IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

CASE NO: **4157/16**

In the matter between:

AFRILINE CIVILS (PTY) LTD Applicant

and

MINISTER OF RURAL DEVELOPMENT & LAND REFORM First Respondent

EXEO KHOKELA CIVIL ENGINEERING CONSTRUCTION (PTY) LTD Second Respondent

CASE NO: **5222/16**

ASLA CONSTRUCTION (PTY) LTD Applicant

And

THE HEAD OF THE DEPARTMENT OF RURAL DEVELOPMENT AND REFORM First Respondent

EXEO KHOKELA CIVIL ENGINEERING CONSTRUCTION (PTY) LTD Second Respondent

Coram: Dlodlo, J
Dates of Hearing: 31 May 2016
Date of Judgment: 23 June 2014

JUDGMENT

DLODLO, J

INTRODUCTION

[1] This matter concerns two separate urgent review applications launched on 10 March 2016 and 31 March 2016 by two Applicants, Afriline Civils (Pty) Ltd ("Afriline") and Asla Construction (Pty) Ltd ("Asla") respectively in terms of which the two Applicants seek to have the First Respondent's decision to award the tender under Contract No: SSC WC 36/2015 DRDR: CONSTRUCTION OF EBENHAESER, BULK IRRIGATION REVITALISATION PROJECT, WESTERN CAPE ("the tender") to the Second Respondent, Exeo Khokela Civil Engineering Construction (Pty) Ltd ("Exeo") reviewed and set aside. Afriline and Asla seek an order reviewing and setting aside, alternatively declaring invalid any agreement concluded between the first Respondent and Exeo in respect of the implementation of the tender.

[2] On 18 March 2016, an order was granted by agreement between Afriline and the First Respondent that an interdict be issued to the effect that, pending the hearing of the review applications, the first

Respondent be interdicted and restrained (a) from taking any steps to implement the tender, including but not limited to, concluding or implementing any agreement in respect of the Tender with Exeo; and (b) from handing over control of the site on which construction is to commence in terms of the Tender to Exeo or any other party. Asla and the First Respondent similarly agreed on 8 April 2016 to an interim interdictory order pending the final determination of a review application. Both review applications have been enrolled for hearing before me which hearing took place on 31 May 2016. The review applications have been consolidated pursuant to Asla having applied to have its application consolidated with that of Afriline.

FACTUAL BACKGROUND

[3] In its Tender and Invitation to Tender, the Cape Town Office of the Department of Rural Development and Land Reform ("the Department"), invited tenders for the construction of the Ebenhaeser Bulk Irrigation Revitalisation Project, Western Cape under Tender No: SSC WC 36/2015 DRDLR ("The Project"). The initial closing date of 12 October 2015 for the submission of tenders was subsequently extended to 23 October 2015. It is of cardinal importance that I mention that the Tender Notice, *inter*

alia, sets out the following eligibility (mandatory) requirements: (a) that tenderers should have a CIDB contractor grading of 8CE and that preference would be offered to tenderers who have a CIDB grading of 8CE or higher; (b) that only tenderers who attended a compulsory briefing session (with written confirmation of attendance at the compulsory site clarification meeting – Form D in the lender document) as well as compliance with other requirements would be eligible to submit tenders; (c) that a compulsory clarification meeting with representatives of the Department would take place at Elsenburg, Muldersvlei Road, Stellenbosch, Western Cape on 1 October 2015. The papers show that representatives of both Afriline and Asla attended the site meeting where the Department's Senior Supply Chain Practitioner, one Mr. Muthabo emphasised certain aspects relating to the Tender. It must be mentioned as well that Mr. Muthabo serves as part of the Secretariat of the Bid Specification and Evaluation Committee and the Provincial Bid Adjudication Committee. According to the minutes of the site meeting (serving as Annexure "A10" to Afriline's Supplementary founding affidavit) which were forwarded to all prospective tenderers who attended the meeting, certain salient aspects as recorded in the minutes of

the site meeting were emphasised by Mr. Muthabo. These included but were not limited to the following:

"(a) The lead partner must have a Contractor grading designation in the 8CE of construction work; and
(b) Submission of an Original Valid Tax Clearance Certificate is compulsory.
Bidders should note, that in accordance with legislation, no contract may be rewarded to a/an person/entity who has failed to submit an Original Valid Tax Clearance Certificate from the South African Revenue Service (SARS), certifying that the taxes of that person/entity are in order or that suitable arrangements have been made with SARS. In bids where a consortia/Joint Venture/Sub-Contractors are involved each party must submit a separate Original Valid Tax Clearance Certificate."

[4] It is common cause that on the closing date (23 October 2016) Afriline, Asla and Exeo as well as the two other tenderers, (King Civil Engineering Contractors (Pty) Ltd and CSV Construction (Pty) Ltd) submitted their tenders on the tender documents prescribed by the Department. The tender documents (these are fairly standard) are indeed voluminous and understandably have not been annexed to the Affidavits filed by the parties. These tender documents have been made available as part of the Rule 53 record process. The Department has (thankfully) annexed the Tender Data, the Returnable Documents and Form A (Schedule

of Proposed Sub-Contractors) which seemingly are particularly relevant to these review proceedings.

[5] It must be mentioned particularly that relevant to the present applications are the Tender Data, the Returnable Documents and Form A (Schedule of Proposed Sub-Contractors) as well as the minute of the site meeting. I hasten to add that these documents certainly augment and stress compliance with two key eligibility (mandatory) requirements. The Tender Date (Annexure "C") for instance, provides expressly for an addition or variation to clause F.2.1 of the Standard Conditions of Tender as follows:

> *"Only those Tenderers who are registered with the CIDB, in a contractor grading designation equal to or higher than a contractor grading designation determined in accordance with the sum for a 8CE of construction work, are eligible to submit tenders."*

[6] In Annexure "D" (the Returnable Documents) the following was stated as part of the list of Returnable Documents:

> *"THE TENDERER MUST SUBMIT THE FOLLOWING DOCUMENTS WITH THIS TENDER. IF THE DOCUMENTS ARE NOT INCLUDED, THE DEPARTMENT WILL NOT CONSIDER THIS TENDER."*

Noticeably, in the Returnable Documents (serving as Annexure “D” in these proceedings) the quote set out above is in bold print and in capital letters. I suppose this is so in order to ensure that the tenderers do not fail to read and apprehend same.

