IN THE NORTH WEST HIGH COURT, MAFIKENG

CASE NO: UM 120/2018

In the matter between:

DDP (PTY) LTD Applicant

and

RUSTENBURG LOCAL MUNICIPALITY 1st Respondent

OPTI PROPERTY CONSULTANTS CC 2nd Respondent

DATE OF HEARING : 15 FEBRUARY 2019

DATE OF JUDGMENT : 28 FEBRUARY 2019

FOR THE APPLICANT : ADV. STOOP SC

FOR THE 1st RESPONDENT : ADV. LAUBSCHER

FOR THE 2nd RESPONDENT : ADV. MASILO

JUDGMENT

HENDRICKS J

Introduction

[1] The Rustenburg Local Municipality (1st Respondent) invited tenders for the Compilation and Maintenance of a New Valuation Roll for the financial years 01 July 2019 to 30 June 2024 or for a period not exceeding five (5) years. Prospective bidders submitted their bids. Opti Property Consultants CC (2nd Respondent) was the successful bidder and the tender was awarded to it. DDP Valuers (Pty) Ltd (Applicant) was one of the unsuccessful bidders whose tender was found to be non-responsive. Dissatisfied about it, the applicant launched an urgent application in this Court to have the implementation of the tender and/or contract suspended (Part A) pending Part B, to have it reviewed and set aside.

Interim Order

[2] On 16th August 2018, Chwaro A.J granted an order in the following terms with regard to Part A:

" ***IT IS ORDERED***

(A) 1. THAT: The rules relating to forms and service be dispensed with and that this application be disposed of as one of urgency as contemplated in Rule 6(12);

(A)2. THAT: Pending the final determination of Part B of this application:

(a) 2.1 the implementation or further implementation of Bid Number RLM/BTO/0031/2017/18 for the Compilation and Maintenance of New Valuation Roll for the financial years the 1st day of JULY 2019 to the 30th day of JUNE 2024 ("the Tender") is suspended;

(a) 2.2 the First and Second Respondents are interdicted and restrained from implementing and/or executing the Tender, alternatively from further implementing and/or executing the Tender;

(A)3. THAT: The First Respondent to pay the costs of Part A and that the First Respondent to pay the costs jointly and severally with the Second Respondent in the event of any opposition by the Second Respondent;"

Part B of the Notice of Motion

[3] The following relief as set out in the Notice of Motion are prayed for in Part B:

""(B)(1) The First Respondent's decision taken on or about 24 May 2018 to award the tender to and to appoint the Second Respondent for the compilation and maintenance of the new valuation roll for the financial years 1 July 2019 to 30 June 2024, is reviewed and set aside;

(B)(2) The First Respondent failure and/or refusal to consider the award of the Tender to the Applicant having regard to the preference points system prescribed in the Preferential Procurement Policy Framework Act, Act 5 of 2000 ('the PPPFA') is reviewed and set aside;

(B)(3) The First Respondent is directed to reconsider, having regard to the preference points system prescribed in the PPPFA, the awarding of the Tender to the Applicant and

to such other tenderers who did qualify in respect of functionality as contemplated in the PPPFA;

(B)(4) That the First Respondent be ordered to pay the costs of this application;

(B)(5) That insofar as any other Respondents oppose this application, they be ordered to pay the costs of this application jointly and severally with the First Respondent;..."

It is Part B that is now before this Court for adjudication.

Submissions

[4] It was contended by Mr. Stoop, who act on behalf of the applicant, that the 1st respondent should not have excluded the applicant's tender from its adjudication process by finding that it was non-responsive. The tender submitted by the applicant essentially complied with the requirements as set out in the tender document and the legislative framework which governs the procurement process of the 1st Respondent. Mr. Laubscher, who act on behalf of the 1st respondent, submitted that the 1st respondent was entitled to exclude the tender of the applicant from its adjudicating process because of non-compliance with the requirements set out in the tender document. Because the tender of the applicant was non-responsive it was correctly excluded because it was not an acceptable tender. It is this issue, amongst others, to be decided by this Court. The 2nd respondent, although it is not a party to the 'main fray' as stated by Mr. Masilo who represent it, was dragged to Court by the applicant because of the aspersions casted on it by the applicant. This, so it was contended by Mr. Masilo, should be taken into consideration in the awarding of costs.

[5] The reasons why the applicant's tender were found to be non-responsive are the following:

(i) tenders forms (MBD 4 and MBD 5) were completed contrary to the prescribed manner;

(ii) current municipal rates and taxes were not attached;

(iii) municipal accounts of the applicant's head office were not attached;

(iv) identity documents copies of the directors were not attached to the tender document;

(v) the resolution of the applicant was not attached.

I will deal with these reasons later on in this judgment.

The Legislative Matrix

[6] Before dealing with the issues at hand it is prudent to outline the legislative matrix which is applicable for a just decision. Section 217(1) of the Constitution of the Republic of South Africa, 1996 **("the Constitution")** stipulates that when **"..an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective."** It goes without saying that the 1st Respondent, a municipality, is an "organ of state" as defined in section 239 of the Constitution.

