IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH

NOT REPORTABLE

CASE NO.: 1998/2021

In the mater between:

HALIFAX GROUP (PTY) LTD **APPLICANT**

and

MANDELA BAY DEVELOPMENT AGENCY **RESPONDENT**

JUDGMENT

GOVINDJEE AJ:

Introduction

[1] The applicant approaches the court on an urgent basis. In essence, it seeks to interdict the respondents from implementing, executing or carrying on with work in respect of the construction of the Moore Dyke Sport Precinct, and to suspend the decision of the first respondent to award that tender to the second respondent ('the Part A application'), pending the review of that decision ('the Part B application').

[2] The application was opposed by both respondents, *inter alia* on the basis that the application should be struck from the roll for lack of urgency. In the time available I have not dealt with every aspect raised in argument,

instead confining this judgment to those issues considered to be most relevant.

Urgency

[3] In urgent applications a judge may dispense with the forms and service provided for in the Uniform Rules and dispose of the matter at a time and place and in such manner and in accordance with such procedure as seems meet.[1] The degree of relaxation of the rules must be commensurate with the exigency of the case.[2] The major considerations in deciding whether or not to exercise the court's power to abridge the times prescribed and to accelerate the hearing of a matter are the following:[3]

- The prejudice that the applicant might suffer by having to wait for a hearing in the ordinary course;
- The prejudice that other litigants might suffer if the applicant is given preference; and
- The prejudice that respondents might suffer by the abridgment of the prescribed times and an early hearing.

[4] In my view the applicant has succeeded in showing sufficient and satisfactory grounds to permit the matter being heard on an urgent basis. The kind of harm alleged justifies the disruption of the roll that it occasions. The applicant seeks to exercise the constitutional right to lawful, reasonable and procedurally fair administrative action[4] and to hold the first respondent, as an organ of state, to the procurement of goods and services in accordance with a system which is fair, equitable, transparent, competitive and cost effective.[5]

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[1] Rule 6(12).

[2] *Luna Meubel Vervaardigers (Edms) Bpk v Makin & another (t/a Makin Furniture Manufacturers*) 1977 (4) SA 135 (W) at 137E-G.

[3] *I L & B Marcow Caterers (Pty) Ltd v Greatermans SA Ltd & another; Aroma Inn (Pty) Ltd v Hypermarket (Pty) Ltd & another* 1981 (4) SA 108 (C) at 112H-113A.

[4] In terms of section 33 of the Constitution of the Republic of South Africa, 1996 ('the Constitution') and the Promotion of Administrative Justice Act, 2000 (Act 3 of 2000) ('PAJA').

[5] S 217 of the Constitution.

[5] There has been no undue delay in bringing the application, following receipt of the first respondent's final decision to reject the applicant's bid as non-responsive on 12 July 2021. It is also clear that the first respondent plans to proceed to implement the tender in the absence of court intervention, so that much of the project may have been completed by the time ordinary review proceedings are determined. I am satisfied, on the facts, that the applicant may not obtain substantial redress in the event that it is successful but forced to wait in the queue to argue part B of the motion, justifying the decision to hear the matter on an urgent basis.[6]

The facts

[6] The first respondent issued and advertised a tender for the construction of the Moore Dyke Sport Precinct during 14 September 2000. The initial closing date for the submission of tenders was 15 October 2020, later extended to 23 October 2020. The applicant's bid was timeously submitted. Nine other companies also submitted bids. The first respondent announced the amounts that had been tendered in each instance and the applicant's bid was the lowest received.

[7] The Bid Evaluation Committee (BEC) met to conduct stage 1 of the evaluation process sometime after 23 October 2020. This is where the tender documents submitted are scrutinised to ensure that all the relevant documents as per the advertisement have been correctly attached.

[8] The applicant received correspondence on 8 December 2020 advising it that its bid was disqualified. A number of changes had been made to the initial tender documents. The second lowest bidder was declared as non-responsive during the stage 1 process, having failed to acknowledge receipt of an addendum and to make changes to the bills of quantities in terms of the bulletins issued.[7] The applicant objected to its

[6] See *In re: Several Matters on the urgent Court Roll* 2013 (1) SA 549 (GSJ) at para 7.

