REPUBLIC OF SOUTH ARICA

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case No: 111275/2014

In the matter between:

ENVITECH SOLUTIONS (PTY) LIMITED Applicant
Registration number 2006/012159/07

And

SALDANHA BAY MUNICIPALITY First Respondent

AECOM SA Second Respondent

JUDGMENT DELIVERED ON 13 AUGUST 2015

RILEY, AJ

[1] The applicant, Envitech Solutions (Pty) Ltd, seeks an order in the following terms:

1. Reviewing and setting aside the first respondent's (the Saldanha Bay Municipality) decision that Envitech's bid for Tender 86/2013 Professional Engineering Services of the development of Langebaan Waste Facility ('the tender') did not qualify to be considered;
2. Reviewing and setting aside the first respondent's allocation of the tender to the second respondent ('AECOM'); and
3. Setting aside the contract concluded between the Municipality and

AECOM in respect of the tender.

[2] The services in respect of which the first respondent has requested tenders are professional engineering and related services, relating to the Langebaan landfill site. It is not in dispute that at the time of the tender the then Langebaan landfill site was rated as one of the worst in the Western Cape in a survey carried out by Afriforum. The tender was issued as one of the steps towards addressing the situation.

[3] It is further not in dispute that the end product of the services tendered for is the design of the rehabilitation and closure measures of the existing permitted landfill site for Langebaan and the removal of the second unpermitted landfill site and the rehabilitation thereof. It also entails the design and construction supervision of a transfer station at the permitted site and if necessary a material recycling facility.

[4] The scope of works is set out in Part C3 of the tender document. It is unnecessary to repeat Part 3 of the tender document at this stage save to state that the services tendered for are described as integrated and interrelated and include attending to regulatory compliance issues, the preliminary and detailed design of the rehabilitation and closure measures of the existing landfill site, preparing a detailed design of the transfer station which can be put out to tender and monitoring the construction of the rehabilitation measures of the landfill site and transfer station by the successful bidder for the construction contract.

[5] According to the evidence, the services to be rendered build on each other and start with preliminary assessments, progress through a preliminary or basic design phase and would culminate, after the detailed design and procurement of a contractor, with the issue of a completion certificate for the new landfill site on behalf of the first respondent

[6] At the time that second respondent had prepared their answering affidavit on 18 August 2014, it was of the view that the contract between the first respondent and itself would have been in place for some ten months and second respondent would have made considerable progress in rendering the services contracted for, in

particular the investigation into the size of the unofficial landfill site and the report on the rehabilitation measures to be put in place, the compilation of a report on the status quo of the existing permitted landfill, the licence application to the Department of Environmental Affairs and Development Planning to close the existing landfill and the compilation of the Integrated Waste Management Plan for approval by the first respondent.

[7] I am satisfied that by the time the application was heard that second respondent will have made considerable progress in providing the services contemplated in the tender.

[8] Both respondents oppose the review. In the main it was contended on behalf of both the first and second respondents that this court is precluded from determining this application as the applicant has failed to utilise any of the internal remedies available to it, and, secondly, that there were no irregularities in the process, alternatively, any irregularity was immaterial, could not and did not affect the outcome of the process and as such does not constitute a ground for review in terms of the Promotion of Administrative Justice Act 3 of 2000 ('PAJA').

[9] It is necessary to mention at this stage that the issue of the tender, the disqualification of the applicant at the quality stage and the award of the tender to second respondent is essentially common cause. These common cause facts and issues which are not in dispute are appropriately summarised in the heads of argument of the first respondent and for the sake of convenience I shall take the liberty of referring extensively to them. In this regard I readily acknowledge that most of what appears in regard to the common cause and or undisputed facts was practically taken verbatim from the heads of argument.

[10] On 10 October 2013, the first respondent placed an advertisement inviting tenders for the provision of the services hereinbefore referred to.

[11] On 24 October 2013 a representative of applicant, a certain Mr G Friedberg, attended an information session held at the Council Chambers of first respondent at which meeting the services and the manner in which any bid or tender would be

evaluated were discussed in quite some detail.

[12] The tender procedure adopted by the applicant was the so-called 'Two Envelope System' as provided for by the first respondent's Supply Chain Management Policy ("the policy") in terms whereof the technical proposal of a bidder would first be considered. The financial proposal of the bidder would be submitted in a separate envelope which would only be opened and considered once the technical proposal had been evaluated and awarded a certain minimum score.

[13] Subsequent to the information meeting, the applicant timeously submitted its technical proposal or bid as well as its financial proposal in a second sealed envelope to the first respondent.

[14] The scope of the proposal was not only discussed at the information session held on 15 October 2013, but is also set out in Part C3 of the proposal and or tender documents.

