IN THE KWAZULU-NATAL HIGH COURT, PIETERMARITZBURG
REPUBLIC OF SOUTH AFRICA

CASE NO: 7538/2011

Heard: 16 September 2011
Order: 30 September 2011
Reasons and further remedies: 25 October 2011

In the matter between

SANYATHI CIVIL ENGINEERING & CONSRTUCTION (PTY) LTD	1ST APPLICANT
PHAMBILI PIPELINES (PTY) LTD	2ND APPLICANT
AND	
ETHEKWINI MUNICIPALITY	1ST RESPONDENT
ESORFRANKI PIPELINES (PTY) LTD	2ND RESPONDENT
CYCAD PIPELINES (PTY) LTD	3RD RESPONDENT

CASE NO: 9347/2011

GROUP FIVE CONSTRUCTION (PTY) LTD	APPLICANT
AND	
ETHEKWINI MUNICIPALITY	1ST RESPONDENT
ESORFRANKI PIPELINE (PTY) LTD	2ND RESPONDENT
CYCAD PIPELINES (PTY) LTD	3RD RESPONDENT

MICHAEL OLIVER SUTCLIFFE	4TH RESPONDENT
SANYATHI CIVIL ENGINEERING & CONSRTUCTION (PTY) LTD	5TH RESPONDENT
PHAMBILI PIPELINES (PTY) LTD	6TH RESPONDENT
NOCI INVESTMENTS (PTY) LTD	7TH RESPONDENT

JUDGMENT

PILLAY D, J

Introduction

1]The supremacy of the Constitution and the rule of law are founding values of our democracy.[1] Law or conduct inconsistent with it is invalid; the obligations it imposes **must** be fulfilled.[2] Did eThekwini Municipality, the first respondent, break the law? If it did, how should it remedy its breach? These questions must be answered in two applications for review of a tender.

2]Sanyathi Civil Engineering and Construction (Pty) Ltd and Phambili Pipelines (Pty) Ltd launched the first application against eThekwini, Esorfranki Pipelines Limited and Cycad Pipelines (Pty) Ltd. They prefaced this application for review with an interdict granted on 26 July 2011 in which

1 S 1(c) of the Constitution of the Republic of South Africa Act 108 of 1996
2 S 2 of the Constitution

Esorfranki agreed not to perform any construction or civil engineering work arising from the tender, pending this review. Phambili fell away as an applicant as they were not properly suited.

3]In the second application Group Five Construction (Pty) Ltd added the City Manger, Sanyathi, Phambili and NOCI formerly known as ICON, its erstwhile joint venture partner, as the fourth, fifth, sixth and seventh respondents. NOCI did not participate in the proceedings.

4]The principle relief claimed in both applications is a declaration that the process of awarding tender number WS5980 for a contract for the construction of the Western Aqueduct Phase Two was illegal and invalid; therefore eThekwini's award of the tender to the Esorfranki-Cycad joint venture should be reviewed and set aside. Initially, Sanyathi asked that it be awarded the tender; alternatively, that the tender be remitted for reconsideration by the Bid Evaluation Committee (BEC) of eThekwini but to exclude Esorfranki-Cycad. By the end of the hearing, Mr Broster SC, who appeared for Sanyathi, abandoned these remedies to make common cause with Mr Olsen SC who appeared for Group Five. The remedy all the applicants now seek is to direct eThekwini to conduct a fresh tender process if it intends to proceed with the construction.

The facts

5]The facts giving rise to these applications began on 6 November 2009, when eThekwini issued a notice and invitation to tender for the construction of about 50 kilometres of steel pipeline with associated road rehabilitation and realignment from Inchanga Station to Ntuzuma with branches to Tshelimnyama and Mount Moriah. The closing date for prospective contractors to submit tenders was 19 February 2010. EThekwini was to announce the award of the tender by 14 May 2010 after which the validity

of the tenders would have expired. This date was extended several times until 15 December 2010. By eThekwini's letters dated 16 December 2010 the joint ventures of Sanyathi-Phambili and Group Five-ICON learnt that their tenders were rejected.

6]In the meantime, on 12 May 2010 the High Court handed down its judgment in *Sizabonke Civils CC v Zululand District Municipality and Others*[3]. Gorven J held that regs 8 (2) - (7) of the Preferential Procurement Regulations, 2001 published in Government Notice R725 of 10 August 2001 (the regulations) were inconsistent with s 2 (1) (b) of the Preferential Procurement Policy Framework Act 5 of 2000 (PPPFA) and were invalid. The inconsistency turned on the fact that s 2 of the PPPFA prescribed that 90 points be allocated for price alone as a component of tenders whereas reg 8 (3) combined functionality with price for tenders above the value of R500 000.00. As the regulations imported a discretion to allocate fewer than 90 points for price, it was *ultra vires* s 2 (1) (b) of the PPPFA. The Minister of Finance cured the defect in the regulations by issuing new regulations which will come into effect on 7 December 2011.

7]In the circumstances, at least seven months before eThekwini had decided to award the tender to Esorfranki-Cycad, the High Court in this province had already declared invalid the very regulations on which eThekwini invited tenders. In its tender notice and invitation to tender, eThekweni had notified potential tenderers that it would allocate a maximum of 20 points for quality, 10 points for relevant experience in constructing large diameter (1000 millimetre) and high pressure welded steel pipelines, and 70 points for price. This tender, like the tender in *Sizabonke,* in which price also counted for 70 points, was *ultra vires* not only because the regulations in terms of which it was issued were *ultra vires* but also because the notice to tender itself conflicted with s 2 (1) (b) of

3 2011 (4) SA 406

the PPPFA.

8]According to the appeals authority, *Sizabonke* came to the attention of eThekwini sometime between the date when the tenders were called for and the date when they had to be evaluated. [4] That means sometime between 6 November 2009, or more likely 12 May 2010 when the judgment was issued, and 15 December 2010 eThekwini knew before evaluating the bids that the regulations on which it issued the notice to tender were invalid. Notwithstanding, eThekwini elected to proceed with awarding the tender to Esorfranki-Cycad, dismissing the invalidity of the regulations as a red herring. In the opinion of its officials, Esorfranki-Cycad was the only remaining tenderer whose tender was *cost-effective* and compliant with the goals of the PPPFA. Claiming to have used experience as a gate-keeper eThekwini rejected Sanyathi's bid as unresponsive at the outset. Mr Marnewick SC submitted for eThekwini that *Sizabonke* appeared to endorse the gate-keeping approach in which functionality did not feature in the point-scoring part of the process.[5]

9]The first inkling the applicants had of eThekwini's reasons for not applying *Sizabonke* emerges from the opinion of the appeals authority. It opined that *Sizabonke* did not interrupt this tender process even though the advertised tender had indicated that 90 points would be allotted to both functionality and price because in the evaluation process itself, price actually counted for 90 points. EThekwini alleged that in this way it gave full effect to *Sizabonke* during the evaluation process. In the view of eThekwini's officials, price became a non-issue because there was only one compliant tender. Every other tenderer had been eliminated by that stage without price having become a relevant consideration.[6] Neither Sanyathi-Phambili nor Group Five-ICON met the prescribed requirements

4 Sanyathi Review 199
5 *Sizabonke* para 30
6 Sanyathi Interdict 162 para 13

of the tender. Sanyathi-Phambili's tender was non responsive and Group Five-ICON's tender failed to meet the sub-minimum for quality. Therefore eThekwini did not have to evaluate the only remaining responsive tender. Although the tender invitation provided for a scoring system of 70 (price): 20 (quality): 10 (preference), eThekwini scored the tenders in compliance with *Sizabonke.* Consequently, no tenderer was prejudiced. [7] So it alleged.

10]In short, eThekwini raised the 'no difference' defence in answer to the legality question. Even though the tender notice was founded on invalid regulations, it contended that it made no difference because it ameliorated the irregularity by actually giving effect to s 2 (1) (b) of the PPPFA.

11]Mr Daniels SC for Esorfranki-Cycad conceded that the invitation to tender and the adjudication of the tender were non-compliant with the mandatory provisions of s 2 (1) (a) of the PPPFA. Notwithstanding this, he persisted that the court has a discretion under Promotion of Administrative Justice Act, 3 of 2000 (PAJA) to grant relief that is just and equitable in the circumstances. That relief, he submitted is to leave the award of the contract intact.

12]In this review, it became common cause that the tender notice conflicted with s 2 (1) (b) of the PPPFA. Is this conflict formal, superficial and easily remedied as eThekwini and Esorfranke-Cycad submitted or is it so flawed that it is not merely a formal irregularity but a fundamental illegality as Sanyathi and Group Five contended?

