



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

CASE NO: 046691/2023

DELETE WHICHEVER IS NOT APPLICABLE	
(1)	REPORTABLE: YES/NO ☒ YES ☐ NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO ☒ YES ☐ NO
(3)	REVISED: ☐
.....1/2/24.....	[REDACTED].....
DATE	SIGNATURE

In the matter between:

BEYOND FORENSICS (PTY) LTD

Applicant

and

**NATIONAL COMMISSIONER, SOUTH
AFRICAN POLICE SERVICE**

First Respondent

**DEPUTY NATIONAL COMMISSIONER OF SUPPORT
SERVICES OF THE SOUTH AFRICAN POLICE SERVICE**

Second Respondent

**ACTING SECTION HEAD OF PROCUREMENT
MANAGEMENT OF THE SOUTH AFRICAN
POLICE SERVICE**

Third Respondent

**BID EVALUATION COMMITTEE OF THE
SOUTH AFRICAN POLICE SERVICE**

Fourth Respondent

**BID ADJUDICATION COMMITTEE OF THE
SOUTH AFRICAN POLICE SERVICE**

Fifth Respondent

ECM TECHNOLOGIES (PTY) LTD

Sixth Respondent

ACINO FORENSIC (PTY) LTD

Seventh Respondent

JUDGMENT

TOLMAY J

INTRODUCTION

1. This is a review application by the applicant (Beyond Forensics) under the Promotion of Administrative Justice Act 3 of 2000 (PAJA) to review and set aside the decision of the first to fifth respondents (SAPS) to award a tender for the supply and delivery of evidence collection kits to SAPS for a period of two years to the

sixth (ECM) and seventh respondents (ACINO). ECM is of the view that there is no merit in the review, but limited its opposition to prayers 5, 6, 7 and 8 of the amended notice of motion which deal with EMC and Acino's entitlement and the reasonableness of their profits and expenses, if the court finds that the review should succeed.

2. The Preferential Procurement Policy Framework Act, 5 of 2000 (PPPFA) Regulations of 2017 (the 2017 Regulations) applied to the tender. The 2017 Regulations were declared invalid on 2 November 2021 and the declaration of invalidity was suspended for a period of twelve months, to allow the Minister to affect some corrective measures to align the Regulations with the PPPFA¹. The minority judgment in *Minister of Finance v Afribusiness NPC* (Afribusiness) stated that the period of suspension expired on 2 November 2021². The judgment was delivered on 16 February 2022, the Minister was of the view that the reference to the suspension date in the minority judgment created uncertainty and approached the Constitutional Court in terms of Rule 42 for a variation of the order. The application was dismissed, and it was confirmed that section 18(1) of the Superior Courts Act 10 of 2013 applies³.
3. As a result, all bids advertised after 31 May 2022, which included the bid under review, were advertised in terms of the 2017 Regulations. The litigation in

¹ Afribusiness NPC v Minister of Finance 2021 (1) SA 325 (SCA). This judgment was confirmed on appeal in Minister of Finance v Afribusiness NPC 2022 (4) SA 365 (CC).

² 2022 (4) SA 365 (CC) at para 17 (See footnote 28).

³ Ibid at para 27.

Afribusiness resulted in a request for various extensions of the validity periods of the tender.

BACKGROUND

4. On 7 July 2022 SAPS issued a tender inviting qualifying suppliers to bid to supply it with several forensic evidence collection kits (the Bid). Bidders were at liberty to make offers on a per kit basis and could bid for any one or more kit types required by SAPS. SAPS received offers for seventeen different types of kits from more than one bidder per kit. During February 2023 only twelve kit types were accepted by SAPS, ten were to be supplied by ECM and 2 by ACINO.
5. It is evident from the papers that, although SAPS invited bids in one tender, a bidder could submit a bid on only one or more separate kits, be evaluated on only those kits and may have been awarded contracts on specific kits. Even though only twelve kits were accepted, the tender was not cancelled by SAPS in terms of the Regulations, instead the remaining five were merely not awarded. The facts indicate that ACINO and EMC were not awarded one tender to share, they were awarded separate tenders based on their offers for the kits for which they tendered.
6. The Bid was subject to the Special Conditions of Contract 19/1/9/1/122 (the SCC). The closing date for all bids was 4 August 2022 at 11h00. It was stipulated that the Bid was valid for 90 days from the closing date in terms of the SCC. On 31 October 2022, SAPS issued a letter to the bidders requesting them to consent to the

extension of the bid validity period to 31 January 2023 on or before 3 November 2022, the reference to 3 November was an error, it should have been 2 November, but nothing turns on that as all relevant bidders responded on or before 2 November. Beyond Forensics and ECM agreed to the extension on 31 October 2022 and ACINO responded to the request on 2 November 2022.

