

**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

CASE NO.: 20263/2021

In the matter between:

**THE QUALITY PLANT HIRE CC / EXPECTRA
388 CC JOINT VENTURE**

First Applicant

QUALITY PLANT HIRE CC

Second Applicant

EXPECTRA 388 CC

Third Applicant

And

**THE MEC FOR THE DEPARTMENT: TRANSPORT
& PUBLIC WORKS, WESTERN CAPE
GOVERNMENT**

First Respondent

**THE MEC FOR THE DEPARTMENT: TREASURY,
WESTERN CAPE GOVERNMENT**

Second Respondent

THE MINISTER OF FINANCE

Third Respondent

IMVULA ROADS & CIVILS (PTY) LTD

Fourth Respondent

ROYAL HASKONING DHV (PTY) LTD

Fifth Respondent

Date of hearing: 30 January 2023

Date of Judgment: 20 June 2023 electronically delivered to counsel

JUDGMENT

HENNEY, J

Introduction:

[1] The First respondent ("the Department") published an invitation to tender for the periodic maintenance of a section of the Du Tait's Kloof Pass. In response to this invitation, the first applicant and the fourth respondent submitted tenders. During the bidding process, the second and third applicants entered their bid as a joint venture. They specifically concluded the Joint Venture Agreement for the purpose of executing the above-mentioned project under contract No C1152. The signed version of the applicants' agreement was included in the bid submitted by them in respect of the project.

[2] On 17 September 2021 correspondence was received from the fifth respondent, who was the first respondent's duly appointed agent on the project. In this letter, clarification was requested in terms of clause C.2.1.17 of the tender data of the applicants' tender. Clarification was specifically sought in respect of the construction programme and the construction equipment.

[3] On 2 November 2021, the applicants received a letter from the Department wherein they were advised that they were not successful in their bid and the contract had been awarded to the fourth respondent in the tender amount of R96 200 000. Even though the applicants' tender was R5 million less than the tender of the fourth respondent.

[4] On 15 November 2021, after a clarification was requested from the first respondent regarding the unsuccessful tender, the applicants were advised that it was unsuccessful due to the following reasons: *'As per the Conditions of Contract clause C. 2.13.4 the Joint Venture Agreement document was not authenticated by a Commissioner of oaths/Public notary or other official deputed to witness sworn statements. The tenderer has failed to fulfill the requirements specifically highlighted and listed in clause C2.13.4 and the tender offer is therefore invalid in terms of this clause.'*

[5] Aggrieved by this decision, the applicants in the course of those proceedings, contended that this requirement was not material and stated that it was overlooked in compiling the bid; and that the non-compliance was merely an innocent omission. They subsequently launched urgent proceedings (Part A) to interdict the rollout of the tender and on 9 December 2021, this court granted the interdict. Only the first respondent opposed the application. Despite the Department applying for leave to appeal, it was not granted and the Department remains interdicted from repairing this road.

[6] The relief sought by the applicants are as follows:

- 1) That the decision of the Department to award the contract to Imvula Roads and Civil (Pty) Ltd be reviewed and set aside;
- 2) That the award be declared null and void ab initio and set aside;
- 3) That the decision to award the contract to Imvula is replaced by a decision to award the contract to the Joint Venture, in the alternative, that the decision to award the contract be referred back to the Department; and
- 4) That the MEC is to pay the cost of the application, such costs to include the cost consequent upon the employment of two counsel.

The Applicants' Case:

[7] The applicants submit that when the Department disqualified the tender of the applicants on the basis that it was non-responsive, it clearly failed to consider that the Joint Venture Agreement was the original and it could not be 'authenticated'.

[8] The applicants further submit that had the applicants not been disqualified, the tender in all likelihood would have been awarded to it, as it would have been the highest scoring tenderer. The tendered price of the applicants was R5 million less than that which the fourth respondent had tendered. The precise wording of the

tender requirement under clause C2.13.4 which the Department alleges the applicants failed to comply with reads as follows:

'Sign the original and all copies of the tender offered where required in terms of the tender data. The tender shall be signed by a person duly authorised to do so. The employer will hold authorised signatories liable on behalf of the tenderer. Signatories for tenderers proposing the contract as Joint Ventures shall state which of the signatures is the lead partner whom the employer shall hold liable for the purposes of the tender offer. Tenders submitted by Joint Ventures by two or more firms shall be accompanied by the document of formation of the Joint Venture, authenticated by a Notary public or other official deputed to witness sworn statements, in which defined precisely the conditions under which the Joint Venture will function, its period of duration, the persons authorised to represent and obligated, the participation of several firms forming the Joint Venture, and any other information necessary to permit a full appraisal of its functioning. The document of formation of the Joint Venture shall state explicitly what the percentage participation in the Joint Venture will be of every partner involved.'

[9] The applicants submit that James Etienne Tolmay ("Tolmay") deposed a confirmatory affidavit that was attached to the supplementary founding affidavit which states that he was the duly authorized representative of the applicants. Tolmay states that he signed the tender of the Joint Venture. And the Joint Venture Agreement included in the tender document of the Joint Venture, was the original agreement and the document was personally signed by him.

