IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case Number: 3563/2018

In the matter between:

AMANDLA GCF CONSTRUCTION CC First Applicant
(Registration Number: 2007/037534/23)

KHUBEKA CONSTRUCTION CC Second Applicant
(Registration Number: 2001/079162/23)

and

MUNICIPALITY MANAGER OF
SALDANHA BAY MUNICIPALITY First Respondent

MARTIN AND EAST (PTY) LTD Second Respondent
(Registration Number: 1950/037428/07)

THE EXECUTIVE MAYOR OF THE
SALDANHA BAY MUNICIPALITY Third Respondent

THE SALDANHA BAY MUNICIPALITY Fourth Respondent

Delivered: 22 June 2018

JUDGMENT

BOQWANA, J

Introduction

[1] This is a review of a decision by the third respondent ("the Mayor") in terms of which he, on appeal, awarded a tender to the second respondent. This, in an instance where the applicants had, prior to the decision on appeal, been successful bidders.

Background

[2] On 31 August 2017 the fourth respondent ("the Municipality") advertised a tender under contract number SBM 03/17/18, for the construction of a class B landfill cell at Vredenburg landfill and associated infrastructure ("the tender"), with the closing date being 13 October 2017. It received nine bids, including that of the applicants and the second respondent.

[3] The Municipality appointed Aurecon South Africa (Pty) Ltd ("Aurecon") as consultants to give it guidance through the process of drawing up specifications for the "scope of work" and the appointment of the suitable main contractor to construct the landfill.

[4] After the evaluation process, the Aurecon report recommended as follows:

> "In our view it is essential that the successful contractor be required to comply with the above. We therefore, are of the opinion that the tender be awarded to the tender with the highest Tender Evaluation Point, Amandla/Khubeka JV with a tender offer of R 45,758,388 provided that they agree to comply with the requirements of Addendum 4, and appoint an independent Leak Location subcontractor with no change to the amount of their Tender Offer.
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> Should Amandla/Khubeka not agree to this, then the tender should be awarded to the next highest tenderer, Martin & East. It is noted, however, that the Preliminary and General items tendered by Martin & East are considered to be high which could have a considerable impact on the cost should any extensions of time be granted. It is recommended that prior to any award to Martin & East, the Preliminary and General rates be re-negotiated."

[5] The bids served before the Bid Evaluation Committee ("BEC"), after scrutiny by departmental officials of the Municipality. Its recommendations were sent to the Bid Adjudication Committee ("BAC") which recommended that the procurement and bid processes were fair, equitable, transparent, competitive and cost effective; that the tender be awarded to the applicants for the amount of R 45 758 387.94; that the final award be made by the first respondent ("the Municipal Manager") and that the bid conforms to all requirements set out in the bidding documents and the bidder scored the highest preference points.

[6] The Municipal Manager approved the bid on 21 December 2017 and made the award subject to the following:

> "
>
> - The notification of successful and unsuccessful tenderers with a 21 day appeal period in terms of Section 62 of the Municipal Systems Act, Act 32 of 2000 from the day of notification of the decision;
> - The award of this tender must be registered on i-tender within 21 days after the contract has been signed in order to comply with CIDB Regulations."

[7] The decision of the Municipal Manager was conveyed to all the bidders, including the applicants. The expiry date for the submission of the appeals was 11 January 2018, which is 21 calendar days after the notification of the Municipal Manager's decision was given.

[8] On 4 January 2018, the Municipality sent out further messages to several bidders seeking confirmation that they had received the letters advising them of the tender award. On 9 January 2018, one of the unsuccessful bidders, JVZ Construction ("JVZ') indicated that it had been closed for "builder's break" at the time the notification was sent, it only re-opened on 09 January 2018 and it was only then that it received the Municipality's notification. It sent another letter on 11 January 2018 stating that it effectively had two days to go through the documentation and respond. It requested that the appeal period be extended. The builder's break apparently refers to a general shut down of the construction

industry between mid-December and mid-January every year, when workers go on leave and companies close offices.

