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

CASE NO: D4178/2020

In the matter between:

TANSNAT DURBAN (PTY) LTD	Applicant
and	
ETHEKWINI MUNICIPALITY	First Respondent
THE KWAZULU-NATAL DEPARTMENT OF TRANSPORT	Second Respondent
MVIMBENI HOLDINGS (PTY) LTD	Third Respondent
EMA LE RONA TRADING ENTERPRISE 69 (PTY) LTD	Fourth Respondent
UNITRANS PASSENGER (PTY) LTD	Fifth Respondent
KZT COUNTRY CURISER (PTY) LTD	Sixth Respondent
MARINPINE TRANSPORT (PTY) LTD	Seventh Respondent
RIPPLE EFFECT 40 CC	Eighth Respondent
IKHWEZI BUS SERVICE (PTY) LTD	Ninth Respondent
RSV TRUCK AND BUS CC	Tenth Respondent
UTHUKELA TRANSPORT SERVICE (PTY) LTD	Eleventh Respondent
LETONN INTERNATIONAL (PTY) LTD	Twelfth Respondent

ADDITIONAL REASONS IN RESPONSE TO REQUEST FOR WRITTEN REASONS

Henriques J

Introduction

[1] These reasons are filed in response to a request for reasons filed with the registrar on 9 September 2020. It was brought to my attention during the recess on 30 September 2020.

[2] This unopposed application served on my motion court roll on 7 September 2020. The first respondent filed an explanatory affidavit setting out its stance in relation to the applicant's application. On 7 September 2020, counsel for the first respondent, Mr Mlaba, maintained a watching brief.

[3] While it is not the practice in unopposed applications, counsel for the applicant Mr Harpur SC, delivered concise heads of argument which the court found helpful. I called for the court file in the review application which had been referred to in the applicant's founding affidavit and which had come before Van Zÿl, J. The applicant indicated such file would be placed before the court at the hearing of this application, but had not done so.

[4] After considering the contents of the application papers, the heads of argument, the submission made by applicant's counsel, and the explanatory affidavit filed by the first respondent, I dismissed the application. I was not satisfied that the applicant had made out a case for the relief sought. I provided brief reasons, *ex temporae,* for the dismissal of the application.

The Relief sought

[5] The relief foreshadowed in the notice of motion was the following. In paragraph 1 of the notice of motion, the applicant sought a declaratory order in the following terms that:

> '[a] The time limit for the delivery of the Applicant's tender for the expression of interest for contract title: 7T-1171 as contained in the notice, a copy of which is annexure "A" to the Applicant's founding affidavit ("the Applicant's expression of interest") was extended to midnight on Friday, 28 February 2020;

[b] the Applicant lawfully tendered its expression of interest at or around noon on 28 February 2020 prior to the expiry of the said time limit;

[c] On 28 February 2020 the First Respondent unlawfully refused to take or allow delivery of the Applicant's expression of interest by indicating that its tender box had already closed at 11 AM on Friday, 28 February 2020 and that it was accordingly not possible for the Applicant to still deliver its said expression of interest, as it was out of time to do so.

[d] By virtue of the said tender by the Applicant, its said expression of interest is to be regarded as timeously received by the First Respondent.

[6] In paragraph 2 of the notice of motion the applicant sought an order for costs of suit, such to include the costs of senior counsel and junior counsel where so employed. However, attached to the concise heads of argument, was a draft order which recorded an agreement between the applicant and first respondent, that there would be no order for costs as against the first respondent. This was confirmed by Mr Mlaba.

The Factual background

[7] A brief factual background against which this order was granted, is necessary.

The request for expressions of interest

[8] It is common cause that during or about November/December 2019, the first respondent issued a notice stating that tender documents were available for "Contract Title: 7T-1171 expression of interest for an Operations Management Company (OMC) to assist with the establishment of a Municipal Entity to run Durban Transport Bus Operations for Ethekwini Municipality".[1] The bid closure date was 2020-01-24.

[9] In the founding affidavit deposed to by the Chief Operating Officer of the applicant, Mr Vickesh Maharaj, he stated that he obtained the procurement documents on enquiry from the first respondent's offices. On perusing the document, it stated that tender offers must be delivered on or before Friday, 24 January 2020 by no later than 11h00 am. These documents were procurement documents which he started

[1] Annexure C, at page 39 of the indexed application.

completing.

