Republic of South Africa

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

Case no: 19367/2014

In the matter between:

TRANSCREATIONS KZN CC Applicant

v

CITY OF CAPE TOWN First Respondent

INDUSTRIAL POLES AND MASTS (PTY) LTD Second Respondent

Court: Judge J I Cloete

Heard: 18 and 19 February 2015

Delivered: 23 March 2015

JUDGMENT

CLOETE J

Introduction

[1] The applicant (*'TK'*) was one of ten unsuccessful tenderers in a tender advertised by the first respondent (*'the City'*) for the manufacture, supply, delivery and offloading of galvanised steel streetlight poles and brackets, with an estimated value of R10 million per annum (excluding VAT) over a period of three years. The second respondent (*'IPM'*) was the only successful tenderer.

[2] TK does not seek to impugn the City's decision to reject its own tender bid. Instead it asks for orders: (a) reviewing and setting aside the City's decision to award the tender to IPM; (b) declaring a particular clause in the tender bid document, namely clause 4, ambiguous and misleading; and (c) directing the City to revise the offending clause and to commence the tender process *de novo*. Both the City and IPM oppose the relief sought.

Locus standi

[3] In its papers TK made no attempt to set out the basis for its *locus standi*. Similarly this issue was not raised or addressed in the answering affidavits of the City or IPM. The furthest that the City went was to note that TK did not seek to have the decision to reject its own tender bid reviewed and set aside.

[4] The issue of *locus standi* was raised for the first time in the heads of argument filed on the City's behalf. Nevertheless, the parties approached the matter on

the basis that this was an important issue, given that it impacts on the very relief which TK seeks, and it was dealt with on that basis.

[5] Counsel for TK submitted that its *locus standi* stems from the premise that if the relief which it seeks is granted, then it will "automatically" follow that TK will get a second bite at the cherry because the entire tender process will have to commence *de novo.* To this extent – I use my own words – the domino effect which TK's success will have will cloak it with the standing to have launched the review application in the first place. Both the City and IPM disagree. Before dealing with their arguments, it is convenient to refer to some of the relevant authorities.

[6] In *Jacobs en 'n Ander v Waks en Andere* 1992 (1) SA 521 (AD) at 533J – 534E the then Appellate Division formulated the test for *locus standi* as follows:

> *'In die algemeen beteken die vereiste van* locus standi *dat iemand wat aanspraak maak op regshulp 'n voldoende belang moet hê by die onderwerp van die geding om die hof te laat oordeel dat sy eis in behandeling geneem behoort te word. Dit is nie 'n tegniese begrip met vas omlynde grense nie. Die gebruiklikste manier waarop die vereiste beskryf word, is om te sê dat 'n eiser of applikant 'n direkte belang by die aangevraagde regshulp moet hê (dit moet nie te ver verwyderd wees nie); andersins word daar ook gesê, na gelang van die samehang van die feite, dat daar 'n werklike belang moet wees (nie abstrak of akademies nie), of dat dit 'n teenswoordige belang moet wees (nie hipoteties nie) – sien, in die algemeen* Cabinet of the Transitional Government for the Territory of South West Africa v Eins *1988 (3) SA 369 (A) op 387J-388H, 398I-390A, en die vorige beslissings wat daar bespreek word (sommige waarvan hieronder genoem sal word). In die omstandighede van die huidige saak is dit veral die vereiste van 'n direkte belang wat op die voorgrond staan. Wat dit*

betref, is die beoordeling van die vraag of 'n litigant se belang by die geding kwalifiseer as 'n direkte belang, dan wel of dit te ver verwyderd is, altyd afhanklik van die besondere feite van elke afsonderlike geval, en geen vaste of algemeen geldende reels kan neergelê word vir die beantwoording van die vraag nie (sien bv Dalrymple and Others v Colonial Treasurer *1910 TS 372* per *Wessels R op 390* in fine*, en vgl* Director of Education, Transvaal v McCagie and Others *1918 AD 616* per *Juta Wn AR op 627). Vorige beslissings kan behulpsame algemene riglyne vir bepaalde soort gevalle aandui, maar meestal het dit weinig nut om die besondere feite van een geval te vergelyk met dié van 'n ander.'*

[7] In *Kolbatschenko v King NO and Another* 2001 (4) SA 336 (C) at 346G-H a full court of this division, following *Jacobs supra* held that:

'What is required, then, is that

(a) the applicant for relief must have an adequate interest ("voldoende belang") in the subject-matter of the litigation, which is not a technical concept; it is usually described as a direct interest in the relief sought;

(b) it must not be too far removed;

(c) it must be actual, not abstract or academic;

(d) it must be a current interest, and not a hypothetical one.

