IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ~~YES~~ / NO

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO

(3) REVISED: N/a

DATE 26.4.2016 **~~SIGNATURE~~** pp

REGISTRAR OF THE HIGH COURT OF SOUTH AFRICA GAUTENG DIVISION, PRETORIA
PRIVATE BAG PRIVAATSAK X67
PRETORIA 0001
2016 -04- 26
JUDGE'S SECRETARY
REGISTRAR'S BLOCK
GRIFFIER VAN DIE HOE HOF VAN SUID AFRIKA GAUTENG AFDELING, PRETORIA

In the matters between: 26/4/2016

Case Number: 99728/15

QAULITY PLANT HIRE CC	1ST APPLICANT
EXPECTRA 388 CC	2ND APPLICANT
and	
THE GREATER TZANEEN MUNICIPALITY	1ST RESPONDENT
SELBY CONSTRUCTION	2ND RESPONDENT

AND

Case Number: 99729/15

QAULITY PLANT HIRE CC	1ST APPLICANT
EXPECTRA 388 CC	2ND APPLICANT
and	
THE GREATER TZANEEN MUNICIPALITY	1ST RESPONDENT
MATLALA NYAPELE INVESTMENT & PROPERTIES CC	2ND RESPONDENT

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READIRA REFUSE SERVICES CC 3RD RESPONDENT

Coram: CROUSE AJ

Heard on: 29 and 30 March 2016
Delivered on: 25 April 2016

JUDGMENT

CROUSE AJ

[1] It is convenient to hear the above two matters together and to give one judgment therein as the matters are closely related.

[2] The Applicants in both matters are Quality Plant Hire CC and Expectra 388 CC. Acting as a joint venture they entered a tender bid in two projects, namely Project 06/2015 – upgrading of the gravel road between Mafarana and Burgersfort[1] to a tar road (hereinafter referred to as Project 1) and Project 02/2015 – upgrading the gravel road from Moruji to Matshwi/Kheshokolwe to a tar road (hereinafter referred to as Project 2). Both projects were placed on tender by the First Respondent, the Greater Tzaneen Municipality (herein after referred to as "the Municipality").

[3] On 28 August 2015, Project 1 was awarded to Selby Construction CC, the Second Respondent in the first matter (hereinafter referred to as "Selby") and Project 2 to the joint venture of Matlala Nyapele Investment and Properties CC and Readira Refuge, who are respectively the Second and Third Respondents in the second matter. I will refer to these two Respondents jointly as "Readira" hereinafter. Where I refer to "the Respondents" in this judgment, I refer to the Municipality, Selby and Readira together.

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[1] In some of the tender documents reference is made to Burgersdorp instead of Burgerfort. I accept for purposes of this judgment that it should be Burgerfort as the latter, unlike Burgersdorp, falls within the jurisdiction of the Municipality.

[4] Feeling aggrieved by the Municipality's aforesaid allocation of the tenders, the Applicants sought to engage the Municipality to obtain the bid adjudication committee's (hereinafter referred to as "BAC") minutes, and reasons for not awarding the tender to them. They also sought an undertaking that the tenders will not be implemented pending the giving of reasons and a possible review application. As this engagement yielded no results, the Applicants on 9 October 2015 initiated an application for interim relief to restrain the Respondents from implementing the said tenders pending a review thereof. On 1 December 2015 judgment was given in the Applicants' favour in the interim interdict. Selby and Readira filed notices of application for leave to appeal against the interim interdict, and continued with the implementation of the tenders. Thereafter the Applicants filed a notice in terms of Rule 30, stating that the interim order was not appealable. As work on the projects did not cease as ordered in the interim interdict, the Applicants also brought a contempt application against the Respondents. In an attempt to expedite this review application rather than pursuing interlocutory applications, the review applications proper were placed before me for decision by way of special motion by order of Fabricius J, dated 26 January 2016. I am informed that the interim applications have not been abandoned and cost orders must still be argued as well.

[5] In the review applications the Applicants seek the review and setting aside of the Municipality's decisions to award the tenders respectively to Selby and Readira, as well as for related relief. In both cases and for the same reasons the Municipality in its opposing papers deemed the Applicants' bids not to have passed the functionality test.

[6] Argument in the review applications commenced before me on 30 March 2016 and I heard argument over a period of two days.

[7] In order to give structure to this judgment, I will deal with the legislative framework for municipal procurement, the application for striking out, the grounds of review, and the appropriate relief.

Discussion of the relevant municipal procurement legislative framework

[8] The legislation discussed hereinafter is relevant to this matter, and is by no means an attempt to deal with all legislation relevant to Municipal procurement. Reference to the *Promotion of Administrative Justice Act* 3 of 2000 (hereinafter referred to as "PAJA"), which is highly relevant to municipal procurement, will not be dealt with under this heading.

[9] The starting point in considering any municipal procurement process, must be the principles set out in section 217(1) of the Constitution of the Republic of South Africa, 1996, (hereinafter referred to as "the Constitution") namely that the system must be fair, equitable, transparent, competitive and cost-effective.

