THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no.: 143/2017

In the matter between:

OVERSTRAND MUNICIPALITY **APPELLANT**

and

WATER AND SANITATION SERVICES

SOUTH AFRICA (PTY) LTD **RESPONDENT**

Neutral citation: *Overstrand Municipality v Water and Sanitation Services South Africa (Pty) Ltd* (143/2017) [2018] ZASCA 50 (29 March 2018)

Coram: Navsa, Leach and Mocumie JJA and Davis and Makgoka AJJA

Heard: 5 March 2018

Delivered: 29 March 2018

Summary: Tender evaluation and adjudication : challenges based, inter alia, on s 6(2)*(b)* of the Promotion of Administrative Justice Act 3 of 2000 : whether acceptable tender in terms of s 7 of the Preferential Procurement Policy Framework Act 5 of 2000 read with applicable regulation : whether regulation dealing with minimum staffing of water works endures despite repeal of a number of statutes regulating the provision of water to the public : savings provisions examined and applied.

ORDER

On appeal from: Western Cape Division of the High Court, Cape Town (Magona AJ sitting as court of first instance):

1 The appeal is dismissed with costs, including the costs of two counsel. The order of the court below is, however, amended to the limited extent reflected below.

2 Paras 3, 4 and 5 of the order of the court below are set aside and substituted as follows

> '3 The decision is remitted to the first respondent for a full new tender process commencing with an RFQ to be started and completed;
>
> 4 In consequence of the order in paragraph 1, the contract between the first and second respondents is set aside; save that the setting aside of the contract is suspended until the tender is re-awarded or on the lapse of a period of six months, whichever is earlier.
>
> 5 The first respondent is ordered to bear the applicant's costs including the costs of two counsel.'

3 The six month period of suspension referred to in the substituted order is to commence running from the date of this judgment.

JUDGMENT

Navsa JA (Leach and Mocumie JJA and Davis and Makgoka AJJA concurring):

[1] This is an appeal, with the leave of this court, against an order of the Western Cape Division of the High Court, Cape Town, in terms of which a decision of the appellant, the Overstrand Municipality (the Municipality), 'to award Tender No SC 1508/2014 for the operation and maintenance of the [Municipality's] bulk water and sewerage infrastructure' to the second respondent, Veolia Water Solutions and Technologies South Africa (Pty) Ltd (Veolia), was reviewed and set aside. The court below, having set aside the decision, remitted the matter to the Municipality for reconsideration. In addition the court made the following consequential orders:

‘4. In consequence of the order in paragraph 1, the contract between the First and Second Respondents is, as a matter of law, set aside; save that the setting aside of the contract is suspended until the tender is re-awarded or on the lapse of a period of two months, whichever is earlier.
5. The First Respondent is ordered to bear the Applicant’s costs including the costs of two counsel.’
The background is set out hereafter.

[2] The Municipality’s area of jurisdiction includes the villages of Rooi-Els, Pringle Bay, Betty’s Bay, Kleinmond, Hawston, Onrus, Sandbaai, Hermanus, De Kelders, Gansbaai, Kleinbaai, Franskraal, Pearly Beach, Buffeljagsbaai, Preekstoel, Stanford and Baardskeerdersbos. It is required to deliver bulk water services to residents of these areas. To that end it established and conducted bulk water delivery and treatment works. In 2014 the Municipality decided to outsource the operation and maintenance of the works to the private sector.

[3] On 25 August 2014 the Municipality invited bidders, in a Request for Qualification (RFQ), to express interest to be pre-qualified in order to compete for the award of a tender in relation to bulk water service delivery and treatment. The RFQ was designed to enable scrutiny of the skills, capacity, experience and credentials of interested parties. Upon completion of that process, four interested parties, that included the respondent, Water and Sanitation Services South Africa (Pty) Ltd (WSSA), and Veolia, were shortlisted. Those who qualified were invited to submit bids in response to a Request for Proposal (RFP), issued by the Municipality on 3 December 2014.

[4] Veolia, WSSA and one of the two remaining qualifying parties, submitted bids. At this stage it is necessary to record some of the material requirements of the RFP. Clause 2.11 of Annexure B of the RFP specifies:
‘2.11 **STAFFING**
The Operator shall at all times provide sufficient numbers of staff, with sufficient experience and qualifications to meet or exceed all the requirements of the Contract. The minimum requirements for the operation of the various classes of works are given in the table below but this does not include laboratory personnel. The Operator needs to comply with the current legislated Regulation 2834 requirements, or any new classification requirements

from the Department of Water & Sanitation, e.g. [Draft] Regulation 17, which is expected to be promulgated soon.'

