



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: **4023/2021**

In the matter between:

AFRIRENT FLEET (PTY) LTD

Applicant

and

MOQHAKA LOCAL MUNICIPALITY

First Respondent

MOIPONE FLEET (PTY) LTD

Second Respondent

CORAM: **DANISO, J et CRONJÉ, AJ**

HEARD ON: **29 MAY 2023**

DELIVERED ON: **18 AUGUST 2023**

JUDGMENT BY: **PR CRONJÉ, AJ**

This judgment was handed down electronically by circulation to the parties' representatives by email, and release to SAFLII. The date and time for hand-down is deemed to be 14h30 on 18 August 2023.

I NATURE OF THE APPLICATION

[1] The Applicant ("Afrirent") brought a review application to have the awarding of a tender to the Second Respondent ("Moipone") by the First Respondent ("the municipality") be: declared *unlawful* and *void ab initio*; that the tender process be reviewed and the tender set aside; and compensation for its alleged loss as a result of the awarding of the tender to Moipone. It is important to state that this judgment does not determine the merits/demerits of the relationship between the municipality and Moipone. If the tender did not comply with legislative provisions, Moipone may suffer the same consequence of not being entitled to any relief. What is good for the goose is good for the gander.

[2] The precise relief sought are:

"1.1 The decision by the First Respondent to award the tender with Reference number: 3/2/3/2020–21 and dated 20 April 2021 described as "APPOINTMENT LETTER: SUPPLY AND DELIVER[Y] OF MUNICIPAL FLEET ON FINANCE LEASE (3/2/3/2020-21) ["the tender"] to Moipone [Moipone Fleet (Pty) Ltd] is declared unlawful and invalid ab initio."

1.2 The decision by the First Respondent to award the tender referred to in paragraph 1.1 above to Second Respondent is reviewed and set aside.

1.3 Any agreement concluded between the First Respondent and Moipone in consequence of the award of the tender by the First Respondent to Moipone is set aside.

- 1.4 *The Applicant is entitled to just and equitable compensation for the loss of profits in accordance with Section 8(1)(c)(ii)(bb) of the Promotion of Administrative Justice Act, 3 of 2000, which amount of compensation is equal to Afirent's bidding price (R139 979 786.00, VAT inclusive).*
- 1.5 *The First Respondent is ordered to pay the cost of the application, such costs to include those consequent upon the employment of two counsel, where so employed.*
- 1.6 *Afirent also applies for an order granting any further and/or alternative relief, including but not limited to, an order directing the First Respondent to award the tender to the Applicant forthwith for a period of three (3) years from date of award.”¹ (own emphasis)*

II THE INVITATION TO SUBMIT A BID/TENDER

[3] On or about 19 August 2020, the municipality invited interested prospective bidders to submit offers for the tender. The closing date was 21 September 2020 at 12:00.²

[4] The requirements in respect of the tender were *inter alia*:

“11.3.1 Only SANAS accredited B-BBEE certificates and the sworn B-BBEE Affidavit Exempted Micro Enterprise which was signed by the Commissioner of Oaths, also is accepted. No other B-BBEE certificates would be acceptable according to the new preferential procurement regulations (PPR).

11.3.2 Bidders who do not have B-BBEE certificates would not be disqualified but would not qualify for B-BBEE points.

¹ Pleadings, p. 1 – 2 - Notice of Motion

² Pleadings p. 10, para 11. The advertisement in the pleadings is illegible and the salient provisions are quoted from the founding affidavit of Afirent - A copy of the advertisement appears at p. 146 of the pleadings

11.3.3 *Bids would be evaluated according to the 80/20 or 90/10 for preferential points system.*

11.3.4 *Tenders submitted were to hold good for a period up to 90 days.*

...

11.3.6 *Preference would be given to service providers within the Moqhaka Local municipality area.*

11.3.7 *The bid proposals will not necessary be accepted and the municipality reserves the right to accept, where applicable, a part or portion of any bid (or where possible) bids/proposals from multiple bidders.*

11.2.8 *The municipality also reserved the right in its sole discretion to readvertise or not to award the tender.*

...

11.3.10 *Failure to attach the abovementioned copies would result in the tender being non-responsive.*³

11.3.11 *The municipality would only communicate the outcome of the bid with the successful bidder and more information could be obtained from the municipal website." (own emphasis)*

[5] Five tenders were submitted and were found to be responsive.⁴ For purposes of this judgement only that of Afrirent and Moipone are discussed. Afrirent's tender price was R139 979 786.00 and that of Moipone R154 874 242.00.⁵

³ This did not apply to the B-BBEE certificates

⁴ Pleadings, p. 13

⁵ Ibid, p. 14

III AFRIRENT'S B-BBEE CERTIFICATES AND COMPLAINT

- [6] It complains that the municipality acted unlawfully⁶ when it did not award it any B-BBEE points. It had a valid certificate at date that it *submitted* its tender. It seeks compensation in terms of the Promotion of Justice Act⁷ ("PAJA"). The municipality aligns itself with Afrirent in so far as it states that the process was irregular.
- [7] The certificate that Afrirent submitted with its tender documents expired on 12 September 2020.⁸ As a result of the expired certificate, Afrirent forfeited 10 (ten) B-BBEE points. If it received the points, it would have received the highest points which would have entitled it to be awarded the tender.
- [8] On 17 September 2020,⁹ INC Ratings informed Afrirent that its audit findings in respect of its certificate will be issued as soon as a decision is made.¹⁰ On 9 October 2020, a B-BBEE verification certificate was issued to Afrirent with date of expiry on 8 October 2021.¹¹ This entitled Afrirent to 10 B-BBEE points if the evaluation committee accepted it.
- [9] Annexure "MRG1" shows that Mr Gama (deponent of Afrirent) sent an e-mail to Mr Visagie of the municipality on 15 October 2020 at 6:17 pm wherein he stated:
- "Afri Rent¹² responded to the fleet tender which was advertised by Moqhaka municipality, at the time when the tender closed we were still busy with the B-BBEE*

⁶ Prayer 1 of the Notice of Motion

⁷ 3 of 2000

⁸ Approximately 9 days before closing date. All the other tenderers' certificates only expired in 2021

⁹ Approximately 4 days before closing date

¹⁰ Pleadings, p. 60

¹¹ Ibid, p. 61; p. 106

¹² "Afri Rent" and "Afrirent" is used inconsistently in the papers

verification and we attached a letter from a SANAS accredited verification agency confirming the audit.

