IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU–NATAL DIVISION, PIETERMARITZBURG

CASE NO: 12642/2021P

In the matter between:

EIGENBAU PROPRIETARY LIMITED	**APPLICANT**
and	
UMGENI WATER	**FIRST RESPONDENT**
THE MINISTER: DEPARTMENT OF WATER	
AND SANITATION	**SECOND RESPONDENT**
NBN CIVILS PROPRIETARY LIMITED	**THIRD RESPONDENT**

JUDGMENT

Chetty J:

[1] The applicant brought an application to review and set aside the decision of the first respondent (also referred to as 'Umgeni') to award a tender to the third respondent (also referred to as 'NBN') for the design, supply and installation of a sludge dewatering plant at the Hazelmere Water Treatment Works. At the time of the launching of the application on an urgent basis, the applicant also sought an order setting aside any contract concluded between Umgeni and NBN arising from the tender. It is apparent

that despite the award of the tender, no contract had been concluded between Umgeni and NBN. That aspect of the relief sought accordingly becomes redundant. NBN chose not to oppose the relief sought and did not participate in the proceedings.

[2] It is common cause that Umgeni advertised the tender in April 2021 and that it was to be evaluated in two stages – the first being functionality, for which 70 points served as the threshold, and the second, being in respect of price and preference. The terms of clause T2.29 of the tender assume much importance to the outcome of the review application. It reads as follows:

'T2.29 TENDERER'S EXPERIENCE

The experience of the Tenderer or joint venture partners in the case of an unincorporated joint venture or consortium will be evaluated on the *basis of experience in similar projects specific to water treatment plant sludge handling or similar,* and conditions in relation to the scope of work.

Tenderers should very briefly describe their experience in this regard relevant to the scope of work and attach this to this schedule. Tenderers must note that the details reflected in the schedule below should have contactable references so that Umgeni Water can verify the information. If the references are not contactable the information shall not be considered for evaluation purposes.

Umgeni Water reserves the right not to appoint a tenderer should the references generally indicate poor performance on previous projects that are reflected in the table below.

Copies of completion certificates are to be attached to the last page of this returnable. Information in the table without the certificates attached will not be considered.' (my italics)

[3] It is not in dispute that the scope of work required the successful bidder to increase the capacity of the sludge treatment plant from 1.5 mega litres to 2.7 mega litres per day, which called for specialised expertise by bidders. It is for this reason that the experience of the successful tenderer was placed in dispute by the applicant, contending that it (the applicant) had the requisite experience called for, and that it and not the third respondent ought to have been awarded the contract. At the closing date of the tender, 16 responses were received. Upon the bidders being subjected to an evaluation in terms of the eligibility criteria, one of them fell away.

[4] The next stage of the evaluation was in respect of functionality, with the tenderer's

experience accounting for 30 weighted percentage points. Whilst percentages were allocated for other areas associated with the scoring criteria, it is only the tenderer's experience that is relevant to the determination of this application. In terms of the weighted percentages allocated in respect of the tenderer's experience, if two projects were completed by the tenderer, 50 points would be awarded; with three projects receiving 70 points and an additional 15 points each would be awarded for every additional project, subject to a maximum of 100 points.

[5] Although 15 tenderers passed the eligibility criteria, only five met the minimum functionality threshold of 70 points. In this regard the applicant scored 81.33, with the third respondent scoring 70.9. It is self-evident that the third respondent 'scraped through' the functionality assessment by the thinnest of margins. The third respondent scored the highest points in respect of pricing, coming in at a contract price of R47.4 million. The applicant, on the other hand, came in at R55.1 million. On 23 November 2021 the applicant was informed in writing that the tender had been awarded the third respondent.

[6] The applicant thereafter queried the basis on which the tender had been awarded to the third respondent, contending the latter was 'relatively unknown' in this market and would have not been able to secure sufficient experience to have been considered eligible in terms of clause T2.29. Accordingly, the applicant was of the view that the third respondent would not have been able to garner sufficient points in the functionality stage in order to be considered for price and preference. That, in essence, was the basis on which the applicant appealed the decision.

[7] Pursuant to the applicant noting its intention to appeal, it requested various documents from Umgeni. The latter provided the applicant with a copy of the Tender Evaluation Report as well as various documents pertaining to the deliberations of the Bid Adjudication Committee. In respect of the summary report on the functionality evaluation, the applicant was provided with a copy of the evaluation remarks, but complained that the document had been redacted and that the names of the tenderers (listed from highest to lowest ranking) had been deleted, with the exception of the name

of the applicant, which scored 81.33. When Umgeni was pressed to supply further documents to the applicant, it refused to do so relying on the provisions of the Promotion of Access to Information Act 2 of 2000 ('PAIA').