[9] On 11 January 2018 the Municipality's Supply Chain Manager, Ms H Meeding, recommended that the appeal period be extended to 18 January 2018 on the basis that "[*s*]*ound supply chain processes are built on fairness (one of the five pillars). The Builder Holiday is a known variable that should have been taken into consideration when the duration of the appeal period was decided upon"*. This recommendation was approved by the Municipal Manager on the same day. The bidders were informed on behalf of the Municipal Manager that day that:

> "the appeal period in terms of Section 62 of the Systems Act, Act 32 of 2000, has been extended to Thursday 18 January 2018.
>
> Please informed that Tender SMB 03/17/18 has been awarded to Amandla Khubeka Joint Venture for the amount of R 48 758 387.94 (including 14% VAT and 10% Contingencies);
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> Rights will only accrue after the appeal period has lapsed and appeals if any were dealt with by the appeal authority."

[10] On 15 January 2018 the second respondent lodged an appeal against the decision of the Municipal Manager to award the tender to the applicants. The basis of the appeal was, firstly, that the applicants had not complied with Addendum 4 issued on 9 October 2017 to all tenderers which stated, inter alia, that: "*To ensure proper 3rd party quality control, the lining contractor and leak location contractor cannot be the same entity*". The second respondent also noted that using two different subcontractors had a financial implication in that some subcontractors would normally offer the leak detection service at no cost if they were engaged to perform the lining installation, but not if they were engaged to perform leak detection. They effectively submitted that the applicants should not have been awarded points for a leak detection subcontractor. The second issue was that an 80/20 formula should have been applied in these circumstances, as all responsive tenders fell within R50 million, as opposed to the 90/10 formula that was used in

this case. It sought re-evaluation of the functionality scoring with zero points awarded to the applicants for the leak detection subcontractor; recalculation of the tender ranking using the 80/20 point system as per Preferential Procurement Regulations of 2017, and the subsequent award to the highest point scoring tenderer.

[11] A memorandum dated 13 February 2018 and signed by the Supply Chain Manager, the Chief Financial Officer and the Municipal Manager, was sent to the Mayor attaching a legal opinion from attorneys, Van der Spuy & Partners.

[12] On 19 February 2018, the Mayor upheld the second respondent's appeal on the basis that the applicants' tender was non-responsive, and appointed the second respondent as a preferred bidder. The salient reasons appearing from the decision are the following:

> "Addendum 4 was an important part of the requirements for the tender that had to be adhered to.
>
> This important requirement was not contained in the report of the evaluation of the tenders, nor was it made a requirement by the Adjudication Committee, or the recommendation of the Adjudication Committee to the Municipality. As a result the Municipal Manager awarded the tender to Amandla without addressing this very important defect in the tender.
>
> To allow tenderers in principle to amend their tender after tender closure in order to conform to the requirements of the tender, is not allowed, unless it can fall under the ambit of clause 24 of the Supply Chain Management Policy of Saldanha, which states that negotiations can be held with preferred bidders.
>
> I am of the opinion that this cannot be to conform to material requirements as set out in the tender document, but ancillary matters. I am of the opinion that in order to be a preferred bidder, the tenderer must at least conform to be requirements of the tender.
>
> I am thus of the opinion that the failure of Amandla to conform to Addendum 4 is indeed a fatal flaw in their tender, which cannot be rectified thereafter, and that their tender was thus nonresponsive."

[13] The Mayor's decision was conveyed to the applicants on 19 February 2018. On 23 February 2018 the applicants requested that no further action be taken and requested further documentation.

[14] On 01 March 2018 the applicants lodged an urgent application for an order interdicting and restraining the first and second respondents from taking any steps to implement the tender, including, but not limited to, implementing any agreement in respect of the tender or commencing or continuing with any construction in terms thereof. The order would also interdict and restrain the first respondent from handing over control of the site, on which construction was to commence in terms of the award of the aforesaid tender, to the second respondent or any other party. The applicant also indicated that it would apply for a review, as part B of its application, on a date to be allocated by the Judge President.

