



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN**

CASE NO: 8221/16

In the matter between:

WESTWOOD INSURANCE BROKERS (PTY) LTD

APPLICANT

and

ETHEKWINI MUNICIPALITY

FIRST RESPONDENT

**CHAIRPERSON: ETHEKWINI MUNICIPALITY
BID EVALUATION COMMITTEE**

SECOND RESPONDENT

**CHAIRPERSON: ETHEKWINI MUNICIPALITY
BID ADJUDICATION COMMITTEE**

THIRD RESPONDENT

NC SOUTH WEST BROKERS CC

FOURTH RESPONDENT

WANDA FINANCIAL CONSULTANTS (PTY) LTD

FIFTH RESPONDENT

WATERSURE (PTY) LTD

SIXTH RESPONDENT

INDWE RISK SERVICES (PTY) LTD

SEVENTH RESPONDENT

MDUDUZI CHRISTOPHER NKOMO N.O.

EIGHTH RESPONDENT

ORDER

Delivered: 5 April 2017

The following order is granted:

1. The fourth respondent shall indemnify the first respondent by paying fifty per cent (50%) of its costs.
2. The remaining fifty per cent (50%) of the first respondent's costs shall be paid in equal shares by the following:
 - (a) Contracts Administrator - Nonhlanhla Zondo;
 - (b) Divisional Manager for Regional Customer Services Water and Sanitation - Bridgette Ntusi;
 - (c) The Manager Contracts and Materials – Tarry Bartholomew;
 - (d) Head of eThekweni Water and Sanitation – Edwin Msweli;
 - (e) Deputy Head Supply Chain Operations - Sandile Ngcobo;
 - (f) Members of the Bid Evaluation Committee namely,
 - i. Vincent Cebekhulu
 - ii. Kamlesh Naidoo
 - iii. Zandile Sithole
 - iv. Greg Evans
 - v. Max Mthembu
 - vi. Tumo Mpetsane
 - (g) Members of the Bid Adjudication Committee namely,
 - i. Andre Petersen
 - ii. Dave Renwick
 - iii. Sandile Mnguni
 - (h) The eighth respondent; and

- (i) The City Manager who confirmed the award to South West.
3. The Acting City Manager Ms Nene shall forthwith serve or cause to be served a copy of this judgment on the Mayor and all those liable for costs above.
 4. The Ms Nene or her replacement shall report to the court on the steps she or he has taken to recover costs under this judgment on affidavit by 30 July 2017 and thereafter on the last day of each month until the costs are paid or the court orders otherwise.
 5. The registrar of this court shall serve a copy of this judgment on the Auditor-General by fax or any other convenient means.
 6. There is no order for costs against Ms Silidile Blose.
 7. Any person having an interest in my judgment is given leave to apply for leave to appeal against this judgment.

JUDGMENT

D. Pillay J:

Introduction

[2] I heard the application to interdict the awarding of the tender for underwriting insurance services for water leaks for individual dwelling units on 30 September, 7 October and 15 November and I granted judgment on 8 December 2016.¹ I found the eighth respondent's decision to award the tender to the fourth respondent, NC South West Brokers CC (South West) to be irrational, for amongst other reasons that he failed to give reasons for preferring South West.² I also found the opinion of the insurance and the treasury departments upon which the eighth respondent relied to prefer South West to be mysterious in the absence of any explanation.³

[3] The decision to prefer South West was processed through the departmental personnel, the Bid Evaluation Committee (BEC) and the Bid Adjudication Committee (BAC). I did not know the identity of all the officials, and how each was involved in the awarding of the tender. Hence I gave directions for the service of my judgment on the eighth respondent, and all those who were involved in supporting the tender in favour of South West or who had any information to assist the court. The deadline expired for those officials to deliver affidavits to the court to show cause why they should not each personally indemnify eThekweni against costs it incurred in this litigation by paying it jointly and severally, the one paying

¹ *Westwood Insurance Brokers (Pty) Ltd v Ethekwini Municipality* (8221/16) [2016] ZAKZDHC 46 (8 December 2016)

² Paragraph 59 of judgment

³ Paragraph 58 of judgment

the others to be absolved; and why a copy of my judgment should not be served on the Auditor-General. Such persons were also invited to indicate by 20 February 2017 whether they wished to be heard in open court; if not, I would dispose of the matter in chambers, as I am now doing.

[4] My judgment was served by eThekweni's attorneys, on the attorneys for the fourth respondent, the eighth respondent, Mr Sibusiso Shezi who had advised that South West's bid was invalid and should be disqualified, and Ms Silindile Blose the Legal Advisor: Legal and Compliance Unit of eThekweni. Dumisile Nene the Deputy City Manager as the Acting City Manager of eThekweni delivered an affidavit confirming service of the judgment on the office of the Mayor and the City Manager. She identified the members of the BEC who attended the meetings of 26 October and 2 November when the BEC considered the tender, the three persons who served on the BAC on 16 November 2015 and other officials who were also involved in the tender. She assured the court that the judgment was served on all the officials mentioned in her affidavit.

[5] All the persons so identified have delivered affidavits except for Mr Sandile Charles Ngcobo. The eighth respondent has also not done so despite being served with my judgment on 23 January 2017.

[6] The crux of the irrationality of the decision by all role players to award the tender to South West turned on a singular undisputed fact: South West purported to comply with clause 3 of the Conditions of Tender by submitting professional indemnity insurance (referred to here as PII1-3) when the tender called for provision of insurance for water loss through underground leaks for individual dwelling units. Clause 3 stipulated that a letter of undertaking from an insurance company licensed to operate in South Africa must accompany the offer. Furthermore the underwriter must be registered with the Financial Services Board (FSB). South West submitted a quotation for professional indemnity from Marsh

(Pty) Ltd whose registration with the FSB as an insurer had also not been established.

[7] The difference between the two types of insurances is obvious and should have been especially so to South West and those employees of eThekwini involved in specifying the condition, to the insurance and finance departments who should have been knowledgeable about insurance and to the professionals who participated in awarding the tender. Substituting one for the other calls into question not only the competence but possibly also the integrity of those who accepted the quotation for professional indemnity insurance instead of underwriting insurance for water leaks.