[8] Although the applicant made much of the refusal and Umgeni's reliance on PAIA, the applicant was eventually furnished with a complete record of the tender proceedings and evaluations in terms of Uniform rule 53. It duly supplemented its founding affidavit, making reference to the documents furnished to it. It is accordingly not necessary for me to say anything more regarding Umgeni's reliance on PAIA or the extent to which such an approach is seemingly inconsistent with *Tetra Mobile Radio (Pty) Ltd v MEC, Department of Works, and others* 2008 (1) SA 438 (SCA). See also *MEC for Roads and Public Works, Eastern Cape, and another v Intertrade Two (Pty) Ltd* 2006 (5) SA 1 (SCA), and *Robcon Civils/Sinawamandla 2 Joint Venture v Kouga Municipality and another* 2010 (3) SA 241 (ECP).

[9] Turning to the merits, in seeking to challenge the decision of Umgeni to award the tender to NBN, the applicant accepted that it bore the onus to prove on a balance of probabilities that the decision to do so was *prima facie* shrouded in illegality. The crux of the applicant's challenge is focused on NBN's lack of experience in the construction of comparable waste water treatment plants, and in particular in the aspect of mechanical sludge dewatering, a concept viewed as a vital ingredient.

[10] As part of its attempt at complying with this requirement, the third respondent put up seven certificates of its experience, comprising four from the Steve Tshwete Local Municipality, one each from the Lesedi Local Municipality, the Govan Mbeki Local Municipality and the Nkomazi Municipality. It is common cause that in considering the relevant project experience of NBN, Umgeni took into account four certificates, which comprised three from the Steve Tshwete Local Municipality (all in respect of its work on the Boskrans Wastewater Works) and the fourth from the Lesedi Local Municipality. As pointed out by Mr *Pillay SC* who appeared on behalf of the applicant, all of the certificates from the Steve Tshwete Local Municipality bear reference to work having taken place in respect of the same contract (No. BA10/11/2019). Of these certificates,

one was a final, two were completion certificates and the fourth was a partial completion certificate.

[11] The deponent to Umgeni's answering affidavit, Mr Maake, the Senior Manager of Legal Services, confirmed that the bids were considered by members of a Cross Functional Sourcing Team ('CFST') comprising persons employed at Umgeni supposedly with the necessary technical expertise to make an informed decision.[1] What is known from the pleadings is that the CFST did not take into account the partial completion certificate issued by the Steve Tshwete Local Municipality. As regards the remaining certificates, the applicant submits that these ought actually to have been considered, at best for NBN, as constituting one project.

[12] What is known from the Functionality Evaluation Criteria is that the minimum threshold to pass functionality was set at 70 points. It is not in dispute that in surpassing the threshold for functionality, NBN scored 70.90 points. It must follow that in an interrogation of NBN's work and project experience, if any fault or error is found to have taken place in the scoring process, this would be fatal to Umgeni's opposition and to NBN's award of the tender, as we know from the record that NBN came through the functionality evaluation by the slimmest of margins – 0.90.

[13] Based on the weighting of points for each project assessed, it was conceded by Mr *Mthembu SC* who appeared with Mr *Zondi* on behalf of Umgeni Water, that any finding by this court which impacted negatively on the points scored by the third respondent in the functionality assessment would be dispositive of the case.[2] Put differently, if the court finds that any one of the certificates or projects considered by the CSFT was improperly or irregularly considered, or that the CSFT ought to have rejected any of the certificates submitted by the third respondent, that would directly affect the third respondent's score of 70.90 in the functionality assessment. Anything less than 70

[1] It is common cause that the three members of the CFST responsible for scoring the bids were Mr SL Mokonyama, Mr R Sewpersad and Mr A Mahabeer holding the positions of process engineer, mechanical technician and Systems Manager respectively.

[2] First respondent's heads of argument, para 13: 'The scoring criteria for functionality evaluation was based on the following (weighting percentages indicated in brackets) tenderer's experience (30); experience of key personnel (40); quality assurance and environmental management (10); method statement (10); and preliminary programme (10) (see Page 13 of the Record, Volume 1).'

points would mean that the threshold for functionality would not have been achieved.

[14] Where tenders are challenged, the test is that set out in *Allpay Consolidated Investment Holdings (Pty) Ltd and others v Chief Executive Officer, South African Social Security Agency, and others* 2014 (1) SA 604 (CC) para 28:

'Under the Constitution there is no reason to conflate procedure and merit. The proper approach is to establish, factually, whether an irregularity occurred. Then the irregularity must be legally evaluated to determine whether it amounts to a ground of review under PAJA.'