I am happy to inform you that the verification has been completed and we retained our level 1 B-BBEE score. I have attached the certificate to enable the municipality to allocate the necessary B-BBEE points.”¹³

- [10] It forwarded a valid copy of its certificate to Supply Chain after the tender was evaluated. It was not too late as the certificate was not mandatory at closing date of the bids.¹⁴ It submits that the SCM regulations did not prohibit a request for a certificate before/upon appointment as with tax certificates and municipal rates and taxes accounts a provided for by the Municipal Finance Management Act¹⁵, Circular no. 90.¹⁶
- [11] The minutes of the meeting of the Bid Adjudication Committee (“BAC”), held on 22 October 2020, showed serious irregularities which favoured Moipone. Secret price negotiations for various items took place and in failing to accept Afrirent’s fresh B-BBEE certificate, Moipone had an unfair advantage, which resulted in it being awarded the tender irregularly after it lowered its tender price.¹⁷
- [12] In respect of the B-BBEE certificate of Afrirent, the BAC minutes record:

“Members asked whether Afri Rent (Pty) Ltd could not have been contacted to provide the municipality with the latest valid B-BBEE certificate before adjudication, as the point difference between the two bidders was on 0.42.

¹³ Pleadings, p. 200

¹⁴ Ibid, p. 17, para 19.2.6

¹⁵ 56 of 2003

¹⁶ Pleadings, p. 18, para 19.2.8

¹⁷ Ibid, p. 16, para 19.2.1. It should be noted that Moipone had a higher rating even before the lowering of the tender price.

The member stated that because on closing date their B-BBEE certificate had expired, they could not be given the B-BBEE points during the tender evaluation process as the committee was not in a position to determine at what B-BBEE Level will they be scored due to their expired certificate. It was noted that Afri Rent (Pty) Ltd did forward a copy of a valid B-BBEE certificate to Supply Chain after the tender was already evaluated, but it was too late as this document was a mandatory valid document needed at the closing date.

This was also clearly indicated on the tender advert and has been our practice not to award B-BBEE points in instances where the bidder did not submit a valid B-BBEE certificate. The member noted that the SCM regulations are silent in terms of requesting a valid B-BBEE certificate before/upon appointment, unlike with the Tax Clearance Certificate and up to date municipal rates and taxes as provided by MFMA Circular no. 90.

Member also indicated that in terms of alignment with the specifications of the vehicles. Afri Rent (Pty) Ltd scored higher than Moipone Fleet (Pty) Ltd as per the Technical Report and the main reason why Moipone Fleet (Pty) Ltd scored the highest was because of the B-BBEE points. Therefore when looking at the price and the specification alignment Afri Rent (Pty) Ltd is the better bidder." [own emphasis]

- [13] The BAC made reference to MBD 6.1¹⁸ under Section 1: General Conditions, subsection 1.6 and 1.7¹⁹ which states:

"1.6 Failure on the part of a bidder to submit proof of B-BBEE status level of contributor together with the bid, will be interpreted to mean that preference points for B-BBEE status level of contribution are not claimed.

¹⁸ Preference Points Claim Form in terms of the Preferential Procurement Regulations and Preferential Procurement Policy of Council: 90/10 Preference Point System

¹⁹ It should be paragraph 1.5 and 1.6. See: http://ocpo.treasury.gov.za/Buyers_Area/Pages/Standard-Bidding-Forms.aspx

1.7 The purchaser reserves the right to require of a bidder, either before a bid is adjudicated or at any time subsequently, to substantiate any claim in regard to preferences, in any manner required by the purchaser." [own emphasis]

[14] It was further noted that it was not the first time that a bidder's certificate had expired before the closing date and the committee *has not in the past requested a valid one to be submitted*. It has to maintain consistency in the matter. Afrigent complains that there was no consensus during the adjudication process in that some members were of the view that the certificate should be considered whilst others were opposed to it.

[15] The committee eventually resolved to:

*"Request for a cost estimation to be conducted by the user department, based on the quotation submitted by the bidders Moipone Fleet and Afri Rent. Thereafter the committee will meet again to conclude the recommendation to the Acting Municipal Manager."*²⁰

[16] The recommendation for appointment of Moipone was dated 16 October 2020.²¹ On 24 March 2021, the Acting Municipal Manager met with Moipone where he, the CFO, the Manager: Supply Chain Management and three representatives of Moipone were present. The prices in respect of items 2, 11, 14, 16, 19, 25 and 34 were discussed. Moipone was requested to see how it could accommodate the municipality in respect of price.²²

[17] In a letter dated 19 March/April 2021, Moipone reported that it reviewed its prices in respect of those items and the bid price can be decreased by R2.1

²⁰ Pleadings, p. 41; This raises the question about the criterium of cost-effectiveness provided for in section 217 of the Constitution.

²¹ Ibid, p. 49 - 50

²² Ibid, p. 52

million.²³ On 20 April 2021, the municipality appointed Moipone on a contract amount of R152 777 509.94.²⁴ Afrigent complains that Moipone was favoured based on allegedly providing a better model via secret price negotiations.

- [18] It submits that the definition of “*acceptable tender*” must be construed against the background of Section 217 of the Constitution and that Moipone’s tender was not an acceptable tender as it was not judged on the values of the Constitution.²⁵
- [19] The price negotiations between the municipality and Moipone falls foul of the provisions of Regulation 24 of the Municipal Supply Chain Management Regulations in that it allowed Moipone a second and unfair opportunity.²⁶
- [20] Its case is exceptional and compensation is an appropriate remedy. Remittal would no longer be practicable or feasible.