[10] Although not relating to municipal procurement, I am mindful of what Wallis JA stated in *South African National Roads Agency Ltd v Toll Collect Consortium 2013 (6) SA 356 (SCA)* toward the end of paragraph [18]: "*When the Constitution, in s 217, requires that the procurement of goods and services by organs of state shall be transparent, its purpose is to ensure that the tender process is not abused to favour those who have influence within the institutions of the State or those whose interests the relevant officials and office bearers in organs of state wish to advance. It requires that public procurement take place in public view and not by way of back-door deals, the peddling of influence or other forms of corruption.*"

[11] With the constitutional principles in mind, the Local Government: Municipal Finance Management Act 56 of 2003 (hereinafter referred to as "the Management Act"), and the regulations thereto (GN 868 of 30 May 2005: Municipal Supply Chain Management Regulations - hereinafter referred to "Supply Chain Regulations") were enacted. In terms of section 111 of the National Management Act each municipality must develop and implement its own supply chain management policy which must be consistent with applicable legislation and government policies.

[12] The object of the Management Act, as set out in section 2 thereof is *"to secure sound and sustainable management of the fiscal and financial affairs of municipalities and municipal entities by establishing norms and standards and other requirements"* for *inter alia* supply chain management.

[13] Section 105 of the Management Act determines that each Municipal official "*must take all reasonable steps within that official's area of responsibility to ensure—(a) that the system of financial management and internal control established for the entity is carried out diligently; (b) that the financial and other resources of the entity are utilised effectively, efficiently, economically and transparently; (c) that any irregular expenditure, fruitless and wasteful expenditure and other losses are prevented.*"

[14] The Supply Chain Regulations[2] make provision for committees to drive the tender process. "Tender" is defined[3] as a written offer in a prescribed or stipulated form in response to an invitation by an organ of State for the provision of services, works or goods, through price quotations, advertised competitive tendering processes or proposals. The bid specification committee must compile the specifications for each procurement. A bid evaluation committee (hereinafter referred to as the "BEC") must *inter alia* evaluate bids and ensure bidders' ability to execute the contract, and also check that the successful the bidder's municipal account for services and taxes are not in arrears. The BEC then makes a recommendation to the BAC. The BAC considers the BEC's report and recommendations, and can either confirm the BEC's recommendation or make a new recommendation. If the BAC recommends another bidder, they must check that that bidder's municipal account is not in arrears.

[15] The municipal manager must thereafter, with due regard to the reasons given, ratify or reject the BAC's recommendation. If the municipal manager, as accounting officer, rejects the recommendation, he must refer the matter to the BAC. He or she also retains a discretion to refer the matter back to either the BEC or the BAC throughout the process. In circumstances where a bidder other than the one

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[2] Regulations 26-29 of the Supply Chain Management Regulations.
[3] Regulation 1(s) of the Preferred Procurement Regulations.

recommended through the process is the successful bidder, the municipal manager must comply with sending the necessary notices as contemplated in section 114 of the Management Act within ten days.

[16] Section 114 (1) of the Management Act states that *"(i)f a tender other than the one recommended in the normal course of implementing the supply chain management policy of a municipality or municipal entity is approved, the accounting officer of the municipality or municipal entity must, in writing, notify the Auditor-General, the relevant provincial treasury and the National Treasury and, in the case of a municipal entity, also the parent municipality, of the reasons for deviating from such recommendation.*

[17] The Municipality must have an effective risk management system for the identification, consideration and avoidance of potential risks in the supply chain management system. They must identify risks on a case-by-case basis, and must identify a person best suited to manage that risk in a pro-active manner.[4]

[18] The Municipality must allow a person aggrieved by their decision to lodge a written complaint within 14 days of the decision. The Municipal policy must provide for the appointment of an independent and impartial person, not directly involved in the supply chain management processes, to assist in the prompt resolution of disputes.[5]

[19] Section 217(2) and (3) of the Constitution also provides for a preferential procurement policy which may be implemented through a framework set out in national legislation. Currently this framework is set out in the Preferential Procurement Policy Framework Act 5 of 2000 (hereinafter referred to as the "Preferential Procurement Act") and regulations thereto in GNR.502 of 8 June 2011: Preferential Procurement Regulations, 2011 (hereinafter referred to as the "Preferential Procurement Regulations").

[20] The Preferential Procurement Regulations allows for a two stage process with which to award tenders. Firstly the bidders' functionality is determined.

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[4] Regulation 41 of the Supply Chain Management Regulations.
[5] Regulations 49 and 50 of the Supply Chain Regulations.

"Functionality" is defined[6] as the measurement according to predetermined norms, as set out in the tender documents, of a service or commodity that is designed to be practical and useful, working or operating, taking into account among other factors, the quality, reliability, viability and durability of a service and the technical capacity and ability of a tenderer.

[21] Only those bidders who meet the requisite functionality threshold, are then considered in a second process. During the second process certain bidders will be preferred based on a specific formula as set out in the Preferential Procurement Regulations.[7] The contract must be awarded to the tenderer who scores the highest points during the second process, unless there are objective criteria to justify the award to another tenderer.[8]

[22] As much was made during argument of Regulation 4 of the Preferential Procurement Regulations, I quote it in its entirety:

> *"**Evaluation of tenders on functionality.**—*
>
> *(1) An organ of state must indicate in the invitation to submit a tender if that tender will be evaluated on functionality.*
>
> *(2) The evaluation criteria for measuring functionality must be objective.*
>
> *(3) When evaluating tenders on functionality, the—*
>
> *(a) evaluation criteria for measuring functionality;*
>
> *(b) weight of each criterion;*
>
> *(c) applicable values; and*
>
> *(d) minimum qualifying score for functionality,*
>
> *must be clearly specified in the invitation to submit a tender.*
>
> *(4) No tender must be regarded as an acceptable tender if it fails to achieve the minimum qualifying score for functionality as indicated in the tender invitation.*
>
> *(5) Tenders that have achieved the minimum qualification score for functionality must be evaluated further in terms of the preference point systems prescribed in regulations 5 and 6."*

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[6] Regulation 1(k) of the Preferred Procurement Regulations.