[15] Prior to analysing the issue of whether NBN had the necessary experience qualifying it to pass functionality, a brief comment on the authority of the deponent to the opposing affidavit is necessary. The applicant correctly pointed out that as a legal adviser to Umgeni, the deponent (Mr Maake) is hardly possessed of the requisite technical skills or qualifications to express views on the construction, design and implementation of sludge dewatering systems. This could not be gainsaid. While Umgeni filed confirmatory affidavits by the members of the CSFT who were responsible for the scoring in the tender process, these confirmatory affidavits do not allude to the specific skills of each of the members of the team, nor does the main affidavit of Mr Maake attribute any of the assertions therein to specific members of the CSFT. In *Drift Supersand (Pty) Limited v Mogale City Local Municipality and another* [2017] 4 All SA 624 (SCA) para 31 the court criticized the practice of merely attaching confirmatory affidavits when such a person should have in fact deposed to a proper affidavit:

'. . . Instead the Municipality adopted the sloppy method of adducing evidence by way of a hearsay allegation made by Mr Mashitisho supported by a so-called "confirmatory affidavit" by Mr Van Wyk, who stated no more than that he had read the affidavit of Mr Mashitisho and "confirmed the contents thereof in so far as it relates to me and any of activities". This might be an acceptable way of placing non-contentious or formal evidence before court, but where, as here, the evidence of a particular witness is crucial, a court is entitled to expect the actual witness who can depose to the events in question to do so under oath. Without doing so, a hearsay statement supported merely by a confirmatory affidavit, in many instances, loses cogency.'

[16] Contrary to the contention by the applicant that where Mr Maake comments on matters in respect of which he clearly has no personal knowledge or expertise, such assertions are to be regarded as inadmissible, I am of the view that it merely affects the cogency of such evidence. In *Panday v National Director of Public Prosecutions* [2020] 4 All SA 544 (KZP) para 29 the court said that '[t]he *dictum* in *Drift Supersand* merely expresses displeasure with the practice coupled with the legal consequence that the cogency of the evidence would, in many instances, be diminished.'

[17] In *President of RSA and others v M & G Media Ltd* [2011] 3 All SA 56 (SCA) paras 37-38 the following was said:

'[37] . . . . If knowledge of the occurrence of the event has come to a witness from direct observation then his or her evidence is admissible to prove that it occurred. If that knowledge was acquired from someone else then a proper basis must be laid for admitting it as hearsay and enabling its weight to be evaluated. And if the knowledge was acquired only by inference then that is not evidential material at all: it is for a court to draw the inference itself upon proof of primary facts.

[38] . . . . Merely to allege that that information is within the "personal knowledge" of a deponent is of little value without some indication, at least from the context, of how that knowledge was acquired so as to establish that the information is admissible, and if it is hearsay, to enable its weight to be evaluated.'

[18] Umgeni filed an application on the morning of the hearing for the late introduction of three confirmatory affidavits. The affidavits sought to be introduced were by Mr M Dlamini, the CEO of Umgeni; Mr S M Mokonyama, a member of the CFST and Mr S Dube, the Chairperson of the Bid Evaluation Committee who participated in the evaluation of the tender. These affidavits were a belated attempt to fend off the criticism by the applicant of the reliance by Umgeni on hearsay evidence. Counsel for the applicant did not oppose the introduction, with the express disclaimer that the affidavits did not do anything to bolster the case of the first respondent. Rather than excluding the averments in the opposing affidavit which are clearly outside the expertise of Mr Maake, and notwithstanding the introduction of the three new affidavits, I am satisfied that the proper approach is to consider the weight to be given to affidavits in light of there still not being any certainty as to which member(s) of the CSFT advanced

particular reasons for scoring NBN above the applicant, and their precise reasons for doing so.

[19] The issue for determination is whether NBN had the requisite tenderer's experience qualifying it to pass functionality criteria, enabling it to proceed to the final stage of price and preference where the 80/20 preferential point system was employed. The starting point is to have regard to the clear and unequivocal wording of the tender invitation. As stated earlier NBN did not participate in the proceedings, although it was cited as the third respondent. The matter must therefore be determined on the evidence on the record which served before the CSFT and the evaluation committee at the relevant time. *Ex post facto* justifications for the decision taken by an administrator are of no moment, particularly where the affidavits filed by the parties in a review application find no correlation to the documents constituting the record.

[20] Mr *Pillay*, in seeking to give content and proper meaning to the tender invitation, relied on the often quoted extract from *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA), para 18 where the following is said:

'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. 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.'[3]

[21] The wording of the invitation to tender states expressly that all tenderers would

[3] It is worth noting that in *CSARS v Daikin Air Conditioning* (185/2017) [2018] ZASCA 66 (25 May 2018), Majiedt J in a dissenting judgment made an interesting observation in paragraphs 31-22, that while the judgment in *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA), para 18 suggests that the same approach can be applied to interpreting 'legislation, some other statutory instrument, or contract', the processes giving rise to the enactment of legislation and negotiations leading to the conclusion of a contract are quite different.

be assessed for functionality on the '*basis of experience in similar projects specific to water treatment plant sludge handling or similar,* and conditions in relation to the scope of work' (my emphasis). Umgeni places emphasis on the words '*similar*' and '*comparable*' contending that the tenderer would have to show similar expertise to that required in terms of the skill set. The words 'similar' and 'comparable' must be interpreted as giving context to the expertise required to supply, deliver, install, test and commission the mechanical, electrical and civils works for a 'water treatment plant', and in particular one concerning the treatment or handling of 'sludge'.[4] As Umgeni explains in its answering affidavit, the upgrade to the Hazelmere plant requires that the sludge treatment plant be up-scaled in terms of its capacity for the water treatment works from 45Ml/d to 75Ml/d and then to 90Ml/d, with the capacity of the sludge treatment increasing from 1.5Ml/d to 2.7Ml/d. The experience required was bifurcated, directed at two distinct skill sets.

