



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

CASE NO: 2682/23P

In the matter between:-

THABZO SECURITY SERVICES CC

APPLICANT

and

THE MSUNDUZI MUNICIPALITY

FIRST RESPONDENT

WISE SECURITY TRAINING CC

PARTY TO BE JOINED
AS SECOND RESPONDENT

ROYAL SECURITY CC

PARTY TO BE JOINED
AS THIRD

RESPONDENT

JUDGMENT

ANNANDALE AJ:

[1] In 2021 the Msunduzi Municipality (the Municipality) engaged in a public tender process for the appointment of a panel of security services providers for a period of three years under tender number SS23-R2021. The invitation to tender included pre-qualification criteria and stated unequivocally that bids not meeting all these criteria would be disqualified, deemed non-responsive and not considered for evaluation.

[2] One of the pre-qualification criteria was the submission of mandatory and returnable documents. This criterion stipulated in terms that only bidders who had submitted all the mandatory and returnable documents listed in a table in clause 8.4.1.1 of the invitation to tender would be deemed responsive. Those that did not would be deemed unresponsive and therefore not be considered for any further evaluation and/or adjudication. Among the mandatory returnable documents was the bidder's audited financial statements for the past three financial years.

[3] The applicant responded to the invitation to tender as did 31 others. It is common cause that the applicant did not comply with the pre-qualification criterion relating to annual financial statements. Instead of submitting audited financial statements for the past three financial years, the applicant submitted three sets of documents said to be the previous year's financial statements, none of them audited, and – curiously - not identical.

[4] Although all purporting to be for the financial year ended 28 February 2020, one iteration of the income statement reflects gross revenue in excess of R94 million, whilst another reflects gross revenue for the same period as R21.5 million. Similarly, one set of financials reflects the costs of sales for that period in the sum of R65.3 million, the other R11.2 million. Unsurprisingly then, the retained profit at the end of the year differs wildly between the documents: in one iteration it exceeds R21 million in the other it is R5.031 million. Similar discrepancies appear on the balance sheet with one version of the financial statements showing total equity and liabilities of a little over R25 million and the other R5.2 million.

[5] The figures in each line item making up the income statement and the balance sheet is significantly different between two different sets of financial statements purportedly for the same period, so the divergence in the totals described above are not due to some form of arithmetical error. The reason for these differences has not been explained by the applicant. Manifestly, at least of the annual financial statements misrepresents the applicant's financial affairs.

[6] Despite all this, the applicant was one of eight bidders recommended by the Municipality's Bid Evaluation Committee (BEC) to be appointed to a panel of security services providers. The other 24 bids had been disqualified (somewhat

ironically) as non-responsive for failure to comply with mandatory documents, which in several instances included a failure to submit audited financial statements. Wise Security CC (Wise), and Royal Security Services CC (Royal), which the applicant sought to join to the proceedings, were also on the recommended list.

[7] The Municipality's Bid Adjudication Committee (BAC) accepted the BEC's recommendations. It concluded a service level agreement (SLA) with the applicant in January 2022 to give effect to its acceptance of the applicant's bid. The applicant thereupon started rendering services at various sites and receiving remuneration in the region of R1.7 million per month.

[8] On 24 November 2022 however, the Municipality received a report by the Auditor-General which identified a number of irregularities in the tender process. One of these was that four bidders who had failed to meet the pre-qualification criteria by not submitting the requisite financial statements should have been disqualified but were not. The applicant and Wise were two of the four bidders named in the Auditor-General's report in this regard.

[9] By the time the Municipality received the Auditor-General's report, it had a new municipal manager. He considered the report without delay, verified its contents and concluded that the decision to award the tender and concluded the SLA with the applicant was improper, irregular and unlawful.

[10] On 2 December 2022, the Municipality sent the applicant a notice purporting to cancel the SLA with effect from 28 February 2023 as its bid was not acceptable and should have been disqualified. The 2 December letter of cancellation however granted the applicant fourteen days to make representations as to why the contract should not be terminated.