[7] The Preferential Procurement Policy Framework Act, Act 5 of 2000 **("the Procurement Act")** requires a municipality to implement a procurement policy

by following a preference point system in respect of any **"acceptable tender".** An **"acceptable tender"** in turn is being defined in section 1 of the said act as being **"...any tender which, in all respects, complies with the specifications and conditions of tender as set out in the tender document."**

[8] On 20 January 2017, the amended Preferential Procurement Regulations, 2017 **("the Procurement Regulations")** were promulgated under the Procurement Act by way of Government Notice R32 in Government Gazette 40553, effective from 20 April 2017. These amended regulations replaced the 2011 amended regulations, who in turn replace the original 2001 regulations.

[9] Section 111 of the Local Government: Municipal Finance and Management Act, Act 56 of 2003 **("the MFMA")**, requires that each municipality must have and implement a supply chain management policy which gives effect to the provisions of Part I of Chapter 11 of the MFMA. This policy must mirror the values as set out in section 217(1) of the Constitution. Section 112 (1) of the MFMA, requires a municipal supply chain management policy to also comply with a regulatory framework that covers as a minimum a wide range of issues. These include, in particular:

"...open and transparent pre-qualification processes for tenders and other bids...", (Section 112 (1)(e));

"...bid documentation, advertising of and invitations for contacts..." (Section 112 (1) (g)); and

"...screening processes ... for prospective contractors on tenders or other bids above a prescribed value... '(Section 112 (1) (i)).

[10] On 30 May 2005, the Municipal Supply Chain Regulations **("MSCR")** were promulgated under section 168 of the MFMA in Government Notice 868 of 2005.

These are the regulations envisaged by the provisions of section 112(1) of the MFMA. The First Respondent in turn and in terms of the provisions of regulation 7 of the Municipal Budget & Reporting Regulations (promulgated under the MFMA) read with section 24 (2) (c) (v) and section 111 of the MFMA, adopted a Supply Chain Management Policy and has amended same from time. The last amendment to this policy being May 2017. Regulation 13 provides *inter alia*:

> *"13 General preconditions for consideration of written quotations or bids*
>
> *A supply chain management policy must state that the municipality or municipal entity may not consider a written quotation or bid unless the provider who submitted the quotation or bid-*
>
> *(a) has furnished the municipality or municipal entity with that provider's-*
> *(i) full name;*
> *(ii) identification number or company or other registration number; and*
> *(iii) tax reference number and VAT registration number, if any;*
>
> *(b) has authorised the municipality or municipal entity to obtain a tax clearance from the South African Revenue Services that the provider's tax matters are in order; and*
>
> *(c) has indicated-*
> *(i) whether he or she is in the service of the state, or has been in the service of the state in the previous twelve months;*

(ii) if the provider is not a natural person, whether any of its directors, managers, principal shareholders or stakeholder is in the service of the state, or has been in the service of the state in the previous twelve months; or

(iii) whether a spouse, child or parent of the provider or of a director, manager, shareholder or stakeholder referred to in subparagraph (ii) is in the service of the state, or has been in the service of the state in the previous twelve months."

The concomitant provision in the 1st Respondent's Supply Chain Management Policy is section 13.

[11] Regulation 21 of the MSCR provide:

"21 Bid documentation for competitive bids.

A supply chain management policy must determine the criteria to which bid documentation for a competitive bidding process must comply, and state that in addition to regulation 13 the bid documentation must-

(a) take into account-

(i) the general conditions of contract;

(ii) any Treasury guidelines on bid documentation; and

(iii) the requirements of the Construction Industry Development Board, in the case of a bid relating to construction, upgrading or refurbishment of buildings or infrastructure;

(b) include evaluation and adjudication criteria, including any criteria required by other applicable legislation;

(c) compel bidders to declare any conflict of interest they may have in the transaction for which the bid is submitted;

(d) if the value of the transaction is expected to exceed RI0 million (VAT included), require bidders to furnish-

(i) if the bidder is required by law to prepare annual financial statements for auditing, their audited annual financial statements-

(aa) for the past three years; or

(bb) since their establishment if established during the past three years;

(ii) ***a certificate signed by the bidder certifying that the bidder has no undisputed commitments for municipal services towards a municipality or other service provider in respect of which payment is overdue for more than 30 days;***

(iii) particulars of any contracts awarded to the bidder by an organ of state during the past five years, including particulars of any material non-compliance or dispute concerning the execution of such contract;

(iv) a statement indicating whether any portion of the goods or services are expected to be sourced from outside the

Republic, and, if so, what portion and whether any portion of payment from the municipality or municipal entity is expected to be transferred out of the Republic; and

(e) stipulate that disputes must be settled by means of mutual consultation, mediation (with or without legal representation), or, when unsuccessful, in a South African court of law." (my emphasis)

The concomitant provision in the 1st Respondent's Supply Chain Management Policy is section 21.