The rule of law

13]Starting with the Constitution,[8] all the authorities[9] state unambiguously

7 Sanyathi Review 363-4 para 95
8 S 2
9 *Fedsure Life Assurance Ltd and Others v Greater JHB Metropolitan Council* 1998 (12) BCLR 1456 (CC) para 56-58; *Oudekraal Estates (Pty) Ltd v City of Cape Town* 2004 (6) SA 222 (SCA)

that an illegal act is invalid. No one can be in any doubt that this is the position in our law. A public body may not only be entitled but also duty bound to approach a court to set aside its own irregular administrative act, [10] because a public authority has an interest and a duty to act on behalf of the public.[11] It is also under a duty not to submit itself to unlawful contracts but to resist attempts to enforce such contracts. [12]

14]Neither a public authority nor this court has any discretion other than to declare an illegal act invalid. Exceptionally, as in *Oudekraal* [13] in which the substantive validity of the initial act was not a precondition, a declaration of invalidity is dispensable. This, in essence, is the import of the rule of law and the principle of legality. The discretion arises only in deciding on an appropriate remedy. Whether the declaration of invalidity results in the setting aside, correction or validation of the invalid act depends on the circumstances. In circumstances such as *Oudekraal*, setting aside was not necessary. However, the peremptory nature of procurement law (discussed below) strictly proscribes the wide range of remedies permitted under s 8 of PAJA, in order to comply with the objectives of the law, especially those aimed at preference and curbing corruption. Still, in order to meet the

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para 26-38 per Howie P et Nugent JA; *Logbro Properties CC v Bedderson NO* 2003 (2) SA 460 (SCA) para 5; *Chairperson, Standing Committee and Others v JFE Sapela Electronics (Pty) Ltd* 2008 (2) SA 638 SCA para 11 (per Scott JA); *Municipal Manager: Qaukeni Local Municipality v FV General Trading CC* 2010 (1) SA 356 (SCA) para 15-16; *Premier, Free State v Firechem Free State (Pty) Ltd* 2000 (4) SA 430 SCA para 30 (per Schutz JA); *Total Computer Services (Pty) Ltd v Municipal Manager Potchefstroom Local Municipality and Others* 2008 (4) SA 346 TPD (per Murphy J) para 20-33; 55; *Minister of Social Development v Phoenix Cash & Carry-PMB CC* [2007] 3 All SA 115 (SCA) para 1-2 (Heher JA); *Gauteng Gambling Board v Silver Star Development* Ltd 2005 (4) SA 67 SCA at para 28; *Bengwenyama Minerals (Pty) Ltd v Genorah Resources(Pty) Ltd* 2011 (4) SA 113 (CC) para 79; (per Froneman J) ; *Giant Concerts CC v Minister of Local Government, Housing and Traditional Affairs, KwaZulu-Natal and Others* 2011 (4) SA 164 (KZP) para 20-22 para 62; *Sizabonke* para 22; Cora Hoexter, Administrative Law in South Africa, Juta 2007 p225-6; Cora Hoexter *The New Constitutional and Administrative Law* Vol 2 p83-84; JR de Ville *Judicial Review of Administrative Action in SA* p 16, 152; 263

10 *Qaukeni* above para 23 and cases cited there; *Oudekraal* above para 39 per Howie P et Nugent JA

11 *Qaukeni* above para 23; *Pepcore Retirement Fund and Another v Financial Services Board and Another* 2003 (6) SA 38 SCA *Rajah and Rajah (Pty) Ltd and Others v Ventersdop Municiplaity and Others* 1961 (4) SA 402 (A) at 407 d-e; *Transair (Pty) Ltd v National Transport Commissioner and Another* 1977 (3) SA 784 (A) at 792 h – 793 g

12*Firechem* para 36-37

13 *Oudekraal* para 31; *JFE Sapela Electronics* para 28

interests of all concerned administrative authorities should have some inflexibility in deciding whether to set aside, correct or validate their actions.[14] To this end PAJA acts as a countervailing force against the peremptoriness of procurement law, provided that whatever remedies the administrative authorities elect, they do so fairly, transparently and cost-effectively.

15]In devising a remedy that strikes a balance between the interests of an administrative body, the unsuccessful tenderers and the successful tenderer,[15] Froneman J recognises the need for flexibility to ameliorate the effects of an illegality but not at the expense of abandoning the rule of law:

> 'The apparent anomaly that an unlawful act can produce legally effective consequences is not one that admits easy and consistently logical solutions but then the law often is a pragmatic blend of logic and experience. The apparent rigor of declaring conduct in conflict to the Constitution and PAJA unlawful is ameliorated by both the Constitution and PAJA by providing for a just and equitable remedy in its wake……**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.'[16] (my emphasis)

16]The factors that count for determining the remedy include the nature of the illegality and the reasonableness of eThekwini's decisions and conduct. Factors that determine whether its decisions are reasonable include the nature of its decision, its identity and expertise as the decision-maker, the range of factors relevant to its decision, the reasons given for them, the nature of the competing interests involved and the impact of the decision. As for conduct, the complaint against eThekwini is not only that it made

14 *Bengwenyama Minerals* para 82
15 *Millennium Waste Management (PTY) Ltd v Chairperson, Tender Board: Limpopo Province and Others* 2008 (2) SA 481 SCA per Jafta at para 22 and 23
16 *Bengwenyama Minerals* para 85

unreasonable decisions but also the process it followed in making them was unfair and unlawful. Group Five alleges that eThekwini was biased in the way it processed the tenders and the appeal. Sanyathi alleges that eThekwini defied the interdict. The nature of these challenges against eThekwini's decisions and conduct compel a review of both the substantive and procedural aspects of the tender.[17]

The nature of the illegality

17]The question of illegality arises in respect of three main decisions:

a) eThekwini's initial decision to issue a notice and invitation to tender in terms of the invalid regulations.
b) eThekwini's subsequent decision to persist with the tender notwithstanding *Sizabonke*.
c) eThekwini's final decision on appeal to uphold its decision to award the tender to Esorfranke-Cycad

18]The invalidity of the notice to tender was not a formal, superficial irregularity but a fundamental illegality. *Sizabonke* says so in the following analysis of the regulations against the PPPFA :

'Accordingly, those parts of reg 8 which mention functionality, and in particular reg 8(3), are in conflict with the Act, since they envisage that points for functionality may be allocated within the 90 points required by the Act to be awarded for price alone. It also does not assist to argue that, because organs of State inviting tenders made under the impugned regulation decide to award the entire 90 points for price the impugned regulations pass muster. This is because the Act requires a minimum allocation of 90 points for price whilst the regulations purport to give a discretion to organs of State to allocate fewer than 90 points for price.'[18]

17 *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others* 2004 (4) SA 490 (CC) para 45. cf *Bel Porto School Governing Body v Premier,Western Cape* 2002 (3) SA 265 (CC) para 88
18 *Sizabonke* para 11

19]He puts to rest any doubt about the illegality of the regulations and what the remedy should be in the following opinion:

> 'In the view I take of the matter that the entire tendering process was fatally flawed and invalid, the setting aside of the specific contract is not going to result in the award of a contract to one of the other tenderers under the same process. Any award of a contract or project in question will require the applicant to adopt an entirely new tender process, based on the provisions of the Act.'[19]

20]This reasoning excludes the interpretation that Mr Marnewick seeks to place on Gorven J's obiter remarks about a gate-keeping exercise. The learned judge's reference to gate-keeping was merely to note rather than endorse that the provincial treasury directed municipalities to comply with a circular in an attempt to address the conflict between the PPPFA and its regulations.

21]In this case too the deviation from s 2 (1) (b) of the PPPFA contaminates the core of the tender. Anything flowing from it is likewise infected. Factually, an invitation to tender for a contract where price counts for only 70 points differs substantially from a tender in which price counts for 90 points. A tender in which 70 points is allocated to price signals to the tenderer that eThekwini placed less emphasis on price, notwithstanding the prescripts of s 2 (b) (1). Correspondingly, it also signals that eThekwini valued quality more highly for the particular contract. That eThekwini in fact scored the Esorfranki-Cycad bid against 90 points for price is irrelevant and in fact expressly disallowed by *Sizabonke.* Effectively, not all tenderers tendered for the same thing i.e. a contract in which price counted for 90 points. Not all tenderers were evaluated for the same thing. The illegality is therefore foundational.