[7] F.2.6 of the CIDB Standard for Uniformity in Construction Procurement ('the CIDB Standard') of 2010 and 2015 provides that the acknowledgment of the receipt of addenda to the tender documents is one of the tenderer's obligations.

disqualification for alleged non-compliance during January 2021 and, following legal advice, the first respondent issued an internal memorandum recording that the applicant's bid was compliant with stage 1 of the evaluation process and had been evaluated under stage 2.[8] The bid was now rejected on the basis that the applicant's score failed to meet the minimum to pass that stage, in part due to the applicant's Health and Safety Officer lacking valid certification. Following an exchange of correspondence, the first respondent confirmed that the applicant's bid met the minimum functionality score.

[9] The applicant's bid was now disqualified on the basis that, despite acknowledging receipt of the applicable addendum, it had not effected changes to the bills of quantities as per the notice to tenderers sent with the Supply Chain Management bulletins requesting changes. The BEC considered this to be a material deviation, as follows:

> 'The evaluation process comprised 3 stages:
> Stage 1 – Compliance Evaluation;
> Stage 2 – Functionality Evaluation; and
> Stage 3 – Price and Preference Evaluation as per Method 2 of the latest CIDB requirements.
>
> During stage 3 evaluation, the BEC noted Halifax Group Pty Ltd did not effect changes to the Bill of Quantities (BoQ) as per Notice to Tenders sent with the SCM Bulletins, requiring the changes to be made on the BoQ. Halifax Group Pty Ltd acknowledged receipt of the Bulletins and the Notices to Tender. The above is deemed by the BEC as a material deviation to the tender. Please see the consultants Technical Report, BoQ attached hereto and the clauses below for further explanation on the material deviation.'

[10] The 'clauses' referred to emanate from the Construction Industry Development Board Standard for Uniformity in Construction Procurement ('the CIDB Standard').[9] The parties again engaged, including

[8] Stage 2 focuses on functionality, emphasis being placed on the bidder's capacity to perform the work and includes consideration of the staff composition of the bidder.

[9] The papers drew on both the 2010 and 2015 CIDB Standard on various occasions. During argument, counsel for the applicant focused particularly on the 2015 Standard. F.3.8 of that Standard provides the following 'test for responsiveness': 'F.3.8.1 Determine, after opening and before detailed evaluation, whether each tender offer properly received: a) complies with the requirements of these Conditions of Tender, b) has been properly

the applicant providing expert reports for consideration. On this occasion the applicant's objections failed and a final decision was made to disqualify the bid. On 21 May 2021, the first respondent addressed the following correspondence to the applicant:

> 'After reviewing the information that was provided, it is the view of the MBDA that Halifax Group (Pty) Ltd is non-responsive as it did not conform to the conditions set out in the Tender Conditions and Data (…Clause F3.8.2) as it contains a material deviation to the tender which can *"detrimentally affect the scope, quality or performance of the works"* (subclause "a") and Clause F2.6 (acknowledgement of addenda to tender documents). This was a first stage compliance requirement for which Halifax Group (Pty) Ltd had been deemed to be compliant due to the signed Notices to Tender. On review of the Bill of Quantities (BOQ), the certification on the Notice to Tender that all changes that were effected were not complied with thus resulting in a change of the compliant allocation to non-compliant…'

[11] The first respondent added that it had found support in an opinion received from the CIDB and that clause 3.9 of the CIDB Standard was only applicable to *responsive tenders*. It also relied on a technical report from Bosch Projects, indicating that the applicant's quoted price would have increased (from R39 100 000,00 to R40 300 507,43) had the applicant made changes in its bills of quantities as required by the first respondent.[10] Even with this change, the applicant's bid would have remained the lowest.

