



**IN THE HIGH COURT OF SOUTH AFRICA  
(WESTERN CAPE DIVISION, CAPE TOWN)**

**CASE NO: 17336/2014**

In the matter between:

**Z & C INFERNO SECURITY CC  
t/a INFERNO SECURITY SERVICES**

**APPLICANT**

**and**

**CITY OF CAPE TOWN**

**FIRST RESPONDENT**

**BLUE WHALE PATROLS CC**

**SECOND RESPONDENT**

**CORAM: POTGIETER AJ  
DATE OF HEARING: 9 DECEMBER 2014  
DATE OF JUDGMENT: 23 FEBRUARY 2015**

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**JUDGMENT**

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**T D POTGIETER, A J**

**INTRODUCTION**

- [1] The Applicant – with 29 others – was declared a responsive and preferred bidder for the provision of security services at sites belonging to, or under the control of, the First Respondent (“the City”) on 18 November 2013.<sup>1</sup> At that stage the Applicant was an existing provider of such services to

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<sup>1</sup> This decision names 30 different entities in 4 groups (Guarding, Events, VIP and Alarm Response) with varying and overlapping membership. The total number of successful bidders subsequently varies in different places in the record, but the exact number does not affect the merits of the matter.

the City. Subsequent to November 2013 it was eliminated from the process and not awarded a contract when the final decision was taken on 26 May 2014.

[2] The Applicant contends in this application (“the main application”) that certain irregularities, amounting to grounds of review in terms of s 6 of the Promotion of Administrative Justice Act, 3 of 2000 (“PAJA”), were committed in the rejection of its tender and asks that the decision be set aside.

[3] Prior to the main application being brought – and after several days of negotiations and correspondence – the Applicant launched an application on 23 September on an urgent basis under case number 16972/2014 for access to the relevant information in terms of the Promotion of Access to Information Act (“PAIA”). The information was furnished and the application postponed. The main application was brought on the basis of an examination of this information.

3.1 When the PAIA application eventually came before Rogers J on 22 October 2014 only the issue of costs remained in contention. This issue, with directions for further affidavits to be filed, was then postponed and was eventually argued together with the main application. I deal with this at the end of this judgment.

[4] In the founding papers of the main application it is alleged that the tax clearance certificate (“TCC”) submitted by the Second Respondent as part of its tender application is a falsified document. Enquiries at SARS confirmed that the Second Respondent did not have current tax clearance with SARS. On 2 October 2014 the Second Respondent, without filing affidavits, withdrew its opposition to the application and its attorneys of record withdrew as such. It took no further part in the proceedings.

- [5] On 3 October 2014 Saldanha J granted interim relief to the Applicant, interdicting the Second Respondent from performing the security services contract awarded to it by the City and directing the City to make use of the Applicant's services "*to perform the services required by the tender and which services would have been performed by the Second Respondent*". The interim order gave further directions and directed the Second Respondent to provide reasons at the hearing of the main application why it should not be ordered to pay the Applicant's costs of the application for interim relief on the scale as between attorney and client.
- [6] Saldanha J postponed the substantive part of the main application – for the review and setting aside of the City's decision – for hearing on the semi-urgent roll on 20 November 2014, with directions for the filing of further affidavits and heads of argument. On that date a further postponement was agreed for the filing of further affidavits and the matter was eventually heard in the last week of term, on 9 December 2014.
- [7] Mr C Joubert appeared for the Applicant and Mr Oosthuizen SC for the City.

## **THE LEGISLATIVE FRAMEWORK**

- [8] Section 217 of the Constitution of the Republic of South Africa provides that when an organ of state contracts for goods and services it must do so "*in accordance with a system which is fair, equitable, transparent, competitive and cost-effective*".
- [9] The City is an organ of state. Section 111 of the Local Government: Municipal Finance Management Act, 56 of 2003 ("*the MFMA*"), read with s 112, requires the City to have and implement a supply chain

management policy (“SCMP”) which is fair, equitable, transparent, competitive and cost-effective.

- [10] Regulation 43 of the Municipal Supply Chain Management Regulations promulgated in terms of s 168 of the MFMA requires that the supply chain management policy of a municipality should state that no award above R15 000.00 may be made to a person whose tax matters have not been declared to be in order by the South African Revenue Service (“SARS”). In the evaluation criteria that formed part of the tender document in the instant case clause 7.2, under the heading ‘Non-responsive tenders’, states *inter alia* in 7.2.2(f) that “tenders” will be declared non-responsive if the tenderer fails to comply with a written deadline for the furnishing of a valid TCC or confirmation from SARS that suitable arrangements with it had been made with it regarding the taxes of the tenderer.
- [11] Regulation 43 demands that a municipality must first check with SARS that someone’s tax matters are in order before an award may be made to that person.
- [12] The procedure for evaluating and awarding bids is set out in clauses 210 to 242 of the SCMP. After the evaluation process the Bid Evaluation Committee (“BEC”) puts before the Bid Adjudication Committee (“BAC”) a report with recommendations. The BEC is, *inter alia*, required to note in its evaluation report a bidder “*who has failed to submit an original and valid tax clearance certificate from the SARS certifying that the taxes of the bidder is in order*” (clause 217.10). After considering this report the BAC makes the final award which need not be to the bidder(s) recommended by the BEC (clause 236, 239).