[8] In trawling through the affidavits submitted to me in response to my rule *nisi* I limited my search to finding explanations for how a quotation for professional indemnity insurance, which insures members of the public against malpractices by professionals, was accepted as an undertaking to provide underwriting insurance services for water leaks. Professionals were not involved in the provision of underwriting insurance services so the need for professional indemnity insurance did not even arise.

[9] Marsh (Pty) Ltd delivered an affidavit to correct factual inaccuracies that allegedly emerged in media reports about my judgment. Its affidavit is intended to assist the court and to resolve certain misconceptions about its status. Marsh clarifies that it is a licensed financial services provider registered in terms of the Financial Advisory and Intermediary Services Act, 37 of 2002. It conducts business as an insurance broker specializing in professional indemnity insurance. It does not conduct business as an insurance company or an underwriter.⁴ As these facts are publicly available on the website of the FSB (eThekwini.fsb.co.za)

⁴ Paragraph 5 and 6 of affidavit of Prabashni Padayachee – Naidoo for Marsh (Pty) Ltd

it is all the more remarkable that South West would offer PII1-3 and eThekwini would accept it as compliant.

[10] As I have already analyzed the eighth respondent's decision in my previous judgment, this judgment will focus on the other role-players whose participation resulted in the awarding of the tender to South West. I intend to deal with the three tiers of decision-making preceding the final decision by the eighth respondent. They are the assessment of South West's bid by the line department and other officials, the line department's report back to the BEC, the BEC meetings of 26 October 2015 and 2 November 2015, and the decision of the BAC at their meeting on 16 November 2015.

The Evidence on Affidavits

Pre-BEC decisions

[11] Bridget Ngenzeni Ntusi employed by eThekwini as a Manager of Regional Customer Services Water and Sanitation Unit submitted an affidavit confirming that she received five responses to the notice advertising the tender. Together with Nonhlanhla Zondo, the Contract Administrator representing Supply Chain Management (SCM), she checked all the documents and discovered that although South West was the most responsive bidder in terms of pricing and B-BBEE points it had submitted a quotation. They were uncertain as to whether they should accept the quotation instead of a letter of undertaking.

[12] They enquired from Mr Sandile Charles Ngcobo, Deputy Head of the Supply Chain Operations who referred them to the insurance department. The manager of the insurance department Mr Thulani Ntuli advised that they should get a legal opinion as he was also uncertain. They approached Mr Sbu Shezi who advised

that they should disqualify South West and confirm WANDA Financial Services, the fifth respondent who was an insurer with a trading license issued by the FSB.

[13] They then prepared a report recommending WANDA. They incorporated all the advice and correspondence pertaining to their consultations, which they submitted to the BEC meeting held on 26 October. They recommended to that meeting that the tender be awarded to WANDA. The BEC responded that the:

‘quotation submitted by South West Consulting is equivalent to a letter of undertaking and advised that the bids be re-evaluated and that we recommend the most responsive bidder as per the tender criteria.’⁵

Messrs Ntusi and Zondo amended the report ‘as advised by the BEC’ and returned it to the BEC. At a meeting held on 2 November 2015 ‘the report was approved.’

[14] Ms Ntusi contends that she performed her duties diligently, sought advice, and acted on the advice she received. Consequently she should not be held liable for any legal costs. Nonhlanhla Zondo the Contract Administrator filed an affidavit substantially similar to that of Ms Ntusi

Meetings of BEC

[15] Kamlesh Rajoo, Chief Legal Advisor: Legal Support (Legal Compliance Unit) of eThekweni attested to an affidavit in which she states that she attended the first BEC meeting on 26 October 2015. The minutes that she attaches to her affidavit are merely a synopsis of the proceedings. An audio recording would be irrefutable proof of the full contents of the discussions. However, after enquiring about the electronic recording of the proceedings the secretariat advised her that all

⁵ Paragraph 14 of the affidavit of Ntusi

recordings are available save for that meeting which cannot be found. She finds this odd.⁶

[16] Her further evidence proceeds as follows:

'We traversed Sbu Shezi's opinion and much debate ensued. As a prudent Committee we could not just disqualify SOUTH WEST on the basis of the opinion, without satisfying ourselves that the opinion had merit. This would be tantamount to Mr Shezi doing the evaluation. I personally said that Sbu Shezi would only make such a call to disqualify, based on what information and documentation was before him. The Opinion referred to a "quotation". We had not had sight of that quotation. In the absence of seeing this quotation we would be remiss in just accepting the Opinion as being true and correct.

On calling for the Quotation, the Line Department furnished THREE (3) pages, the first being a letter/certificate on a Marsh/Centrique Letterhead confirming insurance cover for the Underwriters Manwood (PTY) LTD, the second being a quotation and the third certificate showing a contractual relationship between Marsh and Manwood to underwrite for South West with all three's Financial Services Board Registration Numbers (FSP)

However not being Insurance experts, the committee asked the Line Department to look into these documents. The Reevaluation would entail the checking of the veracity and the correctness of these documents before bringing these documents back to the next BEC with its findings. At no stage did the BEC state that SOUTH WEST must be substituted for WANDA. In Fact, I submit that at this stage the BEC did not know who the most responsive bidder was the BEC Minutes reflect this, as even WESTWOOD was to be re-evaluated. The Line Department was meant to evaluate one more time and advise the Committee of its findings at the subsequent meeting.

The BEC sought to defer the matter to its next meeting ...'⁷ (sic)

⁶ Paragraph 17 of affidavit of Kamlesh Rajoo

⁷ Kamlesh Rajoo's affidavit para 18

[17] Furthermore she considered the contract price of R81 million and the net profit reflected in its income statement, and found that the cash flow of South West was 'of a great concern' to the BEC. So too was the loss ratio of 104 per cent. The BEC noted:

'that the recommended company, WANDA Financial Consulting was not the lowest and was the second responsive, the committee advised the line department to revisit the evaluation and to consider South West Consulting as well as Westwood Insurance Brokers.'⁸

[18] According to the minutes of the meeting of 26 October 2015 the BEC learnt that the most responsive tender was from South West having scored the highest points and lowest price. However, it had not submitted 'a letter of underwriting but a quotation of fees from the company.'⁹

[19] Ms Rajoo was absent from the second meeting of the BEC. However she attests to information from records available to her that whenever a deferred matter returns to the BEC the line department has to attach a cover page to explain the reasons for the deferral and how the deferred issues were dealt with to enable members to refresh their minds. In this case the records show that the cover page was absent at this BEC. Hence the BEC had no record before it of its previous deliberations. Instead a different report with a new recommendation was presented with a brief reference to the matter having served before the BEC on 26 October. Ms Rajoo listened to the record of the proceedings of 2 November and attests to the matter having been dealt with 'in haste'. Someone whose identity that neither she nor anyone else discloses advised the committee 'verbally that this matter was deferred from a previous meeting and everything was in order.' Accordingly the tender in favour of South West was approved without further deliberation.

