THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 392/2017

In the matter between:

WDR EARTHMOVING ENTERPRISES	**FIRST APPELLANT**
COTTERRELL'S CONSTRUCTION CC	**SECOND APPELLANT**
and	
THE JOE GQABI DISTRICT MUNICIPALITY	**FIRST RESPONDENT**
THE MUNICIPAL MANAGER: JOE GQABI DISTRICT	**SECOND RESPONDENT**
THE CHAIRPERSON OF THE BID ADJUDICATION COMMITTEE: JOE GQABI DISTRICT MUNICIPALITY	**THIRD RESPONDENT**
AMADWALA TRADING 363 CC	**FOURTH RESPONDENT**

Neutral citation: *WDR Earthmoving Enterprises & another v The Joe Gqabi District Municipality & others* (392/2017) [2018] ZASCA 72 (30 May 2018)

Coram: Navsa and Swain JJA and Davis, Pillay and Hughes AJJA

Heard: 17 May 2018

Delivered: 30 May 2018

Summary: Municipal Supply Chain Management Regulations – regulation 21(*d*) – obligation on tenderer to submit three years of audited annual financial statements – tenderers declaring legally obliged to do so – failure by tenderers to comply – peremptory statutory requirement – tenders including a competing one declared non-responsive in accordance with tender conditions.

ORDER

On appeal from: Eastern Cape Division of the High Court, Grahamstown (Plasket J, with Revelas and Mbenenge JJ concurring, sitting as court of appeal):

1 The appellants are granted special leave to appeal against the judgment and order of the full court of the Eastern Cape Division of the High Court.

2 The appeal succeeds to the extent set out in paragraph 3 below and the first respondent is ordered to pay the first and second appellants' costs of appeal, such costs to include the costs of the application for leave to appeal.

3 The order of the full court is set aside and replaced with the following order:

'(a) The appeal in respect of the refusal by the court a quo to review and set aside the decision of the third respondent to declare as non-responsive the tender offer of the appellants is dismissed.

(b) The appeal in respect of the refusal by the court a quo to review and set aside the decision by the second respondent to award the tender to the fourth respondent is upheld.

(c) The first and fourth respondents are ordered to pay the costs of appeal of the first and second appellants, jointly and severally, the one paying the other to be absolved.

(d) The order of the court a quo is substituted as follows;

(i) The application to declare as responsive the tender offer of the applicants and award the tender to the applicants is dismissed.

(ii) The decision by the second respondent to award the tender to the fourth respondent is reviewed and set aside.

(iii) The first and fourth respondents are ordered to pay the costs of the first and second applicants jointly and severally, the one paying the other to be absolved, such costs to include the costs of the application to interdict and suspend the operation of the work by the fourth respondent, the rule 35(13) application and the counter-application thereto, as well as the main application.'

JUDGMENT

Swain JA (Navsa JA and Davis, Pillay and Hughes AJJA concurring):

[1] The first issue to be determined in this appeal is whether the joint venture of the first appellant, WDR Earthmoving Enterprises and the second appellant, Cotterrell's Construction CC, should be granted special leave to appeal against the judgment of the full court of the Eastern Cape Division of the High Court (Grahamstown). The full court dismissed the appeal of the appellants against an order of the high court (Lowe J), in which the appellants' application was dismissed. The appellants were in addition ordered to pay the costs of the first and second respondents.

[2] There was before us an application for leave to appeal, referred for oral argument in terms of section 17(2)(*f*) of the Superior Courts Act 10 of 2013. The parties were directed to be prepared, if called upon to do so, to address us on the merits. We heard argument on the application and the merits by the appellants and the first respondent. The fourth respondent, Amadwala Trading 363 CC, did not participate in the appeal and abides the decision of this court.

[3] The relevant factual background is as follows. During September 2014 the first respondent placed advertisements in the local press inviting tender offers from suitably qualified contractors, for the construction of an internal gravity sewer system in Jamestown, in the Eastern Cape, to eradicate the bucket system of sewer collection, then in place.