[11] The applicant states that it made representations. Despite admitting in its answering affidavit that it received these submissions, the Municipality subsequently denied receipt. Be that as it may, the applicant's stance was that the Municipality had no right to cancel a tender after its award and that if the Municipality was of the view that an irregularity had occurred, it was at liberty to launch the necessary application which would be 'met with vigorous opposition'. The Municipality states

that if it had received the submissions nothing therein contained would have changed its position on cancellation.

[12] In its representations, the applicant accepted that three sets of financial statements were submitted for the same financial year and recorded that the other statements were available but had been 'omitted by error'. The representations record that the other two sets of audited financial statements were annexed to it, but they are not annexed to the version of the letter in the record and have never been produced, despite repeated requests by the Municipality.

[13] When the applicant received no response to its representations, or to a follow up letter sent on 15 February 2023, it launched an urgent application set down for 27 February 2023 to pre-empt termination of the SLA at the end of the month as had been foreshadowed in the letter of 2 December 2022 (the first application). It sought a rule *nisi* with interim relief preventing the Municipality from giving effect to its 2 December 2022 cancellation decision pending the finalisation of a review of that decision which the applicant intended to launch. No relief was granted in the first application and the Municipality did not give effect to its intended cancellation of the SLA on 28 February 2023.

[14] Instead, on 6 March 2023, simultaneously with the filing of a supplementary answering affidavit in the first application, the Municipality issued a fresh notice of cancellation effective 31 March 2023. It was only however on 29 March 2023 that the applicant responded to the letter of 6 March 2023, and asked the Municipality for an undertaking that it would not give effect to its cancellation whilst the first application was pending. When the Municipality failed to give the undertaking, on 4 April 2023, the applicant launched a further application under the same case number which it set down for 6 April 2023 (the second application).

[15] By then, the sites previously serviced by the applicant had been taken over by Wise and Royal which had also been appointed to the panel of security service providers. Their membership of the panel notwithstanding, the applicant accused the Municipality of utilising Wise and Royal without following the required tender process, and challenged the validity of their appointment to its erstwhile sites on that basis. The Municipality's deponent states that the transition happened without

any difficulty or violence, whilst the applicant claims that it was accompanied by violence and intimidation of its guards by persons said to be representatives of the Municipality, Wise and Royal. The applicant gave no details of where, how and by whom the alleged acts of violence and intimidation were perpetrated.

[16] What is not in dispute is that the other providers took over the applicant's sites and Royal has been rendering services to all of those sites since the Municipality cancelled the contract it had awarded to Wise on 4 April 2023 because its bid should also have been regarded as non-responsive. *De facto* then, when both applications served before me as opposed motions, the applicant was no longer rendering any services to the Municipality and nor was Wise.

[17] The relief as framed in the second application was aimed at forestalling the implementation of the 6 March 2023 cancellation decision, joining Wise and Royal as respondents and seeking interdictory and declaratory relief against the parties which was in certain respects contradictory and not entirely coherent.

[18] Between the first and second applications, and on 24 March 2023, the applicant instituted review proceedings (again under the same case number as the two applications) in which it sought orders setting aside both cancellation decisions and a declaratory order that it was just and equitable that the SLA remain in place until its expiry in December 2024. I will refer to that application as 'the review', to distinguish it from the first and second applications for interim relief to which I will refer collectively as 'the applications'. The Municipality indicated in its answering affidavit in the second application that it intended to oppose the review and counter-apply for the setting aside of its decision to award the tender to the applicant and conclude the SLA by virtue of the irregularities in the tender process.

Grounds of challenge and response

[19] The Municipality did not purport to cancel the SLA by relying on any terms of the contract in either of its termination notices. In its answering affidavit in the second application however, the Municipality claimed a contractual right to cancel based on three clauses in the SLA, two of which describe the contract as 'month to

month' and another which entitles the Municipality to cancel for reputational damage.