22]*Ouderkraal*, an exceptional judgment in which an invalid act was

19 *Sizabonke* para 23

allowed to stand is distinguishable from this case on the facts and on the applicable law. In that case, the invalid act was not applied coercively by a public authority against the subject; hence no rule of law consideration militated against allowing the invalid act to stand. The subsequent acts were not dependant on the legal validity of the original administrator's approval but merely on the fact that it had been given.[20]

23]However, when exercising its contractual rights in a tender process, an authority exercises public power; it does not exercise contractual powers only and jettison its administrative justice rights and public duties under the Constitution and legislation. [21] As the superior party to a contract an administrative authority dictates the terms and conditions of the tender and the contract. In a municipality as large as eThekwini its superiority and power is all the more formidable. Consequently, its positive duty to take action to set aside a legally invalid act and not simply ignore it is compelling. [22]

24]Another consideration is that an illegal act does not acquire validity through the passage of time. Persisting with an illegal process in the hope that time will render it impractical to reverse is also bad faith. Exceptionally, an invalid administrative act has been allowed to stand if, by the fluxion of time and the extent of the work performed by a successful tenderer restarting the tender process over again is not practical. [23] A court may also substitute its decision for that of the administrative authority. Such exceptional situations include circumstances in which the administrative authority should not be allowed to exercise its power, or the court is in as good a position as the administrative authority to decide the issue, or the particular outcome is inevitable and the decision of the court complies in all

20 *Oudekraal* para 39
21 *Logbro* para 9 - 12
22 *Oudekraal* para 37
23 *Sapela Electronics* para 20 – 29

respects with the constitution and the right to just administrative action. [24] None of these considerations applied before Esorfranki-Cycad was awarded the tender and even thereafter because it has not started the work.[25]

25]The flaw in the invitation to tender in this case is so fundamental that it also contaminates eThekwini's subsequent decisions to proceed with the tender and to confirm its award on appeal. The only way eThekwini could rectify the illegalities was to set aside the award to Esorfranki-Cycad, issue a fresh notice and invitation to tender calling for tenderers to tender on the basis that price would count for 90 points. This was the only rational outcome to cure the defects, if it wished to proceed with the tender.

The law on procurement

26]Procurement law is prescriptive not permissive. Section 217 (1) of the Constitution which is the genesis of the law of procurement emphasises that organs of state **must** contract 'in accordance with the system which is fair equitable, transparent, competitive and cost-effective'. Subsection 3 anticipates national legislation that '**must** prescribe' a fair framework to give effect to policy. That legislation is the PPPFA which is also prescriptive. Section 2 prescribes that an organ of state '**must** determine its preferential procurement policy and implement it within (a prescribed) framework.' Reg 2 (2) of the regulations was emphatic that an organ of state '**must**… **only** apply a preferential procurement system which is in accordance with the act and these regulations'. (my emphasis).

27]Legislation concerning local government specifically reinforces the prescriptive nature of procurement law. Chapter 11 of the Municipal Finance Management Act 6 of 2003 (MFMA) pertinently regulates the

24 *Gauteng Gambling Board* para 28, 29. 39, 41
25 Submission from the Bar

procurement of goods and services and the selection of contractors to assist in providing municipal services.[26] Section 112 of MFMA reiterates the constitutional imperative that supply chain management policy of a municipality '**must'** be fair, equitable, transparent, competitive and cost-effective. It also prescribes not less than 17 criteria for a regulatory framework for municipal supply chain management which must itself be fair, equitable, transparent, competitive and *cost-effective*.[27] That it must also be legal goes without saying. Accounting officers and all other officials of a municipality involved in implementing the supply chain management policy '**must'** meet the prescribed competency levels. For this, national treasury or the provincial treasury provides assistance to train officials. [28]

28]The Local Government: Municipal Systems Act 42 of 2000 (MSA) is another piece of legislation that targets municipalities generally and procurement specifically. Municipal councils established in terms of s 157 of the Constitution have a duty to ensure that their councils use the resources of the municipality in the best interests of the local community and that it provides, without favour or prejudice, democratic and accountable government. [29] Section 6 (1) reiterates that a municipality's administration is governed by the democratic values and principles embodied in section 195 (1) of the Constitution. The administration of a municipality

> '**must…** (b) facilitate a culture of public service and accountability amongst staff; (c) take measures to prevent corruption.' [30]

29]A municipality that elects to provide municipal services through a service delivery agreement with a non-governmental entity '**must'** select the service provider through a process that complies with chapter 11 of the

26 S10 (1) (a) and (c) of MFMA
27 S112 (2) of the MFMA
28 S119 of the MFMA
29 S4 (2) (a) and (b) of MSA
30 S 6 (2) (b) and (c) of the MSA

MFMA. The process '**must'** [31]

a) allow all prospective service providers to have equal and simultaneous access to information relevant to the bidding process.
b) minimise the possibility of fraud and corruption.
c) make the municipality accountable to the local community about progress with selecting a service provider and its reasons for its decisions.

30]Procurement law is bolstered by other provisions of the Constitution and legislation. The constitutional right to just administrative action and the PAJA apply to procurement. [32] Section 195 of the Constitution promises public administration that is governed by a high standard of professional ethics, efficient economic and effective use of resources, is development-oriented, provides services impartially, fairly, equitably and without bias, is accountable, and fosters transparency by providing the public with timely, accessible and accurate information.

31]As the tender process constitutes administrative action under the Constitution and PAJA, tenderers are entitled to a lawful and procedurally fair process. If their rights are affected or threatened, they are entitled to an outcome which is justifiable in relation to the reasons given for the administrative action.[33]

32]In this case, the Standard Conditions of Tender also re-enforced the peremptory nature of the conditions of the tender. The very first condition stipulates that the employer and each tenderer

'**shall** comply with these conditions of tender. In their dealings with each other

31 S 83 (1) (a), (b) and (d) of the MSA
32 *Transnet Limited v Goodman Brothers (Pty) Limited* 2001 (1) SA 853 (SCA) para 4, 6, 9, 10, 11, 39-42; *Logbro* para 5; *Sapela Electronics* para 19; *Mhonko's Estate and Security Services CC and Others v Transnet Ltd* Case NO. 9137/2006 CPD (unreported) (per Wagley J para 2-3)
33 *Logbro* para 5

they **shall** discharge their duties and obligation… timeously and with integrity, and behave equitably, honestly and transparently.'[34] (my emphasis)

Tenderers are obliged to

'provide rates and prices that are fixed for the duration of the contract and not subject to adjustment **except** as provided for in the Conditions of Contract identified in the Contract Data'.[35] (my emphasis)

33]Finally, case law emanating from our highest courts confirms that the general principle is that language of a predominantly imperative nature such as '**must**' is to be construed as peremptory rather than directory unless there are other circumstances which negate this construction.[36] Section 217 (1) of the Constitution is couched in peremptory terms. [37] A contract in breach of these peremptory provisions is invalid and will not be enforced. [38] As a general rule an administrative authority has no inherent power to condone failure to comply with a peremptory requirement. [39] Consequently, a municipality that failed to have in place a supply chain management policy was not relieved of its statutory obligation to act openly and follow a process that was fair, equitable, competitive and *cost-effective*.[40]

34]Procurement law is prescriptive precisely because the award of public tenders is notoriously prone to influence and manipulation.[41] Allowing discretion would weaken the law of its purpose of preferential procurement and curbing corruption. Consistent with its peremptory nature the PPPFA prescribes that only acceptable tenders be considered. The PPPFA

34 Sanyathi Review 52 clause F.1.1.
35 Sanyathi Review 52 clause F.2.10.3
36*Minister of Environmental Affairs and Toursim and another v Pepper Bay Fishing (Pty) Ltd* [2003} 4 All SA 1 (SCA) para 32
37*Qaukeni* para 11
38*Qaukeni* para 16
39 *Pepper Bay Fishing* para 31
40*Qaukeni* para 13
41 *Phoenix Cash & Carry* para 1

defines an acceptable tender as any tender which in all respects complies with the specifications and conditions of tender as set out in the tender document. As this definition severely proscribes the exercise of any discretion, an organ of state wishing to exercise discretion must reserve such discretion for itself in the tender document in the interests of fairness, transparency and competitiveness provided the PPPFA permits such discretion. [42] For example, s 9 of the PPPFA permits a contract not scoring the highest number of points to be awarded on reasonable and justifiable grounds.

35]The PPPFA is also prescriptive about the criteria for evaluating tenders. It prescribes for big contracts, i.e. contracts above a prescribed amount, that the lowest acceptable tender must score 90 points for price alone. Only in small tenders is price lowered to 80 points, but not to 70 points. Price therefore is central to preferential procurement. The SCA also acknowledged the pinnacle position of price in holding that public interest is best served by the selection of the tenderer who is best qualified by price. [43]

36]The prescriptive nature of procurement law also serves the goal of ensuring that the selection process is fair, equitable, transparent, *cost-effective* and competitive.[44] Tenderers must be treated equally by being required to tender for the same thing. Schutz JA observes:

> 'One of the requirements of (a credible tender procedure) is that the body adjudging tenders be presented with comparable offers in order that its members should be able to compare, another is that a tender should speak for itself. Its real import may not be tucked away, apart from its terms. Yet another requirement is that competitors should be treated equally, in the sense that they should all be entitled to tender for the same thing. Competitiveness is not served by only one or some of the tenderers knowing what is the true subject of tender.'

42 *Pepper Bay Fishing* para 37-38
43 *Phoenix Cash & Carry* para 2
44 S 83 (3) of the MSA

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37]Bolton in *The Law of Government Procurement in South Africa* at 182 states:

'Tenderers prepare their tenders based on the specifications laid down in a call for tenders. As a general rule, therefore, an organ of state should not be allowed to make changes to tender specifications after a call for tenders has been advertised. It is in the interests of fairness and transparency (and also competitiveness) for organs of state to abide by the tender specifications initially provided.'