[10] According to the submissions of the applicants, logic dictates that an original document cannot be authenticated, only a copy can be authenticated. As a result of the fact that the original Joint Venture Agreement was submitted as part of the tender document, there was clearly no need to authenticate the original document.

[11] The applicants submit that on a proper interpretation of clause C2.13.4 it would only be necessary to authenticate a Joint Venture Agreement if the agreement was a copy of the original. In this regard, they state that 'authentication' as defined in

the Collins English Dictionary as follows: *'To establish as genuine or valid or give authority or legal validity'*.

[12] According to the applicants, in a legal context it normally means to verify a document to be genuine, which is often done by verifying or *'authenticating'* the signature on a document. They further submit that though not applicable in these circumstances, rule 63 of the Uniform Rules of Court in dealing with whether a document has been sufficiently authenticated, it has been said, with the reference to case law¹, that:

'A document authenticated in accordance with the Rules furnishes, on its mere production from proper custody, prima facie proof of itself, and that it should be in a condition to do this, is the true purpose and the effect of such authentication'.

[13] The applicants further submits that the ultimate purpose of authentication is to verify that a document is genuine. Where the original Joint Venture Agreement was included in the tender, it would be farcical to expect the applicants to also include an authenticated copy thereof; they submit that an original is the best possible evidence of the existence of the agreement.

[14] They further submit that in the answering affidavit of the Department that was delivered in respect of Part A of the notice of motion, it was specifically alleged that the Joint Venture failed to submit a *'commissioned copy of the Joint Venture Agreement'*. They submit what the Department completely ignored is the fact that the original Joint Venture Agreement was included in the tender.

[15] The applicants contend that in dealing with the relevant applicable principles regarding interpretation of documents, it is first necessary to identify the specific issues that must be considered. If regard is to be had to the express provisions of clause C2.13.4, the applicants contends that the following questions must be answered:

¹ *Ex Parte Holmes & Co (Pty) Ltd* 1939 NPD 301 at 307 cited with approval in *Friend v Friend* 1962 (4) SA 115 (E) at 116 D-E; *Chopra V Sparks Cinemas (Pty) Ltd* 1973 (2) SA 352 (D) at 358 C

- a) was a Joint Venture entitled to include an original Joint Venture Agreement instead of a copy?
- b) is the requirement to authenticate the Joint Venture Agreement still applicable if it is originally submitted?

[16] They submit that the only proper way to interpret clause C2.13.4 is that the requirement to authenticate the Joint Venture Agreement would only be applicable if a copy of the Joint Venture Agreement was submitted as part of the tender document; and that it would be absurd if it was impermissible to include an original agreement. In this regard, they rely on the off quoted decision of *Natal Joint Municipal Pension Fund v Endumeni Municipality*².

[17] Based on their reliance on this decision, as well as that of the Constitutional Court in the case of *Chisuse v Director- General of Home Affairs*³ they submit where the court should, in interpreting this provision, undertake a unitary exercise, which means that the interpretation is to be approached holistically, simultaneously considering the text, context and purpose. They submit that it would be preposterous if it is contended by the Department that the only manner in which the aforesaid requirements could be complied with, was if an authenticated copy (instead of the original) was included in the tender. This provision was clearly only applicable if a tenderer included the copy of the Joint Venture Agreement in the tender application.

[18] According to them, if it indeed was a requirement that only an authenticated copy could be included in the tender, instead of the original, then it had to be stated in clear and unambiguous terms. In cases where unclear directions in a tender was found to be present, they submit the court in the case of *All Pay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer, South African Social Security Agency and Others*⁴ held:

² (2012) ZASCA13; 2012(4) SA 593(SCA)

³ (2020) ZACC 20; 2020(6) SA 14 (CC); 2020(10) BCLR 1173(CC) at para 52

⁴ 2014(1) SA 604 (CC) at para 92("All Pay 1")

'The purpose of a tender is not to reward bidders who are clever enough to decipher unclear directions. It is to elicit the best solution through a process that is fair, equitable, transparent, cost effective and competitive...'

[19] According to the applicants, it has not been disputed by the Department that the Joint Venture Agreement included in the tender was indeed the original. In this regard the Department has elected not to respond to the allegations in the supplementary affidavit. They submit that the Department committed a serious illegality when it decided to disqualify the applicants because it included the original Joint Venture agreement in its tender instead of an authenticated copy.

[20] They further submit that the applicants have a right to fair administrative action in terms of the Constitution and that procurement occurs in a lawful manner that complies with the requirements of section 217 of the Constitution.