[22] The applicant accepts that it is not necessary for the successful tenderer to have the *exact* experience stipulated in the invitation to tender. What Umgeni appeared to be satisfied with was that the successful party should have had experience as close as possible to what is specified in the invitation – almost akin to 'substantial compliance'. Accordingly, Umgeni granted to itself a degree of flexibility in terms of scrutinising the bids for necessary skills it was looking for in the successful tenderer. While the exact experience was not necessary, the wording of the tender invitation does not create any flexibility in terms of the requirement of experience in the construction of a water plant

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[4] See *Capitec Bank Holdings Limited and Another v Coral Lagoon Investments 194 (Pty) Ltd and Others* [2021] 3 All SA 647 (SCA); 2022 (1) SA 100 (SCA), paras 25-26 where Unterhalter AJA said the following in regard to the approach to interpretation of words used in texts:
'[25] . . . The much-cited passages from *Natal Joint Municipal Pension Fund v Endumeni Municipality (Endumeni)* offer guidance as to how to approach the interpretation of the words used in a document. It is the language used, understood in the context in which it is used, and having regard to the purpose of the provision that constitutes the unitary exercise of interpretation. I would only add that the triad of text, context and purpose should not be used in a mechanical fashion. It is the relationship between the words used, the concepts expressed by those words and the place of the contested provision within the scheme of the agreement (or instrument) as a whole that constitutes the enterprise by recourse to which a coherent and salient interpretation is determined. As *Endumeni* emphasised, citing well-known cases, "[t]he inevitable point of departure is the language of the provision itself".
[26] . . . . *Endumeni* is not a charter for judicial constructs premised upon what a contract should be taken to mean from a vantage point that is not located in the text of what the parties in fact agreed. Nor does *Endumeni* licence judicial interpretation that imports meanings into a contract so as to make it a better contract, or one that is ethically preferable.'

and mechanical sludge operations. As the applicant points out, this is a specialised field in which very few companies have experience. It is not disputed that it would be risky and potentially hazardous to award the tender to a party without the requisite standard of experience.

[23] In *BKS Consortium v Mayor, Buffalo City Metropolitan Municipality and others* [2013] 4 All SA 461 (ECG) the tender document also contained the words 'similar type'. On the interpretation of a tender document, the following was said in paragraph 94:

'The first and second respondents are not entitled to import additional criteria or factors not stipulated for. They are not entitled to have regard to their own perception of the nature of the contract or of what is necessary in terms of experience and expertise, outside of what is specifically stated in the bid criteria or to interpret the bid criteria to suit such perceptions.'

[24] In *LDM Consulting v Dube Tradeport and others* [2021] ZAKZDHC 14 the tender document also used the words 'similar scope'.[5] In *Haw and Inglis Civil Engineering (Pty) Ltd v MEC of Police Roads and Transport: Free State Provincial Government and others* [2010] ZAFSHC 51 the tenderer was also required to provide details of prior experience in 'similar projects' to that required. In circumstances not dissimilar to those in the matter before me, the court in *Haw and Inglis* in paragraph 34 made the following observations, which resonate with the argument advanced by Mr *Pillay* of the ripple or 'knock-on' effect that the rejection of one aspect of the third respondent's past experience could have for its overall assessment:

'With the benefit of the same affidavits mentioned in the afore-going paragraph, it is clear that the actual score which the second respondent deserved on experience was five points only, i.e. in respect of only one project that qualified as "a similar project". Obviously this score of five points is also below the minimum threshold of 30 points and thus the second respondent's tender should not have been evaluated any further. Even if this tender was not disqualified for failing to meet the minimum threshold of 30 points in respect of functionality the second respondent's total score would have been 62.94 points, which is a lower score than the

[5] *LDM Consulting v Dube Tradeport and others* [2021] ZAKZDHC 14 para 97:
'This tender document calls for consultants for a pharmaceutical/bio-technology manufacturing facility. It further requests under "Bidder's experience" for experience in projects of *similar scope* and under "Experience of Key Personnel" calls for CVs showing the experience of key personnel "in projects of a *similar nature*, size and monetary value." (emphasis added)'.

applicant's total score of 78.23. Thus the applicant would still have been the highest scorer. The effect hereof is that the second respondent was not entitled to be awarded the tender and that there is no rational connection between the decision made by the Department with regards to the score and the reason for the decision. The tender therefore falls to be reviewed and set aside.'