[13] Clause 6.15.1 of the Conditions of Tender states that “(n)o award shall be made to a person whose tax matters have not been declared to be in order by the South African Revenue Services”. Clause 5.19 is to similar effect.

## **CHRONOLOGY**

- [14] Tender 805/2012/13 for the provision of various security services on approximately 1073 sites under the control of the City was advertised in 2012, the closing date for the submission of tender applications being 8 October 2012. The process was dealt with in terms of the City’s SCMP.
- [15] After completion of the bid evaluation process by the BEC the BAC passed a resolution on **18 November 2013** identifying a total of 30 tenderers as preferred bidders, including the Applicant.
- [16] In terms of the resolution the Manager: Facilities Management, Mr M Stander (“Stander”), was authorized to conduct direct negotiations with the preferred bidders with the intention of achieving better rates for the hiring of vehicles and equipment.
- [17] The negotiations referred to were completed during **January and February 2014**.
- [18] The tax clearance certificate (“TCC”) that the Applicant had submitted as part of its bid expired on **1 March 2014**, by which time the final tender awards had not yet been made.
- [19] The Applicant was notified per letter dated **10 February 2014** that its TCC was due to expire on **1 March 2014** and called upon to submit an updated certificate within 7 days after the expiry. The notice refers to clause 5.19 of the tender document, which requires that a tenderer should

be registered and in good standing with the South African Revenue Service ('SARS').<sup>2</sup>

[20] On **7 March 2014** another notice was addressed to the Applicant calling for an updated and valid TCC to be submitted by no later than 10h00 on **31 March 2014**, failing which the Applicant's offer "*will not be considered*".

[21] On **10 March 2014** Zahiraah Jackson, on behalf of the Applicant, sent the relevant officials of the City a "*letter from our tax practitioners regarding my tax clearance certificate for Inferno Security Services*". The letter stated that "*the business*" of Z & C Inferno Security Services "*is currently undergoing a restructure which includes a new corporate entity that will be trading as Inferno Security and the shareholders will be Ms Z C Lawrence and M R Jackson*". The letter added that "*(t)his entity is currently in process of procuring tax clearance certificate*".

(As will appear below this whole process of conversion from CC to (Pty) Ltd was eventually abandoned as "bad tax advice" and the Applicant – as a close corporation – provided the required TCC on 16 May 2014: 6 weeks after the deadline in the final demand, but 10 days before the final award was made.)

[22] In the Founding Affidavit the sole member of Applicant, Zania Cathleen Lawrence, explains that part of the reason for the attempted conversion from CC to limited company was a debt to SARS by the Applicant which

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<sup>2</sup> In argument much was made of clause 7.2.2(f) of the evaluation criteria which states that a bid may be declared non-responsive if the bidder fails to comply timeously with a request for a valid TCC or written confirmation from SARS of suitable arrangements with SARS. The demand *in casu* did not offer the option of written confirmation but expressly demanded a valid TCC. In argument Mr Joubert accepted that his client must be deemed to have known of the option of "suitable arrangements". In the view I take of the matter this does not make a difference. Neither does the difference between 7.2.1 and 7.2.2, also raised in argument.

it could not meet without obtaining loans. She adds that part of the reason for Applicant's "*financial woes*" was the fact that during the 18 month assessment period for the new tender the Applicant had to continue to perform its existing contract with the City at rates that were submitted "*many years ago*".<sup>3</sup> The City contests this averment.

[23] On **25 March 2014** the City received a letter from Applicant's tax adviser confirming that "*Exclusive Access Trading 1830 (Pty) Ltd ... trades as INFERNO SECURITY*" and including a valid TCC in the name of Exclusive Access Trading 1830 (Pty) Ltd, approved on 12 March 2014 and expiring on 12 March 2015. The original TCC plus "*the PTY LTD documentation as requested*" was hand-delivered to the City on **27 March 2014**.

[24] On **28 March 2014** Mrs Louise Harvey, the City's Head: Supplier Development, asked the Applicant per e-mail to confirm whether it had restructured or merely converted from a CC to a (Pty) Ltd. It added that "*if the latter, then a copy of the conversion documentation and confirmation thereof by CIPC should suffice to regard Pty Ltd as being a 'continuation' of the CC. If the latter does NOT apply, then the Pty Ltd must be regarded as being an entirely new legal entity.*"

[25] On **30 March 2014** Zahiraah Jackson, on behalf of Applicant, forwarded an e-mail from the Applicant's tax adviser to the City in which the adviser explains the situation. I quote the e-mail in full:

*"Zahiraah*

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<sup>3</sup> In the final resolution of the BAC dated 26 May 2014 it is recorded that it took 13 months to evaluate and identify the preferred bidders, another 2 months for the negotiations and a further 3 months to request valid TCC's.