[21] The applicants further submit the decision be reviewed and set aside and falls squarely within the Promotion of Administrative Justice Act 3 of 2000 ("the PAJA"). They specifically rely on the following grounds in terms of PAJA:

- 1) section 6(2)(d), because the action was materially influenced by an error of law;
- 2) section 6(2)(e)(ii), the action was taken because irrelevant considerations were taken into account or relevant considerations were not considered;
- 3) section 6(2)(f)(ii)(aa), the action itself is not rationally connected to the purpose for which it was taken;
- 4) section 6(2)(h), the exercise of the power or the performance of the function authorised by the empowering provision, in pursuance of which the administrative action was purportedly taken, is so unreasonable that no reasonable person could have so exercised the power or perform the function;

- 5) section 6 (2)(i), the action is otherwise unconstitutional or unlawful;
- 6) section 6 (2) (c), the action taken was procedurally unfair;
- 7) section 6 (2) (a) (ii) the administrative decision was not authorised by the empowering provision;

[22] Regarding the question as to what an appropriate remedy would be, the applicant submits but for the disqualification of the applicants, it would have been the highest scoring tenderer, therefore if the applicants were not disqualified it is a foregone conclusion that the applicants would have been appointed.

[23] In addition to this, the Department repeatedly stated that it is of the utmost importance that the repairs to Du Tait's Kloof pass be effected on an urgent basis. They submit that to commence with a new tender process or to refer the matter back for reconsideration by the Department would undoubtedly cause a further delay.

[24] They therefore seek a substitution order as contemplated in subsection 8(1)(c)(ii)(aa) of PAJA. In this regard they submit on the basis of the decision of *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd and Another*⁵, where it was emphasised that where the court is in a good position as the decision taker and the decision would be a foregone conclusion, then it would indeed constitute exceptional circumstances to justify the granting of such an order. In this regard, the applicants contend the following should be regarded as exceptional circumstances:

- 1) the fact that barring the disqualification, the applicants would have been awarded the tender was a foregone conclusion;
- 2) the tender of the applicants was significantly cheaper than that of the fourth respondent who ultimately was awarded the tender;

⁵ 2015 (5) SA 245 (CC)

3) Section 2 (1)(f) of the Preferential Procurement Policy Framework Act 5 of 2000 in peremptory terms provides that a contract has to be awarded to the tenderer who scores the highest points, unless objective criteria in addition to those contemplated in paragraph (d) to (e) justify the award to another tenderer;

4) regulation 11 (2) of the Preferential Procurement Regulations, 2017 requires that such objective criteria must be stipulated in the tender documents. No such objective criteria were stipulated in the tender documents;

5) to refer the matter back to the first respondent would cause an unnecessary delay.

[25] The applicants further submitted in addition to the fact that the applicants would undoubtedly have been the highest scoring tenderer, the Department itself has advanced reasons why there should not be any further delay with the implementation of the tender. It was specifically alleged that the relevant roads require urgent maintenance and that any referral back to the MEC would simply cause an unnecessary delay. In this regard they refer the court to the decision of *BKS Consortium v Mayor, Buffalo City Metropolitan Municipality & Others*⁶, where it was found that the disqualification of a JV from a tender should not have occurred and that had such disqualification not occurred, the applicants would have been awarded the contract. In that particular case, the court set aside the tender award and substituted the applicant as the successful bidder for the tender.

[26] The applicants submit that the facts before court in this particular case is similar to the facts in the *BKS Consortium* case; that they have shown the exceptional circumstances exist that warrant the court substituting the decision of the first respondent.

[27] The Department opposes the relief sought on the basis that:

⁶ (2013) 4 ALL SA 461 (ECG)

- 1) the Construction Industry Development Board (CIDB's) Standard for Uniformity in Engineering and Construction Works Contracts empowers the Department to require tenderers who bid as a Joint Venture to submit a notarised Joint Venture Agreement, and that this was a material and mandatory condition of Tender.
- 2) as the applicants' failure to comply with a material and mandatory term of the tender did not constitute an 'acceptable tender' for the purposes of Section 1 of the Preferential Procurement Policy Framework Act 5 of 2000 (the PPPFA)", the Department was obliged to deem their bid to be non-responsive;
- 3) the Department acted in a procedurally fair manner and the decision to exclude the applicants is in no way contrary to any provision of PAJA or the principle of legality;
- 4) the applicants attempt to obfuscate matters by claiming that the authentication of a document equates the certification of a copy of a document as a true copy by notary public or Commissioner of oaths is without merit;
- 5) the applicants neither challenged the lawfulness of item C.2. 13.4 of the Construction Industry Development Board's Standards for Uniformity in Engineering and Construction Works Contracts which empowers the Department to stipulate that the agreements be authenticated, nor the lawfulness of the decision taken by the Department to require such authentication as a tender condition;
- 6) substitution in terms of Section 8(1) (c) (ii) of PAJA is not warranted, given that the applicants alleged improper conduct on mala tides and even if the applicants bid was not deemed non-responsive, they would not have been awarded the contract as it only scored the second highest points, due to their B-BBEE scoring.

[28] The Department submits that the applicants in their supplementary founding affidavit no longer claim that their non-compliance was due to an 'innocent omission'. The Department submits instead, and notwithstanding that this change was not occasioned or justified by any information contained in the Rule 53 record, the applicants claim that they did not comply as the original Joint Venture Agreement was submitted and that there was therefore no need for it to be authenticated.

[29] The Department submits that the Construction Industry Development Board's Standards for Uniformity in Engineering and Construction Works Contracts ("the SFU") empowers the Department to require that tenderers who bid as a joint venture submit a notarized joint venture agreement and the Department included this requirement as a tender condition. And given the applicants' failure to comply with the tender requirement to have the Joint Venture Agreement authenticated by a notary public or a commissioner of oaths, their bid was not an acceptable tender for the purpose of the PPPFA.