[4] Of the tender offers received by the first respondent, only the tender offer of the joint venture of the appellants, as well as that of the fourth respondent, were found to be responsive and progressed to a functionality assessment. The tenders of the appellants and the fourth respondent were then ranked by applying the tender evaluation point system in accordance with clause F.3.11 of the Standard Conditions

of Tender, which together with the Tender Data, governed the tender process. The appellants achieved 99 points and the fourth respondent achieved 85.75 points in terms of the Preferential Procurement Policy Framework Act 5 of 2000 (the Act).

[5] It was accordingly recommended that the tender and contract be awarded to the appellants for the agreed amount of R10 376 681.96, subject to scrutiny by the internal audit unit of the first respondent. In the event of the appellants failing to pass the audit, the project was to be awarded to the fourth respondent for the agreed amount of R12 020 082.82.

[6] On 1 April 2015 the second respondent, the municipal manager of the first respondent, reported that the internal audit process had revealed that the appellants' bid was non-responsive because:

'. . . your recommended bidder ie WDR/Cotterrell JV has not fully complied with the submission of returnable documents, especially the annual financial statements.

The WDR/Cotterrell's JV specifically Cotterrell's Construction CC, submitted annual financial statements for the periods ending 29 February 2012, 28 February 2013 and interim financial statements for the period ending 31 January 2014.

This is a non-compliance with regards to a returnable document and therefore this bidder should not have proceeded further than the evaluation committee.

. . .

Your committee is therefore advised to reconsider its decisions and consider preference in terms of all other qualifying bidders.'

[7] As a result, the Bid Evaluation Committee met and noted that what was submitted in the case of the first appellant were audited annual financial statements for the requisite three financial years. In the case of the second appellant, audited financial statements for only two financial years were attached. In respect of the third year, interim annual financial statements for a portion of the financial year, from 1 March 2013 to 31 January 2014, were attached. It was resolved that the fourth respondent be recommended for the award of the bid. The Bid Adjudication Committee met and the third respondent, the Chairperson of the Bid Adjudication

Committee, then recommended to the second respondent that the tender be awarded to the fourth respondent.

[8] Aggrieved at the turn of events, the appellants' attorneys wrote to the second respondent requesting reasons for the decision to award the tender to the fourth respondent. The first respondent's attorney replied that the reasons for the declaration of the appellants' tender offer as non-responsive were that:

'2.1 The WDR/Cotterrell's JV was considered non-responsive for its failure to submit all supplementary information in relation to Part T2: Returnable Documents, Section T2.2: Returnable Schedules; alternatively, the bid was not accepted because it was incomplete.

2.2 More particularly, the JV failed to submit audited financial statements for the past three years or since the date of establishment where established during the past three years, as required in terms of sub-paragraph 1.1 of 2C – Declaration for Procurement above R10 million (all applicable taxes included) (MBD 5).'

[9] Dissatisfied with the reasons furnished by the first respondent for declaring their tender offer non-responsive, the appellants instituted application proceedings in the Eastern Cape Division of the High Court, (Grahamstown) in which an order was initially sought suspending the award of the tender to the fourth respondent, pending the finalisation of an application to review and set aside the decisions of the second and third respondents. An order was granted that the work undertaken by the fourth respondent pursuant to the award of the tender be suspended. As a result, no further work was carried out on the project in the intervening period.

[10] The appellants thereafter sought an order reviewing and setting aside the decision by the third respondent to declare the tender offer of the appellants as non-responsive, and that of the fourth respondent as responsive. In addition, the decision by the second respondent to award the tender to the fourth respondent was sought to be reviewed and set aside and replaced with an order awarding the tender to the appellants. The court of first instance did not deal with the merits of this claim finding that a dispute of fact had arisen in relation to whether the fourth respondent's bid was non-responsive but that the factual dispute had to be resolved in its favour, applying the test in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984

(3) SA 623 (A) at 634 E-I. As already noted, the application was dismissed with costs and a subsequent appeal to the full court was unsuccessful.

