision for similar products besides the specifications requested in the tender document. Kouga further referred to clause F.2.8 of the conditions and said that during the tender period no correspondence was received from Cochrane. Finally Kouga stated that Cochrane's tender bid provided for a different product from what was specified, and that clause F.2.12.3 provided that an alternative tender could be considered if the main tender bid was the winning bid. Cochrane, so it was stated, did not provide a bid which complied with the specifications.

[19] Cochrane's attorneys then came on board and in a letter to Kouga dated 25 August 2017 stated that Cochrane had been requested to confirm the similarities of its product to the specified product and had done so, and had also furnished the comparison table. It was further pointed out that PVC coating is exceeded by Marine Fusion Bond coating which also provides a longer guarantee period, and that Cochrane' panels weighed more than the specified weight. The letter went on to say that Kouga had failed to provide reasons for disqualifying Cochrane, and further that the specification was fundamentally biased because of the 3510 Singleskin™ requirement, and that Cochrane's bid was rejected because it did not offer the Singleskin product. It was stated that Cochrane reserved its rights to institute review proceedings.

[20] Koega in turn appointed attorneys who wrote to Cochrane's attorneys on 20 September 2017. With regard to the reasons for Kouga's decision they attached Koega's letter of 21 August 2017 and in addition referred to clause F.2.12.1 of the tender conditions which provided that an alternative offer may also be submitted if a main tender offer which conforms to the requirements of the tender documents is submitted. Cochrane had failed to provide an offer in strict compliance with the tender specifications.

[21] Cochrane's attorneys followed up with a letter dated 26 September 2017. They said that Kouga's answer was totally inadequate and that Kouga had failed to indicate why Cochrane's offer did not comply with the specification. They requested meaningful reasons which should indicate in what manner Cochrane's bid did not meet the specification, failing which review proceedings would be instituted. On 9 October 2017, having received no further reasons from Kouga, Cochrane's attorneys indicated that they would now institute review proceedings.

[22] This was not the end of the correspondence because Kouga's attorneys replied to Cochrane's letter of 26 September 2017 on 10 October 2017, and undertook to take instructions and revert. They did so on 18 October 2017, saying that Kouga believed that the information already provided was sufficient but had instructed them to provide Cochrane with further particularity pertaining to Cochrane's deviations from the tender specifications. They attached a document indicating the deviations, amongst which was the use of Marine Fusion Bond coating.

[23] On 30 November 2017 Cochrane's attorneys wrote to Kouga's attorneys stating that the information relied upon by Kouga was incorrect. They again referred to Cochrane's confirmation that its product complied with the tender specifications and the document containing the comparison between its product and the specified product. They asked for a detailed statement setting out why Cochrane's product, details of which had been provided at the request of Kouga, did not meet the tender specification. This letter was followed up with an email on 21 December 2017 requesting a response before 15 January 2018 and indicating that Cochrane would resort to legal proceedings.

[24] On 10 January 2018 Cochrane's attorneys addressed a letter to Kouga's attorneys repeating that the information relied upon by Kouga was incorrect and that Cochrane had complied with the original query by Kouga. Bias in relation to the Singleskin product was again alleged because the requirement of this product implied that the specifications had been drafted to ensure that only Betafence could succeed in the tender and all other parties would automatically be excluded. Reference was made to various provisions of PAJA and Kouga's breach thereof. A "clear and definitive statement" was requested failing which review proceedings would be launched.

[25] Kouga's attorneys replied and attached a document which they said contained a further explanation of the reasons already provided. This document indicated that because Cochrane did not price on certain items, clause F.2.12.3 of the tender conditions was applied. Cochrane's attorneys' response to this explanation was that it was not credible. More was said about Betafence and bias. They demanded on

behalf of Cochrane that the tender award should be cancelled and that the tender process should start over. If the current impasse was not resolved before the end of April 2018, review proceedings would be launched.