[30] According to the Department, this requirement was both a mandatory and material requirement. The Department therefore acted in a procedurally fair manner and held the applicants' bid to be non-responsive. It further contends that the applicants conceptually confuses certification of a copy of a document as a true copy by a notary public or commissioner of oaths, with the authentication of the contents of the document by such an official. It contends that the latter requires the content of the document be verified as true and correct.

[31] According to the Department, the applicants failed to challenge both the unlawfulness of C. 2. 13. 4 of the SFU which empowers it to require that a Joint Venture Agreement be authenticated by a notary public, as well as the lawfulness of the decision taken by the Department to require such authentication as a condition of tender. It submits that the decision to regard the applicants' bid as non-responsive is lawful, rational, reasonable and in fact mandatory. It also gives effect to section 217 of the Constitution, the Preferential Policy Framework Act 5 of 2000 ("the PPFA") and its Regulations and it is not contrary to PAJA in any respect.

[32] The Department submits that in terms of the PPFA which gives effect to section 217 of the Constitution provides that a procuring entity should only consider *'acceptable' tenders which in turn is defined in Section 1 as '...any tender which in all respects complies with the specifications and conditions of tender as set out in the tender document'*. The Department contends that it was obliged to reject the bid that was non-compliant with a material term.

[33] It further states that its procurement policy is subject to the provisions of the Construction Industry Development Board Act, 38 of 2000 ("the CIDB Act") and its regulations. The Construction Industry Development Board was established in terms of this Act. The CIDB Act sets out and promotes uniform and ethical standards to regulate the actions, practices and procedures of parties engaged in construction contracts, within the framework of the procurement policy of government; it further promotes the standardisation of the procurement process with regards to the construction industry. The CIDB Act initiates, promote and implement national programmes and projects aimed at the standardisation of procurement documentation, practices and procedures.

[34] In terms of these provisions the CIDB firstly enacted the SFU in 2004 to ensure uniformity in construction contracts. According to the Department the SFU, which was promulgated on 8 August 2019 in Government Gazette 42622, is the latest iteration and applicable to this tender. In terms of item T1.2.1 of the Conditions of Tender the SFU, as amended by the Department is applicable to this tender. Item 1 provides that the SFU establishes requirements for engineering and construction works aimed at bringing about standardisation and uniformity in construction contracts documentation practices and procedures. Item C.2 of the SFU under item C.2.14 stipulates that tenderers must accept that 'tender offers, which do not provide all the data or information requested completely and in the form required, may be regarded by the employer is non - responsive'. Item C.2.18.1 empowers the Department to request notarised Joint Venture Agreements and specifies that tenderers must be provide "... on request by the [Department], any other material that has a bearing on the tender offer, the tenderer's commercial position (including notarised joint venture agreements}, preferencing arrangements, or samples of materials, considered necessary by the [Department] ..."

[35] The Department submits that while the formation of joint ventures gave effect to section 217 of the Constitution and the PPFA by allowing contractors to increase their buying capacity, pool skills and further B-BBEE, there are various policy reasons that the Department requires bids by joint ventures to be accompanied by an authenticated Joint Venture Agreement. It also resulted in risks and losses for tendering authorities which are as follows:

- a) allowed for fronting by joint ventures who misrepresented the percentage participation of each party and thereby scoring higher B- BBEE points in order to gain an unfair advantage;
- b) it became more difficult for authorities to hold individual partners responsible and liable for losses;
- c) it was more difficult to accurately assess the capabilities, strengths and weaknesses of the parties or make a full appraisal of its functioning;
- d) joint ventures have split up midway through contracts for various reasons, resulting in uncompleted projects.

[36] It was for these reasons that, since approximately 2015, the Department, like any other organ of state in the national, provincial and local government spheres as well as companies, began requiring that documents be notarised or commissioned as a standard form in construction tenders and contracts. Certain precautions were also included in the Department's supply chain management policies in response to the alarming trend of fronting.

[37] One of these were the insistence that notarised or commissioned Joint Venture Agreement be included in a tender which allowed the Department to rely on the representations made therein, given that criminal sanctions may result should a misrepresentation be made in such a document. The Department submits that without being able to rely on the representations being authenticated, it and the other bidders would be severely prejudiced.

[38] In the tender documents the Department expressly amended the SFU on pain of being deemed non - responsive, required that tendering as a joint venture to submit a notarised or otherwise authenticated Joint Venture Agreement which specified the following:

- a) precisely the conditions under which the joint venture will function;
- b) its period of duration;
- c) the persons authorised to represent and obligated in it;
- d) explicitly indicate what the percentage participation in the joint venture will be of each part involved in it; and
- e) any other information necessary to permit a full appraisal of its functioning.

[39] The Department submits that the requirement of the tender in this particular case which requires that a Joint Venture Agreement be authenticated by a notary public or other official deputed to witness sworn statements, is a material and mandatory tender condition. It further submits that an acceptable tender is any tender which in all respects, complies with the specifications and conditions of tender as set out in the tender document.