[11] The appeal raises three issues for determination:

(a) Whether the appellants have standing to seek the review and setting aside of the declaration of the fourth respondent's tender offer as responsive, as also the award of the tender to the fourth respondent?
(b) Whether the declaration of the appellants' tender offer as non-responsive, is reviewable?
(c) Whether the declaration of the fourth respondent's tender offer as responsive, is reviewable?

[12] As regards the issue of standing, the full court held that the appellants had no standing to challenge the award of the tender to the fourth respondent because:

'. . . once its bid was found to be non-responsive, it fell out of the race and it no longer had a legally protected interest in the outcome of the process. As Pillay J stated in *Rodpaul Construction CC t/a Rods Construction v Ethekwini Municipality & others* [2014 JDR 1122 (KZD)] "only a compliant tenderer acquires the right to challenge an award."'

The full court then rejected the argument that the appellants standing to challenge the award to the fourth respondent arose from s 6(1) of the Promotion of Administrative Justice Act 3 of 2000 (the PAJA) which provides that 'any person may institute proceedings in a court . . . for the judicial review of an administrative action'. It held that this provision was:

'. . . merely a recognition that everyone has a right to just administrative action in terms of s 33 of the Constitution and that one way in which that right may be vindicated is by applying to review administrative action that is unlawful, unreasonable or procedurally unfair. It is followed by s 6(2) which states that a court has the power to judicially review administrative action if one or more of the listed grounds of review are present. Section 6(1) does not concern itself with standing. It is implicit in s 6 that it is only a person envisaged in s 38 of the Constitution who may approach a court to judicially review an administrative action.'

[13] However, in *Giant Concerts CC v Rinaldo Investments (Pty) Ltd & others* [2012] ZACC 28; 2013 (3) BCLR 251 para 29, the Constitutional Court held that:

'PAJA, which was enacted to realise s 33, confers a right to challenge a decision in the exercise of a public power or the performance of a public function that "adversely affects the rights of any person and which has a direct, external legal effect". PAJA provides that "any person" may institute proceedings for the judicial review of an administrative action. The wide standing provisions of section 38 were not expressly enacted as part of PAJA. Hoexter suggests that nothing much turns on this because "it seems clear that the provisions of section 38 ought to be read into the statute". This is correct.'

It then added at para 30 that 'adversely affects' in the definition of administrative action:

'. . . was probably intended to convey that administrative action is action that has the capacity to affect legal rights, and that impacts directly and immediately on individuals. The effect of this is that . . . an own-interest litigant, had to show that the decisions it seeks to attack had the capacity to affect its own legal rights or its interests.'

[14] The Constitutional Court added, at para 32, that in determining a litigant's standing:

'. . . we must assume that its complaints about the lawfulness of the transaction are correct. This is because in determining a litigant's standing, a court must, as a matter of logic, assume that the challenge the litigant seeks to bring is justified.'

It summarised the position at para 43, in the following terms:

'The own-interest litigant must, therefore, demonstrate that his or her interests or potential interests are directly affected by the unlawfulness sought to be impugned.'

[15] The standing of the appellants has to be determined by considering whether the award of the tender to the fourth respondent would have a direct effect upon the interests, or potential interests of the appellants, without regard to whether the decision was valid or not. It has to be assumed that the challenge the appellants wish to bring is justified.

[16] I agree with the submission by the appellants that a declaration that a decision on whether the fourth respondent's tender offer was non-responsive, would

directly affect their rights. In the event of a decision against the fourth respondent, the tender process would have to be re-commenced as the only responsive tender offers were those of the appellants and the fourth respondent. The appellants and the fourth respondent together with any other interested parties, would then be entitled to compete for the tender. The appellants therefore have standing to seek the review and setting aside of the declaration of the fourth respondent's tender offer as responsive, as also the award of the tender to the fourth respondent.