[26] On 23 April 2018 Cochrane emailed Kouga directly, asking for an opportunity to meet with Kouga's management team in order to reach an amicable solution to the deadlock. If this was not possible then litigation would ensue. On 14 May 2018 Kouga's attorneys referred to this email and made it clear that sufficient reasons had been provided. The tender had been awarded and Kouga could not cancel this decision. Cochrane was at liberty to institute review proceedings.

[27] On 14 June 2018 Cochrane was granted an interim order interdicting the implementation of the award pending the finalisation of the review application. This was launched on 28 June 2018. It was accepted that the costs of the interdict application would follow the result in this application.

[28] Cochrane's complaints, as set out in the supplementary founding affidavit, are: the tender documentation was defective; the adjudication process was fundamentally flawed; and Cochrane's bid was unfairly and incorrectly assessed.

[29] Defective tender document

This complaint has already been alluded to in the correspondence between the parties, namely that the specifications were biased in favour of Betafence. The only bidder that could have complied with the tender conditions in a price competitive manner was Betafence. Kamba said that Cochrane raised this apparent bias at the

initial tender briefing and was assured that the tender specifications made provision for similar products and that Cochrane's similar product would still be acceptable.

[30] Flawed adjudication process

Kamba referred to the fact that initially the BSC had recommended that the tender be awarded to the Moloi Group but on 19 June 2017 the BEC had recommended that the tender be awarded to Cochrane and that Cochrane had scored the highest points in both its options. He further referred to the portion of the minutes of 13 July 2017 which changed the evaluation of the tender on each item price to an estimated total price. Kamba pointed out these factors as general flaws in the adjudication process.

[31] Unfair and incorrect assessment of Cochrane's bid

Kamba referred to the BAC's chairperson's comment that it is not up to the leading department to motivate and that it is the BEC which is supposed to evaluate the bids. The chairperson had said in the same minutes that part of the technical clarification must be given by the leading department, that the leading department is the expert on certain issues and that the BEC members are not experts on these issues. Kamba pointed to the fact that fusion bond coating was not compared to other types of coatings and further that the source of information was Wikipedia which he considers to be a questionable source for the purpose of evaluating a tender. He referred to the fact that on 6 July 2017 Cochrane's specification was acceptable and in line with the required specifications, yet on 13 July 2017 the fusion bond coating was found not to be the same as the specified PVC coating. Kamba said that the record of decision did not contain an expert opinion of any kind and that the only research done was an internet search on Wikipedia. Further, according to Kamba,

the research did not contain a comparison between fusion bond coating and other types of coating. There was therefore no basis for concluding that marine fusion bond coating was not of similar quality to or better than the specified PVC coating. Cochrane has used marine fusion bond coating since 2005 without repercussions and could have provided data to show that it was superior to or at least equal to PVC coating.

[32] Cochrane relied on a number of grounds of review contained in s 6 of PAJA: irrelevant considerations were taken into account or relevant considerations were not taken into account; the decision was made in bad faith; the decision was made arbitrarily or capriciously; or the decision was not rationally connected to the information before the administrator.

[33] Mr Charl du Plessis, Kouga's municipal manager, deposed to the answering affidavit. He expressed his view with regard to delay and went on to explain why Cochrane's tender was non-compliant. He referred to the CIDB Act which provides that all construction companies registered with the CIDB are required to comply with the code of conduct approved by the CIDB. One of the principles contained in the code is that parties to a construction related procurement contract are required to comply with all applicable legislation and associated regulations. He referred too to the Standards for Uniformity in Construction Procurement and expressly mentioned clause F.2.12 of the standard conditions of tender. Du Plessis also referred to Kouga's supply chain management policy which incorporates the CIDB Act. Du Plessis maintained that it was common cause that Cochrane and Kouga were accordingly obliged to comply with and enforce the standard conditions of tender.