⁸ Kamlesh Rajoo affidavit page 17

⁹ Kamlesh Rajoo affidavit page 17

[20] She asked to be absolved from paying any costs because she was absent from the meeting of 2 November 2015. She did not act *mala fide*, negligent or improperly, that she was acting in the course and scope of her employment with eThekweni and as a member of the BEC has no interest in the outcome of the tender. None of the safeguards of the committee system worked in the awarding of this tender.¹⁰

[21] Gregory Standish Evans is the Head: Engineering Unit who, when he served on the BEC, held the position of Strategic Executive, Engineering Unit. He filed an affidavit stating that he has served on bid committees for more than three years. He was mindful of certain clauses of the Supply Chain Management Policy 2013 adopted by the Council on 30 October 2013. Importantly, the BEC would not consider any bid unless the Supply Chain Management (SCM) verified the bid, accepted it on the agenda of the BEC or it was otherwise approved by the chairman. He was not present at the meeting of 26 October 2015; the City Manager had requested that he attend another meeting.

[22] He attended the meeting of 2 November 2015. The tender for water leaks insurance was not on the agenda. It was raised as the last matter of the day. Mr Evans had not expected this item and had not considered it before. He was therefore unprepared and relied on others who had been present at the previous meeting. He was of the opinion that the new report submitted by the department had taken into account previous deliberations of the meeting of 26 October. The minutes of the previous meeting were not available at the meeting of 2 November 2015. He had no background to the matter. He did know what the BEC's previous position had been. Nor was Mr Shezi's opinion, of which he was unaware at the time, attached to the report.

[23] The report from the Water and Sanitation Unit stated that:

¹⁰ Kamlesh Rajoo affidavit para 26.5

‘the tenderers responses have been reviewed, and there are no technical or commercial issues with the most responsive offer being that of South West Consulting.’¹¹

On that basis he agreed with the recommendation of this award. After perusing the department’s report received on 2 November 2015 Mr Evans observed that there was ‘nothing reflecting that the recommended tenderer was not compliant with the provisions of clause 3 of the conditions of contract and its specification.’¹² Inexplicably, despite having the bid of South West, PII1-3 and the line department’s report that it was a tender for insurance for water leaks Mr Evans nevertheless concluded that whatever concerns had been identified by the BEC on 26 October 2015 had been corrected by the Water and Sanitation Department and that all was in order. He maintained that there was

‘nothing obvious from the report that could have warranted [him] to question the authenticity of the report to further probe.’¹³ (sic)

[24] The recommendation was then made to the BAC to make a final award. The responsibility for the final decision did not rest with the BEC but with the BAC, which received the same documents and recommendation as the BEC when the latter deliberated on the bid.

[25] Tumo Mpetsane, a member of the BEC, filed an affidavit stating that he was present at both meetings of the BEC as Supply Chain Manager. He confirms that although South West was the highest scoring company with the lowest price it did not comply with the requirements because it failed

‘to submit a letter of underwriting but instead supplied a quotation of fees. After interrogating the line department about the letter of underwriting, the line department went to SCM and provided both “**Professional Indemnity Quotation**” documents to BEC proving that South West Consulting met the

¹¹ Paragraph 17 of affidavit of Mr Evans; see also report from Nonhlanhla Zondo attached to his affidavit.

¹² Paragraph 18 of affidavit of Mr Evans.

¹³ Paragraph 19 of affidavit of Mr Evans.

Technical requirements. The line department conformed [?] to BEC that the “**Professional Indemnity Insurance**” was in order.’¹⁴ (sic)

[26] According to Mr Mpetsane the BEC deferred the report to the line department Water and Sanitation for re-evaluation taking into consideration both South West and Westwood. Mr Mpetsane had a copy of Mr Shezi’s opinion disqualifying South West’s bid. He questioned whether Mr Shezi had all three pages of PII1-3 because his opinion referred only to the professional indemnity quotation whereas the other two pages referred to professional indemnity insurance. Remarkably, he does not explain how professional indemnity, whether presented in the form of a quotation or insurance, could ever be relevant to a tender for the provision of insurance for water leaks. Intriguingly Mr Mpetsane’s affidavit continues as follows:

‘The Evaluation report was completely new, having no legal opinion attached to it, it did not have any qualification, or motivation to disqualify South West, meaning that it was complying with the specification. It further stated that the tenderers was **reviewed** and **they were no technical or commercial issues** with the most responsive offer being that of South West Consulting.’ (sic)

[27] On the basis of the line department’s recommendation the BEC approved the recommendation of the award of the tender to South West.

[28] Maxwell Mthembu, the Project Executive: Electricity Unit and a member of the BEC, filed an affidavit confirming that he was present at both meetings of the BEC. At the outset he pointed out that the BEC has to ensure that

‘an appropriate assessment of eligible bidder’s ability to execute the contract has been undertaken by the department presenting the item’.¹⁵(sic)

¹⁴ Paragraph 8 of the affidavit of Tumo Mpetsane

¹⁵ Paragraph 2 of the affidavit of Mthembu

His affidavit is otherwise substantially a duplication of the affidavit of Mr Mpetsane.

[29] Vincent Cebekhulu, Head: Community Participation and Action Support Unit and a member of the BEC, submitted an affidavit confirming that he attended the meeting of 26 October 2015 only. His paragraphs 9 and 10 are substantially similar to paragraph 8 and 10 of the affidavit of Mthembu and Mpetsane.

[30] Zandile Sithole, Deputy Head Supply Chain Management Policy and Support Services and a member of the BEC, filed an affidavit stating that he was present at both meetings of the BEC. His affidavit substantially repeats the evidence from Messrs Mpetsane, Cebekhulu and Mthembu. Although these deponents served with Mr Evans on the BEC, and would therefore have had South West's Bid, PII1-3 and the line department's report they too do not explain how they accepted professional indemnity insurance as compliance.