[17] The full court accordingly erred in concluding that the standing of the appellants to challenge the award of the tender to the fourth respondent, was determined by the finding that the appellants' bid was non-responsive. Its reliance upon *Rodpaul Construction CC v Ethekweni Municipality* 2014 JDR 1122 (KZD) was misplaced. The statement in *Rodpaul,* at para 52, that:

'. . . only a compliant tenderer acquires the right to challenge an award. At best a non-compliant tenderer may appeal to the authority before expiry of the tender notice to waive strict compliance.'

is too broadly cast and does not correctly reflect Canadian law, from which it was said to be derived.

[18] In *M.J.B. Enterprises Ltd v Defence Construction* (1951) [1999] 1 SCR 619 paras 58 and 60, the Supreme Court of Canada held that the submission of a tender in response to an invitation to tender may give rise to contractual obligations (contract A), distinct from the obligations associated with the contract to be entered into upon the acceptance of a tender (contract B), depending upon the intention of the parties. Where the party calling for tenders, awards contract B to a non-compliant tenderer, then a tenderer who submitted a compliant bid, would suffer the loss of contract B and would be entitled to damages in the amount of the profits it would have realised, had it been awarded contract B. It is in this context that only a compliant tenderer would have locus standi to institute an action for damages. The decision has no application to the present dispute.

[19] I turn to consider whether the declaration of the appellants' tender offer as non-responsive, is reviewable. This requires a consideration of the returnable

schedule which lies at the heart of the present dispute. The schedule reads as follows:

'2C Declaration for Procurement above R10 million (All Applicable Taxes Included) (MBD 5)

For all procurement expected to exceed R10 million (all applicable taxes included), bidders must complete the following questionnaire:

1 Are you by law required to prepare annual financial statements for auditing? Yes/No

1.1 If yes, submit audited annual financial statements for the past three years or since the date of establishment if established during the past three years.'

The representatives of the appellants completed separate schedules in respect of the first appellant and the second appellant in compliance with a direction at the site inspection meeting, that in the case of the tenderer being a joint venture, 'each entity has to submit the relevant returnable documents and complete the relevant forms'. In each schedule they ringed the answer 'Yes' to the first question and in response to the second question, stated the following in manuscript, 'Included' and 'See Attached'.

[20] It is common cause that what was attached in the case of the first appellant were audited annual financial statements for the requisite three financial years. However, in the case of the second appellant, audited financial statements for only two financial years were attached. In respect of the third year, interim annual financial statements for a portion of the financial year, from 1 March 2013 to 31 January 2014, were attached.

[21] The obligation to furnish the requisite audited annual financial statements is found in the Municipal Supply Chain Management Regulations GN 868, *GG* 27636, 30 May 2005 made by the Minister of Finance in terms of s 168 of the Local Government: Municipal Finance Management Act 56 of 2003. Regulation 21 provides:

'A supply chain management policy must determine the criteria to which bid documentation for a competitive bidding process must comply, and state that in addition to regulation 13 the bid documentation must

. . .

(*d*) If the value of the transaction is expected to exceed R10 million (VAT included), require bidders to furnish –

(i) if the bidder is required by law to prepare annual financial statements for auditing, their audited financial statements –

(*aa*) for the past three years; or

(*bb*) since their establishment if established during the past three years.'

[22] In compliance with the regulations, paragraph 29(d)(1) of the Supply Chain Management Policy of the first respondent includes this provision. There is accordingly a statutory obligation on the part of the first respondent to obtain and for a tenderer to furnish, the information requested in returnable schedule '2C Declaration for Procurement above R10 million (MBD 5)'. In the event of an affirmative answer to the question, 'are you by law required to prepare annual financial statements for auditing?' there is thus a statutory obligation on the tenderer to furnish and for the first respondent to receive, audited annual financial statements for the past three years.

[23] It is in this context that the relevant clauses in the Tender Data and the Standard Conditions of Tender must be examined. Of importance is the provision in the Tender Data, that in interpreting the Tender Data and the Standard Conditions of Tender, in the event of any ambiguity or inconsistency, the Tender Data shall have precedence.