[34] According to du Plessis, Cochrane did not tender strictly in accordance with the specifications contained in the invitation to tender. Cochrane's specifications were different, in particular those for top rail spikes and panels. (The specifications for these items required PVC coating whereas Cochrane's specifications were Marine Fusion Bond coating.) It followed, according to du Plessis, that Cochrane did not comply with tender condition F.2.12. In particular it did not submit a main tender strictly in accordance with the requirements of the tender document, nor did it submit a schedule comparing the requirements of the tender documents with the proposed alternative requirements. Cochrane therefore did not comply with an express and material tender condition and was correctly found to be non-responsive. Whether or not Cochrane's product was similar or better than that specified, was therefore irrelevant. Du Plessis expressed the view that condition F.2.12 has been incorporated for objectively sound reasons. Organs of State should not have to compare and evaluate alternative products which do not meet the requirements of the tender invitation.

[35] With regard to Kouga's letter of 28 June 2017 requesting information from Cochrane, du Plessis said that Cochrane should have been regarded as non-responsive from the outset and that it was not permissible for a bidder to correct or supplement their bids after the close of tenders. Du Plessis denied that the conditions were manipulated to advantage a particular tenderer and said that the specifications were prepared on the basis of products which are freely available and available to Cochrane. They are well known and frequently used in the fencing industry. Tenderers were not excluded from tendering similar or equally approved

fencing and Cochrane's alternative tender would have been evaluated and adjudicated had it complied with condition F.2.12. It may well have been that at the briefing cession tenderers were advised that similar products would be considered but the material tender conditions still had to be complied with.

[36] In response to Cochrane's contention that there were contradictory recommendations in the various minutes, Du Plessis accepted that initially there may have been some confusion about the basis upon which different specifications would have been considered and evaluated. In hindsight the BEC did not recognise the necessity for alternative tenders to comply with condition F.2.12 but ultimately the BAC recognised that Cochrane had not complied with condition F.2.12. Cochrane's tender was not regarded as non-responsive because its product was inferior but because Cochrane did not comply with a material tender condition.

[37] Du Plessis was of the view that Kouga's letter of 21 August 2017 correctly identified the tender condition with which Cochrane should have complied.

[38] Section 7 (1) of PAJA provides:

> **"Procedure for judicial review**
>
> (1) Any proceedings for judicial review in terms of section 6 (1) must be instituted without unreasonable delay and not later than 180 days after the date-
>
> (a) subject to subsection (2) *(c)*, on which any proceedings instituted in terms of internal remedies as contemplated in subsection (2) *(a)* have been concluded; or
>
> (b) where no such remedies exist, on which the person concerned was informed of the administrative action, became aware of the action and the reasons

> for it or might reasonably have been expected to have become aware of the action and the reasons."

[39] Section 9 of PAJA provides:

> **" Variation of time**
>
> (1) The period of-
>
> (a) 90 days referred to in section 5 may be reduced; or
>
> (b) 90 days or 180 days referred to in sections 5 and 7 may be extended for a fixed period,
>
> by agreement between the parties or, failing such agreement, by a court or tribunal on application by the person or administrator concerned.
>
> (2) The court or tribunal may grant an application in terms of subsection (1) where the interests of justice so require."

[40] In *Rèan International Supply Company (Pty) Ltd and Others v Mpumalanga Gaming Board* 1999 (8) BCLR 918 (T) at 926H-927E, Kirk-Cohen J said the following with regard to adequate or proper reasons for administrative decisions:

> "I have doubts whether a dissatisfied party has the right to seek further particulars or interrogate an administrative body in respect of reasons furnished. It is unnecessary on the facts of this matter to decide whether such right exists or would be permitted in terms of the provisions of the Constitution.
>
> The argument presented on behalf of the applicants was an attempt to equate the reasons of an administrative body to a judgment of the High Court. I reject that submission; the Constitution does not envisage the imposition of that obligation or duty upon the members of an administrative body for the simple fact that they are not judges and it cannot be expected of them. In this regard I refer to the following passage from the judgment of Colman J in *Lukral Investments (Pty) Ltd v Rent Control Board, Pretoria* 1969 (1) SA 496 (T) at 510C–D:
>
> > "Clearly, natural justice does not require of a tribunal that it place before the parties the equivalent of a draft judgment, and invite comment upon or refutation of every point therein. But that is not to say that the disclosure of the bare facts which form the starting point of a decision is always enough. The question is always whether the party concerned has had a fair hearing."