[12] The National Treasury has published a circular, entitled **MFMA Circular No 25**, under MSCR Regulation 21. Paragraph 3.2 thereof requires that changes to Municipal Bid Documents (which are in template provided and compiled by National Treasury) (MBD's) are "kept to a minimum". Variations would need to be limited to dealing with specific contract and project issues. Such changes should be relevant and reasonable to the bidding process at hand.

[13] Regulation 38 (1) (d) (i) of the MSCR thereof provides:

"38 <u>Combating of abuse of supply chain management system</u>

(1) A supply chain management policy must provide measures for the combating of abuse of the supply chain management system, and must enable the accounting officer-....

(d) to reject any bid from a bidder-

(i) if any municipal rates and taxes or municipal service charges owed by that bidder or any of its directors to the municipality or municipal entity, or to any other municipality or municipal entity, are in arrears for more than three months;.... "

(my emphasis)

The concomitant section in the 1st Respondent's Supply Chain Management Policy is section 38.

[14] Regulation 44 of the MSCR provide *inter alia*:

"44. Prohibition on awards to persons in the service of the state:

The supply chain management policy of a municipality or municipal entity must, irrespective of the procurement process followed, state that the municipality or municipal ***entity may not make any award to a person-***

(a) who is in the service of the state;

(b) if that person is not a natural person, of which any director, manager, principal shareholder or stakeholder is a person in the service of the state; or

(c) who is an advisor or consultant contracted with the municipality or municipal entity. "(own emphasis)

Again, the concomitant provision in the 1st Respondent's Supply Chain Management Policy is section 44.

The Case Law

[15] Counsel referred me to the case of **Millennium Waste Management (Pty) Ltd v Chairperson Tender Board: Limpopo Province and Others** 2008 (2) SA 481 (SCA) (**Millennium case**). Particular emphasis was placed on paragraphs [17] to [21] in which it was stated:

> *"[17] Moreover, our law permits condonation of non-compliance with peremptory requirements in cases where condonation is not incompatible with public interest and if such condonation is granted by the body in whose benefit the provision was enacted (SA Eagle Co Ltd v Bavuma). In this case condonation of the appellant's failure to sign would have served the public interest as it would have facilitated competition among the tenderers. By condoning the failure the tender committee would have promoted the values of fairness, competitiveness and cost-effectiveness which are listed in s 217. The appellant had tendered to provide the needed service at a cost of R444 244.43 per month whereas the consortium had quoted and was awarded the tender at the amount of R3 642 257.28 per month.*
>
> *[18] I turn to the question whether the appellant's tender constitutes an acceptable tender as defined in the Preferential Procurement Act. It defines an acceptable tender as 'any tender which, in all respects, complies with the specifications and conditions of tender as set out in the tender document'. When Parliament enacted the Preferential Procurement Act it was complying with the obligation imposed by s 217(3) of the Constitution which*

required that legislation be passed in order to give effect to the implementation of a procurement policy referred to in s 217(2). Therefore the definition in the statute must be construed within the context of the entire s 217 while striving for an interpretation which promotes 'the spirit, purport and objects of the Bill of Rights' as required by s 39(2) of the Constitution. In Chairperson: Standing Tender Committee and Others v JFE Sapela Electronics (Pty) Ltd and Others Scott JA said (para 14):

> *"The definition of 'acceptable tender' in the Preferential Act must be construed against the background of the system envisaged by section 217(1) of the Constitution, namely one which is 'fair, equitable, transparent, competitive and cost-effective'. In other words, whether 'the tender in all respects complies with the specifications and conditions set out in the contract documents must be judged against these values'."*

[19] In this context the definition of tender cannot be given its wide literal meaning. It certainly cannot mean that a tender must comply with conditions which are immaterial, unreasonable or unconstitutional. The defect relied on by the tender committee in this case is the appellant's failure to sign a duly completed form, in circumstances where it is clear that the failure was occasioned by an oversight. In determining whether this non-compliance rendered the appellant's tender unacceptable, regard must also be had to the purpose of the declaration of interest in relation to the tender process in question.

[20] *Counsel for the department submitted that the purpose of the declaration of interest was to curb corruption. As the failure to sign may be intentional, so he argued, the possibility existed that a person or persons inside the department had an interest in the tender of the appellant. A perfunctory perusal of the appellant's declaration shows that the failure to sign was inadvertent. Secondly, the tender committee does not say the information furnished by the appellant to the effect that it had no relationship with the department's employees (including those linked to the evaluation and adjudication of tenders) was false. I am unable to appreciate how the signing of the form would have safeguarded against corruption. It seems to me that what is of paramount importance is the nature of the information furnished and not the signature. As is apparent from the declaration itself, Mr Rhyno Gouws inserted his name on it as the person who furnished the necessary information. He was thus clearly identified. If the appellant intended to misrepresent facts, it is unlikely that Gouws would have exposed himself in that fashion. I may add that he signed the tender on behalf of the tenderer on the very same date which the declaration bears.*