[24] Clause F.1.2 of the Tender Data provides that the tender documents issued by the employer comprise inter alia:

'Part T 2 Returnable documents

T 2.1 List of returnable documents

T2.2 Returnable Schedules.'

[25] Clause F.2.14 in the Standard Conditions of Tender provides:

'Accept that tender offers, which do not provide all the data or information requested completely and in the form required, *may be regarded by the employer as non-responsive.*' (Emphasis added.)

is varied by clause F.2.14 in the Tender Data to read as follows:

'The Tenderer is required to enter information in the following sections of the document:

. . .

Section T2.2: Returnable Schedules

. . .

Accept that failure on the part of the Tenderer to submit any one of the Returnable Documents listed in F.2.23 *shall result in a tender offer being regarded as non-responsive.*' (Emphasis added.)

Clause F.2.23 of the Tender Data in turn provides that:

'All certificates and information, as per T2.1 and T2.2 of the tender document are to be provided with the tender offer as well as:

1. Returnable Schedules required only for tender evaluation purposes

. . .

2. Other documents required only for tender evaluation purposes

. . .

2C Declaration for Procurement above R10 million (MBD 5).'

[26] Accordingly, in terms of clause F.2.14 of the Tender Data a tenderer is required to enter information in the 'Returnable Schedules' forming part of section T2.2 which includes the returnable schedule, '2C Declaration for Procurement above R10 million (MBD 5)'. The answer by a tenderer to the first question posed is information that the tenderer is required to enter on the schedule. If answered in the affirmative, the tenderer is obliged to submit the specified audited annual financial statements.

[27] For the purposes of clause F.2.14 the Returnable Schedule '2C Declaration for Procurement above R10 million (MBD 5)' must be regarded as a 'Returnable Document' because in clause F.2.23 it is included under the category 'Other

documents required only for tender evaluation purposes', and not under the category 'Returnable Schedules required only for tender evaluation purposes'. The specified audited annual financial statements must accordingly also be regarded as 'Returnable Documents' for the purposes of clause F.2.14. A failure on the part of a tenderer to submit any one of the Returnable Documents listed in F.2.23 results in a tender offer being regarded as non-responsive in terms of clause F.2.14.

[28] By contrast, clause F.2.14 of the Standard Conditions of Tender provides that '. . . tender offers, which do not provide all the data or information requested completely and in the form required, *may* be regarded by the employer as non-responsive'. Consequently, the discretion possessed by the employer to condone a failure by the tenderer to provide all of the data or information requested, completely and in the form required in the Standard Conditions of Tender, was replaced in the Tender Data with a peremptory provision that a failure by the tenderer 'to submit any one of the Returnable Documents' will result in the tender offer being regarded as non-responsive.

[29] The third respondent therefore correctly determined that the appellants had not complied with the obligation to submit returnable documents, being audited annual financial statements for three years. However, whether the tender offer of the appellants was correctly declared as non-responsive has to be considered in the context of the decision in *Dr JS Moroka Municipality & others v Betram (Pty) Ltd & another* [2013] ZASCA 186; [2014] 1 All SA 545 (SCA).

[30] In *Moroka* para 10, it was held that it was for the municipality and not the court to decide the prerequisites for a valid tender. A failure to comply with prescribed conditions would result in a tender being disqualified as an acceptable tender under the Act, unless those conditions were immaterial, unreasonable or unconstitutional. With reference to the decision in *Minister of Environmental Affairs and Tourism & others v Pepper Bay Fishing (Pty) Ltd; Minister of Environmental Affairs and Tourism & others v Smith* 2004 (1) SA 308 (SCA) para 31, the court noted that as a general principle an administrative authority has no inherent power to

condone failure to comply with a peremptory requirement. It only has such power, if it has been afforded the discretion to do so.

