IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, GRAHAMSTOWN)

CASE NO. 871/2020

Reportable	**Yes / No**

In the matter between:

MEB ENERGY (PTY) LIMITED **Applicant**

and

NDLAMBE LOCAL MUNICIPALITY **1st Respondent**

QUALITY FILTRATION SYSTEMS (PTY) LIMITED **2nd Respondent**

DEPARTMENT OF WATER & SANITATION **3rd Respondent**

EASTERN CAPE: DEPARTMENT OF COOPERATIVE GOVERNMENT AND TRADITIONAL AFFAIRS **4th Respondent**

JUDGMENT

ZILWA J:

Background

[1] On 26 November 2019 the First Respondent (hereinafter referred to as the Municipality) addressed a written invitation to the applicant for a bid whose subject matter was described as "EMERGENCY RO PLANT; BUILT, OPERATE, 2 MEGA LITRE SEA WATER RO PACKAGE PLANT ON THE BANKS OF THE KOWIE RIVER FOR SANS 241 CLASS A WATER SUPPLY FOR THE NDLAMBE MUNICIPALITY." In the same document the Scope of the Work to be performed by the service provider was described as *"Design and supply / build of 2ML package plant to Ndlambe LM; Procurement of Equipment and Services; Transportation to site; Construction of marine works, civils, pipes, mechanical, electrical and instrument; Installation and commissioning; Start-up; Provide Operation and Maintenance for 5 years; Training and employee local team."*

[2] The same invitation was sent to other service providers. A total of four service providers submitted their bids to the Municipality for the project. A compulsory site briefing was held on 4 December 2019. Clarification letters were addressed by both the applicant and the Second Respondent (hereinafter referred to as QFS) to the Municipality. Such letters were duly responded to by the Municipality.

[3] The bid document issued by the Municipality stated that bidders had to first achieve a functional score of 85 out of 100. It also included a functional score card but without a guideline for scoring.

[4] At the time of the issuing of the initial bid the Municipality had obtained funding for the project from the Department of Cooperative Governance (COCTA) in the sum of R20 000 000.00. It had made a further request for additional funding to the Department of Water and Sanitation for a sum of R80 000 000.00 for the development of a 5 mega litre (ML) reverse osmosis (RO) plant instead of the 2 mega litre plant specified in the bid document to the service providers invited to tender. It was envisaged that in the event of the request for the R80 000 000.00 being approved, the project could be upgraded from a 2 ML to a 5 ML plant.

[5] On 11 December 2019 the applicant had addressed a clarification seeking letter to the Municipality. Amongst other things, the letter sought confirmation of the site location stated in the tender as being the banks of the Kowie River and that such site is the mandatory site for the emergency to 2 ML RO plant in the tender and for future upgrade to 5 ML and not the Waste Water Treatment Works (WWTW). In response the Municipality confirmed that the site location is the banks of Kowie River for 2 ML RO plant and for future upgrade to 5 ML as indicated on the tender

clarification letter dated 5 December 2019. The significance of this clarification and confirmation of the site will be apparent later.

[6] In due course the appointed officials of the Municipality set about evaluating the bids received for their compliance with the tender requirements. This process resulted in the exclusion of some of the tenderers for non-compliance, leaving only the bids of the applicant and the QFS as having been found to be compliant with the tender requirement.

[7] During the tender process the Municipality was granted the R80 000 000.00 extra funding that it had requested. This prompted it to solicit bids from the Applicant and the QFS only for the envisaged 5 ML Sea Water Reverse Osmosis (SWRO) plant. Both the Applicant and QFS submitted the solicited bids, the location of whose works was required by the Municipality to be on the banks of the Kowie River.

[8] On 20 January 2020 the Municipality held a meeting with QFS with regard to the tender. The heading of the minute of that meeting in the Municipality letterheads is "NDLAMBE MUNICIPALITY: NEGOTIATION MEETING FOR SEA

WATER RO PACKAGE PLANT: TENDER 285/2019 HELD ON MONDAY, 20 JANUARY 2020 AT 11H00 IN THE INFRASTRUCTURE OFFICES". The attendees in such meeting were the officials of the Municipality and the representatives of QFS only. The Applicant was not invited to such meeting or any other similar meeting.

[9] In the meeting an option of blending waste water with sea water to produce drinking water, instead of only using sea water (the blended water option), was discussed. Use of waste water is described as "re-use" so the osmosis plant is described as re-use reverse osmosis (RRO). The minutes record the option of a new site for the blended water solution as being at the Waste Water Treatment Works (WWTW) and not at the banks of the Kowie River. The significance of the change of the scope to the blended water option is that the RRO infrastructure and water processing is significantly cheaper than the Sea Water Reverse Osmosis (SWRO) option.