Whether these requirements are met in any particular case will depend on the facts, and no hard-and-fast or generally binding rules can be laid down.'

[8] The right to fair administrative action is contained in the Bill of Rights, specifically s 33(1) of the Constitution. S 33(1) stipulates that everyone has the right to administrative action that is lawful, reasonable, and procedurally fair. S 38 of the Constitution deals with the enforcement of rights, and sets out the classes of persons who are entitled to approach a court for this purpose. The only class relevant in the present matter is contained in s 38(a), being *'anyone*

acting in their own interest'. Hoexter Administrative Law in South Africa 2nd Ed at 494 – 495 expresses the following view:

> *'s 38(a) apparently states the position at common law. However, it seems clear that this provision also goes somewhat beyond the common law, since the type of interest required by it is certainly less stringent than the "sufficient, personal and direct" interest demanded at common law. In particular, a majority of the Constitutional Court took the view in* Ferreira v Levin NO [1996 (1) SA 984 (CC)] *that it is enough if the complainant is affected* directly *by the conduct complained of, and that he or she need not necessarily be affected personally as well. Nevertheless, the cases decided in terms of the common law have not entirely lost their relevance. They will continue to apply in non-constitutional matters – at least until the non-constitutional law is brought into line with constitutional law. Furthermore, interpretations of the common-law interest may well influence the meaning of "own interest" under the Constitution.'*

[9] S 3(1) of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) provides that administrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair. S 6(1) stipulates that any person may institute proceedings in a court or a tribunal for the judicial review of an administrative action. The definition of *'administrative action'* in s 1 of PAJA refers to a decision taken (or not taken) *'which adversely affects the rights of any person and which has a direct, external legal effect'* subject to the exclusions set out therein which are not relevant for present purposes.

[10] In *Democratic Alliance and Others v Acting National Director of Public Prosecutions and Others* 2012 (3) SA 486 (SCA) the Supreme Court of Appeal

dealt with the approach to the determination of *locus standi* on the particular facts before it as follows at paras [45] – [46]:

> *'[45] It is of fundamental importance to our democracy that an institution such as the NPA, which is integral to the rule of law, act in a manner consistent with constitutional prescripts and within its powers, as set out in the National Prosecuting Authority Act 32 of 1998. Certainly the membership of the DA can rightly be expected to hold the party they support to the foundational values espoused in the DA's constitution and to expect the DA to do whatever is in its power, including litigating, to foster and promote the rule of law. In this regard see* Justice Alliance of South Africa and Others v President of the Republic of South Africa and Others *2011 (5) SA 388 (CC) para 17; and the recent decision of the full court in* Bio Energy Afrika Free State (Edms) Bpk v Freedom Front Plus *2012 (2) SA 88 (FB) paras 15-17. It clearly is in the public interest that the issues raised in the review application be adjudicated and, in my view, on the papers before us, it cannot seriously be contended that the DA is not acting, genuinely and in good faith, in the public interest. See* Freedom Under Law v Acting Chairperson: Judicial Service Commission, and Others *2011 (3) SA 549 (SCA) para 21. The question whether, in making the decision to continue the prosecution of Mr Zuma, the NPA had acted in accordance with the law or had wrongly and unlawfully succumbed to political power and influence, as alleged by the DA, is a matter for decision in the review application after all the papers have been filed. Presently, it follows that the DA has standing to act in its own interests, as well as in the public interest, and is entitled to pursue that application to its conclusion.*
>
> *[46] Not so with the parties seeking to intervene. It is difficult to discern with any degree of precision, or at all, the ambit of their complaint against Mr Zuma. It is even more difficult to establish that a complaint, however vague, was lodged with the NPA itself. We were not pointed to any part of the record from which it appears which of the two parties seeking to intervene had in fact lodged a complaint with the NPA. There is much force in the submission that, having regard to the litigation between CCII, which was a bidding party, and government agencies and the subsequent monetary settlement, the basis of which has not been disclosed, it cannot be said that there is any protectable*

> *interest that CCII could advance in the review application. The motivation for entering the fray is in my view clear from what is stated by Mr Young himself, namely, that which, in modern terminology, is referred to as a "fall-back position" – in the event of the DA being held not to have locus standi. In my view the conclusion of the court below in respect of the standing of the parties seeking to intervene is correct. It follows that the application to intervene must fail.'*

[11] The question which thus arises is whether TK has any protectable interest which it could advance in these proceedings. TK seeks only to assail: (a) the award of the tender to IPM; and (b) clause 4 of the tender specification, which is alleged to be *'ambiguous and misleading'*. The sole ground on which the specification is criticised is the failure by the City to specify pole section sizes.