[7] Regulation 6 of the Preferred Procurement Regulations, for tenders in excess of R10 million whereby a bidder with the lowest tender will receive 90 percentage points and a maximum of 10 further points determined by the bidders B-BBEE status level. (Regulation 1 defines **B-BBEE"** as broad-based black economic empowerment as defined in section 1 of the Broad-Based Black Economic Empowerment Act)

[8] Section 2(1) of the Preferential Procurement Act.

[23] Where appropriate I will refer to other specific legislative provisions in discussing the grounds of review.

Readira's Application for striking out:

[24] In terms of the order of Fabricius J of 26 January 2016, the Applicants had to file supplementary affidavits, if so advised, on or before 1 February 2016. The Applicants did not file supplementary affidavits, but dealt with new matter in their replying affidavit. During argument the Respondents all asked for striking out of the new matter, but only Readira brought a formal application in this regard.

[25] At the commencement of the proceedings before me, all the parties indicated that the hearing of the review application and the striking out application must be heard and decided together as they would not want to supplement their papers, regardless of my decision on the striking out application. I specifically raised with each counsel the possibility of prejudice to their respective clients and allowed an adjournment for the parties to consider possible prejudice should they persist in such a stance. The parties remained resolute that the application for striking out and the review should be heard and decided together.

[26] The new material which Readira seeks[9] to be struck out consists of:

[1] Paragraph 29.5 of the replying affidavit pertaining to Annexure **RA7**. This is a BAC's report dated 6 August 2015 recommending that Project 2 be awarded to Selby for an amount of just less than R90 million. The significance of this report is that Readira was in fact appointed as the successful tenderer on Project 2 for a tender amount of R99 million. The Applicants' tender for Project 2 was R15 million rand less.

[2] Paragraph 29.7 of the replying affidavit wherein the Applicants state that the review record does not reflect how Project 2 was awarded to Readira as the BAC had recommended Selby. The Applicants allege that the inescapable conclusion is that it was merely informally handed over to Readira.

[9] In their Notice in terms of Rule 6(15).

[3] Paragraph 29.9 of the replying affidavit, that simply states that in the Applicants' view a different set of rules applied to Selby and Readira, than the rest of the bidders.

[4] Paragraph 157 of the replying affidavit. The Replying affidavit contains two paragraphs 157, the first one simply states that the deponent will hereinafter answer the allegations in Readira's answering affidavit. The second one simply states that qualifications were stated as NQF level 5.

[27] In argument, the request for striking out was extended to cover the rest of the documents pertaining to the tender process which the Applicants attached to their replying affidavit, namely:

[1] Paragraphs 10-41 (pages 226-231): These paragraphs relate to the Applicants' complaint that the review record that the Municipality provided is wholly inadequate and the Applicants' attachment of RA1-RA4 being documents that should have been included in the record.

- **RA1** pertains to the BEC's report to the BAC dated 9 July 2015 wherein Selby is recommended as the successful bidder on project 1 for the tender amount of just less than R54 million.
- **RA2** pertains to the report of the BAC to the Municipal Manager dated 6 August 2015, but which was only signed by individual members between 12 August 2015 and 28 August 2015.
- **RA3** contains a document prepared and signed by the BEC dated 28 July 2015 setting out the plant and equipment of each of the 33 bidders to projects 1 and 2.
- **RA4** contains numerous letters ranging between 1 October 2015 and 6 October 2016 wherein Selby obtained financing from Nedbank for equipment.

[2] Paragraphs 25 – 35[10] (pages 231- 235) deal with Annexures **RA5-8,** being documents of which the Municipality is the author and which the Applicants allege should have formed part of the review record.

[10] Although this refers to a paragraph which should be before the previous paragraph, it is not so. After paragraph 41, the Applicants' founding affidavit continues with a second paragraph 25.

- Annexure **RA5** is the memo dated 29 August 2015 by the Acting Municipal Manager awarding Project 1 to Selby subject to conditions to be met by Selby, for just less than R54 million.
- Annexure **RA6** is the undated BEC report which states that the BEC met on 2 July 2015 and that Selby is recommended for Project 2 in the amount of just less than R90 million.
- Annexure **RA7** as discussed above is the BAC report recommending Selby for project 2.
- Annexure **RA8** is the memo by the acting municipal manager awarding project 2 to Selby subject to certain conditions for just less than R90 million.

[28] Neither Shelby nor the Municipality brought applications for striking out, but both piggy-backed on Readira's application and argued that all new matter should be struck from the replying affidavit. In view of the fact that no objection was levied to Readira's extended request for striking out I will give consideration thereto without necessary finding that it was regularly made.