[5] Regulation 2834[1] was promulgated in terms of the Water Act 54 of 1956. It sets out the minimum number of persons holding the operator classifications prescribed in Schedule IV thereto, who *must* be employed within a specific class of water works. This refers to what everyone now understands to be 'process controllers'. The RFP also required minimum levels of other key staff members with attendant technical qualifications. The introductory sentence to clause 2.11.2 of the RFP reads as follows:

'In addition to the correct Class of Process Controller and Supervisor per Class of plant the Operator shall also provide the following key staff as an absolute minimum:.'

It then goes on to set out the minimum staff requirements for those positions, such as an overall manager, the head of maintenance, etc. I note that bidders were required to assimilate existing municipal staff as part of its full staff complement.

[6] Subsequent to a briefing session with bidders, on 16 January 2015, the Municipality dispatched an e-mail to bidders which indicated process controller vacancies within the municipal staffing structure that would need to be filled to ensure compliance with applicable legislation.

[7] The bidding period expired on 30 January 2015 by which time the three bidders, including Veolia and WSSA, had all submitted their bids. The Municipality, purportedly in accordance with the provisions of the Overstrand Municipality Supply Chain Management Policy, adopted in terms of section 11 of The Local Government Municipal Financial Management Act 56 of 2003, assisted by its technical advisor WorleyParsons RSA (Pty) Ltd (WorleyParsons), proceeded to evaluate the bids.

[8] On 17 February 2015 the Municipality addressed certain written questions to the three bidders, requesting clarification on certain issues. WSSA responded the next day. I shall, in due course, set out the clarification sought and the relevant responses.

[1] GNR. 2834 of 27 December 1985: Regulations in terms of section 26 read in conjunction with section 12A of the Water Act, 1956 (Act 54 of 1956), for the erection, enlargement, operation and registration of water care works.

[9] On 16 March 2015 the Municipality advised WSSA that Veolia was the preferred bidder. It also advised that the award of the tender to Veolia was subject to the successful negotiation of the final terms of a contract. In the event of that being unsuccessful WSSA would be invited to negotiate with the Municipality to conclude a contract. On 31 July 2016 WSSA was informed by the Municipality that the tender had been awarded to Veolia.

[10] WSSA resorted to the provisions of the Promotion of Access to Information Act 2 of 2000 (PAIA) to obtain the evaluative and adjudicative material on which the award of the tender had been based. The litigation that followed was based on the information so received, as well as on parts of the record of decision supplied pursuant to Uniform Rule 53.

[11] It was contended on behalf of WSSA that the material supplied by the Municipality revealed that Veolia had *not* supplied its full costing of the necessary personnel to ensure regulatory compliance. Thus, WSSA's submission was that there was no comparable pricing on which the competing bids could be evaluated. That notwithstanding, the Municipality went on to score the competing bids, having regard to the scoring system prescribed by way of The Preferential Procurement Policy Framework Act 5 of 2000 (the Procurement Act) and the regulations thereunder. In terms of the prescribed scoring system, maximum points are awarded for the lowest comparable prices and the others are then scored proportionally. Furthermore, Broad-Based Black Economic Empowerment (B-BBEE) credentials are compared and scored.

[12] Veolia had offered a global price of about R22 million for the first year of the contract and WSSA had offered a global price of approximately R26,3 million. Veolia were thus awarded the maximum score of 90. WSSA was awarded a score of 72.36 and came in second place. The final component of the scoring and its details are dealt with later in this judgment at para 30. In its founding affidavit WSSA complained that the comparative scoring was unsustainable in the absence of proper pricing of personnel by Veolia.

[13] It was asserted on behalf of WSSA that it was evident from the documentary material supplied by the Municipality, pursuant to the request in term of the provisions of PAIA, that a further amount of approximately R4 million had to be added to Veolia's price for the filling of posts to meet the minimum regulatory requirements. That would approximate the amount bid by WSSA, albeit with a slight marginal difference in favour of Veolia. The score awarded to WSSA in respect of its B-BBEE credentials was higher and the end result, if WSSA is correct on this aspect, would mean that the latter's score could ultimately have been the higher.