[10] Subsequent to the meeting of 20 January 2020 between the Municipality and QFS the latter sent a letter to the Municipality on 23 January 2020, part of which referred to the option of a 2 ML SWRO and a 3 ML RRO. This was the blended water solution. On 24 January 2020 a further letter was sent by QFS to the

Municipality wherein all the details pertaining to the 2ML SWRO and 3ML RRO blended water solution were set out.

[11] On 24 January 2020 an entity that termed itself as the Bid Evaluation Committee of the Ndlambe Municipality issued a document that is stated to be a Tender Evaluation Report. The details and specifications of the tender that was the subject matter of the report fully accord with those of the invitation for proposals that was issued by the Municipality on 26 November 2019. The Tender Evaluation Report analysed the bids submitted by the applicant and QFS for the 2 and 5 ML SWRO plants. In that report there is no mention of the blended water solution or the negotiations of the previous day between the Municipality and QFS. The report recorded that the bid submitted by QFS discharged water at a different location to that envisaged by the Municipality. The Municipality then requested QFS to submit a quotation for a product line that would discharge at the point identified by the Municipality. QFS did so at an additional cost of R862 500.00. All this occurred after the closing dates for the bids and after private negotiations between the Municipality and QFS. No similar invitation was offered to the applicant or any other bidder. The report recommended that if sufficient funds were available the tender should be awarded to QFS to build and operate a 5 ML SWRO at the banks of the Kowie River for an amount of R102 580 335.00 inclusive of VAT.

[12] On 27 January 2020 the Municipality sent a letter to QFS stating that it intended to appoint it (QFS) at a price of R99 889 292.63. The heading on the document refers to "A LETTER OF INTENT TO APPOINT: EMERGENCY RO PLANT: BUILD OPERATE, 5 MEGALITRE SEA WATER RO PACKAGE PLANT ON THE BANKS OF KOWIE RIVER FOR SANS 241 CLASS A WATER SUPPLY FOR THE NDLAMBE MUNICIPALITY". The letter is signed by the Municipal Manager, Adv. R Dumezweni.

[13] On 7 February 2020 the Infrastructure Department of the Municipality submitted a deviation authorisation request, seeking permission to change the scope of the project from a 2 ML SWRO to a 5 ML SWRO Desalination Package Plant. in consequence of the additional funding received. It referred to the tender evaluation report and proposed that QFS be appointed for the 5 ML SWRO at a price of R102 580 335.00. The Municipal Manager is one of the signatories to the memorandum.

[14] On 7 February 2020 the Municipality's Bid Adjudication *Ad Hoc* Committee met and resolved to recommend to the Municipal Manager the award of the tender to build and operate a 2 ML sea water RO package plant on the banks of Kowie River to QFS at an amount of R111 254 827.32 inclusive of VAT. It also

recommended that in the event of the Municipality receiving the additional promised funding the tender should be awarded to QFS to build and operate a 5 ML sea water RO package plant on the banks of Kowie River at an amount of R102 580 335.00 inclusive of VAT.

[15] On 11 February 2020 the Municipal Manager signed a letter appointing QFS for the 5 ML SWRO job. In its answering affidavit the Municipality contends that this letter was signed in error and it was withdrawn and never sent. The only explanation tendered is that it was perceived that the letter did not adequately address the negotiations of 20 January 2020, the letter of 27 January 2020 and the true state of the intended project.

[16] On the same date of 11 February 2020 the Municipal Manager signed another letter appointing QFS for the blended water option, using second hand equipment, next to the Port Alfred Wastewater Treatment Works (WWTW). It is timely to point out that this appointment was for an entirely different solution to that required and specified by the Municipality in the original bid document. No other tenderers submitted bids for this solution, nor was any other quote procured for it. Moreover, the QFS price was not fixed and subject to numerous fluctuations in price. The

maintenance for the first year is priced at R20 135 164.94. Numerous components of the price increase annually and are subject to the exchange rate.

[17] QFS accepted the appointment on 13 February 2020. The last paragraph of QFS's letter of acceptance refers to *"the material scope changes noted after the closing of the above tender"*. It also states that its acceptance of the contract is subject to the signing of the contract agreement by both parties.

[18] Upon learning the failure of its tender and the appointment of QFS as articulated above, the Applicant instituted an urgent application to this Court against the Municipality and QFS, calling upon them to show cause why they should not be interdicted from implementing or performing under the tender in issue pending the review proceedings and the setting aside of the tender. The application was opposed. After the matter had served before Roberson J on 3 March 2020 a *rule nisi* returnable on 17 March 2020 was issued on 5 March 2020.

[19] Subsequent to the issue of the *rule nisi* further affidavits were filed on behalf of both parties. On the ultimate return date of the *rule nisi* the matter served before

Beshe J who, after hearing argument, discharged the *rule nisi* in her judgment that was delivered on 28 April 2020.