[29] Striking out applications are governed by Rule 6(15) which reads: *"The Court may on application order to be struck out from any affidavit any matter which is scandalous, vexatious or irrelevant, with an appropriate order as to costs, including costs as between attorney and client. The Court shall not grant the application unless it is satisfied that the applicant will be prejudiced in his case if it be not granted."*

[30] It is trite that in motion proceedings an applicant must make out a case in the founding affidavit. New matter in a replying affidavit may be struck out because it is irrelevant to the case made out in the founding affidavit. (*Van Zyl and others v Government of RSA and others [2005] 4 All SA 96 (T)*). The concept "*irrelevant matter*" was defined in *Swissborough Diamond Mines (Pty) Ltd v Government of the RSA 1999 (2) SA 279 (T)* as *"allegations which do not apply to the matter in hand and do not contribute one way or the other to a decision of such matter."*

[31] In *Finishing Touch 163 (Pty) Ltd v BHP Billiton Energy Coal South Africa Ltd and Others 2013 (2) SA 204 (SCA)* at p 212 at [26] and [27], the Supreme Court

of Appeal dealt with the question of new matter in a replying affidavit. That Court found the rule that all the necessary allegations upon which the applicant relies must appear in the founding affidavit was not absolute and that a court has a discretion to allow new matter in a replying affidavit in exceptional circumstances. That Court also stated that a distinction must be drawn between a case in which the new material is merely left out of the founding affidavit, and one where new matter came to hand after the filing of the founding affidavit.

[32] Nestadt J in *Shepard v Tuckers Land Development Corporation (Pty) Ltd (1) 1978 (1) SA 173 (W) at p 177G – 178A* also stated that the rule to make out an applicant's case in the founding papers is not an absolute rule and that a Court has a discretion to allow new matter to remain in a replying affidavit, giving the respondent the opportunity to deal with it in a second set of answering affidavits.

[33] In my opinion the facts *in casu*, over and above the Respondents' procedural lapse, constitute special circumstances which oblige me to exercise my discretion in favour of the Applicants and dictate that I should not strike out the new matter in the Applicant's replying affidavit. I make this decision for the following reasons:

> [33.1] The new matter falls exclusively within the knowledge of the Municipality and should in fairness to the Applicants have been included in the review record as it is highly relevant to the matter at hand. In this regard I cannot find that there will be any prejudice to the Municipality if the application for striking out is dismissed. In fact during argument, counsel for the Municipality contended that the Municipality was well aware of all the new documents.
>
> [33.2] This is not an ordinary motion, but a review application where a supplementary affidavit is allowed and appropriate as a matter of course once a proper record is filed.
>
> [33.3] The Respondents have ignored the rule of practice that it is not sufficient to rely on a striking out application alone, and that they were obliged to deal with the new allegations. At the beginning of proceedings I invited all

the Respondents to consider whether they would want the right to answer should the "new material" be admitted. I repeated the invitation again during the course of the argument.

[33.4] The tendering process constitutes a constitutional matter which must be dealt with in a fair and transparent manner to uphold the rule of law in South Africa. Review thus constitutes a public law remedy. In *Steenkamp NO v Provincial Tender Board of the Eastern Cape 2007 (3) SA 121 (CC)* Moseneke DCJ stated at paragraph [20]: "... *when a tender board procures goods and services on behalf of government it wields power derived first from the Constitution itself and next from legislation in pursuit of constitutional goals. It bears repetition that the exercise and control of public power is always a constitutional matter. Section 195 of the Constitution further qualifies the exercise of public power by requiring that public administration be accountable, transparent and fair.*" At paragraph [29] of the judgment, Moseneke DCJ proceeds: "*Ultimately the purpose of a public (law) remedy is to afford the prejudiced party administrative justice, to advance efficient and effective public administration compelled by constitutional precepts and at a broader level, to entrench the rule of law.*"

[33.5] As tender processes are evaluated in terms of public law, any facts which could adversely influence the constitutional principles set out in section 217 of the Constitution, should be placed before a Court during a review application. This should preferably be done by the decision maker to uphold the integrity of the process. I must find that even where the information was placed before me by the Applicants, Selby and Readira cannot complain of prejudice as they had the opportunity with several invitations, to call for the full record or to answer to the new matter.

[33.6] The Applicants were not aware of the new material at the time of preparing the founding papers. The Applicants' counsel further argued that there was no legally valid reason to supplement after the filing of the review records and prior to the filing of the answering affidavits. He submitted that an incomplete record is not a ground to supplement.

[34] For these reasons, I am not prepared to strike out the paragraphs as identified by Readira or any other paragraphs from the replying affidavit. During argument I have on more than one occasion, without any success, questioned the correctness of the Respondents' refusal to supplement or to seek supplementation of the record.

Grounds of review:

[35] The Applicants raised three grounds of review which I will discuss separately under the following sub-headings:

[35.1] Broader Irregularities

[35.2] Regulation 4

[35.3] Plant and equipment

Ground of review: Broader Irregularities:

[36] The Applicants submitted that the broader irregularities in the procurement process caused the awarding of the tenders to be unlawful. Central to this issue is that the filed review record contains no documentary indication that the correct procurement processes were followed.

[37] The purpose of the record is to determine whether the action taken by the municipality is justifiable. In *Democratic Alliance and Others v Acting National Director of Public Prosecutions and Others 2012 (3) SA 486 (SCA)* at paragraph [37], it is stated that "*In the constitutional era courts are clearly empowered beyond the confines of PAJA to scrutinise the exercise of public power for compliance with constitutional prescripts. That much is clear from the Constitutional Court judgments set out above. It can hardly be argued that, in an era of greater transparency, accountability and access to information, a record of decision related to the exercise of public power that can be reviewed should not be made available, whether in terms*

of Rule 53 or by courts exercising their inherent power to regulate their own process. Without the record a court cannot perform its constitutionally entrenched review function, with the result that a litigant's right in terms of s 34 of the Constitution to have a justiciable dispute decided in a fair public hearing before a court with all the issues being ventilated, would be infringed." (footnote omitted)

[38] The filed review record in the Selby matter (Project 1) contains only the tender bid submitted by the Applicants without any further markings thereon and a blank draft tender document of some 370 pages of an unrelated tender document. The new documents show that Selby should have lost at least 30 percentage points on plants and equipment on each tender. There is no evidence of other scores awarded to Selby during the first stage of determining functionality.

