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**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

CASE NO: 8544/22P

(1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO
(3) REVISED: ~~YES~~ / NO
DATE: 11 April 2023

In the matter between:

IMPANDE CONSULTING ENGINEERS (PTY) LTD

Applicant

and

**MEC FOR THE DEPARTMENT
OF TRANSPORT- KWAZULU-NATAL PROVINCE**

First Respondent

**DEPARTMENT OF TRANSPORT
KWAZULU-NATAL PROVINCE**

Second Respondent

ORDER

1. The decision of the second respondent to cancel Bid No. ZNB [...] 20/T is

reviewed and set aside.

2. The second respondent is directed to discontinue the tendering process initiated pursuant to its invitation to Bid No. ZNBO [...] 22/T .

3. The second respondent is directed to implement the recommendations of its Bid Evaluation Committee of 13 December 2021, alternatively 2 March 2022, by:

3.1. Forthwith awarding to the applicant the contract for the Escourt Cost Centre;

3.2. Issuing a letter of appointment to the applicant within ten (10) days of this order for the appointment for the provision of professional engineering services for the Escourt Cost Centre for a period of three years;

3.3. Concluding the required Service Level Agreement with the applicant for the provision of the professional engineering services for a period of three years to the Escourt Cost Centre within twenty-one (21) days of issuing and signing of the letter of appointment.

4. The second respondent is ordered to pay the costs of Part A of this application on the attorney and client scale, and the costs of Part B of this application, on the party and party scale.

JUDGEMENT

NCUBEJ

Introduction

[1] This is opposed application in which the applicant ("Impande") in its amended Notice of Motion, seeks the following relief:

- (a) "Reviewing and setting aside the decision of the second respondent to cancel Bid No ZNB 0[....] 20/T.
 - (b) Directing the second respondent to discontinue the tendering process initiated pursuant to its invitation to Bid No ZNB 0[....] 22/T .
 - (c) Directing the second respondent to implement the recommendations of the Bid Evaluation Committee of 13 December 2021, alternatively 2 March 2022, by:
 - i. Forthwith awarding to the applicant the contract for the Escourt Cost Centre
 - ii. Issuing a letter of appointment to the applicant within 10 (Ten) days of this order for the appointment for the provision of professional engineering services for the Escourt Cost Centre for a period of three years.
 - iii. Concluding the required Service Level Agreement with the applicant for the provision of the professional engineering services for a period of three years to the Escourt Cost Centre, within 21 (twenty-one) days of issuing and signing of the letter of appointment.
 - iv. Directing that any of the respondents who oppose the relief in part B of this application to pay the costs of this application jointly and severally."
- Impande is a consulting engineering company providing civil and structural engineering infrastructure, assets management and project management consultancy services.

Factual Background

[2] On 04 December 2020, the second respondent ("the Department") issued an invitation for bids. It invited suitably qualified entities to bid for the appointments of engineering service providers for each Cost Centre for a period of three years. The parties referred to that tender as ("the original tender"). There were twelve Cost Centres in total. Those were Port Shepstone, Pietermaritzburg, Dundee, Hluhluwe, Eshowe, New Castle, Ulundi, Vryheid, Escourt, Ixopo, Ethekwini and KwaDukuza. The purpose of the bid was to obtain proposals from professional service providers for the provision of civil engineering consultant services for the Cost Centres. The initial closing date was 19 January 2021 at 11.00 am, which was later extended to 29 January 2021. No bids were to be received after 29 January 2021.

[3] The tender validity period was 28 May 2021, but was extended to 29 September 2021, further extended to 28 January 2022 and finally extended to 30 May 2022. The tender was subject to the provisions of the Preferential Procurement Policy Framework Act, 5 of 2000 (PPFA). Impande submitted a bid for all twelve (12) Cost Centres before the closing date. Impande charged an amount of R62 790 000-00 for the Escourt Cost Centre. By the closing date, 90 bids had been received and Impande is reflected as number 54 on the register of bids received. According to the tender advert, there were six (6) stages in the evaluation process. Those stages were (a) Administrative Compliance (b) Pre-qualification (c) Mandatory Requirements (d) Functionality Evaluation (e) Price and Preference and (f) Objective Criteria.

[4] Impande's bid was responsive and it complied with all the requirements. On 02 March 2022 the Bid Evaluation Committees (BEC) of the Department, recommended that the Impande be awarded the contract for the Escourt Cost Centre for the period of three (3) years, with the amount of R62 790 000-00 to be negotiated to R40 334 132.20. Subsequent to the recommendation of the BEC, the Department published a Notice in the Ilanga Newspaper dated 3 - 4, May 2022, cancelling the tender. The reason for the cancellation was stated as "Administrative Non-compliance."