[15] An interim interdict was taken by agreement between the parties on 19 March 2018 and the matter postponed for the review application to 30 April 2018.

[16] In the application before me, the applicants seek an order:

> "1. Reviewing and setting aside:
>
> 1.1 First respondent's decision to extend the period within which any appeal in terms of section 62 of the Local Government: Municipal Systems Act 32 of 2000 (the Systems Act) had to be filed in respect of the award of TENDER SBM 03/17/18 CONSTRUCTION OF A CLASS B LANDFILL CELL AT VREDENBURG LANDFILL AND ASSOCIATED INFRASTRUCTURE ("the tender") to the Applicants;
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> 1.2 Third respondent's decision to award the tender to the Second Respondent;
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> 2. Declaring invalid any agreement concluded between Second Respondent and Fourth Respondent in respect of the implementation of the tender;
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> …"

[17] The second respondent, who had filed an affidavit, did not present argument in Court. For convenience, I refer to the first, third and fourth respondents collectively as "the respondents", and when such reference is made it does not include the second respondent.

Issues to be determined

[18] The applicants' grounds for review are as follows:

1. The Municipal Manager was not authorised to extend the 21-day appeal period stipulated in section 62 (1) of Local Government: Municipal Systems Act 32 of 2000 ("the Systems Act");
2. The second respondent's appeal in terms of section 62 (1) was filed outside the mandatory time period and should not have been considered;
3. The appeal was decided in a procedurally unfair manner, as the applicants were not afforded an opportunity to respond to the allegations concerning them, in the appeal lodged by the second respondent;
4. The Mayor's decision finding the applicants' bids non-responsive, is reviewable;
5. The second respondent's bid was non-responsive and;
6. In the alternative to the above grounds, no appeal in terms of section 62 (1) of the Systems Act was available to the second respondent, or any other aggrieved bidder because, firstly, the Municipal Manager did not act in terms of delegated powers when he awarded the tender to the applicants; and/ or the Mayor being a councillor does not have the powers to consider appeals in procurement matters in terms of section 62 (1) of the Systems Act.

[19] The applicants contend that if one of these points is good, the Court need not go any further.

Was the Municipal Manager permitted to extend the 21-day appeal period?

[20] The first question is whether the 21 day period in which to lodge an appeal in term of section 62 (1) of the Systems Act is capable of being extended by the Municipality. If it is, the next question is whether the Municipal Manager was empowered to do so, in these circumstances, or would it have been only the appeal authority (in this case the Mayor who considered the appeal) who was empowered to extend the period. If I find that the 21 day period cannot be extended, I need not deal with the second question.

[21] Section 62 of the Systems Act provides as follows:

> "(1) A person whose rights are affected by a decision taken by a political structure, political office bearer, councillor or staff member of a municipality in terms of a power or duty delegated or sub-delegated by a delegating authority to the political structure, political office bearer, councillor or staff member, may appeal against that decision by giving written notice of the appeal and reasons to the municipal manager within 21 days of the date of the notification of the decision.
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> (2) The municipal manager must promptly submit the appeal to the appropriate appeal authority mentioned in subsection (4).
>
> (3) The appeal authority must consider the appeal, and confirm, vary or revoke the decision, but no such variation or revocation of a decision may detract from any rights that may have accrued as a result of the decision.
>
> (4) When the appeal is against a decision taken by –
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> (a) a staff member other than the municipal manager, the municipal manager is the appeal authority;
>
> (b) the municipal manager, the executive committee or executive mayor is the appeal authority, or, if the municipality does not have an executive committee or executive mayor, the council of the municipality is the appeal authority; or
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> (c) a political structure or political office bearer, or a councillor –
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> (i) the municipal council is the appeal authority where the council comprises less than 15 councillors; or

(ii) a committee of councillors who were not involved in the decision and appointed by the municipal council for this purpose is the appeal authority where the council comprises more than 14 councillors.

(5) An appeal authority must commence with an appeal within six weeks and decide the appeal within a reasonable period.