Compliance check

[31] Tarryn Bartholomew, employed as the Manager of Contracts and Materials Branch in the Water and Sanitation Department, filed an affidavit confirming her involvement in the tender once the first report to the BEC recommending WANDA was produced to her for signature. Her function was to confirm that the evaluation in the report conformed to s 217 of the Constitution of the Republic of South Africa, 1996, that the proceedings were conducted in an open, fair and transparent manner and that the recommendation complied with SCM Policy. The recommendation was based on the opinion of Mr Sibusiso Shezi from the Legal Department. A copy of his opinion was attached to the report.

[32] Ms Bartholomew has no personal knowledge of what transpired at the BEC. However she learnt that the BEC had raised an issue that the quotation submitted by South West was the equivalent of the letter of undertaking on the basis of which the bids had to be re-evaluated and that the department should recommend

the most responsive bidder as per the tender criteria. Ms Bartholomew amended the report believing it was on the advice of the BEC and returned it to the meeting of 2 November 2015.

BAC meeting of 16 November 2015

[33] André Petersen, Head: SCM at eThekweni was a member of the BAC. He submitted an affidavit stating that he as chairperson of the BAC met on 16 November 2015 with Sandile Mnguni and Dave Renwick to consider the water insurance tender. His explanation for supporting the award to South West is as follows:

‘From the schedule provided in the departmental report to the BEC, the recommended company was the most responsive and the most reasonably priced, hence recommended for award. My support was therefore given as the report seemed straightforward and contained no suggestion that there were any problematic issues.’¹⁶

[34] Sandile Brian Mnguni, Head: Expenditure at eThekweni and a member of the BAC, filed an affidavit substantially similar to that of Mr Petersen. He concluded that compliance with the administrative/legal requirements of the tender had been properly checked by the Water and Sanitation unit, SCM unit, compliance unit, the BEC and all was in order. Furthermore in his view:

‘[t]he responsibility to evaluate tenders in accordance with tender specifications is specifically assigned to the BEC in terms of Regulation 28 of the Municipal Supply Chain management Regulations.’

¹⁶ Paragraph 6 of the affidavit of Petersen

[35] David Lewin Renwick, a registered Professional Engineer, a member of SAICE and a fellow of IMESA, employed by eThekweni Engineering Unit as a project Executive and a member of the BAC, filed an affidavit substantially confirming the evidence of Messrs Mnguni and Petersen. He has since retired.

[36] None of the BAC members attach a copy of the tender specifications and PII1-3 to their affidavits.

[37] Ms Rajoo attests to the BAC being aware of the deferral of this tender as the deferral appeared on the BAC agenda. The members of the BAC were aware of the legal opinion of Mr Shezi as it formed part of their bundle. They ought to have queried and not rubber-stamped the decision of the BEC recommending South West contrary to the legal opinion, she persists. Ms Rajoo is surprised that notwithstanding past practice the BAC gave no credence to the legal opinion and did not refer the recommendation back to the BEC.¹⁷

Legal advisor

[38] Silindile Blose, Legal Advisor to eThekweni, filed an affidavit in which she confirms that she took instructions from the Water and Sanitation Department officials namely Messrs Ntusi and Zondo. Their instructions were that 'the line department officials' were under 'immense pressure' in so far as this tender was concerned.¹⁸ In their view the litigation was a delaying tactic to prevent the commencement of the tender. On those instructions Ms Blose opposed the application. Those instructing her also explained the:

'far reaching ramifications [of] not having a service provider to provide water loss insurance on the public at large as well as eThekweni Municipality on whom the consumers are reliant for protection.'

¹⁷ Kamlesh Rajoo affidavit para 25

¹⁸ Paragraph 4 of affidavit of Ms Blose.

South West was already setting up its processes and the applicants were engaging meaningfully in the handing over process. The matter was urgent and she delivered an initial affidavit whilst the officials obtained all the relevant documents to be included in a supplementary affidavit.

[39] When the further documents came to light counsel advised on the prospects of success. The line department instructed her on 15 September 2016 to concede the application for the interdict and for the review on condition that the tender would commence afresh whilst Westwood would remain the service provider on a month to month basis until a new tender process was finalized. Westwood rejected this settlement offer and insisted on substitution. eThekweni's SCM Unit insisted on the tender process commencing *de novo*. When the settlement discussions collapsed eThekweni's counsel argued the matter on the limited issue of substitution.

Evidence for South West

[40] Mr Viwe Maxwell Matimba submitted an affidavit seeking to absolve South West from liability from any costs on the basis that it elected to abide the decision of the court. He responded to paragraph 4.2 to the second order prayed in which Westwood had sought an order for costs against those opposing the first and second orders prayed. On this basis he alleges that there has been no wrong doing of whatsoever nature by South West and that any cost order would be wholly inappropriate.

The Puzzling Question

[41] How did the entire procurement team of eThekweni comprising of officials from the line department, bid specifications committee, the BEC, the BAC, the compliance officer, SCM practitioners, financial officials and professionals like legal advisors and engineers, unanimously decide that firstly, a quotation is the

equivalent of a letter of undertaking and secondly, the provision of professional indemnity insurance qualifies as underwriting insurance for underground water leaks for individual dwelling units, which was the specified condition of tender? Metaphorically speaking they decided that chalk is cheese.

[42] One page of PII1-3, which South West presented as underwriting for water leaks insurance, is on the letterhead of Marsh–Centriq and bears the title ‘Professional Indemnity Insurance’. Another page bears the heading ‘Professional Indemnity Quotation’. The third page on the letterhead of Marsh also has the heading ‘Professional Indemnity Insurance.’ Nowhere in the three pages that constitute PII1-3 is there any reference, express or implied, to insurance for water leaks. Instead one of the pages provides schedules for limits of liability for various grades and levels of professionals. A person simply reading PII1-3 would have been able to see that it had nothing to do with insurance for water leaks.

[43] In the circumstances the evidence above fortifies my finding that the decision is not merely irrational but bizarre. An irrational decision might still have an explanation albeit one that is not acceptable or is weak in logic. But a bizarre decision is manifestly inexplicable. The decision in this instance is so bizarre that unsurprisingly even those who participated in making it cannot explain it.

