**IN THE HIGH COURT OF SOUTH AFRICA**
**(~~NORTH GAUTENG HIGH COURT~~, PRETORIA)**

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ~~YES~~/NO.
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO.
(3) REVISED.
DATE 29·08·2012 SIGNATURE

CASE NO: 13480/2011
17852/2011

29/8/2012

In the matter between:

| | |
|---|---|
| **ESOFRANKI PIPELINES (PTY) LTD** | 1st Applicant |
| **CYCAD PIPELINES (PTY) LTD** | 2nd Applicant |
| And | |
| **MOPANI DISTRICT MUNICIPALITY** | 1st Respondent |
| **TANGO CONSULTANTS CC** | 2nd Respondent |
| **TLONG REA TRADING SMN JV** | 3rd Respondent |
| **TLONG RE YENG TRADING CC** | 4th Respondent |
| **BASE MAJOR CONSTRUCTION (PTY) LTD** | 5th Respondent |
| **MAITE IRENE MOAKAMELA** | 6th Respondent |
| **MOTLATSO CONSTANCE MALEBATE** | 7th Respondent |
| **LU JINPU** | 8th Respondent |

**MAILULA CHISTOPOLAND MAHOWA** 9th Respondent

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**JUDGMENT**

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**MATOJANE J**

INTRODUCTION

[1] This is an application for the review and setting aside of the decision of the first respondent, the Mopani District Municipality to award a tender for the construction of a welded steel bulk water pipeline from Nandoni Dam to Nsami Dam in Mopani and Vhembe District Municipalities in the Limpopo Province ("the tender") to the joint venture consisting of second and third respondents.

[2] In part B of its Notice of Motion Esofranki seeks an order that the decision to award the tender to the joint venture be reviewed and set aside. That any contracts pursuant to the award of the tender be declared to be of no force and effect, and be set aside. That Esofranki be declared to be the sole successful bidder and that the Municipality be directed to enter into a contract with Esofranki

alternatively, referring the matter back to the Municipality for reconsideration.

[3] Esofranki contends that the Municipality is biased in favour of the joint venture, and for this reason has awarded the tender to the joint venture for the second time. It further contends that the Municipality and the joint venture have colluded to advance the interest of the joint venture.

[4] Cycad, another unsuccessful tenderer has instituted a parallel review application relating to the same tender. By agreement between all the parties the two review applications have been consolidated and were heard at the same time.

[5] Cycad in Part B of its Notice of Motion seeks an order reviewing and setting aside the award of the tender to the joint venture. Cycad no longer prays for an order awarding the tender to Cycad but wants the tender to be awarded to Esofranki. Cycad contends that the Municipality ought not to have eliminated bidders on the basis that their tender prices were either too high or too low. Further, the Municipality ought to have eliminated the joint venture from the tender adjudication process for failure to have possessed the minimum contractor grading designation applicable to the tender.

[6] The Municipality opposes the relief which Esofranki and Cycad seeks on various grounds. The Municipality contends that it fully complied with the provisions of section 217 of the Constitution, the Preferential Procurement Policy Framework Act 5 of 2000 ("The PPPFA") and it's Supply Chain Management Policy when it awarded the tender to the joint venture, and for that reason alone the review application ought to be dismissed with costs.

BACKGROUND FACTS

[7] In August 2010 the Municipality invited interested parties to submit tenders for a construction of a raw water bulk pipeline from Nandoni Dam in Thohoyandou to Nsami Dam in Giyani. The tender relates to the construction of a concrete reservoir with a capacity of 2 mega litres and a raw water bulk pipeline from Nandoni Dam to Nsami Dam. Upon completion of the project, it is envisaged that raw water will be pumped from Nandoni Dam through a 500mm diameter pipeline to a pressure breaker tank near Malamulele and further through a 600mm diameter pipeline which will convey water by gravity up to a storage tank at Nsami Dam. The project was conceived to address the water shortage problem in the Giyani Municipal area. It is for this reason that water has to be sourced from Nandoni Dam.

[8] A local State of Disaster with regard to water security was declared in terms of the Disaster Management Act 57 of 2002 as the current water supply infrastructure is inadequate to supply the area with water and the Municipality is forced to deliver water by water tanks to the most affected villages whilst other villagers resort to buying water at exorbitant prices from those who have boreholes or fetching water by wheelbarrows from rivers and other sources.

[9] On the 28 October 2010 the Municipality awarded the tender to the joint venture after an adjudication process. Cycad was not satisfied with the tender being awarded to the joint venture and launched an urgent application in the North Gauteng High Court, Pretoria on 19 November 2010 ("Cycad's first application") for interim interdictory relief pending the outcome of a review application. Esofranki launched a similar application on the 30 November 2010. Mahowa Inc. entered a notice of intention to oppose the urgent application on behalf of the first, second and third respondents. On the 17 December 2010 the application was by agreement postponed and set down for hearing before his Lordship Mr Justice Preller on the 27 January 2011.

[10] The two applications were settled by agreement between the parties which agreement was made an order of court by his Lordship Mr Justice Preller. In adjudicating the tenders, the Municipality was

not aware that the Preferential Procurement Regulations published in 725 in GG 22549 of 10 August 2001 were declared invalid on 12 March 2010 by his Lordship Mr Justice Gorven in the judgment of **Sizabonke Civils CC t/a Pilcon Projects and Zululand District Municipality and others** 2010(1) SA 356 SCA. The Municipality agreed that its decision to award the tender to the joint venture be reviewed and set aside and that the matter be referred back to it for re-adjudication. In terms of the consent order, re-adjudication of the tender was to take place in terms of the provisions of the Preferential Procurement Policy Frame Work Act, No. 5 of 2000 ("the PPPFA") using the 90/10 point system, 90 points allocated towards price and 10 points allocated towards equity promotion goals. The respondents would not take any further steps in the implementation and execution of the contract. In terms of the court order the first, second, third and fourth respondents will pay the applicants costs of the application.