[7] The list of Returnable Documents deals specifically, *inter alia*, with tax certificates as referred to in clause 2.25 of the Standard Conditions of Tender and it states the following:

> *“An Original, Valid Tax Clearance Certificate.*
> *See Item T2.2.14 For N page T2.1.21*
> *In Bids where Consortia/Joint Venture/Sub-Contractors are involved each party must submit a separate Original Valid Tax Clearance Certificate.”*

As regards one of the Returnable Schedules, ie. Form A: Schedule of Proposed Sun-Contractors in which the tenderer should indicate the sub-contractors it intends to utilise in the performance of the work for the Project (Annexure “E”) pertinently drew the attention of tenderers to the following:

> “*NB: Sub-contractors Tax Clearance Certificate must be submitted with tender documents for consideration”).*

Afriline indicated in its Form A: Schedule of Proposed Subcontractors (Annexure “E”) that it would use TT Innovations as well as its Joetsie and HidroTech as sub-contractors. Asla

indicated it would use Engineering Lining, Hidro-Tech Systems (Pty) Ltd and TT Innovations as its sub-contractors. It is certainly common cause that the submission of original and valid Tax Clearance Certificates in respect of sub-contractors was a mandatory requirement. It is further common cause that the failure to submit such Tax Clearance Certificate would result in the tender being regarded as non-responsive. It actually means that the tender would be rejected solely on that basis and that the tender would not be considered at all. Notwithstanding Afriline's knowledge that its tender could be rejected for failing to comply with the mandatory requirement of the submission of Tax Clearance Certificates, it nevertheless failed to submit a Tax Clearance Certificate for TT Innovations. But the same Afriline submitted Tax Clearance Certificates for Joetsie and Hidro-Tech Systems (Pty) Ltd and an entity known as Martin & East (Pty) Ltd.

Asla, similarly, with the knowledge of this mandatory requirement relating to Tax Clearance Certificates for subcontractors –did not submit a Tax Clearance Certificate for TT Innovations, nor for Engineering Lining and Hidro-Tech Systems (Pty) Ltd. I must mention that Asla submitted Tax Clearance Certificates for Martin & East (Pty) Ltd, PSV Industrial (Pty) Ltd and Hidro-Tech Systems (Pty) Ltd. Exeo submitted Tax Clearance Certificates for Martin &

East (Pty) Ltd and Hidro-Tech Systems (Pty) Ltd. It did not submit a Tax Clearance Certificate for TT Innovations/ king Civil and PSV Construction also did not comply with the mandatory requirement relating to the submission of Tax Clearance Certificates for sub-contractors.

[8] In the evaluation of the tenders on 2 December 2015, the Bid Evaluation Committee recommended that the tender be cancelled due to all five tenderers' non-compliance with the mandatory requirement relating to Tax Clearance Certificates. The Provincial Bid Adjudicating Committee in assessing the tenders on 7 December 2015 similarly concluded that all five tenders were non-responsive due to non-compliance with the Tax Clearance Certificate requirement. Mr. Muthabo drafted a memorandum serving as Annexure "A14" to Afriline Supplementary founding affidavit and this memorandum drew attention to the fact that the tenderers had not submitted and/or attached original and valid Tax Clearance Certificates for their subcontractors. The memorandum recommended that approval be granted to request original and Valid Tax Clearance Certificates from tenderers. On 15 December 2015, it was authorised that such Tax Clearance Certificates could be obtained from the tenderers.

[9] On 18 December 2015 Mr. Muthabo addressed correspondence to all tenderers (Exeo, Afriline, Asla, King Civil and CSV Construction) in which he requested them to submit Tax Clearance Certificates in respect of the sub-contractors listed by them in their tender documents. The letters serving as Annexure "F" and Annexure "G" in these proceedings were addressed to Afriline and Asla respectively. Similar letters were addressed to the other tenderers. These letters pertinently drew to the tenderers' attention that:

> *"6. Failure to submit the abovementioned documents will invalidate the tender".*

It is therefore clear that all the tenderers were afforded an opportunity to submit Tax Clearance Certificates for the sub-contractors which they intended to use in the performance of the work and as indicated in their tender documents. Annexure "H" is an e-mail dated 18 December 2015. Afriline attached Tax Clearance Certificates (as mentioned before) for Joetsie and Hidro-Tech Systems (Pty) Ltd. It, however, failed to submit a Tax Clearance Certificate for TT Innovations. Instead Afriline attached a letter dated 18 December 2015 (serving as Annexure "H" in these proceedings) in which it indicated that TT Innovations is a division of Martin & East (Pty) Ltd and "*not a legal entity in its own*

right." The letter stated that Afriline submitted a Tax Clearance Certificate for Martin & East (Pty) Ltd. Similarly, in an e-mail dated 15 January 2016 (Annexure "1") Asla attached Tax Clearance Certificate for itself, Martin & East (Pty) Ltd and PSV Industrial. It also did not submit a Tax Clearance Certificate for TT Innovations. Asla, however, attached a letter by TT Innovations to Asla dated 14 January 2016 wherein it indicated that TT Innovations is a division of Martin & East (Pty) Ltd. Exeo attached Tax Clearance Certificate for TT Innovations and Hidro-Tech Systems (Pty) Ltd serving as Annexure "J" in these proceedings.

[10] In a letter dated 18 December 2015 (Annexure "K") the Department requested the tenderers consent to extend the tender validity period (which would have expired on 22 January 2015) by two months to 22 March 2016. A similar letter was addressed to the other tenderers. All five tenderers consented to the said extension. In view of the fact that the tender exceeded the amount of R5 million, it had to be considered and awarded by the National Bid Adjudication Committee of the Department and would be subject to evaluation by the Bid Evaluation Committee and thereafter recommended by the Provincial Bid Adjudication Committee. In evaluating the five tenders (gathered from re-

evaluation report Annexure “A20”) the Bid Evaluation Committee held that only two tenders were deemed responsive (and these were Exeo and King Civil Engineering), and that they had met the mandatory requirements. Afriline’s tender was considered to be non-responsive on the basis that: it did not submit a Tax Clearance Certificate for the proposed sub-contractor (TT Innovations) and that its CIDB grading had expired on 15 January 2016. Asla’s tender was similarly deemed to be non-responsive on the basis that it had failed to submit a Tax Clearance Certificate for its proposed sub-contractor, TT Innovations.