[12] The technical report went beyond factoring changes that the applicant ought to have made to its bill of quantities by concluding that the applicant's rates on item 5 of bill 2 were unacceptably low and out of line

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and fully completed and signed, and c) is responsive to the other requirements of the tender documents. F.3.8.2 A responsive tender is one that conforms to all the terms, conditions and specifications of the tender documents without material deviation or qualification. A material deviation or qualification is one which, in the Employer's opinion, would: a) detrimentally affect the scope, quality or performance of the works, services or supply identified in the Scope of Work, b) significantly change the Employer's or the tenderer's risks and responsibilities under the contract, or c) affect the competitive position of other tenderers presenting responsive tenders, if it were to be rectified. Reject a non-responsive tender offer, and not allow it to be subsequently made responsive by correction or withdrawal of the non-conforming deviation or reservation.' Almost identical wording appears in the 2010 CIDB Standard.

[10] The papers highlight that all bids were expected to be in compliance with the CIDB Standard of 2010. The technical report relied on the CIDB Standard of 2015. There is a clear overlap between the two and counsel for both parties directed the bulk of their arguments to the later standard.

with 'acceptable industry average' (having been costed at R15m^3 as opposed to R355m^3.[11] Replacing that amount increased the applicant's tendered amount to R44 294 572,43, and placed the applicant's bid fifth in terms of the pricing submissions received.

[13] A further meeting, and even mediation, was unable to resolve the impasse. The first respondent subsequently appointed the second respondent to undertake the project and made it clear that it was proceeding with implementation. This resulted in the urgent application under consideration.

The issues

[14] Various issues came to the fore during argument, in the context of the parties' submissions in respect of the granting of an interim interdict, and the satisfaction of the requirements for this relief. These include:

a. Did the BEC commit a gross irregularity by considering compliance with tender documentation at a stage when price and preference (stage 3) was in issue, and after the applicant had seemingly passed both stages 1 and 2 of the evaluation process? Or was the BEC entitled to recommend disqualification of a bid for non-compliance with the tender requirements, and to revise earlier findings made at previous stages of the bid evaluation process, at any stage?
b. Was the first respondent's decision to reject the applicant's bid as non-responsive procedurally unfair or materially influenced by errors of law, including omission to consider relevant considerations and consideration of irrelevant matters in arriving at its decision? Or did the applicant submit an acceptable tender,

[11] There is a dispute on the papers as to whether the technical report approached this issue correctly. The first respondent avers that all construction industry experts who advised it indicated that the applicant's rate was unreasonably and unrealistically low. The replacement figure was based on market-related industry price of the item in question as well as the average rate of the tender offers of the other bidders for that item. There is also a dispute regarding the procedure that the first respondent ought to have followed in dealing with the alleged material deviation. For reference to a priced schedule of quantities being questioned on the basis that a quoted price was 'not market related', see *The Chairperson: Standing Tender Committee and Others v JFE Sapela Electronics (Pty) Ltd and Others* [2005] ZASCA 90 at paras 4, 8. This case also serves as an example of an instance where a consulting engineer's report highlighted a particular difficulty with the amounts quoted, demonstrating a misunderstanding on the part of a tenderer: at paras 18, 19.

so that a *prima facie* case for the granting of an interim interdict has been satisfied?

c. Did the first respondent's decision, in awarding the tender to a bidder whose quoted price was higher than the applicant's, violate section 217 of the Constitution.

The legal position

The test for an interim interdict

[15] The well-known test for an interim interdict requires that an applicant must establish:[12]

a. A *prima facie* right even if it is open to some doubt;
b. A reasonable apprehension of irreparable and imminent harm to the right if the interdict is not granted;
c. The balance of convenience must favour the grant of the interdict; and
d. The applicant must have no other remedy.

[16] It is now accepted that courts grant temporary restraining orders against the exercise of statutory power only in *exceptional cases* and when a *strong case* for that relief has been made out.[13] A court considering the grant of an interim interdict must do so in a way that promotes the objects, spirit and purport of the Constitution. The separation of powers doctrine, embedded in the architecture of the Constitution, requires courts to ensure that all branches of government act within the law. It also demands that courts must refrain from entering the exclusive terrain of the other branches of government unless the intrusion is mandated by the Constitution itself.[14] As Moseneke DCJ (as he then was) noted in *OUTA*:[15]

> 'A court must keep in mind that a temporary restraint against the exercise of statutory power well ahead of the final adjudication of a claimant's case may be granted only in the clearest of cases and after a careful