(6) The provisions of this section do not detract from any appropriate appeal procedure provided for in any other applicable law." (Own emphasis)

[22] It is common cause that the appeal in this case was lodged outside the 21 day period provided for in section 62 of the Systems Act. The 21 days appeal period expired on 11 January 2018. The appeal of the second respondent was lodged four days outside the 21 day period.

[23] According to the applicants, section 62 does not confer a discretion to extend the 21 day period for the lodgement of the appeal. To strengthen this argument they rely on the decision of *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), at para 31, wherein the Court concluded 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 (see, for example, *Le Roux and Another v Grigg*-Spall 1946 AD 244 at 252; *South African Co-operative Citrus Exchange Ltd v Director-General: Trade and Industry and Another* 1997 (3) SA 236 (SCA) ([1997] 2 ALL SA 321 (A)) at 241). The Chief Director derives all his (delegated) powers and authority from the enactment constituted by the general notice. If the general notice therefore affords him no discretion, he has none. The question whether he had a discretion is therefore entirely dependent on a proper construction of the general notice." (Own emphasis)

[24] According to the respondents, a statutory time period can be extended by a court in appropriate cases and on proper interpretation of the provision, by the same rationale, the question is whether it would be sensible to interpret the time limit for lodging appeals in section 62 (1) as an absolute bar or that it implicitly

includes a power to ensure fairness (either by extending the period in advance, or by condoning late appeals). In this case the Municipal Manager agreed to extend the period in which to lodge an appeal, having been motivated by a principle of fairness.

[25] Mr Borgström, who appeared for the respondents, contended that applying the time period as an absolute bar would mean that an administrator is stripped of any power to determine a fair process in the circumstances of a case, which would mean that section 62 of the Systems Act would violate the Constitutional right to fair administrative action provided for in section 33 of the Constitution, read with the Promotion of Administrative Justice Act 3 of 2000 ("PAJA"). It would also infringe the right to a fair and equitable consideration of tenders stipulated in section 179 of the Constitution. That, according to the respondents, would amount to an unlawful interpretation of section 62 of the Systems Act, which should be avoided in favour of the obviously preferable position that an administrator can, based on the dictates of fairness in a particular case, extend the time period for the submission of appeal. The facts of this case, according to the respondents, illustrate the type of unfairness that would result from reading section 62 to operate as an absolute bar. The appeal period fell over the builders' holidays, and also included three public holidays, being Christmas day, Day of Goodwill and New Year's Day.

[26] According to the respondents the purpose of section 62 is to ensure a fair opportunity to submit an appeal. This purpose was protected by the approach adopted by the officials of the Municipality. Section 62 applies in every decision made by the Municipality's officials and office bearers under delegated powers. It must be understood to allow for an extension of the time period in deserving cases. Reading it otherwise would cause grave injustice.

[27] Mr Borgström referred to a number of cases dealing with inherent powers of the Court to extend statutory time periods, notably, *Toyota South Africa Motors (Pty) Ltd v Commissioner, South African Revenue Service* 2002 (4) SA 281 (SCA) at para 10, where the Court found that its conclusions on interpretation were

strengthened by a separate consideration that "*the High Court has inherent jurisdiction to govern its own procedures and, more particularly, the matter of access to it by litigants who seek no more than to exercise their rights. It has been held that this jurisdiction pertains not only to condonation of non-compliance with the time limit set by a Rule but also a statutory time limit...".* (See also *Samancor Group Pension Fund v Samancor Chrome and Others* 2010 (4) SA 540 (SCA) at para 20.)

[28] In the first instance, a Municipality (or its officials) is not a High Court and derives no inherent jurisdiction or powers to govern its own procedures as a High Court does. Apart from this, a decision that the respondents also relied on, V*lok NO and Others v Sun International South Africa Ltd and Others* 2014 (1) SA 487 (GSJ), found (at paras 37 to 38) that the findings of the Court in both *Toyota* and *Samancor* were seemingly *obiter* and that it was difficult to reconcile them with the (obiter) dictum in *Mohlomi v Minister of Defence* 1997 (1) SA 124 (CC), at para 17, where Didcott J said:

> "…The wording of that looks odd. It appears to have presupposed a power inherent in the courts to condone defaults of the kind covered which needed to be preserved. But courts have no such inherent power, and none derived from any source unless and until it is conferred on them. That the subsection grants them the power in the circumstances mentioned must necessarily be implicit in its terms, however, since they make no sense otherwise."