[44] The possible explanations range from mistake, ignorance, incompetence, negligence, corruption or something else. However, none of the deponents advance any of these possibilities. Notwithstanding my previous judgment none of those involved in the decision to appoint South West now expresses the following:

- i. Any recognition of the difference between professional indemnity insurance and underwriting insurance for water leaks even at this stage of the proceedings. Those who paid any attention at all to PII1-3 seem to have focused only to the word ‘quotation’. However, my judgment

drew attention to both differences. If they did not know the differences then they should have known them after my judgment.

- ii. Any remorse for their conduct, the unlawfulness of which eThekwini conceded.
- iii. Any recognition of the consequences of the award to South West being allowed to stand. South West had not secured underwriting insurance services and therefore would not have been able to deliver at all on its contract with eThekwini. The consequences for eThekwini and its residence would have been dire.
- iv. The basis on which the opinion of Mr Shezi was rejected and substituted with the opinion that a quotation for professional indemnity insurance is the equivalent of a letter of undertaking for underwriting insurance for water loss.

[45] All those involved in the decision to appoint South West persist in defending what is now manifestly indefensible by trying to justify their conduct in order to avoid having to pay costs. Their responses fortify their failure and continuing refusal to be not only accountable and transparent but also remorseful for their manifestly inexplicable decision which renders them liable for costs. But there is more.

[46] All the deponents deny liability for costs claiming variously that they did not act dishonestly, in bad faith or negligently. It is difficult and therefore unusual for a court to make findings on credibility, intention or motive in motion proceedings, which are confined to evidence on affidavit and the court does not have the opportunity of examining the witnesses. Hence my analysis will steer a course

through facts not in dispute. I preface my analysis with a brief outline of the regulatory framework for procurement as a benchmark to assess the steps through which the tender was processed in this instance.

Supply Chain Management Law

[47] How does the process implemented in the tender in this case square with the norms set for transparent and accountable public procurement under the Constitution?

[48] eThekweni's Supply Chain Management Regulations,¹⁹ based on National Treasury Regulations,²⁰ is designed on the committee system.²¹ The bid specification committees, BECs and the BACs²² are carefully populated and structured to inculcate competent, independent and impartial tender specification, evaluation and adjudication. The accounting officer, who in the case of a municipality is the municipal or city manager,²³ and all officials involved in the implementation of supply chain management policy 'must meet the prescribed competency levels', for which resources, opportunities and training would be provided.²⁴ The accounting officer is responsible for implementing the supply chain management policy.²⁵ She or he:

'must ... take all reasonable steps to ensure that proper mechanisms and separation of duties in the supply chain management system are in place to minimise the likelihood of fraud, corruption, favouritism and unfair and

¹⁹ Municipal Supply Chain Management Regulations GN686 of 2005.
http://eThekweni.l2b.co.za/public/tenderforms/the_municipal_supply_chain_management_regulation_of_2005.pdf. (accessed 28 March 2017).

²⁰ http://eThekweni.treasury.gov.za/legislation/pfma/regulations/gazette_27388.pdf (accessed 28 March 2017).

²¹ Regulation 26 of eThekweni's Supply Chain Management Regulations.

²² Regulation 27-29 of eThekweni's Supply Chain Management Regulations.

²³ s 60 of the Local Government: Municipal Finance Management Act 56 of 2003.

²⁴ s 119 of the Local Government: Municipal Finance Management Act 56 of 2003.

²⁵ s 115(1)(a) of the Local Government: Municipal Finance Management Act 56 of 2003.

irregular practices.’²⁶ (my emphasis)

[49] Each committee has members appointed by the accounting officer. The policy must provide for:

‘an attendance or oversight process by a neutral or independent observer appointed by the accounting officer when this is appropriate for ensuring fairness and promoting transparency.’²⁷ (my emphasis)

[50] Absolutely no councillor may serve on any bid committee.²⁸ The BEC must as far as possible be composed of officials from departments requiring the goods or services and at least one SCM practitioner of the municipality.²⁹ The BAC ‘must consist of at least four senior managers of the municipality’ which must include the chief financial officer or another manager in the budget and treasury office reporting directly to the chief financial officer and designated by the chief financial officer, at least one senior supply chain management practitioner who is an official of the municipality, and a technical expert in the relevant field who is an official of the municipality.³⁰ To reinforce its independence and impartiality a member of the BEC may not serve on the BAC.³¹

[51] The committees are assigned specific functions. For instance the BEC must ‘evaluate bids in accordance with the specifications for a specific procurement; and evaluate each bidder’s ability to execute the contract.’³² The BAC ‘must consider the report and recommendations’ of the BEC before making a final award

²⁶ s 115 (1)(b) of the Local Government: Municipal Finance Management Act 56 of 2003.

²⁷ Regulation 26 (1)(b) of eThekweni’s Supply Chain Management Regulations.

²⁸ s 117 of the Local Government: Municipal Finance Management Act 56 of 2003.

²⁹ Regulation 28(2) of eThekweni’s Supply Chain Management Regulations.

³⁰ Regulation 29(2) of eThekweni’s Supply Chain Management Regulations.

³¹ Regulation 29(3) of eThekweni’s Supply Chain Management Regulations.

³² Regulation 28(1)(a)(i) and (b) of eThekweni’s Supply Chain Management Regulations

or recommendation, including one that deviates from the BEC's recommendation.³³

[52] Given these prescripts each individual and committee acting independently and impartially is meant to exercise effective checks and balances on the others. Additionally no person may interfere with the SCM process of a municipality or amend or tamper with 'tenders, quotations, contracts or bids after their submission.³⁴

Analysis

[53] For convenience I repeat clause 3 of the Condition of Tender here:

'Registration: Offers underwritten by insurance companies licenced to operate in South Africa will only be considered. A letter of undertaking from the insurance company must accompany the offer.

The underwriter must be registered with the Financial Services Board (FSB).'

[54] The cover sheet to the report from the Water and Sanitation Department to the BEC and the approval of the BEC to the BAC states and restates boldly that the tender was a:

'RECOMMENDATION TO AWARD (WATER LOSS INSURANCE)
PROVISION OF INSURANCE COVER FOR UNDERGROUND LEAKS FOR INDIVIDUAL
DWELLING UNITS.'

³³ Regulation 29(1) and (5) of eThekweni's Supply Chain Management Regulations.

³⁴ s 118 of the Local Government: Municipal Finance Management Act 56 of 2003.