[39] The filed review record in the Readira matter (Project 2) contains the tender bid submitted by the Applicants without any further markings thereon and a blank tender document similar to the one which the Applicants submitted consisting of some 370 pages. Over and above the lack of showing that Selby passed the functionality test in respect of project 2, there is no indication as to how the award to Selby turned into an award to Readira.

[40] All the Respondents' counsel argued strongly that these records were sufficient to make a finding that the tenders to Selby and Readira were regularly awarded, as it showed that the Applicants' bid did not receive the requisite 70% on functionality, and therefore did not qualify to be considered in the second stage of the process. The argument continues, that even if the "new matter" in the replying affidavit is not struck out, the Applicant does not have *locus standi* to seek a review on general irregularities during the tender processes, other than to contest the decision on the Applicants' functionality. Reliance was placed on the matter of *Giant Concerts CC v Rinaldo Investments (Pty) Ltd and Others 2013 (3) BCLR 251 (CC) ("Giant concerts") for this contention.* In my opinion *Giant Concerts* is not applicable to the matter at hand as it is not premised upon a tender process.

[41] The Applicants' counsel, on the other hand, contended that if the "new matter" in the founding affidavit is not struck out, it forms part of the grounds of

review and, as an unsuccessful bidder, the Applicants' *locus standi* is established independently from the success of any of the grounds of appeal.

[42] The filed review records are in my opinion severely deficient. With only the Applicants' tender filed, the record cannot be regarded as showing that the tender was allocated in a fair, equitable, transparent, competitive and cost effective manner. One would have expected the record to show at least which decisions were reached and what the reasons for the decisions were. Section 5(3) of the PAJA reads "*If an administrator fails to furnish adequate reasons for an administrative action it must, ... in the absence of proof to the contrary, be presumed in any proceedings for judicial review that the administrative action was taken without good reason.*" Serious questions exist, especially in light of the so-called "new material" which shows that the Readira tender was initially awarded to Selby. The supply chain management policy of the Municipality defines "final award" as "a final decision on which bid or quote to accept". Therefore once it was accepted that Selby's bid was successful, the tender process closes, unless section 114(1) of the Management Act comes into play. The argument therefore that the municipality could just, at a whim, substitute one successful bidder for the next, flies in the face of all the constitutional principles applicable to State procurement. Section 114(1) of the Management Act is part and parcel of a procedure to ensure transparency, fairness and to curb what Wallis JA[11] termed "*back-door deals, the peddling of influence and other forms of corruption*".

[43] The Municipality, in accepting the Readira bid, was legally obliged to comply with section 114(1) of the Management Act. Proof of compliance should have been in the review record. Had there been compliance, proof of the notices to the Auditor-General, the provincial treasury and the National treasury containing reasons for this substitution could very easily have been placed in a supplementary record during the month after the replying affidavit was filed to the hearing of the matter. I therefore accept that section 114(1) of the Management Act was not complied with.

[44] Having accepted that in Project 2 there are no adequate reasons for the appointment of Readira, I am unable to find that Readira's appointment was fair and

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[11] *South African National Roads Agency Ltd v Toll Collect Consortium 2013 (6) SA 356 (SCA) at [18].*

transparent. In addition, it is a requirement of procedural fairness that a tenderer is not entitled to withdraw his bid, especially after being successful. In circumstances where Selby's bid was substantially less than that of Readira, Selby could not merely have withdrawn from the process as contractual obligations had arisen. In not pursuing its private law remedies and merely awarding the tender at a higher price to Readira, the Municipality failed, on the face of it, to act with transparency and cost-effectively.

[45] In respect of Project 1, the filed review record bears no proof of the reasons for the appointment of Selby. However in the "new matter" filed by the Applicants there is evidence that Selby did not have the necessary plant and equipment. There is no indication of what Selby's scoring on the other functionality criteria were. It would have been very easy for the Municipality to have shown such a score card. They elected not to do so. Selby could have dealt with its functionality in its answering affidavit or supplemented its papers or asked that the record be supplemented. It deliberately chose not to do so. I am therefore unable to find that Selby's appointment was transparent or fair in the circumstances.

[46] Having made these findings, the question arises as to how this impacts on the right to fair administrative action of the Applicants. If I find that the Applicants' bids were wrongly disqualified during the functionality evaluation, it goes without saying that the second part of the process and the appointment of Selby and Readira unfairly impacted on the Applicants' right to fair administrative action. In light of my decision hereinunder in respect of functionality, it is not necessary for me to consider the effect of the finding that the record does not show valid reasons for the appointments of Selby and Redira, if the Applicants' bids were correctly disqualified.

Ground of review: Non-compliance with Regulation 4:

[47] The second ground of review is that the invitation to tender did not comply with regulation 4 of the Preferential Procurement Regulations. I have quoted the full content of the regulation above under the legislative framework.