[31] It was held at para 14, that in the absence of any discretion in the relevant legislation or regulations, a discretion to condone a failure to comply with a peremptory requirement was entirely dependent upon a proper construction of the documents forming part of the tender invitation. In the absence of any specific provision in the tender invitation, or the various documents included therewith, providing for a discretion to be afforded to a municipal official or committee to condone a failure to comply with any prescribed condition of tender, the failure could not be condoned.

[32] The dictum in *Millennium Waste Management (Pty) Ltd v Chairperson, Tender Board: Limpopo Province & others* 2008 (2) SA 481 (SCA) para 17 that:

'[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.'

was disapproved of at para 18, on the basis that it was inconsistent with the decision in *Pepper Bay*, but also offended the principle of legality.

[33] In *Overstrand Municipality v Water and Sanitation Services South Africa (Pty) Ltd* [2018] ZASCA 50 para 50, this Court held that it was not necessary on the facts of the case to resolve the apparent differences in the decisions in *Millennium* and *Moroka* and stated the following:

'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. In the present case the non-compliance is not of a trivial or minor nature.'

[34] As pointed out above, the obligation to furnish audited annual financial statements is found in the Municipal Supply Chain Management Regulations. The

failure to provide the requisite audited annual financial statements cannot accordingly be regarded as trivial, or of a minor nature. Likewise, the requirement cannot be described as immaterial, unreasonable or unconstitutional.

[35] Once the appellants affirmed that they were legally obliged to have their annual financial statements audited, there was an obligation on the part of the first respondent to obtain and for the appellants to furnish, the information requested in returnable schedule '2C Declaration for Procurement above R10 million (MBD 5),' including audited annual financial statements, as returnable documents in compliance with clause F.2.23 of the Tender Data. The first respondent was not obliged to determine by the calculation of their respective public interest scores, whether the appellants or the fourth respondent were excused from having their annual financial statements audited. As pointed out by the first respondent, it does not require the calculation of the public interest scores of a tenderer to be submitted to it for independent verification. Nor does it require, or is able to ask for the contributing and relevant point scoring facts so that it may do the calculation itself. The calculation by the appellants in their replying affidavit of their respective public interest scores, done with the object of proving that they were not legally obliged to have their annual financial statements audited, illustrates the problem faced by the first respondent. They did not provide independent verification for their case which was based upon limited disclosed facts. It is for this reason that the first respondent has to rely upon the accuracy of the information provided by a tenderer in the returnable schedule in question. The importance of the accuracy of this information is emphasised by the fact that the resultant obligation to furnish audited annual financial statements is mandatory and the first respondent possesses no discretion to condone the appellants' failure to provide them. Significantly, as stated above the public interest calculations of the appellants are seen from their perspective and have not been independently verified.

[36] Likewise, the argument advanced by counsel for the appellants that a report by the appointed consulting engineer for the project, confirmed that the appellants had the financial resources to perform the tender and were not insolvent, is irrelevant. As pointed out by the first respondent, the consulting engineer, without

reference to the annual financial statements that were submitted, stated that according to their knowledge the appellants were not insolvent, under receivership, bankrupt or being wound-up, or had suspended their business activities.

[37] Two further arguments advanced by counsel for the appellants require consideration. Relying upon clause F.2.18.1 of the Tender Data, which provides that:

'Notwithstanding F.2.23 submit, within 7 days from receipt of a written request by the Employer, a full report from his banker as to his financial standing. The Employer may, at its discretion, condone any failure to comply with the foregoing condition.

Provide on written request by the Employer, where the tendered amount inclusive of VAT exceeds R10 million:

i.) audited annual financial statements for 3 years, or for the period since establishment if established during the last 3 years, if required by law to prepare the annual financial statements for auditing',

It was submitted that the obligation to provide audited annual financial statements only arose on receipt of a written request from the first respondent, which written request, it was common cause, had never been made. Accordingly, so the argument went, the failure to make a written request calling on the appellants to provide the requisite audited annual financial statements, rendered the requirement non-mandatory. This argument ignores paragraph 29(d)(1) of the Supply Chain Management Policy of the first respondent which requires their production and precludes any discretion on the part of the first respondent to request their production.