[10] In addition, it is common cause that Annexure 'C' did not make express provision for the closing time. This was recorded in Annexure 'D'[2] of the actual tender document. The date and time for closure of the bid was found on pg. 42 of the indexed papers. Paragraph (H.2.7) required tender offers to be delivered to the Municipal Centre at 166 K. E. Masinga Road and placed in the tender box located in the ground floor foyer and paragraph (H.2.9) required tender offers to be delivered on or before Friday, 24 January 2020 at or before 11:00. The word 'shall' was used in both paragraphs thereby indicating that this requirement was pre-emptory.

[11] The applicant indicates it became aware of the advert for the expression of interest in December 2019. On 20 January 2020, correspondence was despatched by its attorneys of record, Norton Rose Fulbright, to the first respondent relating to the request for the expression of interest. In such correspondence, the applicant's attorneys recorded that the decision to call for the expression of interest was unauthorised by Council and was subject to review. In addition, the applicant would institute review proceedings to set aside such Council's resolution and required an undertaking by the first respondent to suspend the process pending the final outcome of the contemplated review application.[3] I point out that this is the same review application that came before Van Zÿl J referred to in paragraph 3 above.

[12] In paragraph 10 of the correspondence, the applicant recorded that it was not possible to have the review application heard prior to the tender closure date of 24 January 2020.

[13] Presumably in response to the correspondence and in a letter dated 23 January 2020,[4] the Head: Legal and Compliance at the eThekwini Municipality Legal and Compliance Unit, Malusi Mhlongo, stated the following:

'...While the Expression of Interest was made public in December 2019 and the

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[2] Pages 40-70 of the indexed application..
[3] Annexure SN1, pages 76 and 77, of the indexed application.
[4] Annexure SN2, pages 78 and 79, of the indexed application.

correspondence was received three (03) days before the closing date, we take your point in relation to insufficient time to move a review application before the closing date. In the aforegoing, we hereby give an undertaking to extend the closing date *(my emphasis)* for the submission of bids to 28 February 2020'.

[14] In relation to the review application, Mr Mhlongo indicated that the first respondent would respond at the appropriate time in the appropriate forum. Pursuant to such correspondence, an addendum was issued in respect of tender reference: 7T-1171 by T. Manyathi, Head eThekwini Transport Authority which related to the extension of the closing date. This addendum reads as follows:

'**ADDENDUM 1**

Extension of closing date

This Addendum is to be read as forming part of the Contract Documents and serves to inform you that the **closing date** of the tender has been **extended** to **28 February 2020**'.[5]

[15] The acknowledgment of Addendum No. 1 read as follows:

'This Addendum is to be read as forming part of the Contract Documents and serves to inform you that the **closing date** of the tender has been **extended** to **28 February 2020'**.[6]

[16] The deponent to the applicants founding affidavit states that he personally compiled the expression of interest document and was in the process of finalising it, when he had to attend at court when the urgent application served before Van Zÿl, J on 27 February 2020. His presence, he states was required for the purpose of giving instructions to the applicant's legal representatives during the course of the hearing. The applicant he states, believed that there was no specific time limit within which the expression of interest had to be submitted, save that the applicant had until midnight on Friday, 28 February 2020 to lodge or submit the documents. Both he and the applicant were under the impression that it would suffice if the expression of interest was delivered or lodged by close of business on 28 February 2020. Subsequently, the

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[5] Annexure "E.bis" at pages 80 and 81 of the indexed application papers.
[6] Annexure "E.bis" at pages 82 of the indexed application papers.

applicant was advised (presumably by its legal representatives) that as a matter of law, the civilian method of calculation applied and the deadline for submission was midnight on Friday, 28 February 2020.

[17] When the applicant learnt of the advert for the proposed expression of interest it immediately indicated its intention to challenge the decision to set up and proceed with the expression of interest tender and review such decision. The basis for such review was that the expression of interest was not authorised by a proper, valid or sustainable Council resolution. Prior to the institution of this application, it proceeded with its application for review in February 2020. The application papers in the review application were issued on 25 February 2020 and enrolled for hearing as an urgent application on Thursday, 27 February 2020. Part A of the relief which the applicant sought was for an interdict preventing the first respondent from proceeding with and implementing the expression of interest process pending the outcome of the applicant's application for review of the impugned decision.