[11] On 18 February 2016 the Bid Evaluation Committee reconvened and resolved to consider and accept Afriline’s and Asla’s tenders despite both of them not having submitted a Tax Clearance Certificate for TT Innovations. In so doing, the Committee had regard to their tenders which indicated that TT Innovations is a division of Martin & East (Pty) Ltd. On 19 February 2016 the Provincial Bid Adjudicating Committee, however, resolved (See Annexure “A20”) that Afriline’s and Asla’s tenders be referred back to the Bid Evaluation Committee for re-evaluation since *“it not agree with the inclusion of both Afriline Civil (Pty) Ltd*

Construction (Pty) Ltd whereas they failed to submit TCC for their sub-contractors."

[12] On 22 February 2016 the Bid Evaluation Committee reconvened and re-evaluated Afriline's and Asla's tenders. It reversed its earlier view to qualify both Afriline and Asla-and decided to disqualify them on the basis that they failed to comply with the mandatory requirement relating to the furnishing of a Tax Clearance Certificate for their sub-contractor, TT Innovations. The Bid Evaluation Committee recommended that the tender of Exeo be accepted. The Provincial Bid Adjudicating Committee similarly recommended that the tender of Exeo be accepted. The Provincial Bid Adjudicating Committee similarly recommended that Exeo's tender be accepted.

[13] On 1 March 2016 the National Bid Adjudicating Committee resolved that Exeo's tender be accepted and that the tender be awarded to Exeo. The National Bid Adjudicating Committee paid particular attention to Afriline's and Asla's view that they were not obliged to submit a Tax Clearance Certificate for its sub-contractor TT Innovations. It clearly had regard to the correspondence in which it was asserted that TT Innovations was

a division of Martin & East (Pty) Ltd. The National Bid Adjudicating Committee concluded that the contents of the letter from TT Innovations was not true in view of the fact that Exeo had obtained and furnished a Tax Clearance Certificate for TT Innovations. The Tax Clearance certificate also demonstrated that the South African Revenue Service (SARS) regarded TT Innovations as a separate legal entity. The Department and Exeo signed the contract between them on 7 March 2016.

THE PROCUREMENT LAW

APPLICABLE IN THE MATTER

[14] It is apparent on the papers that there are essentially three issues which underpin the review grounds set out in the two review applications launched by Afriline and Asla against the First Respondent. These are: (a) whether Afriline's and Asla's tenders were fairly rejected by the Department as non-responsive for failing to comply with the mandatory requirement relating to the furnishing of a Tax Clearance Certificate for their proposed sub-contractor, TT Innovations; (b) whether Afriline's tender was fairly rejected by the Department as non-responsive on the basis that Afriline's CIDB grading had lapsed on 15 January 2016 thereby resulting in Afriline's failure to comply with the mandatory

requirement that tenderers had to be registered with the CIDB with a grading of 8CE or higher; and (c) whether the Department's award of the tender to Exeo was fair given that Exeo's tender was allegedly non-compliant with the mandatory requirement relating to the submission of its own Tax Clearance Certificate. The above constitute a crystallisation of the issue at play in this matter.

[15] The procurement processes of organs of state are of course rooted in Section 217 (1) of the Constitution Act 108 of 1996 and the provisions of the Preferential Procurement Policy Framework Act 5 of 2000 (the "PPPFA") Section 217 (1) of the Constitution states as follows:

> *"When an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective."*

It is trite that the award of a tender by an organ of state constitutes administrative action under the Promotion of Administrative Justice Act 3 of 2000 ("PAJA"). Therefore in terms of Section 3 (2) (a) of PAJA, the tender process must be lawful, procedurally fair and justifiable.

[16] Perhaps it falls to be mentioned that in relation to the legally binding and enforceable framework within which a tender ought to be submitted, evaluated and awarded, the Constitutional Court in **All Pay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer, South African Social Security Agency, and Others** 2014 (1) SA 604 (CC) at 619G-620B; para [40] expressed itself as follows:

> *"Compliance with the requirements for a valid tender process, issued in accordance with the constitutional and legislative procurement framework is thus legally required. These requirements are not merely internal prescripts that SASSA may disregard at whim. To hold otherwise would undermine the demands of equal treatment, transparency and efficiency under the Constitution. Once a particular administrative process is prescribed by law, it is subject to the norms of procedural fairness codified in PAJA. Deviations from the procedure will be assessed in terms of those norms of procedural fairness. But it does not mean that, where administrators depart from procedures, the basis for doing so will have to be reasonable and justifiable, and the process of change must be procedurally fair."*

An established legal principle is that non-compliance with specifications, prescripts, requirements or conditions included in a tender document would render a tender unacceptable or non-

responsive and liable to disqualification from the further tender process.

[17] If unacceptable or non-responsive tender or tenders were to be further considered despite failing to comply with and/or conform to mandatory requirements, then certainly the consequences would be that the tender process as a whole is not transparent as required by the provisions of the PPPFA and Section 217 (1) of the Constitution quoted *supra*. Talking to this aspect the Court in **Loghdey and Others v City of Cape Town and Others**; **Advanced Parking Solutions CC and Another v City of Cape Town and Others** 2010 (6) BCLR 591 (WCC) at 607 A-B para [48] the Court made the following observation:

> *"Furthermore, by proceeding to score the tenders on the basis of allowing the SPS tender to be treated as if it had tendered a different device, the evaluation committee scored a tender that was not "acceptable" within the meaning of the PPFA. In my view, the further consideration of a tender that was manifestly non-compliant with a material requirement of the RFP stripped the process of one of the essential characteristics of the public procurement process: transparency."*

I am in full agreement with the above observation. This of course accords with the transparency that must always permeate the

tender process. It remains of cardinal importance to mention that for a tender to be deemed acceptable or responsive it must, in accordance with the provisions of Section 1 (i) of the PPPFA in all respects comply with the specifications and conditions of the tender as set out in the tender document.