[11] The tenders were re-adjudicated in February 2011 and the tender was again awarded to the joint venture. Esofranki launched a second application for an order that the Municipality's decision to award the tender to the joint venture be suspended pending the final determination of Part B of the application in which an order was sought reviewing and setting aside the applicant's decision to award the tender to the joint venture.

[12] On 16 February 2011 Cycad also launched an urgent application ("Cycads second application") for an order that, pending the final determination of the appeal against the Municipality's award of the tender to the joint venture, the respondents be interdicted and restrained from concluding and/or implementing any contract for the supply of labour or materials in the furtherance of any work in terms of the tender. The urgent application became academic when the appeal against the Municipality's award of the tender to the joint venture was dismissed. On the 4 March 2011 Cycad informed Mahowa Inc. that it intended reviewing and setting aside the award of the contract to the joint venture and the decision on appeal, and sought an undertaking that pending the review application, the respondents would not take any further steps to conclude the contract or execute the contract. The respondent failed to provide the undertaking and Cycad launched an application for urgent interim relief on the 18 March 2011. Mahowa Inc. acknowledged receipt of the application on behalf of all the respondents.

[13] On the 22 March 2011, his Lordship Mr Justice Fabricius granted an urgent interim interdict at the instance of Esofranki, interdicting and restraining the respondents from executing the contract pending the outcome of the review application instituted by Esofranki.

[14] On 28 March 2011 the Municipality launched an application for leave to appeal the interim order granted by his Lordship Mr Justice Fabricius. On 11 May 2011, the Municipality's application for leave to appeal was dismissed and on 19 May 2011 the Municipality applied for leave to appeal to the Supreme Court of Appeal ("the petition").

[15] Esofranki served a second Rule 49(11) application ("the second Rule 49(11) application") for relief pending the outcome of the petition interdicting the respondents from continuing with the implementation of the tender pending the outcome of the petition. After granting of the order the joint venture continued to implement the tender and Esofranki launched an application for a further interim interdict pending the hearing of the second Rule 49(11) application which had been postponed *sine die* by Judge De Vos. On 8 July 2011 His Lordship Mr Justice Kollapen granted the second interim interdict at the instance of Esofranki in the midst of a part-heard matter before His Lordship Mr Justice De Vos, interdicting the respondents from taking any further steps in the execution of the works subject to any reasonable measures to safeguard the security of the works.

[16] The joint venture took the view that it could lay down the pipes that were on site in order to protect such pipes as the order allowed for the protection of the project assets. Esofranki launched the "contempt application". The joint venture further brought an

application seeking an interpretation of Judge Kollapen's order. His Lordship Mr Justice Jordaan granted an order by agreement between the parties suspending the works.

[17] The Supreme Court of Appeal dismissed the Municipality's petition with costs. On the 24 August 2011, the Municipality served an application for leave to appeal to the Constitutional Court. Esofranki launched the third Rule 49(11) application to ensure that the 22 March 2011 interim interdict order remains in force pending the outcome of the application for leave to appeal to the Constitutional Court.

[18] On 1 September 2011, in response to the third rule 49(11) application, the Municipality launched a counter-application, seeking on an urgent basis, *inter alia*, the discharge of the interim interdict granted by His Lordship Mr Justice Fabricius on 22 March 2011 and a declaration that the Esofranki review application had lapsed because they had not filed their supplementary founding affidavit. The Municipality alleged in the founding affidavit in support of the counter-claim that, in the light of the substantial execution of the contract, it would not be just and equitable to set aside the tender and to award the contract to Esofranki or any other successful bidder.

[19] Cycad intervened in the Municipality's counter application and sought an opportunity to bring its own application for joinder as it had material interest in the outcome of these proceedings. The counter application was postponed *sine die*, costs reserved.

ISSUES

[20] Esofranki no longer persists with the contempt of court relief sought in the third Rule 49(11) application. The third Rule 49(11) application was intended to ensure that the 22 March 2011 interim interdict order remains in force pending the outcome of the application for leave to appeal to the Constitutional Court. The third Rule 49(11) application and the counter application became academic when the Constitutional Court dismissed the Municipality's application for leave to appeal to that Court. The Municipality has withdrawn its opposition to the condonation application by Esofranki in the review application and costs will follow the costs in the main proceedings as between Esofranki and Mopani. The joint venture has decided to abandon its rescission application and has tendered costs, including costs of two counsels. The issues for determination are the following:

20.1 The merits of the third Rule 49(11) application and the costs thereof. Esofranki seeks a cost order *de bonis*

*propriis* against Mahowa, the attorney of record for the Municipality.

20.2 Esofranki's and Cycads review applications.

THE THIRD RULE 49(11) APPLICATION

[21] It was contended on behalf of Esofranki that the application for leave to appeal and the appeal are frivolous and vexatious and the application for leave to appeal has been noted for the indirect purpose to gain time for the joint venture to continue with the implementation of the tender so as to be able to argue that the tender has reached such a stage of implementation that the review application has become academic.

[22] At the outset, it is important to set out the circumstances under which the order of His Lordship Mr Justice Fabricius was granted as a background against which this application should be judged. It would appear from the reading of the record that the Municipality and Esofranki had an understanding that the matter would be stood down to later on in that week to enable Esofranki to file a replying affidavit because the Municipality had served the answering affidavit the previous day on a public holiday. Esofranki insisted that the Municipality must file an application for an order

condoning the late filing of its answering affidavit. By then the Municipality had not even filed in court. Counsel for the Municipality addressed the court on the wish to have the hearing of Part B of the main application to be heard on an expedited basis in three weeks time so that whoever would ultimately succeed in taking over the project would be potentially in a position to take over the work that has been done. Esofranki after agreeing that the matter would stand down, during roll call, allowed his Lordship Mr. Justice Fabricius to grant an order against the Municipality and the joint venture. The court granted an interim order without considering what was contained in the answering affidavit which sought to explain why the order should not be granted.