[55] Insurance for water leaks was unmistakably central not peripheral to the contract, as it might be for example in a building contract in which insurance against loss during construction would be incidental to the primary construction contract. Tenderers had to comply with it strictly. For non-compliance meant that the very service for which the tender was issued would not be delivered.

[56] I had ordered the Mayor and the Municipal Manager to identify every person who participated in awarding the tender and to deliver my judgment to him or her. The accounting officer had to be involved in the awarding of this tender. No accounting officer has delivered an affidavit to give his or her account of the tender in this instance. Ms Nene as the Deputy City Manager and Acting City Manager is the current accounting officer. She fails to explain whether she or any other person was the accounting officer and what her role was at the time of the award. She does not say when she was appointed to act. If she was not the accounting officer at the time then she has failed to comply with paragraphs 2 and 3 of my order. It is possible that the accounting officer at the time, if it was not Ms Nene, has not been served with my judgment. Sibusiso Sithole signed off as the City Manager the circular appointing members to the bid committees. However that was on 5 June 2014; the tender process in this instance began in April 2015. However, Ms Nene had an opportunity to disclose fully the identity of all the persons involved in the tender. Her failure to disclose the identity of the accounting officer at the time and the role played by that person, whoever it was, is unacceptable.

[57] Of the persons to whom Ms Nene delivered my judgment I have not received an affidavit from the Mayor, who generally has no role in procurement processes, and two senior officials who do have a role, namely, Edwin Msweli and Sandile Ngcobo. As the head of Water and Sanitation, Mr Msweli had a duty to deliver an affidavit to account for what happened in his department under his watch, even if in the unlikely event, he played no direct role in awarding the tender. Messrs Ntusi and Zondo approached Mr Ngcobo for advice. As the Deputy Head: Supply Chain Operations he had to know the difference between a quotation and an undertaking

at the very least, and between professional indemnity and underwriting insurance. If he genuinely did not know then he had a duty to make reasonable enquiries. Most of all, both officials holding senior positions had a duty to explain their acts and omissions not only to avoid a cost order but also to account as is their constitutional obligation.

[58] Messrs Ntusi and Zondo approached the manager of the insurance department. If Mr Thulani Ntuli genuinely did not know whether PII1-3 could be accepted as an undertaking for insurance for water leaks how is he the manager of the insurance department?

[59] According to the eighth respondent's award, the advice came from the insurance and treasury departments to which he deferred because they 'deal with these kinds of undertakings on a regular basis.'³⁵ As I noted in my previous judgment, not a single document has surfaced from those in the insurance and treasury departments evidencing their opinion. Nor have I received an affidavit from Mr Thulani Ntuli or any other person from the insurance and treasury departments. Ms Nene does not identify anyone from these departments as having participated in the decision. She has not served my judgment on Mr Ntuli. The palpable silence about the involvement of the insurance and treasury departments suggest that they know more than they care to disclose but I cannot take the matter further against them as they are not before me.

[60] Underwriting insurance for water loss was a threshold, qualifying requirement. If a tenderer failed to provide such insurance, its bid should not have passed the first tier of checks by the line department into the second tier before the BEC. The query that the BEC referred to the line department was about South West submitting a quotation of fees. Its preoccupation appears to have been about

³⁵ Page 44 of the pleadings line 360.

whether the letter amounted to a quotation or a letter of undertaking, not that it was professional indemnity and not water loss insurance.

[61] The line department and bid specification committee prepared the conditions of tender emphasizing clause 3 as an absolute prerequisite. These officials had to know precisely what the condition meant, why it was necessary, what tenderers had to do to comply, that literally and contextually the provision of professional indemnity insurance instead of insurance for water leaks was non-compliance and a quotation was not an undertaking.

[62] Messrs Ntusi and Zondo should not have considered a non-compliant or non-responsive bid. Even though they recommended WANDA, they submitted South West's bid with their first report to the BEC. Once they obtained the opinion of Mr Shezi who confirmed that they should reject PII1-3, they should not have submitted it. Why did they?

[63] On the version of the line department officials, it was members of the BEC at the meeting of 26 October who formed the opinion that a quotation was the equivalent of underwriting insurance. They understood the deferral to be an instruction to substitute South West as the preferred bidder. They do not say who from the bid specifications committee prescribed clause 3 as a qualifying requirement, and if it was not them then whether they at any stage checked with such person(s) who did, whether PII1-3 met that department's condition for underwriting insurance. Of all role players the line department officials had to know what the insurance requirements were.

[64] Messrs Ntusi and Zondo mindlessly accepted the BEC's alleged response that the 'quotation submitted by South West Consulting is equivalent to a letter of

undertaking'.³⁶ They undertook no further checks, not even the basic step of reverting to Mr Shezi on whose advice they had acted initially. On their own version they are liable for costs for simply doing the BEC's bidding without applying the most basic checks and balances required of officials responsible for rendering a fair and transparent procurement process. The BEC based its decision on their work; in turn the BAC based its decision on the decision of the BEC.

[65] On the version of the members of the BEC, supported by the minutes of the meeting of 26 October, they were not experts and deferred the matter to the line department for clarification of PII1-3. What expertise did the BEC need that they could not distinguish literally and contextually between professional indemnity and water leaks insurance, and between a quotation and an undertaking?

[66] Ms Rajoo as the Chief Legal advisor does not offer any evidence that she distinguished between underwriting insurance for water loss and professional indemnity insurance either at the meeting at 26 October 2015 or subsequently when she prepared her affidavit for this enquiry into costs. She had Mr Shezi's opinion, which she correctly refused to accept without seeing all three pages of PII1-3. Even after perusing PII1-3 she needed an insurance expert. A law graduate does not need an insurance expert to distinguish between these two types of insurances let alone someone holding the position of Chief Legal Advisor in a large city. Her advice should have been to disqualify South West's bid without further ado.

[67] Ms Ntusi's affidavit about what directives the BEC issued to her differs considerably from the minutes of the BEC meeting of 26 October and Ms Rajoo's affidavit. According to Ms Ntusi the BEC regarded South West's quotation as the

³⁶ Paragraph 14 of the affidavit of Ms Ntusi.

‘equivalent’ of a letter of undertaking. According to Ms Rajoo’s affidavit the committee was uncertain of the

‘veracity and correctness of two quotations and the third being a certificate which was submitted purportedly in compliance with the underwriting insurance requirement of the conditions of tender.’

