SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

CASE NO: 623/2013

Reportable

In the matter between:

LEPOGO CONSTRUCTION (PTY) LTD **APPELLANT**

and

THE GOVAN MBEKI MUNICIPALITY **RESPONDENT**

Neutral citation: *Lepogo Construction (Pty) Ltd v The Govan Mbeki Municipality* (623/13) [2014] ZASCA 154 (29 September 2014).

Coram: Ponnan, Shongwe, Pillay JJA, Fourie et Mathopo AJJA

Heard: **22 August 2014**

Delivered: **29 September 2014**

Summary: Contract – Municipality invitation to tender – Contract documents prescribing procedure for entering into a valid contract- Prescribed formalities not complied with – No *vinculum juris* created.

ORDER

On appeal from: North Gauteng High Court, Pretoria (Fabricius J sitting as court of first instance)

The appeal is dismissed with costs.

JUDGMENT

Ponnan JA (Fourie and Mathopo AJJA Concurring)

[1] This is an appeal by the appellant, Lepogo Construction (Pty) Ltd (Lepogo) against the dismissal of its claim for payment of the sum of R4 822 084.96 against the Govan Mbeki Municipality (the Municipality) by the North Gauteng High Court (per Fabricius J). The appeal is with the leave of the high court.

[2] On 11 February 2008 Bigen Africa Services (Pty) Ltd (Bigen Africa) was appointed by the Municipality as the consulting engineer for the construction of a 10ML Post Tensioned Water Reservoir with a dome. The Municipality, in consultation with Bigen Africa, then invited tenders for the construction of the reservoir. Lepogo submitted two tenders - an original as well as an alternative tender. Contending that its alternative tender had been accepted by the Municipality and that: (a) a binding and enforceable agreement had come into existence between them; and (b) the Municipality had subsequently repudiated that agreement, Lepogo issued summons against the Municipality for damages.

[3] Lepogo's particulars of claim alleged:

‘3.1 On or about 29 January 2009 and at Pretoria the plaintiff and defendant entered into a written contract (being contract no. 8/3/1-62/2007 and hereinafter referred to as “the construction contract”) for the construction of a 10ML Post Tensioned Reservoir with a Dome Roof.

3.2 In entering into the construction contract the plaintiff was represented by J. de Jong and the defendant by Bigen Africa Services (Pty) Ltd (*“Bigen Africa”*). Bigen Africa was in terms of paragraph 1.4 of the ‘tender data’ appointed by defendant as its duly authorised agent and acted in this capacity at the time when the construction contract was entered into and at all material times thereafter. The provisions of the aforementioned paragraph 1.4 appear from paragraph 4.1 below.

3.3 The terms of the construction contract were embodied in:

3.3.1 A “*Contract Document*” prepared by or on behalf of the defendant.

This document included *inter alia*:

3.3.1.1 Defendant’s tender notice and invitation to tender;

3.3.1.2 The tender data;

3.3.1.3 The standard conditions of tender;

3.3.1.4 The contract data;

3.3.1.5 The pricing data;

3.3.1.6 The scope of work;

3.3.1.7 Site information.

The contract document is voluminous and it is impractical to attach a copy thereof hereto. Defendant is already in possession of a copy thereof and a true copy thereof will be made available to this Honourable Court at the hearing of this action.

3.3.1 bis A document generally referred to as “General Conditions of Contract for Constructions Works (2004)”. This document (hereinafter referred to as “the General Conditions of Contract”) is voluminous and it is impractical to attach a copy thereof hereto. . . .

3.3.2 A letter dated 17 October 2008 under cover of which plaintiff’s original tender was submitted to defendant. A copy of this letter is attached hereto marked “A”. . . .

3.3.3 A letter dated 17 October 2008 under cover of which plaintiff submitted an alternative tender to defendant. A copy of this letter together with the annexures thereto is attached hereto marked “B”.

3.3.4 A letter dated 24 October 2008 addressed by plaintiff to Bigen Africa (acting on behalf of defendant) in terms of which plaintiff’s alternative tender was amended in the respects as set out in the letter and certain information supplied to defendant. A copy of this letter together with its annexures is attached hereto as annexure “C”.

. . .

3.3.6 A letter dated 29 January 2009 addressed by Bigen Africa (acting on behalf of defendant) to plaintiff in terms of which plaintiff’s alternative tender was accepted by defendant and plaintiff

was appointed the contractor for the construction of the 10ML Post Tensioned Reservoir in Embalenhle. A copy of this letter is attached hereto marked “E”.