[23] The Municipality felt aggrieved at the manner in which it was dealt with before His Lordship Mr. Justice Fabricius. It felt that its right to a fair hearing was violated and took the matter on appeal to redress what it thought was wrong. In dismissing the Municipality's application for leave to appeal, His Lordship Mr Justice Fabricius held that his order was not appealable and that there were not reasonable prospect of another court coming to a different conclusion. The higher courts determined that the order by Mr Justice Fabricius was interlocutory and was not appealable. In my view, all steps taken by the Municipality were in accordance with the Uniform Rules of Court and Rules of the Supreme Court of Appeal. I do not agree that the

attempts by the Municipality to overturn what it thought was a violation of its constitutional right to be heard in court was frivolous and vexatious or that it was dishonest and part of a stratagem to subvert the course of justice.

[24] It appears further from the record that between October 2010 when the tender was awarded to the joint venture and January 2011 when the award was by agreement reviewed and set aside by his Lordship Mr Justice Preller no interdict was sought and none was granted, nothing stopped the joint venture from executing the tender. Execution of the tender stopped after the order of His Lordship Mr Justice Preller. It is important to note that the order before Preller J was by consent and the Municipality had agreed to the setting aside of the first tender award. It follows therefore that the fact that the Municipality discharged that costs order does not provide proof as contended by Esofranki and Cycad that the Municipality is biased in favour of the joint venture. In any event, the costs of the review application were paid long after the tender was awarded.

[25] The joint venture resumed the execution of the tender in February 2011 after re-adjudication. An interdict was granted by His Lordship Mr. Justice Fabricius J on 22 March 2011 interdicting and restraining the Municipality and the joint venture from executing the

tender. The record of the proceedings before Fabricius J indicates that counsel for the Municipality never purported to act for the joint venture, counsel specifically informed the court that he acted for the Municipality alone and no counsel represented the joint venture even though Mahowa might have indicated to Esofranki and Cycad that he did act for the joint venture.

[26] Mahowa Inc.'s Pretoria correspondent attorneys have deposed to an affidavit wherein it is conceded that it was the correspondent's attorney's error which resulted in the Notice to Opposed being delivered on behalf of all the respondents instead of the Municipality alone. This concession is contradicted by an earlier settlement agreement that Mahowa concluded on behalf of the joint venture which was made an order of court by His Lordship Mr. Preller J, burdening the joint venture with costs. Mahowa further personally consulted with Ms Malebate, a representative of the joint venture and drafted affidavits that he personally sent to Esofranki. He also signed an acknowledgment of receipt when papers were served on the first, second, third and fourth respondents by Esofranki. Until the 19 April 2010 when Attorney Mahowa notified Cycad in writing that he was only acting for Municipality and Ramothwala, Mahowa represented the first to fifth respondents in all the proceedings preceding the review application in the Cycad mattes.

[27] The order granted by Fabricius J was not served upon the joint venture which continued to execute the tender. The works were interdicted by his Lordship Mr Justice Webster on 1 April 2011 to 4 April 2011 and later extended to 15 April 2011. On 15 April 2011 his Lordship Mr Justice Fabricius extended the order to the 11 May 2011 whereupon the application for leave to appeal was dismissed. On the 19 May 2011 the Municipality applied for leave to appeal to the Supreme Court of Appeal. During the time that the interdict was suspended by the applications for leave to appeal, the joint venture and the Municipality as they were entitled to do, continued to execute the tender until they were interdicted from doing so.

[28] In my view, there is no basis for the contention by Esofranki that the actions of the Municipality legitimised contempt of the various orders of this court and that the Municipality had an ulterior and misguided motive of advancing the interests of the joint venture. Nothing prevented Esofranki from seeking declaration of contempt if it felt that it had a case. During all this time the tender had not been set aside and it existed as a matter of fact. It was not unlawful to give effect to it until it is set aside by a court in proceedings for judicial review. See **Oudekraal Estates (Pty) Ltd v City of Cape Town** 2004 (6) SA 222 (SCA) [26].

[29] In our law, all administrative acts are presumed to have been done rightly until such time that the decision is set aside by a court of law. The Municipality was accordingly entitled to proceed on the basis that the award of the tender was valid and lawful until set aside by the court. The presumption of regularity is explained by Lawrence Baxter Administrative Law at 355-6 and at 380 as follows:

> "There exists an evidential presumption of validity expressed by the *maxim omnia praesumuntur rite esse acta;* and until the act in question is found to be unlawful by a court, there is no certainty that it is".

[30] Esofranki raises the issue of alleged contempt in these proceedings to demonstrate that the Municipality was biased against it and acted in collusion with the joint venture. They point out that Mahowa has fraudulently represented to the court and all parties to these proceedings that he represented both the Municipality and the joint venture. That Mahowa on behalf of the Municipality paid the taxed costs that were claimed from the joint venture and that both the Municipality and the joint venture have jointly implemented a stratagem to ensure that as much work is done for so long as possible. There is no merit in these submissions because what Mahowa may have done after the award of the tender and during litigation cannot be a ground of review.

[31] In a judicial review, the focus is on the process, and on the way in which the decision-maker came to the challenged conclusion, all the facts which allegedly occurred after the award of the tender, are irrelevant and are not taken into account. Courts have always taken care to distinguish between the merits of a decision and the process by which it is reached. The former cannot justify a breach in the standards of the latter. See **Yates v University of Bophuthatswana and others** 1994 (3) SA 815 (BG) at 835G. **Rustenburg Platinum Mines Ltd v Commission for Conciliation Mediation and Arbitration** 2007 (1) SA 576 (SCA). The repeated allegations by Esofranki that the Municipality, the joint venture including Mahowa were corrupt and acted in contempt of the orders granted by this court are not sourced from the record or the Notice of Motion as supplemented in terms of Rule 53(1)(b) and importantly Rule 53(4). Accordingly, any facts and material which were not before the Municipality and which were not considered by the Municipality when the decision was made are irrelevant for purposes of determining whether or not the decision in issue is reviewable.