The learned author continues:

'To depart from tender specifications in any event gives one tenderer an unfair advantage over the other tenderers, who will have relied on the standard practice in submitting their own tenders, the amount of which will be based on the actual tender specifications.'

38]Ethekwini relied on *Mhonko's Estate and Security Services CC and Others v Transnet Ltd* Case NO. 9137/2006 CPD para 25 (unreported) (per Wagley J) to support its proposition that an authority may set benchmarks before or after the close of a tender provided the benchmark is not arbitrary, unreasonable or irrational. As a general proposition the submission cannot be faulted. The circumstances of each case determine whether the authority acts arbitrarily, unreasonably or irrationally. However, setting benchmarks in a manner that has the effect of unfairly preferring some tenderers over others evidences bias and should be disallowed. The learned judge acknowledges that it would be improper to negotiate prices with some candidates when others are eliminated without being given a similar opportunity.[46]

Other factors

45 *Firechem* para 30
46 *Mhonko's Estate* para 25

39]Besides the law of procurement and its prescriptive nature, other factors also go to determining the reasonableness of eThekwini's decisions and conduct. EThekwini is one the largest municipalities in South Africa. This tender valued at over R800m is one of the biggest any municipality might issue. Issuing tenders is one of the core activities of a municipality. Commensurate with the risk involved, eThekwini is expected to employ competent officials appropriately qualified and knowledgeable about the law and the risks. Therefore eThekwini officials had to know the law of procurement intimately and the risks of an illegal award. National treasury or the provincial treasury provides assistance to train officials to implement procurement policy properly. [47] In addition to the size of the tender, the dire need for the supply of water as an essential service to peri-urban communities elevated the degree of care and competence expected of the decision makers.

40]The fact that construction companies capable of building large and long pipes and of meeting the onerous tender requirements were few was not a reason to condone the illegality of its tender notice and short-cut the peremptory process. In fact, eThekweni had no powers to condone the illegality. Reasoning based on the scarcity of capacity led eThekweni to also make assumptions about Esorfranki-Cycad's capabilities, which may not be justified, and to deny the applicants a similar opportunity.

In these circumstances, the decision to persist with the tender after *Sisabonke* was wholly unreasonable and unlawful.

The appeals authority's reasoning

41]Despite the welter of weighty authorities on procurement law, the

47 S119 of the MFMA

appeals authority selected only a few. Its selection and the reasons for drawing on them are intriguing. For the proposition that a municipality is entitled to decline to award a contract and invite fresh tenders, the appeals authority drew on *Steenkamp NO v Provincial Tender Board Eastern Cape* 2006 (3) SA 151 (SCA) (per Harms JA). The *ratio* of that case is that an unsuccessful tenderer has no vested or contractual right that entitles it to recover damages in delict. That case is therefore irrelevant to the law and facts in this case in which the unsuccessful tenderers are not claiming damages. Harms JA made another point, one that is relevant to this case. He emphasized that 'if the process of awarding a tender is sufficiently tainted, the transaction may be visited with invalidity on review'.[48]

42]EThekwini cited *Logbro* to support the view that a term in tender documents that non-compliant tenders would not be considered was enforceable, and that tenderers are not entitled to a perfect process. The remark that tenderers are not entitled to a perfect process emerged only as a concession in a nuanced argument by counsel for the tenderer. It is neither the ratio nor an obiter of *Logbro*.[49]

43]*Logbro* is better known as authority for locating procurement contracts within administrative law to entitle tenderers to a lawful and procedurally fair process and, where their rights are affected or threatened, to an outcome which is justifiable in relation to the reasons provided for it. Furthermore, although the authority charged with repairing a flawed process is entitled to take into account any consideration material to the decision, it must give the compliant tenderers an opportunity to respond, at least in writing, to the considerations in question. If eThekwini had paid attention to this ratio it would have informed its response to Group Five's request to attend the appeal. EThekweni would also have realised that it could not evaluate the bids against 90 points instead of 70 points without alerting the applicants to

48 *Steenkamp* NO para 11
49 *Logbro* para 17

the change and soliciting their reaction.[50]

44]Most importantly, *Logbro* is remembered for overruling *Mustapha and Another v Receiver of Revenue, Lichtenburg and Others* 1958 (3) SA 343 (A) to hold that a public authority that dictated the tender conditions was thus undoubtedly

> '"acting from a position of superiority or authority by virtue of its being a public authority" in specifying those terms.' [51]

45]An authority is therefore burdened with its public duties of fairness in exercising the powers it derives from the terms of a contract. In endorsing Shreiner JA's minority opinion in *Mustapha* Cameron JA quoted:

> '(T)he Minister acts as a State official and not as a private owner, who need listen to no representations and is entitled to act as arbitrarily as he pleases, so long as he breaks no contract…. the Minister has no ….free hand. He receives his powers directly or indirectly from the statute alone and can only act within its limitations, express or implied. If the exercise of his powers under the subsection is challenged the Courts must interpret the provision, including its implications and any lawfully made regulations, in order to decide whether the powers have been duly exercised. . .' [52]

46]If eThekwini's officials had reflected on this ratio, they would have reminded themselves that it was a public authority and as such it could not conduct its affairs as a private enterprise. It is accountable to the public.

47]For authority that the tender specifications were permissive and discretionary rather than mandatory, eThekwini relied on *Total Computer Services (Pty) Ltd v Municipal Manager Potchefstroom Local Municipality and Others* 2008 (4) SA 346 TPD (per Murphy J). In that case, the municipality had a discretion to accept an unsigned tender because to

50 *Logbro* para 26
51 *Logbro* para 11
52 *Logbro* para 12

reject it would have been 'unduly formalistic'. Omitting to sign a tender is manifestly a formal defect. It hardly compares with tendering for a contract in excess of R800m, founded on invalid regulations, based on a tender notice that signalled that price would count for 70 instead of 90 points and one that yielded an award evaluated on criteria different to those advertised in the tender notice. Furthermore, the tender specifications in *Total Computer Services* appear to have allowed a discretion in relation to formal defects. However, as discussed above, the Constitution and the legislation pertaining to procurement are emphatically prescriptive. But correcting a formal defect was not the main thrust of that judgment.

48]The main thrust of Murphy J's judgment that eThekwini omits to mention was to declare the awards in *Total Computer Services* to be unlawful and unfair and to review and set them aside because the municipality miscalculated points, based its decision on irrelevant considerations, contravened the PPPFA by awarding a contract to a tenderer without the highest score, and made a decision that bore no rational connection to the facts on which it was based. He further directed the municipality to reconsider two of the competing tenders **in 'accordance with all laws, including s 217 of the Constitution.'**[53]

49]EThekwini referred to *Metro Projects CC and Another v Klerksdorp Local Municipality and Others* 2004 (1) SA 16 (SCA) to ward off criticism that it sought clarity from Esorfranki-Cycad and not from the unsuccessful tenderers. In that judgment Conradie JA remarked generally that fairness of a tender procedure must be decided in the circumstances of each case. In certain circumstances it may be fair to ask a tenderer to explain an ambiguity, to correct an obvious mistake, to clarify information, without losing the attributes of fairness, transparency, competitiveness and cost-effectiveness. The learned judge observed further :

53 *Total Computer Services* para 76

> 'There are degrees of compliance with any standard and it is notoriously difficult to assess whether less than perfect compliance falls on one side or the other of the validity divide. Whether or not there can in any particular case be said to have been compliance… may not be an easy question to answer. In the present case there is no difficulty.'

50]In that case the tender was tainted by deception. [54] This case should also have presented eThekwini with no difficulty because the tender was based on invalid regulations.

51]EThekwini could not have missed the import of two of the above cases on which it relied because they relate specifically to local government legislation. In *Metro Projects CC* Conradie JA summarised the legal prescripts then applicable to local government procurement law.[55] He also pointed to *Logbro* 'where the leading cases are collected', [56] and concluded that primarily, the Local Government Transition Act, 1993 then applicable required a local authority to be fair. Similarly, in *Total Computer Services* Murphy J delved extensively into ss 217, 195 (1) and 33 of the Constitution, s 3 (2) (a) and 6 (2) (b) of PAJA and s 168 of the MFMA.

52]In the circumstances, eThekwini could not have missed the essential message of these binding authorities. If it looked nowhere else but to *Sizabonke,* as it claims it did, it would have applied procurement law properly if it was impartial and objective. Quite simply, *Sizabonke* drew attention to the inconsistency between the very regulations that eThekwini applied and the PPPFA, declared them invalid and ordered that the process start afresh. EThekwini could therefore not, in good faith, have misunderstood the import of *Sizabonke.* Mr Marnewick SC for eThekwini

54 *Metro Projects CC* para 10 – 13 and 15
55 *Metro Projects CC* para 10 – 13
56 *Metro Projects CC* para 13; *Logbro* para 5

sought to distinguish *Sizabonke* from this case on the facts. The material facts are not distinguishable; besides, it is the principle of legality that counts.