[15] The manner in which the proposal would be evaluated by the first respondent, as well as the minimum score that had to be obtained in order for the financial proposal of the applicant to be opened, is set out in clauses F.3.5.2 and F.3.11.3 of the proposal.

[16] The proposal was duly evaluated by the Bid Evaluation Committee ("the BEC"), in particular by Ms Rene Toesie ('Toesie'), Gavin Williams ('Williams') and Malcolm Jagers ('Jagers'), all of whom completed evaluation forms, the form and contents of which are not in dispute.

[17] The BEC, as represented by Mr C Carelse, submitted its report dated 4 February 2014 regarding the evaluation of the technical proposals of all the tenders including its evaluation of the proposal, to the Bid Adjudication Committee of the first respondent ("the BAC").

[18] In such report the BEC advised the BAC that the average score awarded to the proposal of the applicant by the BEC was less than seventy points and that

applicant did not qualify for the consideration of its financial proposal.

[19] On 4 February 2014 the BAC accepted the recommendation of the BEC and determined that the financial proposal of the applicant which was contained in a second sealed envelope be returned to it.

[20] On 11 February 2014, the first respondent advised applicant by email that it did not qualify to have its second envelope opened.

[21] The applicant, by way of email on 12 February 2014, enquired as to the reasons why it did not qualify as such for the purposes of '*its quality management system'*. The first respondent did not respond to such email whereupon the applicant sought the required information from the first respondent in terms of PAJA as it intended to proceed with a review application.

[22] The first respondent responded to such request by way of a letter from its Municipal Manager dated 27 March 2014, to which it annexed all relevant documentation.

[23] The applicant never objected to or appealed against any of the decisions or actions of the first respondent within twenty-one calendar days of either 11 February 2014 or 14 March 2014, but simply instituted the review proceedings.

[24] On a consideration of the pleadings it is clear that very few of the objective facts relevant and material to this matter are truly in dispute and that the factual disputes between the parties relate more to the interpretation of certain documentation and the application of the undisputed facts as will appear in more detail hereinafter. Accordingly I shall approach the matter on the basis that where there is a dispute as to the facts a final order may be granted if the facts as stated by the respondent together with the facts averred in the applicants affidavits which have been admitted by the respondent justify such an order. Accordingly where it is clear that facts, though not formally admitted, cannot be denied, they must be viewed as admitted. See **Plascon Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd** [1984] 2 All SA 366(A) 367 – 368; 1984(3) SA 623(A) 634E – 635D. It follows therefore that

any remaining factual disputes must be resolved in favour of the respondents.

The in limine point

[25] In the present matter the parties are agreed that the applicant failed to appeal against the decision of the first respondent not to approve the tender. It is common cause that first respondent adopted the supply chain management policy as it was required to in terms of Section 111 of the Local Government: Municipal Finance Management Act, 56 of 2003 ('the MFMA'). It is not disputed that the current policy complies with the regulations promulgated by the Minister of Finance in terms of Section 168 of the MFMA. The said policy is also published on the website of the first respondent.

[26] Section 46 of the policy provides that any person aggrieved by the decisions or actions taken in the implementation of the policy may, within fourteen days of the decision or the action, lodge a written objection or complaint against the decision or action. It is clear that the purpose of this provision is to enable the first respondent to informally, quickly and cost effectively investigate and deal with any concerns regarding a decision taken by it.

[27] Section 29(9) of the policy further determines that a person whose rights are affected by a decision taken by the first respondent in terms of delegated authority in the implementation of its supply chain management system, may appeal against that decision by giving written notice of the appeal and the reasons or grounds thereof to the Municipal Manager within twenty-one days of the date of receipt of the notification of the offending decision.

[28] Section 29(9) of the policy also determines that no bid would be formally accepted until either the expiry of the twenty-one day appeal period or confirmation in writing before the expiry of the twenty-one day appeal period that none of the affected parties intended to note an appeal, or confirmation of the satisfactory resolution of any appeals.

[29] The applicant was notified that its bid or tender did not progress to the second

stage of the tender process on 11 February 2014, and on 14 March 2014 the BAC of first respondent awarded the tender to second respondent which appointment was conditional upon the twenty-one day period referred to above expiring.

[30] The applicant failed to utilise its right of appeal against any of the aforementioned decisions or actions by the first respondent within fourteen or twenty-one calendar days of either 11 February 2014 or 14 March 2014.