Issues

[5] The question is whether the decision taken by the Department to cancel the whole tender, based on Administrative Non-Compliance was valid, rational and in accordance with prescripts and the law. The Department avers that the tender was cancelled because of material irregularity in the process.

The Law

[6] One of the founding principles of our law is the Supremacy of the Constitution.¹ The Constitution is the supreme law of the Republic, law or conduct which is inconsistent with the Constitution is invalid and the obligations imposed by the

¹ Sec 1 of the Constitution of the Republic of South Africa Act 108 of 1996.

Constitution must be fulfilled. The Constitution guarantees everyone the right to administrative action that is valid, reasonable and procedurally fair.² The parliament is enjoined to enact legislation to give effect to the constitutional right to just administrative action and such legislation must make provision for the review of administrative action by the courts.³

[7] Section 217 of the Constitution provides that when an organ of state in the national, provincial or local sphere of government contracts for goods, or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost effective. Pursuant to constitutional imperatives,⁴ parliament enacted the Promotion of Administrative Justice Act⁵, ("PAJA"). PAJA provides that administrative action materially and adversely affecting the rights or legitimate expectations of any person must be procedurally fair.⁶ The court may review an administrative action if the administrator who took that action amongst other things, took irrelevant considerations into account or when she did not consider relevant consideration.⁷

[8] The tender in question was subject to the provision of the Procurement Framework Regulations of 2017("Procurement Regulations"). Regulation 13 thereof provides:

"13 (1) An organ of state may, before the award of a tender, cancel a tender invitation if-

- (a) due to changed circumstances, there is no longer a need for the goods or services specified in the invitation.
- (b) funds are no longer available to cover the total envisaged expenditure;
- (c) no acceptable tender is received; or
- (d) there is material irregularity in the process.

² Sec 33 (1) of the Constitution

³ Sec 33 (3) (a) of the Constitution.

⁴ Sec 33 (3) of the Constitution

⁵ Act No 3 of 2000

⁶ Section 3.

⁷ Section (6) (2) (e) (i) and (iii).

(2) The decision to cancel a tender invitation in terms of sub regulation (1) must be published in the same manner in which the original tender invitation was advertised.

(3) An organ of state may only with the prior approval of the relevant treasury cancel a tender invitation for the second time."

Discussion

[9] Having considered the legislative frame work, I turn now to look at the substance of the decision to cancel the tender before award. I must consider the reason given for the decision to cancel the tender and then assess if the decision was a rational or irrational one. In my view, irrational decision is the one which is shockingly bad and defies logic, to the extent that no sensible person, in his right frame of mind and who had applied his mind correctly to the question to be decided could have arrived at it. According to the cancellation advert in the Ilanga Newspaper, the tender was cancelled for "administrative non-compliance". This is despite the fact that the process had progressed to the stage where the BEC had recommended that the tender be awarded to various bidders, including Impande, whose tender had passed the scrutiny and was found to be compliant with all the requirements.

[10] It was only the Bid Adjudication Committee ("BAC") which referred the matter back to BEC. The argument raised by the Department in these proceedings, is that the BAC referred the matter back to the BEC since the BAC discovered that the BEC evaluated ninety-two (92) bids instead of ninety (90) bids recorded in the register when the tender closed on 29 January 2021. The Department is now changing the reason for the decision to cancel the tender from "administrative non-compliance" to "material irregularity". This is clearly done in order to bring the reason for the decision to cancel the tender within the ambit of Regulation 13 (1)(d). Unfortunately, the reason which was published in the notice of cancellation and brought to the attention of the public, including Impande, was "administrative non-compliance", not "material irregularity." "Administrative non-compliance" is not one of the grounds mentioned in Regulation 13. If that was the reason why the tender was cancelled, the action of cancelling the tender was not rationally connected to the decision.

[11] In ***PG Group Pty (Ltd) v National Energy Regulation of South Africa***⁸ Leach JA Said:

"It is a fundamental requirement of administrative law that an administrative decision must be rational. This is entrenched in Section 6 (2) (f) (ii) of PAJA which provides for an administrative action being reviewable if it is not rationally connected, *inter alia*, to the purpose for which it was taken, the purpose of the empowering provision, or the reason given for it by the functionary who took it. Administrative action is also reviewable under PAJA if 'it is one that a decision maker could not reach' - see *Bato Star Fishing v Minister of Environmental Affairs* 2004 (4) SA 490."