[20] On 13 May 2020 the present application was launched by the Applicant, consisting of Part A which requested the hearing of the matter by way of urgency with expedited dates for the delivery of the necessary documents and the Municipality's record of decision and Part B which sought the orders in the present review proceedings. Part A of the application served before Malusi J on 19 May 2020, culminating in an order that was issued on 20 May 2020 and a full judgment that was delivered on 22 May 2020. In his judgment dealing with the issue of urgency with regard to the review sought in Part B of the application the learned Judge ruled that the matter is urgent and he condoned the applicant's non-compliance with the rules relating to time periods, service and forms. He further issued directives with regard to the further conduct of the matter and the filing of the necessary documentation by the parties.

[21] Pursuant to Malusi J's judgment the necessary documentation was filed, and the matter was duly argued. Only the Municipality opposes the application. The other respondents have neither opposed nor filed any papers in the matter. In particular QFS has not has not taken up the cudgels in any attempt to defend the

award of the tender to it by the Municipality or to place before the Court any factors that may be relevant to the outcome of the application.

The issues

[22] As indicated above the propriety of the Applicant bringing the present review application by way of urgency was hotly contested by the Municipality. It formed the subject matter of the argument and the hearing of Part A of the application before Malusi J, which culminated in the learned Judge's ruling and orders referred to above. Despite the order and full judgment that declared the bringing of the review application as urgent, the Municipality still persists with its challenge to the Applicant's entitlement to bring the review application that forms the subject matter of this judgment by way of urgency. It argues that the order of Malusi J on Part A of the application was interlocutory in nature and not final and, as such, capable of variation by the Court hearing the merits. Accordingly, the urgency of the application remains in issue.

[23] With regard to the merits of the review application proper, two issues arise, namely:

(i) whether the appointment of QFS by the Municipality was lawful or not;

(ii) in the event of a finding that the appointment of QFS was unlawful, a just and equitable remedy that ought to be granted in the matter.

The Issue of Urgency

[24] The Municipality's persistence in challenging the Applicant's entitlement to bring the review application by way of urgency is based on the contention that the Applicant created its own urgency by the manner in which it conducted its case. The Applicant's submission is that the issue of urgency has been finally decided and it is not open to the Municipality to revisit it.

[25] The Applicant has argued that the Municipality conceded both before Malusi J and before me that the resolution of the issues raised in the review application is urgent. The only issue is whether the Applicant created its own urgency by delaying unreasonably before bringing the application.

[26] The Applicant denies the alleged unreasonable delay on its part before bringing the review application. It contends that a proper assessment of the facts and events belies the alleged unreasonable delay in bringing the application. It has also argued that the discussion pertaining to urgency is inextricably linked to the

merits and that if the Court finds that there were material irregularities with regard to the award of the tender by the Municipality to QFS, it should follow that the matter is urgent and should be dealt with urgently to address such irregularities. The Applicant has further argued that there was nothing unreasonable about awaiting the outcome of the interim interdict application before launching the review application.

[27] The gist of the Municipality's argument is that the Applicant unreasonably delayed in bringing the review application particularly during the period of the operation of the order of Roberson J where interim relief was granted. While the order of Roberson J was to the effect no works on the tender could be performed, it is common cause that the provision of water was necessary and urgent and that the procurement process had been conducted on the basis of the emergency provisions. Accordingly, the delay in bringing the review during that period not only created the urgent time frames of the present review but it also created additional prejudice to the public of Ndlambe, argues the Municipality.

[28] I am not persuaded by the Municipality's argument that the order of Malusi J on Part A of the application ought to be interfered with. To a large extent the argument adduced on behalf of the Municipality before me against the hearing of

the review application by way of urgency is similar to the one adduced before Malusi J before his ruling on the issue of urgency.

[29] On this point I can do no better than quoting the relevant paragraphs from Malusi J's judgment on this very issue of urgency in bringing the review application. The learned Judge expressed himself on the issue as follows;

> "[5] Mr Paterson, who appeared on behalf of the Municipality submitted that the urgency was self-created. He stated that MEB knew of the award of the tender on 21 February 2020. This was the event which ought to have galvanised MEB to launch its application for review. He stated that had MEB timeously prosecuted the review, the present application would not have been necessary. It was argued that the Court ought not to be distracted by the interdict application which was a parallel process from the review. It was contended that if MEB had followed the proper procedure by launching the review at the same time as the parallel interdict process then there would not have been a need for the current application.
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> [6] In my view the matter is urgent. It is of overriding importance that the citizens residing within the municipal boundaries be provided with water expeditiously. Court proceedings emanating from such an urgent need must necessarily be heard as a matter of urgency. I also find merit in the submission that a hearing in the ordinarily course may lead to an empty judgment. On the facts of this matter it appears that it may have been prudent for MEB to have launched the review simultaneously with the interdict but it cannot be said it was necessarily. It would have affected the urgency of the matter if it was

necessary and not just prudent. The fact that it was not done does not deprive the matter of the urgency."