*It was not a conversion of CC to Pty Ltd. It was a “transfer as a going concern” of Inferno Security for, inter alia, restructuring and (BEE purpose) so “nothing has really changed”.*

*Insofar as a VAT number is concerned it takes a minimum of three months to get this as SARS requires 3 months bank statements so until there is a VAT number Inferno Security does not charge VAT and neither do their clients pay VAT so there is no difference.*

*Regards”*

- [26] It seems as if the parties were to some extent talking at cross-purposes at this stage and also used confusing terminology. The TCC clearly related to “an entirely new legal entity”, being a limited company and not a CC. The City apparently wanted to know whether it was dealing with essentially the same concern – “a continuation of the CC” – and, if so, whether such “continuation of the CC” had a valid TCC. For this they required the “conversion documentation” (paragraph 24 above) which was apparently furnished the day before (paragraph 23 above). It seems to me that “transfer as a going concern” in a situation where “nothing has really changed” effectively constitutes “a continuation of the CC” in the form of a limited company (“(Pty) Ltd”). It does seem that the City was at this stage prepared to accept a TCC by an entity proved to be “a continuation of the CC”.
- [27] The e-mail mentioned in paragraph [25] above elicited the reply on **31 March 2014**, however, that each legal entity is required to register on the City of Cape Town data base and that the details of Exclusive Access Trading 1830 (Pty) Ltd cannot be used to update the details “against vendor 19313 which is for the legal entity Z and C Inferno Security Services CC – trading as Inferno Security Services”. This seems to



contradict the view conveyed on 28 March (paragraph 24 above) that a (Pty) Ltd could be regarded as a continuation of a CC.

- [28] In reply to this and also on **31 March 2014** Jackson sent an e-mail to Steyn explaining that the Applicant was acting on the advice of “banks, tax practitioners etc” and that this “was done at the same time as what the final warning dated 07 March stipulates”. She undertook to provide the further formal documents as soon as they came to hand, asked for “a reasonable time in order to resolve this matter” and requested “a meeting with yourselves to clarify this matter”.
- [29] On **1 April 2014** Jackson was advised by Harvey to liaise directly with the tender office regarding her request as “I am unfortunately not in a position to allow you any extensions”. On the same day Ina Steyn, SCM practitioner of the City, advised that she would need to take the request to the BEC for their comments.
- [30] A meeting of the BEC was held on **10 April 2014**.<sup>4</sup> Prior to the meeting Steyn advised the attendees by e-mail of the problems that bidders had with expired TCC’s. I quote the e-mail *verbatim* and in full:

*“I had to set up this meeting as we need clarity of some “legislation” issues.*

*Background:*

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<sup>4</sup> Steyn states in her affidavit that this was the date of the meeting and this is also the date reflected in the heading of the minutes that she attaches to her affidavit at page 214 of the court record. However, the signed approval of the minutes – by the chairperson “in consultation with the members of the BEC” – at the bottom of the second page is dated 8/4/2014. This discrepancy is not cleared up in the court papers, as far as I could ascertain.

- *We really struggled to obtain tax clearance certificated for all the tenderers that was identified as the preferred bidders after we did our negotiations.*
- *In February 2014 we sent letters to all the companies who's tax clearance has expired during the evaluation period. A second letter was drafted to those who's tax clearance certificates is about to expire to alert them.*
- *We received various requests for extension until end of March 2014.*
- *The BEC decided to draft a final letter dated 7 March 2014 informing all the vendors effected that we grant them extension until 31 March 2014 at 10:00.*

*Issues:*

- ***Profressional Security t/a Prosec** sent a fax on 28/03/2014 advising me that SARS are experiencing computer problems and are enable to print a Tax Clearance Certificate. They forward the tax clearance on 1 April 2014 at 9:53 with an approved date of 31 March 2014.*
- ***Ilizwe Armed Security** – Mailed me on 31 March 2014 at 2:30 proof of progress in obtaining the Tax clearance certificate. They send me an approved “Instalment Payment Request. Dated 31/03/2014. Our document states:*
- ***5.19 Tax clearance***
  - *5.19.1 Tenderers shall be registered and in good standing with the South African Revenue Service (SARS). In this*

*regard, it is the responsibility of the tenderer to submit to the CCT documentary evidence in the form of an original valid Tax Clearance Certificate issued by SARS. Tax Clearance certificates must be delivered to the Supplier Management Unit located within the Tender Distribution Office, 2<sup>nd</sup> Floor, (Concourse Level), Civic Centre, 12 Hertzog Boulevard, Cape Town (Tel 021 400 9242/3/4/5).*