[18] In **Westinghouse Electric Belgium SA v Eskom Holdings (Soc) Ltd and Another** 2016 (3) SA 1 (SCA) at 12F-H para [39], the Supreme Court of Appeal provided a deserved guidance in this regard when it stated that for the tender process to be lawful there had to be proper compliance with it and that *"a tender should speak for itself."* Fairness should permeate the tender process and particularly so in respect of the procedure adopted for awarding or refusing tenders to the tenderers. See in this regard **Tetra Mobile Radio (Pty) Ltd v MEC, Department of Works and Others** 2008 (1) SA 438 (SCA) at 443B-C para [9]. Conradie JA writing for the Supreme Court of Appeal in **Metro Projects CC and Another v Klerksdorp Municipality and Others** 2004 (1) SA 16 (SCA) at 21D –E para [13] sufficiently, in my view, elaborated on the duty to act fairly as follows:

> *"Fairness must be decided on the circumstances of each case. It may in given circumstances be fair to ask a tenderer to explain an ambiguity in its tender; it may be fair to allow a*

tenderer to correct an obvious mistake; it may, particularly in a complex tender, be fair to ask for clarification or details required for its proper evaluation. Whatever is done may not cause the process to lose the attribute of fairness or, in the local government sphere, the attributes of transparency, competitiveness and cost-effectiveness."

[20] It must be noted that in **Metro Projects CC** *supra* in considering whether the tender process followed was fair, the Supreme Court of Appeal delved into the circumstances as follows:

"A high-ranking municipal official purported to give the ninth respondent an opportunity of augmenting its tender so that its offer might have a better chance of acceptance by the decision-making body. The augmented offer was at first concealed from and then represented to the mayoral committee as having been the tender offer. It was accepted on that basis. The deception stripped the tender process of an essential element of fairness: the equal evaluation of tenders. Where subterfuge and deceit subvert the essence of a tender process, participation in it is prejudicial to every one of the competing tenderers whether it stood a chance of winning the tender or not."

Similarly, this Court **in Loghdey** *supra* warned as follows:

"The offer by SPS that was eventually accepted by the City was not the one made in SPS's tender…In my view the process went awry in this respect when, instead of excluding the SPS tender from consideration when it became apparent

from the independent technical expert's report of July 2007 that the tender did not comply with the stated technical specifications, the City instead engaged in a so-called clarification process. In the course of the process, SPS was permitted (if not encouraged) to offer to provide something materially different from that which had been offered in its tender and thereby, quite irregularly, given a second opportunity."

[21] An important issue of whether a tenderer's non-compliance with a mandatory requirement could be condoned by an administrative authority was laid to rest by the Supreme Court of Appeal when it held in **Dr. JS Moroka Municipality v Bertram (Pty) Ltd** [2014] 1 ALL SA 545 (SCA) at 551g-552a paras [16] and [17] that such non-compliance can only be condoned if the tender documents conferred a discretion on the administrative authority to condone such non-compliance with a mandatory requirement. The same principle was of course more broadly stated by the Supreme Court of Appeal (per Brand JA) in **Minister of Environmental Affairs and Tourism and Others v Pepper Bay Fishing (Pty) Ltd; Minister of Environmental Affairs and Others v Smith** 2004 (1) SA 308 (SCA) at para [31] as follows:

"As a general principle an administrative authority has no inherent power to condone failure to comply with a

peremptory requirement. It only has such power if it has been afforded the discretion to do so…The Chief Director derives all his (delegated) powers and authority from the enactment constituted by the general notice. If the general notice therefore affords him no discretion, he has none. The question whether he had a discretion is therefore entirely dependent on a proper construction of the general notice."

In the matter under discussion I accept that the issue of condonation hardly arises. The tender documents and the process do not, seemingly, permit condonation of a tenderer's non-compliance. The common cause is that the requirements relating to the Tax Clearance Certificates and the CIDB registration remain mandatory requirements and therefore non-compliance therewith would translate to the invalidity of the tender or tenders.

CONSIDERATION OF THE GROUNDS

OF REVIEW AND THE APPLICATION

OF RELEVANT LEGAL PRINCIPLES

[22] On behalf of the Department two applications to strike out were moved. These applications are based on what the Department regards as new matters surfacing for the first time in reply by the Applicants. It suffices to mention that the rule against new matters in reply is not cast in stone ie it is not absolute and should be

applied with a fair measure of common cause. Paragraph 18 of Mr. Fortuin's replying affidavit elaborates on the contents of annexure *"A16"* which has always been part of the record. The fact is that whether a matter raised in reply constitutes a new matter is something to be determined on the facts of each individual case. There is a distinction between the case in which the material is first brought to light by the Applicant who knew about it at the time of the filing of affidavit and facts alleged in Respondent's answering affidavit or possible existence of further ground for relief sought by the Applicant. Of course in the latter type of case the Court would more readily allow an Applicant in his replying affidavit to utilise and enlarge upon what has been revealed by the Respondent and to set up such additional ground for relief as might arise therefrom. See eg. **Investments (Pty) Ltd v Town Council of the Borough of Stanger** 1976 (2) SA 701 (T). Even if certain averments could have been made in the founding affidavit (on its own) that is no basis for excluding it from consideration at times. A common-sense approach based essentially on the want of prejudice may preclude the excluding of such averments from being considered. See in this regard, **EBotswana (Pty) Ltd v Sentech (Pty) Ltd and Others** 2013 (6) SA 327 (GSJ). See also **Smith v Kwanonqubela Town Council** 1999 (4) SA 947 (SCA) para [15] where it was

noted *(inter alia)* that the rule against new matters in reply is not absolute and should be applied with a fair measure of common sense. These so-called “new matters” have already been dealt with by the Department. I would thus refuse the striking out application and rather focus my attention on the merits of the matter before me. Mr. De Waal painstakingly pointed out that the Department’s decision to award the bid to Exeo suffers from the reviewable irregularities in that (in his contention) (a) Exeo’s bid should not have been accepted in the absence of its original Tax Clearance Certificate; (b) the Department should have realised that TT Innovations (Pty) Ltd was not the nominated sub-contractor for Afriline; Asla and Exeo because as from 1 September 2014 it operates as a division of Martin & East (Pty) Ltd; (c) the approach followed in respect of the validity of CIDB registration and other certificates was not consistently applied; and (d) Afriline could not have been excluded on the basis that its CIDB registration expired on 15 January 2016. In Mr. De Waal’s submission what the Departmental Committees were required to do is an *“intelligently evaluative approach”*. See **Loliwe CC t/a Vusumzi Environmental Services v City of Cape Town and Others** (case number 3791/2012 [2012] ZAWCHC 162 (6 July 2012) at para 35 and 42. In Mr. De Waal’s view anyone applying such an approach

would have either (a) accepted the detailed explanation given in the 14 January letter; or (b) have made further enquiries.