4 Plaintiff relies on all the provisions of the construction contract. The following provisions of the construction contract are, however, in particular relevant to this action: . . .

. . .

6 The total contract sum payable by defendant to plaintiff in terms of the construction contract for the construction of the reservoir . . . amounted to R10.545 797.00.

7 On 30 January 2009 and in the offices of Bigen Africa in Pretoria plaintiff (represented by J. de Jong) and defendant (represented by Bigen Africa) orally agreed that the site would be handed over to plaintiff on 9 February 2009 to enable plaintiff to commence with the construction of the 10ML Post Tensioned Reservoir.

8 Defendant failed to hand the site over to plaintiff on 9 February 2009 or thereafter to enable it to commence with the construction of the 10ML Post Tensioned Reservoir . . .

9.1 On or about 20 April 2009 Bigen Africa, acting as agent on behalf of defendant, informed the plaintiff in writing that it had been instructed by defendant to withdraw the awarding of the construction contract to plaintiff. . . .

9.2 The aforementioned letter, . . . constitutes a repudiation of the construction contract by defendant.

9.3 The plaintiff has elected to accept the repudiation and to cancel the construction contract subject to its right to claim all damages suffered by it as a result of defendant’s breach of contract from defendant. This election was conveyed by plaintiff to defendant by letter dated 23 April 2009.

10.1 As a result of defendant’s aforementioned breach of the construction contract plaintiff suffered damages in a total amount of R4.374 834.96 and [that amount came to be amended at the trial to R4.822 084.96]. The amount of R4.374 834.96 is calculated as will more fully appear from annexure “J” hereto.

[4] The defendant’s plea to Lepogo’s particulars of claim is not a model of clarity. In essence the Municipality denied that a valid and binding contract had come into existence between it and Lepogo, *inter alia*, because one of its former employees, through his fraudulent conduct, purported to appoint Lepogo when he lacked the authority so to do.

[5] Insofar as the procurement of services is concerned, s 217(1) of the Constitution requires that when an organ of state such as the Municipality contracts for goods or services it must do so ‘in accordance with a system which is fair, equitable, transparent,

competitive and cost effective'. Section 217(3) of the Constitution provides that national legislation must prescribe a framework within which that policy must be implemented. In this instance, the legislation contemplated by s 217(3) is the Local Government: Municipal Finance Management Act 56 of 2003 (the Act), which according to s 110(1)(*a*), applies to the procurement by the Municipality of, inter alia, the goods and services to be supplied in this case. Section 111 of the Act obliges each Municipality to have and implement a supply chain management policy which, in terms of s 112, must be fair, equitable, transparent, competitive and cost effective and comply with a prescribed regulatory framework for municipal supply chain management.

[6] Here the Municipality had implemented a supply chain management policy (the policy) pursuant to s 111 of the Act. In terms of clause 3.2 of the policy, the council of the Municipality had delegated all its powers and duties to the accounting officer (in this instance the municipal manager) to enable him to discharge the supply chain management responsibilities conferred by the Act and the policy. Clause 3.3 of the policy provides:

'3.3.1 The Accounting Officer may in terms of Section 79 of 106 of the MFMA sub-delegate any supply chain management powers and duties, including those delegated to the Accounting Officer in terms of this policy, but any such sub-delegation must be consistent with subparagraph 3.2 of this policy.'

Clause 3.3.2(a), however, specifically provided that in respect of 'any amount above R10 million (VAT included)' that power may not be sub-delegated by the accounting officer.

[7] Clause 9 of the policy headed 'Evaluation of and allocation of bids/quotations' provides for a Bid Evaluation Committee (BEC) and Bid Adjudication Committee (BAC). The former is tasked with evaluating all bids received and submitting a report and its recommendations regarding the award of the bid to the BAC (clause 9.3). The latter according to clause 9.5 must:

'(a) accept the bid which in all the circumstances appears to be the most advantageous to the municipality, taking into consideration the objectives and stipulations of the preferential procurement policy; or

(b) reject all bids.'

[8] In its tender evaluation report, Bigen Africa recorded that it had received two tenders from Lepogo Construction and a third from Lubbe Construction and Veza Musa

Civils JV. It is noteworthy that Lubbe ranked first on Bigen Africa's tender evaluation report.

[9] On 28 November 2008 the BEC recommended:

'That Lepogo Construction be appointed on Offer B for Bid: 8/3/1 – 62/2008: Construction of 10ML reservoir in Embalenhle for an amount of R12,859,264.