IV THE MUNICIPALITY’S CASE

- [21] The deponent states that he played no role in the decision to advertise the tender, nor did he participate in the procurement process. The municipality, upon legal advice, was of the view that the appointment is constitutionally invalid, unlawful and that it must be reviewed and set aside.²⁷ The municipality was not entitled to request tenders, and the process of adjudication was deeply flawed in respect of both procedure and substance.²⁸

²³ Ibid, p. 56

²⁴ Ibid, p. 57

²⁵ Ibid, p. 32, para 21

²⁶ Ibid, p. 34, para 23

²⁷ Ibid, p. 214, para 6

²⁸ Ibid, p. 215, para 7.1 – 7.3

- [22] Mr Majavu (the attorney for the municipality) raised reservations about the appointment of Moipone. This was communicated directly to the municipality's erstwhile CFO, as well as the then acting municipal manager.²⁹ No less than four separate legal memoranda were provided to the municipality.³⁰ Mr Majavu raised issues pertaining to why Afrivent's fresh certificate was ignored and that it appears that the relevant committees of the municipality have shown a predilection in manipulation of prices to favour Moipone. There would have been a huge cost saving if Afrivent's certificate was accepted.³¹
- [23] On assessment of the municipality's 2021/2022 annual budget it was determined that the total amount budgeted for capital expenditure was R255 917 000.00 for the 2020 – 2024 financial years. The budget did not make express provision for a new municipal fleet, most certainly not to the extent contemplated by the tender.³² The conclusion of the agreement with Moipone would have been an additional capital expenditure. In terms of the provisions of Section 19 of the MFMA, the municipality may only spend money on capital projects where money for the project, excluding the cost of the feasibility studies conducted by or on behalf of the municipality, has been appropriated in the capital budget.
- [24] The municipality could only incur expenditure in terms of an approved budget and within the limit of amounts appropriated for different votes as per s 15 of the MFMA and there was a specific prohibition on spending on capital projects, absent compliance with s 19 of the MFMA.³³ Section 46(3) of the MFMA

²⁹ Ibid, p. 218, para 16

³⁰ None were appended to the opposing affidavit

³¹ Pleadings, p. 218, para 19

³² Ibid, p. 219, para 21 - 22

³³ Ibid, p. 221, para 25

provides that the municipality may only incur long-term debt in accordance with the provisions of *inter alia* s 19 after acting in accordance with s 21A of the Systems Act, by obtaining Council approval and having considered information setting out particulars of the proposed debt, the amount thereof, the purpose thereof and provision of security, as well as inviting the public, national treasury, provincial treasury to submit written comments or representations to Council in respect of the proposed debt.³⁴

- [25] On 8 March 2022, the erstwhile CFO of the municipality provided a copy of a communication in respect of audit findings by the Auditor-General. The communication is dated 27 October 2021. In its audit findings, it *inter alia* stated that awarding the tender to Moipone would result in non-compliance and possible understatement of irregular expenditure.³⁵
- [26] According to the municipality the process was flawed to the extent that it could never have resulted in a legitimate outcome binding the municipality.³⁶ It simply does not have the money to pay for the tender.³⁷
- [27] Moipone was allowed to swap the lease agreement it initially submitted with a new document. This was at a stage when the BAC refused to take Afrivent's new certificate. The BAC displayed naked bias in favour of Moipone and the rejection of Afrivent's bid as non-responsive could be termed "*arbitrary*".³⁸ On this basis, the municipality does not oppose the relief sought in paragraphs 1 to 3 of the Notice of Motion.

³⁴ Ibid, p. 221, para 26

³⁵ Ibid, p. 240; Afrivent's case is not premised on the various grounds in the communiqué.

³⁶ Ibid, p. 231, para 65

³⁷ Ibid, p. 231, para 67

³⁸ Ibid, p. 224, para 34

- [28] It submits that compensation is not the only remedy or indeed an available remedy as Afrivent never attempted to interdict the municipality from concluding the agreement and/or pay the full sum of the bid. Compensation is not a suitable remedy in circumstances where a litigant successfully reviews an administrative decision.³⁹
- [29] Afrivent would in any event not be entitled to appointment where there has been non-compliance with the provisions of s 46 of the MFMA.

V MOIPONE'S CASE

- [30] It refers to the advertisement which stated:

"Bidders must submit an original certified copy of [a] B-BBEE status level verification certificate to substantiate their B-BBEE rating claims and B-BBEE status should also be captured on CSD registration;

Only [a] SANAS accredited B-BBEE certificate and the sworn B-BBEE affidavit, B-BBEE exempted micro-enterprise, which is signed by [a] Commissioner of Oaths, also is accepted;

No other B-BBEE certificate will be acceptable according to the new preferential procurement regulations (PPR);

Bidders who do not have B-BBEE certificates will not be disqualified but will not qualify for B-BBEE points." (own emphasis)

- [31] All the bids were found responsive but in respect of Afrivent it was noted that its B-BBEE certificate had expired prior to the closing date.⁴⁰ The compliance

³⁹ Ibid, p. 227, para 47

⁴⁰ Ibid, p. 121, para 17

report was reviewed by two independent parties on 25 September 2020 and 28 September 2020.⁴¹

- [32] The adjustment of the bid price was as a result of an adjustment in the number of vehicles which the municipality required whereas Moipone included more vehicles. In exercising its discretion the municipality applied the quoted pricing to the number of vehicles required. There was no change in pricing save for the number of vehicles quoted.⁴²
- [33] Were Afrirent allowed to submit a certificate after the closing date, it would have been a direct violation of s 217 of the Constitution which requires a fair, equitable, transparent, competitive and cost-effective procurement process.⁴³
- [34] It submits that the provisions of s 217 of the Constitution was replicated in s 38(1)(a) of the PFMA. The Preferential Procurement Policy Framework Act⁴⁴ ("the PPPFA") was enacted to give effect to Section 217(3) of the Constitution. The General Procurement Guidelines were issued by Treasury in terms of s 76(4)(c) for proper and successful Government procurement.⁴⁵ These guidelines rest upon the principles of Five Pillar Procurement which is to be read with Supply Chain Management: A Guide for Accounting Officers/Authorities.⁴⁶ The pillars are: value for money; open and effective competition; ethics and fair dealing; accountability and reporting; and equity. The guidelines establish that open and effective competition requires a framework of procurement laws, policies, practices, and procedures that are