[14] In a supplementary affidavit, filed pursuant to a record provided in terms of Uniform Rule 53, WSSA raised further factual grounds of review, including specifications relating to certain key personnel necessary for regulatory and technical compliance that Veolia allegedly had not met. This additional ground of complaint was, in essence, that Veolia's bid was non-compliant with the RFP. WSSA also complained that Veolia had been allowed to alter its rates subsequent to the bid being awarded, as evidenced by the completed contract. This, it was contended, was procedurally unfair. For all these reasons, WSSA submitted it was entitled to the orders of the court below set out in para 1.

[15] I turn to deal with the Municipality's case. The Municipality referred to WSSA's amended notice of motion, in which not only the decision to select Veolia as the preferred bidder was attacked, but also the decision to award the tender. It regarded the attack on the first decision as misconceived, in that it was merely preliminary to the award of the tender subject to successful negotiations. It contended that the decision was not administrative action and reviewable in terms of the Promotion of Administrative Justice Act 3 of 2000 (PAJA). Even if it were administrative action, there had been an undue delay in taking it on review, by which time the negotiations had been concluded and been given effect.

[16] In any event, so the Municipality asserted, Veolia's bid was properly assessed and there had been no change in price or rates in the contract eventually concluded with Veolia. The bid, so it said, was compliant with the RFP.

[17] Insofar as the costing of personnel was concerned, more specifically in relation to the absorption of municipal staff, the Municipality referred to a tender information meeting held on 10 December 2014, at which the following was conveyed:

'The Bidders must price as if all 53 employees will be taken over. There is a schedule of own staff costs which the bidders must complete with the costs that they used in pricing the bid. This may be used when the actual numbers change to adjust the price.'

At that meeting the Municipality stated, in response to a question, that a maximum of three years would be allowed within which to have all staff fully skilled, but that a skills development plan had to be submitted within the first 3 months. In a further information session bidders were reminded that they were to assume that all 53 municipal posts were to be transferred and that the price for the 53 is to be excluded from the bid price.

[18] Veolia and WSSA had each supplied a staffing schedule. Veolia's amounted to R85 300 whilst WSSA's amounted to R241 730.00. The letter seeking clarification from Veolia, foreshadowed in para 8 above, contained the following:

'2. Staffing costs: Your suggestion that the full staff budget of Overstrand Municipality be transferred to the Operator is not acceptable; the budget only for staff actually transferring will be added to this contract. Any shortfall in staff will have to be supplied by the Operator, and the cost adjustment for them will be based on the schedule of staff costs supplied by the Operator. Also note that irrespective of staff organograms and other related submissions in your bid, it will be and remain the responsibility of the Operator to supply all required staff as will be legally and operationally required to operate the works at their tendered rates. The staff complement provided must ensure that the DWS regulatory requirements per plans will be attained including the impact of Regulation 17. It is also assumed that your pricing allows for all additional staff required including all support staff. Please confirm your acceptance of this interpretation.

3. Schedule of staff costs: It appears that the costs supplied by you in the schedule of staff costs are very low compared to the market. Please confirm that you are aware of that fact.

4. Please indicate in detail in the table below the exact full-time Human Resources that are included in your price that will be allocated to this contract on a full time basis.'

[19] Veolia responded as follows:

'We remove our qualification that the full staff budget of the Municipality is transferred to Veolia and accept that the Schedule of Employee costs will apply for the shortfall of staff that does not transfer to Veolia.
That current staff complement of 53 is sufficient for Veolia to provide the service and this is the basis of our offer. Our offer excludes the cost to employ more than 53 staff to meet the impact of Regulation 17. The Veolia offered mechanism is that additional staff (more than 53) is employed over several years in accordance with the approved Annual Plan and available municipal budget using the Schedule of Employee Costs to determine the additional cost.'

In addition, Veolia provided the following information:

'As per our qualification, the rates provided are the Total Cost to Company in our employment contracts and travel and overtime costs are not included in the schedule of staff costs. Please refer to below table for typical staff cost where travel and overtime are included.'

[20] According to the Municipality, Veolia supplied full details of human resources in its bid, indicating the precise number of part-time and full-time staff. They provided for eleven full time employees and three part-time employees, in addition to the staff to be taken over from the Municipality. They indicated that the staff costs were included in the submitted bid price.