[48] The Applicants argue that the invitation to tender did not objectively comply with three of the four requisites set out in Regulation 4(3), in that the initial advertisement containing an invitation to tender did not set out the evaluation criteria for measuring functionality, the weight of each criterion, nor its applicable values. As the Applicants regarded this as an absolute requirement which must be tested objectively, the Applicants' submission is that it was unnecessary to show any prejudice to them as a result of this non-compliance. In fact the Applicants cannot point to any prejudice as they were fully aware of these requisites at the time of filing their bids.

[49] The Preferential Procurement Regulations do not define "invitation to tender." The Applicants' argument is that "invitation to tender" consists only of the first publication of a tender in a newspaper or on the Municipality's website. The Respondents' argument is that this cannot constitute a ground for review if I undertake a purposive interpretation of Regulation 4. It is in my opinion not necessary to decide whether the Applicants' contention is correct or whether "invitation to tender" also includes further communications such as "price quotations, advertised competitive tendering processes or proposals," as contemplated in regulation 1(s) of the Preferential Procurement Regulations. I will accept, without deciding, that the Applicants are correct in their contention and have therefore established a ground of review under section 6(2)(b) of PAJA, namely that a mandatory and material procedure prescribed by an empowering provision was not complied with. If I make such a finding, then I am obliged to declare the tender unlawful.

[50] Although I am mindful not to confuse process and outcome as cautioned by Froneman J in the *AllPay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer, South African Social Security Agency, and Others* 2014 (1) SA 604 (CC), herein referred to as "*Allpay matter of November 2014*", I am equally satisfied that if this was the only ground of review, I would not have afforded the Applicants the relief they seek in deciding what a just and equitable order would be. In considering what an appropriate order would be, Froneman J in paragraph [56] of the *Allpay matter of November 2014* stated that a court may take into consideration whether despite such breach a similar outcome would have ensued. I am of the

opinion that I may at this stage look at prejudice to the bidders. I must also look at public interest. There was no prejudice to any of the parties before me. There is no indication that the Municipality would have reached a different outcome, even if Regulation 4 were fully complied with.

[51] Even if I accept that the Applicants' are correct in raising this ground of review, I am unable to find that it is fair or equitable to afford the Applicants' the relief they seek on this ground of review. I am obliged to find that the Applicants are non-suited on this ground of appeal.

Ground of review: Plant and equipment

[52] Prior to the launching of the urgent application, the Municipality did not give reasons for their decision to disqualify the Applicants' bids, despite a request from the Applicants. Neither did the Municipality implement any attempt at risk management and resolution of the dispute, as they are required to do in a procedurally fair process. I will come back to this aspect later in the judgment.

[53] According to the bid documents, functionality was evaluated on four criteria, namely:

[53.1] Reputation and reference: This weighs 40 percentage points with a grading system depending on company experience for the previous five years and the value of a previous road updating tender. Highest points were awarded for successful completion of a contract of more than R80 million and lowest points for a contract of more than R40 million. It is accepted by all parties that the Applicants should have scored 40 percentage points for this.

[53.2] Financial References: This weighs 10 percentage points depending on the bidder's bank rating. It is accepted by all parties that the Applicants should have scored 10 percentage points for this.

[53.3] Experience of staff and personnel: This weighs 20 percentage points. The Municipality required an academic requirement as a minimum requisite before evaluating the number of years of the site agent. Although the

Applicants' site agent has more than 25 years' experience, which constitutes more experience than necessary for the maximum score provided for in the evaluation, he did not have the requisite academic qualification. It is accepted by all parties that the Applicants scored zero percentage points here.

[53.4] Plant and equipment: This weighs 30 percentage points. The Municipality chose not to work with a grading in respect of the requisite plant and equipment, but rather with an "*all or nothing*" approach. This means that if a bidder did not have all the plant and equipment, that bidder would receive a zero score, even if that bidder was in possession of most of the equipment. This will hold true even if a bidder just lacks one piece of plant or equipment. I fail to see the logic of this, but I am not called to second guess the criteria determined by the Municipality due to the principle of deference. The Applicants scored zero. It is in dispute that this score was correctly and fairly given. I will proceed to deal with this issue further herein under.

[54] On 28 July 2015[12], the BEC signed a spreadsheet listing the equipment each of the bidders had available. The spreadsheet is clearly marked for Project 1 and 2. According to this spreadsheet not a single bidder could have received any score for plant and equipment. On the spreadsheet the Applicants' position on plant and equipment is far more favourable than that of the other bidders. The document reflects that the Applicants had all the items necessary to receive full marks, but for an excavator, a water tanker and a grader. Selby had no plant and equipment. Readira had no equipment under four categories and the wrong equipment under two further categories.

[55] The spreadsheet is however incorrect in reflecting that the Applicants lacked the required plant and equipment. In fact their bid had shown that they had two excavators, two water tankers and two graders. Their bid clearly stated that the Joint Venture owned and have available all the required plant and equipment for the upgrading of the roads and all registration papers were attached to that statement.

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[12] Although this spreadsheet was signed by the BEC nearly 20 days after their recommendation to the BAC, I make no inference of *mala fides* here. It is equally plausible that they had a handwritten spreadsheet at the time of making their recommendation.

[56] The reason for the non-appearance of the items on the spreadsheet is quite simple. In the attached registration certificates the excavators are described as "long crawlers," a common name for excavators; and the water tankers and graders were not identified as such on the registration certificates.