- *5.19.2 Each party to a Partnership/Joint Venture/Consortium shall submit a separate Tax Clearance Certificate.*
- *5.19.3 Tenderers are to note that the CCT will not award a contract to a tenderer whose tax matters are not in order.*
- ***Z and C Inferno Security CC t/a Inferno Security Services** – The company has indicated that they are busy restructuring the company and therefore the tendered entity could not provide me with a tax clearance certificate. Attached you will find various communication between myself, Inferno and Louise Harvey from Vender Database Management. – I am in receipt of the tax clearance certificate for the “new” company Exclusive Access Trading 830 Pty Ltd, but not for the “tendered” company. Louise has informed me that both entities are still alive.*

*None of the 3 met our requirements of 31 March 2014 at 10:00 can we continue by making these companies as not considered as they could not provide us with a tax clearance certificate?*

*Should you think there is no need to meet please inform me accordingly.*

Martin and André

*The mail dated 31 March 2014 at 4:04pm Inferno asked extension. I have informed them that it is a BEC decision and not mine. What is your view?*

*Ina”*

Steyn states in her affidavit that Ilizwe furnished the proof of satisfactory arrangements “*prior to the deadline of 31 March*”, but this is not borne out by the e-mail that she attaches as proof of this statement. The e-mail was sent at 14h30 on 31 March and the deadline was set for 10h00 on 31 March.

[31] The hand-written minutes of the BEC meeting of **10 April 2014** reflect the following. Again I quote *verbatim* and in full:

*“Professional Security t/a Prosec – company can’t obtain their certificate from SARS as they stipulated SARS printers were experiencing problems with printer. The due date for submitting SARS certificate was the 3/03/2014 whereas the company submitted their certificate on 1 April 2014.*

*Mr M Stander said in order to be fair to all tenderers, the certificate(s) submitted on/before today’s meeting will be accepted as this was final meeting.*

*Ilizwe mailed on 31/03/2014 a proof of payment agreement with SARS in order to be in good standard. Their account settled in 3 instalments –*

*with SARS in order for the amount due to be settled. That doesn't proof that the company will be in good standarding with SARS.*

*As per clause 7.2.2 (f) of evaluation criteria states the company can make suitable arrangements with SARS. Therefore Ilizwe has been favourably recommended and we will have to go back to the company to inform them that "their arrangements with SARS are noted and that they should ensure that the TCC is submitted when the process has concluded.*

*Inferno Security Services – the company has indicated that they are busy restructuring the company, therefore the company can not provide TCC. The company (Inferno) is being transferred to Exclusive Access Trading 830 (Pty) Ltd.*

*SCM to inform the company that they failed to submit the TCC(?) for Inferno Security Services, and that they submitted a TCC of another company.*

*Therefore the request/offer of Inferno Sec Service will not be considered due to failer to submit TCC.*

*Therefore 29 companies are responsive and recommendend for security and VIP & EVENTS.*

[32] In my view it is significant to note that the 29 recommended bidders in this report include not only Prosec and Ilizwe, but also the Second Respondent. The TCC furnished by the Second Respondent, although not even mentioned or queried at the above meeting, is on the face of it patently irregular. It is annexed as "IS12" to the founding affidavit and is a one page document headed Tax Clearance Certificate – Good Standing. It reflects a company registration number. However, in the spaces left open for Income Tax Reference Number, VAT/Diesel Registration

Number, PAYE Registration Number, SDL Registration Number and UIF Registration Number no numbers appear but only the words “Blue Whale Patrols”, repeated five times. It is not explained in the papers how and by whom this was accepted as a valid TCC. In view of this “TCC” it is not surprising that the Second Respondent has withdrawn its opposition to this application.<sup>5</sup>

[33] On **14 April 2014** Jackson asked Steyn per e-mail whether Applicant’s request for a meeting had been considered. On the same day she received the reply that *“no substantial proof was received that during the ‘restructuring’ of your company the ‘new’ company took over Z and C Inferno Security CC t/a Inferno Security Services, therefore the Bid Evaluation Committee can only make a recommendation based on the information received from Z and C Inferno Security CC t/a as Inferno Security Services”*.

[34] On **21 April 2014** Jackson advised Steyn that *“we have been ill advised by our tax practitioners regarding the transformation to the Pty Ltd”*. She added that *“to obtain a tax clearance certificate and/or letter of arrangement for Z&C Inferno Security Services we therefore plead you to allow us 7 working days in order to do so”*.