7. On 17 January 2023, SAPS again sought consent to the extension of the validity period to 31 March 2023. Beyond Forensics did not receive SAPS's request to extend the validity period the second time. ECM and ACINO responded to the request and consented to the extension. On 3 March SAPS sought and was granted a further extension to 30 June 2023.

GROUND OF REVIEW

8. Beyond Forensics raised the following grounds of review:
 - 8.1 The tender conflicted with the 2017 Regulations.
 - 8.2 The initial bid validity period expired before ACINO agreed to extend the validity period.
 - 8.3 Beyond Forensics was not invited to extend its validity period for the second time.
 - 8.4 EMC and ACINO did not agree to the extension of the validity period in the prescribed manner.

ISSUES TO BE DETERMINED

9. Initially the parties raised several other issues, but in the joint practice note they agreed that only the following issues need determination:
 - 9.1 Did the tender comply with Regulations 5 and 9 of the 2017 Regulations?
 - 9.2 Did the initial 90-day period expire on 1 or 2 November 2022?
 - 9.3 Was the second bid validity period lawfully extended in relation to Beyond Forensics and ECM?
 - 9.4 Was the initial bid validity period lawfully extended in relation to the awarded kits?
 - 9.5 What would be a just and equitable remedy if the tender is declared invalid?

COMPLIANCE WITH PPPFA REGULATIONS 5 AND 9

10. Regulation 5(1) of the 2017 Regulations stipulates “*Organs of state must state in the tender document if the tender will be evaluated on functionality*”. The use of the word “if” in the Regulation clearly implies that functionality may not always apply to a tender, but if it does it “must” be stated in the tender documents. Beyond Forensics erroneously placed emphasis on the word “must” and in doing so ignored the wording of the rest of the sentence.
11. Regulation 5 further provides that the evaluation criteria for functionality must be objective, and the tender documents must specify the evaluation criteria, points for each criterion and sub-criterion and the minimum qualifying score. It also prescribes how the functionality evaluation must be done and the consequences for failure to obtain a minimum qualifying score on functionality. However, all these

provisions would only find application if the tender is to be evaluated on functionality.

12. It was argued on behalf of Beyond Forensics that if a tender involves an assessment of bidders, it involves an assessment of functionality in which case Regulation 5 must be complied with. However, functionality concerns the ability of a tenderer to provide what is required in terms of the tender. In the context of this tender, it was not the ability of the tenderers to perform, but whether what they offered would meet the requirements of SAPS that needed to be determined. As a result, regulation 5 did not apply to the tender.
13. Regulation 9 provides that if feasible, in a contract with a value of over R30 million, an Organ of state must apply subcontracting to advance designated groups. The record indicates that during the Bid Specification Process, an industry analysis was conducted, and it was concluded that it was not practical to sub-contract, whilst ensuring contaminant free kits. It cannot be argued that this concern was either irrational or unreasonable. Furthermore, the SCC did not make provision for subcontracting.
14. SAPS took a decision prior to the advertisement of the Bid that subcontracting would not apply, and this decision has not been challenged or set aside and unless this is done it has effect and cannot be ignored ⁴. The reliance by Beyond Forensics

⁴ Oudekraal Estates (Pty) Ltd v City of Cape Town and Others 2004 (6) SA 222 (SCA) at para 37, See also MEC for Health, Eastern Cape and Another v Kirland Investments t/a Eye and Lazer Institute 2014 (3) SA 481 (CC) at para 92.

on *Walele v Cape Town*⁵ is accordingly misconceived, in the absence of a challenge there is no need for the decision-maker to show that the opinion it relied on for the exercise of its power was reasonable. Regulation 9 therefore did not apply to the tender.

THE EXTENSION OF THE FIRST BID VALIDITY PERIOD

15. Beyond Forensics argued that the initial bid validity period expired without the bidders having consented to the extension thereof. It applied the civil method of computation, including the first day and excluding the last day to determine the validity period.
16. The SCC stated 4 August 2022 as the closing date and that the bid validity period was 90 days after the closing date, this much is acknowledged by Beyond Forensics in the founding affidavit. It however is of the view that the initial validity period expired on midnight 31 October 2022, therefore when the bidders were asked to extend the validity period it had already expired. The respondents however argued that the initial bid validity period expired on 2 November 2022.
17. The general position is that the ordinary civil method of computation applies, unless a period is prescribed by law, in which case section 4 of the Interpretation

⁵ 2008 (6) SA 129 (CC) at para 60.

Act⁶ applies, unless there is a clear indication that the parties intended another method to apply⁷.