[23] According to Mr. De Waal a reviewable material error of fact was made in the instant matter. In his view the error of fact he relies on is of the kind that is uncontentious and objectively verifiable and may accordingly be relied upon in these review proceedings. Mr. De Waal in supporting his assertion in this regard referred the Court to **Dumani v Nair and Another** 2013 (2) SA 274 (SCA) para 26ff; **Minister of Home Affairs and Others v Somali Association of South Africa and Another** 2015 (3) SA 545 (SCA) para 25. In **Dumani case** *supra* the Supreme Court of Appeal stated the following:

> *"[26] The Appellant's attorney submitted that the presiding officer at the inquiry into the Appellant's misconduct committed a material misdirection of fact that entitled the High Court and entitles this Court to 'review the convictions and consider the matter afresh' in terms of the decision in Pepcor Retirement Fund and Another Financial Services Board and Another 2003 (6) SA38 (SCA) ([2003] 3 ALL SA 21). The argument requires a consideration of the*

parameters of material error of fact as a ground of review……..” .

It is also of importance that I set out infra the reasoning of the Supreme Court of Appeal (per Ponnan JA) in **Minister of Home Affairs v Somali Association of SA** *supra*. This reasoning is contained in paragraph [25] of the judgment. The relevant part thereof reads as follows:

“[25] When the decision to close the PERRO was taken, it was in the belief that the Lebombo RRO would be operational in April 2012. In that, the relevant authorities were overly optimistic. Mr. Apleni now states (in his answering affidavit in response to the respondents' application to adduce new evidence):

If the Lebombo RRO is set up by February next year (……...) it would mean that Mr. Apleni's initial estimation was off by approximately four years.

…….....

Implicit in that must be an acceptance that Mr. Apleni believed that the establishment of the Lembombo RRO, which was inextricably linked to the closure of the PERRO, would satisfy our obligations to asylum seekers as required by the Act and Constitution. That being so, it can hardly be imagined that the decision to close the PERRO would have been taken by Mr. Apleni when he did, had he known then that the Lebombo RRO would only be operational at the earliest in February 2016. It must follow that the DG's

decision to close the PERRO had been made in ignorance of the true facts material to that decision (See Pepcor Retirement Fund and Another v Financial Services Board and Another 2003 (6) SA 38 (SCA) ([2003] 3 ALL SA 21; [2003] ZASCA 56) paras 47 and 48; Dumani v Nair and Another 2013 (2) SA 274 (SCA) para 32).”

[24] In Mr. De Waal’s contention the award was influenced by a material error and that therefore in terms of the Promotion of Administrative Justice Act 3 of 2000(“PAJA”) the error was because irrelevant considerations were taken into account or relevant considerations were not considered (Section 6 (2) (e) (iii)) or that it was not rationally connected to the information before the administrator (Section 6 (2) (f) (ii) (cc)). Mr. De Waal took time in explaining that the perusal of the record ie (Rule 53 record) made it clear that the Department did not generally assess whether CIDB registrations or other certificates such as Tax Clearance Certificates were valid for the entire evaluation period. I deal with these issues comprehensively later in this judgment. One of course must have regard to cases such as **Jicama 17 (Pty) Ltd v West Coast District Municipality** 2006 (1) SA 116 (C) in which the Court found *inter alia* that new reasons which are put forward for the first time in answering papers cannot answer a review application. The Court cited with

approval dictums in **R v Westminister City Council, Ex Parte Erinakov** [1996] 2 ALL ER 302 (CA) at 315h -316d where it was held that allowing new reasons to be presented would lead to "*a sloppy approach by the decision-maker", and would in many cases give rise to the new reasons were "in fact second thoughts designed to remedy an otherwise fatal error exposed by the judicial review proceedings".* I accept that unequal treatment of bidders is indeed inimical to the fairness of the tender process. The authority of the latter statement is indeed *inter alia* **All Pay Consolidated v Chief Executive Officer, SASSA** 2014 (1) SA 604 (CC) paras 39 -40.

[25] Mr. De Waal relying on **Nucon Roads and Civils (Pty) Ltd v MEC For Department of Public Works, Roads and Transport: N.W. Province and Others** (M71/14) [2014] ZANWHC 19 (8 August 2014) contended that Afriline's principle submission is that the validity of its CIDB grading must be determined with reference to the position at closing day of the tender. He went so far as to contend that a bidder may even obtain a higher CIDB garding post-closing day and hence may become eligible for an award for which it did not qualify at closing day. He referred in this regard to **Icon Construction (Pty) Ltd v Dihlabeng Local Municipality**

and Others (A90/2015) [2015] ZAFSHC 205 (10 September 2015 where the Court held *inter alia* that:

> *"I agree with tile submissions of Icon and Esor that the interpretation of and reliance placed by the Municipality on Regulation 25(1A) of the Regulations to the Construction Industry Development Board Act 38 of 2000, is incorrect. If the words in Regulation 25(1A) "...but who is capable of being so registered prior to the evaluation of those submissions may be evaluated ..." were intended to mean that documentation to supplement a bid can be filed at any time up to the date that the bids are physically assessed, it would not only make a mockery of the closing date for submissions, but would lead to an untenable situation that those who did not qualify at the closing date, and only later did so, would be unduly preferred, to the prejudice and detriment of other bidders who met all requirements at the closing date."*

I hasten to point out that the above quoted portion of the Free State bench does not (in my view) provide support to the contention advanced by Mr. De Waal in this regard. I undertake to deal with the relevant provisions of the Construction Industry Development Board 38 of 2000 later in this judgment.