[18] The relief claimed in the review application is set out as follows:[7]

'PART A

[1] That this application be heard on an urgent basis in terms of Rule 6 (12) dispensing with the prescribed time limits forms and service.

[2] That pending the final outcome of the Applicant's review of the impugned decision referred to in part B below:

[a] the First Respondent is interdicted and restrained with immediate effect from in any way implementing and/or taking any further steps to give effect to the impugned decision;

[b] the time for the submission of expressions of interest as contemplated in the impugned decision be and is extended until the time of the said final outcome and if the impugned decision is not set-aside, for a further period of one month after the said final outcome;

[c] that the costs of the part A relief shall be costs in the cause of the part B relief;

[d] that the Applicant is afforded further, other or alternative relief.

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[7] Only the relief sought is quoted.

PART B

KINDLY TAKE NOTICE THAT the Applicant applies in terms of Rule 53 of the Uniform rules at a date and time to be determined by the Registrar the Court for orders in the following terms:

[1] That the decision (*"the impugned decision"*) of the First Respondent to call for an expression of interest for an operations management company to assist with the establishment of a Municipal entity to run Durban transport bus operations for the Ethekwini Municipality and to issue the tender documents termed *"procurement document"*, copies of which are annexure **"A"** and **"B"** to the Founding Affidavit of the Vickesh Maharaj is reviewed and set-aside:

[2] that the first Respondent is directed to pay the Applicant's costs in respect of the part A and part B relief sought in the present application with such costs to include the costs of senior and junior counsel;

[3] That the Applicant is afforded further other or alternative relief.'

[19] It is common cause that the review application is referred to in the letter addressed to and sent to the first respondent on 20 January 2020 and an extension was granted for the submission of the expression of interest to 28 February 2020.

[20] As stated above Part A of the urgent review application was heard by Van Zÿl, J on 27 February 2020. After hearing argument, Van Zÿl J, according to the applicant, struck the matter from the roll for lack of urgency. He found that the urgency was self-created and directed the applicant to pay the costs of the application. In the founding affidavit in the present matter, Mr Maharaj[8] states that both Part A and Part B of the relief sought in the review application are still pending before the court and that the applicant intends to pursue the relief in Part A and Part B.[9]

[21] When opposing Part A of the relief sought in the urgent review application, the first respondent filed an interim answering affidavit in which it took issue with the short notice that it was placed under to respond to the application and raised a challenge that the application was not urgent. It alleged, in respect of urgency that the first

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[8] Paras 18 and 19 at page 9 of the indexed application.
[9] Page 9 of the indexed application.

respondent had advertised the expression of interest in December 2019 and that the initial closing date for the submission of the expression of interest was 24 January 2020. The applicant had been aware of the advert as early as 20 January 2020, as it addressed correspondence to the first respondent.

[22] As a consequence of such correspondence, the closing date was extended to 28 February 2020. It delayed from 20 January 2020 until 24 February 2020 to launch the review proceedings despite being informed on 23 January 2020 that an extension had been granted. In addition, the first respondent indicated that the applicant could respond to the expression of interest under protest and reserve its right in so far as a review application was concerned

The review application

[23] In the urgent review application issued on 24 February 2020 and heard on 27 February 2020 by Van Zÿl, J Part A related to interim relief sought by the applicant. It is common cause that Van Zÿl, did not grant any relief and the order issued was for the application to be removed from the roll and the applicants directed to pay the costs thereof. In the initial answering affidavit, the first respondent raised the aspect of urgency and the fact that it had granted the applicant's request to extend the closing date to 28 February 2020.

[24] In the first respondent's main affidavit deposed to on 25 March 2020, that was delivered in opposition to the relief sought in Part A of the applicant's review application, two points *in limine* were raised. The first related to the non-joinder of parties who had timeously submitted expressions of interest by 11h00 am on 28 February 2020. The affidavit also indicates that the closing date and time for the lodging of expressions of interest was 11h00 am on 28 February 2020.

[25] The second point *in limine* was that the applicant had no legal interest in the decision sought to be reviewed. The deponent specifically stated the following:

> 'Tansnat seeks in Part B to review and have set aside the decision of the municipality to call for expressions of interest for employment of an OMC to assist with the establishment of an admissible entity. It does not seek a review of the actual decision

> of the Municipal Council to approve the establishment of the municipal entity. The appointment of an OMC is merely a means of giving effect to the decision to establish the municipal entity. At the hearing of the matter, it will be argued that Tansnat has no legal interest in how the municipality goes about the creation and operation of the municipal entity'.