⁴¹ Ibid, p. 121, para 18; p. 149

⁴² Ibid, p. 124, para 31.1.2

⁴³ Ibid, p. 129, para 31.2.6

⁴⁴ 5 of 2000

⁴⁵ Pleadings, p. 134, para 39

⁴⁶ Ibid, p. 134, para 40

transparent; openness in the procurement process; encouragement of effective competition through procurement methods suited to market circumstances; and observance of the PPPFA.⁴⁷

- [35] The accounting officer or authority must develop and implement an effective and efficient supply chain management system. Regulation 16A 3.2 of the Treasury Regulations⁴⁸ requires that the supply chain management system must be fair, equitable, transparent, competitive and cost-effective and be consistent with the provisions of the PPPFA. Supplementing a tender *ex post facto* will be to the detriment of bidders. The validity of the certificate is determined in relation to its date of issue vis-à-vis its expiration date.⁴⁹ Moipone was appointed on 12 December 2020, well within the ninety (90) day validity period.

VI AFRIRENT'S ARGUMENT

- [36] Mr Bomela, for Afrirent, refers to *AAA Investments (Proprietary) Limited v Micro Finance Regulatory Council and Another*⁵⁰ where the Constitutional Court held:

"[68] This is a matter of the application of the rule of law and the principle of legality⁵¹ which flows from the value of the rule of law enshrined in section 1 of the Constitution. This Court has held that "[t]he exercise of all public power must comply with the Constitution, which is the supreme law, and the doctrine of legality, which is part of that law".⁵² The doctrine of legality, which requires that power should have a source in law,

⁴⁷ Ibid, p. 135, para 42

⁴⁸ 15 March 2005

⁴⁹ Pleadings, p. 142, para 70.1

⁵⁰ [2006] ZACC 9; 2006 (11) BCLR 1255 (CC); 2007 (1) SA 343 (CC)

⁵¹ See: *State Information Technology Agency SOC Ltd v Gijima Holdings (Pty) Limited* [2017] JOL 39257 (CC); [2017] ZACC 40 (CC); 2018 (2) SA 23 (CC)

⁵² *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others* [2000] ZACC 1; 2000 (2) SA

is applicable whenever public power is exercised. Private power, although subject to the law and in certain circumstances the Bill of Rights, does not derive its authority or force from law and need not find a source in law. Public power on the other hand can only be validly exercised if it is clearly sourced in law."

- [37] Section 217 of the Constitution⁵³ provides that when an organ of state contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective. Reliance is placed on *Steenkamp N.O. v Provincial Tender Board (Eastern Cape)*.⁵⁴ That Court, however, also held that compelling public considerations require that adjudicators of disputes, as of competing tenders, are immune from damages claims in respect of their incorrect or negligent but honest decisions. However, if an administrative or statutory decision is made in bad faith or under corrupt circumstances or completely outside the legitimate scope of the empowering provision, different public policy considerations may well apply.
- [38] The verification agency issued a letter on 17 September 2020, before the closing day for the bids confirming that Afrirent would submit a fresh certificate. Rejection of the fresh certificate caused the process not to be fair based on fairness, equity, transparency and consistency.⁵⁵

674 (CC); 2000 (3) BCLR 241 (CC) at para 20. See also: *Fedsure Life Assurance Limited and Others v Greater Johannesburg Transitional Metropolitan Council and Others* [1998] ZACC 17; 1999 (1) SA 374 (CC); 1998 (12) BCLR 1458 (CC) at paras 40 and 56.

⁵³ Act 108 of 1996

⁵⁴ *Steenkamp NO v Provincial Tender Board of the Eastern Cape* [2006] ZACC 16; 2007 (3) SA 121 (CC); 2007 (3) BCLR 300 (CC) (28 September 2006) para 55. See also: *Telematrix (Pty) Ltd v Advertising Standards Authority SA* [2005] ZASCA 73; [2006] 1 All SA 6 (SCA); 2006 (1) SA 461 (SCA) para [26]. The facts and principles in *Minister of Safety and Security v Van Duivenboden* (209/2001) [2002] ZASCA 79; [2002] 3 All SA 741 (SCA) are distinguishable

⁵⁵ National Treasuries Implementation Guide Preferential Regulations 2011 at para 4.2.

- [39] Moipone was provided the benefit of secret price negotiations on certain items whereas Afrirent's fresh certificate was rejected. Afrirent was not contacted by the municipality before adjudication. It is argued that the advertisement "*vaguely stated*" that bidders who did not have certificates would not be disqualified but would not earn points. The SCM Regulations does not prohibit a request for a valid certificate before or upon appointment. In respect of the specification of the vehicles, Afrirent scored higher than Moipone. Given the provisions of subsection 1.7 of the General Conditions, a member of the committee did enquire whether the committee may request a certificate. The failure to do so constituted a serious miscarriage of administrative justice.
- [40] Moipone was selectively and inconsistently afforded the favourable opportunity for price negotiations after expiry of the validity of the tender period and to reduce the price outside the validity of the tender period.
- [41] Reference is made to *City of Ekurhuleni Metropolitan municipality v Takubiza Trading & Projects CC and Others*⁵⁶ where it was held:

"[9] *Plasket J, who took the view that the judgment in Telkom SA was 'essentially on all fours with [Searle]', observed:*

'[68] As with this case, what had to be decided, according to Southwood J, was "the legal consequence of a failure by a public body to accept, within the stipulated validity period for the (tender) proposals, any of the proposals received." In deciding this issue, Southwood J's starting point was four inter-related propositions. They are that: (a) the decision to award a tender is an administrative action and the PAJA therefore applies; (b) generally speaking, once a contract has been entered into following the award of a tender, the law of contract applies; (c) but a contract entered into contrary to prescribed tender processes is invalid; and (d) consequently, "even if no contract is entered into, all steps

⁵⁶ [2022] ZASCA 82; 2023 (1) SA 44 (SCA)

taken in accordance with a process which does not comply with the prescribed tender process are also invalid.”