[26] Similarly, Mr. Schreuder contended that the Department's conclusion that the letter of Martin & East (Pty) Ltd to the effect

that TT Innovations (Pty) Ltd was a division of it is untrue, is cynical and irrational. In Mr. Schreuder's view there was no logical and rational basis for the rejection of this information which had been placed before the Department. Relying on **Chairman, State Tender Board v Digital Voice Processing (Pty) Ltd; Chairman, State Tender Board v Sneller Digital (Pty) Ltd and Others** 2012 (2) SA 16 (SCA) he contended that the decision to reject this information was irrational and no rational basis existed for the Department's conclusion. In the **Chairman, State Tender Board case** *supra* the Court talking to the requirement of rationality described same as follows:

> *"[40] In order to be rational, the decision must be 'based on accurate findings of fact and a correct application of the law'. That being so, no rational basis existed for the STB'S conclusions. The administrative action that it took was not rationally connected to the information before it as required by Section 6 (2) (f) (ii) (cc) of the PAJA".*

Mr. Schreuder submitted that the Department could easily have determined the correct position by way of an enquiry into the public records of the Registrar of Companies or by way of enquiry with the sub-contractor concerned. He referred me to **Aurecon South Africa (Pty) Ltd v Cape Town City** 2016 (2) SA 199 (SCA) para [43] at 218 where the following appears:

"……. Legal validity is concerned not only with technical, but also with substantial correctness, which should not always be sacrified for form. I do not understand AllPay to overturn this principle. There the court pointed out – "Once a particular administrative process is prescribed by law, it is subject to the norms of procedural fairness codified by PAJA. Deviations from the procedure will be assessed in terms of those norms of procedural fairness. That does not mean that administrators may never depart from the system put in place or that deviations will necessarily result in procedural fairness, but it does mean that, where administrator depart from procedures, the basis for doing so will have to be reasonable and justifiable, and the process of change must be procedurally fair. (para [40])"

Mr. Schreuder was correctly concerned that the Bid Evaluation Committee on the insistence of the Provincial Bid Evaluation Committee changed its earlier finding and recommendation that the tenders of Asla and Afriline were responsive.

[27] On Mr. Schreuder's contention the Bid Evaluation Committee's action of changing its finding and recommendation were unauthorised (Section 6 (2) (a) (ii) of PAJA), procedurally unfair (Section 6 (2) (c) of PAJA), was a result of irrelevant considerations being taken into account or relevant considerations not being considered (Section 6 (2) (e) (iii) of

PAJA) or as a result of the Bid Evaluation Committee's action itself not being rationally connected to the purpose for which it was taken, the purpose of the empowering provision or the information before the Bid Evaluation Committee (Section 6 (2) (f) (ii) of PAJA). Mr. Schreuder was so critical of the handling of the tenders by the Bid Evaluation Committee such that he contended that the statutory process that it followed forms part of what was referred to as the *"means"* in **Albutt v Centre for the Study of Violence and Reconciliation and Others** 2010 (3) SA 293 (CC) para [51]. In the latter paragraph the Constitutional Court held, inter alia, the following:

> *"….. but, where the decision is challenged on the grounds of rationality, Courts are obliged to examine the means selected to determine whether they are rationally related to the objective sought to be achieved. What must be stressed is that the purpose of the enquiry is to determine not whether there are other means that could have been used, but whether the means selected are rationally related to the objective sought to be achieved. And, if, objectively speaking, they are not, they fall short of the standard demanded by the Constitution."*

I am in full agreement with the sentiments postulated above by the Constitutional Court. Indeed rationality involves both substantive and procedural issues and is thus both the process by which the

decision is made and the decision itself must be rationality related. See **DA v President of the Republic of South Africa** 2013 (1) SA 248 (CC).

[28] It is of importance that I agree that in review proceedings such as these the inquiry regarding which documents were before the decision-maker at the time that the decision was taken is actually confined to Rule 53 record. The purpose of the record is to enable the Applicant and the Court to fully assess the lawfulness of the decision-making process. See for instance **Cape Town City v South African National Road Authority and Others** 2015 (3) SA 386 (SCA) in para [36] where the Supreme Court of Appeal stated, inter alia, *"when an Applicant in review proceedings files its supplementary affidavit, after having had sight of the record, it is in effect fully stating its case for the first time. …"* Indeed the Applicant filed their supplementary affidavits herein and these contain more details than contained in the original founding affidavits. This is because they had had sight of the Rule 53 record. The original Rule 53 record not having found its way to the judge seized with the matter for reasons beyond my comprehension, I derived assistance from Rule 53 record (copy) handed over by Mr. De Waal. In Mr. Schreuder's submission the

Department should have accepted (at the very least) that Asla substantially complied with the requirement to submit a Tax Clearance Certificate in respect of its sub-contractor. As pointed out above the Bid Evaluation Committee on the insistence of the Provincial Bid Evaluation Committee changed its earlier finding and recommendation that the tenders of Asla and Afriline were responsible. Mr. Schreuder (just like Mr. De Waal) was extremely concerned about the changed decision.

[29] It is common cause that the review grounds advanced by both Applicants (ie Afriline and Asla) are similar. The award of tender to Exeo is criticised on the basis that the Applicants contend that it did not submit an Original Tax Clearance Certificate as part of its tender. This assertion arose from what the consultants for the Project (Element Consulting Engineering) stated in their Tender Evaluation Report. They stated that "*due to the printing quality"* Exeo's Tax Clearance Certificate "does not seem to be an original". It would appear that both Afriline and Asla then seek to draw from Element's abovementioned statement that Exeo must have submitted a copy of its Tax Clearance Certificate. It is common cause that Exeo is not the author of this Tax Clearance Certificate. The author is SARS. In the Answering Affidavit filed

on behalf of the First Respondent and deposed to by Mr. Motsoenek the Chief Director: Supply Chain and Facilities Management Services in the Department of Rural Development and Land Reform the following important clarification in this regard appears:

> *"120.2 The consulting engineers therefore did not express a definitive view on this issue. In any event, during the evaluation and adjudication process conducted by the Bid Evaluation Committee, the Provincial Bid Adjudication Committee and the National Adjudication Committee, it was indeed found that Exeo had submitted an Original Tax Clearance Certificate in respect of itself".*

I am not certain, in any event, how much reliance this Court needs to place on the unsigned report of Element in which a view is expressed that Exeo's Tax Clearance Certificate appears to be a copy instead of an original. This was not at all a categorical finding by Element in respect of the Tax Clearance Certificate of Exeo. This was merely an expression of reservation based on the appearance of the Certificate. As Mr. Charles Cook of Exeo explained in the Answering Affidavit filed on behalf of the Second Respondent (Exeo) *"the quality of the printed tax certificates depends on the condition of the cartridges of the printers used by SARS. From time to time the quality of cartridges is such that the*

originally printed certificates appear to be copies." It would appear that reliance placed by both Afriline and Asla on the alleged failure to submit an Original Tax Clearance Certificate by Exeo is indeed totally misplaced. In the first place the consultants were appointed to assist the Department with the evaluation of the tenders as regards technical matters. It is not my understanding that the consultants were tasked with conducting an evaluation and consideration of the tenders as to whether they were responsive or not. Only the Bid Evaluation Committee, the Provincial Bid Adjudication Committee and the National Bid Adjudication Committee could make a determination whether a tenderer's tender was responsive or not. Strangely this is also conceded by Afriline when it stated that "the final evaluation and adjudication of the bids remain the responsibility of the Department". This should be a non-issue because the consultants merely expressed their concern with the quality of Exeo's Tax Certificate and they did not conclude that it was not an Original Tax Clearance Certificate emanating from the South African Revenue Services. There is no merit to this ground of review at all.