[40] It further submits that non-compliance with the peremptory provision such as in this case, and where a tenderer failed to comply with such a provision, such a tender should be regarded as non-responsive. Regarding the authentication of documents by a notary public and commissioner of oaths, I will deal with these submissions of the Department later in this judgment.

[41] The Department further submits that the remedy of substitution would be wholly inappropriate, given the fact that it has a legitimate governmental purpose that bids by a Joint Venture must be accompanied by an authenticated Joint Venture

Agreement, and that the requirement is both mandatory and material. In this regard the decision of *Dr JS Moroka Municipality and Others v Betram (Pty) Ltd and another*⁷, where it was stated that unless those conditions are immaterial, unreasonable or unconstitutional, it was for the organ of state and not the court to decide what should be a prerequisite for a valid tender and a failure to comply with the prescribed conditions will result in a tender being disqualified as an 'acceptable tender'. They submit therefore that the applicants are not entitled to the relief they are seeking.

[42] According to the Department, the substitution sought is a drastic remedy, which should in terms of section 8(1) (c) of PAJA be only granted in exceptional cases and that the applicants has not made out a case for such an extraordinary remedy. This is because there have been no mala tides on the part of the officials from the Department. Furthermore, even though the applicants submitted the lowest bid in light of the 8-BBEE score, it could only score the second highest points, and even if was not disqualified, the tender would most likely not be awarded to it. Should the court therefore find in favour of the applicants, the Department submits that the court remit the matter back to the MEC to take a decision thereon.

Analysis:

[43] I agree with the Department that the Applicants seems to have deviated from their initial grounds as proffered in the interim application as to why the decision not to award the tender should be reviewed and set aside. The applicants' submission that they did not alter or amend the basis for its application but rather substantiated and advanced the case that was initially presented to the court is without substance; it strikes at the heart of the question whether there was non-compliance with the requirement that the joint venture agreement had to be authenticated either by a notary public or a commissioner of oaths.

[44] In my view, this deviation is not a mere substantiation to advance their case because in the interim proceedings in the founding affidavit deposed to by Galia

⁷ (2014) 1 All SA 545 (SCA)

Motala ("Motala"), a managing member of the second applicant filed on behalf of the applicants; She admitted that there was non-compliance with the requirement that the Joint Venture Agreement had to be authenticated, but it was as a result of an innocent omission they did not pick it up at the time of the tender.⁸ This was clearly illustrated by the submission they made during those proceedings where they stated at that time

' . . . In the present matter, the applicants deponent states quite clearly that the requirement and the joint venture agreement that had to be annexed also had to be confirmed by a notary public, was a new requirement, which appears to be common cause, was something that the applicants did not pick up at the time of the tender. All that was required was that the officials simply request that the document be properly notarized'.

[45] This version however, changed in their supplementary founding affidavit in terms of rule 53(4), when they stated that they were advised because the original joint venture agreement was submitted, it could not be authenticated. And the joint venture has been advised that only a copy could be authenticated. They further submitted that on a proper interpretation, it would only be necessary to have an authenticated joint venture agreement if the agreement was not the original agreement; that could be authenticated by either a notary public or an official deputed to witness sworn statements like a commissioner of oaths.

[46] The applicants' further states that the reason why they changed their original stance was because at the time of deposing to the founding affidavit, it was not considered that the joint venture agreement included in the tender was the original. To illustrate this discrepancy, they state... *'This requirement, being an amendment to the Standard Conditions of Tender, was overlooked in compiling the bid and noncompliance can only be couched as an innocent omission'*⁹. (emphasis added)

[47] This latter version clearly seeks to make out a case that there was not a question of any non-compliance. And I agree with the submission of the Department

⁸ Para 7.9 at page 21

⁹ Para 7.9 at page 16 in FA in support of the interim interdict proceedings in Part A

that the applicants may not on the one hand claim that the failure was due to an innocent omission and then subsequently claim that it was deliberate given the fact that it was not required to authenticate an original document. These two versions in my view are mutually exclusive and cannot be regarded as a mere substantiation to advance the case that was initially presented to the court. Initially they admitted that due to ignorance on their part, because of the amendment to the Standard Conditions of Tender that their non-compliance was due to an innocent omission.

[48] A party in review proceedings are generally in terms of Rule 53(4) permitted, after the record has been made available to such a party, to add or vary the terms of his or her notice of motion and supplement the supporting affidavit.

[49] In *Lufuno Mphaphuli and Associates (Pty) Ltd v Andrews and Another*¹⁰, the Supreme Court of Appeal held the following in this regard: *'The grounds for any review, as well as the facts and circumstances upon which a litigant wishes to rely, have to be set out in its founding affidavit amplified insofar as may be necessary by a supplementary affidavit after the receipt of the record from the presiding officer, obviously based on the new information that has since become available ... (own emphasis)*

[50] In her supplementary founding affidavit Motala states that *'At the time of the deposing to the founding affidavit it was not considered the Joint Venture Agreement included in the tender was the original, upon receipt of the record it was pointed out to me that the document included in the tender was duly signed by myself and Tolmay. It is only realised that the original agreement was in fact included in the tender'*.