VII THE MUNICIPALITY’S ARGUMENTS

- [42] The municipality concedes the merits of Afrirent’s case with exclusion of the relief in paragraphs 4 and 6 of the Notice of Motion. It aligns itself with Afrirent stating that the appointment of Moipone was not cost-effective, the process of evaluation appears to have been manipulated in favour of Moipone, the SLA was concluded in circumstances when the municipality’s budget did not make provision for the acquisition of a new municipal fleet, the contract contravenes s 19 of the MFMA, and the Auditor General found that the tender was invalid as Moipone’s bid was non-responsive.
- [43] It states that it could not support the tender process with reference to the decision of the Constitutional Court in *Matatiele Municipality and Others v President of the Republic of South Africa and Others*.⁵⁷ The Constitution requires public officials to be accountable and to observe heightened standards in litigation. They must not mislead or obfuscate. They must do right and they must do it properly. They are required to be candid and place a full and fair account of the facts before a court.⁵⁸
- [44] It denies that Afrirent is entitled to compensation as no proper basis was laid in the founding affidavit. Nor does the supplementary affidavit address the issue sufficiently. In *Minister of Defence and Others v Dunn*⁵⁹, the SCA held that some loss has to be proved. The Court found that compensation was not justifiable even had the administrative action complained of been reviewable.

⁵⁷ [2006] ZACC 2; 2006 (5) BCLR 622 (CC); 2006 (5) SA 47 (CC)

⁵⁸ *Public Protector v South African Reserve Bank* [2019] ZACC 29; 2019 (9) BCLR 1113 (CC); 2019 (6) SA 253 (CC)

⁵⁹ [2007] ZASCA 75; [2007] SCA 75 (RSA); [2008] 2 All SA 14 (SCA) ; 2007 (6) SA 52 (SCA)

[45] Exceptional circumstances has to be established. In *Darson Construction (Pty) Ltd v City of Cape Town and another*⁶⁰ it was held that it is apparent that an award for compensation is not intended to be the norm in cases where administrative action is reviewed.

[46] In *Olitzka Property Holdings v State Tender Board and another*⁶¹ it was held:

"[38] This in my view has acute consequences for the plaintiff's task in seeking to convince the Court that an award of the profit lost through the non-award of the tender could constitute "appropriate relief". An interdict would not only have anticipated the later dispute; it would have eliminated the source of loss the plaintiff invokes. This no doubt reflects the wisdom of hindsight, and offers stony comfort to a plaintiff who, as Mr Ginsburg was at pains to emphasise, has never manifested an intention to abandon its rights. Yet, as Ngcobo J emphasised on behalf of the Constitutional Court in *Hoffmann v South African Airways*, what constitutes "appropriate relief" depends on the facts of each case. The plaintiff relies on its special circumstances to found a constitutional entitlement. Fair scrutiny must encompass all aspects of its position, and the alternative remedies available to it. at all stages of the dispute, must be a critical factor in that assessment." (own emphasis)

[47] Afrirent could have brought an interdict but elected not to do so. The compensation that Afrirent seeks bears no relation to its profits. Afrirent also did not make a case for substitution relief. Exceptional circumstances must exist to justify substitution.

⁶⁰ 2007 (4) SA 488 (C). See the references therein to some of the other cases referred to in this judgment

⁶¹ (698/98) [2001] ZASCA 51 (28 March 2001). See also: *HT Pelatona Projects (Pty) Ltd v Tswelopele Local Municipality and Others* (2214/2022) [2022] ZAFSHC 97 (23 May 2022)

- [48] If the Court sets the tender aside, Afrirent would only be partially successful and that there should therefore not be punitive costs.

VIII MOIPONE'S ARGUMENT

- [49] The municipality cannot, so to speak, use the proceedings to self-review its decision to award the tender.
- [50] The PPPFA, Section 1, states what an acceptable tender means. Reference is made to *Chairperson: Standing Tender Committee and Others v JFE Sapela Electronics (Pty) Ltd and Others*⁶² where it was held that the starting point is s 217 of the Constitution, which enquires a system which is fair, equitable, transparent, competitive and cost-effective. A tender has to comply in every respect with the specifications and conditions of tender as set out in the tender document. The legislature and executive in all spheres are constrained by the principle that they may exercise no power and perform no function beyond those conferred upon them by law.⁶³
- [51] In *Dr JS Moroka municipality and Others v Betram (Pty) Limited and Another*⁶⁴ (*Bertram*) it was held that a bid that does not satisfy the necessary prescribed minimum qualifying requirements simply cannot be viewed as a bid 'validly submitted'. Moreover, the tender process consists of various stages: first, examination of all bids received, at which stage those which do not comply with the prescribed minimum standards are liable to be rejected as invalid;

⁶² [2005] ZASCA 90; 2008 (2) SA 638 (SCA) ; [2005] 4 All SA 487 (SCA)

⁶³ See: *Pharmaceutical Manufacturers Association of SA: in re ex parte President of the Republic of South Africa* [2000] ZACC 1; 2000 (2) SA 674 (CC) paras 17 and 50; *Gerber v Member of the Executive Council for Development Planning & Local Government, Gauteng* 2003 (2) SA 344 (SCA) para 35

⁶⁴ [2013] ZASCA 186; [2014] 1 All SA 545 (SCA)

second, the evaluation of all bids 'validly submitted'. The fact that all bids validly submitted are to be taken into consideration affords no discretion to condone and take into account bids not validly submitted but disqualified.⁶⁵ In *Bertram supra* there was no discretion to condone a failure to comply with the prescribed minimum prerequisite of a valid and original tax clearance certificate.⁶⁶

- [52] An administrative authority has no inherent power to condone a failure to comply with a *peremptory* requirement.⁶⁷ The notice that bidders who do not have a certificate will not be disqualified but will not qualify for points is clear. It denies that the fresh certificate was submitted on 19 October 2020⁶⁸ before adjudication by the BAC on 22 October 2020.
- [53] Regulation 7(8) states that subject to sub-regulation (9) and Regulation 11, the contract must be awarded to the tenderer scoring the highest points. Regulation 7(9)(a) provides that if the price offered by a tenderer scoring the highest points is not market-related⁶⁹, the organ of state may not award the contract to the tenderer. Subparagraph (b) however provides that an organ of state may negotiate a market-related price with the tenderer scoring the highest points or cancel the tender.