[26] Such affidavit acknowledged that the applicant endeavoured to lodge its expression of interest but did so after the cut-off time at 11h00 am on Friday, 28 February 2020.[10]

[27] In addition, it averred the applicant had not established that it has a *prima facie* right which will be infringed by the calling for expressions of interest.[11] At the hearing of the review application, the first respondent indicated that it will not take issue with the applicant attempting to lodge an expression of interest, that it has waived its rights to challenge the impugned decision.[12]

[28] According to the applicant, the expression of interest document was ready for submission on 28 February 2020 by approximately midday. On the previous day, Thursday 27 February 2020, at 22h35 pm, the deponent to the applicant's founding affidavit sent an email to Ms Michelle Pearton, an employee of the first respondent, the acting Project Manager, wherein he made reference to the extension given to the applicant for the submission of the expression of interest document and recorded that it expired on 28 February 2020. In addition, he surprisingly for reasons known only to himself, made enquiries regarding the delivery address for the expression of interest.

[29] Ms Pearton responded on Friday, 28 February 2020 at 12h02. It also appears that the parties had a telephonic discussion at approximately 11h30 am. Mr Maharaj had left a message for Ms Pearton to call him back on the morning of 28 February 2020. She did so at approximately 12h02, and in her email recorded the following:

> 'As per our telephonic discussion this morning, the delivery address and time is clearly stated on the tender document, page 2 – see attached, of which you would have had

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[10] Para 91 at page 705 of the review application, Volume 8.
[11] para 92 at page 705 of the review application, Volume 8.
[12] para 93 at page 705 of the review application, Volume 8.

access to, in order to prepare a response to the expression of interest'.

[30] Ms Pearton informed Mr Maharaj that the date had been extended in accordance with 'SN2' but the time for the delivery of the expression of interest had closed at 11h00 am on 28 February 2020. Ms Pearton also denied Mr Maharaj's request to deliver the tender document at approximately 11h45 am as the tender box closed at 11h00 am and the tender documents which had been submitted timeously had already been cleared out of the box by the employees of the municipality.

[31] Mr Maharaj submits that it was impossible for the applicant to submit the expression of interest on 28 February 2020 even though he tendered to do so. Consequently, he contacted the applicant's attorneys of record who addressed an email to the first respondent at 12h30 pm recording his conversation with Ms Pearton as well as referring to the emails exchanged with Ms Pearton. The applicant's attorney's correspondence also recorded that the deadline that had been extended to 28 February 2020 did not stipulate a time within which the expression of interest had to be delivered. Consequently, the civilian method of calculation applied and the applicant was entitled to deliver the expression of interest document up to and including midnight on 28 February 2020.

[32] The first respondent in its explanatory affidavit, records that it does not intend opposing the relief sought by the applicant but cannot consent to the relief. The purpose of the affidavit was to appraise this court of the reasons why it has adopted to abide the decision of the court. The first respondent had called for its 'expressions of interest' for an OMC to assist with the establishment of a municipal entity to run bus operations for it. The notice which appeared in the press required interested parties to submit their response to such request before 11:00 am on 24 January 2020. The first respondent decided to extend the closing date for submissions of responses until 28 February 2020.

[33] The intention of the first respondent was that such expressions of interest should have been lodged before 11h00 am on such date. It acknowledges however, that the notice which appeared in the press advising interested parties of the extension

of the deadline, and that it did not stipulate the time by which the documents had to be lodged.

[34] It is common cause that officials of the first respondent had refused to accept the applicant's submission which it attempted to lodge after 11h00 am on 28 February 2020. In respect of the applicant's contention that it had until midnight on February 2020 to lodge its expression of interest, the first respondent stated the following:

> 'I am advised that whether this contention is correct, is a decision which this Honourable Court will have to make, based on the interpretation of the notice which appeared in the press, extending the deadline, together with all relevant information'.[13]

[35] At para. 14 and 15, the first respondent states the following:[14]

> '[14] The First Respondent did not, and does not, deliberately seek to prevent the Applicant from lodging the response. Indeed, it may well be beneficial to the First Respondent's rate payers if the response is taken into consideration when adjudicating the responses submitted by all interested parties.
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> [15] On the other hand, the First Respondent believes that it may not simply agree to accept the Applicant's contention that it had until midnight to submit its response, is subsequently held to be correct, then the First Respondent, by accepting the response after 11:00 am, may have prejudiced interest with other parties who submitted responses timeously. These other parties are the named Third Respondents in this matter.'