[31] Subsection 7(2) of PAJA provides that:

> *(a) Subject to paragraph (c), no court or tribunal shall review an administration action in terms of this Act unless any internal remedy provided for in any other law has first been exhausted.*
>
> *(b) Subject to paragraph (c), a court or tribunal must, if it is not satisfied that any internal remedy referred to in paragraph (a) has been exhausted, direct that the person concerned must first exhaust such remedy before instituting proceedings in a court or tribunal for judicial review in terms of this Act.*
>
> *(c) A court or tribunal may in exceptional circumstances and on application by the person concerned, exempt such person from the obligation to exhaust any internal remedy if the court or tribunal deems it in the interest of justice.* (my emphasis)

[32] According to Cora Hexter; Administrative Law in South Africa (at p. 478 – 482) the provisions as set out in section 7(2) of PAJA are stringent and are cast in peremptory language. It is commonly accepted that review is prohibited unless any internal remedy provided for in any other law has been exhausted. Accordingly the court is obliged to turn the applicant away if it is not satisfied that internal remedies have been exhausted and may grant exemption from the duty only in exceptional circumstances where it is in the interest of justice to do so.

[33] The presence of exceptional circumstances was interpreted by a unanimous SCA in **Nichol and Others v Registrar of Pension Funds and Others** [2006] 1 All SA 589 (SCA) at para 16 to mean that the circumstances must 'be such as to require

the immediate intervention of the courts rather than resort to the applicable internal remedy'. See also **Koyabe v Minister of Home Affairs and Others** (**Lawyers for Human Rights as Amicus Curiae**) 2010(4) SA 327 (CC) at [34] to [40].

[34] In the present matter the applicant has failed to make a single allegation in its founding papers that could support the granting of any relief in terms of Section 7(2)(c) of PAJA. It appears to seek to remedy this deficiency by alleging in its replying papers that:

1. In terms of Section 46 of the policy, it had a discretion whether or not to lodge a written objection or complaint against any decision made or action taken by first respondent in implementing the policy;
2. The internal remedy afforded by Section 46 of the policy did not preclude the applicant from approaching the court;
3. It was never advised of the appeal procedure.

[35] As stated, section 46 of the policy provides that 'persons aggrieved by decisions or actions taken in the implementation of this supply chain management system, may lodge within fourteen days of the decision or action, a written objection or complaint against the decision or action'. Section 47(6) provides that '*this paragraph must not be read as affecting a person's rights to approach a court at any time*'.

[36] It is trite law that in motion proceedings the affidavits serve not only to place evidence before the court but also to define the issues between the parties. In **Swissborough Diamond Mines v Government of the RSA and Others** 1999(2) SA 279 (TPD) at 323G Joffe J held that the need to identify the issues is not only for the benefit of the court but also and primarily for the parties, who must know the case that must be met and in respect of which they must adduce evidence in the affidavits. The learned judge held further at p323 j-324A that an applicant must accordingly raise the issues upon which it would seek to rely in the founding affidavit. It must do so by defining the relevant issues and by setting out the evidence upon which it relies to discharge the onus of proof resting on it in respect thereof.

[37] In my view the applicant must have been aware that it was precluded from

making out a case in reply and must have been aware of the aspects referred to in paragraph 34 hereinbefore when it prepared its founding papers. See **Shakot Investments (Pty) Ltd v Town Council of the Borough of Stanger** 1976(2) SA 701(D) at 705 A – B and **Finishing Touch 163 (Pty) Ltd v BHP Billiton Energy Coal SA Ltd and Others** 2013(2) SA 204 (SCA) at [26]. I am fortified in my finding as it is clear to me that the applicant has most extensive experience in respect of tenders and related processes as is set out in its project experience.

[38] I turn now to deal with applicant's reliance on Sections 46 and 47 of the policy.

[39] I agree with Hoexter (*supra*) that the term '*internal*' and the phrase '*any other law*' as is provided in Section 7 of PAJA ought to be read restrictively to include only remedies specifically provided for in the legislation with which the case is concerned. I further agree with the view that it would also be both unrealistic and unjustifiable to expect an aggrieved individual to pursue every possible avenue provided for by the law, before approaching the court for relief. See **Reed and Others v Master of the High Court and Others** [2005] 2 All SA 429(E) para 20. What is however clear, is that Section 7(2) of PAJA has to be read in the light of the statutory requirement that applications for review must be made within six months. It is also accepted law that the six month period begins to run only when the internal remedies have been exhausted. (See Section 7(i)).

[40] On careful consideration and analysis of Section 46 as read with Section 47 of the policy I am satisfied that the remedy provided therein is but one of the internal remedies provided for by the policy. In my view it was clearly not designed to trump the clear provisions of PAJA. As I have stated, it is at best a general remedy aimed at achieving the quick and inexpensive resolution of any dispute by allowing a party to lodge a written objection or complaint against any decision or action. It clearly does not amount to an appeal as envisaged by the policy.