That the Department of Technical and Engineering Services must source the shortfall of approximately R4,8m from MIG.'

The primary motivation as recorded in the minutes of the BEC for that recommendation was that:

'Lepogo Construction has extensive related experience in the construction of reservoirs.'

[10] On 15 January 2009 the BAC met to inter alia consider the recommendation of the BEC. The minutes of that meeting record:

'Resolved

There seems to be a problem with figures mentioned (R4.5 Million) is much lower than the amount on Bid. The item be sent back to Department Technical Services to provide with vote for verification of funds availability.'

[11] On 20 January 2009 a memorandum was despatched by the chairperson of the BAC, Ms N Ndlovu, to the chairperson of the BEC, Mr EN Muanza. That memorandum, which was copied to the municipal manager read:

'Kindly be advised that the Bid Adjudication Committee at its meeting held on 15 January 2009 has resolved as follows:

. . .

That, Lepogo Construction be appointed on offer B for the above mentioned Bid for an amount of R12 859 264.00 on condition the department provide this committee with vote numbers as proof that the amount of R12 859 264.00 is budgeted for this project.'

The Municipal Manager added in manuscript at the foot of the memorandum:

'Approved. The department (TES) (Department of Technical and Engineering Services) to handle the issue of the budget with the CFO.'

The memorandum was thereafter signed by the Municipal Manager and dated 21 January 2009.

[12] On 26 January 2009, and without being authorised to do so, Mr Muanza faxed that memorandum to Mr Koos Bultman of Bigen Africa. The latter then wrote to Lepogo on 27 January 2009: 'fax as received yesterday from Govan Mbeki DM, a proper letter of appointment will follow'. Two days later Mr Bultman informed Lepogo:

'On behalf of our client The Govan Mbeki Municipality, Lepogo Construction (Pty) Ltd is herewith appointed for the Construction of a 10ML Reservoir in Embalenhle for the sum of R12 859 264-00 (Twelve million eight hundred and fifty nine thousand two hundred and sixty four Rand) inclusive of vat, all as per tender documentation offer B dated 17 October 2008.'

[13] On 5 February 2009 Mr Muanza wrote to Mr Bultman: 'Please take note of the attached Memorandum received from the Municipal Manager of Govan Mbeki Municipality.'

The attached memorandum which was dated 4 February 2009 read:

'Please be informed that I am currently investigating the processes followed in the finalization of the bid for the Construction of 10ML Reservoir for eMbalenhle (Bid 8/3/1 – 62/2008). I therefore instruct you as Head of Department, and the consultant (Bigen Africa Services (PTY) LTD); to henceforth halt processing or disposing of any document related to the execution of the said project to any bidder until further notice.'

On 27 February 2009 and in response to the memorandum from the municipal manager, Lepogo wrote to Bigen Africa:

'1) We have received our letter of appointment dated 29/1/09 for the above contract.

2) Our Mr. de Jong had a meeting with yourselves in your offices on 30/1/09 regarding this contract. One of the items discussed was the date for the site handover which was subsequently set as 9/2/09.

3) On 5/2/09 we were telephonically informed by yourselves that this meeting will be postp[h]oned indefinitely as a result of an e'mail dated 4/2/09 that you received from the Govan Mbeki Municipality. This said e'mail you forwarded to us on 5/2/09.

4) Subsequent to the e'mail of 5/2/09 we have been in telephonic communication on a regular basis to enquire as to when the site handover would take place, but to date Bigen Africa has not been able to confirm a date for this.

5) We have therefore no alternative but to notify you, as we hereby do, that in terms of clauses 41; 42; 47; 48 of the G.C.C. we reserve the right to claim for any and all costs (direct and indirect) associated with the delay of the site handover as well as the delayed start of the contract.'

That letter was followed on 6 March 2009 with the following:

'We take note of your e'mail dated 2/3/09 which had attached the memo from the office of the municipality manager of Govan Mbeki Municipality dated 24/2/09.
We are unclear as to the intention of the municipality, or the implications that this memo may have for Lepogo Construction.
We deem it prudent however to notify you as we hereby do, that should this action by the municipality result in costs of whatever nature to our company in the present or the future, we shall claim these from the client as per the G.C.C..
These costs will include but are not limited to :

a) standing time
b) squardered costs
c) loss of profit, etc.'

[14] On 24 February 2009 the municipal manager wrote:

'Pursuant to my memo dated the 4th February 2009, regarding my intentions to investigate processes and circumstances leading to the awarding of the said bid, please be informed that I have decided to withdraw the awarding of the bid 8/3/1 – 62/2008 – Construction of 10ML Reservoir, and instead opt to re-start the tender process.
All the necessary and due processes are being taken care of to safeguard the best interest of Council.'