[30] Having read the entire application papers and having heard argument from both parties on this issue of urgency I am of the same view as Malusi J. A holistic view of the entire factual matrix of this application clearly militates in favour of hearing the matter by way of urgency. I am not persuaded that there are any new facts that have emerged since the judgment of Malusi J, militating against hearing the matter by way of urgency. I cannot find any merit to the Municipality's contention that on the facts the Applicant created its own urgency. In the exercise of my discretion in determining whether the Applicant has shown good cause for bridging the time frames set out in the relevant Rules I am persuaded that the only proper way to bring this review application was by way of urgency. If the review were to be heard in the normal course with the normal time frames and if the Applicant were to emerge victorious on the merits, such victory would be hollow. In any event, a determination of this review one way or the other is inherently urgent in that it is of utmost importance that the project of supplying the urgently needed water to the Municipality's residents cannot be unduly delayed. For those reasons I am of the view that Malusi J's finding with regard to the urgency of the matter should still stand and that the hearing of the review application by way of urgency is

imperative. Accordingly, the Municipality's continued challenge to the urgency of the review application must fail.

The Merits

[31] The main pillar upon which the Municipality anchors its defence to the challenge by the Applicant for the award of the tender in issue to QFS is its alleged identification of QFS as a preferred bidder in terms of section 25 of its Supply Chain Management Policy. It then becomes crucial to interrogate the propriety of such identification of QFS as a preferred bidder to consider whether or not it passes muster.

[32] The Municipality contends that just prior to 8 January 2020 it was informed that its funding request to the Department of Water and Sanitation would probably be approved. This meant that the entire tender process would be changed and instead of seeking the development of the 2 ML plant a 5 ML plant would be sought.

[33] The Municipality then states that it addressed correspondence to both QFS and the applicant. The letter to QFS called upon it to quote for the 5 ML package plant with brine line discharging to Waste Water Treatment Plant and product line

discharging to water treatment plant. A further quote was sought for the same plant but with brine discharging under Kowie River Bridge and product line discharging to water treatment plant.

[34] The correspondence addressed to the Applicant sought confirmation that the cost of the 5 ML package plant with brine line and product line to water treatment plant is R52 231 158.44 VAT exclusive. The explanation proffered by the Municipality for the difference between the two requests addressed to the Applicant and to QFS is that QFS had not made any submission or quote with regard to the 5 ML plant in its original offer.

[35] The Municipality's explanation with regard to the correspondence that it had addressed to QFS in essence states that long after the closure of the bids QFS was afforded an opportunity to bid for a 5 ML plant, which it had not done in its original bid. In my view such course of conduct on the part of the Municipality is beset with problems, especially since no similar invitation was ever extended to the other bidders that had bidded for the tender.

[36] The Municipality further explains that after QFS had replied to its letter of January 2020 with a quote for the 5 ML plant it had considered the QFS bid to be the most cost effective solution and it was from that point that it regarded QFS as a preferred bidder in terms of section 25 of its Supply Chain Management Policy.

[37] The QFS bid for the 5 ML package plant that was given at the invitation of the Municipality through its letter of 8 January 2020 was in its response letter dated 13 January 2020. This would mean that the point from which the Municipality regarded QFS as a preferred bidder was from the time of the receipt of the letter of 13 January 2020 or shortly thereafter. Significantly, this was before the evaluation of the tenders from the Applicant and QFS by the Municipality's Bid Evaluation Committee, which, as already stated above, only occurred on 24 January 2020. Inexplicably, on 20 January 2020 the Municipality was already negotiating with QFS as a preferred bidder, even before the bids had been evaluated. In my view this obviously falls foul of the provisions of the Municipality's Supply Chain Management Policy on which it puts reliance.

[38] The Clause 25 of the Municipality's Supply Chain Management Policy provides as follows:

"25 NEGOTIATIONS WITH PREFERRED BIDDERS

(1) The accounting officer may negotiate the final terms of a contract with bidders identified through a competitive bidding process as preferred bidders, provided that such negotiation –

(a) does not allow any preferred bidder a second or unfair opportunity;

(b) is not to the detriment of any other bidder;

(c) does not lead to a higher price than the bid as submitted; and

(d) will not be contrary to any legal requirement or amount to a prohibited practice.

(2) Minutes of such negotiations must be kept for record and audit purposes.

[39] The first question that arises is whether QFS was accorded the preferred bidder status by the Municipality **following a lawful competitive bidding process**. The term "competitive bidding process" is defined in the Supply Chain Management Policy as a transparent procurement method in which bids from competing contractors, suppliers or vendors are invited by openly advertising the scope, specifications, terms and conditions of the proposed contract as well as the criteria by which responsive bids received will be evaluated.

[40] It then becomes crucial to determine whether or not the process leading to the identification of QFS as a preferred bidder was lawful, because if it was not then the

Municipality's reliance on Clause 25 of the Supply Chain Management Policy cannot be sustained.