[21] Veolia had stated that, although they considered that full regulatory compliance could be achieved with the 53 posts to be transferred from the Municipality, it had, nevertheless, made provision for the aforementioned additional 14 staff members. WorleyParsons reported on Veolia's staffing proposal as follows:

'It appears that Veolia endeavoured in their submission to provide for the Function to be performed with the smallest possible team of people, concentrating on improved efficiencies and operational management. This approach is fully in line with the stated objective of the municipality with this project namely to improve operational efficiencies at a lower cost. The matter of if they will definitely obtain regulatory compliance within the stated time on this basis will have to be confirmed during the contract negotiation stage should they be selected as preferred bidder.'

[22] WSSA was afforded a similar opportunity to clarify its bid on these issues. The Municipality stated, somewhat surprisingly, in its opposition to the relief claimed, that

the need for clarification arose because the RFP did not expressly request bidders to specify the details of their staff compliment. For present purposes it is not necessary to deal with its response. The competitive positions of WSSA and Veolia is summarised as follows in para 37 of the Municipality's answering affidavit:

'The observation regarding WSSA that has been emphasised above was justified taking into account that ultimately Veolia proposed to add only 11 full-time employees and 3 part-time employees to the 53 municipal workers, whereas WSSA was proposing an additional 41 workers on top of the 53 municipal workers.'

[23] WorleyParsons in the Bid Evaluation Report considered whether the limited staff that Veolia intended to provide would meet regulatory requirements and stated the following:

'Veolia stated that their aim would be to train the existing staff so as to ensure regulatory compliance in the initial three year period but that they may need to negotiate in this period for additional money to appoint more people should that be required. (The RFP required that regulatory compliance can be achieved over a period of three years and that municipal staff . . . must be trained to achieve regulatory compliance where possible[.]) It is difficult to quantify any cost implications at this stage as it is not only a matter of allowing for the cost of additional staff as some existing staff should have the potential to be trained up and then some positions may become redundant as operational efficiency improves. It must however be noted that this is an area of concern and will need special attention during the negotiations with the preferred bidder, should that be Veolia.'

[24] The maximum scoring for B-BBEE was 10 and for pricing was 90. Veolia scored 90 for pricing and 0 for B-BBEE contribution. WSSA scored 72.36 for pricing and 5 points for B-BBEE contribution; hence Veolia was the successful bidder.

[25] Ultimately, the Municipality asserted, 'WSSA was 20% more expensive than Veolia'. The Municipality said that one explanation for the cost difference was the fixed charge which was based on the clarification sought and provided. The Municipality stated that both bids were, for the reasons set out above, treated as firm bids.

[26] Thereafter Veolia was selected as the preferred bidder with which negotiations were to be entered into for the conclusion of a contract. This was to be

conducted by the accounting officer in terms of prevailing legislation and policy on behalf of the Municipality. In this regard s 24(1) of the Overstrand Municipality Supply Chain Management Policy provides, inter alia:

'**Negotiations with preferred bidders and communication with prospective providers and 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; and

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

d) does not lead to a lower price in respect of sale of land / goods.

2) Minutes of such negotiations must be kept for record purposes and as far as practical be made part of the final contract.'

[27] The Municipality interpreted the Supply Chain Management Policy to mean that until negotiations were successfully completed there could be no talk of the final award of the tender. This explains the communications to WSSA, referred to in para 9 above.

[28] The Municipality was adamant that during the negotiations, care was taken that technical specifications and pricing remained unaffected and that the competitive nature of the bids was not impinged upon. The final cost of the municipal staff to be absorbed, which was not included in the bid price, was negotiated after a due diligence exercise. This was determined at about R13,2 million. That amount applied to all bidders and was thus neutral. The Municipality insisted that Veolia's price was properly assessed against the other competing bids and was found to be appropriate and relevant to the scope and purpose of the services to be rendered. The Municipality was satisfied that the objectives of the tender would be met; namely skills development and retention, assurance of water supply at the right quality and quantity, operations optimisation and asset preservation.

[29] The Municipality noted that an internal appeal process had not been followed by WSSA, which chose, instead, to launch the litigation culminating in the present appeal. According to the Municipality, Veolia commenced with performance under

the contract on 1 November 2015, when it assumed full authority for the functioning of the works.

