IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case No.: 3455/2021

In the matter between: -

MASAKHE MEDIA (PTY) LTD Applicant

and

MANGAUNG METROPOLITAN MUNICIPALITY 1st Respondent
PROVANTAGE (PTY) LIMITED 2nd Respondent
KP YOUNG DESIGNERS (PTY) LIMITED 3rd Respondent

CORAM: C. J. MUSI, JP *et* C. REINDERS, J

HEARD ON: 14 NOVEMBER 2022

JUDGMENT BY: C. J. MUSI, JP

DELIVERED ON: 16 MARCH 2023

Introduction

[1] The applicant, Masakhe Media (Pty) Ltd (Masakhe), sought an order reviewing and setting aside the decision of the first respondent, Mangaung Metropolitan Municipality (Mangaung), to award a tender for lamppost advertising, pavement posters and notices to the second respondent, Provantage (Pty) Ltd

(Provantage) and the third respondent, K P Young Designers (Pty) Ltd (Young). The applicant is one of the unsuccessful bidders for the tender. Young did not oppose the application. Provantage opposed it and filed a conditional counter application to the effect that in the event that Mangaung's decision is set aside, that it should not be divested of any rights which it would have been entitled to under the agreement concluded between it and Mangaung during January 2021.

[2] During March 2018 Mangaung invited bids from prospective tenderers for the provision of outdoor advertising in its municipal area under bid number MMM/BID458:2017/2018 (the tender). Bids closed at 11:30 on 8 May 2018. The bid validity period was for 120 days after the closing date. The applicant, Provantage and Young submitted bids before the closing date. Provantage complied with the bid requirements and qualified for consideration. Mangaung disqualified the applicant's bid. The reasons for the disqualification are not germane for the determination of this dispute. Young's bid was also found to be compliant.

[3] On 17 September 2018 a Mr Mabuza, Mangaung's General Manager: Geographic Information Services, addressed a letter to all prospective service providers informing them that the bid had not been disposed of before the expiry of the validity period. He indicated that the bid was valid until 8 September 2018 and requested all the bidders to indicate whether they are willing to hold their bids valid until 30 November 2018. The applicant neither received nor responded to the letter. Provantage consented to the purported extension. The bid was extended again to 31 January 2019 and further extended to 31 May 2019.

[4] On 8 October 2019, but in a letter dated 13 September 2019, Mangaung informed Provantage that it decided to award the latter, amongst others, 1500 lamppost, pavement posters and notices for the Bloemfontein and Botshabelo areas, at a monthly tariff of R166,24 per unit. Provantange accepted the award. Mangaung subsequently purported to amended the award by removing the lamppost, pavement posters and notices. Provantage objected to the purported

amendment and the original award was reinstated on 17 November 2020. On 28 January 2021, Mangaung and Provantage concluded a lease agreement.

[5] With regard to Young, Mangaung informed it on 5 June 2019 that its bid was accepted and that it was appointed to a panel of outdoor advertisers for various categories of advertising, including lampposts, pavement posters and notices in Bloemfontein and Botshabelo. On 9 September 2019, Mangaung wrote a letter to Young informing it that its award has been corrected to include 1500 lampposts and other categories of outdoor advertising in the above-mentioned areas and Thaba Nchu, Wepener and Dewetsdorp. On 31 August 2021, Mangaung and Young concluded a lease agreement.

[6] Regulation 2(1) of the Regulations made in terms of s168 of the Local Government Municipal Finance Act 56 of 2003 (the MFMA) provides that each municipality and each municipal entity must have and implement a supply chain policy that gives effect to s217 of the Constitution and the MFMA. The policy must be fair, equitable, transparent, competitive and cost effective. Regulation 2(3) states that:

> 'No municipality or municipal entity may act otherwise than in accordance with its supply chain management policy when–
> (a) procuring goods and services;
> (b) disposing of goods no longer needed;
> (c) selecting contractors to provide assistance in the provision of municipal services otherwise than in circumstances where Chapter 8 of the Municipal Systems Act applies; or
> .(d) in the case of a municipality, selecting external mechanisms referred to in section 80(1)(b) of the Municipal Systems Act for the provision of municipal services in circumstances contemplated in section 83 of that Act.'[1]

[7] Clause 16.2.6 of Mangaung's 11th Supply Chain Management Policy (SCMP) states:

[1] Government Gazette No. 27636 - Vol. 479 - 30May2005, General Notice 868 of 2005.

'16.2.6.1 The period for which bids are to remain valid and binding shall be indicated in the bid documents. The period is calculated from the closing time and bids shall remain in force and binding until the end of the final day of the period.