53]If eThekwini's officials had undertaken an objective and frank assessment of their own list of authorities, they would have come to no other conclusion but that the process was invalid and had to be restarted. Instead, once the BEC and BAC decided to award the tender to Esorfranki-Cycad, the appeals authority set about finding a legal basis to defend their decision. That is not the purpose of any appellate authority. At the risk of over-simplification, the purpose of an appeal is to ensure that the initial decision is lawful and, if not, to correct it.

54]Although a measure of institutional bias is predictable when an official of an institution has to adjudicate a matter in which the institution is a party, such bias exceeds the bounds of tolerance when officials fail to apply their minds professionally, competently and, most of all, constitutionally. EThekwini's disregard for the constitution and all the authorities including its own citations is breathtakingly brazen. Not only does its selection imply bias on the part of the appeals authority but by providing seriously misleading reasons for its decision the appeals authority opens itself to a charge of *mala fides*. [57]

55]As the invalidity of the tender notice was so obvious, eThekwini could have restarted the process afresh without even approaching the court.The CC has held that it is always open to an authority to admit without qualification that an administrative decision had been wrong or wrongly taken and consequently to expressly disavow that decision altogether. [58] EThekwini had no powers to condone it. On the contrary, it had a duty to

57 *Phoenix Cash & Carry* para 23
58 Cora Hoexter, *Administrative Law in South Africa*, Juta 2007 247-251; *Njongi v MEC Department of Welfare Eastern Cape* 2008(4) SA 273 (CC) para 56; *MEC for Education, KZN v Khumalo* 2011 (1) BCLR 94 (LC) para 36

correct it. [59] Advertising the tender on invalid regulations was manifestly an error of law which did not disqualify eThekwini from reversing its own act. Disavowing reliance on a wrong or unconscionable decision is not precluded by the principle of *functus officio.* [60] At the very least eThekwini had to have entertained some doubt about the validity of the tenders once it became aware of *Sizabonke*, in which case the proper course of action then would have been to follow *Qaukeni* [61] and *Oudekraal* [62] and approach the High Court for a declarator at its own instance.

Procedural Fairness

56]EThekwini's officials are criticised for failing to follow fair procedures and to grant a rational tender award. Dealing first with procedural fairness, the criticism relates to the delay in awarding the tender, withholding information, the appeal process, the clarification of Esorfranke-Cycad's award and eThekwini's response to the interdict.

Delay in awarding tender

57]Initially the validity of the tenders was to endure for 12 weeks from 19 February 2010. On that basis EThekwini should have announced the awarding of the tender by 14 May 2010. It delayed until 16 December 2010 to notify the unsuccessful parties of the award of the tender to Esorfranki-Cycad. Although eThekwini has produced minutes of meetings of its BEC, it does not adequately explain the reason for mis-assessing the time for evaluating and granting the tender. The long and unexpected delay of ten months together with the inadequate explanation is cause for suspicion that something untoward happened. Coupled with other defects, suspicion

59 *Khumalo* para 36
60 Cora Hoexter, *Administrative Law in South Africa*, Juta 2007 247
61 *Qaukeni* para 23
62 *Oudekraal* para 37

predictably calcifies into belief that eThekwini's officials were biased.

Withholding information

58]Exactly when eThekwini concluded the contract with Esorfranke-Cycad is not clear. Sanyathi suggested that it might have been when eThekwini notified them of its acceptance of their tender. That is, before the appeal. EThekwini denied that it awarded the contract to Esorfranki-Cycad simultaneously with notifying the applicants on 16 December 2010 that they were unsuccessful. It alleged that on 20 December 2010 it notified Esorfranki-Cycad that their tender was recommended subject to the appeal.[63] This is born out by eThekweni's correspondence with Esorfranki-Cycad. It maintained that it confirmed the award to Esorfranki-Cycad only on 7 June 2011, after it dismissed the appeals.

59]The date when eThekwini concluded the contract with Esorfranki-Cycad should be an objective fact easily proved on the mere production of the contract. My attention has not been drawn to the signed contract nor have I had the opportunity in the limited time to trawl through the volumes of record to locate the contract or to track the communications between eThekwini and Esorfranki-Cycad. This is one of the matters for further investigation that informs the remedy I order. For now it suffices that eThekwini does not dispute that it signed the contract after it was interdicted from doing so.

The appeal process

60]Group Five submitted that the appeal procedure revealed that eThekwini was biased or reasonably suspected of bias. It alleged that eThekwini delayed or withheld information and documents that Group Five-

63 Sanyathi Review 463

ICON needed to prepare their grounds of appeal. EThekwini imposed unreasonable and onerous deadlines on them to submit their grounds of appeal. It also failed to disclose important facts and documents relating to the adjudication of the tender. So the complaint went.

61]EThekwini's notice on 16 December 2010 to Group Five-ICON and Sanyathi-Phambili that their tenders were unsuccessful was sent not only on a public holiday and the start of the December builders' holiday but at a time when most law firms are closed. The applicants were unnecessarily pressured and disadvantaged. EThekwini compounded the inconvenience by failing to attach reasons for its decision to reject Group Five-Cycad's tender when it informed them that they were unsuccessful. It gave reasons only about a month later on 14 January 2011.

62]The appeal process required aggrieved tenderers to appeal to eThekwini within 14 days from the notice of its decision. EThekwini should have allowed the 14 days to appeal to run from the date it supplied reasons for rejecting their tenders. Group Five-ICON had to endure the indignity and anxiety of having to plead for extensions of time to the superior and powerful authority of eThekwini. Despite the inconvenience, Sanyathi-Pambili and Group Five-ICON noted their appeals against eThekwini's decision to award the tender to Esorfranki on 1 March 2011 and 23 December 2010 respectively. Group Five-ICON supplemented its grounds of appeal on 4 March 2011.

63]Having delayed seven months to award the bid, having omitted to attach its reasons for rejecting their tenders, having taken a month to give Group Five-ICON its reasons for rejecting their tender and having pressured Sanyathi-Phambili and Group Five-ICON to note their appeals, eThekwini then delayed another three months to decide the appeal. On 6 June 2011 Sanyathi-Phambili had to obtain an order before van Zyl J

directing eThekwini and its BAC to deliver the appeal decision within 14 days. By letter dated 8 June 2011 to Sanyathi-Phambili, eThekwini wrote that its appeal was dismissed.[64]

Production of documents

64]On 3 January 2011 Group Five-ICON received the revised report of the BEC on 24 January 2011. It asked eThekwini for the unrevised report. eThekwini replied on 26 January 2011 that it was at a loss in regard to the request for unrevised reports and that it had already supplied the only version of the report on which eThekwini's BAC based its decision. The following day, apparently after getting clarity of the documents requested, eThekwini admitted that it had an original version of the report. Whether eThekwini's officials were deliberately concealing relevant information from Group Five-ICON is hard to say on reading the papers. This is an enquiry for the council of eThekwini to pursue. Until then their conduct is suspect.

Clarification

65]EThekwini had represented to Group Five-ICON that it had not had any correspondence with Esorfranki-Cycad to clarify the latter's tender. The evidence suggests that they did communicate verbally. It is now common cause that eThekwini had in fact sought clarification from Esorfranki-Cycad but not from Group Five-ICON. As Conradie J pointed out in *Metro Projects CC* above to merely seek clarification from one tenderer and not others an authority does not commit procedural irregularity. Whether eThekwini's seeking such clarification was an irregular step depends on whether substantively the tender needed clarification. This is considered below under the substantive fairness of the tender.

64 Sanyathi Interdict 154. There appears to be a typographical error as the minutes of the appeals authority records that it sat on 6 June 2011 and not on 16 June 2011 as reflected in the rejection letter.

The interdict

66]On 22 June 2011, after receiving the appeals authority's reasons for dismissing its appeal, Sanyathi-Phambili notified eThekwini of its intention to apply for an interdict to stop eThekwini and Esorfranki-Cycad from concluding further contracts and performing any construction arising from the tender, pending this review, unless it received an undertaking by the following day.[65] The undertaking eThekwini had given on 31 January 2011 not to implement the award pending the appeals had expired. Not having received the further undertaking, Sanyathi-Phambili served the interdict on eThekwini at 16h24 on Friday 24 June 2011 and obtained a rule *nisi* unopposed on 27 June 2011 soon after 11h00.

67]Notwithstanding at least four days notice of the application for the interdict, eThekwini proceeded with its plans to host a media launch publicising the signing of the contract with Esorfranki-Cycad at 14h30 that very afternoon, barely a few hours after being interdicted from signing the contract.[66] It is not clear whether eThekwini received the order granting the interdict before it signed the contract.