[12] The original reason given by the Department, for the decision to cancel the tender was administrative non- compliance, they cannot now come with another reason. In ***Umgeni Water v Sembcorp Siza Water (Pty) Ltc***⁹ Wallis JA expressed himself in the following terms:

"The appellants are however bound by the original reason given for their decision. They cannot now rely upon the management scheme as a further reason and engage in *ex post facto* rationalization of a bad decision."

Therefore, the Department's original reason, for the decision to cancel the tender, stands and it cannot be supplemented or substituted with any other reason.

[13] One must also not lose sight of the fact that the material irregularity which the Department now raises as the basis for their decision to cancel the tender process is not the ground relied upon by the BEC in its recommendation to have the tender process cancelled. The reasons relied upon by the BEC for the cancelation, was the non-responsiveness of other bidders, not Impande. The discrepancy in the bid proposals submitted and those which were evaluated by the BEC, was never raised by the BEC.

⁸ 2018 (5) SA 150 (SCA) at para 40

⁹ 2020 (2) SA 450 (SCA) at para 52

[14] In any event, those bid proposals that found their way through to the BEC evaluation report are clearly identifiable in the evaluation report itself. They are numbered 91 and 92 respectively; whereas the register containing the number of bids submitted before the closing date, reflects 90 bid proposals received. The extra two bids were from LTE Consulting and Sombude JV. Those two entities were rejected. Both those entities did not meet the pre-qualification requirements and they were rejected. Therefore, the inclusion of those two entities in the evaluation report, had no impact on the outcome of the tender process.

[15] The question, therefore, is whether the irregularity relied upon by the Department was a material irregularity which vitiated the whole tender process. Was it an irregularity of great import or consequences? In my view, a material irregularity, is one which, if ignored, could lead to substantial injustice and render the tender process unfair. In the present case, the impugned bidders were evaluated and rejected, they did not make their way through to the next stage and as such, they were not amongst the bidders recommended for an award of contract. The continuation of the tender process was not going to lead to any substantial injustice. I conclude therefore, that the decision to cancel the original tender, was irrational and unjustified.

Remedy

[16] What remains is the appropriate and effective relief to be granted. What would be the appropriate relief under the circumstances? The starting point of exercise is section 8(1) of PAJA which provides:

"(1) The court or tribunal, in proceedings for judicial review in terms of section 6(1) may grant any order that is just and equitable, including orders-

(a) directing the administrator-

(i) ...

(ii) ...

- (b) prohibiting the administrator from acting in a particular manner;
- (c) setting aside the administrative action and-
 - (i) remitting the matter for reconsideration by the administrator, with or without directions or
 - (ii) in exceptional cases-
 - (aa) substituting or varying the administrative action or correcting a defect resulting from the administrative action or
 - (bb) directing the administrator or any other party to the proceedings to pay compensation.
- (d) ...
- (e) ...
- (f) as to costs."

Therefore, in terms of section 8(1)(c)(ii)(aa) the court can substitute its own decision for the decision of the administrator, only in exceptional cases.

[17] Impande is asking this court to exercise its discretionary powers in terms of section 8(1)(c)(ii)(aa) and substitute its own decision for that of the Department. Impande argues that if the BEC, the BAC and HOD did not commit an error, in making the impugned decision, Impande would have been awarded the Escort contract. The Department argues in its answering affidavit and Heads of Argument, that substitution will offend the principle of separation of powers. It is important to note that the Department's wrong decision to cancel the tender process infringed Impande's constitutional right to an administrative action that is lawful, reasonable and procedurally fair, which is entrenched in section 33(1) of the Bill of Rights.

[18] In *Mwelase and Others v Director-General for the Department of Rural Development and Land Reform and Another*¹⁰ Cameron J, said:

¹⁰ 2019 (6) SA 597 (CC) paras 46 and 47.

"The courts and government are not at odds about fulfilling the aspirations of the Constitution. Nor does the separation of powers imply a rigid or static concept of strictly demarcated functional roles. The different branches of constitutional power share a commitment to the Constitution's vision of justice, dignity and equality. That is our common goal. The three branches of government are engaged in a shared enterprise of fulfilling practical constitutional promises to the country's most vulnerable. These joint efforts will not always be frictionless. On the contrary, it has been astutely noted that an understanding of the separation of powers as a relationship of mutual accountability, responsiveness and openness between the three branches' may give rise to unavoidable- even productive- tension."