Where does truth lie?

[68] The identity of the person who formed the opinion that South West’s bid could be salvaged if it were sent back to the line department has not been disclosed to the court. All that the court is aware of is that such person is a member of the BEC. However it is the BEC at its meeting of 26 October that decided collectively to reject the opinion of the line department which rested on the advice of Mr Shezi and called for a reconsideration of PII1-3.

[69] At the second meeting of the BEC the first report and the reasons for the deferral were not tabled. No one, not even Ms Zondo, who is referenced in the report to the BEC, offers any explanation for omitting to do so. Nor did any of the members of the BEC object to presiding over the bid without full disclosure. Members who were not at the previous meeting were not privy to the deliberations that resulted in the second report to the BEC. On their version without full knowledge of the tender and the line department’s reports the members attending the second BEC meeting approved the appointment of South West. Messrs Mpetsane, Cebekhulu, Mthembu and Sithole, three of whom attended both meetings, disingenuously state under oath that ‘Professional Indemnity Quotation’ documents provided to the BEC proved that South West met the technical requirements. The omission of the first report from the second meeting of the BEC is a red herring because the annexures to Mr Evans’s affidavit proves that members of the BEC had all the information they needed to reject PII1-3.

[70]None of the BEC members identify the person(s) who moved, seconded or even spoke in favour of the appointment. They accepted the 'advice' of the line department that PII1-3 providing for the professional indemnity insurance complied with the condition of tender requiring underwriting insurance for water leaks.

[71]What Mr Evans and other members of the BEC assented to without full knowledge was the recommendation that South West

'be accepted for provision of insurance cover for underground leaks for individual dwelling units for a period of Thirty-six (36) months, in accordance with their schedule of rates' (*sic*),

which amounted to R27 million per year over three years from 2015. They assented despite having before them PII1-3. They did not need to have the report of 26 October 2015 to realise that the tender condition was not being met. Mr Evans, as the Head of the Engineering Unit, and Mr Mr Sithole, as Deputy Head of SCM Policy and Support Services, had to know the difference between underwriting and professional indemnity insurance.

[72]Mr Evans and Ms Rajoo both attest to the BAC having the same document pack and recommendations when considering the bids. However, to their affidavits the three members of the BAC attach the record of the BEC report serving before them when they made the decision to confirm the award to South West. That record does not include the tender specifications, the bid documents and especially PII1-3. They do not comment at all about the omission of these documents from their bundle. How could they consider a bid without the specifications and the bid documents?

[73]It should have been clear from my judgment that they were required to explain how they approved a tender for the provision of water loss insurance without seeing any proof of underwriting insurance as stipulated in the conditions of

tender. If they did not appreciate the differences when they considered the BEC report they should have seen the light after my judgment. However, they say nothing, not even about the near-travesty for which they would have been co-responsible.

[74] Regulation 29(1) requires the BAC to:

‘consider the report and recommendations of the bid evaluation committee; and ... either- ... make a final award or a recommendation to the accounting officer to make the final award.’

[75] The online thesaurus gives the following meanings for ‘consider’:

‘reflect, think, deliberate, ponder, study, cogitate, ruminate, mull over, weigh up, judge something, weigh possibilities before deciding, examine and discuss problem, look carefully at something.’

[76] ‘Consider’ means much more than the BAC simply endorsing the decision of the BEC without interrogating the correctness of it. They could not have considered it because if they had then these senior officers who include a professional engineer, the Head of Supply Chain Management and the Head of Expenditure would have applied their collective general knowledge and experience to realise that a quotation for professional indemnity insurance is not underwriting insurance for water leaks.

[77] Ms Bartholomew holds a highly responsible position as manager effectively in charge of corporate governance in the Water and Sanitation Department to ensure compliance with the constitutional aims for procurement free of corruption and collusion. In this instance she failed to perform her functions independently and consistently with her duties to uphold and enforce s 217 of the Constitution. Her evidence amounts to an admission that she fettered her discretion in favour of the opinion of another, notably the BEC.

[78] To summarise: contrary to eThekweni's Supply Chain Management Regulations, none of the committees and officials exercised their independent, impartial discretion. The line department or specification committee submitted a bid despite being advised by Mr Shezi that they should disqualify it. They then capitulated and cow-towed to the BEC's alleged instruction to equate a quotation to an undertaking. Members of the BEC who attended the first meeting irrationally accepted that professional indemnity insurance was underwriting insurance for water loss and that a quotation is an undertaking. Those members of the BEC who attended the second meeting mindlessly rubber-stamped a recommendation of the line department. It was this ill-considered recommendation that surfaced before the BAC, a committee of senior officials prevailing at the apex of the committee structure. The BAC also abdicated its responsibilities by simply endorsing the BEC's recommendation without making the most elementary checks to ensure that the bid met the tender specifications.

[79] Ms Blose opposed the interdict on the instructions of Messrs Ntusi and Zondo. Their view that the litigation was a delaying tactic to prevent the commencement of the tender and their concern for the 'far reaching ramifications [of] not having a service provider to provide water loss insurance on the public at large as well as eThekweni'³⁷ prompted her decision to oppose the application.

[80] In her role as Legal Advisor, Ms Blose had no choice but to carry out the instructions of the line department to oppose the application. Furthermore she had to do so under the pressure of an urgent application. As soon as better information came to light she withdrew the opposition.

[81] However, the withdrawal came after the court insisted on seeing compliance with clause 3, which was the obvious starting point of the enquiry. Moreover in her

³⁷ Paragraph 4 of the affidavit of Ms Blose.

affidavit opposing the interdict she dismissed the non-compliance with clause 3 flippantly saying:

‘The underwriting is just a fancy word for a quotation.’

As a lawyer her reaction was irresponsible.

[82] As for South West, my enquiry is not into costs due to Westwood. I resolved that issue in my previous judgment. This enquiry, I emphasise, is about recovering costs incurred at the expense of the tax paying public in a procurement process that was seriously flawed.

[83] Evidence of the Rajah brothers in the application showed that South West knew that it had submitted a bid that had failed to comply with a qualifying requirement. The tender was for water leaks insurance; that was the service that South West was tendering to provide. As the tenderer it had to know that what it offered, namely the professional indemnity, was not water loss insurance. Its bid should never have served before the BEC.