LEGAL FRAMEWORK

[32] Section 217(1) of the Constitution of the Republic of South Africa Act 108 of 1996 governs the award of tenders. The award of tenders must be made in accordance with a system that is fair,

equitable, transparent, competitive and cost-effective. The Supreme Court of Appeal in **Millenium Waste Management (Pty) Ltd v Chairperson, Tender Board, Limpopo Province and Others** 2008 (2) SA 481(SCA) at para 4 described section 217 as:

> "Laying down minimum requirements for a valid tender process and contracts entered into following an award of the tender to a successful tenderer".

See also **Steenkamp NO v Provincial Tender Board, Eastern Cape** 2007 (3) SA 121 (CC) at para 20.

[33] Organs of state are required to adhere to a procurement policy that fall within the framework created by the PPPFA and the CIDB Act. Section 16(3) of the CIDB Act obliges the Minister for National Development responsible for Public Works to prescribe the manner in which public sector construction contracts may be invited, awarded and managed within the framework of the registrar and within the framework of the procurement policy.

[34] It is common cause that the tenders had to be adjudicated in terms of the Municipality's Supply Chain Management Policy, the PPPFA and section 217 of the Constitution.

[35] The Municipality is obliged, in terms of section 2(1)(a) of the PPPFA, to adjudicate an "acceptable tender" in accordance with a preference points system prescribed in the PPPFA.

[36] An "acceptable tender" is defined in the PPPFA as a tender which, in all respects, complies with the specifications and conditions of tender as set out in the tender document. The definition of "acceptable tender" in the PPPFA: **Chairperson Standing Tender Committee and Others v JFE Sapela Electronics (Pty) Ltd** 2008 (2) SA 638 SCA at para 14.

[37] An organ of state is obliged to score contracts with a rand value of more than R500 000,00 in terms of a points system that allows for 90 points to be awarded to the lowest acceptable tender and a maximum of 10 points to be allocated for the achievement of equity promotion goals. See section 2(1)(a) of the PPPFA.

[38] Equity promotion goals include, in terms of section 2(1)(d) of the PPPFA, contracting with persons that were historically disadvantaged ("HDI"s) on the basis of race, gender or disability. Any goal for which a point may be awarded must be clearly specified in the invitation to bid. See section 2(1)(e) of the PPPFA.

[39] An organ of state is obliged to award the contract to the bidder that scores the highest points unless objective criteria justifies the award of the tender to another bidder. Section 2(1)(f) of the PPPFA. Criteria justifying the award of the tender to an entity other than the bidder with the highest score may not include any criteria associated with the award of points for equity promotion goals. See section 2(1)(f) of the PPPFA.

[40] Regulation 9 of the Regulations promulgated under the PPPF Act provides that "despite Regulation 3(4), 4(4), 5(4), 6(4) and 8(80), a contract may, on reasonable and justifiable grounds be awarded to a tenderer that did not score the highest number of points."

[41] Pursuant to the provisions of the CIDB Act, the Minister adopted Regulations ("the CIDB Regulations") prescribing the manner in which public sector construction contracts should be invited, awarded and managed. Section 16(3) of the CIDB Act, Regulations published in GN 692 in GG 26427 of 9 June 2004, as amended.

[42] The Regulations compel contractors to apply to the CIDB for registration in at least one contractor grading designation. (Regulation 7(2)). Contractors may register in one or more classes

of work but may hold only one contractor grading designation in a particular class of work (Regulation 7(3)). Examples of the classes of work would be Civil Engineering (CE), Electrical Engineering (EP) and Mechanical Engineering (MB).

[43] The CIDB will award a contractor grading designation to a contractor with reference to the contractor's financial capability and work capability (Regulation 11). The contractor grading designations ranges between 1 to 9.

[44] Each contractor grading designation indicates a contractor's capability to undertake a contract in the range of tender values associated with the designation in the class of the construction work to which the category of designation of the contract relates to (Regulation 17).

[45] For example, a contractor grading designation of 1 indicates that the contractor is considered to be capable of undertaking a contract with a contract value of less than R200 000.00; a contractor grading designation of 8 indicates a capability to perform a contract with a maximum contract value of R130 000.00 and a contractor grading designation of 9 indicates a capability to perform a contract with a contract value higher than R130 000.00 but with no limitation.

[46] The CIDB may also classify a contractor as a "potentially emerging" enterprise by identifying the principals who are previously disadvantaged persons, by establishing whether the principals own at least 50% of the enterprise and by establishing whether the principals exercise the authority to manage the assets and daily operations of the enterprise and appropriate managerial and financial authority in determining the policies and directing the operations of the enterprise (Regulation 13). A contractor registered as a "potentially emerging" enterprise will carry the designation "PE".

[47] This case cannot be properly decided without first having regard to the manner in which Esofranki, a civil engineering group with a turn over of 1.9 billion conducts this litigation. Esofranki and Cycad, despite their protestations to the contrary are not independent. The Esofranki-Cycad joint venture was awarded a tender by the Ethekwini Municipality for the construction of the Western Aqueduct Phase Two. The KwaZulu Natal High Court in the matter of **Sanyathi Civil Engineering and Consultants v Ethekwini Municipality** reviewed and set aside the award of the tender to the Esofranki-Cycad joint venture as the court found that corruption could not be ruled out in the tender process.