[25] The point stressed by the applicant is that at the time of the filing of the founding affidavit and supplementary affidavit, it believed that NBN had submitted seven certificates as proof of its project experience. It was only after Umgeni filed its answering affidavit that the applicant become aware that only four certificates were taken into account in assessing NBN's experience. It was further contended that there is nothing on the record to indicate which four certificates were considered. In tender disputes, the record must speak for itself. Affidavits filed in review proceedings cannot constitute evidence that is not borne out by the record. If one has regard to the score sheet for NBN, under the heading of 'Tenderer's Experience', which is explained as '*Company experience in the construction of comparable water/waste water sludge treatment plants utilising mechanical sludge dewatering in which the tenderer undertook work in the mechanical, electrical and civil disciplines'*, it is recorded that NBN provided experience of four projects, receiving a score of 85. This is further elaborated on in the summary of the report of functionality evaluation which notes that the contractor (NBN) has four relevant projects,[6] and received a score of 70.90 in comparison to the applicant which was assessed on two projects, receiving an overall score of 81.33 for functionality, based on a weighted average score of 15. As stated earlier, the threshold to get through the functionality stage is 70 points. Anything below 70 means that you do not progress to the next stage. The contention of the applicant is that if NBN had been properly assessed, it should have been assessed on two rather than four projects, at a weighted average of 15 each, resulting in a total of 50. These scores are relevant only in as much as they reflect the slimmest of margins by which the third respondent passed the functionality stage. It is the contention of the applicant that if the court finds any deviation, this would entail that NBN would not have passed functionality, and would have not been considered for price and preference.

[6] Page 813 of the record erroneously refers to five projects. It was common cause that this was a mistake.

[26] The applicant contends that the third respondent did not comply with the strict prescripts of the tender in that a careful perusal of the certificates reveals that they did not have the details of contactable references to enable Umgeni to verify the information provided. The tender invitation is worded in peremptory language, with which the tenderer must comply. In this regard it was submitted by Mr *Mthembu* that the certificates issued by the Steve Tshwete Local Municipality contain the name of the official as well as the details of the municipality, providing the necessary contact details. Insofar as the certificate issued by the Lesedi Local Municipality is concerned, the contention was that the certificate contains the name of the official of the municipality, and that although the certificate does not contain an address or contact details of the relevant official, this could easily have been established.

[27] The explanation proffered by Umgeni does not constitute strict compliance, nor even substantial compliance, with the terms of the tender. This was considered in *Envitech Solutions (Pty) Limited v Saldanha Bay Municipality and another* [2015] ZAWCHC 108 para 85 where the court said the following with regard to interpretation of the terms of a tender:

'[85] When considering the submissions made by applicant, I have [had] regard to the fact that the tender document falls to be dealt with as a legal document. In KPMG Chartered Accountants (SA) v Securefin Limited and Another 2009 (4) SA 399 (SCA) [Harms DP in dealing with the interpretation of a document, held as follows at paragraphs [39] – [40]:

1. "If a document was intended to provide a complete memorial of a jural act, extrinsic evidence may not contradict, add to or modify its meaning."

2. "Interpretation is a matter of law and not of fact and, accordingly, interpretation is a matter for the court and not for witnesses …"

3. "[T]he rules about admissibility of evidence in this regard do not depend on the nature of the document, whether statute, contract or patent ...,"

4. "[T]o the extent that evidence may be admissible to contextualise the document (since 'context is everything') to establish its factual matrix or purpose` or for purposes of identification, one must use it as conservatively as possible".'[7]

[7] See also *Jocastro (Pty) Ltd v Ekurhuleni Metropolitan Municipality* 2018 JDR 0525 (WCC) para 31:
'Our courts have consistently held that the interpretative process is one of ascertaining the intention of the

[28] It is also not in dispute that NBN did not provide a summary of its experience relevant to the scope of work on similar projects. Again, on a strict interpretation of the tender document, the applicant correctly points to a flaw in Umgeni's assessment of the bid of NBN. While not conceding that the application hinged on this issue or that of the failure to provide a summary of its experience and expertise in the area of mechanical sludge dewatering plants, both counsel were in agreement that the crux of the application rested on whether Umgeni acted correctly in accepting that the four certificates on behalf of NBN met the threshold for functionality of its experience in performing the same or similar work as set out in the tender document. Accepting for the moment that Umgeni did not require the exact experience to that set out in the tender invitation – and that similar experience would suffice – the question to be answered is whether NBN met that threshold.

[29] The principal argument of the applicant is that in terms of the Promotion of Administrative Justice Act 3 of 2000 ('PAJA') the award of the tender by Umgeni to the third respondent should be reviewed and set aside on the grounds that it was awarded taking into account irrelevant considerations and was not rationally connected to the purpose for which it was taken. The applicant contends that the Bid Evaluation Committee erred in awarding the third respondent a score of 70.90 in the functionality evaluation stage, enabling it to procede to the last stage dealing with price and preference. It was submitted that the third respondent ought not to have proceeded beyond functionality as it would not have surpassed the threshold of 70 points.

[30] The lens through which the award of the tender to the third respondent must be scrutinised is the scope of work which requires the construction of comparable water or wastewater sludge treatment plants, using mechanical sludge dewatering.