⁶⁵ At para [15]

⁶⁶ See also: *IMVUSA Trading 134 CC and Another v Dr. Ruth Mompoti District municipality and Others* (2628/08) [2008] ZANWHC 46 where it was, on different grounds, accepted

⁶⁷ *Bertram supra* at para [18]

⁶⁸ Pleadings, p. 19, para 19.2.13

⁶⁹ Whether the tender was "*market related*" is not relevant for the present discussion as this was not a basis for the review. The tender of Afrivent was R139 979 786.00 and that of Moipone initially R154 874 242.00, this was R14 894 456.00 higher. Moipone later reduced its tender marginally to R152 777 509.94, which was still R12 797 723.00 higher than Afrivent's tender

- [54] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others*⁷⁰ makes it clear that there is no indication of unreasonableness, nor of relevant factors having been ignored nor of irrelevant factors having been taken into account.⁷¹
- [55] *South African National Road Agency Ltd v The Toll Collect Consortium and Another*⁷² gave content to the requirement of transparency in tender processes. Once the tender is awarded in an open and public fashion it is not open to a “disappointed tenderer to find some ground for reversing the outcome or commencing the process anew”. In *Metro Projects CC and Another v Klerksdorp Local municipality and Others*⁷³ the SCA acknowledged that in given circumstances it may be fair to ask a tenderer to explain an ambiguity in its tender and to correct an obvious mistake or call for clarification or details to enable a proper evaluation of a bid. However, “whatever is done may not cause a process to lose the attribute of fairness or, in the local government sphere, attributes of transparency, competitiveness and cost-effectiveness.”
- [56] In *Minister of Social Development and Others v Phoenix Cash & Carry Pmb CC*⁷⁴, the SCA urged that public tender processes be interpreted and applied without undue reliance on form. The present matter is to be distinguished as the stipulation of the certificate was clear. So too was the consequence of failing to submit it. In *Azcon Projects CC v National Minister, Department of Public Works, Mthatha & another*

⁷⁰ [2004] ZACC 15; 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC)

⁷¹ At para [60]

⁷² [2013] ZASCA 102; [2013] 4 All SA 393 (SCA); 2013 (6) SA 356 (SCA)

⁷³ [2003] ZASCA 91; [2004] 1 All SA 504 (SCA) at para [13]

⁷⁴ [2007] ZASCA 26; [2007] 3 All SA 115 (SCA); 2007 (9) BCLR 982 (SCA)

(*Azcon*)⁷⁵, *Azcon* posted a valid tax certificate a day after the closing day of the bids. Neither its certificate nor the explanation for the delay in submitting it came to the attention of the BEC. The sole reason for excluding *Azcon*'s bid from the tender process was its failure to submit its tax certificate with its tender documents. The Court considered itself bound by *Millennium Waste Management (Pty) Ltd. v Chairperson of the Tender Board: Limpopo Province and Others (Millennium)*⁷⁶ to condone "innocent omissions and/or bona fide errors in the bid process". *Bertram* declared that *Millennium* should be regarded as incorrect. The importance of the duty to issue clear deadlines for submission of all requirements for an acceptable bid is apparent in *Azcon*. If the body did not have the information in the first place, it cannot be faulted for not taking it into account.

[57] In *Vodacom (Pty) Ltd and Another v Nelson Mandela Bay municipality and Others*⁷⁷, the Court refused to sanction a tender that allowed bidders to supply omissions or complete parts of obligatory questionnaires after the closing date for the tender. The Court, however, for other reasons set the award aside. To challenge an administrative decision substantively, a complainant must show that the decision is one that no reasonable decision-maker could reach.

[58] In *Rainbow Civils CC v Minister of Transport and Public Works, Western Cape and Others*⁷⁸ the Court held:

"[88] I might add, en passant, that I do not consider that the terms of the Preference Document afforded the Decision Maker any discretion to condone non-compliance with the requirements regarding the Verification Certificate. And

⁷⁵ [2011] JOL 27630 (ECM)

⁷⁶ [2007] ZASCA 165; [2007] SCA 165 (RSA); [2008] 2 All SA 145; 2008 (2) SA 481; 2008 (5) BCLR 508; 2008 (2) SA 481 (SCA)

⁷⁷ [2010] ZAECPHC 34; 2012 (3) SA 240 (ECP)

⁷⁸ [2013] ZAWCHC 3

had the Decision Maker been aware of the defect and afforded Safaz an opportunity to augment its tender by submitting the prescribed Verification Certificate, such conduct might well have founded a complaint that all tenders were not being treated equally. That, however, is not the situation with which we are faced in this case, and in my view the simple answer, for present purposes, is that Safaz did not submit the prescribed Verification Certificate and should not, therefore, have been awarded any preference points for B-BBEE Status."

- [59] Reference is made to *Tetra Mobile Radio (Pty) Ltd. v Member of the Executive Council of the Department of Works and Others*⁷⁹ where the SCA held that fairness is inherent in tender process. A proper evaluation is done of what is available and at what price, so as to ensure cost-effectiveness and competitiveness.

IX EVALUATION

- [60] The Constitution of the Republic of South Africa⁸⁰ requires that administrators take decisions lawfully, reasonably and in a procedurally fair manner.
- [61] To succeed in its relief, Afrivent's first hurdle would be to show that the municipality exercised a discretion to reject the fresh certificate on any of the grounds in s 6 of PAJA. In the Notice of Motion only one ground was selected – the decision was unlawful.⁸¹ Section 6 does not explicitly refer to the other ground that is relied on – the decision being invalid *ab initio*.
- [62] From the record of the evaluation committee it is clear that it opted for applying the principle of consistency in not asking for updated (fresh) certificates in

⁷⁹ [2007] ZASCA 128; [2007] SCA 128 (RSA); 2008 (1) SA 438 (SCA)

⁸⁰ 108 of 1996

⁸¹ Pleadings, p. 1

respect of the B-BBEE certificate. I cannot find that the committee exercised its discretion on any basis that may invoke a review thereof.