[21] *Since the adjudication of tenders constitutes administrative action, of necessity the process must be conducted in a manner that promotes the administrative-justice rights while satisfying the requirements of PAJA (Du Toit v Minister of Transport). Conditions such as the one relied on by the tender committee should not be mechanically applied with no regard to a tenderer's constitutional rights. By insisting*

on disqualifying the appellant's tender for an innocent omission, the tender committee acted unreasonably. Its decision in this regard was based on the committee's error in thinking that the omission amounted to a failure to comply with a condition envisaged in the Preferential Procurement Act. Consequently, its decision was 'materially influenced by an error of law' contemplated in s 6 (2) (d) of PAJA, one of the grounds of review relied on by the appellant. Therefore, the tender process followed by the department was inconsistent with PAJA. In the light of this finding, it is not necessary, in my view, to consider other grounds raised by the appellant. Suffice it to say that they were all based on PAJA and it appears that the appellant could have succeeded on more than one ground."

[16] In the matter of **Dr. J.S Moroka Municipality and Others v Betram (Pty) Limited and Another** 2014 (1) All SA 545 (SCA) (**Moroka case**) the following is stated in paragraphs [16] to [18]:

"[16] In these circumstances it is clear that there was no discretion to condone a failure to comply with the prescribed minimum prerequisite of a valid and original tax clearance certificate. That being so, the tender submitted by the first respondent was not an 'acceptable tender' as envisaged by the Procurement Act and did not pass the so-called 'threshold requirement' to allow it to be considered and evaluated. Indeed, its acceptance would have been invalid and liable to be set aside - as was held by this court in Sapela Electronics. On this basis the appellants were perfectly entitled to disqualify the first respondent's tender as they did.

[17] *As a last line of defence, so to speak, the first respondent argued in the alternative that for reasons of public policy its tender ought not to have been disqualified but should have been evaluated. This argument was founded essentially on the fact that it was lower than that of Eldocrete and the statement in Millennium Waste Management that:*

> *'(O)ur law permits condonation of non-compliance with peremptory requirements in cases where condonation is not incompatible with public interest and if such condonation is granted by the body in whose favour the provision was enacted (SA Eagle Insurance Co Ltd v Bavuma)'*

[18] *The first respondent's argument on this issue faces a fundamental difficulty. The decision in SA Eagle Insurance Co Ltd v Bavuma, referred to as authority for the proposition in the dictum in Millennium Waste Management quoted above that condonation can be granted where it is not inconsistent with public policy, related to a statutory provision enacted for the specific benefit of an individual or body. It was held that such a benefit may be waived by that individual or body provided that no public interests were affected thereby and that it was not open to another person, whom the statute was not intended to benefit, to insist that the provision be observed. In my view, that does not support the proposition that, if it is not inconsistent with public policy, non-compliance with a peremptory requirement of a tender can be condoned so that a tender*

which is 'unacceptable' as envisaged by the Procurement Act may be accepted. Not only is such a proposition inconsistent with the decision of this court in Pepper Bay - a decision regularly followed and approved, including in Millennium Waste Management - but it also offends the principle of legality, as emphasised by this court in Sapela Electronics. Accordingly, in my respectful view, insofar as the judgment in Millennium Waste Management may be construed as accepting that a failure to comply with the peremptory requirement of a tender may be condoned by a municipal functionary who is of the view that it would be in the public interest for such tender to be accepted, it should be regarded as incorrect."

[17] In **Superintendent-General North West Department of Education and Another v African Paper Products (Pty) Ltd and Others** (M 282/14) [2014] ZANWHC 29 (**African Paper case**), the following is stated in paragraphs [96] to [100]:-

"[96] Furthermore, as correctly submitted by the third respondent, because of the inherent, material, substantive and procedural defects within the tender process, the fairness of the process has been ruptured irredeemably. This means that the process has to be restarted and all those that tendered need to be afforded a fair and proper opportunity to put in new bids under a revised and clarified invitation to tender.

[97] During the submissions the first respondent urged this Court to use its discretion not to set aside the tender award even if it finds that it was flawed. The proposition is

supported by the second respondent, albeit on different reasons, being that it had already manufactured all the stationery and it is ready to be used. Indeed the Court enjoys the discretion to decline to set aside the award of the tender on the ground of practical exigency. See: ***AllPay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others 2014 (4) SA 179 (CC) paragraph 30-31*** *(herein after referred to as* ***ALLPAY 2).***

[98] However, this discretion does not arise where the non-compliance relates to requirements enacted in the public interest, such as BBBEE requirements, the duty to provide accurate information and the like -See: ***paragraph 18*** *of the case of* ***Dr J.S. Moroka Municipality*** *quoted above.*

[99] Permitting or condoning non-compliance in such circumstances would offend the principle of legality. See: ***Moroka*** *supra.*

[100] I echo the same sentiments in this matter. Any prejudice to the first and second respondents which is alleged cannot and should not usurp the right and duty of the Department to ensure it adheres to a lawful procurement process, the rights of other tenderers and the overriding public interest in a lawful and transparent tender process. Courts must provide effective relief for infringements of Constitutional rights."