[48] The present legal representative of Cycad appeared for the Esofranki-Cycad joint venture in the Natal matter. Counsel took

issue with the submission by counsel for the joint venture that the founding papers in the two applications that presently serve before the court were remarkably so similar that it was clear that they were drafted by the same hand or at the very least, the one served as the inspiration of the other.

[49] It is self-evident from a comparison of paragraph 130 of the founding affidavit in the Cycad matter and paragraph 14.29 in the Esofranki matter that the two overlap completely or one served as the inspiration of the other. The deponent in the Cycad matter stated:

> "130.1 The third respondent failed to submit a valid tax clearance certificate in that the purported tax clearance certificate lapses on 25 September 2010;
>
> 130.2 the purported letter of Good Standing of the third respondent issued by the Office of the Compensation Commissioner lapses on 31 August 2010 due to the 2009 return not having been submitted;
>
> 130.3 the Joint Venture failed to submit the qualifications, experience and positions of the sole member of the second respondent, Constance Malebate, one of the key personnel has required in terms of page 21 of the List of Returnable Documents;

130.4 the Joint Venture failed to submit a valid financial reference from a bank as required in terms of page 23 of the List of Returnable Documents;

130.5 the second respondent failed to submit a schedule of its experience as required by page 30 of the List of Returnable Documents;

130.6 the second and third respondents failed to submit a properly worded guarantee as required in terms of C1.3 at page 58 of the List of Returnable Documents. The document which purports to be a 'Guarantee' from tropical Eden Brokers CC, does not satisfy the requirements of the pro forma guarantee; and

130.7 the Joint Venture failed to submit the (sic) certificate reflecting the Joint Venture's CIDB grading."

[50] In the Esofranki application the following is stated by the deponent:

"14.29.1 The fifth respondent failed to submit a valid tax clearance certificate. The purported tax clearance certificate marked 'AR24', lapses on 25 September 2010;

14.29.2 the purported Letter of Good Standing issued by the Office of the Compensation Commissioner relating to the fifth

respondent, annexed marked 'AR25', lapses on 31 August 2010 due to the 2009 return not having been submitted. No such letter was filed on behalf of the fourth respondent;

14.29.3 the fourth and fifth respondents failed to submit the qualifications, experience and positions of the sole member of the fourth respondent, Constance Malebate, one of the 'key personnel' as required in terms of page 21 of the 'List of Returnable Documents' annexed marked 'AR26';

14.29.4 the fourth and fifth respondents failed to submit a valid financial reference from a bank as required in terms of page 23 of the List of Returnable Documents. A letter from First National Bank ('FNB'), annexed marked 'AR27', is incomprehensible and fails, on a plain reading of the document, to satisfy the requirement that the fifth respondent is in good standing with FNB. The fourth respondent has failed to submit the letter confirming that it is in good financial standing, as required;

14.29.5 the fourth respondent failed to submit to submit a schedule of its relevant experience as require by page 30 of the List of Returnable Documents, annexure marked 'AR28'; and

14.29.6 the fourth and fifth respondents failed to submit a properly worded guarantee as required in terms of C1.3 at page 58 of the List of Returnable Documents, which purports to be a 'Guarantee' from Tropical Eden Brokers CC, does not satisfy the requirements of the pro forma guarantee. The purported

'Guarantee' from Tropical Eden Brokers, annexed marked 'AR29', also falls hopelessly short of the requirement of the table A2, annexed marked 'AR30."

[51] The conclusion is inescapable that the applicants have embarked on a deliberate strategy to attack the flanks of the Municipality simultaneously in a pinching motion until it capitulates and award the contract to Esofranki. In its Notice of Motion, Cycad sought that the tender be awarded to it and after a detailed and sustained technical attack on the tender process, it now, for unexplained reasons, suggests in its Heads of Argument that the tender should now be awarded to Esofranki. A simile used by the counsel for the Municipality is apt, "the stalking horse now withdraws and the candidate becomes Esofranki who says we want the tender to be awarded to us". This in my view, suggests an ulterior motive to benefit and or advance the cause of Esofranki in the litigation.

[52] If any further proof of collusion between Esofranki and Cycad is sought, one has to have regard to a letter, provisionally admitted as evidence, by Mr Thomson, Esofranki's legal representative addressed on behalf of Cycad, who had legal representation of their own. The letter suggested that if the Municipality were to settle on the suggested terms, Esofranki and Cycad would refrain from supporting any future criminal investigations against the Municipality.

I now proceeded to deal with the provisionally admitted letters and affidavits.

[53] On the final day of argument, counsel for the joint venture sought to introduce into evidence two documents, one being a letter from Esofranki's legal representative (exhibit "A") and the other being a letter from Cycad's attorneys (exhibit "B"). Esofranki objected to having its letter placed before the court on the basis that it was privileged because it entailed settlement discussions between the parties. There was no objection to the handing up of exhibit "B" which was sent at the instance of Cycad to all parties distancing itself from the contents of exhibit "A". The two letters were provisionally admitted into evidence as Esofranki even objected to the court having a look at the letter if only to determine its admissibility.

[54] I quote the contents of exhibit "A" to show why it is, in my view, admissible as evidence in these proceedings:

> "1. Having regard to recent developments which have resulted in five departments of the Limpopo Provincial Government being placed under administration and the probable investigation of this tender and its award as also the conduct of the legal proceedings and the costs associated therewith (which we intend encouraging) we are instructed to make the following proposals:

"1.1 That the respondents withdraw their opposition to the application;

1.2 That the first respondent confirms the award of the tender to our client;

1.3 That the respondents jointly and severally tender payment of our client's legal costs and those of Cycad;

1.4 Our client would withdraw the relief sought against Mr Mahowa (on the basis that each party pays its own costs); and

1.5 Our client and Cycad would refrain form pursuing or encouraging or supporting any future investigations into matters relating to this tender and the conduct of the legal proceedings." (own emphasis).