18. In *Justice Alliance of South Africa v President of the Republic of South Africa and Others*⁸, the Constitutional Court applied the civil method to compute the period of the term of office of the Chief Justice, on the basis that the Judges' Remuneration and Conditions of Employment Act⁹ does not provide a computation method. The Constitutional Court, however, did not elaborate or explain the computation method applied and no definitive finding was made in this regard. Therefore, *Nedcor Bank Ltd v The Master and Others*¹⁰ remains the binding authority, where the question was whether the first meeting of creditors was properly convened in terms of section 40(2) of the Insolvency Act¹¹. The section requires that the notice convening the meeting be published on a date not less than ten days before the date of the meeting. The Supreme Court of Appeal held that "*When reckoning days in a statutory provision, a Court is enjoined to apply the provisions of section 4 of the Interpretation Act unless there is something in the language or context of the particular provision repugnant to such provision or unless a contrary intention appears therein.*"¹²

⁶ 33 of 1957.

⁷ LAWSA vol 27 at para 290.

⁸ 2011 (5) SA 388 (CC) at para 6.

⁹ 47 of 2001.

¹⁰ 2002 (1) SA 390 (SCA).

¹¹ 24 of 1936.

¹² Ibid at para 12.

19. Section 4 of the Interpretation Act provides that when any particular number of days is prescribed for the doing of any act or any other purpose, it shall be reckoned exclusive of the first and inclusive of the last day, unless the last day falls on a Sunday or public holiday, in which case it shall be reckoned exclusive of the first day and also exclusive of every such Sunday or public holiday. Only if the parties left the matter open would the civil method apply. Where the parties have indicated a contrary intention, then the intention must prevail¹³.
20. In the tender documents 90 days were prescribed, therefore section 4 of the Interpretation Act should be applied. The word “after” is also instructive as it cannot but mean that the first day, being the closing date, should be excluded¹⁴. As a result, 4 August should be excluded, and the last day should be included.
21. The 90-day period therefore expired on 2 November 2022 and all eligible bidders consented to the extension on or before that date, therefore this case is distinguishable from *Ekurhuleni Metro Municipality v Takubiza Trading Projects CC and Others*¹⁵ as in that in that case the affirmative response was received after expiry of the bid validity period. The first validity period was accordingly validly extended.

¹³ *Dormell Properties 282 CC v Renasa Insurance CO Ltd and Others* NNO 2011(1) SA 70 (SCA), See also *Transnat Durban (Pty)Ltd. v Ethekewini Municipality and others* (2020) JOL 48852 (KZD) at para 39 - 44.

¹⁴ *Azisa (Pty) Ltd v Azisa Media CC* 2002 (4) SA 377 (C) at para 386H-387B.

¹⁵ 2023 (1) SA 44 (SCA).

THE SECOND EXTENSION OF THE BID VALIDITY PERIOD.

22. The email invitation which SAPS sent to Beyond Forensics to extend the validity period on the second occasion was sent to the wrong address. As a result, Beyond Forensics failed to respond timeously and it was argued that its bid lapsed. SAPS points out that despite Beyond Forensics not having been notified, the Bid Evaluation Committee was unaware thereof and Beyond Forensics' bid was evaluated in full and the bid evaluation was not in any way influenced by the error.
23. In *Aurecon South Africa (Pty) Ltd v Cape Town City*¹⁶ (Aurecon) the complaint was that the bidder had not been formally approached for consent to an extension of its validity period. The importance of substance over form was pointed out by the Supreme Court of Appeal and the following was said” *It is clear from the above discussion that none of the so-called irregularities constituted irregularities at all. In any event, it is firmly established in our law that administrative action based on formal or procedural defects is not always invalid and that legal validity is concerned not with technical but also with substantial correctness which should not always be sacrificed to form. I do not understand AllPay to overturn this principle. There the Court pointed out that:*
- ‘Once a particular administrative process is prescribed by law, it is subject to the norms of procedural fairness codified by PAJA. Deviations from the procedure will be assessed in terms of those norms of procedural fairness. That does not mean that administrators may never depart from the system put in place or that*

¹⁶ 2016 (2) SA 199 (SCA).

deviations will necessarily result in unfairness. But it does mean that, where administrators depart from procedures, the basis for doing so will have to be reasonable and justifiable, and the process of change must be procedurally fair.¹⁷

24. If substance is placed over form, Beyond Forensics was not prejudiced in any way because of this error, as its bid was properly evaluated, and the error did not result in its exclusion from the tender, therefore the fact that Beyond Forensics was not aware of the request did not result in procedural unfairness.