[35] Steyn replied the next day, **22 April 2014**, that the e-mail had been noted and that *“the recommendation for award is on the agenda of today’s meeting of the Bid Evaluation Committee”*. From the final BEC report submitted to the BAC on 19 May 2014 – see par [38] below – it appears that the BAC considered the award of this tender on 22 April but referred it back to the BEC to obtain approval from the tenderers, *inter alia*, to

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<sup>5</sup> At the end of this judgment I attach the Second Respondent’s “TCC” as well as the TCC furnished by the Applicant on 16 May 2014, referred to below.

extend the contract period for two years until 30 June 2017 on the same terms, conditions and tariffs.

- [36] On 24 April 2014 all 29 preferred bidders confirmed that they agree to the two year extension.
- [37] On 16 May 2014 the Applicant submitted a valid, updated tax clearance certificate to the BEC. Steyn confirms this in her affidavit, remarks that the deadline had expired at that stage and adds: *“Other bidders had either furnished the relevant clearance certificates before the deadline or had their bids declared non-responsive.”* This is not correct in respect of two other bidders, as set out in paragraph [31] above. She then adds: *“There is no reason why Applicant should be accorded preferential treatment, which was not given to the other bidders.”* She does not explain why the other two received “preferential treatment”.
- [38] On 19 May 2014 the BEC submitted its final report to the BAC recommending that the tenders of 29 preferred bidders be accepted.

The report refers to the meeting of 10 April 2014 and states that legal advice was obtained to assist the chairperson in making informed decisions on Prosec, Ilizwe and the Applicant. The report then contains the same information about the Applicant, Prosec and Ilizwe as that included in the minutes of the 10 April meeting (paragraph [31] above). In the case of the Applicant the report concludes with the statement in bold type and underlined: **“No valid tax clearance certificate for the entity that tendered was submitted and therefore the offer was not considered further.”** No mention is made of the fact that a valid TCC was submitted to the BEC three days before this report, on 16 May.

The list of 29 recommended tenderers on pages 34-35 of the report excludes the Applicant. In the case of each bidder it lists the “Tax clearance certificate expiring date”. This list reflects that the TCC’s of three preferred bidders expired before the date of the report (19 May). These three are Trust Loss Control Services (Pty) Ltd (expired on 14 May 2014), Delta Corporate Security Services CC (expired on 25 March 2014) and Sechaba Protection Services Western Cape (Pty) Ltd (expired on 13 May 2014). The report does not mention or comment on these expired TCC’s.

38.1 Stander’s attempt in his affidavit to explain the award of tenders to these three entities is unconvincing. He states that the BAC “*made their decision*” on 22 April 2014 – and this is echoed by a member of the BAC, Mr P L de Vries, the City’s Manager: Demand and Risk Management – and that Trust Loss’s TCC was valid on that date. But the final resolution of the BAC awarding the tenders was taken on 26 May 2014 (see the next paragraph). Steyn confirms in her affidavit that the BAC “*had a further meeting on 26 May 2014, at which it awarded the tender in question to 25 (sic) bidders*”. Stander further states that Delta and Sechaba had indeed furnished new TCC’s prior to the expiration of the old TCC’s – but does not explain why that is not reflected in the final BEC report. Nor does he explain how that fact was brought to the attention of the BAC before the latter’s final decision, if indeed it was.

[39] The final award of the tender by the **BAC** occurred at a meeting of the BAC on **26 May 2014** and is reflected in a document (“the BAC Resolutions”) bearing the same date. The recommendations of the BEC relating to the three non-compliant bidders and their TCC’s (par [31] above) were accepted, with the result that the Applicant’s bid was not



further considered, but those of Prosec and Ilizwe were. All 29 bidders that were considered were successful. The successful bidders thus included the Second Respondent, Prosec and Ilizwe, and the three bidders mentioned in the previous paragraph.

- [40] The Applicant was informed on **2 June 2014** that its tender was unsuccessful.
- [41] The Applicant appealed against this decision in terms of the Municipal Systems Act but was advised on **8 August 2014** that its appeal had been dismissed. The appeal decision states that the Applicant submitted a valid TCC on 16 May 2014 and that the final award of the tender was made on 26 May 2014, but concluded that the TCC *“could no longer be accepted for evaluation purposes, and consequently for award purposes, as the period for submission thereof had already expired”*.
- [42] On **19 August 2014** the Applicant requested the City, through its attorney, for permission to inspect the tender documents of six other applicants, including the Second Respondent, and for copies of all documents and internal memoranda relating to the tender. Payment for the copies in this regard was requested and made on **22 August 2014**.
- [43] Despite this and further requests by the Applicant’s attorneys – and even after the City’s relevant officials obtained counsel’s advice on the question of privileged documentation – the City refused to provide copies of all the documents. A final demand in this regard was made on **16 September 2014** and when no reply was received a court application was brought and set down for Monday, **29 September 2014**.

[44] On **26 September 2014** the City effectively conceded the information application. The Applicant and its attorney could then inspect the documentation.