[55] Cycad in exhibit "B" distanced itself from exhibit "A" in its entirety and informed all the parties that the contents of and proposals made in exhibit "A" were never discussed or cleared with it or its legal representatives and that Mr Thompson did not have a mandate to speak on its behalf. Mr Thompson is called upon to set the record straight.

[56] Esofranki sought to introduce an affidavit from Mr Thompson explaining the circumstances under which exhibit "A" was written.

Various newspaper articles about alleged pending criminal prosecutions and investigations by the CIDB into corruption in the Limpopo province were attached to the affidavit. The affidavit was also provisionally admitted into evidence.

[57] Mr Thompson in his affidavit fails to explain how it came about that he saw fit to address a letter on behalf of Cycad who already had legal representation. He failed to set the record straight as demanded in exhibit "B". Mr Thompson further fails to explain why the investigation of corruption in the Limpopo Province should give rise to a concern on the part of Esofranki as the Municipality was not placed under administration. Mr Thomson states in his affidavit that exhibit "A" was well received and that he received two innocuous responses from the respondents. The attorneys for the joint venture and Mahowa disputes Mr Thompson's assertions and denies having undertaken to respond once they have obtained instructions from their clients. The attorneys for Mahowa are adamant that there were not settlement negotiations taking place.

[58] The contents of exhibit "A" clearly speaks for itself. Esofranki is prepared to ignore the crime that it contents the Municipality and its legal representatives have committed if only it can get the contract. This is all the more so in circumstances where Mahowa has alleged in his duplicating affidavit that the relief sought against him

de *bonis propriis* was brought for the ulterior motive of pressurising him to advise his client, the Municipality, to settle with Esofranki and Cycad.

[59] It is clear that the joint venture and Mahowa are not relying on the letter to obtain an irregular advantage in respect of a concession or admission made during settlement negotiations, but to show that it contains a threat that if the matter is settled on suggested terms Esofranki and Cycad will refrain from pursuing or encouraging or supporting any future investigation into the matters relating to the tender and the conduct of the legal proceedings. The letter in my view demonstrate the ulterior purpose for seeking costs *de bonis propriis* against Mahowa and is under the circumstances admissible into evidence to demonstrate that there was a threat made. See **Hoffend v Elgety** 1949(3) SA 91 (A) at 108-9 and **Naidoo v Marine & Trade Ins Co. Ltd** 1978 (3) SA 666 at 681 B-

[60] Failure to admit the letter into evidence will be against public interest as the letter also refers to the conduct of the present legal proceedings. Esofranki relies heavily on allegations of corruption and fraud on the part of the Municipality and its legal representatives. These allegations are damaging in the extreme and intended to be so as stated by Mr Luderitz SC appearing for Esofranki. Mr Luderitz SC attributed unlawful and dishonest conduct to his more senior

colleague and his junior in open court. The gratuitous aspersions cast by Mr Luderitz SC on his colleagues during argument are not been made on affidavit in the third Rule 49(11) application and cannot be responded to properly by the legal representatives concerned. Such conduct cannot be countenanced and should be censured.

[61] The letter further demonstrates that attorney Thompson/ Esofranki is prepared to hamper the proper administration of justice through extortion or bribery in exchange for the contract. Such conduct ought not to be countenanced and should be censured. Hunt, **S.A Criminal Law and Procedure**, vol. II, p 204 defines the crime of compounding as:

> "unlawfully and intentionally agreeing for reward not to prosecute a crime which is punishable otherwise than by fine only".

See **Arend and Another v Astra Furnishers (Pty) Ltd** 1974 (1) SA 298 (C),

COSTS *DE BONIS PROPRIIS*

[62] Esofranki seeks a punitive *de bonis propriis* cost order on attorney and own client scale, including the costs incumbent upon

employment of two counsel against the attorney of record of the Municipality, Mahowa. It is submitted that the costs order sought against Mahowa is justified by his alleged dishonest conduct in representing both the Municipality and the joint venture in an attempt to advance the improper motives of the Municipality. In a sanctimonious and disingenuous manner, Esofranki seeks costs *de bonis propriss* against Mahowa with dirty hands and with an ulterior motive. Much as Mahowa did not have authority to represent the joint venture the same applies to Mr Thompson who did not dispute in his affidavit, the averment of Cycad in exhibit "B" that he did not have the authority to represent Cycad.

[63] Mahowa Inc.'s Pretoria correspondent attorneys have deposed to an affidavit wherein it is conceded that it was the correspondent's attorney's error which resulted in the Notice to Oppose being delivered on behalf of all the respondents instead of the Municipality's alone. From the reading of the record of the proceedings before Fabricius J on the 22 March 2011, counsel for the Municipality expressly placed on record that he was acting for the Municipality alone. The joint venture was not represented. The contention that Mahowa faxed affidavits on behalf of the joint venture is not raised in the founding affidavit of the review application with the result that Mahowa is not given an opportunity to explain his conduct.

[64] It is submitted that Mahowa appears not to have advised his client appropriately, consequently, has caused a substantial amount of the tax payers monies to be wasted by repeated, defective and meritless applications for leave to appeal which Mahowa ought to have advised his client on, despite being repeatedly warned by Esofranki that appealing against an interim order constitutes an abuse of the process of court. The difficulty with this submission is that Esofranki deliberately chose to ignore adverse evidence in the answering affidavit of the Municipality that it is not correct that Mahowa advised the Municipality not to comply with the orders granted by this court. The affidavit states that Mahowa advised the Municipality to comply with the orders granted by this court when such orders were in full force and effect and the Municipality complied with such orders. In my view, this submission is based entirely on speculation and is malicious. Mahowa is neither an official nor an employee of the Municipality. He has no power to influence its actions or inactions other than to provide the ordinary services of an attorney who is guided by senior counsel.