68]EThekwini contends that as it had confirmed the award to Esorfranki-Cycad on the 7 June 2011, the media launch was merely ceremonial; it had already committed itself contractually. On its version, it formally accepted Esorfranki-Cycad's tender only on 27 June 2011.

69]However, it persisted in signing the contract that day after Sanyathi and Van Zyl J's order notified it of the application to review the awarding of the tender. In granting the order to deliver reasons for the appeal decision, the

65 Sanyathi Interdict 19
66 Sanyathi Interdict 21

learned judge had alerted eThekwini that the review application might be instituted within 60 days.

70]Even if the signing was ceremonial, eThekwini had a duty to establish what the outcome of the application was, knowing that its planned signing of the contract might be declared unlawful. Unlike contracting for private enterprise, eThekwini did not have a free hand to contract with Esorfranki-Cycad. In the case of an alleged illegality, it is not a passive bystander but a public authority that is duty-bound to represent the public interest. In as much as the law imposes on it a positive obligation to approach the court to remedy an illegality, when it fails to do so and another party steps into the breach, eThekwini had an even greater responsibility to heed the process and participate in it in the public interest. [67] As Sanyathi was challenging the legality of a huge tender, the awarding of which eThekwini was about to publicise, eThekwini should have ascertained the basis of the interdict, assessed whether it had merit and whether the court had granted relief. As eThekwini was aware of the illegality of its tender notice, it should also have anticipated that the interdict would be granted. If it did not know what the likely outcome would be then it had a duty to find out. To persist with the signing ceremony was bad faith. Importantly, eThekwini misrepresented to the public and the local community to which it is accountable, that the contract for the provision of water pipeline for the Western Aqueduct was proceeding when it had been stalled by the interdict.

Findings

71]Although the first five complaints of procedural unfairness do not on their own result in procedural unfairness sufficient to warrant the setting aside of the award, considered cumulatively, they make a strong case of bias on the part of eThekwini's officials. Their substantive reasons for their decisions discussed below fortify Group Five's case for bias. Furthermore,

67 *Qaukeni* para 23

eThekwini reveals its intransigence in its reaction to the interdict. It was not prepared to backtrack on its decision to award the tender to Esorfranki-Cycad, when, in all the circumstances of this case, it was the most prudent course of action.

Substantive fairness

A stillborn process

72]Mr Marnewick submitted that the issue is whether the tenders were assessed scores that were rationally connected to the evidence before eThekwini. This question does not arise unless the evidence was adduced through a lawful procedure and was relevant. As pointed out above, the invalid tender notice also contaminated the evidence it elicited. EThekwini could not breath legal life into a tender process that was stillborn.

73]Furthermore, the evidence became irrelevant once eThekwini decided to evaluate the tenders on a basis different from that on which the applicants prepared their tenders. EThekwini tucked away from the applicants the real import of the tender, namely, that price would in fact count for 90 points in the evaluation of the bids. By departing from the tender specifications it gave Esorfranki-Cycad an unfair advantage over the other tenderers, who relied on the tender notice for the specifications.

74]EThekwini's allocation of 70 points for price in the tender notice was a material deviation from s 2 (1) (b) of the PPPFA. Rationally, a tender in response to a notice in which price counts for 70 points differs materially from a tender responding to a notice in which price counts for 90 points. By changing the tender specifications privately and informally so that price actually counted for 90 points eThekwini not only deviated materially from the prescribed process and substantive requirements but also violated the

constitutional imperative of fairness, transparency and competitiveness. In short, by obtaining tenders through an invalid invitation to tender and thereafter persisting in evaluating those tenders, eThekwini rendered an irrational and substantively unfair award to Esorfranki-Cycad. But the substantive unfairness does not end there.

Fixed price v price adjustable

75]Sanyathi and Group Five further challenged that the award to Esorfranki-Cycad was unresponsive and unacceptable firstly because Esorfranki-Cycad offered a fixed price instead of an adjustable price bid. Secondly, it offered two managers instead of three.

76]EThekwini submitted that clause F.3.8.2 of the tender conferred a discretion on eThekwini to determine whether deviations were material. As for the fixed price objection, on a plain reading clause F.2.10.3 of the tender entitled tenderers to submit prices subject to escalation as provided for in the conditions of contract. Tenderers had the prerogative to submit a fixed price or a price subject to escalation bid. A fixed price tender would nevertheless be subject to re-measurement of quantities, not values. As for accepting Esorfranki-Cycad's offer of two instead of three contract managers, eThekwini responded that it allowed this because the third contractor would not have been at an additional cost to eThekwini. In any event, eThekwini awarded zero points to Esorfranki-Cycad for the third contract manager. EThekwini therefore denied acting arbitrarily, capriciously or irrationally and being biased in favour of Esorfranki-Cycad.

77]Esorfranki-Cycad concurred with eThekwini that notwithstanding clause 46.2 of the general rules of contract which provided for adjustment of the contract price, clause F2.10.3 of the standard conditions of tender contemplated fixed rates for the duration of the contract unless a condition

of the contract read with the contract data permitted adjustment. Esorfranki-Cycad's bid for a 'Fixed firm price is offered. No escalation applicable.' was ambiguous as it was never Esorfranki-Cycad's intention to offer a fixed price. It was always subject to re-measurement. So submitted Mr Daniels SC for Esorfranki-Cycad.

78]The standard conditions of tender prescribed the test for responsiveness. That test required eThekwini on opening and before evaluating the bids in detail to ensure that each tender properly received complied with the requirements of the conditions of tender and that it was responsive to the other requirements of the tender document. It was to regard as responsive a tender that conformed to all the terms, conditions and specifications of the tender document without material deviation or qualification. A material deviation or qualification was one which, in eThekwini's opinion, changed its or the tenderer's risk and responsibilities under the contract or would affect the position of other tenderers presenting responsive tenders if it were to be rectified. EThekwini had a duty to reject a non-responsive tender and not to allow it to be subsequently made responsive by correction or withdrawal of the non-conforming deviation or reservation. Furthermore, only acceptable tenders as defined counted.

79]In this case, clause F.2.10.3. stipulates that tenders ought to:

'provide rates and prices that are fixed for the duration of the contract and not subject to adjustment except as provided for in the Conditions of Contract identified in the Contract Data'.

80]The exception is in clause 46.2 of the Contract Data which reads:
'Contract price adjustment is applicable'.

81]The meaning of this clause is plain to lay persons and to experts.

According to Roy George Turner, an experienced quantity surveyor of forty seven years practice, this is also the industry meaning.

82]Clause 46.2 further prescribes that the values of the certificates '**shall**' be adjusted in accordance with the contract price adjustment schedule which in turn prescribes certain values for the coefficients. Furthermore, the regulations defined 'firm price' which Esorfranki-Cycad offered, to mean

> 'price that is subject to adjustments in accordance with the actual increase or decrease resulting from the change, imposition, or abolition of customs or excise duty…or tax which … has an influence on the price …'

In short, the adjustments to price are triggered by a customs, duties, levies and taxes.

83]The difference between Esorfranki-Cycad's fixed firm price contract and the tender conditions is as stark to the court as it is to experts. Mr Turner describes the difference thus:

> 'A **fixed price** tender is a tender in which the price is not subject to any adjustment or increases or decreases in the cost of labour, material, fuel, plant and other basic input costs in the construction of the project.
>
> The tenderer consequently makes his own allowance for these items and includes it in his tender thereby assuming the risk or benefit of any shortfall or excess in his allowance…
>
> A **subject to escalation** contract provides for a price that is subject to adjustment in line with price adjustments as per the relevant indices which are issued by authoritative bodies such as the BER (Bureau of Economic Research) and SAFCEC (South African Federation of Civil Engineering Contractors) and are based upon input costs and market conditions in the construction industry….

(As for) (**c)ontract price adjustment (escalation) forecasting,** various indices and related formula exist which are used to forecast provisions for escalation in the construction industry. Two such indices …are the… BER Contract Price Adjustment Provisions (CPAP) and the …SAFCEC Index.

The BER Cost Index can be used to determine the percentage rise in building cost over a period based on (certain) formula… The SAFCEC Index can be used to determine escalation factors (also) based on a formula' that takes into account labour, plant, materials and fuel.

84]Case law too recognises that in the field of procurement, fixed price or lump sum bids differ materially from a bid in which price is subject to escalation or 'rate and measurement'.[68] Given the stark differences between the different pricing methods by no stretch of any interpretive enterprise could a fixed price be regarded as a price subject to adjustment and *vice versa*. Contrary to eThekwini's contention therefore, tenderers did not have a choice between submitting a fixed price bid, a price subject to adjustment bid and a price subject to escalation bid. Furthermore, given the peremptory statutory provisions regarding price, the tender documents had to be clear on the requirements for price. Esorfranki-Cycad's bid for 'A fixed firm price. No escalation applicable' was unambiguously the opposite of the tender requirement. Ethekweni understood[69] from Esorfranki-Cycad's tender that no escalation applied. Although materiality of a deviation depends on eThekwini's opinion, such opinion has to be rational and free of bias. To allow such a deviation on price that was manifestly material, renders the award to Esorfranki-Cycad irrational and biased.