[12] At the risk of repetition, TK has not challenged the City's rejection of its own bid, despite a substantial portion of its papers and the argument advanced on its behalf being devoted to why its bid should not have been rejected. TK's complaints in this regard are irrelevant to the relief which it seeks.

[13] The City argues that, as an unsuccessful tenderer who has not challenged the rejection of its own bid, TK has effectively placed itself out of the running in respect of the award of the tender to IPM. From this perspective, even were the award to IPM to be set aside, TK would be in no better position, unless the court were to order the City to commence the entire tender process *de novo.* However, the sole premise upon which TK seeks an order that the process commence *de novo* is a finding that one clause in the entire tender document is ambiguous and misleading, namely the failure to specify pole section sizes. In

this regard, it is significant that TK's tender bid was not declared non-responsive because of a failure to comply with clause 4 relating to section sizes. It was declared non-responsive for different reasons, namely that:

13.1 its calculations supporting its pole design were wrong;

13.2 the structural engineer's professional indemnity insurance certificate was not provided (during argument TK's counsel conceded that this was a crucial omission on its part);

13.3 the galvaniser's permit was not provided;

13.4 it failed to complete certain manufacturer's technical particulars and equipment guarantees; and

13.5 it failed to complete the statement of compliance in the tender document.

[14] The City thus contends that TK has no *locus standi* for the relief which it seeks. Although it was "adversely affected" and aggrieved by the award of the tender to IPM, it is in reality in no different position to any other member of the public who is disgruntled by that award, including all of the other unsuccessful tenderers who similarly have not challenged the rejection of their respective bids. The same applies to the declaratory relief sought, for the reason that TK's bid was in any event not rejected for failure to comply with clause 4 of the tender bid document.

[15] It is not in dispute that prospective bidders were at liberty to quote for as many items listed in the price schedule as they wished. In other words, they were not obliged to quote on all of the items for which the tender was advertised, being heavy duty streetlight poles; light duty streetlight poles; various types of adaptors, arms and accessories; a range of double streetlight and island arches; and various access opening cover plates. TK only bid for heavy and light duty streetlight poles and certain types of adaptors.

[16] The City thus argues that, even in the event of the court setting aside the award to IPM and/or finding that TK's complaint regarding clause 4 is well-founded, the City would not necessarily have to re-run the entire tender process. The City's decision-makers are best placed to make this call (*Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others* 2004 (4) SA 490 (CC)). Of course, it is possible that the City might decide to do so, but bearing in mind its constitutional obligation to manage its resources properly, it might not. Indeed, there is nothing on the papers to suggest that it will follow as an automatic consequence that the City will re-run the entire tender process from scratch; or even that this would be the appropriate course for the court to order it to follow.

[17] IPM supports the City's submissions and referred the court to *Fidelity Security Services (Pty) Ltd v Mogale City Local Municipality and Others* (handed down by Vermeulen AJ on 17 December 2014, case no 14/14936 GPJHC). At para [42] the court, referring to a preceding judgment of the Supreme Court of Appeal between the same parties, held as follows:

> *'[42] In paragraphs 9, 20, 31, 46 and 51.4 of the answering affidavit of the Municipality, the deponent is at pains to point out that the SCA did not, in its judgment, hold that the Second Respondent is disqualified from being considered for the award of the contract. This observation is, of course, correct as far as it goes. The SCA did not have to say this because the lawfulness of the Second Respondent's disqualification was not an issue before it. It was merely part of the broader factual matrix of the appeal which fell to be determined by it. The fact of the matter is that it was not necessary for the SCA to hold that the Second Respondent is disqualified; the Municipality had itself made this decision when the Fourth Respondent, during March 2012, accepted the BEC's recommendation that the Second Respondent be disqualified. There is no warrant for inferring from the fact that the SCA's order is silent about the matter and contains an order for the re-evaluation of the bids, that therefore the committee was at large to overrule or ignore the municipal manager's decision that the Second Respondent be disqualified; a decision arrived at on the committee's own findings and recommendation. When the SCA ordered that the bids be re-evaluated, that was meant, in my respectful view, as a reference to remaining extant bids that had not been disqualified. The SCA's judgment cannot be understood as meaning that the bids of all original tenderers, including those who were disqualified by the Municipality because of improper conduct, fell to be re-evaluated…'*