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parties – what they meant to achieve and in so doing, the court must consider all the relevant circumstances surrounding the contract to determine what their intention was in concluding it. From a plain reading of this clause, it is clear that the objective is to fulfill the mandate of the tender which is to ensure, *inter alia*, that the appointed service provider has the necessary capacity to ensure deliveries are not delayed. Furthermore, the information that is required after the use of the adjective "*fully*" in the last sentence of the paragraph, denotes the information of the number of persons available to execute the project and their respective responsibilities. No where does this clause call for the identity of the persons to be stated.' (emphasis in original).

As stated earlier this is a specialised field, in which very few companies have the necessary expertise. The third respondent submitted a bid in its own name, not as a joint-venture with any other entity. It is not disputed by Umgeni that the construction by an inexperienced tenderer would pose a risk to the infrastructure, as well having an impact on environmental and water service delivery to communities.

[31] The applicant in its bid to win the tender submitted experience in two projects on sludge dewatering treatment plant construction. Each of the projects was distinct from the other and it is not disputed that there was no overlap in the work evidenced by the certificates which were put up by the applicant.

[32] Three of the four certificates issued to the third respondent that were taken into account by Umgeni were issued by the Steven Tshwete Local Municipality. The first was a final completion certificate for a contract of approximately R30 million and issued in June 2021. The second was a completion certificate for work of approximately R8.4 million issued in December 2020. The third completion certificate was for a contract of approximately R11.6 million issued in November 2020. The last certificate taken into account in the third respondent's bid was issued by the Lesedi Local Municipality in September 2020. It is not evident from the certificate as to the value of the works carried out. It is submitted on behalf of the third respondent that the work carried out for the Lesedi Local Municipality was similar or comparable to the scope of work required in the tender. This certificate bears reference to the removal of old sewer pumps and the replacement with submersible pumps, the installation of a pump screen, refurbishment of a pump house, refurbishment of a steel crane girder and the refurbishment of what is described as a 'centrifugal sewer pump'.

[33] As pointed out by the applicant in its replying affidavit, the scope of work required of the successful tenderer is to demonstrate experience in mechanical sludge dewatering. There is no direct comparison evidence from the work carried out by the third respondent on behalf of the Lesedi Local Municipality to the nature of work to be carried out under the tender. The deponent to the answering affidavit, Mr

Maake, further states that the tender invitation did not require the same or exact experience but similar or comparable experience in relation to waste water treatment plants utilising mechanical sludge dewatering. Mr Maake, who has no expertise in mechanical engineering or water treatment plants, proffers an explanation for why the experience of the third respondent can be taken into account. He says, and without attributing his comment to any member of the CFST, that 'a sludge dewatering plant is a sub-component of a water/wastewater works', and that it is a system designed to dewater the treatment sludge from all upstream treatment process.

[34] The explanation by Mr Maake is of no value in as much as he merely expresses an opinion without laying any foundation for why such opinion should be considered as an expert assessment of the scope of work in terms of the tender. Adopting the most benevolent approach towards the third respondent, the court, for the purpose of this decision alone, is prepared to accept the opinion of Mr Maake that the certificate from the Lesedi Local Municipality did qualify as experience of the same or similar work required at the Hazelmere Water Treatment plant.

[35] In respect of the certificates issued by the Steve Tshwete Local Municipality, the first respondent contends that such work was carried out in relation to the civil, mechanical and electrical refurbishment of equipment and waste water treatment works and pump stations. The first respondent concedes in the answering affidavit that all of the work reflected in the certificates from the Steve Tshwete Local Municipality pertained to work carried out at the Boskrans Wastewater Works. Mr *Pillay*, on behalf of the applicant went further and pointed out that the certificates issued by the Steve Tshwete Local Municipality, albeit under the same contract number, are not indicative of the third respondent having independently carried out the work referred to. The final completion certificates refer to the third respondent as being 'part of a panel' of contractors. It is therefore unclear what precise part of the overall refurbishment exercise was undertaken by the third respondent alone. A close inspection of the certificates issued in December 2020 and November 2020 indicate that the nature of work carried out was to 'install and commission complete set of 10 x shaft surface aerators' and work on a sedimentation tank. This court does not have

the necessary expertise to determine whether this constitutes evidence of the same or similar experience set out in the tender invitation.

[36] It was submitted by counsel for the applicant that the certificates from the Steve Tshwete Local Municipality should be strictly considered as one project. If one adopts this position, the third respondent would have only scored points on only two projects – one from Steve Tshwete and one from Lesedi municipality - amounting to 50 points. That would have resulted in the third respondent failing to reach the threshold of 70 points in the functionality stage. The position advanced by the applicant is based essentially on all three certificates containing the details of the same contract number, leading to the inference that they were not divisible from each other. In essence they constitute one certificate in terms of experience.