[41] On a proper interpretation of Section 47(6) of the policy, I am satisfied that it clearly only relates to the provisions of Section 46 and 47 thereof. It therefore follows that it is of no consequence to, and accordingly does not affect the remedy

referred to in section 29 and most certainly does not override the remedy as provided by section 29. See **Bothma-Batho Transport (EDMS) Bpk v S Bothma & Seun Transport (EDMS) Bpk** 2014(2) SA 494 (SCA) [10] – [12].

[42] Even though the applicant alleges that it was never advised of the appeal procedure by the first respondent, it does not allege that it was not aware of it. The fact of the matter is that it could never make such an allegation as the policy is published and as I have mentioned, applicant must have been aware of it due to its extensive experience in this sphere and it must therefore have been aware of the provisions of Section 62 of the Local Government; Municipal Systems Act 32 of 2000 ('MSA').

[43] What is fatal to the applicants case is that it claims that it did not have to exhaust any internal remedies, and, in addition, it further failed to make an application to this court for exemption as is required by Section 7(2)(c) of PAJA by failing to set out exceptional circumstances in its papers that would have allowed this court to entertain the review.

[44] I agree with the submissions of Mr Brink on behalf of the first respondent that it must therefore be so that:

1. Applicant clearly never intended to lodge an appeal in terms of Section 29(9) of the policy. This is clear from the fact that by 18 March 2014 it made it clear that it intended to proceed with a judicial review despite the fact that it had not yet been furnished with the information required by it.
2. Despite not receiving a response to the email of 12 February 2014, applicant took no further steps until 18 March 2014 when it delivered the request in terms of PAJA to the first respondent.

[45] Based on the aforementioned, I am further satisfied that the applicant cannot even rely on the lapse of the twenty-one day period before it received the information in terms of PAJA.

[46] I accordingly have no hesitation in finding that the applicant failed to take any

steps reasonable or in good faith or otherwise to exhaust the available internal remedies. I am not persuaded that the applicant can place any reliance on sections 46 and 47 of the policy based on the findings I have made hereinbefore. In my view the applicant has further failed to prove exceptional circumstances for its failure to utilise the remedy, and or it has failed to advance reasons why it should be exempted from the duty to exhaust the internal remedies which were available to it.

[47] In the circumstances, the applicant's application falls to be dismissed on this basis alone.

Legal principles

[48] Notwithstanding my finding that applicant's application falls to be dismissed for the reasons hereinbefore set out, it is necessary to consider the grounds of review raised by the applicant.

[49] Before dealing with the grounds for review raised by the applicant, it is necessary to refer to the relevant legal principles which are applicable to the issues that require determination.

[50] In terms of Section 33(1) of the Constitution of the Republic of South Africa 108 of 1996 ('the Constitution'), everyone has the right to administrative action that is lawful, reasonable and procedurally fair. In compliance with section 33(3) of the Constitution, PAJA was enacted to give effect to the aforementioned constitutional rights. It is now accepted law that even though PAJA does not replace or amend Section 33 of the Constitution, it is now the primary or default pathway to review. See **Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others** 2004(4) SA 490 (CC) at [22] – [25].

[51] Section 3(1) of PAJA requires administrative action which materially and adversely affects the rights or legitimate expectations of any person to be procedurally fair, whilst Section 3(2) determines that a fair administrative procedure depends on the circumstances of each case. See **Minister of Environment Affairs & Tourism and Others v Bato Star Fishing (Pty) Ltd** 2003(6) SA 407 (SCA) at

[65]; **SA Veterinary Council and Another v Szymanski** 2003(4) SA 42 (SCA) at [19] and [20]. In **Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer**, **South African Social Security Agency & Others** 2014(1) SA 604 (CC) at paragraphs [41] – [42] the constitutional court held that Section 6 of PAJA '*gives legislative expression to the fundamental right to administrative 'action that is lawful, reasonable and procedurally fair' under section 33 of the Constitution. It is a long-held principle of our administrative law that the primary focus in scrutinising administrative action is on the fairness of the process, not the substantive correctness of the outcome*'.

[52] The court held further at [28] that, '*The proper approach is to establish, factually whether an irregularity occurred. Then the irregularity must be legally evaluated to determine whether it amounts to a ground of review under PAJA*'. It is clear that the primary focus of the legal evaluation is to scrutinize the fairness of the process and not the substantive correctness of the outcome thereof. Where appropriate, it will be necessary to take into account the materiality of any deviance from legal requirements by linking the question of compliance to the purpose of the provision, before concluding that a review ground under PAJA has been established.