[18] Although there is no suggestion of misconduct on TK's part, the passage quoted from the abovementioned judgment, applied to the facts of the present matter, supports the argument that TK has no *locus standi.*

[19] Having regard to the aforegoing, it is my view that TK lacks the necessary standing to ask for the relief sought. However, on the assumption that I am wrong, it is necessary to consider the merits of TK's complaints in respect of the award to IPM and the failure by the City to specify pole section sizes, which TK refers to as *'the design ambiguity'.*

The award of the tender to IPM

[20] TK attacks the award of the tender to IPM on four grounds, namely: (a) non-compliance with clause 3.2 of the tender specification; (b) its steel grade did not comply with clause 3.9; (c) it failed to comply with deflections stipulated in clause 3.11; and (d) it failed to complete schedule 14 of the tender bid document. A related, but in a sense independent complaint, is that the City deviated from the procurement process.

[21] Clause 3.2 of the tender specification stipulates that the poles shall be designed and manufactured in accordance with the standards in SANS 10225 and SANS 14713-1. For present purposes the only standard under scrutiny is that relating to the design of the poles, which must be in accordance with SANS 10225 – *'the design and construction of lighting masts'*.

[22] The drawings submitted by IPM included a note which read: *'Designing of poles to new SANS 1022-1991'.* The calculation sheets submitted by IPM referred to *'SABS 0225:1991 – the design and construction of lighting masts'.* TK's complaint is that the standard incorporated in SANS 10225 is inconsistent with both the drawings and calculation sheets submitted by IPM; and that its calculations were made using an outdated code of practice, namely SABS 0225:1991.

[23] However it is undisputed that SANS 10225 was preceded by SABS 0225; that these two standards are identical in all material respects; and that the former is essentially a renumbered version of the latter.

[24] In its answering affidavit IPM explained that the reference in its drawings to *'new SANS 1022-1991'* was a mere typographical error in omitting the number "5" after "1022".

[25] That this was the case appears from IPM's covering letter to the City, which states that: *'Safety Factor of Poles are Designed strictly according to the new SANS 10225-1991'* [sic] as well as the certificate of its structural engineer which confirms that the poles *'will be designed to the recognised code of practice – SANS 10225: the design and construction of lighting masts'.* Both the aforementioned letter and certificate were included in IPM's bid.

[26] During argument counsel for TK also contended that the City's failure to obtain clarification from IPM regarding what she termed "a material aspect" of the SANS code before making the tender award to it rendered the bidding process unfair.

[27] However the City explained that at the time of evaluating IPM's tender bid its officials took the view that IPM had simply *'conflated'* the two standards. Given that standard SANS 1022-1991 does not exist, it submits that its officials correctly interpreted this as being a reference to SANS 10225-1991, having

regard also to the other documents included in the bid. This approach cannot be faulted.

[28] In any event, as previously stated, it is common cause that there is no difference in substance between SABS 0225:1991 and SANS 10225. Therefore IPM's reference to SABS 0225:1991 as the applicable standard can hardly be considered a material error. TK's complaints in this regard are without merit and must be rejected.

[29] TK's second complaint is that IPM fell foul of clause 3.9 of the tender specification which prescribes that the steel to be used must be grade 355. The steel used in IPM's calculations has a strength of 300 MPa. This was not compliant with grade 355 which has a strength of 350 MPa.

[30] The City accepts that 350 MPa steel is stronger than 300 MPa steel. The parties accept that 300 MPa steel is no longer available in the market. TK agrees that it is therefore *'impractical'* for the City to have accepted a calculation based on 300 MPa steel.

[31] The City explained that IPM's design calculations, admittedly based on 300 MPa steel, nonetheless delivered satisfactory results in compliance with the tender specifications. This was met with a bare denial by TK in reply. The City's explanation must thus be accepted as correct in accordance with the *Plascon-Evans* rule, given that there is nothing to suggest that it is so far-fetched or untenable that it falls to be rejected on the papers as they stand.