[84] After I queried the insurance requirements, South West attempted to rectify its situation by submitting a contract for insurance with Lion of Africa. Although it could have been compliant with clause 3,³⁸ South West violated the regulations to submit documents after the closing date of the tender.

[85] The party to gain most from allowing the award to stand was South West. The wrongfulness of its conduct is its misrepresentation that professional indemnity insurance was in fact underwriting of insurance for water leaks. Its misinterpretation was not naïve or innocent; no one tendering to provide underwriting insurance for water leaks can genuinely mistake professional indemnity insurance as compliance, not when insurance for water leaks is the core service for which the tender was issued, not when the potential reward is as

³⁸ Paras 45 - 47 of my judgment.

high as R80 million, and definitely not when the risks of non-delivery for the residents of eThekweni would be catastrophic.

[86] As for the eighth respondent, not only is his failure to give reasons a basis to impose a cost order on him but also his unsubstantiated and mindless deference to officials from the treasury and insurance departments. I am still in the dark as to what information he had from these departments.

Costs

[87] A tender of R80 million was large enough to be taken very seriously. Importantly, if South West got away with its misrepresentation, vulnerable people occupying, for instance, municipal and other sub-economic housing schemes would have had no insurance for water leaks. The cost of the water leaks would have had to be borne by eThekweni and by extension all its tax paying residents. Coinciding with a devastating drought, the lack of insurance for water leaks would have been catastrophic for water supplies if the leaking pipes were not repaired quickly. Why South West's bid was not rejected at the outset for non-compliance adds to the mystery as to how it passed the scrutiny of so many officials charged with the responsibility of safeguarding public procurement against illegalities.

[88] A recurring theme of this judgment is the non-disclosure of relevant information. Whether this is deliberate or not is not always impossible to tell. Irrespective, when determining liability for costs, the fact of the non-disclosure alone counts. It must be measured against the constitutional obligation of all persons performing public services to be accountable and transparent. Disclosure is also important for individuals to avoid or mitigate their liability for costs. If all those involved are exposed then the burden on each individual would be mitigated if an order for joint and equal liability is imposed. Also, if those who had a greater hand in awarding an unlawful tender are exposed then the liability for costs of

those who played a less significant role would be commensurately minimised. This approach commends itself for the greater cause of inculcating accountability and transparency in every sphere of public procurement, including enforcement.

[89] I analysed the evidence in some detail to assess where in the range from ignorance, incompetence, negligence, corruption or something else the conduct of the decision-makers fall in order to determine whether some should be held more or less liable than others in order to apportion costs appropriately. I cannot single out individuals as having committed acts of corruption because the evidence does not go that far. However, given how bizarre the decision is I cannot exclude that possibility but that is for some other process to uncover. Ostensibly, all the participants were negligent, inattentive to their responsibilities and unaccountable. I have not been able to uncover why this was so.

[90] I considered distinguishing the role played by the various persons in the decision to award the tender to South West. All who participated, including South West, are liable for costs because of their on-going refusal to explain, account, accept responsibility, and recognise that but for the interdict their decision would have resulted in a calamity of intolerable proportions. None show remorse. All the participants failed in their duty to check and recheck that the contract that they approved was capable of delivering the services that eThekweni and its residents would pay for. The compliance officer, the line department officials and all the members of the BEC are particularly liable because they engaged with PII1-3. The seniority of the members of the BAC and the fact that they preside at the apex of the committee system is an aggravating factor. They should have engaged with PII1-3.

[91] However, I do distinguished South West from the rest. No tenderer should be allowed to escape with impunity for deliberate misrepresentations in public procurement processes. South West created the situation that compelled this litigation. Walking away unscathed from the debacle is not an option.

[92] Legal Advisor Ms Blose acted under the pressure of an urgent interdict and played no role in the decision to award the tender. She is absolved from liability for costs.

[93] No order is made against persons from the finance and treasury who have not been served with my judgment as those who implicated them ought to have ensured that they were served.

[94] Those who have been served but who have not delivered an affidavit will be held liable.

[95] In deference to the separation of powers principle this judgment does not preclude but encourages eThekweni to further investigate the awarding of the tender.

Order

[96] Accordingly I make the following order:

1. The fourth respondent shall indemnify the first respondent by paying fifty per cent (50%) of its costs.
2. The remaining fifty per cent (50%) of the first respondent's costs shall be paid in equal shares by the following:
 - a. Contracts Administrator - Nonhlanhla Zondo;

- b. Divisional Manager for Regional Customer Services Water and Sanitation - Bridgette Ntusi;
 - c. The Manager Contracts and Materials – Tarry Bartholomew;
 - d. Head of eThekweni Water and Sanitation – Edwin Msweli;
 - e. Deputy Head Supply Chain Operations - Sandile Ngcobo;
 - f. Members of the Bid Evaluation Committee namely,
 - i. Vincent Cebekhulu
 - ii. Kamlesh Naidoo
 - iii. Zandile Sithole
 - iv. Greg Evans
 - v. Max Mthembu
 - vi. Tumo Mpetsane
 - g. Members of the Bid Adjudication Committee namely,
 - i. Andre Petersen
 - ii. Dave Renwick
 - iii. Sandile Mnguni
 - h. The eighth respondent; and
 - i. The City Manager who confirmed the award to South West.
3. The Acting City Manager Ms Nene shall forthwith serve or cause to be served a copy of this judgment on the Mayor and all those liable for costs above.
4. The Ms Nene or her replacement shall report to the court on the steps she or he has taken to recover costs under this judgment on affidavit by 30 July 2017 and thereafter on the last day of each month until the costs are paid or the court orders otherwise.
5. The registrar of this court shall serve a copy of this judgment on the Auditor-General by fax or any other convenient means.

6. There is no order for costs against Ms Silidile Blose.

7. Any person having an interest in my judgment is given leave to apply for leave to appeal against this judgment.

D. Pillay J

APPEARANCES

Counsel for the Applicant	:	A.G Jeffrey SC
Instructed by	:	Larson Falconer Hassan Parsee Inc Tel: (031) 534 1600 Ref: yhassan@lfhp.co.za
Counsel for the 1 st , 2 nd ,3 rd Respondent	:	I Pillay
Instructed by	:	S.D Moloji & Associates Tel: (031) 563 3231 Ref: SDM/XSN/0461-16
Date of Judgment	:	5 April 2017