[53] It is further clear that compliance with the requirements for a valid tender process, issued in accordance with the constitutional and legislative procurement framework, is legally required.

[54] It is accepted law that this does not mean that administrators may never depart from the system put in place or that deviations will necessary result in procedural unfairness. Where, however, 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 as assessed against the norms of procedural fairness as stipulated in PAJA. See Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer, South African Social Security Agency and Others (supra) at [34] – [40].

[55] In challenging the validity of administrative action, an aggrieved party may rely on any number of alleged irregularities in the administrative process. These alleged

irregularities are presented as evidence to establish that any one or more of the grounds of review under Section 6 of PAJA may exist. It is unnecessary to repeat the specific grounds of review as set out in Section 6.

[56] What is more important is that the judicial task through PAJA is to assess whether this evidence justifies the conclusion that any one or more of the review grounds do in fact exist.

[57] Once a court has found that there are valid grounds for review, it is obliged to enter into an enquiry with a view to formulating a just and equitable remedy which enquiry will entail all relevant factors.

Applicable Procurement Framework

[58] Section 111 of the Local Government: Municipal Finance Management Act 56 of 2003 ("the MFMA") determines that each municipality entity must have and implement a supply chain management policy which gives effect to the provisions of Part 1 of Chapter 11 thereof.

[59] Section 112 of the MFMA further requires any supply chain management policy of a municipality or municipal entity to be fair, equitable, transparent, competitive and cost-effective and to comply with a prescribed regulatory framework for municipal supply chain management, which must cover at least the stipulated issues as set out at section 112(1)(a) – (9).

[60] The Municipal Supply Chain Management Regulations promulgated in terms of Section 168 of the MFMA by way of General Notice 868 in Government Gazette 27636 of 30 May 2005 sets out the requirements that any such supply chain management policy must comply with.

[61] After considering the first respondent's policy, I am satisfied that it complies with the requirements stipulated in the MFMA and the aforementioned regulations.

[62] The first respondent also conceded that the process had to be conducted in

compliance with the policy.

[63] In my view the crucial question to be determined is whether there was an irregularity in the process in the sense of material non-compliance with the policy and whether such an irregularity amounts to a ground of review under PAJA.

The applicant's grounds for review

[64] I pause to mention at this stage that it appears that applicant does not appear to attack the lawfulness or reasonableness of the first respondent's actions and decisions but appears to have concentrated its attack on its right to procedurally fair administrative action.

[65] On a consideration of the applicant's founding affidavit it appears as if the applicant is actually dissatisfied with the correctness of the substantive outcome of the process. It was strongly contended on behalf of the respondents that as applicant is not entitled to attack the correctness of the decision; it now seeks to achieve the same object by attacking the procedural fairness of the evaluation process on grounds that are untenable and artificial.

[66] For the sake of convenience I shall deal with the applicant's grounds of review under following headings:

1. The BEC was not properly constituted;
2. Whether the use of the average score methodology by the first respondent amounts to administrative action in terms of PAJA and therefore qualifies as a ground of review.

The BEC was not properly constituted

[67] Although an argument is raised in paragraphs 8 to 11 of applicant's heads of argument that first respondent's BEC was not properly constituted, and that there was no compliance with Clause 28(2) of the first respondent's supply chain policy, these points were not pursued during argument on behalf of the applicant. It was suggested that the policy required that at least one supply chain management

practitioner was required to be on the BEC.

[68] Clause 28(2) of the supply chain management policy requires that the BEC must as far as possible consist of (i) officials from departments requiring the goods or services put out to tender, and (ii) at least one supply chain management practitioner.

[69] In my view such an argument would have been opportunistic considering that first respondent provided the applicant with all the relevant documentation in its possession (inclusive of the information relating to this issue) in its letter of 27 March 2014. Applicant at no stage raises this issue nor is it traversed in its founding papers or further affidavits. In its answering papers the first respondent expressly alleges that the BEC was properly constituted, that it evaluated the proposal, and that it prepared the report. These allegations were never disputed by the applicant in reply. The identity of the members of the BEC is further evident from the first respondent's answering affidavits. In fact the BEC consisted of Ms Toetsie (a manager: Support Services), Mr Williams (a manager: Water and Sanitation) and Mr Jagers (an Engineering Technologist: Roads and Stormwaters).

[70] Based on the evidence presented by the first respondent, I am satisfied that the report was in fact prepared by the BEC. In fact in its answering affidavit the first respondent specifically describes the report as the report by the BEC to the BAC. A further reason why this argument must fail is that the requirement in Section 28(2)(b) of the policy, that a supply chain management practitioner of first respondent must be a member of the BEC, is clearly not imperative or mandatory.