[36] Accordingly, the basis upon which the applicant submits it is entitled to the declaratory order is the following:

(i) The deadline for the submission of the expression of interest document only stipulated a date and did not stipulate a time. In the absence of a time being stipulated, it had until midnight on 28 February 2020 to deliver the expression of interest document;

(ii) The municipality is estopped from refusing to accept such expression of interest document as it indicated to Tansnat that it could participate in

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[13] Para 13 at page 181 of the indexed application.
[14] Paras 14 and 15 at pages 181 and 182 of the indexed application.

the process without waiving its rights to institute the review application and without prejudice to its rights and under protest. It could continue with the review application without the first respondent contending that it could not do so by virtue of its participation in the process;

(iii) It disagrees with the municipality's interpretation that only the date was extended and that the original time as provided for in the tender document, 11:00 am applied.

[37] It is common cause that the applicant and the first respondent are engaged in litigation. Agreements had been concluded between them as well as the Department of Transport in 2009 and 2011. Arising from such agreements, litigation ensued between the parties in relation to allegations by both parties that the other was indebted. When the parties fell into dispute with each other, the agreements became operational on a month to month basis and was then extended until the final determination of the disputes between them. When litigation ensued in relation to the disputed claims by the municipality against Tansnat and by Tansnat against the municipality, the municipality launched a liquidation application against Tansnat. Such application was settled in terms of a written agreement and disputed claims by the parties against each other were in terms of the settlement agreement submitted to a process of adjudication before former Chief Justice, Mr Sandile Ngcobo. The adjudication process commenced but has not been completed.

Analysis

[38] In dismissing the application I took into account the aforementioned factual background but more importantly the following. The applicant submitted that as no time was stipulated for compliance in SN2, the time for such compliance expired at midnight on 28 February 2020 and relied on the civil method of computation.

[39] The applicant's counsel referred me to the decision of *Dormell Properties 282 CC v Renasa Insurance Co. Ltd and others N.N.O*[15] in support of the submission the civilian method of calculation was applicable.

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[15] *Dormell Properties 282 CC v Renasa Insurance Co. Ltd and others N.N.O* 2011 (1) SA 70 (SCA).

[40] The decision in *Dormell* related to the expiry date of a guarantee. Bertelsmann, AJA held the following:[16]

> 'The terms of the contract are the decisive criterion by which any potential expiry of a deadline has to be determined:
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> > "These passages show, I think, that where time has to be computed under a contract, we must look primarily at the terms of the contract, in order, if possible, to discover from them what the parties intended, and that it is only when the contract is not decisive upon the point, that it is admissible to introduce the rules of law with regard to computation of time."
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> Per Solomon JA in Joubert v Enslin 1910 AD 6 at 46.'

[41] Then further Bertelsmann, AJA,[17] held the following:

> 'In Roman law, which our law has retained in this respect, the expiry of a period of time could be calculated either by the natural or the civil method. The natural method calculates '*de momento in momentum*', from the exact moment of the first day, upon which the period to be calculated commences, to the exactly corresponding moment of the last day.'

[42] Bertelsmann, AJA considered the terms of the written agreement being the guarantee in order to determine that the words must be given their ordinary meaning in order to determine what the parties understood. He took the view that it was difficult to discern why the court *a quo* applied the civil method of calculation when the expiry date of the guarantee appeared clearly from the guarantee itself. He held,[18] that the expiry date was 28 February 2008 as agreed upon by the parties and that the court erred in applying the civil method of computation to the guarantee. This, in my view, was because the court looked at the terms of the contract to determine what the parties intended. Mpati, J concurred in the judgment of Bertelsmann, AJA.