- [63] In applying the principle of consistency in the admission or not of additional information, in this instance the B-BBEE certificate, it was held in *Minister of Finance v Aribusiness NPC*:⁸²

"[38] It is trite that assessing the validity of a statute (and by extension regulations promulgated thereunder) demands that courts adopt an objective approach. In *Ferreira*, this Court captured the principle aptly as follows:

"A statute is either valid or 'of no force and effect to the extent of its inconsistency'. The subjective positions in which parties find themselves cannot have a bearing on the status of the provisions of a statute under attack."⁸³ (own emphasis)

- [64] The principle of consistency is more commonly found in labour law. In *Southern Sun Hotel Interests (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others*⁸⁴, Van Niekerk J stated the following:

"[10] The legal principles applicable to consistency in the exercise of discipline are set out in Item 7 (b) (iii) of the Code of Good Practice: Dismissal establishes as a guideline for testing the fairness of a dismissal for misconduct whether 'the rule or standard has been consistently applied by the employer'. This is often referred to as the 'parity principle', a basic tenet of fairness that requires

⁸² [2022] ZACC 4; 2022 (4) SA 362 (CC); 2022 (9) BCLR 1108 (CC); See also *Ferreira v Levin N.O.*; *Vryenhoek v Powell N.O.* [1995] ZACC 13; 1996 (1) SA 984 (CC); 1996 (1) BCLR 1 (CC); See also: "[58] In terms of section 2 of the Constitution, "[the] Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled". The supremacy of the Constitution thus demands that any legislation or subordinate legislation complies with it. Because the Constitution enjoys precedence over other sources of law, their validity is ultimately tested against its provisions."

⁸³ See also para [39]

⁸⁴ [2009] ZALC 68; (2010) 31 ILJ 452 (LC) ; [2009] 11 BLLR 1128 (LC)

like cases to be treated alike. The courts have distinguished two forms of inconsistency – historical and contemporaneous inconsistency. The former requires that an employer apply the penalty of dismissal consistently with the way in which the penalty has been applied to other employees in the past; the latter requires that the penalty be applied consistently as between two or more employees who commit the same misconduct.” (own emphasis)

[65] In *C & M Fasteners CC v Buffalo City Metropolitan municipality*⁸⁵ it was held:

“The legal framework relevant was set out as follows by Plasket J in WDR Earthmoving Enterprises CC and Another v Joe Gqabi District municipality and Others:

“[6] Section 217 of the Constitution provides that when organs of state procure goods and services they must do so in accordance with a system that is “fair, equitable, transparent, competitive and cost-effective”. These principles are given effect to by a complex web of primary and subordinate legislation as well as supply chain management policies. These instruments both empower organs of state in their procurement processes and place limits on their powers. Procurement processes, in order to be lawful and constitutionally compliant, must be undertaken in accordance with these provisions: compliance with them is legally required and they may not be disregarded.

[7] ... Framed in the obverse, a decision-maker in a public procurement process is required by Section 33(1) of the Constitution to act lawfully, reasonably and in a procedurally fair manner and if he or she does not, the impugned decision may be set aside.

[8] ... Whenever a public body has a duty imposed on it by statute, and disregards important provisions of the statute, or is guilty of gross irregularity or clear illegality in the performance of the duty, this Court may be asked to review the proceedings complained of and set aside or correct them.’

[9] ... a court would be “unable to interfere with a due and honest exercise of discretion, even if it considered the decision inequitable or wrong”. The reason for this is simple: the legislature mandated and empowered administrators to

⁸⁵ [2019] ZAECHC 22

administer, and not courts; and the role of the courts is limited to ensuring that administrators do not stray beyond the legal limits of their mandates.

[10] ... Administrative action may only be set aside by a court exercising its review powers if it is irregular.⁸⁶ It may not be interfered with because it is a decision a judge considers to be wrong." (own emphasis)

[66] Chaskalson, in *Pharmaceutical supra*, held:

"[36] ... The law does not interfere with the proper exercise of the discretion by the executive in those situations: but it can set limits by defining the bounds of the activity: and it can intervene if the discretion is exercised improperly or mistakenly. That is a fundamental principle of our constitution."

[82] ... "Now it is settled law that where a matter is left to the discretion or the determination of a public officer, and where his discretion has been bona fide exercised or his judgment bona fide expressed, the Court will not interfere with the result. Not being a judicial functionary, no appeal or review in the ordinary sense would lie; and if he has duly and honestly applied himself to the question which has been left to his discretion, it is impossible for a Court of Law either to make him change his mind or to substitute its conclusion for his own." (own emphasis)

[67] From the summary of the parties' versions and arguments, I find that it cannot be said that the committee did not exercise its discretion fairly. The advertisement set an objective criterium. If there is no valid certificate, there cannot be points to be claimed. *Azcon supra* is distinguishable. The tenderer was registered for VAT at date of closing of the tender. All that it had to do was to submit its proof. In *Afrivent's* case, its certificate lapsed, It did not have a valid certificate in the period between 12 September 2020 and 9 October 2020. Its status thus changed and it was not possible to determine whether it would again

⁸⁶ See: *Municipal Manager: Qaukeni and Others v F V General Trading CC* [2009] ZASCA 66; 2010 (1) SA 356 (SCA); [2009] 4 All SA 231 (SCA)

qualify. One can only speculate whether other companies who did not tender because they did not have valid certificates at close of the tender may also have applied if they knew that it could be submitted later. The advertisement made it clear that it had to be valid at date of closing.