<u>Whether the use by the first respondent of the average score methodology in evaluating the tenders/proposal amounts to administrative action in terms of PAJA and therefore qualifies as a ground of review.</u>

[71] Since much of the applicant's argument in this regard is based on the document F.3.11.3 as appears on page 7 of the tender document, I deem it appropriate to reproduce it at this stage so that the arguments are viewed in better perspective.

F.3.11.3 PRE-EVALAUTION QUALITY CRITERIA - MINIMUM AVERAGE SCORE 70%

1. SPECIFIC PROJECT APPLICABLE EXPERTISE → 60 POINTS (TOTAL)

Infrastructure of Firm to execute project 20

The Firm's infrastructure in order to execute projects in this discipline is hereby evaluated. This includes all offices, technological infrastructure, etc.

Excellent = 20 -15 Good = 14-10 Fair = 9-4 Poor = 3-0

Project experience of proposed team in this field 30

The Firm's key personnel's experience in projects relating to this discipline. Technologically advanced projects and special achievements done in this discipline are looked at.

Excellent = 30-23 Good = 22-15 Fair = 14-7 Poor = 6-0

Quality Management System: 10

ISO 9001:2001 = 10 CESA approved system = 5

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2. Approach and Methodology → 40 points (TOTAL)

Understanding of the terms of reference/brief 15

Did the consultant understand the brief correctly and was his/her proposal up to expectations?

Yes = 15 Partly = 10 No = 5

Approach and work plan 25

The approach and work plan to the problem;

Unique and innovative = 25 Workable = 15 Not acceptable = 5

The minimum percentage for the pre-evaluation is 70.

Tenderers who obtain a score of less than 70% of the points allocated in the pre-evaluation will be declared ineligible to tender.

[72] It is common cause that two members of the first respondent's BEC gave applicant a score of 70% for quality and the third gave it a score of 66%. Applicant's average quality score was therefore 68.67% and it was accordingly disqualified as it did not cross the quality threshold.

[73] The applicant avers that the respondent did not disclose to it and or explain to it that an average score would be awarded in evaluating the tender. This contention is not dealt with in applicant's heads of argument nor were any submissions made during argument in this regard. It is however clear on the evidence and the document F.3.11.3 that tenderers were advised that they were required to achieve '*a minimum average score*' of 70% in respect of quality criteria and that tenderers who did not do so would be '*declared ineligible*' to tender.

[74] As mentioned above, Mr G Friedberg, a representative of the applicant, attended an information session held at the Council Chambers of the first respondent on 24 October 2013 at which meeting the services and the manner in which the tender would be evaluated were discussed in detail.

[75] First respondent further made it clear to the tenderers what factors would be taken into account to judge the quality criteria and how those factors were weighted. According to the dicta in **Minister of Environmental Affairs &Tourism and Another v Scenematic Fourteen (Pty) Ltd** 2005(6) SA 182 (SCA) at [18] the first respondent was in any event not necessarily required to explain to tenderers in advance how the bids for the tender would be processed. In **South African National Roads Agency Limited v The Toll Collect Consortium** 2013(6) SA 356 (SCA) at [22] the SCA further made it clear that, '*Disclosure of [a] refined process of scoring in relation to a tender evaluation process will only be required if its non-disclosure would mislead tenderers or leave them in the dark as to the information they should provide in order to satisfy the requirements of the tender*'. Applicant makes no allegations of this nature nor does it allege that it would have prepared the tender differently if it knew that an average score would be calculated.

[76] I am on the whole satisfied that the first respondent complied with the relevant requirements. Accordingly I find that the averment by the applicant that it was not

advised that an average score would be used and that the tender process was for this reason procedurally unfair has no merit and falls to be dismissed.

[77] According to section 1 of PAJA, '***administrative action'*** means any decision taken, or any failure to take a decision, by-

(a) an organ of state, when-

(i) exercising a power in terms of the Constitution or a provisional constitution; or

(ii) exercising a public power or performing a public function in terms of any legislation; or

(b) a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision,

which adversely affects the rights of any person and which has a direct, external legal effect, but does not include-

(aa) the executive powers or functions of the National Executive, including the powers or functions referred to in sections 79(1) and (4), 84(2)(a), (b), (c), (f), (g), (h), (i) and (k), 85(2), (b), (c), (d) and (e), 91(2), (3), (4) and (5), 92(3), 93, 97, 98, 99 and 100 of the Constitution;

(bb) the executive powers or functions of the Provincial Executive, including the powers or functions referred to in sections 121(1) and (2), 125(2)(d), (e) and (f), 126, 127(2), 132(2), 133(3)(b), 137, 138, 139 and 145(1) of the Constitution;

(cc) the executive powers or functions of a municipal council;

(dd) the legislative functions of Parliament, a provincial legislature or a municipal council;

(ee) the judicial functions of a judicial officer of a court referred to in section 166 of the Constitution or of a Special Tribunal established under section 2 of the Special Investigating Units and Special Tribunals Act, 1996 (Act 74 of 1996), and the judicial functions of a traditional leader under customary law or any other law;

(ff) a decision to institute or continue a prosecution;

(gg) a decision relating to any respect regarding the nomination, selection or appointment of a judicial or any other person, by the Judicial Service Commission in terms of any law;

[Para. (gg) substituted by s. 26 of Act 55 of 2003.]