85]Mr Turner points out that comparing a fixed price offer with an offer subject to adjustment for cost changes introduces an element of subjectivity as it is dependant upon the assumptions of the assessor who must form a

68 *Group Five Building Ltd v Minister of Community Development* 1993 (3) SA 629 at 645G-H
69 Group Five Review 405

view on the duration of the contract, the size of the project, the likelihood of changes and the assumed rate of progress. This subjectivity is evident in eThekwini's assessment of Esorfranki-Cycad's bid firstly when it assumed without establishing as a fact that Esorfranki-Cycad had 'built in' some form of protection against inflation without establishing what that protection was and whether it was realistic and suitable for the high risks involved in this tender.

86]Secondly, eThekwini in its discretion applied price escalation instead of contract price adjustment prescribed in the contract data. Given the substantial difference between these two pricing methods, the exercise of this discretion allowed a material deviation from the conditions of the tender in order to favour Esorfranki-Cycad.

87]Thirdly, eThekwini de-escalated Esorfranki-Cycad's price at the rate of 11.25% per annum which it alleged is the average percentage derived from the current escalation indices from the Western Aqueduct Phase One contract. Mr Turner contends that the rate of de-escalation was too high and unsupported by the authoritative indices viz, the BER index average of 5.12% and the SAFCEC index average of 7.74% per annum.

88]The rate of escalation or de-escalation should not be an issue at all as price escalation did not apply; contract price adjustment applied. Significantly, the effect of applying 11.25% as opposed to 5.12% or 7.74% was to de-escalate Esorfranki-Cycad's bid from R750m to R646m making it the lowest bid. EThekwini performed another calculation in which it escalated the price of other tenderers at 11.25% to the contract commencement dates of 1 December 2010 and 1 March 2011. Predictably, Esorfranki-Cycad scored the lowest again. Left with a situation in which it was required to compare a fixed price tender with price adjusted tenders, eThekwini devised the escalation-descalation formula as a way of

undertaking the comparative exercise. As the tender documents prescribed price adjustment only and does not contemplate escalation and de-escalation, eThekwini's evaluation of Esorfranki-Cycad's bid was *ultra vires*.

89]Even if the purpose of the escalation was to test whether eThekwini was receiving value for money and not for purposes of rejecting the applicants' bids, the comparative exercise informed the decision to accept Esorfranki-Cycad's bid. As such eThekwini used an *ultra vires* process to decide the award. Therefore, not only did eThekwini fail to enquire into relevant criteria that constituted the 'built in' protection, it also considered irrelevant criteria by escalating and de-escalating price and by using a subjective if not controversial rate of 11.25% per annum. By so evaluating Esorfranki-Cycad's fixed price tender eThekwini disadvantaged other tenderers who might have competed on the basis of a fixed price tender had they known that eThekwini would deviate from a material term of the tender conditions.

Two managers instead of three

90]An offer of two managers is materially different from an offer of three managers. It has implications for pricing, cost, risk and competitiveness. As Sanyathi protested, the costs of one manager of say, R30 000 per month affects price materially in a long term contract. This deviation was therefore material. More importantly, having regard to the tender document's requirements for a responsive tender, Esorfranki-Cycad's tender was not responsive. As a tender of three managers compared to two managers has a demonstrably different impact on price, risks, responsibility and competitiveness, eThekwini's opinion to hold otherwise was irrational. Bias in favour of Esorfranki-Cycad also taints its opinion. Even if eThekwini allocated zero for this item, by deviating from the tender conditions privately and without notice to or consultation with other tenderers it violated the

obligation to ensure that tenders are transparent and competitive.

Clarification

91]Although I have said that seeking clarity from one tenderer and not others is not necessarily a procedural flaw, eThekwini's reasons for seeking clarity of Esorfranki-Cycad's bid are not justified. In terms of F3.10 of the standard conditions of tender, eThekwini needed to seek clarification only if a tender offer could lead to ambiguity in a contract. Esorfranki-Cycad tendered: 'A fixed firm price is offered. No escalation applicable'. EThekwini sought to clarify what was meant by fixed price and why Esorfranki-Cycad offered only 2 instead of 3 managers. Esorfranki-Cycad's tender is clear. So too is the condition of tender that contract price adjustment applies. Above all, the regulations defined 'firm price'. Experienced companies such as Esorfranki-Cycad must surely know the difference between fixed price, fixed firm price, price subject to escalation and contract price adjustment and be able to say exactly what they mean, especially when the contract is worth more than R800m. Ethekweni therefore had no need to seek clarification.

92]By seeking clarification eThekwini assisted Esorfranki-Cycad to submit an otherwise unacceptable, unresponsive tender, in violation not only of all the prescripts of procurement law but also of its very own standard conditions of tender. It was anti-competitive to other tenderers and potential tenderers who did not enjoy the same indulgence.

93]EThekwini did not reserve for itself in the tender documents any discretion to waive full compliance with the substantive conditions of tender to allow a fixed price bid instead of a price adjustable bid, or two managers instead of three. Assuming that the reservation of such discretion is permitted notwithstanding the prescriptive nature of procurement law,

eThekwini had to exercise such discretion impartially and fairly, which it did not do.

Disqualification of Sanyathi-Phambili

94]EThekwini's main defence to Sanyathi's assertions was that Sanyathi-Phambili failed to meet the threshold of 80% which disqualified it. It attempted to show that its scoring of Sanyathi-Phambili bid was rational. Unlike in *Sizabonke*, Sanyathi-Phambili was eliminated at the initial stage of the tender before the evaluation. Sanyathi-Phambili's tender price was not the best. The Esorfranki-Cycad's tender was the best price because it was fixed. As the first respondent was left with one responsive tender, it did not have to embark on a comparative analysis to award the tender. So it was submitted for eThekwini.

95]As the authorities caution against stepping into the shoes of the administrative authority,[70] I refrain from doing so not only because I cannot evaluate the bids but also because I do not need to for the purposes of this judgment, in view of my finding that the award to Esorfranki-Cycad was substantively unlawful on other grounds. Besides, the disputes of fact about Sanyathi's experience have to be tested through oral evidence before any definitive findings can emerge.

Disqualification of Group Five –ICON

96]The reason eThekwini gave for rejecting Group Five-ICON's bid was that their covering letter to their bid contained qualifications regarding the proving of services, shoring, bedding and backfilling which it considered to be material technical divergences from the tender specifications that put eThekwini at risk. The Group Five-ICON tender was prefaced with what

70 *Bato Star* para 45-46

they called ‘clarifications’ because in their opinion the tender documents were vague.

97]As indicated above, it is pointless trying to fathom whether eThekwini applied a rational mind to the substantive merits of the tenders when the evidence before it was irrelevant to the terms on which they were to be evaluated. Group Five-ICON should have at the outset clarified any ambiguity in eThekwini’s documents by ascertaining their exact meaning from eThekwini before submitting their tender. However, if their qualifications or ‘clarifications’ constituted material technical divergence, it should have been obvious to eThekwini from the outset that Group Five-ICON’s tender was unresponsive; eThekwini should have rejected it without allowing it to enter the next phase of the evaluation. Instead, eThekwini allowed its BEC to consider the tender further and to report to the BEC in May and April 2010. Only in October 2010 when it presented its final report did eThekwini conclude that Group Five-ICON’s bid constituted material technical divergence and could not be considered further.

98]Surprisingly, eThekwini did not advance this reason in the ruling of the appeals authority. Instead of engaging with Group Five-ICON’s grounds of appeal, eThekwini blandly replied that ‘it is not unreasonable for the municipality to not disturb an evaluation which has been made honestly and without obvious error’. Couched in the double negative, it seems that Ethekweni might itself not have been convinced of the reasonableness of its evaluation. For the same reasons that I do not have to evaluate the substantive merits of Sanyathi’s bid I do not delve into the merits of Group Five-ICON’s bid.

Conclusion

99]This case typifies how not to conduct procurement. The illegality and

consequent procedural and substantive irregularities are precisely of the sort that the prescriptive constitutional and statutory framework seeks to prohibit. Even if Sanyathi and Group Five were not the best tenders on criteria other than price, i.e the gate-keeping criteria, which might disqualify them again if they tender afresh, all the tenderers, the administration and the community deserve a fair procedure. A fair procedure is not only one that ensures transparency and competitiveness but also one that is free of the slightest whiff of corruption.