[18] In **Consensus Computing (Pty) Ltd v Rustenburg Local Municipality and Another**, Case No UM 120/2018 (**Consensus case**), the following is stated in paragraphs [16] to [19]:

> *"[16] In **Dr JS Moroka Municipality and Others v Betram (Ply) Limited and Another**", the appellant had submitted a copy of a tax clearance certificate contrary to the requirement stipulated in the Preferential Procurement Regulations which provides that, no contract may be awarded to a person who failed to submit an original tax clearance. The Court held that one of the specific provisions in the tender invitation and the various documents which included the bid instructions and the standard terms and conditions of the bid, were peremptory. The requirement was that: all bids "validly submitted would be taken into consideration". The court held the following in respect of this clause:*
>
> > *"[15] ... The clause relates to bids 'validly submitted' and, as is indeed stated in clause 2.5.5 of the standard terms and conditions of bid, only tenders submitted 'in the prescribed manner may be accepted as valid bids'. That clause merely states the obvious. A bid that does not satisfy the necessary prescribed minimum qualifying requirements simply cannot be viewed as a bid 'validly submitted'. Moreover, the tender process consists of various stages: first, examination of all bids received, at which stage those which do not comply with the prescribed, minimum standards are liable to be rejected as invalid; second, the evaluation*

of all bids 'validly submitted' as prescribed in clause 3; and third, a decision on which of the validly submitted bids should be accepted. The fact that all bids validly submitted are to be taken into consideration as set out in clause 3.1 affords no discretion to condone and take into account bids not validly submitted but disqualified.

[16] In these circumstances it is clear that there was no discretion to condone a failure to comply with the prescribed minimum prerequisite of a valid and original tax clearance certificate. That being so, the tender submitted by the first respondent was not an 'acceptable tender' as envisaged by the Procurement Act and did not pass the so-called 'threshold requirement' to allow it to be considered and evaluated. Indeed, its acceptance would have been invalid and liable to be set aside - as was held by this court in Sapela Electronics. On this basis the appellants were perfectly entitled to disqualify the first respondent's tender as they did."(Footnote excluded).

[17] The case of ***Dr JS Moroka*** *supra overruled* ***Millennium Waste Management (Pty) Ltd v Chairperson of the Tender Board: Limpopo Province and Others****, where the court held the view that administrative bodies have the power to condone non-compliance with the threshold*

requirements if it is in the public interest to do so. The material facts were that the appellant has inadvertently omitted to sign a fully completed MBD 4, which he had initialed on each page. The Court held the view that failure to sign the form was occasioned by an oversight. It however held that, in determining whether non-compliance rendered the appellant's tender unacceptable, regard must also be had to the purpose of the declaration of interest in relation to the tender process in question.

[18] In ***Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others****, the court did not adopt the legal approach applied by the Supreme Court of Appeal in* ***Allpay Consolidated Investment Holdings (Pty) Ltd and Others v SASSA****, that inconsequential irregularities may not affect the outcome of the decision and stated the following in paragraphs [22], [24] and [27].*

"Proper legal approach

[22] This judgment holds that:

(a) The suggestion that "inconsequential irregularities" are of no moment conflates the test for irregularities and their import; hence an assessment of the fairness and lawfulness of the procurement process must be independent of the outcome of the tender process.

(b) The materiality of compliance with legal requirements depends on the extent to which the purpose of the requirements is attained.

(c) The constitutional and legislative procurement framework entails supply chain management prescripts that are legally binding.

(d) The fairness and lawfulness of the procurement process must be assessed in terms of the provisions of the Promotion of Administrative Justice Act (PAJA).

(e) Black economic empowerment generally requires substantive participation in the management and running of any enterprise.

(f) The remedy stage is where appropriate consideration must be given to the public interest in the consequences of setting the procurement process aside.

(a) Fairness and lawfulness independent of result

[24] This approach to irregularities seems detrimental to important aspects of the procurement process. First, it undermines the role procedural requirements play in ensuring even treatment of all bidders. Second, it overlooks that the purpose of a fair process is to ensure the best outcome; the two cannot be

severed. On the approach of the Supreme Court of Appeal, procedural requirements are not considered on their own merits, but instead through the lens of the final outcome. This conflates the different and separate questions of unlawfulness and remedy. If the process leading to the bid's success was compromised, it cannot be known with certainty what course the process might have taken had procedural requirements been properly observed.

[27] There is a further consideration. As Corruption Watch explained, with reference to international authority and experience, deviations from fair process may themselves all too often be symptoms of corruption or malfeasance in the process. In other words, an unfair process may betoken a deliberately skewed process. Hence insistence on compliance with process formalities has a three-fold purpose: ***(a) it ensures fairness to participants in the bid process; (b) it enhances the likelihood of efficiency and optimality in the outcome; and (c) it serves as a guardian against a process skewed by corrupt influences."*** *(Emphasis added)*

See also ***Chairperson: Standing Tender Committee and Others v HE Sapela Electronics (Pty) Ltd Others*** *and* ***VE Retculation (Pty Ltd and***

Others v Mosselbay Municipality & Others *and the unreported case of* ***Superintendent-General: North West Department of Education and Another v African Paper Products Ltd and Others****".*