[12] *Setlogelo v Setlogelo* 1914 AD 221 as cited in *National Treasury and Others v Opposition to Urban Tolling Allicance and Others* ('*OUTA*') 2012 (6) SA 223 (CC) at para 50.
[13] *Gool v Minister of Justice and another* 1955 (2) SA 682 (CPD) cited with approval in *OUTA* at paras 43-45.
[14] *OUTA* at para 44.
[15] *OUTA* at para 47.

consideration of separation of powers harm. It is neither prudent nor necessary to define "clearest of cases". However, one important consideration would be whether the harm apprehended by the claimant amounts to a breach of one or more fundamental rights warranted by the Bill of Rights.'

[17] In *Eriksen Ltd v Protea Motors and Another*,[16] Holmes JA stated the following:

> 'The granting of an interim interdict pending an action is an extraordinary remedy within the discretion of the Court. Where the right which it is sought to protect is not clear, the Court's approach in the matter of an interim interdict was lucidly laid down by Innes JA in *Setlogelo v Setlogelo*, 1914 AD 221 at p. 227. In general, the requisites are –
>
> a) A right which, "though *prima facie* established, is open to some doubt";
> b) A well-grounded apprehension of irreparable injury;
> c) The absence of ordinary remedy.
>
> In exercising its discretion, the Court weighs, *inter alia*, the prejudice to the applicant if the interdict is withheld against the prejudice to the respondent if it is granted. This is sometimes called the balance of convenience. The foregoing considerations are not individually decisive, but are interrelated; for example, the stronger the applicant's prospects of success the less his need to rely on prejudice to himself. Conversely, the more the element of 'some doubt', the greater the need for the other factors to favour him. The Court considers the affidavits as a whole, and the interrelation of the foregoing considerations, according to the facts and probabilities…Viewed in that light, the reference to a right which, "though *prima facie* established, is open to some doubt" is apt, flexible and practical, and needs no further elaboration.'

<u>Acceptability and non-responsiveness</u>

[18] An organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, must contract for goods or services in accordance with a system which is fair, equitable,

[16] 1973 (3) SA 685 (A) at 691C-G, as quoted in *MEB Energy (Pty) Ltd v Ndlambe Local Municipality and Another* (unreported Eastern Cape Division, Grahamstown, case no 466/2020) at para 6.

transparent, competitive and cost effective.[17] Section 1 of the Preferential Procurement Policy Framework Act, 2000 ('the PPPFA')[18] defines an acceptable tender to mean any tender which in all respects complies with the specifications and conditions of the tender as set out in the tender documents. The doctrine of legality demands that the legislature and executive in all spheres are constrained to exercise power and perform their functions in a manner consistent with the law. The acceptance by an organ of state of a tender which is not 'acceptable' within the meaning of the PPPFA would amount to an invalid act that would ultimately fall to be set aside. Acceptability is, therefore, a statutory threshold requirement.[19]

[19] Importantly, it is for the first respondent, as employer or institution inviting the tender, to decide the prerequisites for a valid tender.[20] A failure to comply with prescribed conditions would result in a tender being disqualified as an acceptable tender under the PPPFA, unless those conditions were immaterial, unreasonable or unconstitutional.[21] Put differently, a tender should not easily be invalidated on the basis that it contains minor deviations that do not materially alter or depart from the characteristics, terms, conditions and other requirements set out in tender documents.[22] Whether or not a deviation or qualification is material is a question to be determined by the BEC in its discretion, taking into account the set eligibility criteria.[23]

[20] The definition of 'acceptable tender' in the PPPFA must be construed against the background of the system envisaged by section 217(1) of the Constitution, namely one which is 'fair, equitable, transparent,