[51] This in my view, is not new information that had become available since the filing of the founding affidavit. This was information that the applications must have been aware of, because if they on their new version had submitted the original Joint Venture Agreement, then they would have been in possession of a copy or copies of the agreement, which follows that the original was submitted. It is inconceivable that

¹⁰ 2008(7) BCLR 725 (SCA) at para 15

they would have submitted copies or a copy of the Joint Venture Agreement for them to have realized at a later stage that they have in fact submitted an original of the Joint Venture Agreement.

[52] This is in any event at odds with the case as put up in the founding affidavit, where they acknowledged that they did not realize that their failure to authenticate the Joint Venture Agreement amounted to non-compliance, which they fully understood and subsequently implies that they knew that the original documents were submitted but were unaware of the amended Standard Conditions of Tender that required the Joint Venture Agreement to be authenticated. This raised the question of the materiality of the non-compliance and not the question which they now raise, whether it amounted to a failure to comply with the conditions of tender, which is a totally separate issue.

[53] I will nonetheless proceed to consider these issues. In these proceedings, it seems that the case the applicants now seeks to advance is that they do not dispute the fact that the need to authenticate the Joint Venture Agreement is a necessary and material requirement. This is evident from the papers where they do not challenge the reasons and rationality of this requirement as advanced by the Head of the Department. In this regard, the Department states that in the tender documents, it had expressly amended the SFU to, on pain of being deemed non - responsive to require bidders tendering as a joint venture to submit a notarized or otherwise authenticated Joint Venture Agreement wherein certain information essential to the Joint Venture is required as mentioned by the Head of Department¹¹.

[54] The applicants also do not challenge that a notarized or commissioned Joint Venture Agreement allows the Department to rely on the representations made therein given that criminal sanctions would possibly result should a misrepresentation be made in such a document. And it is also not disputed that the Department without being able to rely on the representations being authenticated, it and other bidders will be severely prejudiced.

¹¹ See paragraphs 34, 35, 36 above.

[55] It is also not disputed that should a tenderer fail to comply, the Department would be obliged to regard the bid as non-responsive and such failure would constitute a material deviation or qualification that; (a) would detrimentally affect the scope or performance of the works services; (b) significantly change the Department's risks under the contract; (c) affect the competitive position of other tenderers presenting responsive tenders if it were to be subsequently rectified.

[56] It seems that in these proceedings the applicants do not dispute that this tender requirement is mandatory and material. Their case is that they have complied with this requirement and that there was no need to have the Joint Venture Agreement authenticated because they have submitted an original Joint Venture Agreement and only a copy needs to be authenticated, as pointed out earlier.

[57] The Department on the other hand submits that the applicants attempt to obfuscate matters by claiming that the authentication of a document equates to the certification of a copy of a document as a true copy by a notary public or commissioner of oaths. The question therefore, for consideration in these proceedings is to determine what is meant by authentication in terms of clause C2.13.4. According to the applicants this clause is open to more than one interpretation. They submit the following to be reasonable interpretations of this clause. These are:

- a) that the agreement be certified as a true copy of the original;
- b) that the information contained in the agreement be authenticated;
- c) have the signatures on the agreement be authenticated.

[58] According to them, the only reasonable interpretation is that '*authenticated by notary public or other official deputed to witness or statements*' is that the document must be certified as a true copy of the original. According to them it follows naturally that the joint venture was not required to do so because it submitted an original agreement.

[59] According to the applicants, the Department should have set out clearly and unambiguously in the tender document, what was required. If a notarised agreement was required, it should have been stated clearly. Similarly, if it was necessary to confirm the signatures on the agreement then it should have been stated accordingly.

[60] The applicants submit that there was no certainty about the tender requirements and relies on the case of *City of Ekurhuleni Metropolitan Municipality v Takubiza Trading and Projects CC*¹² where it was emphasized although with reference to the tender process: '*That certainty has to be the touchstone*'. The applicants also rely on the decision of *Minister of Social Development and Others v Phoenix Cash and Carry PMB CC*¹³ that reinforces the position that the public tender process should be so interpreted and applied as to avoid both uncertainty and undue reliance on form.

[61] This submission by the applicants is without merit for two reason. Firstly, the wording of clause C.2.13.4 is clear, and from my understanding of the applicants' case both in the interim proceedings as well as these proceedings, there was no uncertainty in their understanding of what this provision meant. During the interim proceedings, they say they were aware that an authenticated Joint Venture Agreement had to be submitted but due to an innocent omission they had not done so. In these proceedings, the case is that there was no need to submit an authenticated Joint Venture Agreement because they have submitted the original. Secondly, it seems that this point was raised for the first time in their supplementary heads of argument; surprisingly it was not raised in their supplementary founding affidavit or in their initial heads of argument.