[41] The starting point is to recognise that despite the urgency of the procurement in issue the Municipality had decided to go out on tender and invite bids as part of a tender process. This constitutes administrative action and it is governed by section 217 of the Constitution, the Preferential Procurement Policy Framework Act 5 of 2000 (PPFA) and the 2017 Procurement Regulations.[1] Under the PPFA, a bid can be awarded to an acceptable tender.[2] Acceptable tender means any tender which, in all respects, complies with the specifications and conditions of the tender as set out in the tender document.

[42] The Municipality's tender evaluation report reveals that the QFS bid provided for water disposal near a fire hydrant instead of into the water treatment works. QFS then had to amend and supplement its bid at the invitation of the Municipality to rectify this shortcoming. This was long after the bids had closed. In my view this was irregular and ran foul of the proper procurement procedure requirements. What

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[1] *Moseme Road Construction CC and Others vs King Civil Engineering Contractors (Pty) Ltd and Another* 2010 (4) SA 359 (SCA) at para [2].

[2] Section 2(1) of the PPFA; *Chairperson: Standing Tender Committee and Others vs JFE Sapela Electronics (Pty) Ltd* 2008 (2) SA 638 (SCA) at para [11]; *Millennium Waste Management (Pty) Ltd vs Chairperson Tender Board, Limpopo Province and Others* 2008 (2) SA 481 (SCA) para [18].

is even worse is that in permitting QFS to amend or supplement its bid the Municipality even permitted QFS to augment its bids after the bid had closed by adding the correct water discharge point at a cost of R862 500.00. In ***Chairperson, STC and Others v JFE Sapela Electronics*** *(supra)* Scott JA had the following to say with regard to a situation that is comparable to the facts in the present case[3]

> *"It is well established that a tender process implemented by an organ of State is an 'administrative action' within the meaning of the Promotion of Administrative Justice Act 3 of 2000 (PAJA). See eg Logbro Properties CC v Bedderson NO and Others 2003 (2) SA 460 (SCA) para 5 and the cases there cited. As observed by Cameron JA "This entitled the appellant . . . to a lawful and procedurally fair process". What is fair administrative process "depends on the circumstancse of each case" (3(2)(a) of PAJA). In Metro Projects CC and Another v Klerksdorp Local Municipality 2004 (1) SA 16 (SCA) para 13 Conradie JA said:*
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> > *"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 attribute of transparency, competitiveness and cost effectiveness. In the present case, what in*

[3] Para [19] on pages 646 – 647.

fact occurred is that Nolitha's tender, with the latter's written consent, was adjusted by the reallocation of an amount over-quoted for one or rather, two items, to "most of the remaining maintenance items for Installations A to P" for which Nolitha had under-quoted. The effect was apparently to convert a tender from one regarded by the engineer as unbalanced and a financial risk to one which was acceptable. But the offer made by Nolitha, as embodied in its tender, was not the one ultimately accepted. What was accepted was in truth an offer that was made on 7 November 2003, some two months after the closing date for tenders. In my view this was enough to strip the tender process of the element of fairness which requires the equal evaluation of tenders. It follows that the acceptance of the Nolitha tender and the award of the contract were correctly held by the Court a quo to be reviewable."

[43] I am of the view that the facts of the present case fall almost on all fours with the facts in the *Sapela* case that informed the *dictum* by Scott J quoted above. For similar reasons the award of the tender by the Municipality to QFS cannot pass muster. It was unlawful and it is reviewable.

[44] In its papers the Municipality has stated that there were no detailed guide lines to inform the functional scoring assessment of the tenders received. Once again, this is another problem with regard to the whole manner in which the Municipality dealt with the tender. A tender cannot be assessed for functionality on undisclosed or

subjective criteria.[4] Scoring for functionality must be undertaken by means that are explicable and clear and by standards that do not permit individual bias and preference to intrude.[5]

[45] The tender that was issued by the Municipality specified a minimum score for functionality of 85%. According to the Municipality in its answering affidavit both the applicant and QFS scored 80%, which is below the specified minimum score for functionality. In terms of the Preferential Procurement Policy Regulations, 2017 a tender that fails to obtain the minimum qualifying score for functionality as indicated in the tender document is not an acceptable tender.[6] This is a mandatory statutory requirement, which was ignored in the tender in issue. In ***Money v Walter Sisulu Local Municipality and Others***[7] it was held that *"If the applicant did not secure the minimum points for functionality as advertised, it follows that they were not entitled to be awarded the tender"*. In the present tender both the Applicant and QFS were scored below the minimum points advertised for functionality. For that reason, none of them were entitled to be awarded the tender. This is a further ground that renders the award of the tender to QFS reviewable. The argument proffered on behalf of the Municipality that the process of the tender scoring is ever flexible and that not every

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[4] See *Westinghouse Electric Belgium SA v Eskom Holdings (SOC) Ltd* 2016 (3) SA 1 (SCA).
[5] See *South African National Roads Agency Ltd v Toll Collect Consortium* 2013 (6) SA 356 (SCA) at para [20].
[6] Regulation 5(6) (3730/18) [2019] ZAECGHC 30 (26 March 2019)
[7] (370/18) [2019] ZAECGHC 30 (26 March 2019).

slip in its administration is to be visited with judicial sanction does not, in my view, hold water in this particular aspect. It was not open to the Municipal Manager to simply ignore the prescribed minimum score for functionality as he purported to do in this matter. His weak-kneed attempt to explain this serious shortcoming amounts to naught. His actions were tainted with impropriety and irregularity, rendering the whole process nugatory.