The remedy

100]As indicated above, having granted an order declaring the tender process illegal and invalid and setting aside the award of the contract, the purpose of this judgement is to give reasons for that order and devise an appropriate remedy. Froneman J observed that the generous jurisdiction of s 8 of PAJA enables a wide range of just and equitable remedies that include declaratory orders, orders setting aside the administrative act, orders directing the administration to act in an appropriate manner and orders prohibiting it from acting in a particular manner. [71] In choosing a just and equitable remedy, the fundamental constitutional importance of the principle of legality which requires invalid administrative action to be declared unlawful must be emphasized before a court grants any discretionary relief. [72] Judgments call for the courts to strike a balance between the interests of the administrative body, the unsuccessful tenderers, the successful tenderer[73] and, I add, the public.

101]In this case, the invalidity is so fundamental that it is incapable of being corrected, validated or substituted. The bids were not tendered on the basis that price counted for 90 points but have to be evaluated on that

71 *Bengwenyama Minerals* para 83
72 *Bengwenyama Minerals* para 84
73 *Millennium Waste Management* para 22 and 23

basis. Consequently, the court cannot refer the matter to the BEC to re-evaluate some or all of the tenders as Sanyathi initially suggested. Nor can the court substitute its decision for that of eThekwini.

102]However, my findings show that eThekwini's officials breached several sub-sections of section 6 of PAJA. Topping the list is my finding that they were biased.[74] Their actions were procedurally unfair[75] and not authorised by the empowering provision. They considered irrelevant factors and disregarded relevant factors.[76] Their actions were not only irrational but also unconstitutional and unlawful.

103]These violations are so serious and pervasive that the observation that the high standards set in s 217 (1) of the Constitution and the PPPFA seem to be honoured more in the breach than in the observance,[77] is an understatement. The literature is littered with exhortations to accountability, fairness, equity, impartiality, ethicality, transparency, competitiveness and cost-effectiveness. This high standard of governance of public administration at all levels is prescribed in order to prevent corruption. These exhortations and standards, and the plethora of authorities from our highest courts should have left eThekwini officials in no doubt that it could not proceed with the tender after *Sizabonke*. EThekwini had to know the case law on procurement not only because it specialises in procurement but also because all the cases precede the evaluation of the bids.

104]From the perspective of efficient management, prudence required eThekwini to comply with *Zizabonke* from the outset. It was less risky and therefore less costly then to start afresh than to continue and compound the illegality. Whether eThekwini's officials even considered the management of risk angle is doubtful because it advances not reasons for rejecting it.

74 S 6 (2) (a) (iii) of PAJA
75 2 c of PAJA
76 2 e of PAJA
77 *Phoenix Cash & Carry* para 1

105]In these circumstances, the actions of eThekwini's officials amount to gross negligence, sheer incompetence or lack of capacity. Having found that the officials were intransigent and that they acted in bad faith, corruption cannot be ruled out.

106]The impact of awarding a tender unlawfully is that it cannot shake off the stench of corruption that accompanies it, however well-meaning the officials awarding it might be. Not only the officials but the administration itself becomes suspect and vulnerable to attack from the community the administration is meant to serve. Unsuccessful tenderers also want justice.

107]Hence the remedy I devise is aimed at inviting the council of eThekwini to consider the evidence in this review and the reasons for my findings with a view to investigating which officials are guilty of misconduct or poor performance or lack the capacity for their positions. Furthermore, in the exercise of its right and duty to exercise eThekwini's executive authority in terms of s 4 of the MSA, the council should consider recovering from those found guilty the costs eThekwini incurred as a consequence of their unlawful conduct. In the exercise of such executive authority to conduct the investigation eThekwini '**must'** respect the rights of citizens and others protected by the Bill of Rights. [78]

Locus standi

108]Esorfranki-Cycad and eThekweni prefaced their opposition with an objection to the *locus standi* of Sanyathi and Group Five. Ethekweni abandoned its opposition at the hearing.

109]The crux of Esorfranki-Cycad's challenge was that the applicants act

78 S3 of MSA

on their own in this review without their respective joint venture partners in the tender; consequently, they cannot challenge the substantive merits of the tender nor can they claim any relief for themselves. In amplification of its opposition to the Group Five application, Mr Daniels contended that the only interest Group Five had acting on its own was that of a construction company that regularly participates in tenders and which now sought an opportunity to participate in a fresh tender. Mr Daniels acknowledged that Sanyathi and Group Five have standing on their own to challenge the legality of the tender process for non-compliance with the PPPFA. This concession alone disposes of the objection. As unsuccessful tenderers they automatically have *locus standi* to challenge the award of the tender,[79] notwithstanding the merits of their own tenders because the award to Esorfranki-Cycad has the capacity to affect legal rights. [80]

110]Furthermore, s 38 a of the Constitution read with s 6 (1) of PAJA entitles any person acting in their own interest to the right to approach a competent court to allege that a right in the Bill of Rights has been infringed or threatened. Any person has merely to allege that a right in the Bill of Rights has been infringed or threatened to acquire access to a court. The threshold for access is therefore low and consistent with the inclusive quality of our Constitution. The Constitutional Court encourages this broad, generous approach[81] to give effect to the right everyone has to access to the courts. It discourages formalism and legal objections that obstruct access to the court.

111]The right to just administrative action and to access to the courts are powerful rights that can hardly be lost by the mere inaction or refusal by a joint venture partner to participate in their enforcement. *Bamford in the Law*

79 *Goodman Brothers (Pty) Limited* 2001 (1) SA 853 (SCA) para 42, (per Olivier JA, 10 -12 per Schutz JA

80 *Grey's Marine Hout Bay (Pty) Limited v Minister of Public Works* 2005 (6) SA 313 (SCA) para 23.

81 *Ferreira v Levin NO and Others, Vryenhoek v Powel NO and Others* 1996 (1) SA 1 (CC) para 167-8

of Partnership and Voluntary Association in South Africa [82]clarifies that a partner may join a co-partner as co-defendant if the co-partner refuses to join the partner in enforcing a debt due to the partnership. The issue is less about standing and more about notifying persons of the proceedings so that they can elect to exercise the right of access and participate in the proceedings as plaintiffs or as defendants. This case is distinguishable on the facts, the law and the remedies sought from *Sandton Civic Precinct (Pty) Ltd v City of Johannesburg & Another* in which a party to a consortium sought declaratory relief in relation the development of property. [83]

112]Above all, it is in the public interest that the circumstances of this tender be publicly ventilated. As eThekwini failed in its responsibility to correct the illegality or have the court correct it, the court can not relinquish its function as an auditor of legality[84] now that another interested party has taken the initiative. The applicants have an interest[85] in their own right and as partners to the joint venture to institute these proceedings.

113]In the circumstances, Esorfranki-Cycad's objection to the *locus standi* of Sanyathi and Group Five has no merit and is dismissed.

Costs

114]I ordered eThekwini to pay the costs of Sanyathi and Group Five. This litigation is as a result of the unreasonable and unconscionable conduct of its officials who triggered and persisted in this dispute. The council of eThekwini in the course of its deliberations should endeavour to recover these costs from officials who acted unlawfully or committed misconduct so that tax payers are not penalised.

82 Third edition p 69 and the authorities referred to in footnote 61 and 62
83 2009 (1) SA 317 (SCA)
84 Tom Bingham *The Rule of Law* p 61
85 *Ferreira* para 167-8

Order

115]Accordingly, I supplement the order I granted on 30 September 2011 declaring the tender process illegal and invalid and setting aside the award of the contract to Esorfranki-Cycad, with eThekwini paying the applicants' costs, with the following remedy:

a) The applicants, Sanyathi Civil Engineering and Construction (Pty) Ltd and Group Five Construction (Pty) Ltd shall serve a copy of this judgment on the mayor of eThekwini.
b) The mayor of EThekwini shall table this judgment before the council of eThekwini.
c) The council of eThekwini shall consider this judgment with a view to:
    (i) conducting or commissioning an investigation into the conduct of officials involved in the awarding of tender number WS5980 for the construction of the Western Aqueduct Phase Two;
    (ii) recovering the costs eThekwini incurred from those officials found guilty of misconduct or acting unlawfully.

D. Pillay J

Dated: 24 October 2011

Appearances

Case no 7538/2011

For the Applicant:	Broster SC with Adv P. Wallis
Instructed by:	M. B Perderson & Associates
For the 1st respondent:	Marnewick SC with Sachs
Instructed by:	Berkowitz Cohen Wartski Attorneys
For the 2nd and 3rd respondent:	Daniels SC
Instructed by:	Du Toit Mcdonald Inc

Case no: 9347/2011

For the Applicant:	Olsen SC with Salmon SC
Instructed by:	Norton Rose
For the 1st and 4th Respondent:	Marnewick SC with Adv Sachs
Instructed by:	Berkowitz Cohen Wartski Attorneys
For the 2nd and 3rd respondent:	Daniels SC
Instructed by:	Du Toit Mcdonald Inc
For the 5th and 6th respondent:	Broster SC withAdv P. Wallis
Instructed by:	M. B Perderson & Associates
For the 7th respondent:	No appearance