[43] In the same judgment, Cloete, JA also similarly considered the expiry date of the guarantee and dealt with it at paragraphs 53 – 59 of the judgment. Cloete, JA

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[16] *Dormell Properties 282 CC v Renasa Insurance Co. Ltd and others N.N.O* para 26.
[17] *Dormell Properties 282 CC v Renasa Insurance Co. Ltd and others N.N.O* para 27.
[18] *Dormell Properties 282 CC v Renasa Insurance Co. Ltd and others N.N.O* para 31.

opined that the approach of the court *a quo* in applying the civil method of computation was fundamentally wrong. He took the view that the guarantee contained the relevant contractual provision which provided that the guarantee quote shall expire on the guarantee expiry date being 28 February 2008.[19]

[44] Cloete, JA held that the guarantee expired on that day. This was because there was no period of time which required computation. The civil and all other methods of computation for a period of time were accordingly not applicable. The civil method of computation for a period of time provides that the first day of the period is included and the last day is excluded.

[45] Cloete, JA further held as follows:[20]

> 'I therefore hold the proposition to be self-evident and backed by centuries of authority, that where a contract does not require a period of time to be calculated, but provides that the entitlement to exercise a right or the obligation to perform a duty ends on a specific day - as in the present case, where the guarantee provides that it will expire on 28 February 2008 - the right may be exercised, or the obligation performed, on that day. The appellant in fact called up the guarantee on 28 February 2008 and the court a quo was wrong in non-suiting it on the basis that the guarantee had expired at midnight on the previous day.

This conclusion was reached by Cloete, JA after considering various authorities and principles.[21]

[46] The well-known authority for the interpretation of documents and the starting point are the often quoted phrases of Wallis JA in *Natal Joint Municipal Pension Fund v Endumeni Municipality*[22] in which he held the following:

> 'Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence.

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[19] *Dormell Properties 282 CC v Renasa Insurance Co. Ltd and others N.N.O* 2011 (1) SA 70 (SCA) para 55.
[20] *Dormell Properties 282 CC v Renasa Insurance Co. Ltd and others N.N.O* para 59.
[21] *Dormell Properties 282 CC v Renasa Insurance Co. Ltd and others N.N.O* para 56-58.
[22] *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) para 18.

Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation. In a contractual context it is to make a contract for the parties other than the one they in fact made. The "inevitable point of departure is the language of the provision itself", read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.'

[47] *Lawsa*[23] regarding the computation of time in contracts summarised the case law as follows:

'...the courts give primacy to the intention of the lawgiver or the contracting parties as evidenced in the time provision falling to be construed, since the "golden rule applicable to the interpretation of all contracts", as in the construction of statutes, is the ascertainment of the parties' or legislator's intention. In substance, however, the position has been reached where civilian computation operates as the residual rule applicable to the construction of time stipulations in all contracts and statutes (except statutory provisions expressed in days) unless the words used amount to a prescription that a different measure should be used. The courts will not depart from the civilian method of computing time unless it is "clear" from the language that the contracting parties or the lawgiver intended the departure. The civilian method is also applied in construing statutory provisions referring to days where the language or context contains a repugnancy or where the legal provision evinces an intention contrary to the application of statutory calculation, but the Supreme Court of Appeal has held that, in the absence of repugnancy, the interests of legal certainty generally require the application of the statutory method.' (my emphasis)

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[23] E Cameron 'Time' in 27 *Lawsa* 2 ed para 291.

[48] This was emphasised in *Afrisun KZN (Pty) Ltd v Sewpersad*[24] where the court held:

> '[8] The important words in calculating the period are those that fix the commencement of the period which are, "as from the date on which the claim arose". Those words are the typical words of commencement that bring the ordinary civil method of computation into operation. See *Kleynhans v Yorkshire Insurance Co. Ltd* 1957 (3) SA 544 (A) at 549G-H. Departure from the civil rule is permissible only if it is clear from the language of the section and the context in which it appears are such as to show that the Legislature intended a different method to be used see *Joubert v Enslin* 1910 AD at 37; *Kleynhans* case at 549; *South African Mutual Fire & General Insurance Co. Ltd v Fouche en 'n ander* 1970 (1) SA 302 (A) at 315H-316C.
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> [9] It is also the case where the parties have not indicated in their contract how such period should be reckoned, the computation should as a general rule, be made including the first day and excluding the last day. See: *Minister of Police v Subbulutchmi* 1980 (4) SA 768 (AD) at 772A. The clear wording of a statute or contract may of course lead to the rejection in any particular case of the ordinary civil rule in favour of the natural *de memonto in momentum* rule or in favour of the exceptional civil rule, which includes both the first and the last days.' (my emphasis):