[19] In ***Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd and Another***¹¹ it was said that there are two factors which inform the decision whether or not the court should substitute its decision for that of the administrator. The first factor is whether the court is in as good a position as the administrator to make that decision. The second factor is whether the decision of the administrator is a foregone conclusion. The other factors to be considered will include delay, bias or the incompetence of the administrator. The ultimate question is whether the substitution order is just and equitable. Whether exceptional circumstances exist will inevitably depend on the facts of each case.

[20] Applying the above principles to the present case, I am of the view that a substitution order is justified. It will serve no purpose to remit the case to the Department. Considering the fact that the BEC had done the evaluation and made a recommendation to award the Escourt Cost Centre to Impande, the decision of the Department was a foregone conclusion. If there were no irregular bids included in the evaluation report, Impande would have been awarded the contract for the Escourt Cost Centre. There was no other reason for the matter to be referred back to the BEC, except for the two bids which were perceived to be irregular. The other relevant factor in this case is the delay. The tender has been cancelled twice in three years affecting urgently required service delivery to the public. The remittal of this matter back to the Department, will cause further delays in the provision of services to the

¹¹ 2015 (5) SA 245 (CC)

public and that exercise will be prejudicial to Impande.

Costs

[21] It has become a norm for the public officials to neglect correspondence, even legal documents from attorneys representing and acting in the interest of their clients. In this case, after the original tender was wrongly cancelled, the Department sought to undertake a new tender process in order to appoint service providers for the same work for which Impande was recommended under the original tender. Impande sought an undertaking from the Department that the Department was not going to proceed with the new tender process whilst Impande was preparing to take the cancellation of the original tender on review. There was no response from the Department. The lackadaisical conduct of the Department forced Impande to bring part A of the application interdicting the Department from continuing with the new tender process. On three occasions, Impande requested reasons and other documents which the Department relied on for the decision to cancel the original tender. The Department did not respond.

[22] What is worse is that the Department's answering affidavit was filed out of time in defiance of a directive from court setting the date on which the same was to be filed. The answering affidavit was to be filed by no later than 26 August 2022. That was not done. On 26 August the Department asked for the extension of time to file their affidavit on 29 August 2022. The answering affidavit was sent by email to the Impande Attorneys at 19h30 on 29 August and filed in court on 30 August 2022. In ***F Kany Investments CC and Another v Umdoni Municipality***¹² it was said:-

"Something needs to be said about the conduct of the respondent. It has been tardy and impolite in the extreme, choosing not to reply to correspondence legitimately sent to it by the applicant's attorneys. It has, through its conduct, unnecessarily dragged this matter out for years. It has said that it will act and then did not act. It has ignored what it acknowledged was a potentially dangerous situation and has put the life and limb of its constituents at risk. This is not the

¹² (1891/2021P) [2022] ZAKZPHC 35 (10 August 2022)

service our country requires from a municipality. Such conduct is unworthy of an institution intended to serve the people. It warrants a punitive costs order."

I find that the conduct of the Department in this case deserves a punitive costs order as well.

Order

[23] In the result, I make the following order:

1. The decision of the second respondent to cancel Bid No. ZNB [...] 20/Tis reviewed and set aside.
2. The second respondent is directed to discontinue the tendering process initiated pursuant to its invitation to Bid No. ZNB 0[...] 22/T .
3. The second respondent is directed to implement the recommendations of its Bid Evaluation Committee of 13 December 2021, alternatively 2 March 2022, by:
 - 3.1. Forthwith awarding to the applicant the contract for the Escourt Cost Centre;
 - 3.2. Issuing a letter of appointment to the applicant within ten (10) days of this order for the appointment for the provision of professional engineering services for the Escourt Cost Centre for a period of three years;
 - 3.3. Concluding the required Service Level Agreement with the applicant for the provision of the professional engineering services for a period of three years to the Escourt Cost Centre within twenty-one (21) days of issuing and signing of the letter of appointment.
4. The second respondent is ordered to pay the costs of Part A of this application on the attorney and client scale, and the costs of Part B of this application, on the party and party scale.

M T NCUBE

Judge of the High Court of
South Africa, Pietermaritzburg

Judgment reserved: 11 October 2022

Judgment delivered: 11 April 2023

Appearances

For Applicant:	Adv Manentsa, B L
Instructed by:	Shandu Attorneys Inc
	Sandton
	c/o Venns Attorneys
	Pietermaritzburg

For First and Second Respondent:	Adv Sibeko, VG
Instructed by:	State Attorney (KwaZulu-Natal)