[57] In its report dated 9 July 2015 the BEC indicated that their evaluation of the bid was completed on 9 July 2015. It is clear from the spreadsheet that the BEC's purpose was to establish whether each bid had the necessary equipment available by looking at the attached registration certificates. They wrongly came to the conclusion that none of the companies had excavators. The report then states, interestingly enough, that some of the vehicle licencing certificates did not have a vehicle description on it. Consequently the BEC contacted a licencing officer at the Municipality to ascertain why the licencing documents did not contain a description. This unnamed official told the BEC that the vehicle owners were responsible to ensure that the description of a vehicle is correctly captured. Based on this, and without any further clarification, the Applicants (and presumably others) were merely disqualified. The BAC on the face of the documents merely concurred with the recommendation of the BEC.

[58] The Municipality's reason for the disqualification of the Applicants' bid was that the Applicants were unable to score the requisite 70% on the functionality test. The lack of the necessary academic qualifications of the site manager and the fact that the Applicants' joint venture could not prove that it had ownership of and/or lease contracts for the necessary road construction equipment were given as the two reasons why the Applicants were unable to score the requite 70%.

[59] I am satisfied that the mentioned documents do not bear out that there was ever a problem with the fact that the Applicants' joint venture did not own the plant and equipment as given as the reason by the Municipality *ex post facto*. As a joint venture is not a legal persona it would be impossible for the registration papers to be in the name of the joint venture. The only reasonable inference to be made from the report, as was contended by the Applicants' counsel, is that the ownership issue of the Applicants' joint venture was an afterthought. Coupled with the fact that no reasons were given when the Applicants sought same before the interim interdict, and the fact that the Municipality did not provide the necessary documents dealing

with the scoring during both stages of the tender process, this raises a reasonable suspicion that the Municipality did not act with the necessary transparency. The reports by the BEC and the BAC, coupled with the spreadsheet on plant and equipment, clearly indicate that these committees were only interested in determining whether there was a licencing certificate with a description of each of the necessary road construction motor vehicles to show that the bidders had access to specific equipment. If it was contended as per the reasons given by the Municipality that ownership was in issue, then the spreadsheet would have shown no plant and equipment for the Applicants, whereas as indicated above, the Applicants only lacked equipment under three categories.

[60] Realising that the registration certificates did not contain the correct and/or full description of the plant and equipment, the BEC sought internal clarification. This bears out that the BEC realised that their assessment of the availability of the respective bidders' plant and equipment could not be correct. The internal answer received to the query, that the blame for the absence of a full description on the registration certificate lies at the door of the owner of the vehicles, cannot be considered relevant to the decision the BEC had to make. The decision was whether the bidders had the necessary plant and equipment, and not who is to blame for the perceived faulty or incomplete registration. Without giving the bidders a reasonable opportunity to respond to the advice sought or to clarify the position, the BEC just found that the bidders' did not have the necessary plant and equipment, despite knowing this to be incorrect. The Applicants' rights and/or legitimate expectations were therefor adversely affected by the BEC's evaluation of the availability of the bidders' plant and equipment.

[61] The BEC's so-called "consultation" with another municipal official, after realising that the licencing certificates did not contain the necessary descriptions, and then not to give the Applicants (and the other bidders) the opportunity to respond thereto, offends against the rules of natural justice. Fairness must be decided in each case with reference to the circumstances of that case. The BEC and BAC has therefore not acted procedurally fairly towards the Applicants and other bidders as contemplated in PAJA.

[62] Both the BEC and the BAC must have realised that they were not acting procedurally fairly vis-à-vis the bidders who have attached registration certificates and who contended that the registration certificates pertained to the necessary equipment. More so in the case of the Applicants, where there was a formal document on a letterhead of the Applicants' joint venture indicating that the necessary plant and equipment are owned and available, and a sufficient number of registration certificates were attached.

[63] I am mindful of the dictum of Conradie JA in *Metro Projects CC and Another v Klerksdorp Local Municipality and Others [2004] 1 All SA 504 (SCA)* where he stated: *"In Logbro Properties Cameron JA referred to the 'ever-flexible duty to act fairly' that rested on a provincial tender committee. Fairness must be decided on the circumstances of each case. It may in given circumstances be fair to ask a tenderer to explain an ambiguity in its tender; it may be fair to allow a tenderer to correct an obvious mistake; it may, particularly in a complex tender, be fair to ask for clarification or details required for its proper evaluation. Whatever is done may not cause the process to lose the attribute of fairness or, in the local government sphere, the attributes of transparency, competitiveness and cost-effectiveness."* (Citations omitted).

[64] The matter before me is definitely a complex matter due to the length of the tender book (consisting of 370 pages) as well as the very high cost of the projects. As the Municipality was aware that the Applicants and other tenderers had the plant available but that the registration documents did not bear the correct registration, they were obliged in my opinion to have called for clarification of the registration documents attached to the bid. Having not done so has especially infringed upon transparency and cost effectiveness of the whole process.

[65] Having acted in this unreasonable manner, the Municipality has disqualified the Applicants' bid (and probably other bidders) on functionality, in circumstances where the Applicants' bid should have been considered in the second process. The Applicant's bid was lower than that of Selby in both projects. It therefore stands to be reasoned that the outcome could have been different,

depending on the BEEE status of the Applicants, had the Applicants been included in the second process.