[45] This led to present application, which was brought on an urgent basis on **30 September 2014** with the results set out in the first few paragraphs of this judgment.

[46] In summary the tender process produced the following:

- (a) On 18 November 2013 there were 30 preferred bidders, including the Applicant, identified who were all responsive.
- (b) Mainly as a result of the lengthy process of negotiations that followed, the TCC's of several of these bidders expired before the final award of the tender was eventually made 18 months later on 26 May 2014.
- (c) A final deadline of 10h00 on 31 March 2014 was set for the furnishing of valid TCC's. The final written demand in this regard did not offer the option of "suitable arrangements" with SARS, but expressly demands "*an original, valid tax clearance certificate*". It adds: "*Should this certificate not reach the under mentioned office at the stipulated date and time your offer will not be considered.*"
- (d) Three bidders – the Applicant, Prosec and Ilizwe – did not meet this deadline.
- (e) Prosec furnished a TCC shortly after the deadline and this was "condoned" by the BEC in its final report.

- (f) Ilizwe furnished details of suitable arrangements with SARS shortly after the deadline and this was accepted as sufficient by the BEC in its final report.
- (g) In its new guise as a limited company the Applicant furnished a valid TCC on 25 March 2014. This was not accepted by the City. Eventually the Applicant's "conversion" from CC to (Pty) Ltd was abandoned as "bad tax advice" and six weeks after the deadline the Applicant furnished a valid and current TCC to the BEC. This was 3 days before the BEC's final report to the BAC and 10 days before the BAC took its final decision on 26 May.
- (h) The fact that the Applicant had furnished a valid TCC was not mentioned in the BEC's final report and thus not brought to the attention of the BAC. The Applicant was excluded from the final award solely on the basis that it did not furnish a valid TCC before the deadline on 31 March.
- (i) When the final decision was taken on 26 May the TCC's of 3 other preferred bidders had, according to the BEC's final report, already expired. They were all awarded part of the tender.
- (j) The Second Respondent's TCC was on the face of it clearly invalid, but it was indicated in the BEC's final report as in possession of a valid TCC and awarded part of the tender by the BAC.

## **DISCUSSION**

[47] In her affidavit opposing the interim relief sought Steyn states, *inter alia*, that

47.1 the BEC's approach was that "*...the procurement body cannot, having indicated to all tender parties that certain steps had to be taken by a stipulated deadline, allow a situation where one of those parties breaches a deadline but nevertheless has its bid considered*"; and

47.2 "*it is fixed and settled procedure that if a bid is not recommended by the BEC, is not thereafter evaluated or awarded by the BAC*". She confirms that the BEC had at its meeting of 10 April 2014 taken a decision "*that the offer of Inferno Security Services should not be considered due to failure to submit the tax clearance certificate*".

[48] Steyn also makes it clear that the only reason why the Applicant's bid was refused was that it "*did not comply with the mandatory requirements regarding the furnishing of a tax clearance certificate*".

[49] Mr Joubert, who appeared for the Applicant, advanced essentially three arguments:

49.1 the BAC, who was the body that had the final say, simply accepted the recommendations of the BEC – which, as is clear from the chronology above, reflected the factual position as it was 6 weeks before, on 10 April – and did not apply its mind properly to the issue to be decided;

49.2 in any event, even had the BAC applied its mind, it did not have all the relevant facts before it in the sense that it did not know that the Applicant had furnished a current and valid TCC; and

49.3 the process that lead to the rejection of the Applicant's tender was not fair and just towards the Applicant and benefited other bidders over the Applicant in an arbitrary manner.

[50] In this regard Mr Joubert pointed out that the City awarded contracts to each and every tenderer that was found by it to be responsive, and not eliminated at a later stage. It would accordingly have been a simple matter for the BAC to include the Applicant amongst the companies to whom contracts were awarded. Mr Joubert submitted that, had the BAC on 26 May 2014 decided to exclude the Applicant from the award knowing that the Applicant had furnished a valid and current TCC 10 days before and was in all other respects still responsive, such a decision would have been unreasonable and irrational in view of the fact that all other bidders in the same situation were awarded part of the tender.

[51] In addition, he submitted that the deadline of 31 March 2014 was arbitrary and unreasonable, and that such a strict enforcement thereof amounted to an unduly mechanical and formalistic approach.<sup>6</sup> Such a strict enforcement also was not applied to Ilizwe and Prosec – and also not to the three bidders whose TCC's had expired shortly before the final award, as set out in paragraphs [38] and [39] above, who were either granted tenders without having valid TCC's at the time, or were allowed to furnish valid TCC's "informally".