[30] As set out earlier in this judgment Afriline and Asla contend that given the fact that their proposed and/or nominated sub-contractor,

TT Innovations (Pty) Ltd, is a sub-division of Martin and East (Pty) Ltd, it follows that their submission of a Tax Clearance Certificate for Martin and East (ostensibly on behalf of TT Innovations) effectively rendered their tenders compliant with the mandatory requirement relating to the furnishing of a Tax Clearance Certificate for their proposed and/or nominated sub-contractor, TT Innovations (Pty) Ltd. They amplified their assertion by pointing to the 14 January 2016 letter of Martin and East in which it is stated that following a merger between TT Innovations and Martin & East on 1 March 2014, TT Innovations had become a division of Martin & East; and that Martin & East would contract in all tenders submitted after 1 September 2014 via TT Innovations (as a division of Martin & East) and henceforth assume all legal and contractual responsibilities, obligations and liabilities for TT Innovations. These two Applicants (Afriline and Asla) assert that the Department had committed material error by erroneously assuming that the subcontracting party was TT Innovations as an independent entity when in fact the subcontracting party was to be TT Innovations as a division of Martin & East.

[31] But it remains important to point out that the allegations advanced by and/or on behalf of Afriline and Asla as regards TT Innovations

do not seemingly square with the facts and the documents which served before the various committees, in particular the National Bid Adjudication Committee (which ultimately awarded the tender to Exeo) In Form A: (Schedule of Proposed Subcontractors) of the tender document that they intended to use TT Innovations and not Martin & East as sub-contractor. These applicants made no reference at all to Martin & East as their sub-contractor in their tender documents. Indeed the only inescapable inference to be drawn from this is that TT Innovations was indicated as an independent entity. Accordingly, both Afriline and Asla were required to submit a Tax Clearance Certificate for their proposed sub-contractor, TT Innovations, (and thus not Martin & East) which they did not do. Afriline and Asla were certainly required to comply equally and fairly with the mandatory requirements of the tender process which were documented earlier in this judgment. I referred *supra* to cases such as **Loghdey**; **Westinghouse** and **Metro Projects**. These cases talk to compliance with the mandatory requirements of the tender process.

[32] Clearly, by submitting a Tax Clearance Certificate for Martin & East (instead of that belonging to TT Innovations) it does appear that Afriline and Asla were in fact engaged in an attempt to substitute

their proposed sub-contractor (TT Innovations) with Martin & East. Of course the tender process does not allow such substitution. It is important to mention that the fact that Exeo submitted a Tax Clearance Certificate for the same entity (TT Innovations) demonstrates that TT Innovations is indeed an independent entity properly in good standing with SARS and is not a division of Martin & East. In the same Tax Clearance Certificate TT Innovations is reflected as a separate company with its own company registration number as well as the income tax number, VAT/diesel registration, UIF registration and SDC registration. When one compares Martin & East's and TT Innovations' Tax Clearance Certificates one notices different registration numbers for income tax, VAT, PAYE, UIF and SDC. Certainly these companies are independently registered with SARS. Another compelling indicator of TT Innovations continued independent existence as a company (this despite the resolution to have same merged with Martin & East in terms of Section 44 of the Income Tax Act) is the certificate issued by the Companies and Intellectual Property Commission ("CIPC"). The latter certificate shows that TT Innovations was still a registered company actively in business as at 24 November 2015. It is important to mention that the latest CIPC report dated 29 April 2016 demonstrates as well that TT Innovations is still actively in

business. Of course it is not the contention of Afriline and Asla that TT Innovations is presently not in business and not trading. They specifically proposed TT Innovations as their sub-contractor. They did not , for instance propose Martin & East (an entity they now describe as the mother body) as their sub-contractor. If for instance they did so, on this aspect their bids would have been found to be responsive because it is a Tax Clearance Certificate of Martin & East which they submitted. It is certainly not correct to contend as Afriline and Asla did that TT Innovations *is "not a legal entity in its own right".* That assertion is not at all consistent with the contents of TT Innovations' letter dated 14 January 2016. The latter letter does not state that TT Innovations stopped trading and no longer exists.

[33] Noticeably, the Applicants suggest that the Department should have made further enquiries relating to their failure to submit a Tax Clearance Certificate for TT Innovations in view of the fact that Exeo had submitted a Tax Clearance Certificate for TT Innovations. What the Applicants, in my view, seemingly lose sight of is that enquiry by the Department in this regard would have resulted in Afriline and Asla being afforded a further opportunity to supplement their bids by submitting a Tax Clearance Certificate for

TT Innovations. It is trite that to do so, would have tainted the tender process with unfairness and that would certainly have constituted a reviewable irregularity which would have vitiated the whole tender process. In my view the assertions that the National Bid Adjudication Committee had committed a material error of fact lack foundation and they are pertinently incorrect. Afriline and Asla themselves made a fundamental error in not submitting a Tax Clearance Certificate of an entity they proposed would be their sub-contractor. The fact is that when it evaluated Afriline's, Asla's and Exeo's tenders, clearly the National Bid Adjudicating Committee (on objective information at its disposal) reasonably concluded that the sub-contractor they intended to use would be TT Innovations as registered with SARS as a taxpayer which was in *"Good Standing"* and which as certified by SARS, was a taxpayer which "has complied with the requirements as set out in Section 256 (3) of the Tax Administration ACT. These two Applicants actually disqualified themselves in respect of the sub-contractor's Tax Clearance Certificate. It is only convenient now for them to apportion blame to the Department.