[66] In the circumstances I find that the Applicants' review as contemplated in PAJA must succeed. The Municipality did not act procedurally fair towards the Applicants (and probably other bidders), they further took irrelevant considerations into account and did not consider relevant considerations; and the decision is not rationally connected to the reasons stated therefor by the Municipality.

Relief

[67] Having now found that the Applicants have succeeded in showing that their rights were adversely affected by the administrative action of the Municipality in awarding the tenders, I must consider what relief is fair and equitable.

[68] All the Respondents raised the issue of money already spent in fulfilling the tender, and the financial prejudice that will result in a re-advertisement of the tender. This is indeed an important factor which a review court should consider in the exercise of its discretion in formulating a remedy. However, in my opinion, this factor must be considered against the facts of each matter. At the time when the interim interdict was sought, the Applicants had shown through undisputed evidence that, at that stage, no work had been commenced with. Despite this, the Respondents failed to state when the work (now allegedly done) was in fact done. I was not informed whether the work commenced prior to the granting of the interim interdict or not, but I am told that after the granting of the interim interdict, it was necessary for the Applicants to bring a further application to interdict the Respondents from continuing the work on the two tenders. Both Selby and Readira brought an Application for Leave to Appeal after the granting of the interim interdict. Despite the Applicants' contention that no appeal lies against the granting of an interim interdict, the Respondents continued to work on the projects. The issue whether an interim order is appealable was discussed in *National Treasury and Others v Opposition To Urban Tolling Alliance and Others 2012 (6) SA 223 (CC)*, but I am not called upon to decide whether the interim order in this case was appealable

or not. Counsel for both Selby and Readira has disavowed that they would have given advice to proceed with work after the interim interdict.

[69] The only inference to be drawn is that the Respondents were well aware of the assumed risk when they, without a court's ruling, and after having been informed of the Applicants' position, commenced or continued to work on the projects. As such, any prejudice which they may have suffered in consequence of their actions is entirely self-created. Having made this finding however, I cannot neglect to deal with the Municipality's role in allowing the projects to continue. Although the Municipality was obliged in terms of Regulation 41 of the Supply Chain Management Regulations to do proper risk management, the Municipality did not adhere to the Regulation. Counsel for the Municipality indicated that it was not necessary for the Municipality to ensure that no work be done at the time of the Applicants' objection prior to the interdict, as the Municipality was of the view that the objection did not hold water. Neither did the Municipality employ risk management in response to the interim interdict as the Municipality was of the opinion that the Applicants' review application, after the interdict, was doomed to fail. Such an attitude is a dangerous one and again offends against the rules of natural justice; but in the face of a valid court order, it is contemptuous. The Municipality, in not implementing risk management, failed in its constitutional duty of acting in a procedural fair manner.

[70] Both Selby and Readira have raised the issue that the community is entitled to the envisaged tar road and to proper service delivery. This is undoubtedly so. The community is entitled to prompt and efficient service delivery. The question is however, if the rule of law is breached in awarding the tenders, must the community's wish for a continuation of the unlawfully awarded tender proceed, because they are anxious that the road be completed, or must the rule of law be upheld and thereby postpone the completion of the road, which was envisaged to have been competed at the end of 2017, with six or more months. In my opinion the rule of law must weigh heavier. Ultimately any State procurement that does not uphold the rule of law and/or which does not seem to do so through a transparent process, defies the rule of law and works to the detriment of the general public. More often than not, this detriment is most visible in the lives of the most vulnerable

members of our society. On the other hand if the procurement processes are transparent and fair, it combats corruption, creates work opportunities and cost effective infrastructure. This in turn creates public confidence.

[71] The Applicants requested that I, in considering what a fair remedy should be, should consider an order that the Municipality compensate Selby and Readira for the work already done on Projects 1 and 2. I have given serious consideration to this suggestion. Neither Selby nor Readira have requested this. I have decided not to do so, as I do not want to limit any remedy that either party may have against the Municipality or vice-a-versa.

Order:

[72] It is therefore ordered under case number 99728/15 that:

[72.1] The First Respondent's (Municipality's) decision to disqualify the Applicants' bid for Project 06/2015 – for upgrading of the gravel road between Mafarana and Burgersfort (Project 1) to a tar road is reviewed and set aside.

[72.2] The Municipality's decision to award the tender in Project 1 to the Second Respondent, as well as the service level agreement entered into between the Municipality and the Second Respondent as a result thereof, are reviewed and set aside.

[72.3] The Municipality is to commence afresh with the tender process within 21 days of this order.

[72.4] The Respondents are to pay the Applicants' costs jointly and severally, the one paying the other to be absolved. These costs should include the costs consequent on the employment of two counsel.

[73] It is ordered under case number 99729/15 that:

[73.1] The First Respondent's (Municipality's) decision to disqualify the Applicants' bid for Project 02/2015 – for upgrading the gravel road from Moruji to Matshwi/Kheshokolwe to a tar road (hereinafter referred to as Project 2) is reviewed and set aside.

[73.2] The Municipality's decision to award the tender in Project 2 to the Second and Third Respondents, as well as the service level agreements entered into between the Municipality and Second and Third Respondents as a result thereof, are reviewed and set aside.

[73.3] The Municipality is to commence afresh with the tender process within 21 days of this order.

[73.4] The Respondents are to pay the Applicants' costs jointly and severally, the one paying the other to be absolved. These costs should include the costs consequent on the employment of two counsel.

E. CROUSE
Acting Judge of the High Court

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