(hh) any decision taken, or failure to take a decision, in terms of any provision of the Promotion of Access to Information Act, 2000; or

(iii) any decision taken, or failure to take a decision, in terms of section 4(1).

[78] Mr Bruwer who appeared on behalf of the applicant contended that the methodology of the first respondent in calculating an average score in evaluating its proposal was wrong and not authorised by the tender documentation. The basis of this argument seems to be that as two of the three evaluators gave its bid a score of 70% for quality that it should have progressed to the second stage of the tender evaluation. According to his argument, the '*majority of the scores*' approach, and not the '*average of the scores*' approach, should have been used. Counsel for respondents argued strongly that such an approach is in conflict with the tender document which specifically states that a '*minimum average score*' of 70% was required. On a consideration of the first respondent's policy or the proposal and more so Section F.3.11.3 of the tender document, it is clear requirement that a bidder must achieve a minimum average score of 70% in respect of its technical proposal.

[79] On considering the meaning of the words '*administrative action*' as set out in section 1 of PAJA, I am satisfied that the decision by the first respondent to use a particular scoring approach is not and can never be interpreted to amount to administrative action as contemplated in PAJA. I agree with Ms Reynolds who appeared on behalf of the second respondent that it is not a decision which in itself '*adversely affects the rights of any person*', nor does it in itself have a direct external legal effect. It is further inconceivable, considering that reference is specifically made to an '*average score*', how the BEC was expected to determine a single score for a bidder without calculating the '*average score*' awarded by its members.

[80] If I am to assume that applicant intended to launch an attack on the basis that

the reasonableness of the scoring approach adopted by the first respondent is reviewable, then I would have to find that the administrative decision by the first respondent to adopt the scoring approach that it did, '*is one that a reasonable decision maker could not reach*'. See Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs (*supra)* at [44].

[81] It seems to me that to be reasonable the decision must be capable of furthering the purpose for which the power to make the decision (in the present matter) to determine the scoring methodology was given. According to Cora Hexter, (*supra*) what is required is '*merely a rational connection – not perfect or ideal rationality*'. In **Democratic Alliance v President of the Republic of South Africa and Others** 2013(1) SA 248 (CC) at 32 the court held that the aim of evaluating the relationships between means and ends '…*is not to determine whether some means will achieve the purpose better than others but only whether the means employed are rationally related to the purpose for which the power was conferred*'.

[82] In my view applicant has not made out a case to show that the first respondent's decision to use the average of scores rather than the majority scores is so unreasonable that no reasonable decision maker could have decided this. Accordingly this argument must also fail.

[83] It was further contended by Mr Bruwer that in terms of the tender requirements the evaluators were given a discretion to allocate points insofar as infrastructure and project experience are concerned and that insofar as approach and methodology are concerned that the evaluation was limited to an assessment of whether or not the applicant understood the brief correctly and whether or not the proposal was up to expectations. He further contended that insofar as the approach and work plan are concerned, their discretion was limited to determining whether in the opinion of the evaluators the approach and work plan were unique and innovative, workable or not acceptable.

[84] He submitted that the evaluators did not exercise their discretion properly and that applicant should have achieved a total score of 73%, i.e., if the total scores of three evaluators are to be added if they exercised their discretion in accordance with

the terms as set out in the tender document.

[85] When considering the submissions made by applicant, I have regard to the fact that the tender document falls to be dealt with as a legal document. In **KPMG Chartered Accountants (SA) v Securefin Limited and Another** 2009(4) SA 399 (SCA) [Harms DP in dealing with the interpretation of a document, held as follows at paragraphs [39] – [40]:

1. *'If a document was intended to provide a complete memorial of a jural act, extrinsic evidence may not contradict, add to or modify its meaning.*
2. *'Interpretation is a matter of law and not of fact and, accordingly, interpretation is a matter for the court and not for witnesses …'*
3. *'[T]he rules about admissibility of evidence in this regard do not depend on the nature of the document, whether statute, contract or patent ...,'*
4. *'[T]o the extent that evidence may be admissible to contextualise the document (since 'context is everything') to establish its factual matrix or purpose` or for purposes of identification, one must use it as conservatively as possible.'*

[86] It is clear that a paramount consideration in the interpretation process therefore revolves around the '*context*' or '*factual' matrix*'. It is further accepted law that in the event of ambiguity, it is permissible for the court to consider evidence of background circumstances including, which is particularly relevant in the present matter, the nature and purpose of the tender document.