[52] Mr Oosthuizen SC, who appeared for the City, countered these arguments mainly on the basis that the City was entitled to determine a procedure for the award of tenders and in particular to set deadlines in the process. If a bidder missed a deadline (in this case for the furnishing of a valid TCC) after repeated requests he can properly be disqualified, regardless of

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<sup>6</sup>*AllPay Consolidated Investment Holdings (Pty) Ltd v CEO, South Africa Social Security Agency* 2014 (1) SA 604 (CC) at para 36.

whether he later complies. This is what happened in the instant case and the Applicant can have no complaints.

- [53] Mr Oosthuizen is correct that the City is entitled to set deadlines as part of its process for awarding the tenders.<sup>7</sup> But the whole process must still be just and fair and not advantage certain bidders over others. In the instant case two other bidders who also missed the particular deadline – albeit by small margins – were eventually awarded contracts. This implies that the City reserved to itself a discretion to condone non-compliance with a deadline. If so, the City can in my view not use that discretion arbitrarily to condone non-compliance which it thinks is acceptable and not condone non-compliance which it regards as unacceptable – when in both cases there was compliance before the date of the final award. It must be noted that the Applicant’s late compliance did not delay the process or inconvenience the City or the other bidders. It would have been a simple matter for the BEC to simply inform the BAC that there was late compliance by the Applicant in furnishing its TCC.
- [54] The remarks of De Vries, a BAC member, are significant in this regard. In his affidavit he states, *inter alia*, that ‘*the City is required to declare a bidder who fails to furnish documentation validly demanded by a written deadline date as non-responsive*’. He then adds: “*It would be inappropriate and amount to an inequality of treatment of bidders to permit a situation where some of the bidders furnish documents by the stipulated deadline while others do not, and then to allow the non-compliant bidders to simply submit their documentation a long time after the deadline has expired, but nevertheless consider their bids*

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<sup>7</sup> Mr Oosthuizen relied, *inter alia*, on the unreported judgment by Schippers J in *Bizstorm 51 CC t/a Global Force Security Services v Witzenberg Municipality and another Case 13794/13 (30 May 2014)*, but this is clearly distinguishable on the facts. As explained in paragraph [36] of the judgment the applicant in that case did not “comply with the requirements set out in the bid documents”.

*notwithstanding their failure to comply with the said deadlines'* (underlining added). This seems to indicate that non-compliant bidders who submit their documentation a 'short time' after the deadline fall in a separate category and will have their bids considered – which of course is what happened in this case.

- [55] De Vries does not explain the difference between an unacceptably long time and a (possibly) acceptable short time after the deadline. In my view such a distinction is unacceptable and would introduce an unfair element of arbitrariness into the process.<sup>8</sup>
- [56] In my view the fact that a bidder had missed the deadline for a TCC 6 weeks earlier, but had subsequently submitted the required document well before the final decision had to be taken, should at least have been brought to the attention of the BAC, as the final decision-making body. It was for the BAC to decide whether the missing of the deadline was fatal, not for the BEC. And the BAC was not placed in a position to make that call, since it was not told that there was a call to make. It simply did not have all the relevant evidence before it. A crucial piece of evidence – the late TCC – was withheld from it.
- [57] It is not explained in the papers how and why the BAC awarded part of the tender to three bidders whose TCC's had expired by the time of the final decision on 26 May 2014. One must assume that either the BAC did not notice this, or that further information not reflected in the BEC report was furnished to the BAC, as Stander seemed to imply. The former possibility would support the "rubber-stamp" argument; the latter raises

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<sup>8</sup> In his affidavit De Vries refers only to the BAC meeting of 22 April and states that the BAC decided at that meeting to accept the BEC's recommendation to declare the applicant's bid non-responsive. This is wrong, as shown above in paragraphs [38] and [39]. He also states that the decision was taken *'largely because of the aspect'* of the missing of the deadline, while elsewhere it is stated categorically that this is the only reason.

the question why the fact of the Applicant's late TCC was then not also brought to the attention of the BAC for consideration.

- [58] In that context there is much to be said for Mr Joubert's argument that the final decision was, in fact, taken by the BEC and that the BAC simply "rubber-stamped" the BEC's recommendations. This argument is strengthened by the fact that the BAC apparently did not notice the obvious irregularity of the TCC of the Second Respondent. However, I do not regard it necessary to decide whether the final decision was in fact taken by the BEC and not the BAC.
- [59] The proper legal approach to considering irregularities in administrative action and whether same amount to grounds of review in PAJA, has been authoritatively set out in *AllPay*.<sup>9</sup> In essence, whether an irregularity amounts to a ground of review under PAJA depends on the materiality of the irregularity, which is determined with reference to the purpose of the requirement. Once a ground of review is established, the administrative action must of necessity be declared invalid, after which the appropriate remedy in terms of s 8 of PAJA falls to be considered.
- [60] In my view the review should succeed on the basis that the BAC, as the body who had to make the final decision, did not have a crucial piece of evidence before it when it made that decision. That piece of evidence was the fact that the Applicant had submitted a valid TCC some 10 days previously. Although it had missed an express deadline for delivery of the TCC, the BAC should at least have been put in the position that enabled it to decide whether this missing of the deadline should be condoned. This is especially the case since the missing of the same deadline by two other bidders was condoned by the BEC and, subsequently, the BAC. The fact

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<sup>9</sup>(*supra*) at para 22 a-f.



that these two missed the deadline by a day or two and the Applicant by six weeks, does not, in my view, affect the principle. The City, through the BEC/BAC, apparently reserved for itself a discretion to condone the missing of this specific deadline. The fact that the BEC report does not mention the Applicant's late TCC precluded the BAC from exercising that discretion – favourably or unfavourably – in the Applicant's case.