[29] Snyckers AJ, in *Vlok*, found, at para 53, that he was free to consider the proper interpretation of section 124 (2) (serving before him), "*untrammelled by the operation of a power dehors such interpretation, but contending with it*." At para 110 he concluded by stating:

> "…despite the power of the principles relied upon by the plaintiffs, and despite the fact that the words of the subsection itself are concededly neutral and contain no express exclusion of a power to condone, the exclusion of a power to condone must be implied into the subsection by way of necessary construction." (Own emphasis)

[30] In the *Vlok* case, a defendant had excepted to the particulars of claim, on the basis, *inter alia*, that the claim was brought outside the 30 day period stipulated in s 124 (2) of the Companies Act 71 of 2008 (" 2008 Companies Act"). The issue before the court was whether it had powers to condone the bringing of proceedings outside that period. Counsel for the plaintiff had argued that the court had general powers to condone non-compliance with a relevant time period and that the time period was non-prescriptive and must be read to permit a power to condone non-compliance (see *Vlok* at para 27). In advancing their argument on the second leg, counsel for the plaintiff submitted that the provision must be interpreted in a way that best promoted the spirit, purport and object of the Bill of Rights, particularly section 34. This is not dissimilar to what the respondents' counsel is arguing in this case, in relation to the promotion of the objects of section 33 of the Bill of Rights and PAJA, as well as section 179.

[31] The Court found the argument of adopting a reading that better promotes a right to be compelling, but that it should not be taken too far. It made the following important observations at para 65:

> "The argument on compelling the reading that 'better' promotes a right is powerful, and has been demonstrated to be of application in relation to the power to condone and the right of access to court. It should not, however, be taken too far. The principle in question does not, in my view, require the following approach to the interpretation of a statutory provision: find a right in some way implicated by the provision. Ask yourself how that right could be 'better' promoted by the provision than the provision seems to achieve. Posit a 'better' provision that achieves such better promotion. Then say, unless the words of the provision expressly or compellingly exclude a construction that makes it look more like the 'better' provision, the better provision must be taken to be the proper construction of the provision. Something is wrong somewhere if the construction exercise is approached thus."

[32] Principles that can be extracted from the case law above, in relation to this case, is that there is no general power afforded to the Municipality (acting through

its officials or office bearers) to extend a statutory time period, except if that power is conferred on it, as allowed in that particular section of the statute. In the end, it comes down to the interpretation of that particular statute. Therefore, if the legislature intended a statute to operate as an absolute bar, the 'general power', if there was any, could not trump that intention.

[33] The language used in section 62 indicates the intention to have appeals dealt with swiftly. Not only is the notice of the appeal and reasons to be given to the Municipal Manager within 21 days, section 62 (2) requires the Municipal Manager to "promptly submit the appeal to the appropriate appeal authority…". Section 62 (5) requires the appeal authority to "commence with an appeal within six weeks and decide the appeal within a reasonable period". Professor P Bolton, in her article, *Municipal Tender Awards and Internal Appeals by Unsuccessful Bidders* [2010] PER 18, concludes at page 23/508 that *"[t]he appeal authority has no power to…award the tender to a bidder who did not appeal or who perhaps did appeal but whose appeal was out of time*."

[34] I agree with Mr Borgström that the purpose of the s 62 of the Systems Act is to afford the bidders a fair opportunity to submit an appeal. The existence of the 21 day period within which to submit the notice of appeal, in and of itself, affords that opportunity. It also further suspends the award of the bid to the successful bidder. In fact, the notice sent out on 21 December 2017 subjected the notification of the award to the 21 day period. Fairness, in my view, cannot be viewed only from one side, that of an unsuccessful bidder. It must be looked at from the perspective of all the bidders, including the successful bidder.