On 20 April 2009 Bigen wrote to Lepogo:

'As an agent acting on behalf of the Govan Mbeki Municipality we have been instructed to withdraw the awarding of bid 8/3/1 – 62/ 2008 – Construction of a 10ML Reservoir.'

[15] The undisputed evidence adduced on behalf of the Municipality is that only after a bid specification committee decides on specifications for a bid and the consultant, who has been appointed to the project has done the necessary designs and specifications, will the tender issue inviting bids for the construction work. Bids are advertised in the newspaper and on the Municipality's website and notice board. Once the tenders are received, the consultant consolidates them and preforms a pre-evaluation assessment. Thereafter, the consultant submits a pre-evaluation report to the Municipality, which serves before the BEC. The BEC is tasked with the evaluation of the various bids and it then makes recommendations to the BAC. That committee, in turn, makes a recommendation to the municipal manager. That is the procedure that was followed in this instance.

[16] When the BAC sat on 15 January 2009 to consider the recommendation of the BEC, it resolved that it could not deal with the matter until the shortfall between the bid amount and the budgeted amount for the project had been addressed. The BAC accordingly resolved that the BEC recommendation not be endorsed until the issue of the shortfall had been addressed. That resolution notwithstanding, Mr Johan van der Merwe, who was then serving as the acting chairperson of the BAC, subsequently had the minutes of the BAC altered to reflect that Lepogo had been recommended for appointment as the contractor to the project. The altered minutes, after having been signed by Mr van der Merwe, were thereafter forwarded to the municipal manager. At a meeting of the BAC on 3 February 2009 Mr Merwe admitted that he had 'wrongfully recommended Lepogo'. Mr van der Merwe by way of explanation thereafter despatched the following letter to the municipal manager:

'I hereby would like to report to you that the recommendation letter issued to you on the 21st January 2009 for your approval was wrong.

On the 19th January 2009 I asked the secretary of the Adjudication Committee to do all the recommendation letters for our meeting of 15th January 2009. I said to her she must do it the same as the evaluation committee meetings recommendations.

After she brought it to me for signatures I forgot to take the letter out of Bid 8/3/1 – 62/2008. It was sent to you for approval and then it was sent to Technical Services.

On the 2nd February I realized that this letter went out wrongly. I discussed the matter with the director Technical Services. He informed me that the appointment letter was already given to Lepogo Construction and there is no way to stop the process.'

[17] According to the municipal manager, Dr Mathunyane, his approval of Lepogo's bid was conditional. The condition, so he testified, was that the user department had to ensure that the money for the completion of the project could be sourced before they could proceed with the tender. He explained:

'You cannot appoint a contractor when you do not have the money so the approval was conditional. After the internal memo which is copied to various persons it is necessary for the relevant department to prepare an appointment letter which I must sign.'

He testified that in dispatching the memorandum - which was an internal one – to Mr Bultman, Mr Muanza had breached confidentiality. The Municipality instituted disciplinary charges against both Mr van der Merwe and Mr Muanza for their role in the debacle. The former resigned before the disciplinary process could be finalised. The latter was charged

with misconduct for communicating an internal memorandum. He was found guilty at a disciplinary enquiry and dismissed.

[18] Lepogo's case depends upon the establishment of a contractual relationship between it and the Municipality. Relying on the letter of appointment from Mr Bultman of 29 January 2009 as having given rise to a contract between it and the Municipality, Lepogo, in accordance with its earlier threat, instituted the action, the subject of the present appeal, against the Municipality during June 2009. Lepogo alleged in its particulars of claim that 'the terms of the construction contract were embodied in *"A Contract Document"*'. That document was incorporated in the Municipality's invitation to tender and stipulated from the outset the procedure to be followed for the coming into existence of a binding agreement between the Municipality and the successful tenderer.

[19] In terms of the contract document a 'contract' means 'the agreement that results from the acceptance of a bid by an organ of state'. The contract document further provided that:

'**3.13 Acceptance of tender offer**

Accept the tender offer only if the tenderer complies with the legal requirements, if any, stated in the tender data.

Notify the successful tenderer of the employer's acceptance of his tender offer by completing and returning one copy of the form of offer and acceptance before the expiry of the validity period stated in the tender data, or agreed additional period. Provided that the form of offer and acceptance does not contain any qualifying statements, it will constitute the formation of a contract between the employer and the successful tenderer as described in the form of offer and acceptance.