WAS THE INITIAL BID VALIDITY PERIOD LAWFULLY EXTENDED IN RELATION TO THE AWARDED KITS.

25. As set out above in par.4 and par.5, Beyond Forensics' s argument that this question must be answered in relation to the tender as a whole does not take into consideration the nature of the tender. Since suppliers could tender on any number of kits and could, and were indeed, awarded bids in relation to the kits tendered for the question cannot be answered in relation to the tender as a whole. In actual fact the successful bidders were awarded separate tenders.
26. There was a form sent to the qualifying bidders to complete in relation to the request for an extension. The complaint is that ECM did not sign the necessary documentation and ACINO did not delete either the words "Yes" or "No", to indicate

¹⁷ Ibid at para 43.

whether they agreed to the extension. Beyond Forensics says that as a result it was not possible to determine whether ACINO and EMC agreed to the extension of the validity period.

27. ACINO did indeed fail to indicate yes or no on the form, but the attached email coupled with the signature of the form, clearly point to an agreement to the extension of the validity period. ECM on the other hand circled "Yes" but the document was not signed. However, if the email and form is read together it is clear that the intention was to agree to the extension.
28. ECM and ACINO accordingly did agree to the extension if substance is placed over form and SAPS was aware of the consent.

CONCLUSION

29. Due to the conclusion arrived at, the issue of an appropriate remedy need not be addressed.
30. As far there was non-compliance, it must be emphasised that the proper approach is as was set out in *Aurecon* referred to above and held in *Allpay Consolidated Investments Holdings (Pty) Ltd v Chief Executive Officer of the South African Security Agency and Others*¹⁸ where it was stated as follows: "Under the

¹⁸ 2014 (1) SA 604 (CC).

Constitution there is no reason to conflate procedure and merit. The proper approach is to establish, factually, whether an irregularity occurred. Then the irregularity must be legally evaluated to determine whether it amounts to a ground of review under PAJA. This legal evaluation must, where appropriate, take into account the materiality of any deviance from legal requirements, by linking the question of compliance to the purpose of the provision, before concluding that a review ground under PAJA has been established.”

31. Beyond Forensics argued that section 38(1)(a)(iii) of the Public Finance Management Act 1 of 1999 stresses the importance of the Supply Management Policy, but it remains a guide and not legislation and the object of the policy is “to achieve reasonable and consistent decision-making to provide a guide and measure of certainty to the public”¹⁹. In so far as there was non-compliance, it was not material and did not impact on certainty. Importantly no irregularity or error contributed to the disqualification of Beyond Forensics and its bid was considered despite any error that may have occurred. The application stands to be dismissed.

COSTS

32. SAPS argued that the principle set out in *BioWatch*²⁰ should not be applied as the application was an abuse of process and mala fide. SAPS says the application was ill-considered, frivolous, and vexatious. Beyond Forensics on the other hand

¹⁹ CTP v Director General Department of Basic Education and Others [2018] JOL 49986 (SCA) at para 30.

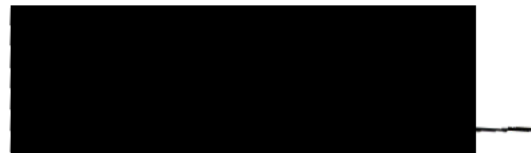
²⁰ Biowatch Trust v Registrar Genetic Resources and Others 2009 (6) SA 232 (CC).

complains about SAPS's conduct regarding the tender and the litigation in general and requests costs on an attorney and client scale.

33. It seems that it would be fair and reasonable that SAPS and Beyond Forensics should each pay its own costs, due to the circumstances that prevailed during the litigation. However, ACINO and EMC are both entitled to their costs, and Beyond Forensics should pay it, not only because they were successful, but also because the amended notice of motion resulted in escalating the disputes, which contributed in additional costs and necessitated opposition. As a result, Beyond Forensics should pay their costs.

The following order is made:

- 1) The application is dismissed.
- 2) The applicant shall pay the costs of the Sixth and Seventh Respondents, which costs shall include the costs of two counsel where applicable.
- 3) The Applicant and the First to Fifth Respondents will pay their own costs.



R G TOLMAY
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

APPEARANCES

For Applicant:	Adv S Grobler SC Adv P Volmink Instructed by Dirk Kotze Attorneys
For First to Fifth Respondents:	Adv Z Z Matebese SC Adv V Pillay Instructed by State Attorney
For Sixth Respondents:	Adv C Rip Adv M Du Plessis Instructed by Thompson Attorneys
For Seventh Respondents:	Adv R Moultrie SC Adv M Z Gwala Instructed by Webber Wentzel
Date of Hearing:	7 November 2023
Date of Judgment:	1 February 2024