[30] Veolia apparently added additional staff members, acquired assets and procured the services of sub-contractors. It also constructed an office at Hermanus to enable it to provide the services to the public within the Municipality's area of jurisdiction. It was submitted on behalf of the Municipality that the tender could not now be set aside, without serious disruption to the services being provided.

[31] The court below (Magona AJ), held that there was no doubt that, insofar as the evaluation of the bids and the award of the tender was concerned, the Municipality engaged in administrative action as contemplated in PAJA. The court below found that the Municipality deviated from the regulatory framework that specified skills thresholds and that Veolia's bid was not in compliance with the RFP. It went on to conclude that the 'Municipality's action in this regard was procedurally unfair as Veolia did not qualify as an acceptable tender as defined in the Procurement Act, right from the start'. (Footnotes omitted.)

[32] More specifically the court below held that regulation 2834 provided for the number of qualified process controllers to operate the works and that there had been a shortfall in Veolia's bid. It had regard to the submission on behalf of the Municipality that compliance with the regulatory framework did not have to be met immediately but could be achieved in 3 years. This did not find favour with the court below. The court below considered the report by WorleyParsons that vacant municipal posts had to be filled to ensure regulatory compliance. It also took into account the explanation by the Municipality that WorleyParsons had overlooked the additional staff for which Veolia had provided. The court concluded that the additional staff did not fall within the personnel prescribed by the regulation, and went on to hold that it this was procedurally unfair.

[33] The court below also held that, in the negotiating process Veolia had been permitted to vary the terms of its bid, by adding an additional 14 posts and absorbing the costs. It considered this unfair and further rendered the award of the tender liable to be set aside.

[34] The court below did not consider that the implementation of the negotiated contract between the Municipality and Veolia militated against remitting the matter for consideration anew. It took the view that the contract was one that extended to 15 years and that remitting the matter for a re-run of the tender process was a just and equitable remedy. It went on to make the orders set out at the commencement of this judgment. It is against those orders and the conclusions on which they were based that the present appeal is directed. Veolia did not participate in the proceedings in the court below nor in the present appeal. The disputants were and are the Municipality and WSSA.

[35] Despite the asserted intricacies of the present dispute and the various grounds of review on which WSSA's claim for relief in the court below was based, the appeal turns on the primary question of whether the bid by Veolia in all respects complied with the specifications of tender, the RFP. It has long been laid down and accepted that the evaluation and award of a tender constitutes an administrative action.[2] The primary challenge by WSSA is based on s 6(2)*(b)* of PAJA, which provides:

'(2) A court or tribunal has the power to judicially review an administrative action if –

. . .

(b) a mandatory and material procedure or condition prescribed by an empowering provision was not complied with'.

[36] Procurement of goods and services by an organ of state must be carried out in terms of the principles set out in s 217(1) of the Constitution, which reads:

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

Section 217(3) of the Constitution reads:

'(3) National legislation must prescribe a framework within which the policy referred to in subsection (2) must be implemented.'

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[2] See *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 (3) SA 121 (CC) para 21 and the authorities there cited.

The Procurement Act is legislation pursuant to s 217(3). It sets out a framework for the implementation of a procurement policy. Section 1 thereof defines 'acceptable tender' as follows:

'**"acceptable tender"** means any tender which, in all respects, complies with the specifications and conditions of tender set out in the tender document . . .'

[37] It will be recalled that the RFP, in clause 2.11, set out in para 4 above, specified the minimum staffing requirements particularly as relates to process controllers for the operation of the various classes of the works. Regulation 2834 specifies in table form the minimum staffing requirements (particularly as relates to process controllers) across various classes of works. At this stage it is necessary to have regard to section 7 of Regulation 2834, which provides:

'7. Employment of persons. – The owner of a water care work shall, as from the date fixed in terms of section 12A (2) of the Act, employ for the operation of such work the minimum number of persons of the classes prescribed in Schedule IV in respect of the work concerned: Provided that the Director-General may allow fewer persons or persons with lower educational qualifications to be employed for the operation of any particular water care work for the period and subject to the conditions determined by him, if he is of opinion that, in the particular circumstances, the attainment of the objectives of these regulations will not be frustrated by such employment.'