[49] In the above quoted text of *Lawsa*,[25] reference is made to paragraph 59 of the judgment in *Dormell*[26] regarding the computation of time. *Joubert v Enslin*,[27] which is referred to in *Lawsa*,[28] sets out the following in respect to the computation of time between contracting parties:

> 'The golden rule applicable to the interpretation of all contracts is to ascertain and to follow the intention of the parties; and, if the contract itself, or any evidence admissible under the circumstances, affords a definite indication of the meaning of the contracting parties, then it seems to me that a Court should always give effect to that meaning. It is only when the contract affords no guide that the strict legal method of computing the

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[24] *Afrisun KZN (Pty) Ltd t/a Sibaya Casino and Entertainment Kingdom and another v Sewpersad* [2017] ZAKZPHC 50.
[25] Para 47 of this judgment.
[26] E Cameron 'Time' in 27 *Lawsa* 2 ed para 291, footnote 5; *Dormell Properties 282 CC v Renasa Insurance Co Ltd and others NNO* 2011 (1) SA 70 (SCA); [2011] 1 All SA 557 (SCA).
[27] *Joubert v Enslin* 1910 AD 6 at 37 – 38.
[28] E Cameron 'Time' in 27 *Lawsa* 2 ed para 284: *Joubert v Enslin* at 34 describes the natural method as 'mathematically exact' (see footnote 26 above), and para 291: which quotes the text at 37 – 38 of *Joubert v Enslin*.

period fixed comes into operation. Applying these principles to the matter before us, the terms of the written offer, so far as they go, afford no indication that the parties intended fourteen days to be calculated in any but the ordinary way; that is by days and not from moment to moment. Certainly that seems to be the sense in which they all understood it. But, if we assume in favour of the respondent that the words of the document afford us no guide, I see no special circumstances in this case which would justify us in departing from the general rule and in calculating the period mathematically. No considerations of public interest or of policy are present, and the equities are, if anything, rather on the side of the appellant, who had imposed a serious restriction on his ordinary rights of dealing with his own property, in order to allow the respondent to come to a decision in the matter. The time, therefore, should be computed in the ordinary way, with the result that the option period expired at midnight on Monday, 4th October. So that the notification sent to the Midland Company on the Tuesday morning was too late, and could create no contractual relationship between the parties.' (my emphasis)

[51] In *Christie's*,[29] relying on *Dormell*[30] as authority, the following is written:

'Where the contract fixes a date by which an obligation is to be performed, or, for that matter, a right exercised, the debtor, or creditor as the case may be, has until the end of that day to perform, or exercise the right.'

Thereafter, it reads (footnotes omitted)[31]

'The principle applies when the contract fixes the time for performance as 'about' a certain date, it being a matter of interpretation how much latitude was intended. It also applies when the contract fixes the time for performance by reference to the fulfilment of a suspensive condition, or suspensive time clause, or to an event the happening of which will, in the nature of things, be peculiarly within the knowledge of the debtor, because the creditor cannot be expected to make demand in such a case.'

Further on in *Christie's* it states (footnotes omitted):[32]

'Instead, what is known as the civil method of computation must be applied, by including the day on which the period begins to run and excluding the last day, unless there are special circumstances justifying the departure from this general rule and the

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[29] GB Bradfield *Christie's Law of Contract in South Africa* 7 ed (2016) at 591.
[30] *Dormell Properties 282 CC v Renasa Insurance Co. Ltd and others N.N.O* 2011 (1) SA 70 (SCA).
[31] Bradfield *Christie's Law of Contract in South Africa* at 591.
[32] Bradfield *Christie's Law of Contract in South Africa* at 592; see also E Cameron 'Time' in 27 *Lawsa* 2 ed paras 284 and 291.

adoption of what is known as the natural method of computation. The natural method requires the fixed time to be calculated *de momento ad momentum*, from the moment of the event from which the period begins to run until the identical moment on the last day of the period.'