[32] The City also explained that in any event IPM's design drawings confirm that the poles will be manufactured using the stronger grade 355 (350 MPa) steel.

[33] In its founding papers, TK limited its complaint purely to non-compliance by IPM. It was only in reply that TK launched two additional attacks. These were that IPM *'could have an overstock of 300 MPa steel'*; and that *'in any event'* the price of steel is directly proportionate to the grade of steel used, and if the incorrect grade of steel is used in the manufacture of the poles *'it would therefore affect the price of the poles when tendering'*. No detail was provided in support of these allegations. Obviously the City was not afforded the opportunity to deal with this new matter raised for the first time in reply. Counsel for TK however sought to enlarge on these allegations in both her heads of argument as well as oral argument at the hearing. This took TK's complaint no further, given that it had failed to make out any such case in its founding papers.

[34] I therefore conclude that the second complaint must similarly be rejected.

[35] TK's third complaint relates to what it calls *'deflection criteria'* stipulated in clause 3.11 of the tender document. It contends that IPM's pole design does not comply with the maximum permissible deflections under design loads as specified for items 1B to 5B in the tender.

[36] In support of this allegation TK annexed to its founding papers a report from its structural engineer, Mr Rob Young. The contents of this report were not

confirmed under oath by Mr Young and thus constitute hearsay. Mr Young only deposed to a confirmatory affidavit in support of TK's replying affidavit, in which he stated that:

> *'I have read the affidavit of RAJU CHETTY* [the main deponent] *and confirm its contents insofar as they relate to Young & Satharia* [the engineering firm at which Mr Young is employed] *and myself.'*

[37] However in its replying affidavit TK: (a) without referring to any specific aspect of Mr Young's earlier, unconfirmed report, made certain allegations of a technical or expert nature *of its own accord* without being qualified to do so; and (b) advanced other criticisms which had neither been dealt with by Mr Young in his earlier report nor in its own founding papers.

[38] In similar vein, TK's counsel enlarged on this inadmissible evidence in both her heads of argument as well as oral argument. When the inadmissibility of this evidence was pointed out to her, she was instructed to apply for a postponement (which she simply moved from the Bar without any notice to the City or IPM) in order to obtain an affidavit from Mr Young. The City and IPM rightly opposed this application – the impermissible nature of the evidence had already been pointed out by the City in its heads of argument – and it was refused.

[39] Accordingly, TK failed to place any admissible evidence before the court in support of this particular complaint, and it too falls to be rejected.

[40] The fourth complaint is that IPM did not complete schedule 14 of the tender document, which is the statement of compliance. This was one of the reasons why TK's own bid had been rejected, and it contends that IPM's bid should have been evaluated by the City on the same basis.

[41] Although this was not disclosed in TK's founding papers, the City pointed out in its answering affidavit that TK had left schedule 14 completely blank. On the other hand IPM, while not specifically placing a mark next to the word "yes" in the document to confirm compliance, wrote the following in the space provided:

> *'All offers are strictly according to your Council's specifications, and all designs are adequate in terms of horizontal and vertical wind deflections.*
>
> *Please refer to our design calculations for more detail.'*

[42] The City thus correctly submits that IPM was, in effect, answering "yes" in schedule 14, because it expressly confirmed compliance, albeit without deleting the "no" in the "yes/no" option. In my view this is a clear case of substantial compliance and the City correctly did not adopt an overly formalistic or technical approach. In any event, it is fallacious for TK to contend that its "response" and IPM's response to schedule 14 are comparable.

[43] It follows that this complaint must also be rejected.