> In my view none of these concepts has been made redundant by the new Constitution.
>
> Counsel for the respondent referred to the English text book, *Judicial Review of Administrative Action*, 5 ed paragraph 9–049 to 9–053. I consider the following quotations to be relevant:
>
> > "It is clear that the reasons given must be intelligible and must adequately meet the substance of the arguments advanced."
> >
> > "The Courts have not attempted to define a uniform standard or threshold which the reasons must satisfy."
> >
> > "Courts should not scrutinise reasons with the analytical rigour employed on statutes or trust instruments, and ought to forgive obvious mistakes that were unlikely to have misled anyone. Brevity is an administrative virtue, and elliptical reasons may be perfectly comprehensible when considered against the background of the arguments at the hearing" (my underlining).""

Further at 927H-I the learned judge said:

> "On the one hand it is not necessary for an administrative body to spoonfeed an aggrieved party seeking reasons; on the other hand the administrative body cannot expect an aggrieved party to seek justification for the reasons from a myriad of documents where such reasons cannot reasonably be determined."

[41] It was submitted on behalf of Cochrane that the reasons provided by Kouga for its decision are still not fully understood and are vague or even meaningless and contradictory. It was only on receipt of the letter from Kouga's attorneys of 6 March 2018 attaching the document which indicated that condition F.2.12.3 had been applied, that the 180 day period began to run, in other words when reasons for the decision were given. On the other hand, it was submitted on behalf of Kouga that Kouga's attorneys' letter of 20 September 2017 provided the reason for the decision. I shall quote the relevant paragraph of that letter:

> "We are instructed to inform you that in addition your client is also referred to clause F.2.12.1 of the Standard Conditions which provides that an alternative tender offer may also be submitted if a "main tender offer" which conforms to the requirements of the tender documents is also submitted.

> According to our client Cochrane Projects failed to provide a tender offer in strict compliance with the tender specifications."

[42] In my view this paragraph is clear and in accordance with what is espoused in the passage from *Rèan International* (*supra*). It is difficult to understand why it was not understood by Cochrane or its attorneys. In fact I am also of the view that Kouga's letter of 21 August 2017 gave adequate and comprehensible reasons for the decision. That letter stated, inter alia:

> "Your submission made was for different product (sic) than what was asked for in the specifications. Clause F.2.12.3 of the above standard stipulates that an alternative tender offer may only be considered in the event that the main tender offer is the winning tender. Your company did not provide an offer for what was requested in the specifications."

[43] Both the above quoted paragraphs, read together with the tender conditions, made it clear in my view that Cochrane had not submitted a main tender which complied with the specifications. Cochrane was permitted to submit an alternative tender but was still obliged to submit a main tender.

[44] In *Cape Town City v Aurecon SA (Pty) Ltd* 2017 (4) SA 223 (CC) at paragraphs [40] – [42] the following was said with regard to the time that the 180 days start to run (footnote omitted):

> "[40] The City also attempted to distinguish its knowledge of 'reasons' from its knowledge of 'irregularities'. In this regard the City was of the view that the reference to 'reasons' in s 7(1)*(b)* of PAJA does not refer to formal reasons furnished in terms of s 5 of the Act but merely to 'the relevant events giving rise to the particular decision and which render it susceptible to review'.
>
> [41] On a textual level the City's contention confuses two discrete concepts: *reasons* and *irregularities*. Section 7(1) of PAJA does not provide that an application must be brought within 180 days after the City became aware that the administrative action was tainted by irregularity. On the contrary, it provides that the clock starts to run with reference to the date on which the reasons for the administrative action became known (or ought reasonably to have become known) to an applicant.

> [42] On a purposive level the City's interpretation would give rise to undesirable outcomes. As the SCA pointed out, the City's interpretation would —
> 'automatically entitle every aggrieved applicant to an unqualified right to institute judicial review only upon gaining knowledge that a decision (and its underlying reasons), of which he or she had been aware all along, was tainted by irregularity, whenever that might be. This result is untenable as it disregards the potential prejudice to [Aurecon] and the public interest in the finality of administrative decisions and the exercise of administrative functions.'"