[38] In oral argument before us, counsel on behalf of both parties, were uncertain about the legislative thread pertaining to the continued existence or otherwise of Regulation 2834.[3] Since Regulation 2834 is central to the bid specification and is relied on by WSSA, as prescribing the minimum number of process controllers, it is necessary to start with a consideration of whether it continued in existence despite the repeal of related legislative enactments.

[39] As stated earlier, Regulation 2834 was promulgated in terms of s 26, read with s 12A of the WA.[4] The Water Services Act 108 of 1997 (the WSA) repealed a

[3] Counsel were invited to make written submissions on this question, which we received.

[4] Section 26 of the WA enabled the Minister to make regulations relating to the prevention of the pollution of water. The Minister was generally empowered to make regulations on any matter which, in the Minister's opinion, was necessary or expedient for the attainment of the objects of the Act. Section 12A dealt with 'Water care works'. Section 12A(2), which is pertinent, reads as follows:
'No person shall after a date fixe by the Minister by notice in the *Gazette* in general or in respect of an area defined in the notice, use a water care work unless the minimum number of persons with the

number of provisions of the WA, but not ss 26 and 12A. This must mean that Regulation 2834 continued in existence as the statutory provisions in terms of which it was promulgated remained intact. Section 84 of the WSA, which is a savings provision, did not at that stage, in my view, intrude upon the question of the validity of Regulation 2834. Section 84(6) reads as follows:

'Anything done before the commencement of this Act by an organisation contemplated in subsection (2) and any regulation made or condition set under or in terms of any law repealed by subsection (1) remains valid and is deemed to have been done, made or set under or in terms of the corresponding provision of this Act if –

(a) it is capable of being done, made or set under or in terms of this Act; and

(b) it is not in conflict with the main objects of this Act as set out in section 2.'

Simply put, sections 26 and 12A of the WA, under which Regulation 2834 was promulgated, remained in force and continued to be its statutory support.

[40] The National Water Act 36 of 1998 (NWA), however, repealed the remaining provisions of the WA, including sections 26 and 12A. Section 163(4) of the NWA, which is a savings provision, provides:

'(4) Any regulation made under a law repealed by this Act remains in force and is considered to have been made under this Act –

(a) to the extent that it is not inconsistent with this Act; and

(b) until it is repealed by the Minister under this Act.'

Sections 2*(d)* and *(h)* of the NWA set out, inter alia, the purposes of the NWA as follows:

'*(d)* promoting the efficient, sustainable and beneficial use of water in the public interest;

. . .

(h) reducing and preventing pollution and degradation of water resources'.

[41] Section 26 of the NWA enables the Minister to make regulations in relation to a host of matters, including the following:

'26(1)*(e)* regulating the design, construction, installation, operation and maintenance of any waterwork, where it is necessary or desirable to monitor any water use or to protect a water resource;

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minimum qualifications and experience prescribed by regulation under section 26 is employed for the operating thereof and that work and those persons have been registered in the manner prescribed by the said regulation with the department, or otherwise than in accordance with any condition subject to which that work or those persons are so registered.'

(f) requiring qualifications for and registration of persons authorised to design, construct, install, operate and maintain any waterwork, in order to protect the public and to safeguard human life and property'.

Regulation 2834 was not specifically repealed by the Minister under the NWA and, from what is set out above, is not inconsistent therewith.

[42] I disagree, for the reasons set out above, with the submission on behalf of the Municipality, that the savings provision in the NWA applied before the WSA repealed the remaining provisions of the WA. I also disagree with the further submission that, since the WSA has processes for the making of regulations that differ from the manner in which regulations were made under the WA, Regulation 2834 would be inconsistent therewith and that the savings provision as per s 163(4) of that Act does not apply. These submissions on behalf of the Municipality were intended to support the argument that there was no existing binding provision in terms of Regulation 2834 in relation to minimum staffing of water works and their qualifications. Section 69 of the NWA provides for public participation in relation to regulations contemplated under the Act. That does not detract from the fact that Regulation 2834 is not inconsistent with the objects of the NWA. Even if the savings provision in the NWA had applied before the remaining sections of the WA were repealed by the WSA. Regulation 2834 would be consistent with the objectives of the NWA and would thus have continued in existence.

[43] A further submission on behalf of the Municipality, in relation to the continuing validity of Regulation 2834, was that the NWA does not confer on the Minister the power to prescribe national standards for process controllers and water service works. In this regard, it was submitted that s 9 of the WSA is applicable and dictates how standards ought to be dealt with rather than through Regulation 2834. Section 9 of the WSA provides, inter alia:

'(1) The Minister may, from time to time, prescribe compulsory national standards relating to–

(a) the provision of water services;

. . .