[17] S 217 of the Constitution.
[18] Act 5 of 2000. It is accepted that this legislation gives effect to the directive contained in s 217(3) of the Constitution.
[19] *JFE Sapela supra* at paras 11, 12.
[20] *Dr JS Moroka Municipality & Others v Betram (Pty) Ltd & Another* [2014] 1 All SA 545 (SCA) at para 10, applied in *WDR Earthmoving Enterprises & Another v The Joe Gqabi District Municipality & Others* [2018] ZASCA 72 at paras 29, 30 and 40.
[21] *WDR Earthmoving supra* at para 30. F.2.14 of the CIDB Standard (2010 and 2015) provides that tenderers 'accept that tender offers, which do not provide all the data or information requested completely and in the form required, may be regarded by the employer as non-responsive.'
[22] *Overstrand Municipality v Water and Sanitation Services South Africa (Pty) Ltd* [2018] ZASCA 50 at para 50.
[23] *Aurecon South Africa (Pty) Ltd v City of Cape Town* [2015] ZASCA 209 (A) at para 26. On the link between a 'responsive' tender and the PPPFA concept of 'acceptability', see *JFE Sapela supra* at para 12.

competitive and effective'. 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.[24]

[21] The mere pricing of an item does not necessarily equate to proper compliance.[25] As the Supreme Court of Appeal held in *JFE Sapela*:[26]

> 'What the Preferential Act does not permit a tenderer to do is in effect omit from his tender a whole section of the work itemized in the bill of schedules and required to be performed. A tenderer who is permitted to do this has an unfair advantage over competing tenderers who base their tenders on the premise, inherent in the tender documents, that all the work itemized in the schedule of quantities is to be performed…What is imperative is that all tenderers tender for the same thing. By tendering on the basis that certain work will not be required a tenderer is able to reduce his price to the detriment of other tenderers, and almost certainly also to the detriment of the public…Such a tender offends each of the core values which section 217(1) of the Constitution seeks to uphold. It would not be a tender which is 'acceptable' within the meaning of the Preferential Act.'

A rigid or flexible approach?

[22] There are degrees of compliance with any standard and, as the Supreme Court of Appeal held in *Metro Projects CC*, it is notoriously difficult to assess whether less than perfect compliance falls 'on one side or the other of the validity divide'.[27] This is due to the highly contextual and fact sensitive nature of the enquiry, so that judicial pronouncements must be understood within the factual matrix of each particular case.[28] There is no simple, single formula for evaluating responsiveness and acceptability and the consequences of non-compliance may vary depending on factors such as the purpose and materiality of the bid requirement in question

[24] *JFE Sapela supra* at para 14.
[25] *Ibid*.
[26] *Ibid*.
[27] *Metro Projects CC v Klerksdorp Local Municipality* 2004 (1) SA 16 (SCA) at para 15. Also see, in general, P Volmink 'Legal consequences of non-compliance with bid requirements' (2014) 1 *African Public Procurement Law Journal* 41.
[28] Volmink 42.

and the extent of compliance.[29] Fair administrative process depends on the circumstances of each case and in some cases it is indeed fair to afford a tenderer an opportunity to correct an obvious mistake, to ask for clarification or further details, provided that the process on the whole does not lose the attribute of fairness or, in the local government sphere, the attributes of transparency, competitiveness and cost-effectiveness.[30]

[23] It is nevertheless accepted that compliance with bid requirements is necessary and has intrinsic value.[31] Equal bid requirement observation by all bidders enhances the fairness of the process, so that bid requirements simply cannot be discarded at the drop of a hat.[32] It must, by contrast, also be noted that there are inherent dangers in adopting an unduly rigid approach to the issue of responsiveness, and that courts must guard against the elimination of bidders based on administrative considerations as opposed to issues of substance.[33] Such an approach could defeat the objectives of fairness, transparency, competitiveness and cost effectiveness.[34] The Constitutional Court has eschewed both an overly rigid as well as an overly flexible approach and instead adopted a purposive approach to the issue of bid responsiveness.[35] On this approach, there are instances where substantial compliance with the tender terms and conditions (as opposed to perfect compliance) would suffice.[36] As Volmink has indicated:

> 'A process of fair-minded reasoning requires that bids be assessed on their merits and not be excluded for relatively minor breaches. Such an approach gives effect to the values of fairness, equity, transparency, competitiveness and cost effectiveness enshrined in section 217(1) of the Constitution. Thus, the courts are required to enquire into the underlying