16.2.6.2 This period of validity may be extended by mutual consent in writing between the Municipality and the bidder, provided that the original validity period has not expired, and that all bidders shall have an opportunity to extend such period.

16.2.6.3 In the event that the municipality failed to extend bid validity period before its expire date, such extension may be requested and granted by the City Manager by mutual consent in writing between the Municipality and the bidder.

16.2.6.4 If, in exceptional circumstances, it becomes necessary to extend the bid period, a notice shall be published in the press at least one week prior to the original bid closing date. This notice shall also be posted on the notice boards at designated Municipal offices, and a notice to all bidders of bids received at that stage to this effect shall be issued.

16.2.6.5 In the event that validity period is not indicated in the bid document or advert, the validity period shall remain 120 days.'

[7] It is common cause that the bid validity period had expired when Mangaung sought to extend it. It is further common cause that the City Manager did not grant the extension in terms of clause 16.2.6.3 of the SCMP.

[8] In **Ekurhuleni Metro Municipality v Takubiza Trading and Projects CC and Others**[2] it was said that:

'... the validity period is indeed one of the fundamental 'rules of the game', being the period within which the process should be finalised. To extend the tender validity period, the consent of all the participants to the tender process is required. Unless there is a timeous request and favourable response from all the tenderers prior to the expiry of the tender, the tender comes to an end.'[3]

[2] (846/2021) [2022] ZASCA 82; 2023 (1) SA 44 (SCA) (3 June 2022).
[3] At para 13.

[9] The upshot is that the decision to award the tender to Provantage and Young was made after the tender process came to an end. Mangaung could not revive the process. A new bid process had to be initiated.[4] This is sufficient reason to set the awards aside. Before dealing with the remedy I pause to mention the glaring defects in Young's tender documents.

[10] The bid document contained minimum requirements and documents to be attached to the bid documents of all bidders, which included:

(i) Valid paper tax clearance certificate, tax clearance reference number and tax compliance status pin;

(ii) Certified copy of company registration certificate reflecting the names and identity numbers of active shareholding of all parties;

(iii) Municipal rates and taxes clearance certificate not older than 90 days or a lease agreement; and

(iv) All supplementary/compulsory forms contained in the bid document must be completed and signed in full.

[11] It is stated in the bid document that failure to comply with the minimum requirements will invalidate a bid.

[12] Young's bid was woefully inadequate and should never have been considered. Young's director signed the necessary forms without dating them. The issue date on the tax clearance status pin is 18 August 2020. The certificate of shareholder's interest, the Company Registration Certificate from the CIPC and the CSD registration summary report from the Central Supplier Data Base for Government are all dated 11 August 2020. The tender was therefore awarded to Young before it submitted all these important documents. I am therefore not surprised that it decided not to oppose this application. The consideration of Young's unresponsive and non-compliant tender and the resultant decision to award it the tender also rendered the entire process unfair and unlawful.

---

[4] Defensor Electronic Security (Pty) Ltd v Centlec SOC Ltd and Another [2021] ZAFSHC 315 at para 8.

[13] In my judgment Mangaung's decisions are reviewable in terms of s6 of PAJA[5] and ought to be set aside, at least, because:

(i) The decision to grant Young the tender was taken in bad faith;

(ii) A mandatory and material procedure or condition prescribed by an empowering provision was not complied with;

(iii) Its decisions were unfair; and

(iv) The decisions were not rationally connected to the purpose for which they were taken and not rationally connected to the information before it.

[14] I now turn to consider the appropriate relief. It is now well established that every improper performance of an administrative function would implicate the Constitution. Section 172(1)(b) of the Constitution stipulates that:

---

[5] Section 6 of the Promotion of Administrative Justice Act 3 of 2000 reads:

'(1) Any person may institute proceedings in a court or a tribunal for the judicial review of an administrative action.

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

(a) the administrator who took it-
(i) was not authorised to do so by the empowering provision;
(ii) acted under a delegation of power which was not authorised by the empowering provision; or
(iii) was biased or reasonably suspected of bias;

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

(c) the action was procedurally unfair;

(d) the action was materially influenced by an error of law;

(e) the action was taken-
(i) for a reason not authorised by the empowering provision;
(ii) for an ulterior purpose or motive;
(iii) because irrelevant considerations were taken into account or relevant considerations were not considered;
(iv) because of the unauthorised or unwarranted dictates of another person or body;
(v) in bad faith; or
(vi) arbitrarily or capriciously;

(f) the action itself-
(i) contravenes a law or is not authorised by the empowering provision; or
(ii) is not rationally connected to-
(aa) the purpose for which it was taken;
(bb) the purpose of the empowering provision;
(cc) the information before the administrator; or
(dd) the reasons given for it by the administrator;

(g) the action concerned consists of a failure to take a decision;

(h) the exercise of the power or the performance of the function authorised by the empowering provision, in pursuance of which the administrative action was purportedly taken, is so unreasonable that no reasonable person could have so exercised the power or performed the function; or

(i) the action is otherwise unconstitutional or unlawful.