[38] The second argument advanced by counsel for the appellant was that when regard was had to clause F.3.8 of the Standard Conditions of Tender and the decision in *Allpay Consolidated Investment Holdings (Pty) Ltd & others v Chief Executive Officer of the South African Social Security Agency & others* 2014 (4) SA 179 (CC); [2014] ZACC 12, the failure by the appellants to furnish the requisite audited annual financial statements, did not constitute a material deviation from the requirements of the Tender Data and Standard Conditions of Tender.

[39] Clause F.3.8 provides as follows:

‘F.3.8.1 Determine, after opening and before detailed evaluation, whether each tender offer properly received:

a) complies with the requirements of these Conditions of Tender,

b) has been properly and fully completed and signed, and

c) is responsive to the other requirements of the tender documents.

F.3.8.2 A responsive tender is one that conforms to all the terms, conditions, and specifications of the tender documents without material deviation or qualification. A material deviation or qualification is one which, in the Employer’s opinion, would:

a) detrimentally affect the scope, quality, or performance of the works, services or supply identified in the Scope of Work,

b) significantly change the Employer’s or the tenderer’s risks and responsibilities under the contract,

c) affect the competitive position of other tenderers presenting responsive tenders, if it were to be rectified.

Reject a non-responsive tender offer, and not allow it to be subsequently made responsive by correction or withdrawal of the non-conforming deviation or reservation.'

[40] As pointed out, in interpreting the Tender Data and the Standard Conditions of Tender in the event of any ambiguity or inconsistency, the Tender Data has precedence. The peremptory provision in clause F.2.14 of the Tender data that a failure by the tenderer ‘to submit any one of the Returnable Documents’ will result in the tender offer being regarded as non-responsive, is inconsistent with the discretion afforded to the first respondent in terms of clause F.3.8 of the Standard Conditions of Tender. The peremptory provision accordingly has precedence. In addition the dictum in *Allpay* at para 28, that in determining whether a ground of review exists under the PAJA, the materiality of any deviance from legal requirements must be assessed by linking the question of compliance to the purpose of the provision, is distinguishable on the facts of this case, where a peremptory provision is in issue. In any event the purpose of the provision is to provide independent audited verification for three years, in order to provide assurance as to the financial viability and ability to perform the contract.

[41] The appellants' appeal against the refusal by the court a quo to review and set aside the decision of the third respondent to declare as non-responsive the tender offer of the appellants and the dismissal by the full court of the appellants' appeal in this regard, must accordingly fail.

[42] I turn to consider whether the declaration of the fourth respondent's tender offer as responsive, is reviewable. As pointed out the court of first instance held that a dispute of fact had arisen in relation to whether the fourth respondent's bid was non-responsive but that the factual dispute had to be resolved in its favour, applying the test in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634 E-I. The full court did not deal with the merits of this issue, having found that the appellants had no standing to challenge the award of the tender to the fourth respondent.

[43] The appellants submit that the fourth respondent's tender offer should have been declared non-responsive because it also failed to submit audited annual financial statements, despite having declared that it was required, by law, to have audited annual financial statements, by answering the first question posed in returnable schedule '2C Declaration for Procurement above R10 million (MBD 5)' in the affirmative. In this regard it is clear that there is no dispute of fact as extracts of the annual financial statements of the fourth respondent, as attached to the appellants' supplementary affidavit, confirm that they were unaudited. In addition, the first respondent in its opposing affidavit to the appellants' application for special leave to appeal confirmed that 'it is correct that the Fourth Respondent submitted complete financial statements, but that these were not audited'.