. . .

3.16 Issue final contract

Prepare and issue the final draft of the contract documents to the successful tenderer for acceptance as soon as possible after the date of the employer's signing of the form of offer and acceptance (including the schedule of deviations, if any). Only those documents that the conditions of tender require the tenderer to submit, after acceptance by the employer, shall be included.'

The form of offer and acceptance annexed to the contract document, provided:

'[t]he employer . . . has solicited offers to enter into a contract for the procurement of . . .';

'[t]he tenderer . . . has examined the documents listed in the tender data and addenda thereto and by submitting this offer has accepted the conditions of tender';

. . .

'[t]his offer may be accepted by the employer by signing the acceptance part of this form of offer and acceptance and returning one copy of this document to the tenderer . . ., whereupon the tenderer becomes the contractor in the conditions of contract . . .'.

. . .

ACCEPTANCE

By signing this part of this form of offer and acceptance, the employer . . . accepts the tenderer's offer. . . . Acceptance of the tenderer's offer shall form an agreement, between the employer and the tenderer upon the terms and conditions contained in this agreement and in the contract that is the subject of this agreement.

. . .

Notwithstanding anything contained herein, this agreement comes into effect on the date when the tenderer receives one fully completed original copy of this document, including the schedule of deviations (if any). Unless the tenderer (now contractor) within five days of the date of such receipt notifies the employer in writing of any reason why he cannot accept the contents of this agreement, this agreement shall constitute a binding contract between the parties.'

[20] It is undisputed that the form of offer and acceptance had not been completed by the parties. It is the completion of that form, according to clause 3.13, that constitutes the formation of a contract between the Municipality and the successful tenderer. And, in terms of clause 3.16, the agreement only comes into effect on the date when the tenderer receives a fully completed version of the contract document. Even then, according to clause 3.16, a contractor has five days after the signing and issuance of the final version of the contract document by the Municipality to notify the Municipality of his non-acceptance of the contents of the agreement. Only thereafter, in the words of clause 3.16, does a 'binding contract' come into existence between the parties. Thus, what clause 3.13 does is to stipulate the procedure to be followed for the conclusion of an agreement and clause 3.16 goes further in stipulating when a binding contract comes into existence.

[21] It was, however, argued on behalf of Lepogo that the words employed in the contract document are obscure and that it lacks clarity. In my view the contract does not admit of any doubt. The manner in which the contract was to be concluded was clearly prescribed in the Municipality's invitation to tender. Thus whatever was done prior thereto was simply preliminary to the conclusion of and did not give rise to a binding agreement

between the parties. It must therefore follow that in relying on the letter of appointment from Mr Bultman of 29 January 2009 as having given rise to a contract between it and the Municipality, Lepogo misconceived the position, because there was in truth no decision on the part of the municipality to approve (let alone accept) its tender. That being so, there is also no room for Lepogo to rely on the doctrine of quasi mutual assent (see *Pillay & Another v Shaik & Others* 2009 (4) SA 74).

[22] In an endeavor to avoid what on the face of it was an insuperable difficulty, counsel submitted that because Lepogo had been appointed pursuant to its alternative tender the general conditions in the contract document did not apply to it. Two factors, however, militate against that submission. First, clause 2.12 of the contract document requires an alternative tender to be submitted 'strictly in accordance with all the requirements of the tender documents'. And, second, Lepogo's alternative tender specifically provided that the: '[c]onditions of the original tender as far as not contrary to this letter will apply'. The alternative tender was concerned with an alternative schedule of quantities and works. There was thus nothing in the alternative tender that contradicted the offer and acceptance provisions in the contract document. Counsel was ultimately constrained to concede as much.

[23] It follows that the appeal must fail and in the result it is dismissed with costs.

V M PONNAN
JUDGE OF APPEAL

Pillay JA (Shongwe JA concurring)

[24] I have had the benefit of reading the judgment of Ponnan JA. I agree with his conclusion but I have taken a different view in arriving at it.

[25] '. . . a binding contract is as a rule constituted by the acceptance of an offer.'[1] The offer and the acceptance are two of the fundamental formalities required to establish a binding contract. This appeal is, with the leave of the court below, directed at the order of the North Gauteng High Court (Fabricius J) dismissing the claim of the appellant with costs. It concerns the question of whether there existed a contract on which Lepogo Construction (Pty) Limited, the appellant, could rely to found a claim for damages against the Govan Mbeki Municipality, the respondent, an organ of state.