[37] In my view rather than simply concentrating on the contract number reflected on the certificates, the proper enquiry should be directed at the content of the certificates rather than their form. As a starting point Mr *Pillay* referred to the Construction Industry Development Board Act 38 of 2000 ('CIDB Act'), which is applicable to all construction projects, similar to that envisioned in the tender invitation. The CIDB Act defines a project to mean 'a construction works contract or a series of related construction work contracts'. If one has regard to the certificates provided by the third respondent, they were issued in November and December 2020. They are completion certificates, which makes reference to specific works undertaken - the installation and commission of surface aerators and the construction of a sedimentation tank. In contrast, if one has regard to the certificate issued in June 2021, although it bears the same contract number as the other two certificates, it makes no reference to any specific scope of work undertaken by the third respondent. Perhaps more importantly is that the certificate issued in June 2021 is entitled 'Final Completion Certificate', whereas the other two certificates are entitled 'Completion Certificate'.

[38] The respondent has not sought to explain the distinction between the certificates. However, the applicant contends that the final completion certificate, by

its very nature, is a reflection of the composite of all works, and would necessarily include the work in the earlier certificates. As the third respondent was part of a panel of contractors attending to various tasks on the project, each task completed by the third respondent would result in the generation of a completion certificate. The final completion certificate is therefore not evidence of any specific works undertaken, but confirmation of the third respondent having been part of the panel of contractors who carried out mechanical and electrical works at the Boskrans Wastewater works.

[39] The first respondent does not provide any explanation as to why these certificates from the Steve Tshwete Local Municipality were considered individually as evidence of third respondent's prior experience, or put differently, as experience on three separate projects. Counsel for the applicant submitted that these certificates should not be looked at in isolation, as they all pertained to the same project, were undertaken at the same site, and for the refurbishment of the same water treatment plant. At best for the applicant, it was contended that the three certificates should be considered as one in respect of prior experience. On the other hand, the best case scenario for first respondent, as submitted by Mr *Pillay,* was that the certificates should be considered as work experience on two projects only. The final completion certificate does not fall within this category. On either assumption, the third respondent would not have met the threshold of 70 points at the functionality evaluation stage.

[40] Faced with the predicament presented by the Steve Tshwete Local Municipality certificates, Mr *Mthembu* was constrained to concede that the final completion certificate could not be considered as an individual project experience, in contrast to the two certificates issued in November and December 2020. The concession is fatal to the opposition to the review, as counsel for the first respondent accepted that if *any* of the third respondent's certificates were found to have been incorrectly considered or evaluated at the functionality stage, it would follow that the third respondent would not have passed the functionality evaluation stage.

[41] In light of the foregoing I am satisfied that on a factual basis the applicant has succeeded in establishing that the first respondent irregularly took into account the three certificates from the Steve Tshwete Local Municipality. At best, these certificates constitute evidence of prior experience on two projects. At worst, they constitute evidence of work on a single project. On either scenario, the third respondent would not have passed functionality. It follows therefore that the decision to score the third respondent on four projects was irrational in terms of s 6(2)*(f)*(ii) of PAJA, in as much as the impugned decision is not rationally connected to the information before the decision-maker; and the reasons given for it. See C Hoexter and G Penfold *Administrative Law in South Africa* 3 ed (2021) at 464-465. Accordingly, the irregularity constitutes a sufficient ground for the reviewing and setting aside of the decision to award the tender to the third respondent in terms of PAJA.

[42] The provisions of s 8(1) of PAJA provide that where an administrative action has been set aside, the court may in determining an order that is just and equitable, remit the matter for reconsideration by the administrator, with or without directions. In exceptional circumstances, under s 8(1)(c)(ii)(*aa*) a court may substitute or vary the administrative action or correct a defect resulting from such action. The applicant seeks that the tender be awarded to it on the basis that having regard to the facts of the present matter, it would not be just and equitable for the court to remit the matter in circumstances when the only party (in the absence of the third respondent) to have passed functionality and moved on to the final stage, is the applicant. In the vast majority of cases courts have shown a reluctance to substitute their own decision for that of the administrator and accordingly the 'default' position where a tender has been set aside is to remit the matter to the administrator. This position is informed by the view that an administrator is best suited, by virtue of its experience and expertise, to make the right decision.

[43] Obviously there are instances where an administrator displays bias in the decision-making process, leaving a court with no confidence that the administrator can be entrusted to fairly adjudicate over a remitted tender process. It was pointed out by Mr *Mthembu* on behalf of the first respondent that while the evaluation

committee may have erred in considering the three certificates from the Steve Tshwete Local Municipality as constituting separate or individual projects on which the third respondent had worked, this does not constitute evidence of bias or impropriety. I agree entirely.

[44] Section 8 of PAJA, read with s 172 of the Constitution, empowers a court to prevent injustice by making a just and equitable order. The court in *MEC for Health, Eastern Cape and another v Kirland Investments (Pty) Ltd t/a Eye and Laser Institute* 2014 (3) SA 481 (CC) para 52, observed that:

'This power enables our courts to regulate consequences flowing from a declaration of constitutional invalidity. This suggests that the need to exercise this power arises if there is a declaration of invalidity or an administrative action is set aside. If there is no declaration of invalidity, generally the exercise of the power may not be triggered.'