[52] With regard to the use of the civil method of interpreting time clauses in contracts, it has been admitted that (footnote omitted):[33]

'it may yield results which are not in accordance with the thinking of lay persons. The terminology the method (in conjunction with others) employs, moreover, in referring to "the first day" and "the last day" is inapt inasmuch as "the enquiry is to find the point from which time commences to run, and then normally, by simple calculation, to discover when the period ends". Exclusion of either the last or the first day thus renders those days strictly irrelevant to the calculation, but the meaning of the terms is none the less reasonably clear.'

[53] An example of the possible confusion that may be encountered by lay persons was set out in *Semer v Retief & Berman*[34] where Ogilvie Thompson AJ remarked

'But as was stressed by Mr. Snitcher for applicant, there are additional factors which fall to be considered. Annexure 'X' is dated 15th July, 1947, and confers a right "for three weeks from date hereof". Laymen might quite understandingly consider that that period only expired on 5th August, as distinct from at midnight on 4th August: but, *prima facie*, one would not expect businessmen to consider that the option expired only on 6th August.'

[54] In *Natal Joint Municipal Pension Fund v Endumeni Municipality*[35] the court pointed out within its concluding discussion on interpretation as follows:

'In between these two extremes, in most cases the court is faced with two or more possible meanings that are to a greater or lesser degree available on the language used. Here it is usually said that the language is ambiguous although the only ambiguity lies in selecting the proper meaning (on which views may legitimately differ). In resolving the problem, the apparent purpose of the provision and the context in which it occurs will be important guides to the correct interpretation an interpretation

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[33] E Cameron 'Time' in 27 *Lawsa* 2 ed para 291.
[34] *Semer v Retief & Berman* 1948 (1) SA 182 (C) at 188.
[35] *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) para 26.

> will not be given that leads to impractical, unbusinesslike or oppressive consequences or that will stultify the broader operation of the legislation or contract under consideration.'

[55] In my considered view, this application, concerned the crisp question of interpretation. The tender document provided the time for compliance. It was not appropriate to apply the civil method of calculation as the tender document provided otherwise. Annexure "E.bis" made it clear that the addendum had to be read with the tender documents, which tender documents stipulated the time of 11h00am at paragraph (H2.7.9.).

[56] Only the date for submission was extended and in the absence of the time also being extended or stipulated, then the original time for submission applied. *Dormell* and *Endumeni* support the conclusion that one looks at the contract and only where no time is stipulated or there is an ambiguity (which was not the position in this matter) does one then utilise the civil method of calculation.

[57] In my opinion a case had not been made out to interpret the extension granted in the letter to mean that the time was also affected. I am enjoined to give the spirit and tenor of the documents a literal meaning. In addition, I join issue with the submission that the common law and estoppel applied.

[58] As soon as I concluded the deadline expired at 11h00, there was no reason to accept the applicants tender of the expression of interest. From the analysis set out above and the conclusion reached that the deadline was 11h00 am and all the letter did was revise the tender date, the further grounds raised by the applicant in the affidavit are unsustainable.

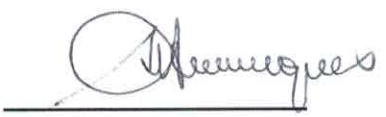
[59] In addition, prospective tenderers apart from the applicant submitted and filed their expressions of interest timeously. It would seem the true reason for why the applicant did not do so timeously was that it delayed in doing so and set much score on being successful before Van Zÿl, J granting the relief in paragraph A of the review application.

[60] Although the first respondent elected to abide the decision of the court and file only an explanatory affidavit, it was alive to the fact that the relief was dependant on the courts' interpretation of the law and the terms of the contract. The fact that it elected to abide and not oppose the relief sought ought not to have lulled the applicant and its legal representatives into a false sense that the granting of the relief was a fait accompli.

Conclusion

[61] In conclusion, in this matter one had to have regard to the affidavits filed both in the review application and this application. In addition, one cannot also exclude the possibility that this application was done in response partly to the second i*n limine* point raised in the review application and as a result of Van Zÿl, J not granting part A of the interim relief.

[62] These were the reasons for the application being dismissed.



HENRIQUES J

Case Information

Date of Hearing	:	7 September 2020
Date request for reasons received	:	30 September 2020
Date of response to Request for reasons	:	3 November 2020

Appearances

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Third to Twelfth Respondents: No opposition

The additional reasons for judgment were handed down electronically by circulation to the parties' representatives by email. The date and time for hand down is deemed to be 09h30 on 3 November 2020.