(3) If any person relies on the ground of review referred to in subsection (2) *(g)*, he or she may in respect of a failure to take a decision, where-

(a) (i) an administrator has a duty to take a decision;
(ii) there is no law that prescribes a period within which the administrator is required to take that decision; and
(iii) the administrator has failed to take that decision,

institute proceedings in a court or tribunal for judicial review of the failure to take the decision on the ground that there has been unreasonable delay in taking the decision; or

(b) (i) an administrator has a duty to take a decision;
(ii) a law prescribes a period within which the administrator is required to take that decision; and
(iii) the administrator has failed to take that decision before the expiration of that period,

institute proceedings in a court or tribunal for judicial review of the failure to take the decision within that period on the ground that the administrator has a duty to take the decision notwithstanding the expiration of that period.'

'172 (1) When deciding a constitutional matter within its power, a court- ...

(b) may make any order that is just and equitable, including-

(i) an order limiting the retrospective effect of the declaration of invalidity; and

(ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.'

[15] When an administrative act is declared constitutionally invalid, the aggrieved party would be entitled to just and equitable relief based on the facts of each case. In **Steenkamp**[6] it was explained that:

> "...In each case the remedy must fit the injury. The remedy must be fair to those affected by it and yet vindicate effectively the right violated. It must be just and equitable in the light of the facts, the implicated constitutional principles, if any, and the controlling law. It is nonetheless appropriate to note that ordinarily a breach of administrative justice attracts public law remedies and not private law remedies. The purpose of a public law remedy is to pre-empt or correct or reverse an improper administrative function. In some instance the remedy takes the form of an order to make or not to make a particular decision or an order declaring rights or an injunction to furnish reasons for an adverse decision. Ultimately the purpose of a public remedy is to afford the prejudiced party administrative justice, to advance efficient and effective public administration compelled by constitutional precepts and at a broader level, to entrench the rule of law.'[7]

[16] A Court must therefore weigh all relevant factors in order to decide what remedy would be just and equitable. The interests of the successful bidder, those of the unsuccessful bidder and the public interest should be considered. The costs incurred by the successful bidder in implementing its offer should also be considered.[8] Likewise, the cost of ordering a fresh tender is a relevant factor.[9]

---

[6] Steenkamp NO v Provincial Tender Board, Eastern Cape 2007 (3) SA 121 (CC); 2007 (3) BCLR 300 (CC).

[7] Ibid at para 29.

[8] Millennium Waste Management (Pty) Ltd v Chairperson, Tender Board: Limpopo Province and Others 2008 (2) SA 481 (SCA) paras 22.

[9] Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others (No 2) [2014] ZACC 12; 2014 (4) SA 179 (CC) at para 7.

[17] Masakhe contends that the awards and resultant contracts should be set aside and the tender process restarted. Provantage contends that it had commenced acting, to its prejudice, in reliance on the lease agreement. It incurred costs by removing illegal signage on behalf of Mangaung and then sunk the costs of installing lampposts. It states that because of the low occupancy rate, the reduced scope of the lease (from 1500 to 600 lampposts), the high fixed rental it offered Mangaung and the illegal signage around Mangaung it expects to break even during the last year of the contract.

[18] Although Masakhe stuck to its contention that the award should be set aside it conceded that Provantage would be prejudiced by such an order. However, it disputed Provantage's calculations substantiating its claim that it would only break even during year five of the contract. It pointed out that Provantage ought to reach break-even stage during year three.

[19] I do not deem it necessary to go into the minute details of Provantage's projections. It did not provide the exact figures of its income during the first year of the contract. When it filed its affidavit explaining its income and expenditure it was past the first year. Initially when it calculated its income it based it on 1500 lampposts while it knew that despite the award being for 1500 lampposts the lease agreement only made provision for 600 lampposts. It projected an income based on 50% occupancy. Masakhe disputed this and stated that Provantage is under projecting its occupancy rate and that 50% is unrealistic. It also pointed out that Provantage had more than 600 lampposts during the first year. It further stated that it commissioned a person to do an audit of the lampposts occupied by Provantage in Mangaung. This revealed an occupancy rate of 59% percent. Provantage tendered based on a 75% occupancy rate for 1500 lampposts.