[26] In 2008, the respondent, decided to have a '10ML Post Tensioned Reservoir with Dome Roof' constructed. It appointed Bigen Africa Services (Pty) Ltd, an engineering company, as its authorised agent ('the agent') to source a construction company, on its behalf, to construct the required reservoir by way of tender, and to monitor the design and construction thereof.

[27] A call for tenders, a process the respondent is bound to employ, is a mere request to potential service providers (in this case contractors) to submit offers capable of being accepted or rejected at the discretion of the offeree. If accepted, a contract between the offeror and offeree comes into existence.

[28] An invitation to tender from an organ of state and the processing thereof is governed by s 3 of the Promotion of Administrative Justice Act 3 of 2000, s 2(1) of the Preferential Procurement Policy Framework Act 5 of 2000, Local Government: Municipal Finance Management Act (56/2003): Municipal Supply Chain Management Regulations[2] and its preferential procurement policy. This system is intended to provide for a fair, equitable, transparent, competitive and cost effective process as contemplated in s 217(2) of the Constitution of the Republic of South

[1] Watermeyer ACJ in *Reid Bros (SA) Ltd v Fischer Bearings Co Ltd* 1943 AD 232 at 241.
[2] Published in GN R868, *GG* 27636, 30 May 2005.

Africa, 1996 so as to award contracts upon tender.

[29] It is common cause that the agent advertised for tenders for this project and would deal with tenderers on behalf of the respondent in regard to the tendering processes which, with the conditions of the proposed construction agreement, were embodied in the following contract documents:

5.1 Defendant's tender notice and invitation to tender;

5.2 The tender data;

5.3 The standard conditions of tender;

5.4 The contract data;

5.5 The pricing data;

5.6 The scope of work;

5.7 Site information and

5.8 General Conditions of Contract for Construction Works (2004).

[30] On 17 October 2008, the appellant responded to the invitation and submitted two tenders – a main tender for R16 676 790.13 and an alternative one for R12 859 264.00 – through the authorised agent.[3] The main tender was accompanied by a covering letter from the appellant. The alternative tender was attached to a separate letter which dealt mostly with technical matters related to the construction of the reservoir. Of importance however, is that it included a paragraph which read as follows - 'conditions of the original tender as far as not in contrary (sic) to this letter will also apply'. These were not the only tenders for this particular contract. After the agent had sieved through the tenders, it sent them on to the respondent municipality with a recommendation as to who it thought would be the appropriate contractor to be awarded the contract. Hence a proper offer to build the 10 ML reservoir was made to the respondent.

[31] In terms of the supply chain management regulations, the tender bids served before a Bid Specification Committee, a Bid Evaluation Committee and a Bid Adjudication Committee,[4] before being presented to the municipal manager for consideration and approval.

[3] In terms of paragraph 1.4 of the Standard Conditions of Tender, communications between the respondent, as employer, and tenderer(s) had to be through the agent only.

[4] All of these are independent internal committees.

[32] After the Bid Specification Committee had considered the tenders, the appellant's tenders, together with another, served at the Bid Evaluation Committee meeting on 17 December 2008. It recommended that the appellant be appointed as the contractor to construct the reservoir as undertaken in its alternative tender. However it qualified the recommendation and directed the respondent's Department of Technical and Engineering Services (TES) to source a shortfall of R4,8 million to make up the required tender amount of R12 859 264.00. It sent a memorandum to that effect to the Bid Adjudication Committee.

[33] According to the minute of the meeting of the Bid Adjudication Committee of 15 January 2009, that particular tender was indeed discussed but was left unresolved because the question of the R4,8 million shortfall was still outstanding. The committee returned the item to the TES to confirm the availability of funds to cover the shortfall. However a memorandum allegedly from this committee, dated 20 January 2009, found its way to the municipal manager for approval. This memorandum contained a resolution and motivation supporting the appointment of the appellant in respect of the alternative tender. (There was evidence on behalf of the respondent that at some stage the Bid Adjudication Committee may have decided to recommend another construction company.) It is unclear how or why this memorandum was sent to the municipal manager in the form that it arrived on his desk. It is, however, not necessary to investigate that aspect in this judgment. The municipal manager approved the appointment of the appellant as 'resolved' subject to the TES sourcing the budgetary requirements for the project through the respondent's chief financial officer. He endorsed the memorandum to that effect and it was sent to the TES to deal with the budget since it was the department which would oversee the project and ultimately operate the reservoir.