[46] Clause 39 of the Supply Chain Management Policy permits procurement through a **process** other than through tenders and a competitive bidding process. It does not permit an accounting officer to alter the specifications of the bid document. Once the Municipality decided to follow a tender process, it could not alter the terms of the bid specification after its advertisement unless this was specifically provided for in the bid itself, or under the cancellation provisions in the 2017 Procurement Regulations or by a Court. As already stated, Regulation 5(6) of the Preferential Procurement Regulations, 2017, stipulates that a tender that fails to meet a minimum score for functionality is not an acceptable tender. A Municipal deviation cannot override the Regulations. Moreover, unlike other deviations in this tender, for which there is a paper trail, there is none for the changing of the minimum score for functionality from 85% to 80% that was done by the Municipal Manager. He merely makes that *ipse dixit* in the answering affidavit, without even stating when that

change was made and without producing any documentation as required by Clause 39 of the Supply Chain Management Policy. Such action simply cannot be sustained and it runs completely foul of the proper tender procedures.

[47] As stated above, the original tender that was put out by the Municipality was for a 2 ML bid. That is what the bid document specified and it did not change until the bids were closed. It was only thereafter that upon obtaining further funding the Municipality changed it to a 5 ML plant unilateraly and only requested submissions for such altered bid from the two shortlisted bidders. In my view this was a further irregularity and it deprived the other prospective bidders that could only have been interested in bidding for a 5 ML rather than a 2 ML plant of an opportunity so to bid. Moreover, neither PAJA, the PPPFA, the Regulations or the bid conditions authorised this change in the manner in which it was done. It is for that reason that even the Municipality's own internal audit considered this irregular and expressed itself in these terms *"the extension of scope, per the evidence provided, limited to the two responsive bidders was an anticompetitive practice as it eliminated any other bidders who may have been interested in bidding for the subsequent 5 ML tender. I hasten to mention that there appears to be two tenders involved in the process, first being the 2 ML and the second being the 5 ML".*

[48] A further irregularity in this matter is the correction of the QFS bid by the Municipality by adding to the QFS bid maintenance costs of R60 000 000.00 as reflected in the correction schedule.

[49] The irregularities specified above, both individually and cumulatively, taint the Municipality's decision to identify QFS as a preferred bidder. On the basis of those irregularities there is no ground for holding the identification of QFS as a preferred bidder as having followed a **lawful competitive bidding process**. That finding is sufficient on its own to put paid to any attempt by the Municipality to resist the review and setting aside of its decision sought in this application.

[50] Moreover, the identification of QFS as a preferred bidder by the Municipality is further tainted by the consideration of the timeline of the relevant events. As already indicated, by 20 January 2020 the Municipality was already negotiating with QFS as a preferred bidder, yet it was only on 24 January 2020 that the tender evaluation officials recommended QFS at a price of approximately R102 million. This means that in identifying QFS as a preferred bidder and negotiating with it as such on 20 January 2020, the Municipality could not have relied on the decision of the tender evaluation officials since that decision was not yet to hand at that stage.

[51] The attempt on the part of the Municipality to use the provisions of Clause 25 of its Supply Chain Management Policy to justify its award of the tender to QFS cannot succeed for yet another reason. Clause 25 cannot be used to negotiate a different contract to the one referred to in the bid or to change the terms of the bid.[8]

[52] On the Municipality's own showing, the QFS was preferred on the basis of a 5 ML SWRO on the banks of the Kowie River at a price of approximately R102 million but the award pertains to a 2 ML SWRO/3 ML RRO at the WWTW site for approximately R99 million rand.

[53] Procurement Law requires fairness in the tender procedure. Its very essence is to ensure that before government, national or provincial, purchases goods or services, or enters into contracts for procurement thereof, a proper evaluation is done of what is available and at what price, so as to ensure cost effectiveness and competitiveness.[9] In ***All-Pay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer, South African Social Security Agency and Others***[10] the Constitutional Court held that one of the requirements of a fair tender

[8] See *Overstrand Municipality v Water and Sanitation Services South Africa (Pty) Ltd* (143/2017) [2018] ZASCA 50 at para [33].
[9] See Tetra Mobil Radio (Pty) Ltd v MEC, Department of Works 2008 (1) SA 43 (SCA) at para [9].
[10] 2014 (1) SA 604 (CC) [First All-Pay judgment].

process is that the body adjudging tenders be presented with **comparable offers** in order that its members should be able to compare. Another requirement is that competitors should be treated equally in the sense that they should all be entitled to tender for the same thing. Competitiveness is not served by only one or some of the tenderers knowing what is the true subject of the tender as that would deprive the public of the benefit of an open and competitive process.