- [61] The BAC's decision not to accept the Applicant's tender should therefore be reviewed and set aside.
- [62] In my view it is also not necessary to remit the issue to the City for taking a new decision. It is clear that if the BAC had all the facts before it and had observed – as it should have – that the Second Respondent's TCC was invalid, the reasonable thing to have done would have been to include the Applicant in the list of successful tenders and exclude the Second Respondent. As a result of the urgent application in this matter the Applicant is, in fact, at present rendering the relevant services to the City in place of the Second Respondent. It seems the eminently reasonable and practical thing to order that this situation prevails.
- [63] The costs of the PAIA application that preceded the main application was reserved and argued simultaneously with the main application. As stated above, this application was only conceded by the City after a final demand for the documents was made and the papers of a court application were served. I have listened to the arguments by Mr Wynne, for the City, on this issue, in which he asked that there should be no order as to costs in that application. I am not persuaded that there is any valid reason why the City should not bear the costs of this application. If it had acted promptly and correctly after having received the request, there would have been no need for the application to be brought.

## REMEDY

- [64] Given the fact that all responsive tenderers who were not subsequently eliminated were awarded tenders, this is in my view an exceptional case as contemplated in s 8(1)(c)(ii)(aa) of PAJA. The Court is in a position to grant an order that a part of the tender must be awarded to the Applicant.
- [65] Due to the elimination of the Second Respondent (who has withdrawn opposition to this application), the sites that had been awarded to it can conveniently and without any prejudice simply be awarded to the Applicant, as was done in terms of the interim relief granted by this Court on 3 October 2014.
- [66] I therefore make the following order:
1. The First Respondent's decision to award part of tender 80S/2012/2013 to the Second Respondent is reviewed and set aside;
  2. The First Respondent's decision not to award part of tender 80S/2012/2013 to the Applicant is reviewed and set aside, and substituted with a decision to award that part of the tender previously awarded to the Second Respondent to the Applicant;
  3. The First Respondent is ordered to pay the Applicant's costs of this application and the application for access to information.

  
**T D POTGIETER A J**



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**Request For Profile**  
**Re-issue existing document**

Z LAWRENCE  
145 DUNCAN STREET  
PAROW VALLEY  
PAROW

7500

Issue Date 2014/05/15  
Tax Reference No. 000000000000  
Case Number 133534937

**South African Revenue Service**  
SARS Tel: 0800 00 SARS (7277)  
Cape Mail www.sars.gov.za  
8076

Dear ZANIA CATHLEEN LAWRENCE

**RE-ISSUE OF AN EXISTING DOCUMENT**

Thank you for your request received on 2014/05/15.

Please find attached the document(s) you have requested.

Should you require any further information or assistance, please contact the SARS Contact Centre on 0800 00 SARS (7277). Please remember to have your ID number and tax reference number on hand when you call so that we can assist you promptly.

Sincerely

**ISSUED ON BEHALF OF THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE**

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116

Tax Clearance Certificate Number  
0004/2/2014/0002745703

## Tax Clearance Certificate - Good Standing

**Enquiries**

0800 00 7277

**Approved Date**

2014-05-15

**Expiry Date**

2015-05-15

Company Registration Number	2007/164470/23
Income Tax	9135745165 - Z and C INFERNO SECURITY SERVICES CC.
PAYE Registration	7320766126 - Z and C INFERNO SECURITY SERVICES CC.
UIF Registration	U320766126 - Z and C INFERNO SECURITY SERVICES CC.
SDL Registration	L320766126 - Z and C INFERNO SECURITY SERVICES CC.
Trading Name	INFERNO SECURITY SERVICES
Tender Number	GoodStanding

It is hereby confirmed that, on the basis of the information at my disposal, the above-mentioned taxpayer has complied with the requirements as set out in section 256(3) of the Tax Administration Act.

This certificate is valid for a period of 12 months unless otherwise communicated by SARS.

Verification of this certificate can be done at any SARS Revenue office nationwide.

Photo copies of this certificate are not valid.

SARS reserves the right to withdraw this certificate at any time should any taxes, levies or duties become due and outstanding by the above taxpayer during the one year period for which the certificate is valid.