Analysis

[19] In the present case, the tender document clearly states the following: "NB FAILURE TO ADHERE TO THE BELOW MENTIONED POINTS WILL INVALIDATE THE TENDER AND RESULT IN DISQUALIFICATION". Visser noted the requirements on the form accompanying the tender document. It is within the power of the Municipality, and not the Court, to decide on the prerequisites for a valid tender. See ***Dr JS Moroka Municipality*** *supra at para [10], where the Court held that:*

> *"… Essentially it was for the municipality, and not the court, to decide what should be a prerequisite for a valid tender, and a failure to comply with prescribed conditions with result in a tender being disqualified as acceptable tender under (sic) the by the Procurement Act unless those conditions are immaterial, unreasonable or unconstitutional"*

[19] Mr. Laubscher during argument submitted that proper context must be given to the **Millennium** case. This is what he termed to be the elephant in the room. The **Millennium** case was dealt with extensively in the **Moroka** case and if not overruled, then surely qualified. Particular emphasis is placed on paragraph [18] thereof in which it is pertinently stated that an interpretation of the **Millennium** case to mean that it is open to an entity to condone the non-compliance with peremptory requirements of tender proceedings and that an unacceptable tender

may be accepted, offend the principle of legality. The learned Judge of Appeal concluded:

> *"Accordingly, in my respectful view, insofar as the judgment in Millennium Waste Management may be construed as accepting that a failure to comply with the peremptory requirements of a tender may be condoned by a municipal functionary who is of the view that it would be in the public interest for such tender to be accepted, it should be regarded as incorrect"*

I am in full agreement with this *dictum* and find it quite apposite in this case at hand.

The merits

[20] I now turn to deal with the reasons why the tender of the applicant was found to be non-responsive. It is expressly stated in the tender document that: **"FAILURE TO COMPLETE ALL BLANK SPACES ON THIS FORM OR ATTEND TO OTHER DETAILS MENTIONED THEREIN WILL RENDER THE BID/TENDER LIABLE TO REJECTION"**

(i) TENDER FORMS MBD 4 AND MBD 5 WERE COMPLETED CONTRARY TO THE PRESCRIBED MANNER.

[21] These forms comprises of questions in a questionnaire which must be answered either in the affirmative or in the negative. Next to each question appears the answers **YES** or **NO**. Only one of these two must be indicated as an answer. In the applicant's forms, the **YES** was scratched through and the **NO** encircled. The 1st respondent submitted that this was done contrary to the prescripts of the tender document. Mr. Stoop contended that there can be no uncertainty about the answer that was provided to each question. For example he said the **YES**

was deleted and the **NO** encircled to prove that the answer is **NO**. This is quite obvious and indeed a noble attempt to explain what the intention of the applicant was when the form was completed. However, only one of the answers either **YES** or **NO** should have been deleted. The applicant obviously did not comply with the prescripts of the tender document to keep the scratches on the tender form to a minimum.

(ii) CURRENT MUNICIPAL RATES AND TAXES WERE NOT ATTACHED.

[22] The closing date for the tender was 07th May 2018. Current municipal rates and taxes statements means statements not older than three (3) months [90 days] in terms of the provisions of Regulation 38 (1) (d) (i) of the Supply Chain Management Regulations, 2005 must have been provided. The statement of the director Mr. Nel was dated 16 February 2018. This was within the three (3) months [90 day] period like the statements of all other directors. This in itself was not a valid reason to exclude the tender of the applicant.

(iii) MUNICIPAL ACCOUNTS OF THE APPLICANT'S HEAD OFFICE WAS NOT ATTACHED.

[23] With regard to this aspect, it was contended by Mr. Stoop that the tender document is confusing or ambiguous. The tender document states: -

> *"Current municipal rates and taxes statement for the company's address must be attached; or*
>
> - *If the rates and taxes account are not in the names of the company, the attached municipal rates statement must be accompanied by the following:*

- ❖ *An original affidavit from the property owner whose names are reflecting on the municipal rates and taxes account, to confirm that the director resides, in their property*

- *Valid lease agreement of the company (showing lease period)*

- *An original letter from a tribal authority not older than three (3) months indicating that the company is operating on tribal land."*

[24] Mr. Stoop further submitted that the purpose of the above requirement, is to ensure compliance with the provisions of Regulation 38 (1) (d) (i) of the SCM Regulations and to enable the municipality (1st respondent) to ensure that the company's municipal rates and taxes account is not in arrears for a period exceeding 3 months. The bulleted paragraphs in the tender document are preceded by the word **'or'**. That would suggest that, unless the company attaches a current municipal rates and taxes statement for its address (presumably, this refers to its principal place of business), the company has to provide the documentation referred to in the bulleted paragraphs. It is not clear from the tender documentation if a company has to comply with the provisions of each bulleted paragraph or with only the bulleted paragraph that may be relevant.