[34] Mr Bultman, who represented the agent, testified that he dealt only with Mr Muanza in regard to the reservoir project and on 26 January 2009 he received a facsimile copy of the endorsed memorandum. It was sent by Mr Muanza, the director: Technical Engineering Services. On 27 January 2009, Mr Bultman communicated with the appellant by sending it a copy of the same memorandum under a cover letter wherein he promised that a proper letter of appointment would follow and enquiring as to when they could have their first meeting. On 29 January

2009, the agent addressed a letter to the appellant. It read as follows –

'On behalf of our client The Govan Mbeki Municipality, Lepogo Construction (Pty) Ltd is herewith appointed for the Construction of a 10 Mℓ Reservoir in Embalenhle for the sum of R12 859 264-00 (Twelve million eight hundred and fifty nine thousand two hundred and sixty four Rand) inclusive of vat, all as per tender documentation offer B dated 17 October 2008

The items shown as rate only are not approved and should only be incorporated into your design and construction if approved in writing by ourselves

Congratulations, and we are looking forward to a successful project.'

[35] On or about 30 January 2009, the municipal manager was informed that the process in respect of which he approved the appointment of the appellant to construct the reservoir had been compromised. He requested those who had told him about the alleged compromise to put this in writing. He then directed a letter to Mr Muanza informing him that he was investigating the processes followed in the finalisation of the bid for the construction of the reservoir and instructed him, as head of the department, and the agent to stop processing or disposing of any document related to the execution of the project until further notice. Upon receipt hereof, Mr Muanza dispatched a copy of this letter to the agent who in turn sent a copy thereof to the appellant.

[36] At a meeting of 6 March 2009 attended by the agent and municipal officials, the status regarding this project and its processes were discussed and the agent was instructed to urgently cancel the appellant's appointment as the contractor in respect of the construction of the reservoir.

[37] On 20 April 2009 the agent sent a letter to the appellant. It read as follows:

'Construction of a 10Mℓ Post Tensioned Reservoir

As an agent acting on behalf of the Govan Mbeki Municipality we have been instructed to withdraw the awarding of bid 8/3/1-62/2008 – Construction of a 10Mℓ Reservoir.'

The appellant then sued the respondent for damages in an amount of R4822 084.96.

[38] In his testimony, Mr de Jongh who testified on behalf of the appellant, said that he regarded the letter of appointment as acceptance of the offer by the respondent

and as far as he was concerned, a contract between the appellant and respondent had thereby been brought into existence. He further testified that he regarded the withdrawal of the 'awarding of the bid' as constituting repudiation of the contract and the appellant accepted this. He explained that as a result, the appellant suffered damages in respect of direct costs for standing time of labour and the plant and loss of profit. It is on this basis that it sued the respondent.

[39] The respondent pleaded that the process of approval for the appointment of the appellant for this project was tainted by fraud by one of the members of the Adjudication Committee and consequently there was no animus contrahendi between it and the appellant. It further pleaded that the approval of the appointment was not lawful, and maintained that no contract between them existed. The crisp issue to be decided therefore is whether a contract was properly concluded by the parties.

[40] When the matter was dealt with in the court below, the claim was dismissed on the basis that the process and in turn the agreement lacked legality and consequently could not be enforced. Mr Delport, who appeared for the respondent, submitted that the approach was incorrect and that the court below should have at least applied the principles of estoppel or the Turquand Rule.

[41] I do not consider it necessary to deal with this appeal on the basis adopted by the court below or as suggested by Mr Delport since the matter can be disposed of on a much simpler basis.

[42] The conditions as set out in the contract document(s) clearly prescribe the processes to be followed in order to conclude a contract upon which one of the parties could rely to found a proper claim. Of relevance to this appeal is the contract condition relating to the mode of acceptance of the offer. In the Preferential Procurement Regulations[5] 'contract' means 'the agreement that results from the acceptance of a bid by an organ of state'. In the Standard Conditions of Tender[6] certain undertakings relating to the mode of acceptance, for

[5] Which is attached to Portion 1 of the tender document.
[6] Another section of the tender document.

the respondent to complete are listed. These subsections are clear and unambiguous and read as follows:

'3.13 Acceptance of tender offer.

3.13.1 Accept the tender offer only if the tenderer complies with the legal requirements, if any, stated in the tender data.

3.13.2 Notify the successful tenderer of the employer's acceptance of his tender offer by completing and returning one copy of the form of offer and acceptance before the expiry of the validity period stated in the tender data, or agreed additional period. Provided that the form of offer and acceptance does not contain any qualifying statements, it will constitute the formation of a contract between the employer and the successful tenderer as described in the form of offer and acceptance.