[29] Volmink 44. For a proposed matrix of factors to be considered when determining the consequence of non-compliance with bid requirements, see Volmink 58.
[30] *Metro Projects CC supra* at para 13 as cited in *JFE Sapela supra* at para 19.
[31] See *AllPay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency and Others* 2014 (1) BCLR (1) CC at para 27. For an example of a strict approach, see *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) SA 1 (SCA).
[32] See Volmink 57.
[33] *Minister of Social Development v Phoenix Cash and Carry* [2007] JOL 19529 (SCA).
[34] *Phoenix Cash and Carry supra* at para 2.
[35] *AllPay supra* as cited in Volmink 51-52. A key question to ask, in terms of this approach, is whether what the applicant did constituted compliance with the statutory provisions viewed in light of their purpose.
[36] Volmink 52.

> objective and materiality of a bid requirement, to ascertain whether its purpose was in fact met despite less than perfect compliance. A decision whether or not to exclude a non-compliant bidder from a bid process will depend on a variety of factors including: the wording of the RFP, the materiality of the unfulfilled requirements, the degree of non-compliance and the purpose of the requirement.'[37]

Analysis

[24] The applicant alleges a *prima facie* right based on the provisions of section 217 of the Constitution and its right to just administrative action. It takes issue with the rejection of its bid to undertake work on the construction of the Moore Dyke Sport Precinct.

[25] The core difficulty for the applicant is that its submission failed to comply, in all respects, with the specifications and conditions of tender, seemingly placing it outside of the boundaries of due implementation of a preferential procurement policy, in terms of the PPPFA.[38] In particular, bidders were required to amend the item description and quantity of section 4 of Bill No. 1, which changed the scope of works from 150mm thick layer of topsoil to 300mm thick layer of topsoil, and the quantity of topsoil required was changed from 3498m to 10215m. The applicant admits its error, but avers, *inter alia*, that the first respondent has failed to prove that the error would detrimentally affect the scope, quality or performance of the work. In the first respondent's opinion, this amounts to a material deviation that renders the tender non-responsive, and resulted in the applicant's bid being rejected.

[26] When considering the facts set out by the applicant, together with the facts set up in opposition that the applicant cannot dispute, and having regard to the inherent probabilities, there is serious doubt in my mind whether the applicant should be able to obtain final relief.[39] It was clearly open to the first respondent to determine the prerequisites for a valid

[37] Volmink 57. For a suggested framework for determining the consequences of non-compliance with bid requirements, see Volmink 58.
[38] Section 1, read with section 2 of the PPPFA.
[39] See *Webster v Mitchell* 1948 (1) SA 1186 (W) 1189-1190, read with *Gool supra* at 688C-E.

tender.[40] Acceptance of a tender that did not satisfy the stipulated requirements would have resulted in the first respondent facing a legality challenge for the breach of a threshold requirement.[41] That the BEC realised the non-compliance during stage 3 of its process is of no moment in the circumstances. To hold otherwise would be to isolate the different functions of the various stages of a tender process artificially and rigidly. In any event, there appears to be no basis for the suggestion - either in the statutory framework or in the conditions of tender - that the BEC was precluded from disqualifying the bid when it did so.

[27] I am also unable to agree that the non-compliance related to conditions that were immaterial, unreasonable or unconstitutional. A material deviation or qualification is one which, in the employer's opinion, would detrimentally affect the scope, quality or performance of the works, services or supply identified in the Scope of Work. The deviation in this instance involves the pricing of the Bill of Quantities and cannot be considered to be a trivial or minor issue. The non-compliance followed acknowledgement of addenda to the tender documents, indicating the amendments required, and amounts to a material deviation of a stipulated requirement affecting the scope, quality or performance of the work.[42] The opinion formed by the first respondent that the applicant's tender proposal was non-responsive within the meaning of the CIDB Standard appears to have been rationally arrived at *intra vires* the provisions of the tender documentation.[43]

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[40] See *WBHO / Pro Khaya JV v The Nelson Mandela University and Another* (unreported, Eastern Cape Local Division, Port Elizabeth, case no. 2121/19) at paras 27-29.

[41] See *JFE Sapela supra*.