[20] There is no doubt that Provantage entered into agreements with its clients for advertising space. It incurred a cost in assisting Mangaung to remove the illegal signage so that it could commence sooner with its contract. Although it stated that the removal of the illegal signage was at no cost to Mangaung, it included the cost thereof as an expenditure. This is fair because it had to pay for the

removal of the illegal structures and it did not charge Mangaung for the service. The issuing of a notice to remove illegal signage and the removal thereof is Mangaung's responsibility. Its outdoor advertising policy makes this clear.

[21] We can take judicial notice of the fact that 2024 is going to be an election year. Political parties and independent candidates would need advertising space. Provantage has not factored this into their projections. The demand would be high during before the elections and probably immediately thereafter.

[22] This kind of tender should be distinguished from those in **Allpay** and **Ilex**[10]. In both those cases the services were of such a nature that its disruption would have had catastrophic consequences. In **Allpay** child grants would have been in jeopardy and in **Ilex** HIV Viral load testing would have been stopped imperilling the lives and livelihood of millions living with HIV/AIDS.

[23] In this case Mangaung did not ask to be provided with a service in the conventional sense. It wanted to lease municipal assets to supply outdoor advertising. This would have generated much needed income. It currently earns R99 744.00 per month from Provantage. However, the disruption of the service would not have similar consequences as those in **Allpay** and **Ilex**.

[24] Mangaung would have to run a new tender process in respect of the award to Young, which we intend to set aside. In that process it can include the 900 lampposts that Provantage did not contract for. This might take long if the current process is anything to go by. The closing date for the tender in this matter was in May 2018. The contract with Provantage was only entered into in January 2021. Manaung's lack of alacrity is patent. It can in the meantime generate an income from Provantage and the latter can recoup some, if not all, of its losses. It may decide to wait until the contract between it and Provantage has run its course and call for proposals for all its outdoor advertising sites.

[10] Ilex South Africa (Pty) Ltd v National Health Laboratory Service and Others 2021 (5) SA 587 (GJ).

[25] What weighs heavily in favour of Provantage is the fact that no complicity with Mangaung was shown. It is therefore an innocent party, although it could have investigated whether a proper extension was granted in terms of the relevant prescipts. Young was clearly a guilty party that flaunted most of the rules of the game. To crown it all, when the award was made to it, it gave or sold its rights to another entity. A clear case of fronting.

[26] We deliberately did not decide the issue of whether Masakhe was improperly excluded because the fairness of this process was seriously undermined by Young and Mangaung. It further seems to us that the financial part of Masakhe's offer was illegible. It did not include a total bid price. It explained how its bid could have been understood intelligibly. It gave a sensible explanation but the Bid Adjudication Committee wanted a total bid price, which was not in the bid.

[27] Provantage carries the onus to prove that it can only satisfy the no profit no loss principle by benefiting from the entire period of the contract. Its projections are flawed. We are constraint to do the best we can with the figures given to us. The only way to do that is to determine a cut off period which we assess to be a period that would not leave it, an innocent tenderer, out of pocket. Masakhe may obviously tender if the Young award and the 900 lampposts are re-run. We should, however, not prescribe to Mangaung when and how it should advertise its new request for proposals for outdoor advertising.

[28] The conditional counter application was unnecessary because fashioning a just and equitable remedy must always follow a declaration of invalidity. Masakhe was substantially successful and Provantage defended the matter on a limited basis. We are of the view that no order as costs should be made.

[29] I therefore make the following order.

1. The award of the tender under bid no MMM/BID458:2017/2018 for lamppost advertising, pavement posters and notices in the Mangaung municipal area by the first respondent to the second respondent on or about 13 September 2019, and the consequent Advertising Lease

Agreement that was concluded between the first respondent and the second respondent on or about 28 January 2021, is declared invalid.

2. The award of the tender under bid no MMM/BID458:2017/2018 for lamppost advertising, pavement posters and notices in the Mangaung municipal area by the first respondent to the third respondent on or about 5 June 2019, and the consequent Advertising Lease Agreement that was concluded between the first and the third respondent on or about 31 August 2021, is declared unlawful and invalid.

3. The invalidity of the award and the contract in paragraph 1 is suspended for a period of 22 months from the date of this order. The second respondent shall continue to perform under the contract in paragraph 1 for 22 months from the date of this order.

4. The conditional counter application is dismissed.

5. No order as to costs is made in the main and conditional counter application.

[redacted]

C.J. MUSI, JP

I concur.

[redacted]

C. REINDERS, J

Appearances:

For the Applicant:	Adv. M. J. Engelbrecht SC with Adv. A. Pantazis Instructed by Lovius Block Attorneys Bloemfontein
For the 2nd Respondent:	Adv. A Sawma SC with Adv. D Watson Instructed by McIntyre & Van Der Post Bloemfontein