[44] Counsel for the first respondent therefore submitted that although the financial statements of the fourth respondent were unaudited, they were nevertheless complete. By contrast in the case of the second appellant, so the argument went, audited financial statements for only two financial years were attached. In respect of the third year, interim annual financial statements for a portion of the financial year, from 1 March 2013 to 31 January 2014, were attached. In other words the annual financial statements of the fourth respondent were complete, albeit unaudited,

whereas the annual financial statements of the second appellant were incomplete, because in the third year they only covered the period 1 March 2013 to 31 January 2013 and did not extend to 28 February 2013. The distinction is one without a difference. Returnable schedule '2C Declaration for Procurement above R10 million (MBD 5)', read with the Municipal Supply Chain Management Regulations, and paragraph 29(d)(1) of the Supply Chain Management Policy of the first respondent, required audited financial statements for three years to be submitted. The fact that the fourth respondent's annual financial statements for three years were complete, matters not, if they were unaudited. The same considerations as at para 40 apply.

[45] The third respondent accordingly erred in concluding that the bid of the fourth respondent was responsive. The decision by the second respondent to accept the recommendation of the third respondent to award the tender to the fourth respondent and thereafter award the tender to the fourth respondent, accordingly falls to be reviewed and set aside. In the result, the first respondent will have to commence the tender process afresh and invite tender offers from suitably qualified contractors, for the construction of the internal gravity sewer system in Jamestown. The appellants accordingly qualify for the grant of special leave to appeal from the judgment of the full court of the Eastern Cape Division, Grahamstown, to this Court.

[46] I turn to the issue of costs. Although the appellants' appeal against the decision by the second respondent to declare the appellants' bid as non-responsive has failed, the appellants' appeal against the decision by the second respondent to award the tender to the fourth respondent has succeeded. The appellants have therefore achieved substantial success on appeal and are entitled to their costs in the court of first instance, against the first and fourth respondents jointly and severally, the one paying the other to be absolved. Such costs are to include the costs of the application to interdict and suspend the operation of the work by the fourth respondent, the rule 35(13) application and the counter-application thereto, as well as the application on the merits of the appellants' claim. The appellants are also entitled to the costs of the appeal to the full court, against the first and fourth respondents jointly and severally, the one paying the other to be absolved. However, as regards the appeal to this Court, by virtue of the fact that the fourth respondent

did not participate in the appeal and abided the decision of this Court, the appellants' costs of the appeal should only be awarded against the first respondent.

[47] I grant the following order:

1 The appellants are granted special leave to appeal against the judgment and order of the full court of the Eastern Cape Division of the High Court.

2 The appeal succeeds to the extent set out in paragraph 3 below and the first respondent is ordered to pay the first and second appellants' costs of appeal, such costs to include the costs of the application for leave to appeal.

3 The order of the full court is set aside and replaced with the following order:

'(a) The appeal in respect of the refusal by the court a quo to review and set aside the decision of the third respondent to declare as non-responsive the tender offer of the appellants is dismissed.

(b) The appeal in respect of the refusal by the court a quo to review and set aside the decision by the second respondent to award the tender to the fourth respondent is upheld.

(c) The first and fourth respondents are ordered to pay the costs of appeal of the first and second appellants, jointly and severally, the one paying the other to be absolved.

(d) The order of the court a quo is substituted as follows;

(i) The application to declare as responsive the tender offer of the applicants and award the tender to the applicants is dismissed.

(ii) The decision by the second respondent to award the tender to the fourth respondent is reviewed and set aside.

(iii) The first and fourth respondents are ordered to pay the costs of the first and second applicants jointly and severally, the one paying the other to be absolved, such costs to include the costs of the application to interdict and suspend the operation of the work by the fourth respondent, the rule 35(13) application and the counter-application thereto, as well as the main application.'

K G B Swain
Judge of Appeal

Appearances:

For the Appellants:	J D Huisamen SC
	Instructed by:
	Joubert Galpin Searle Inc, Port Elizabeth
	Honey & Partners Inc, Bloemfontein
For the Respondents:	S Grobler
	Instructed by:
	Peyper Attorneys, Bloemfontein