[25] It was submitted by Mr. Stoop that the tender documentation should be interpreted in the context of the proper legal matrix and in particular the provisions of Regulation 38 (1) (d) (i) and that properly interpreted:

(a) a tenderer who is a company has to attach the current municipal rates and taxes account in respect of its principal place of business;

or

(b) if the property is not registered in the name of the company (and the rates and taxes account is not in its name), to provide the municipality with documentation set out in either of the three alternatives that are indicated in the bulleted paragraphs.

[26] Mr. Stoop submitted that the applicant did attach a valid lease agreement and therefore complied with the conditions in the tender documentation. The crux of the matter still remain that the applicant failed to attach to the tender documents the municipal accounts of its head office in Rustenburg. It was not sufficient to attach only the lease agreement. The municipal account of the applicant's head office should have been attached to the tender document. If the municipal account is not in the name of the company (in this case the applicant) then an original affidavit from the property owner whose names are reflected on the municipal rates and taxes account should be attached. This was not done.

(iv) COPIES OF IDENTITY DOCUMENTS OF THE DIRECTORS WERE ALSO NOT ATTACHED.

[27] There is no dispute with regards to this aspect. Copies of the identity documents of the directors were not attached. Mr. Stoop contended that one should look at the document in its totality, especially since the applicant is a company. A Certificate of Incorporation of the Company; a Certificate Confirming the Directors; a Certificate of Change of Name and a Certificate of Change of Registered Address of the applicant were indeed provided. If the purpose of copies of the identity documents of the directors are required, the documents mentioned clearly and sufficiently identify the directors of the applicant. This is however not what was required in terms of the tender requirements.

[28] Mr. Stoop submitted that copies of the identity document of the directors of the applicant are not necessary for the 1st respondent to determine the identity of the

applicant. He submitted that insistence on copies of the directors of the applicant is unreasonable. I do not agree. It is vitally important that the directors of the applicant provide proof of their identity. I also do not think that the insistence on copies of the identity documents of the directors of the applicant is an attempt to elevate an irrelevant requirement and cloth it with the status of materiality. The applicant did not comply with this requirement.

(v) THE RESOLUTION OF THE APPLICANT WAS NOT ATTACHED.

[29] There is a section on a particular page in the bid/tender document that deals with signatory authorization. This must be completed by the bidder and deals with the resolution taken by the company. As such the company authorize a person to enter into a contract on its behalf. Two tramlines were drawn diagonally across the face of this document with an inscription between the tramlines **"see resolution attached"**. What this mean in simple terms is that this document is not completed because the applicant company has taken a resolution with regard to who is authorized to sign and contract on its behalf. This is indeed crucial and vitally important.

[30] Mr. Stoop drew an analogy with the **Millennium** case in which there was an oversight to sign an authority form. With due respect, the oversight to sign at a certain place on a form is distinguishable different from not completing an authority form. It was intimated with reference to a resolution that has been attached, that it is not necessary to complete this part of the form in view of the resolution taken and attached and then fail to attach the resolution. This in my view is fatal. The effect of this is that there is no proof that the person who completed the tender document was authorized to do so on behalf of the applicant. This is not simply an oversight and it cannot confidently be argued that it is immaterial, unreasonable or unconstitutional.

[31] Although the designation of the person is stated to be that of the Chief Executive Officer (CEO) of the applicant, it does not follow axiomatic that he as CEO was authorized to contract/bid on behalf of the applicant. The contention that the CEO's failure to sign the resolution is of no consequence doesn't hold any water. Absent proof of authority in the form of a resolution nullify the tender on behalf of the applicant. This is the most important aspect of non-compliance with the prescripts of the tender/bid application. This makes the tender non-responsive or not an acceptable tender.

[32] The tender terms and conditions expressly state that **"NB! FAILURE TO ADHERE TO THE BELOW MENTIONED POINTS WILL INVALIDATE THE TENDER AND RESULT IN DISQUALIFICATION."** The signature authorization form states **"PLEASE NOTE: FAILURE TO COMPLETE ALL BLANK SPACES ON THIS FORM OR ATTEND TO OTHER DETAILS MENTIONED THEREIN WILL RENDER THE BID/TENDER LIABLE TO REJECTION."** This is indeed a sound warning. The fact that the applicant did not comply with this instruction justify the rejection or non-evaluation of the tender. If the 1st respondent were to condone the non-compliance of the peremptory requirements of the tender, it would itself be open to a review.

[33] This Court had to deal with a similar situation in the **Consensus Computing** case referred to, *supra*. In that case the signatory form was incomplete. Leeuw JP in that judgment states the following:

> *"[28] The second reason for disqualifying the applicant's bid is that the signatory form is incomplete. Visser completed the signatory resolution wherein he states that a resolution was taken at a meeting of directors held on the 27' day of November 2017. He attests that he is authorized to sign all Aocuments on behalf of the company. He omitted to mention the name of the other director but instead wrote*

"N/A" on the form. There is an endorsement at the bottom of this application that:" PLEASE NOTE: Failure to complete all blank spaces on this form or attend to other details mentioned therein will render the bid/tender liable to rejection." It is also prescribed as a requirement, under "Authority of Signatory and sign Form that "(Please attach such copy where instructed)" which requirement was noted by Visser.