[62] Authentication is defined as: '*To establish as genuine or valid or to give authority or legal validity*'¹⁴. It is further useful to determine the real meaning of authentication by having regard to what in general, under our law is meant by authentication of a document and the purpose for which authentication of documents

¹² [2022] ZASCA 82 (3 June 2022) at para 15

¹³ [2007] 3 ALL SA 115 (SCA) at para 2

¹⁴ Collins English Dictionary

is required. I agree with the Department that in the legal context it normally means to verify a document to be genuine, which is often done by verifying the signature on the document. It is also useful to have regard to provisions of rule 63 of the uniform rules of Court although it is not applicable in this case to determine what is meant by authentication of a document. In this regard, I align myself with what said in *Ex Parte Holmes & Co* 1939 MPD 301 at 307¹⁵ that: '*...[A] document authenticated in accordance with the rules, furnishes, on its mere production from proper custody, prima facie proof of itself, and that it should be in a condition to do this, is the true purpose and effect of such authentication*'.

[63] In a more recent judgment of this court in *Benjamin v Additional Magistrate, Cape Town and Others*¹⁶ authentication of a document was described as:

'... In the legal context it normally means to verify a document to be genuine, which is often done by verifying or "authenticating" the signature on a document.' It further states at paragraph 28 that under the common law:

'The meaning of the word "authenticate" means a process by which a document is considered to be genuine or what it purports to be, as will be discussed in more detail below. In practice this is usually done by a statement (authenticating document) by a person other than the author of the authenticated document that a signature on the authenticated document is a genuine signature. There are various ways of authenticating a document: For example, oral evidence might be lead that a document is a valid document. Another example where authentication is not done with reference to the signature is in the case of a document such as an email, which does not have a signature. Someone testifying that he or she sent an email is in effect saying that the email is genuine or authentic. Furthermore, not every document with a correct signature is, however, a genuine document: a valid signature might be obtained by fraud, or a signature stamp might be used by someone for fraudulent purposes.'

¹⁵ Cited with approval in *Friend v Friend* 1962 (4) SA 115 (E) at 116 D- G; *Chopra v Sparks Cinemas (Pty) Ltd* 1973(2) 352(0) at 358

¹⁶ (14216/2013) [2014] ZAWCHC 115 (1 August 2014) at para 25 (footnotes omitted)

And at paragraph 30 - 33 the court states: '... [I]t is clear that it is the genuineness of the document that is at stake and not just the signature on the document.' The court in Chopra also stated, referring to *McLeod v Gesade Holdings (Pty) Ltd*:

"... Ramsbottom J. observed that the Rules then in force relating to the authentication of documents were not exhaustive, that what the Court had to be satisfied of was that the document before it was a genuine one, and that the signature of the person who was said to be the signatory thereof was indeed the signature. "

I agree with the statement that it is the document that is important and which must be genuine. *The reference to a signature does not mean that the signature also has to be verified in some way in every case.*

31 *Although in the majority of cases authentication is done by way of verifying a signature, the real issue is whether the document as a whole is authentic, not only whether the signature is authentic. This authentication can be done either by saying "the signature is the signature of X" or "this is an authentic document" or other words to that effect.*

32 *An example of a case where the authentication was not done by way of verifying the signature is *Mountain View Hotel (Pty) Ltd v Rossouw*. In that matter the statement made was that "the person swearing to the affidavit is personally known to him as ...", not that he verified the signature. The court accepted the affidavit as being sufficiently authenticated under Uniform Rule 63(4) read with Uniform Rule 27(3).*

33 *What is important is that the document is genuine, not whether the signature is genuine. It is theoretically possible that a genuine signature might be obtained by fraudulent means, which would not make the document valid, even though the signature might be valid.* (own emphasis)

[64] Authentication of a document in the legal context is not the certification of a document to be the true copy of an original as contended by the applicants. It is a

process whereby authentication is usually settled by a statement or authentication document by a person other than the author of the document that confirms that the signature or the content of the document, in terms of what is stated there in, is genuine. There are various ways of authenticating a document, the most common of which is during court proceedings where a person is confronted with a document when he or she is required to confirm the contents thereof as correct. In other instances, the authentication of a document is usually performed by a notary public or a commissioner of oaths, in the presence of the person who seeks the authentication or commissioning thereof. The process of authentication is undertaken by a person other than the author or authors of the document.

[65] A notary public is a practicing attorney who is admitted and enrolled to practice as a notary in terms of section 1 of the Legal Practice Act, 28 of 2014. A notary public is a responsible officer of court in whose solemn acts confidence is reposed.¹⁷ There is a presumption that every statement contained in a notarial deed is true, and that all proper solemnities have been observed by the notary. A notary public must be an independent person and in no way have an interest in the act which he or she executes.

[66] Our law places great score on documents and especially agreements that are authenticated, in this regard the following is *inter alia* stated in *LAWSA*¹⁸:

'[When] members of the public employ a notary to draft a document, they have the following safeguards:

There is a high tradition of honesty and reliability attached to the office and faithfully upheld by the majority of notaries

A notary who does not use reasonable skill in exercising this calling, or who draws up a document which is not legal, may be held liable for damages to any person who may suffer as a result thereof.