- [68] If Afrirent does not pass this hurdle, the fact that there were negotiations on price or that the grounds that the municipality relies on for arguing that it could in any event not award any tender is of no moment. If the municipality's version is correct, neither Afrirent nor Moipone would qualify for the tender. It is for this reason that I decided not to express myself on the enforceability of any claim, whether by Afrirent or Moipone.

- [69] The question whether Afrirent could qualify for damages was answered in *Steenkamp supra*, where the Court held:

"54" *The residual question is whether there is justification to develop the common law to embrace this narrow claim for damages based on out-of-pocket expenses in favour of an initially successful tenderer where the award is subsequently set aside by the court and the tenderer retains the right to participate in the subsequent tender process. I think not. First, there is no magic in characterising financial loss as out-of-pocket. If public policy is slow to recompense financial loss of disappointed tenderers it should not change simply because of the name the financial loss bears. Second, even if there may not be a public law remedy such as an interdict, review or appeal this is no reason for resorting to damages as a remedy for out-of-pocket loss. This is so because first, as I found earlier, the loss may be avoided and second it is not justified to discriminate between tenderers only on the basis that they are either disappointed tenderers or initially successful tenderers. To do so is to allot different legal rights to parties to the same tender process. There is no justification for this distinction particularly because ordinarily both classes of tenderers are free to tender again should the initial tender be set aside.*
(own emphasis)

- [70] *Rodpaul Construction CC t/a Rods Construction v Ethekwini municipality and Others*⁸⁷ is on all fours with the matter before us. In that matter the B-BBEE certificate also expired on close of the tender.

"[14] *Its Certificate had expired on 11 July 2012. The certificate that Rodpaul supplied on 28 January 2013 was neither original nor valid at the closing date of the tender. It was effective from 28 January 2013 to 27 January 2014. The failure to submit an original, valid Certificate with the tender documents rendered Rodpaul's bid 'non-compliant'. It is against principles and unfair to render a non-compliant bid compliant.*

[68] *In respectful disagreement with Rodpaul I see nothing incorrect or in conflict with decisions of the High Courts in the above quotation. The extract demonstrates that the chairman understood the risk of compromising the integrity of the process if Rodpaul was allowed to submit its Certificate after the closing date of the tender. He was open to persuasion to do so on production of legal authority. In that event he would have given all six bidders a chance to improve their points. Crucial to the decision was that the Certificate that Rodpaul had allegedly submitted with its tender had expired six months before the closing date. Correctly the chairman concluded that such a Certificate could not have any value in the scoring of the tender.* (own emphasis)

- [71] In respect of Moipone's argument that the municipality cannot self-review by way of this application, I refer to *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd*⁸⁸ where the Constitutional Court held:

"[56] *In Khumalo Skweyiya J stated that it is the duty of state litigants to rectify unlawful decisions:*

⁸⁷ [2014] ZAKZDHC 18 at para 68

⁸⁸ [2019] ZACC 15; See also: *State Information Technology Agency SOC Ltd v Gijima Holdings (Pty) Limited* [2017] JOL 39257 (CC); [2017] ZACC 40 (CC); 2018 (2) SA 23 (CC). That matter dealt with condonation

“This Court has affirmed as a fundamental principle that the state ‘should be exemplary in its compliance with the fundamental constitutional principle that proscribes self-help’. What is more, in Khumalo, this Court held that state functionaries are enjoined to uphold and protect the rule of law by, inter alia, seeking the redress of their departments’ unlawful decisions. Generally, it is the duty of a state functionary to rectify unlawfulness. The courts have a duty to insist that the state, in all its dealings, operates within the confines of the law and, in so doing, remains accountable to those on whose behalf it exercises power. Public functionaries ‘must, where faced with an irregularity in the public administration, in the context of employment or otherwise, seek to redress it’.”

[119] Where there has been no delay by an organ of state in seeking to review its own prior decision, a declaration of unlawfulness should invariably be made. In AllPay II, we affirmed that this “default position” reflects the most basic imperative of the principle of legality in “requir[ing] the consequences of invalidity to be corrected or reversed where they can no longer be prevented”. In bringing an application for self-review promptly, the state is also complying with its duty to correct suspected unlawful decisions expeditiously and diligently. In short, timely self-review generally results in a win-win for the rule of law.

[120] Where there is non-negligible delay by an organ of state in bringing a self-review application, the court must determine whether the delay is reasonable and should accordingly be condoned. In Khumalo, this Court rightly cautioned that “a court should be slow to allow procedural obstacles to prevent it from looking into a challenge to the lawfulness of an exercise of public power”.”

[72] It is not necessary for purposes of this judgment to express any views on it, except to state that there was no counter-application.

[73] The matter before us raises the important issue that government may, compared with other tenderers who may have lower B-BBEE points, pay much higher amounts for the same services when costs are not carefully considered. The Constitutional values of competitiveness and cost-efficiency should always

be considered. This municipality may pay in excess of R12million more for the same service just on a points difference. I take no issue with the point system but this is an aspect that needs further consideration in public procurement.

X COSTS

[74] Afirent asked for costs only against the municipality.

[75] The municipality aligned itself with Afirent to the extent that it agreed that awarding the tender to Moipone was irregular. The municipality, however, went further to state that the tender could never have been awarded. If *Rodpaul supra* is followed, which I do, Afirent had itself to blame for not having a valid certificate at the date of closing of the tender or during evaluation.

[76] Afirent has not shown exceptional circumstances for a claim of damages. It has not been successful in either turning the tender process around, nor for damages. In view of the municipality's ambivalent alignment with Afirent, an order that Afirent pays half the cost of the municipality would be fair.

[77] In respect of the relief that involved Moipone, Afirent failed. Following the general rule and finding no reason to deviate from it, Afirent should pay the costs of Moipone. In view of the important issues raised, the costs of two counsel is justified.

[78] I would make the following order:

ORDER:

1. The Application is dismissed.

2. The Applicant pays half the taxed party and party costs of the First Respondent.
3. The Applicant pays the costs of two counsel of the Second Respondent on party and party scale.

I agree/~~do not agree~~:


P R CRONJÉ, AJ


The Honourable
2023-08-18
N.S. Daniso
N S DANISO, J

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