[34] Afriline's other ground pertains to its CIDB grading which lapsed on 15 January 2016 prior to the consideration and the award of the

tender. I promised to say a few words on the Construction Industry Development Board Act 38 of 2000. In terms of Section 18 a contractor may not undertake, carry out or complete any construction works or portion thereof for public sector contracts, awarded in terms of competitive tender or quotation, unless he or she is registered with the CIDB and holds a valid registration certificate issued by the CIDB. Section 20 provides that registration by the CIDB is valid for a period of three years and that a registered contractor must apply for renewal of registration three months before the existing registration expires. The CIDB is under no obligation to approve an application for renewal by reason of the fact that the contractor is at that stage registered with the Board.

[35] The registration process is regulated by the regulations promulgated under the Act itself. The Construction Industry Development Regulations were published under GN692 in GG26427 on 9 June 2004 in terms of Section 33 of the Act. The 2004 Regulations make provision for different classes of construction work. The different classes are listed in Schedule 3 and include civil engineering works with the designation “CE”. The tender in the instant matter relates to that class of construction

works. Regulation 17 provides that a contractor registered in a contractor grading designation indicated in column 1 of Table 8 is considered to be capable of undertaking a contract in the range of tender values indicated in column 2 of that table in the class of the construction works to which the category of registration of that contractor relates. It is not necessary to set out Table 8 *infra*. The Project *in casu* entails civil engineering and consequently the minimum grading required by the 2004 Regulations is 8CE. Afriline contends that its tender should have been considered (and the tender process should have been concluded) prior to the expiry of its CIDB registration. It must be borne in mind that the closing date for the submission of tenders was subsequently amended to Friday 23 October 2015 at 11h00. Thus the tender submitted had to be valid for a period of 90 days from the date of submission ie 23 October 2015 until 22 January 2016. In paragraph 45 of the answering affidavit this issue is dealt with and there is no apparent denial of this in replying papers:

> *"45. The Department also addressed a letter dated 18 December 2015 to the tenderers in which the Department requested the tenderers to consent that the tender validity period –which was due to expire on 22 January 2016 – be extended as the tenderers were still under consideration. The tenderers were requested to consent to an extension of the*

validity period by a period of two months to 22 March 2016. A similar letter was addressed to all the other tenderers. Including Asla, Exeo and Afriline. I attach hereto as annexure "K", a letter addressed to Afriline. This letter also indicated that:

"If the extension of the validity period is subject to amendments in any respect, the reasons for and the nature of the amendment must be clearly indicated in a letter"."

[36] It clearly was incumbent upon Afriline to ensure that its registration was valid during the validity period of its tender. But the fact of the matter is that Afriline's CIDB registration expired on 15 January 2016, a date which is both before 22 January 2016 (the initial validity period) and the subsequently extended validity period to 22 March 2016 (as requested in the letter dated 18 December 2015 (Annexure "K"). At the risk of repeating what I have referred to already Afriline contends that the validity of its CIDB grading ought to be determined with reference to the position of the closing date for the submission of tenders. Afriline referred to Section 18 (1) of the Construction Industry Development Board Act (referred to *supra)*. It is apposite to set out the relevant provisions of Section 18 and these provide as follows:

"18. Unregistered Contractors

(1) A contractor may not undertake, carry out or complete any construction works or portion thereof for public sector contracts, awarded in terms of competitive tender or quotation, unless he or she is registered with the Board and holds a valid registration issued by the Board.

(2) Any contractor who carries out or attempts to carry out any construction works or portion thereof under a public sector contract and who is not a registered contractor of the Board in terms of this Act, is guilty of an offence and liable, on conviction, to a fine not exceeding ten percent of the value of the contract so carried out."

It is of importance, however, to note that Regulation 25 (9) (a) of the CIDB Regulations provides as follows:

"25(9) An employer must, before awarding a construction works contract satisfy him or herself that the contractor concerned-

(a) Is registered in terms of these regulations;"

[37] I have pointed out in the introductory portion of a discussion regarding the CIDB that Section 20 (2) of the Act obliged Afriline to apply for the renewal of its registration three months prior to its CIDB registration expiring. In other words, in view of the fact that Afriline's registration (admittedly) expired on 15 January 2016, Afriline should have applied for the renewal of its registration by 15

October 2015. Notably, this date is prior to the date when Afriline submitted its tender on the closing date of 23 October 2015. The fact is that Afriline did not apply for the renewal of its registration before 23 October 2015. This review ground too lacks merit because prior to the date when the tenders were evaluated and particularly prior to the subsequent date of the award of the tender (1 March 2016) Afriline's CIDB registration was not valid. It had lapsed on 15 January 2016. The unfortunate fact is that as at 1 March 2016 when the tender was awarded to Exeo, Afriline was not registered in terms of the CIDB Act. I am in full agreement with the submission by Mr. Jacobs SC that the reinstatement of Afriline's CIDB registration on 11 May 2016 (long after the First Respondent had served its answering affidavit on 28 April 2016) indeed has no bearing on the evaluation and award of the Tender as at 1 March 2016 since the reinstatement of its registration was clearly effected *ex post facto* the award of the Tender. I hasten to add that the decision of the National Bid Adjudicating Committee to reject Afriline's tender for want of compliance with the mandatory requirement that tenderers had to be registered with the CIDB with a grading of 8CE, in my view, cannot be faulted. As far as the alleged different inconsistent treatment of tenderers is concerned, it suffices to merely mention that the allegation has no foundational

grounds. I say so because Asla was registered in terms of the CIDB Act at the time when the tender was awarded to Exeo on 1 March 2016. Clearly Asla was not disqualified on the basis of not being registered in terms of the CIDB Act. I do not comprehend the contention that Exeo should also have been excluded because its own Tax Clearance Certificate had expired on 8 March 2016 before the extended tender expiry date of 22 March 2016. The point is that the tender was already awarded to Exeo on 1 March 2016 and this rendered irrelevant the subsequent expiry of Exeo's Tax Clearance Certificate (after 1 March 2016). I am unable to find that irregularities occurred in the awarding of the tender to Exeo.

ORDER

[38] In the circumstances I make the following order:

(a) The application to strike out certain parts of replying affidavits is dismissed with costs.

(b) The review applications under case numbers 4157/16 and 5222/16 are hereby dismissed.

(c) The interim interdicts issued in respect of case numbers 4157/16 and 5222/16 on 18 March 2016 and 8 April 2016 respectively are hereby discharged.

(d) The Applicants are ordered to pay the First Respondent's costs and such costs shall include the costs occasioned by employment of two counsel.

_____

D V Dlodlo
Judge of the High Court