¹⁷ The Transvaal Land Co Ltd v Registrar of Deeds 1909 TS 759

¹⁸ Paragraph 104 ,Volume 26(4), Third Edition

When a document is executed before a notary there is a presumption that every statement contained in the document is true and that all the proper solemnities have been observed by the notary, and this presumption can be rebutted only by clear proof to the contrary

Although it is not customary to execute documents notarially unless this is especially required by law, a notary is not relieved of his or her professional responsibility when he or she draws a document in underhand form. This provides a guarantee of quality to members of the public who engage a notary to draft a legal document. '

(Footnotes omitted)

[67] In the case of a commissioner of oaths in terms of Section 7 as well as section 9 of the Justices of Peace and Commissioner of Oaths Act 16 of 1963, a commissioner of oaths, apart from certifying documents as being a true copy of an original, also authenticates documents in the manner as prescribed in the act. In terms of the Act, the oath or an affirmation is administered when a person makes a solemn or attested declaration before a commissioner of oaths.

[68] In terms of section 9 any person who, in an affidavit, affirmation or solemn attested declaration made before a commissioner of oaths has made a statement knowing it to be false, shall be guilty of an offence and liable upon conviction to penalties prescribed by law for the offence of perjury. A commissioner of oaths in terms of certain provisions of our law. In terms of certain provisions of our law statements other than affidavits may be required to be commissioned by commissioner of oaths. For example the Wills Act 7 of 1953, provides that a will must be signed by a testator in the *'presence and by direction of the testator, a commissioner of oaths certifies that he has satisfied himself as to the identity of the testator and that the will so signed is the will of the testator, and each page of the will, excluding the page on which the certificate appears, is also signed, anywhere on the page, by the commissioner of oaths who so certifies ...'*

[69] Other examples where documents other than affidavits must be commissioned by a commissioner of oaths are found *inter alia* in section 40 of the Local

Government: Municipal Property Rates Act 6 of 2004; and the regulations prescribed in terms of the Military Pensions Act 84 of 1976, which requires that an application for pension or gratuity must be signed and attested before a commissioner of oaths.

[70] It is because of the consequences of a false statement being made before a commissioner of oaths on pain of being found guilty of an offence and liable upon conviction to penalties prescribed by law for the offence of perjury, that documents either by law or in this particular case, a Joint Venture Agreement needs to be authenticated by a notary public or commissioner of oaths.

[71] In this regard, as stated by the head of department, it is necessary to have a Joint Venture Agreement authenticated as a notarized or commissioned Joint Venture Agreement allows the Department to rely on the representations made therein given that criminal sanctions may result should a misrepresentation be made in such a document. She stated that this was done to curtail the alarming trend of fronting by tenderers seeking to bypass the aims and objectives of the PPPFA and its regulations; as well as the B-BBEE Act and its Code when they enter into Joint Venture Agreements to unfairly manipulate the point scoring system. It is clear that these provisions constitute a safety mechanism to prevent fronting and artificial manipulation of B-BBEE point scoring system. It requires that the lead partner of the joint venture shall have the higher or equal grading to all others in the joint venture and shall also have a higher or equal shareholding in the joint venture. It also has as its further purpose to prevent abuse and manipulation which have common control shareholding by providing that, in the event of two members of the joint venture have common control in shareholding to have such members, be deemed to be a single member of the joint venture by using the CIBD and B-BBEE grading of the member with the higher CIBD grading. It is for these reasons that this information that is required in the Joint Venture Agreement has to be authenticated by a notary public or commissioner of oaths; to ensure that the information is correct and not misrepresented. This in my view, is a legitimate government purpose in order to avoid fraud and corruption.

[72] The mere inclusion of an original Joint Venture Agreement without it being authenticated does not mean anything, and is no guarantee that any of the

information as required, to prevent fronting and the artificial manipulation of the joint venture. It is to safeguard any misrepresentation of the true purpose of a joint venture and to ensure there are compliance with the provisions of section 217 of the Constitution. For all of these reasons, the applicants' contention that the mere inclusion of the original Joint Venture Agreement without it being authenticated by a notary public or commissioner of oaths in their bid complied with the tender requirements, is without merit. It was a material and mandatory condition which the applicants failed to comply with. The Department was therefore justified in declaring their bid as non - responsive, and as a result, the application falls to be dismissed.

Given these findings, there is no need for me to deal with the substitution issue.

Costs:

[73] The applicants submit that the court should not grant a costs order against them because they were vindicating their right to just administrative action, and therefore the court should apply the principles as said that in the case of *Biowatch Trust v Registrar of Genetic Resources* 2009 (6) SA 232 (CC).

This is not the typical case where the application was brought purely to vindicate a constitutional right, but more so to fight for the right to acquire a tender in the course of conducting a business to gain financially. Where the consequences would not have led to undue hardship but merely to miss out on a business opportunity with the government. Furthermore, it seems that the applicants are a business with financial means and no case had been made out that they would suffer unduly if a cost order were granted against them.

Order:

In the result therefore, I make the following order:

That the application is dismissed with costs, including the costs of two counsel.

R.C.A Henney

Judge of the High Court

Counsel for the applicants: Adv APJ Els and Adv AA Basson

Instructed by: Thomas & Swanepoel Inc

Counsel for the first respondent: Adv I Jamie SC and Adv M R Vassen

Instructed by: Office of the State Attorney