[54] In the present matter those requirements were not met. The only real offer for the blended water option that was received by the Municipality came from QFS and the benefit of properly comparing prices for such solution was not available. Accordingly, there was no proper evaluation of what was available in the market and at what price. No decision-making committee of the Municipality actually evaluated the QFS bid for the blended water solution and, in any event, such evaluation would have proved difficult since there was no specification for this solution in any published tender bid. There was no functional scoring of the QFS bid for the blended water solution. For all intents and purposes the Municipality, contrary to its own Supply Chain Management requirements, had procured only one quotation for this product. Had a proper bid been issued by the Municipality for the blended water option it is possible that a number of other prospective bidders would have had an opportunity to submit their bids. Such opportunity was never availed, leading to a

possibility that bids for lesser prices for the blended water solution could have been submitted and awarded.

[55] In the premises the whole process that was followed by the Municipality clearly flouted the proper procurement processes and it violated a number of the Municipality's own Supply Chain Management Policy clauses such as clauses 20(1). 23(1)(b) and 23(2) as well as section 33(1) of the Municipal Finance Management Act since there will be ongoing maintenance for 3 or more years and the requirements of the said section were not met.

[56] For all the reasons stated above I find that the award of the tender by the Municipality to QFS was unlawful and reviewable under section 6 of PAJA.

Just and Equitable Remedy

[57] Having declared the award of the tender in issue unlawful, all that remains is to consider a just and equitable remedy under section 172(1)(b) of the Constitution and in terms of section 8 of PAJA.[11]

[11] First *All-Pay* judgment para [25].

[58] In general unlawful conduct must be set aside. The Constitutional Court[12] articulated the legal position as follows:

> *"Logic, general legal principle, the Constitution, and the binding authority of this Court all point to a default position that requires the consequences of invalidity to be corrected or reversed where they can no longer be prevented. It is an approach that accords with the rule of law and the principle of legality."*

[59] This position is mirrored in other common law jurisdictions, including England, where the exercise of the court's discretion against setting aside an unlawful decision is considered an exception and *"an unusual and strong thing"*.[13]

[60] The Municipality has argued that even if the challenge to the award of the tender to QFS may be good and it succeeds, that should not necessarily lead to the granting of a remedy and that priority has to be given to the public good. It further

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[12] *All-Pay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others* (No. 2) 2014 (4) SA 179 (CC) at para [30] (second All-Pay judgment).

[13] In *R v Lincolnshire CC and Wealdon DC Ex P. Atkinson, Wales and Stratford* (1996) 8 Admin L R. 529 at 550, Sedley J held: "To refuse relief where an error of law by a public authority has been demonstrated is an unusual and strong thing; but there is no doubt that it can be done."

argued that many factors, such as the impact upon the public, partial performance, the position of tenderers in a renewed tender are some of the factors that can preclude the granting of a remedy even where the tender award has been found to be unlawful.

[61] It has further been submitted on behalf of the Municipality that in the present case the setting aside of the tender would mean that the process would have to begin again from scratch, which would result in significant delays that are not in the interests of the public good. Reference has also been made to an alleged partial performance by QFS, which will result in lost and irrecoverable expenditure if the award has to be set aside. It has also been argued that the amended scope of works and the solution developed by QFS should be regarded as the latter's intellectual property, hence the setting aside of the award would create real difficulties with regard to that engineering solution and the position of the parties to a retender.

[62] In the circumstances of this case I can find no merit to the Municipality's submissions on this aspect. Ordinarily, the Municipality cannot be allowed to utilise its own improper conduct as a tool to trump the default position that unlawful conduct must be set aside.

[63] On the papers very little appears to have been done by QFS after the improper award of the tender to it by Municipality. The equipment that QFS has offered to provide appears to be the second-hand equipment that it already had, not equipment acquired or manufactured specially for this project.

[64] What is rather shocking and difficult to comprehend is the fact that the Municipality rushed to pay QFS R20 000 000,00 on 25 May 2020 even before the written contract pertaining to the tender had been signed by the parties, which only occurred on 29 May 2020. On the papers and in argument no tangible explanation was tendered for this unusual situation.

[65] The questionable payment of the R20 000 000.00 by the Municipality to QFS in the circumstances set out above appears to be the only material part of the contract that has been performed by the Municipality with regard to the tender award. In my view that does not present any material problem in that once the contract is set aside, QFS must effect restitution and repay that amount to the Municipality. This is because an order declaring any law or conduct inconsistent with the Constitution automatically operates retrospectively.[14]

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[14] *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 (1) SA 984 (CC) at para [25] – [30]; *Ex Parte Women's Legal Centre; In re Moise v Greater Germiston Transitional Local Council* 2001 (4) SA 1288 (CC) at para [9].