[65] In its founding affidavit, Esofranki stated that His lordship Mr Justice Fabricius interdicted "all of the respondents from continuing with the implementation of the tender until ..." despite conceding that no order has to date been granted against Mahowa, Esofranki refused the invitation by Mahowa to state clearly that references

made in respect of all respondents excluded Mahowa and persisted with the false claims that Mahowa was guilty of contempt of court thereby attempting to mislead the court. Such conduct is reprehensible and the application against Mahowa should not have been launched.

[66] It is submitted further that Mahowa filed lengthy affidavits, deliberately attaching same documents repeatedly in order to bolster the volume of the third Rule 49(11) application, that he attached numerous irrelevant and bulky documents without referring to the relevant part of such documents. Such conduct, it was argued constitutes a serious abuse of the process of court warranting a *de bonis propriis* costs order. It was further argued that such documentation was attached simply for purposes of attempting to delay the adjudication of the third Rule 49(11) application and to tie up the time of the legal representatives of Esofranki.

[67] The third Rule 49(11) application before Tuchten J would not have been disposed off in an urgent court in the matter of hours as there were many parties separately represented. There were two counsels for Esofranki, two counsels for the Municipality, two counsels for the joint venture and one counsel for Mahowa. If one have regard to the founding affidavit which had a total of 196 pages, the answering affidavit and the counter application alone without

annexures, the papers were already voluminous. In any event, His Lordship Mr Justice Tuchten was in a better position to consider whether indeed court papers were burdened to the extend submitted if the submission was raised properly in the papers before him. It was Esofranki's legal representatives who prepared the record and could have excluded from the record irrelevant annexures and confined the record to what was relevant to the relief being sought.

[68] In my view, the application for punitive costs against Mahowa was brought by an attorney for an ulterior purpose, to force the Municipality to capitulate. This is aggravated by the fact that with full knowledge that Mahowa was never a party to any of the applications that served before various courts, Esofranki falsely contended that Mahowa failed to provide a re-adjudication report in contempt of the court order. Mahowa was deliberately accused of unprofessional, dishonourable and unworthy conduct. He was maliciously accused of wasting taxpayer's money and failing to respond to correspondence. The above conduct by Esofranki and its attorney calls for an order of costs on an attorney and client scale.

GROUNDS OF REVIEW

CIDB GRADING

[69] The standard Conditions of the Bid required the Municipality, on opening of the tenders, and before the detailed evaluation of the tenders, to satisfy itself that the tenders met all the requirements of the Bid Data read with the conditions of the Bid, were properly and fully completed and signed and were responsive to all the requirements of the tender conditions.

[70] It is common cause that the contractor grading designation of "9CE" was required. The joint venture submitted the following documents:

70.1 A screen dump from the CIDB website for Base Major reflecting a CIDB grading of 8CE as at 23 August 2010; and

70.2 A screen dump from the CIDB website for Tlong reflecting a CIDB grading of 1 CEPE as at 23 August 2010.

[71] In the Bid Evaluation Report of 1 February 2011 the Municipality evaluated the joint venture relying on a "screen dump" dated 27 October 2011, approximately, a year after the date of the

bid submission. It is clear that the joint venture did not comply with the requisite CIDB grading that was specified in the bid document at the time of submitting it's tender and ought to have been disqualified along with the five other bidders who did not comply with the requisite CIDB grading. The joint venture bid cannot be regarded as "acceptable" in that it does not comply with the specification and conditions of the municipalities' own bid document and was accordingly irrational, arbitrary and unreasonable.

FAILURE TO COMPLY WITH TENDER CONDITIONS

[72] Bidders were required, for purposes of claiming points for functionality and competence, to provide at least the following information:

72.1 A list of five references with contact details;

72.2 Proof of banking details;

72.3 Proof that the bidder enjoyed a bank rating of "C" or better;

72.4 Registered financial institutions' full details as guarantor in the amount of 10% of the contract value for surety purposes;

72.5 Copies of the curriculum vitae, experience and specific knowledge of the site manager and other key personnel; and

72.6 Proof of ownership of vehicles and equipment.

[73] Tlong failed to submit a list of its own qualifications and experience or list of key personnel or plant equipment. Ms Malebate, a sole member of Tlong, failed to submit a list of her own qualification and experience in the construction industry. The joint venture claimed that Tlong was a lead partner although it failed to meet the requirement of a CIDB grading of at least 8CEPE. Base Major's CIDB grading of 8CE failed to satisfy the minimum contractor grading designation required of the lead partner.

[74] Base Mayor alleges that it has always had a CIDB grading of 9CE but fails to explain why it tendered on the basis that it had a CIDB grading of 8CE.

BIAS IN FAVOUR OF THE JOINT VENTURE

[75] The following facts support the conclusion that the decision to appoint the joint venture was vitiated by bias, bad faith and ulterior purpose of using Ms Malebate for fronting. One of the documents the Municipality would have considered in adjudicating the tender is the joint venture agreement recording *inter alia*, that the two entities are both service providers in the field of civil construction and that they have in their individual capacities amassed experience in implementing the construction. Tlong was only created after the invitation to tender was extended and a week before the tender was actually submitted. It has no employees, assets or income.

[76] The Municipality will have noted that the Tlong did not conduct any business at the time the tender was submitted. It did not exist at the given address. I agree with counsel for Cycad that the representation that the joint venture carries on business at given address is a fraud on the Municipality and they should not have been allocated a point in respect of locality. The given address is a residential house with only a few furniture. Had proper investigation been done, the Municipality would have found that Mrs Malebate is employed at an unrelated company, MM Paving and it is part of Selby Construction, she and the owner are brother and sister. There are in fact neither offices nor an operating business address.

[77] Ms Malebate made a false representation that the total number her firm has been in business was three years. Tenderers were required to list all shareholders by name, position, identity numbers and citizenship, HDI etc. It is falsely represented that Mr Jim Lu a Chinese national obtained South African citizenship on the date of his birth.