3.14 Notice to unsuccessful tenderers

After the successful tenderer has acknowledged the employer's notice of acceptance, notify other tenderers that their offers have not been accepted.

3.15 Prepare contract documents

If necessary, revise documents that shall form part of the contract and that were issued by the employer as part of the tender documents to take account of

a) addenda issued during the tender period,
b) inclusions of some of the returnable documents,
c) other revisions agreed between the employer and the successful tenderer, and
d) the schedule of deviations attached to the form of offer and acceptance, if any.

3.16 Issue final contract

Prepare and issue the final draft of the contract documents to the successful tenderer for acceptance as soon as possible after the date of the employer's signing of the form of offer and acceptance (including the schedule of deviations, if any). Only those documents that the conditions of tender require the tenderer to submit, after acceptance by the employer, shall not be included.'

The above sets out how the contract is concluded and the formalities to be followed thereafter.

[43] The standard forms of offer and acceptance referred to in the Standard Conditions of Tender make provision for basic details of the agreement and signatures of the representatives of the respective parties as well as witnesses.

[44] It is trite that where, in a proposed contract, the mode of acceptance is stipulated,

it is that mode that must be followed before a contract is concluded.[7] In *Westinghouse Brake & Equipment (Pty) Ltd v Bilger Engineering (Pty) Ltd* 1986 (2) 555 (A) at 573F it was stated that an offeror may always prescribe the mode of acceptance of his offer in order that a *vinculum juris* should be created. In *Driftwood Properties (Pty) Ltd v McLean* 1971 (3) SA 591 (A) at 597D it was stated that 'It is trite than an offeror can indicate the mode of acceptance whereby a *vinculum juris* will be created'. In *Withok Small Farms (Pty) Ltd & others v Amber Sunrise Properties 5 (Pty) Ltd* 2009 (2) SA 504 (SCA) at 508 para 10, it was held that 'It is a trite principle of the common law that, unless the contrary is established, a contract comes into being when the acceptance of the offer is brought to the notice of the offeror. It is also trite that an offeror may indicate, whether expressly or impliedly, the mode of acceptance by which a *vinculum juris* will be created'. However in this case,this stage of the process had not yet been reached since the bid had not been accepted by the organ of state – the respondent. Significantly neither party had signed the offer and acceptance forms and neither were any of the conditions which were supposed to follow the acceptance of the offer, in particular the issue of the final contract, complied with. In my view there is simply no contract that had come into existence and that would be the end of the matter.

[45] When these conditions of the contract were pointed out to Mr Delport he accepted the position as correct and in the light thereof, chose to rather argue that because the appellant had been appointed in respect of the alternative tender, the general conditions and processes as set out in the contract documents did not apply (as it would if appointed for the primary tender). He accepted that if it was found that the general conditions of the contract were applicable to the alternative offer, then proper acceptance could only have been effected in the prescribed manner. In support of that submission, he referred to a condition in the appellant's covering letter to the alternative tender viz 'conditions of the original tender as far as not in contrary to this letter will also apply'. (It is clear that it was intended to read '. . . as far as it is not contrary to this letter will also apply') He further argued that in that event, the conduct of the respondent from the time he received the letter of appointment from its agent, was sufficient reason to infer that the contract had

[7] This was the position as early as 1924 - see *Laws v Rutherfurd* 1924 AD 261.

been concluded. He specifically referred to the fact that the appellant was afforded the opportunity to conduct a site inspection and also that he was given to understand that the site would be handed over to the appellant on 9 February 2009. He was however unable to point out anything in the letter which was 'contrary' to the general contract conditions that could possibly render them inapplicable to the alternative tender. Moreover it is doubtful that there could have been a situation in which the general contract conditions would not have been applicable to the alternative tender.

[46] Absent anything contrary in the conditions, it follows that the general body of the conditions indeed applies to the alternative offer. There is consequently no contract between the parties and the appellant has no basis on which to base a claim for damages.

[47] The appeal is accordingly dismissed with costs.

R PILLAY
JUDGE OF APPEAL

APPEARANCES:

FOR APPELLANT:	Adv P P Delport SC Instructed by: Pennells Attorneys, Pretoria Phatsoane Henney Attorneys, Bloemfontein
FOR RESPONDENT:	Adv P L Mokoena SC Instructed by: Ramathe MJ Attorneys c/o Maoumakoe Attorneys, Pretoria M O Seobe Attorneys, Bloemfontein