(d) the nature, operation, sustainability, operational efficiency and economic viability of water services;

(e) requirements for persons who install and operate water services works;
(f) the construction and functioning of water services works and consumer installations.'

I fail to understand how, in the absence of a repeal of Regulation 2834, the Minister's power to make other regulations, which has not yet been finally employed, detracts from the continuing validity of Regulation 2834 on the basis set out above. In my view, this is a strained and desperate attempt to avoid the consequences of the bid by Veolia being declared invalid.

[44] I now turn to deal with the bid specification. The staffing requirements of the RFP are set out in mandatory terms. The 'minimum [staffing] requirements for the operation of the various classes of works' are set out in the RFP, which must be read with Regulation 2834, specifying the minimum number of process controllers across various classes of works. The bid specification goes on to state that the 'operator' (the successful tenderer), 'needs to comply with the current legislated Regulation 2834 requirements, or any new classification requirements from the Department of Water and Sanitation, e.g. [Draft] Regulation 17, which is expected to be promulgated soon'.

[45] It is true that the Municipality assured bidders that the required skills could be developed over a three-year period. That could only relate to 'Draft' Regulation 17, in respect of which compliance could rightly be thought to be prospective. The same does not apply in relation to Regulation 2834. The purpose of Regulation 2834, in relation to water works, in line with the empowering statutes, was aimed at assurance of water supply at the right quality and quantity as well as operations optimisation and asset preservation. The RFP, in terms, sought to achieve the same.

[46] For reasons that will become apparent, it is not necessary to resolve the apparent differences in the decisions of this court in *Millennium Waste Management (Pty) Ltd v Chairperson, Tender Board: Limpopo Province & others* 2008 (2) SA 481 (SCA) and *Dr J S Moroka Municipality v Betram (Pty) Ltd & another* 2014 (1) SA 545 (SCA). This court, in *Millennium*, said at para 17:

'[O]ur law permits condonation of non-compliance with peremptory requirements in cases where condonation is not incompatible with public interest and if such condonation is granted by the body in whose benefit the provision was enacted.' (Citation omitted.)

Under the heading 'A flexible approach', P Volmink described the effect of the decision in *Moroka Municipality*, as follows:

'[A]dministrative bodies do not enjoy a blanket discretion to condone non-compliance with mandatory bid requirements in all instances. Rather, they have the power to condone non-compliance with mandatory provisions only when they have been afforded the discretion to do so in the RFP document or some other enabling provision.'[5]

[47] Veolia's bid did not make provision for the minimum number of process controllers across all classes of works – there was a substantial shortfall. It was never the Municipality's case that the additional 14 members of staff Veolia intended to employ included the process controllers in question. It will be recalled that the Municipality, advised by WorleyParsons, adopted the attitude that regulatory compliance could be achieved in the initial three-year period. In this regard it might well have had draft regulation 17 in mind, but this caused it to be less mindful of compliance with its own stated minimum staffing requirements, more particularly, in relation to process controllers and the provisions of Regulation 2834.

[48] WSSA accepted that, in terms of Regulation 2834, the Director-General in the Department of Water and Sanitation could allow fewer persons or persons with lower educational qualifications to be employed for the operation of any particular water care work, subject to conditions, if he/she is of the opinion that, in the particular circumstances, the attainment of the objectives of these regulations would not be frustrated by such employment.[6] However, WSSA contended, taking into account that the Director-General might be inclined to relax the numbers and qualification requirements, in that three of the water works were automated and not likely to require full-time process controllers, it would still leave a shortfall of 12 process controllers. There was a measure of disagreement concerning the actual shortfall of process controllers, with the Municipality criticising WSSA for changing its initial assertion that Veolia's bid had a shortfall of 11 process controllers, to later stating that there was a shortfall of 12 process controllers and further for not discounting three process controllers due to automated works. Whatever the difference, the ineluctable conclusion is that there was a shortfall of approximately 10 process

[5] P Volmink, 'Legal Consequences of Non Compliance with Bid Requirements' (2014) 1 *African Public Procurement Law Journal* 41, 49. See also paras 16 and 18 of *Moroka Municipality*.
[6] See section 7 set out in para 44 above.

controllers. The Municipality accepted that, in the event that Regulation 2834 was to be strictly applied, WSSA's own bid would fall short in relation to process controllers. There appears to be some substance to that contention, but it is not an issue we have been called upon the address. It does, however, underscore the need for the remittal for a bid process to be started afresh with the issue by the Municipality of an RFQ.