[35] If discretion to condone or extend the time limit is considered based on the circumstances of an unsuccessful bidder, with the view to promoting the spirit of the rights in terms of section 33 of the Constitution, the rights of the successful bidder must be considered too, whose award is held in suspension until the expiry of 21 days, or the outcome of the appeal.

[36] I am mindful that section 62 applies generally to the decisions made by officials and office bearers with delegated powers, and not only to tender decisions. This is another reason why this section cannot be read to empower an official or office bearer of the Municipality to condone late filing, or to extend the time period. Deciding on which cases would be considered as 'deserving cases' or 'appropriate cases', in the absence of any criteria built into the statute, could present a challenge.

[37] It is worth referring to the remarks of the Court in *Affordable Medicines Trust and Others v Minister of Health and Others* 2006 (3) SA 247 (CC), at para 34, where it pointedly observed:

> "[34] However, the delegation must not be so broad or vague that the authority to whom the power is delegated is unable to determine the nature and the scope of the powers conferred. For this may well lead to the arbitrary exercise of the delegated power. Where broad discretionary powers are conferred, there must be some constraints on the exercise of such power so that those who are affected by the exercise of the broad discretionary powers will know what is relevant to the exercise of those powers or in what circumstances they are entitled to seek relief from an adverse decision. These constraints will generally appear from the provisions of the empowering statute as well as the policies and objectives of the empowering statute."
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> (Footnotes omitted – Own emphasis)

[38] In the similar vein, the Court in *Dawood & Another v Minister of Home Affairs and Others* 2000 (3) SA 936 (CC), at para 46, remarked:

> "…There is, however, a difference between requiring a court or tribunal in exercising a discretion to interpret legislation in a manner that is consistent with the Constitution and conferring a broad discretion upon an official, who may be quite untrained in law and constitutional interpretation, and expecting that official, in the absence of direct guidance, to exercise the discretion in a manner consistent with the provisions of the Bill of Rights. Officials are often extremely busy and have to respond quickly and efficiently to many requests or applications. The nature of their work does not permit

> considered reflection on the scope of constitutional rights or the circumstances in which a limitation of such rights is justifiable. It is true that as employees of the State they bear a constitutional obligation to seek to promote the Bill of Rights as well. But it is important to interpret that obligation within the context of the role that administrative officials play in the framework of government, which is different from that played by judicial officers." (Footnotes omitted – Own emphasis)

[39] I am not sure of how far the argument can go that Constitutional principles of fairness are offended by a statutory provision that contains a deadline. As was found in *Vlok* supra (at para 107) "*it is precisely the absence of fluidity in the deadline that is critical for the achievement of the statutory purpose*". Same should be said of section 62. Therefore, although the wording of the provision is neutral and contains no express wording to exclude or include powers to extend the period of 21 days, interpreting the section to give the Municipality implicit powers to extend the time period in section 62, in the interest of maintaining overall fairness, gives the Municipality wide powers to extend the deadline by whichever period it deems fit, which period may be short, long or indefinite in duration. This, in my view, goes counter to what is sought to be achieved by the statute. Similarly, condoning non-compliance by some applicants, who are held to be 'deserving' of such condonation, whilst others were held to the time limit, may not represent the overall fairness advocated by the respondents. All these issues seek to highlight the problems that arise if we start introducing issues of fairness into the construction of the statute.

[40] The *Pepper Bay* & *Smith* cases supra highlight the point that "fairness" does not come to it. These cases were heard together at the Supreme Court of Appeal ("SCA"). In both cases the applicants were severely affected by the rejection of their applications because of late payment and late submission of application forms. They offered good reasons for the late submissions, but the Court was not persuaded. In the *Pepper Bay* case, the applicant had lodged an application for fishing rights. However, it paid the required fee by way of a post-dated cheque, to a date four days after the deadline (closing date) for the submission of applications.