[78] The representation is made that the contract is going to be managed and executed in equal portions by Tlong and Base Major when it is obvious that Tlong has no experience in construction work at all. According to the joint venture agreement the equity participation was going to be on 30:70 basis yet when it comes to claiming points in respect of women, the joint venture claims 50 percent of the available points - instead of 30 percent of the available 2.5 points and on PDI should have been 30 percent of the available 3 points.

[79] I agree with Cycad's contention that the decision to award the tender to the joint venture falls to be reviewed and set aside on, *inter alia* the following grounds:

79.1 Section 6 (2)(b) of PAJA, read with the Preferential Procurement Policy Framework Act, 5 of 2000 ("The

PPPFA Act") and the Construction Industry Development Board Act 38 of 2000 ("CIDB Act") and its regulations;

79.2 Section 6(2)(d) of PAJA, the decision to award the tender to the joint venture was materially influenced by an error of law;

79.3 Section 6(2)(e)(iii) of PAJA, the decision of the Municipality took irrelevant considerations into account and failed to take relevant considerations into account;

79.4 Section 6(2)(e)(vi) of PAJA, the decision of the Municipality was taken arbitrarily;

79.5 Section 6(2)(f) of PAJA, the decision of the Municipality was not rationally connected to the purpose for which it was taken, the purpose of the empowering legislation and the information before the Municipality;

79.6 Section 6(2)(h) of PAJA, the decision of the Municipality is so unreasonable that no reasonable person could have so exercised the power; and

79.7 Section 6(a)(iii) of PAJA, there is a reasonable suspicion of bias in favour of the joint venture.

[80] The Constitutional Court had found that where there is a procedurally unfair administrative action, this is a violation of the Constitution, and the court must in terms of section 172(1)(a), declare such action to be invalid. See **Bengwenyama Minerals v Genorah Resources** supra. The conduct of the Municipality is inconsistent with the constitution and is invalid in terms of section 172 (1)(a) of the Constitution.

REMEDY

[81] Section 6 of PAJA, grants a court a broad discretion when crafting a remedy, to ensure that it is just and equitable. The Constitutional Court in **Bel Porto School Governing Body and Others v Premier, Western Cape, and Another** 2002 (3) SA 265 SA (CC) stated:

> " The flexibility in the provision of constitutional remedies means that there is no constitutional straightjacket such as suggested in the High Court or in argument in this Court. The appropriateness of the remedy would be determined by the facts of the particular case. In a constitutional state with a comprehensive bill of rights protected by a judiciary with the power and the duty to do what is just, equitable and appropriate to enforce its

provisions: Par 181. See also President of the Republic of South Africa and Another v Modderklip Boerdery (PTY) Ltd 2005(5) SA 3 (CC)".

[82] If follows that the fact that a contract has been invalidated does not automatically lead to the invalidation of all acts performed pursuant thereto. Froneman J in **Bengwenyama Minerals v Genorah Resources** 2011(4) SA 113 stated :

> "The rule of law must never be relinquished but the circumstances of each case must be examined in order to determine whether factual certainty requires some amelioration of legality, and if so, to what extent. The approach taken will depend on the kind of challenge presented – direct or collateral; the interests involved, and the extent or materiality of the breach of the constitutional right to just administrative action in each particular case".

[83] In replying oral argument, Esofranki's counsel handed up to court a draft order in which, at paragraph 5, Esofranki seeks to be awarded the balance of the partially completed contract which is the subject of the review application. The proposed relief raises a multiplicity of underlying factual issues that have not been ventilated and is in my view, not just and equitable under the circumstances as it will not serve the purpose of ensuring that water is brought to the destitute communities.

[84] Esofranki has disputed the quality and workmanship of the work that has been done by the joint venture. There are also a number of material risks that have arisen since the work was stopped as a result of exposure of the site to the elements and bedding contamination. Esofranki will not take responsibility for the work and will not give the Municipality any guarantee for such work. The joint venture on the other hand will not give the Municipality a guarantee for the work it has done because not all of it has been tested and there will be no incentive to give any guarantee if it is not going to be paid for such guarantee. Other complex issues that have not been considered are the logistical, legal and financial viability of such a relief. Issues regarding the extent to which the contract has been completed, the ownership of materials, whether if the balance of the contract is legally and factually severable, it should be put out to tender etc.

[85] In my view, public interest will be served if the Municipality could independently at the joint venture's costs, verify that all the work done meets the required standards and all concerns are remedied by the joint venture.

[86] In the circumstances, applicants have succeeded in their challenge to the Municipality's decision to award the tender to the joint venture. I however, am of the view that each party should pay

its own costs because of the unreasonable and unconscionable manner in which Esofranki and its attorney including Cycad conducted this litigation. I am also of the view that Esofranki and its attorney should be ordered to pay the ninth respondent's (Mr Mahowa's) costs on a punitive scale as a result of the vexatious and unjustified attack on Mr Mahowa.

[87] The following order is made:

1. The tender process is declared illegal and invalid and is set aside.

2. The Municipality is ordered to independently and at the joint venture's costs, verify that all the work has been done according to specifications and that the joint venture does all the necessary remedial work and work is completed as soon as possible in terms of the agreement.

3. Each party is ordered to pay its own costs .

4. Esofranki Pipelines (Pty) Ltd is ordered to pay ninth respondents' costs on the attorney and own client scale, including the costs reserved on 3 and 4 October 2011.

5. The Registrar of the court is ordered to transmit a copy of this judgement to the Law Society of the Northern Provinces. The Law Society shall consider this judgment with the view to conduct an investigation into the conduct of Mr Mahowa and Mr Thompson in these proceedings.

**K E MATOJANE**
**JUDGE OF THE HIGH COURT**