[66] Accordingly, an administrative action that has been declared invalid, as is the case with the present tender award to QFS, is void *ab initio*. A tenderer like QFS is not entitled to benefit from an unlawful contract.[15]

[67] QFS was cited as the Second Respondent in this matter, yet it chose not to enter the fray or to protect itself from this outcome. It has not even filed any affidavits clarifying any performance or potential prejudice on its part or the extent thereof. I do not consider it to be the place of the Municipality to take up the cudgels on behalf of QFS with regard to the alleged prejudice that may be suffered by QFS if the tender award is set aside. I am in agreement with the Applicant's submission that by not participating in this application QFS has acquiesced to the possible outcome of the cancellation of the contract and the resultant need for it to refund the R20 000 000.00 paid to it by the Municipality.

[68] The complaint by the Municipality that in the event of the tender award being set aside it would have to go out to tender again, with the resultant delay in the performance of the required work cannot, in my view, be regarded as sufficient to

[15] Second *All Pay* judgment; paras [67] and [70].

thwart the default position of having its unlawful conduct set aside. By now the Municipality knows exactly what funding it has as well as the solution that it wants i.e. the blended water option. There is no reason why it cannot go out to tender and **properly** appoint a bidder within a short time period.

[69] Exercising a discretion to decline to set aside a tender whose process was unlawful is not something that is done lightly. This has happened where, for example, 10 months of a 12 months appointment had been completed and there would be an interruption to services to the public;[16] where 3 months remained on a 3 year appointment to provide pre-paid electricity[17] and where the contract would come to an end 2 weeks after the judgment would be delivered.[18] Clearly these cases are an exception to the general rule.

[70] In my view a just and equitable remedy in this case is one that acts as a deterrent against further violation of rights enshrined in the Bill of Rights by the Municipality.[19] The conduct of the Municipality fell far-short of what is required of

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[16] *Nambithi Technologies (Pty) Ltd v City of Tshwane Metropolitan Municipality* 2013 JDR 2524 (GNP); para [32]. This finding was upheld on appeal.
[17] *Contour Technology (Pty) Ltd v Mamusa Local Municipality and Another,* KPIM 32/2018; per Petersen AJ; paras [41] and [44].
[18] Mn*gomezulu and Mistry Inc. v MEC for Health; NW Province and Another* [2019] 3 All SA 796 (NWM) at para [75].
[19] *Sanderson v Attorney-General, Eastern Cape* 1998 (2) SA 38 (CC) at para [38]; *Hoffmann v South African Airways* 2001 (1) SA 1 (CC) at para [45].

an organ of State, which is required to conduct itself openly, honestly and fairly.[20] It has to be brought home firmly on the Municipality that the courts cannot and will not tolerate this type of improper conduct on its part. Indeed the public good, in my view, is for this Court to sharply show its disapproval of the manner in which the Municipality has dealt with this tender by setting aside the award. To do otherwise would send the wrong message and possibly encourage the Municipality to repeat its improper conduct in future.

[71] It is worth mentioning that at the time the Municipality concluded the contract with QFS these proceedings had already commenced and it is difficult to understand why the Municipality could not have awaited their finalisation.

[72] Given all these factors I am not persuaded that the Municipality has discharged the *onus* of persuading me to deviate from the general default position of setting aside its unlawful conduct but rather to allow an unlawful administrative act to stand.

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[20] *Matatiele Municipality v President of the Republic of South Africa and Others* 2006 (5) SA 47 (CC) paras [107] and [109]; *Van der Merve and Another v Taylor NO and Others* 2008 (1) SA 1 (CC) para [72].

[73] In the result, the following order will issue:

1. **The decision by the First Respondent (Ndlambe Local Municipality) to award the tender with Notice No. 285/2019 described as "*Emergency RO Plant; build, operate, 2 Megalitre Sea Water RO Package Plant on the Banks of the Kowie River for SANS 241 Class A Water Supply; Ref 20200219-014 (the tender)* to the Second Respondent (Quality Filtration Systems (Pty) Limited) is declared unlawful.**

2. **The decision by the First Respondent to award the tender referred to in paragraph 1 above to the Second Respondent is reviewed and set aside.**

3. **Any agreement concluded between the First and Second Respondents in consequence of the award of the tender by the First Respondent to the Second Respondent is set aside.**

4. **The first Respondent is ordered to pay the costs of this application, such costs to include those consequent upon the employment of two Counsel, where employed.**

P ZILWA
JUDGE OF THE HIGH COURT
BHISHO

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For the 1st Respondent:	Adv. T J M Paterson SC and Adv. S H Cole
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Date Heard:	18 & 19 June 2020
Judgment Delivered:	07 July 2020