The Chief Director for Environmental Affairs and Tourism concluded that the application had been "improperly lodged" in that the required application fee had not been paid timeously. His further view was that he had no discretion to condone non-compliance with the requirement of timeous payments. As a consequence, he concluded that he had no authority to consider the application on its merits. In that event the application was rejected purely on procedural grounds.

[41] In the *Smith* case 28 subsistence fishermen mandated a chartered accountant, Mr Bonthuys ("Bonthuys") to assist them in preparing their applications for the right to undertake the commercial fishing of West Cost Rock Lobster. Bonthuys was specifically directed to ensure that the applications comply with the necessary formalities, that the relevant application fees were timeously paid and that the applications were submitted before the 12 noon deadline. Bonthuys paid the application fee required in the morning of the date of the deadline. He then went to queue to submit the applications, but the queues were very long. When Bonthuys and those accompanying him, eventually got to the room where the applications were received, they realised that they were only in possession of the original application forms, while the general notice had required submission of the original form together with two copies. The copies had apparently been left in the vehicle which they had been travelling in, which at that time had already left. The officials receiving the applications refused to take the original without the copies, and they also refused to allow Bonthuys to make copies and return those the same day. Bonthuys therefore only went back with the applications, accompanied by the two copies as required, the following day and that is when the officials involved received the documents.

[42] The Chief Director in this instance took the view that the applications had been submitted late; that the time periods fixed by the general notice were peremptory; and that he had no discretion to condone the late submission of the applications. As a consequence he refused the applications without considering them on their merits. Smith appealed to the Minister in terms of section 80 of the

Marine Leaving Resources Act 18 of 1998 ("the MLR Act"), but was unsuccessful, essentially because the Minister shared the views of the Chief Director in all material respects.

[43] Smith had contended that a certain official of the department had extended the deadline to 12 noon of the following day and that because his application was lodged before the extended deadline it could not be considered late. The official denied that he had ever given such an extension. And moreover denied that he, or any employee of the department, had any authority to grant an extension of the deadline prescribed by the Minister in the General Notice. Brand JA found that the Chief Director and the Minister were correct in their conclusion that the General Notice, read as a whole, did not confer a discretion on the Chief Director to condone the defects in either of the applications concerned.

[44] As in *Pepper Bay* & *Smith* supra, it may seem unfair as the parties were, for all intents and purposes, possessed of compelling arguments as to why the late filing of the applications should be condoned. However, as Brand JA put it, as a general principle an administrative authority has no inherent power to condone failure to comply with a peremptory requirement. Such a discretion must be found in the provisions of the statute.

[45] For all these reasons stated above, the Municipal Manager was not empowered to extend the 21 day period in section 62 (1) by another week, as he did. His decision must be reviewed and set aside. It follows, therefore, that the decision by the Mayor must also fall away, as it ought not to have been made, by virtue of the notice of appeal having been filed outside the 21 day period. It matters not that the Municipal Manager invited bidders to do so. He exercised a power he did not have, accordingly such extension was *ultra vires*.

[46] In view of my finding that the 21 day period could not be altered, it is not necessary to deal with other grounds for review. There is no reason why costs should not follow the result.

[47] I therefore make the following order:

1. The First Respondent's decision to extend the period within which any appeal in terms of section 62 of the Local Government: Municipal Systems Act 32 of 2000 ("the Systems Act") had to be filed in respect of the award of TENDER SBM 03/17/18 CONSTRUCTION OF A CLASS B LANDFILL CELL AT VREDENBURG LANDFILL AND ASSOCIATED INFRASTRUCTURE ("the tender") to the Applicants, is reviewed and set aside;
2. The Third Respondent's decision to award the tender to the Second Respondent, is reviewed and set aside;
3. The First, Third and Fourth Respondents are ordered to pay costs of the Applicants.

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N P BOQWANA

Judge of the High Court

APPEARANCES

For the Applicants:	Adv. H J De Waal
Instructed by:	Van der Meer and Partners Inc, Cape Town
For the First, Third and Fourth Respondents:	Adv. D Borgström
Instructed by:	Van der Spuy & Partners, Paarl
For the Second Respondent:	No appearance