[45] Counsel for the applicant, with reference to *Central Energy Fund SOC Ltd and another v Venus Rays Trade (Pty) Ltd and others* [2022] ZASCA 54, submitted that in terms of the wide remedial discretionary power given to a court to arrive at *any* order which is just and equitable, a court is not bound to formulate an order that accords strictly with the prayers in the notice of motion. The order issued should address the real dispute between the parties (see *Economic Freedom Fighters and others v Speaker of the National Assembly and another* 2018 (2) SA 571 (CC), para 211). In seeking to persuade the court to award the tender to the applicant without admitting the matter to the administrator, Mr *Pillay* referred to *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 (3) SA 121 (CC), para 29 where the court pointed out that in deciding on the relief to which an aggrieved party is entitled, 'the remedy must be fair to those affected by it and yet vindicate effectively the right violated.'

[46] Counsel for the applicant submitted that the court was in as good a position as the first respondent to make a decision as to the successful tenderer. It was submitted that the Bid Evaluation Committee has already completed its function in terms of the tender procedure - all tenderers have been scored for functionality and only the applicant and NBN succeeded in advancing to the last stage dealing with the

price and preference. It is not in dispute that the applicants scored 81.33 during the functionality stage. The applicant was placed second behind another company which scored 89 points. This company was however disqualified for reasons not relevant to this application. It is also common cause that none of the other unsuccessful tenderers sought to join or intervene in these proceedings, perhaps recognising that they had no prospect of achieving any success had they done so. A further factor which counsel submitted that the court ought to take into account against remittal is that the work required at the waste water treatment plant is urgent, and has been so from the time of the launching the application. Remittal of the matter would only serve to delay the eventual awarding the tender, and the commencement of work on site.

[47] All of the arguments raised by the applicant are compelling, and find very little resistance from the first respondent, save for the contention by Mr *Mthembu* that as part of the process of awarding the tender, the first respondent is obliged to undertake a due diligence exercise which is referred to as a 'compliance check'. It would appear that following the decision to award the tender to NBN, a due diligence assessment was carried out on the successful tenderer to evaluate what potential loss or risk may be incurred in doing business with the entity prior to the establishment of the contractual relationship. This accords with sound business practice. Amongst the aspects verified is the relevant information pertaining to the entity's directors, whether any of the directors have any 'connections' to any person employed at the first respondent (to exclude any possibility of an irregularly awarded tender), the entity's compliance in terms of the South African Revenue Services systems and whether the entity has any judgments awarded against it. All of this information is then reviewed and vetted prior to a contract being signed between the first respondent and the successful tenderer. It is in this regard that counsel for the first respondent submits that rather than the court awarding the tender to the applicant, it should remit the matter to allow for the due diligence exercise to be conducted on the applicant, thereby respecting the boundaries of separation, to avoid any notion of judicial overreach.

[48] In my view while I accept that the scope of work required is urgent, a court

should display a degree of deference to the processes which the administrator has in place, and which form part of its usual business practices. To foist a decision on the first respondent, without the latter having had the opportunity to conduct its due diligence exercise, carries with it significant risk. What if the applicant is awarded the tender by the court, only for the first respondent to later find out that it is not compliant in terms of SARS' requirements or that it has a series of judgments granted against it?

[49] I am of the view that it would be just and equitable for this court not to substitute its decision for that of the administrator and that the matter should be remitted with certain directions. In this regard I invited counsel to propose the terms on which such remittal should take place, cognisant of the due diligence check to be undertaken by the first respondent. I am satisfied that the order below takes note of the urgency of the work to be performed, yet at the same time grants a degree of deference to the administrator to exercise its duty as the ultimate contracting party. The order strives to achieve that which is fair to both parties, as there is essentially only one party still in the race.

[50] In the result I make the following order:

1. The first respondent's decision to appoint the third respondent as the successful bidder in respect of tender number 2021/041 for the design, supply, delivery, installation, testing and commissioning of mechanical, electrical and civil works in respect of the Hazelmere Water Treatment Works Sludge Plant Upgrade ('the tender') is reviewed and declared constitutionally invalid.

2. That the award of the tender to the third respondent by the first respondent is set aside, and the tender is remitted for immediate re-adjudication.

3. The re-adjudication of the award of the tender is remitted to the first respondent's Bid Adjudication Committee for award on the basis that the third respondent's tender did not pass functionality.

4. The first respondent is directed to award the tender on the basis that the applicant is the highest scoring bid for price and preference points of those bids that did pass functionality.

5. The first respondent is directed to immediately undertake and complete any compliance check of the applicant's bid and then within thirty (30) calendar days of this order to award the tender on the basis of the directions in paragraphs 2, 3 and 4 above.

6. That the costs of this application be borne by the first respondent; such costs are to include the costs of two counsel (where so engaged) including that of senior counsel.

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M R CHETTY

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