[42] The first respondent's consideration that the rate for item 5 in section 4 of Bill No. 2 was unacceptably low and unbalanced supported its approach that the applicant's bid would detrimentally affect the scope, quality of performance of the works and amounted to a material deviation so that the bid was considered non-responsive: See *MACP Construction (Pty) Ltd v Greater Tzaneen Municipality and Another* (unreported, North Gauteng High Court, Pretoria, case no. 5906/2012) at para 36: '…the Municipality is entitled to eliminate from consideration any tenderer whose tender has been determined by objective, market related criteria to be so low that if its tender were accepted, the Municipality would run the risks of substandard work or a demand for additional funds…' Further support for this outcome is evident from F.2.14 of the 2010 and 2015 CIDB Standard, headed 'Information and data to be completed in all respects': it is for a tenderer to accept that tender offers, which do not provide all the data or information requested completely and in the form required, may be regarded by the employer as non-responsive.

[43] *WBHO supra* at para 45. Reder Construction's bid was also disqualified as non-responsive for failure to make changes to the bills of quantities in terms of the bulletins issued, but during stage 1 of the evaluation process. On the acceptability of a duly qualified and impartial expert to advise the first respondent of a reasonable price

[28] The provisions of the CIDB Standard relating to 'arithmetical errors, omissions and discrepancies' do not assist the applicant. That part of the CIDB Standard allows for the highest ranked tender or tenderer with the highest number of tender evaluation points *after the evaluation of tender offers in accordance with F.3.11* to be checked for matters such as incorrect placement of a decimal point, omissions in completing the pricing schedule or bills of quantities or arithmetic errors. F.3.11 of the CIDB Standard, deals with the evaluation of a *responsive tender offer*. As such, the applicant's purported reliance on CIDB Practice Notes pertaining to arithmetical errors and the like is misplaced, being inapplicable to instances of material deviations from tender requirements.

[29] The applicant's submission was non-responsive and, in terms of the stipulated test for responsiveness, it was open to the first respondent to reject the tender offer and to not allow it to be made responsive by correction or withdrawal of the non-conforming deviation.[44] The previous interactions between the parties and reversal of earlier decisions to disqualify the applicant's bid, following the lodging of objections, does not change the position.[45]

[30] In exercising the court's discretionary function, the various requirements for the granting of an interim interdict must be considered in their totality. This includes the applicant's reasonable apprehension of irreparable harm, the balance of convenience and respective prejudice which would be suffered by each party as a result of the grant or refusal of a temporary interdict. A key factor is that the applicant holds slim prospects of success in the review proceedings, as described. When evaluated together with the other factors, the conclusion is that the applicant cannot succeed in obtaining temporary relief. This finding is fortified when considering that courts are to grant temporary restraining orders against the exercise of

for the work or commodity concerned, and on the dangers of accepting a tender that is too low, see *MACP Construction (Pty) Ltd supra* at para 34.

[44] F.3.8 of the 2010 and 2015 CIDB Standard. See *WBHO supra* at para 100, relying on *Dr JS Moroka Municipality supra* at paras 12, 15 and 16.

[45] See *MACP Construction (Pty) Ltd supra* at para 34, 36.

statutory power only in *exceptional cases* and when a *strong case* for that relief has been made out. I am unable to conclude that the applicant has passed that test in this instance.

Order

[31] I make the following order:

1. The applicant's non-compliance with the Uniform Rules of Court relating to forms, time periods and service is condoned and the applicant is granted leave to move this application on an urgent basis.
2. The application for interim relief ('the Part A relief') is dismissed with costs.
3. The Part B application is postponed *sine die*.

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A GOVINDJEE
ACTING JUDGE OF THE HIGH COURT

APPEARANCES:

FOR THE APPLICANT:	Adv B Ndamase and Adv A Masiza, instructed by R Siyila Inc, Port Elizabeth
FOR THE 1ST RESPONDENT:	Adv G Appels, instructed by McWilliams & Elliott Attorneys, Port Elizabeth
FOR THE 2nd RESPONDENT:	Adv O Ronnassen SC instructed by Friedman Scheckter Attorneys, Port Elizabeth

DATE HEARD: 30 July 2021
DATED DELEIVERED: 12 August 2021