[45] By persisting in its correspondence Cochrane was to an extent seeking to discover irregularities, when it had already been informed of the reasons for the decision. I do think however that it appears that Cochrane was somewhat sidetracked by the fact that it had been asked by Kouga for a comparison of its product with the tender specifications, that its product had been considered acceptable, and that it had at one stage been recommended and had scored the highest marks. I think these factors caused it to lose sight of, or to pay insufficient attention to, the tender conditions, specifically condition F.2.12. It appears not to have grasped the full meaning of condition F.2.12, namely that it was permitted to offer a product with alternative specifications, provided that it submitted a main tender which complied with the tender specifications.

[46] Nonetheless, adequate reasons having been provided, the 180 days commenced, at the latest, on 20 September 2017. The application was launched some months outside the 180 day period. It was therefore necessary for Cochrane to seek an extension of this period in terms of s 9 of PAJA.

[47] In *Aurecon South Africa (Pty) Ltd v Cape Town City* 2016 (2) SA 199 (SCA) at para [17] the following was said with regard to condonation of a delay (footnotes omitted):

> "Whether it is in the interests of justice to condone a delay depends entirely on the facts and circumstances of each case. The relevant factors in that enquiry generally include the nature of the relief sought, the extent and cause of the delay, its effect on the administration of justice and other litigants, the reasonableness of the explanation for the delay which must cover the whole period of delay, the importance of the issue to be raised and the prospects of success."

[48] Cochrane has not really given an explanation for the delay because it is effectively of the view that there was no delay. I have found otherwise. Cochrane's persistence in requesting further reasons was in my view unreasonable. One wonders just how long the correspondence would have continued had it not been for Kouga finally putting its foot down. If I count correctly, Cochrane threatened review proceedings on no less than seven occasions, the first as early as August 2017. There was no apparent reason why the review was not brought much earlier.

[49] As far as the prospects of success are concerned, I am of the view that they are slim. I agree that Cochrane's reliance on the quality of its product is irrelevant. That is not why it was considered non-responsive. Irrelevant too was its reliance on the lack of an expert opinion in relation to the quality of its product. As was submitted on behalf of Kouga, if Cochrane had complied strictly with clause F.2.12 of the tender conditions, it might have been awarded the tender. It was not excluded from bidding. It was never contended that the condition itself was unconstitutional. I do not think that the tender was designed to favour Betafence, or Yonke, which was apparently supplied by Betafence. As du Plessis stated, the specified products were

freely available, including to Cochrane. All prospective bidders were subject to the same conditions and specifications. It was submitted on behalf of Cochrane that if they had submitted a bid which complied with the specifications, it would have been too expensive. As pointed out on behalf of Kouga this contention was not contained in Cochrane's papers.

[50] While the BEC did initially lose sight of what was required by clause F.2.12, it ultimately did rely on that condition. It would have been unfair to other bidders if Cochrane had been treated differently and allowed to remedy a non-compliant bid ex post facto. The point was, as submitted on behalf of Kouga, that whatever misapprehension might have been created, objectively Cochrane's bid was non-compliant. Any earlier confusion, incorrect recommendations, a request for a schedule comparing Cochrane's product with the tender specifications, a change in evaluation criteria (evaluation on total price as against price per item) or assurances at the tender briefing, were irrelevant.

[51] It follows that I am of the view that Cochrane has not demonstrated that it is in the interests of justice to grant an extension of the 180 period.

[52] The application is dismissed with costs, including the costs of the interdict application.

_____

J M ROBERSON
JUDGE OF THE HIGH COURT
Appearances:

For the Applicant: Adv B Jackson SC instructed by Wheeldon Rushmere & Cole, Makhanda.

For the First Respondent: Adv R G Buchanan SC, instructed by Whitesides Attorneys, Makhanda.