[49] Regulation 2834 was in place and it required, in peremptory terms, as did the RFP, a minimum required number of process controllers. Thus, Veolia's bid did not meet this requirement. Nothing in the bid specifications or the regulations nor in any other legislation that I am aware of affords the Municipality the power to condone non-compliance with the mandatory and material requirements set out in the RFP, based as it is on Regulation 2834. Furthermore, as explored and explained above, Regulation 2834 in setting the minimum requirements was aimed at protecting the public interest. Condoning the material non-compliance in the present case would be inimical to that interest. The Municipality, in my view, was not as attentive, as it should have been, to bid specifications because it was impressed by Veolia's lower bid.

[50] I am alert to the debate concerning the possible sufficiency of substantial or adequate compliance with what, in conventional terms, is described as mandatory requirements. One should also guard against invalidating a tender that contains minor deviations that do not materially alter or depart from the characteristics, terms, conditions and other requirements set out in tender documents.[7] In the present case the non-compliance is not of a trivial or minor nature. The tender by Veolia was not an 'acceptable' one in terms of the Procurement Act, in that it did not 'in all respects' comply with the specifications and conditions set out in the RFP. Thus, the challenge in terms of s 6(2)*(b)* of PAJA, namely that a 'mandatory and material procedure or condition prescribed by an empowering provision, was not complied with'. In my view, for all the reasons set out above, WSSA has made out a case for setting aside

[7] In this regard see C Hoexter *Administrative Law in South Africa* 2 ed (2012) at 292-295 and P Bolton 'Disqualification for non-compliance with public tender conditions' (2014) 17(6) Potchefstroom Electronic Law Journal 2313, 2344.

the decision by the Municipality to award the tender to Veolia and the consequent contract.

[51] The bid was for a lengthy period of 15 years. It is in the public interest, as well as in the interest of persons interested in providing the services required by the Municipality, as well as in the interest of both Veolia and WSSA that the tender process be started anew, in line with the principles set out in s 217 of the Constitution and in line with the provisions of the Procurement Act.[8] The best course to follow is the setting aside of the award of the tender to Veolia coupled with a remittal for a full bid process to be started anew with an RFQ, without interrupting the operations at the works, resulting in prejudice to the residents of the areas referred to in para 2 above. The Municipality is urged to finalise and not subvert a full tender process within the time limit attached to the order of suspension made. In the event of further litigation, the Municipality and its officials are forewarned of likely costs and other implications. The appeal is liable to be dismissed, save that the order made by the court below, because of the time-lapse and because of considerations of fairness to bidders, the Municipality and the public, is amended to the extent reflected in the substituted order that follows.

[52] The following order is made:

1 The appeal is dismissed with costs, including the costs of two counsel. The order of the court below is, however, amended to the limited extent reflected below.

2 Paras 3, 4 and 5 of the order of the court below are set aside and substituted as follows

> '3 The decision is remitted to the first respondent for a full new tender process commencing with an RFQ to be started and completed;
>
> 4 In consequence of the order in paragraph 1, the contract between the first and second respondents is set aside; save that the setting aside of the contract is suspended until the tender is re-awarded or on the lapse of a period of six months, whichever is earlier.
>
> 5 The first respondent is ordered to bear the applicant's costs including the costs of two counsel.'

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[8] See *Allpay Consolidated Investment Holdings (Pty) Ltd & others v Chief Executive Officer, South African Social Security Agency & others* 2014 (4) SA 179 (CC) at 32-33.

3 The six month period of suspension referred to in the substituted order is to commence running from the date of this judgment.

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M S Navsa

Judge of Appeal

Appearances:

For the Appellant:	P Farlam SC (with him N Mangcu-Lockwood) Instructed by: Fairbridges Wertheim Becker Attorneys, Cape Town McIntyre & Van der Post Attorneys, Bloemfontein
For the Respondent:	A P Joubert SC (with him D Gintner) Instructed by: Werksmans Attorneys, Cape Town Honey Attorneys, Bloemfontein