[29] The copy of the resolution was not attached to the form. However, Busisiwe Norah Molete, who is a co-director at Consensus deposed to a supporting affidavit wherein she states that from 26 November 2017 to 31 January 2018 she was unable to report for work due to a heart operation. She further states that during that period, she delegated her authority to sign documents on behalf of Consensus to Visser. It is important to note that this information was not available when the Bid Evaluation Committee considered the documents of all bidders.

[30] Counsel for the applicant argued that Visser committed a patent error and that the purpose of this requirement is to ensure that the person who signed is authorized. He further submits that there is no requirement for a resolution to be filed.

[31] If indeed the applicant is aware that the purpose of this requirement is to ensure that Visser was authorized to sign the tender documents on behalf of the company, it is strange that there is no explanation from Visser as to why in this case, it was not done. Visser's argument overlooks

> *the fact that, even though it is known that Consensus has two directors, it does not necessarily mean that for the purpose of the bid process, the other director has authorized him to bid on behalf of Consensus. Furthermore, Visser does not explain why he did not file the supporting affidavit of Ms Molefe when he filed the bid papers. Once again, there is no allegation that the requirement in this threshold in unconstitutional, immaterial or unreasonable. Visser omitted to comply with this requirement at his own peril."*

[34] I find this *dictum* quite apposite in this case but this case is quite distinguishable. In the **Consensus Computing** case an attempt was at least made by Visser to complete the said signatory form unlike in the present case where no attempt was made whatsoever to complete the said form. To reiterate, the form was cancelled by the drawing of two parallel tramlines diagonally across the face of the document with the words written or inscripted between the tramlines **"see resolution attached."** The argument presented by Mr. Stoop may well have fitted better in the **Consensus Computing** case than in this matter. No resolution equates to no authority to bind the applicant as a company. To reiterate, this is fatal to the bid/tender of the applicant.

(vi) OTHER ASPECTS.

[35] Some other aspects were also raised by Mr. Stoop in an attempt to illustrate that the 1st Respondent's decision was taken for ulterior purposes or motives and does not accord with the legislative matrix which governs the awarding of tenders. Amongst others it was mentioned that the contract awarded to the 2nd respondent was for a three (3) year period and not for a five (5) year period as stipulated by the tender document. It is clear from the tender document that

bids/tenders were invited for "the financial years 01 July 2019 to 30 June 2024 or for a period not exceeding five (5) years".

[36] Mr. Stoop contended that the shorter period of three (3) years most definitely influence the price of the contract because if it is for a shorter period, the price will be less because lesser expenses would be incurred to finalize the contract. I do not agree. The sooner the contract is completed the better and it matters not insofar as the price is concerned. It is to the advantage of the contractor if he/she/it can complete the contract in a shorter period of time. This put paid to the argument of Mr. Stoop with regard to the period of contract.

[37] Speaking of price, Mr. Stoop pointed out that the applicant tendered for R6 000 000.00 whilst the 2nd respondent tendered for R8 383 500.00. Although the applicant's tender is more than R2 million less, it was not considered. It does not follow automatically that the lowest tender must be accepted, especially when it is non-responsive or an unacceptable tender because of the failure to comply with the prescripts of the municipality. It is also quite apparent that the price tendered by the 2nd respondent was not adjusted. This was found to be a reasonable and acceptable price by the 1st respondent. The 1st respondent cannot be faulted in this regard.

Conclusion

[38] I find that the first respondent was correct in concluding that the applicant did not present an acceptable tender. The tender of the applicant was correctly found to be non-responsive for the aforementioned reasons. The application stands to be dismissed. There is also no plausible reason why costs should not follow the result and be awarded in favour of the first respondent. Mr. Masilo on behalf of the 2nd respondent submitted that because of the aspersions casted on the 2nd respondent by the applicant, they were forced to come to court and explain their position although they did not adjudicate the awarding of the tender and therefore

are not in the 'main fray' of this matter. Mr. Stoop submitted that although this was the case initially, the 2nd respondent was made aware of the fact that the 1st respondent supplied an incomplete and incorrect record which prompted the applicant to cast the aspersions as it did. However, it was not necessary for the 2nd respondent to be before this Court because the 2nd respondent was made aware of this timeously. Costs with regard to the 2nd respondent should therefore not be placed at the door of the applicant. It is quite correct as contended by Mr. Stoop that after the 2nd respondent was alerted to the fact that there is no *lis* between the applicant and the 2nd respondent, it should have seized the further opposition and consequently further preparation for the hearing of this matter. The 2nd respondent is therefore not entitled to be awarded the costs of this application.

Order:

[39] Consequently, the following order is made:

(i) The application is dismissed.

(ii) The applicant is ordered to pay the costs of the 1st Respondent with regard to this application.

(iii) No costs order is made with regard to the 2nd Respondent.

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R D HENDRICKS
JUDGE OF THE HIGH COURT,
NORTH WEST DIVISION, MAHIKENG