[44] TK's last complaint pertaining to IPM is that the City deviated from the tender process by making a further award to IPM, not included in the original tender,

for additional lettering on the steel pole covers in the amount of R100 per cover (excl. VAT). It is common cause that this award was made in terms of clause 308.5 of the City's Supply Chain Management Policy (SCMP) which provides that:

> *'308. The City Manager may dispense with the official procurement processes established by this Policy, and procure any required goods or services through any convenient process, which may include direct negotiation, but only in respect of: …*
>
> *308.5 any other exceptional circumstances where it is impractical or impossible to follow the official procurement process.'*

[45] The closing date for tender bids was 7 April 2014. TK alleges that the first indication that the City's Bid Evaluation Committee (BEC) considered making the further award is contained in its report to the Bid Adjudication Committee (BAC) dated 17 July 2014, in which the BEC also recommended that the original tender be awarded to IPM. At the foot of p 3 of that report the following appears:

> *'For decision by the Accounting Officer:*
>
> *2.2 It is recommended that the official procurement process established and adopted **BE DISPENSED** with in terms of clauses 308 of the Supply Chain Management Policy, sub-clause 5 for the additional lettering on the steel pole covers.*
>
> *2.3 It is recommended that Industrial Poles and Masts (Pty) Ltd **BE APPOINTED** to render the service for the **additional lettering on the steel pole covers** in the amount of R100,00 per steel pole cover*

[exclusive of VAT] for the period from date of commencement until 2017/06/30. [See discussion]'

[46] On p 10 of the report, under *'Discussion'* the following is recorded:

'Deviation for the additional lettering on the steel pole covers:
A technical oversight caused the omission from the specification stipulating the steel pole access cover of the street light pole to be stamped "PROPERTY OF THE CITY OF CAPE TOWN". The only responsive tenderer was requested to provide a quotation for the additional requirements required in terms of the specification of the street light pole [Refer to Annexure C].'

[47] Annexure C is the quotation submitted by IPM for the lettering. On 19 August 2014 the City's Executive Director, Dr Gisela Kaiser, supported the recommendation in respect of the further award and commented that:

'Given high incidence of vandalism, critical that infrastructure is marked with City of Cape Town.'

[48] In the BAC's recommendation to the City Manager of 28 July 2014 the following appears:

'SUPPLY CHAIN MANAGEMENT BID ADJUDICATION COMMITTEE RECOMMENDATION TO THE CITY MANAGER: 28 JULY 2014

SCMB 51/07/14 REQUEST FOR DEVIATION: TENDER NO. 239G/2013/14: MANUFACTURE, SUPPLY, DELIVERY AND OFF-LOADING OF GALVANISED STEEL STREETLIGHT POLES AND BRACKETS

In response to questions raised regarding the non-responsive submissions, the official explained that the requirement of a Structural Engineer's Professional Indemnity Insurance Certificate was extremely important for this tender.

The official was requested to obtain the signature of the relevant Executive Director on the report for the deviation portion of the recommendation.

RESOLVED that for the reasons set out in the report the tender offer submitted by Industrial Poles and Masts (Pty) Ltd for Tender No. 239G/2013/14: Manufacture, supply, delivery and off-loading of galvanised steel streetlight poles and brackets, be accepted from date of commencement until 30 June 2017, as follows…

[and later]

RECOMMENDED TO THE CITY MANAGER that for the reasons set out in the report authority be granted for a deviation from the Supply Chain Management procedures, as allowed for in Clause 308.5 of the CCT's Supply Chain Management Policy to:

(a) appoint Industrial Poles and Masts (Pty) Ltd to render the service for the additional lettering on the steel pole covers in the amount of R100.00 (excl. VAT) per steel pole cover, from date of commencement of contract until 30 June 2017.

RESOLVED that subject to the above:

(b) the appointment of Industrial Poles and Masts (Pty) Ltd to render the service for the additional lettering on the steel pole covers in the amount of R100.00 (excl. VAT) per steel pole cover, from date of commencement of contract until 30 June 2017, be approved.'

[emphasis supplied. The BAC recommendation is annexure TK19.]

[49] In its founding papers TK sought to extrapolate the above into the following:

‘

38.

In its request for deviation the BAC deals with the deviation and indicates in its report that it was explained in response to questions regarding non-responsive submission that the structural engineer’s professional indemnity insurance certificate was extremely important. As a result it was agreed, Annexure ***“TK19”*** *hereto.*

39.

Quite clearly this cannot be the case.

40.

The professional indemnity certificate could never be the most important thing in order to allow for the only responsive bidder to bid bearing in mind that there were other tenderers who also had produced the professional indemnity certificate.

41.

In any event there was no exceptional circumstances, in which the deviation as approved ought to be allowed.’