[87] It seems to me that when considering a tender document that one of the basic purposes which it serves (in a tender where quality or functionality is a relevant factor, rather than price alone) is to enable the relevant decision-makers to evaluate whether the goods or services offered by the tenderers meet the quality requirements of the State. In **Cash Paymaster Services (Pty) Ltd v Eastern Cape Province and Others** 1999(1) SA 324 (CKHC) the court succinctly set out the position at 350H as follows:

'*The very essence of tender procedures may well be described as a*

procedure intended to ensure that government, before it procures goods or services, or enters into contracts for the procurement thereof, is assured that a proper evaluation is done of what is available, at what price and whether or not that which is procured serves the purposes for which it is intended'.

[88] According to the argument advanced on behalf of the applicant the members of the BEC, when evaluating the bids for '*Approach and Methodology*', were permitted to allocate a score of only 15 or 10 or 5, for understanding the terms of reference, and only 25 or 15 or 5 for '*approach and work plan'*. According to this argument an individual member of the BEC was not permitted for example to allocate a score of 20 for a bidder's approach and work plan which fell somewhere between '*unique and innovative*' and '*workable*'; or a score of 0 rather than 5 for a bid which contained no indication at all of the bidder's approach or work plan.

[89] On the whole it seems that applicant alleges that two of the BEC members, Toesie and Jagers, were unable to identify the relevant criteria by which the evaluation had to be undertaken, as a result of which they did not assess and determine the correct points that should have been allocated in respect of the tender.

[90] It is important to point out at this stage that although the applicant contends that the evaluators had no discretion as far as the assessment of the applicant's '*Approach and Work Plan*" is concerned, the applicant conceded that the scoring of the tender is a matter which lies within the discretion of the evaluator. This is of course a contradiction.

[91] It is further clear that even though applicant admits that the evaluators have a discretion in conducting their assessments it is not prepared to allow room for a nuanced approach on the part of the evaluators.

[92] In my view the very nature and purpose of the document F.3.11.3 permits for the members of the BEC to exercise a discretion in respect of the scoring of the respective categories relating to the Pre-Evaluation Quality Criteria. It must be so that the purpose of F.3.11.3 is to specifically disclose to bidders the basic criteria against which their bids would be assessed for quality and at the same time the

relative weight of the various criteria.

[93] The correct interpretation of F.3.11.3 in the context of the tender document must accordingly be that evaluators are permitted to give a score appropriate to a particular tender rather than, as was correctly contended by Mr Reynolds, being '*straight jacketed*' into one of a set of predetermined scores. Such an interpretation allows for a proper evaluation of quality which is in fact what is required in situations such as the present and is consistent with the purpose of F.3.11.3 which is ultimately to make it clear to bidders what the basic quality criteria are and how they are weighted.

[94] In any event, it seems to me that had the evaluators only allocated scores of 5, 15 or 25 for the work plan as applicant contends they were obliged to do, they (being Toesie and Jagers) would both have allocated scores of 15 and not 25. Their actual scores (18 and 19 respectively), as appears from the evaluation sheets H1 and H3 to the founding affidavit, are closer to 15 than to 25. If consideration is given to their actual qualitative assessments ('*fair'* and *'acceptable*') then it is clear that they fall way short of '*unique and innovative*', and are more in line with '*workable*', the description with which a score of 15 is associated in terms of F.3.11.3.

[95] It is generally accepted law that the court can only interfere if the tender process is infected with illegality, impropriety or corruption. There is no evidence of this present in this matter. It is further accepted law that where the complaints merely go to the result of the evaluation of the tender (as in the present matter), the court will be reluctant to intervene and to substitute its judgment with that of the evaluator. A court may not interfere because the tender could have been clearer or more explicit. Nor will it interfere because it disagrees with the assessment of the evaluator as to the relative importance of different factors and the weight to be attached to them. See **South African National Roads Agency v The Toll Road Consortium and Another** 2013(6) SA 356 (SCA) at [25] to [27].

[96] In my view there is no merit to any of the arguments raised by the applicant that the tender is reviewable and should therefore be set aside. It follows that the further relief sought by the applicant can also not be granted.

[97] In the result I make the following order:

The application is dismissed with costs.

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RILEY, AJ