[50] However on a plain reading of the BAC recommendation, its comments relating to the structural engineer’s professional indemnity insurance certificate pertained *only* to the bids which had been declared non-responsive. They did not relate to the deviation request which was dealt with separately. Furthermore, the recommendation to the City Manager for the deviation clearly stated that it was *‘for the reasons set out in the report’*. The “report” is obviously the report of the BEC which had set out those reasons, together with those for declaring the other bids for the original tender non-responsive. Nowhere in BAC’s recommendation does one find any separate or further reasons.

[51] In any event the uncontroverted evidence of the City is that, due to an increasing and serious problem of theft of steel pole access covers, it requires them to be stamped as its property in certain geographical areas. Its pricing schedule reflects that, at most, an anticipated annual quantity of 1100 cover plates with lettering would need to be procured. This comes to a maximum additional amount of R110 000 per annum (excl. VAT) in the context of an annual tender sum of R10 million per annum (excl. VAT), or only 1%.

[52] In the circumstances the City is right in its submission that it would be ridiculous and impractical to have to abandon and re-run the entire tender process from scratch in order to be able to make the further award. To do so would be a gross waste of public funds.

[53] Furthermore, as the City points out, no other tenderers were prejudiced as a result of the deviation because they had *already* been excluded.

[54] It follows that TK's complaint on this ground must also be rejected.

The alleged design ambiguity

[55] It is undisputed that prospective tenderers were furnished with a detailed tender specification, setting out exactly how the poles were to be manufactured, requiring compliance with all applicable SANS standards, wind speed, deflections, design drawings, calculations and so forth. It is common cause that

in so doing *all* pole design specifications were provided to tenderers except for the pole section sizes.

[56] The crux of TK's complaint is that because pole section sizes are not specified, this gives rise to an *'ambiguity'* because *'on an analysis of the specifications it is possible to produce two or more technically compliant design drawings resulting in varying section sizes and pole masses'.* This in turn is alleged to ultimately affect the price tendered by each bidder, thus rendering the bidding process unfair and contrary to s 217 of the Constitution.

[57] The City's answer to this is that, instead of causing any ambiguity (in the sense of uncertainty or double meaning) the very purpose of not stipulating section sizes is to stimulate competition and ingenuity amongst prospective bidders in order to derive the best aesthetic but compliant designs for the lowest price. This approach is not unfair and meets the requirements of s 217, namely a procurement process which is fair, equitable, transparent, competitive and cost-effective.

[58] The City thus submits that the omission of pole section sizes from the specification facilitates competition on price. If only one section size is stipulated in the specification, each and every variable will then be prescribed, and price competition will be materially curtailed or altogether eliminated. Put differently, the City must have some scope within the specification itself to facilitate *competitive* bidding. It is undisputed that TK and IPM both produced

technically compliant pole designs. However, as a result their designs were priced differently, with IPM's design being the less expensive of the two.

[59] TK has adduced no evidence that the specification is ambiguous in the sense of being capable of more than one possible meaning or interpretation. On the contrary, the pole section size is left *unspecified* and therefore open for tenderers to select to best commercial advantage. TK has also adduced no evidence that as a result of the failure to prescribe section sizes it was uncertain or confused as to how to complete the tender documents for this specific tender. As a fact it understood and complied with the tender specification. It selected pole section sizes within its discretion, as it was entitled to do, and submitted its tender accordingly. There is also no evidence, or even an allegation, that TK – or indeed anyone else – was *'misled'* by the specification. The high water mark of its complaint during the internal appeal process was that *'It is possible that the specification may have been ambiguous and interpreted differently by different structural engineers'.* No details were provided. In fact, TK does not explain what, if anything, it would have done differently had pole section sizes indeed been prescribed.

[60] In summary, TK was unable to produce a shred of evidence to counter the City's response to this complaint. In these circumstances, it is appropriate to refer to what was held in an earlier judgment of the Supreme Court of Appeal in *Bato Star* [2003 (6) SA 407 (SCA)] at para [53]:

'[53] Judicial deference is particularly appropriate where the subject-matter of an administrative action is very technical or of a kind in which a Court has no particular proficiency. We cannot even pretend to have the skills and access to knowledge that is available to the Chief Director. It is not our task to better his allocations, unless we should conclude that his decision cannot be sustained on rational grounds. That I cannot say.'

[61] I thus conclude that this complaint must also be rejected.

[62] **In the result the following order is made:**

'The application is dismissed with costs, including all reserved costs orders as well as the reasonable travelling and accommodation costs of the legal representatives of the second respondent.'

_____

J I CLOETE