[20] The Municipality argues in the alternative, that if the cancellation constitutes administrative action rather than purely contractual conduct it was nonetheless entitled to cancel as it is did because it is obliged to comply with section 217 of the Constitution and section 112(1)(l) of the Municipal Finance Management Act, 56 of 2003. The Municipality may therefore only contract for goods and services in accordance with a system which is fair, equitable, transparent, competitive, and cost-effective and complies with the Preferential Public Procurement Framework Act 5 of 2000 (the PPPFA) which was enacted to give effect to the requirements in section 217 of the Constitution. The Municipality asserts that the procurement process leading to the conclusion of the SLA met none of these constitutional requirements and did not comply with the PPPFA. The Municipality accepts that it has not yet applied to court to set aside the process, but submits that its opposition to the applications is a permissible reactive challenge.

[21] The applicant takes issue with the Municipality's cancellation decisions and its stance in opposition to the applications on three grounds. First, that its failure to submit the annual financial statements was not material and the BEC enjoyed a discretion to condone non-compliance as it did. Second, if it is wrong in this regard, the Municipality had no purely contractual right to cancel the contract after it had awarded the tender, and had resorted to impermissible self-help when it purported to cancel. Third, the applicant contends that absent an application for self-review to set aside the award of the tender and the conclusion of the SLA, the Municipality was bound to give effect to the contract it had concluded and could not enforce its cancellation decision in the form of a reactive challenge either in the applications or in the review.

Relief Sought

[22] Given the purpose for which the two applications were launched, the facts on the ground as they existed when the applications were heard suggested that some of the relief sought had been overtaken by events. At the start of the hearing I

therefore asked counsel for the applicant to specify what relief was being persisted in. In order to understand the extent to which the engagement which followed changed the landscape of the case, it is necessary to set out the relief as originally framed in the first and second applications, save for the paragraphs dealing with urgency which had become moot.

[23] The second notice of motion incorporated some relief from the first by reference. It therefore conduces to better understanding of the applicant's ultimate position to commence with a recordal of the relevant portions of relief in the second notice of motion:-

- '1. That Wise Security Training CC ...and Royal Security CC.... be joined as the Second and Third Respondents under case number 2682/23P.
2. The case heading of the application under case number 2682/23P is hereby amended to henceforth reflect the Msunduzi Municipality as the first respondent and Wize Security Training CC ...is recorded as the second respondent and Royal Security CCis recorded as the third respondent.
3. That the relief sought in paragraph 2 of the notice of motion in the main application be granted pending the finalisation of the opposed hearing on 15 August 2023.
4. Alternatively to paragraph 3: That a Rule *nisi* do hereby issue calling upon ... any... interested party, to show cause ... why, pending the determination of this matter, an order in the following terms should not be granted, viz.
 - 4.1 The First Respondent be interdicted and restrained forthwith from implementing a notice of termination dated 6 March 2023 issued under tender number S23-R/2021 pending finalisation of the review application under case number 2682/23P.
 - 4.2 The Second and Third Respondents be interdicted and restrained from entering and removing, interfering, intimidating, coopting in any manner whatsoever Applicant's registered employees guarding sites under tender number S23-R2021 pending finalisation of this matter.
 - 4.3 The Second Respondent is ordered forthwith to accept possession of all firearms and rifles in possession of the Applicant's employees (security guards) guarding the sites

under tender number S23-R2020 supplied by the Second Respondent pending finalisation of this matter.

- 4.4 The Third Respondent is ordered forthwith to accept possession of all firearms and rifles supplied to the Applicant's employees (security guards) guarding sites under tender number S23-R202.
- 4.5 Pending/allocation and/or award of the tender to the Second and Third Respondents of sites awarded under tender number S23-R2021 is declared unlawful and of no force and effect.
- 4.6 Costs of the application.
- 4.7 Further and or alternative relief.¹

[24] There are three sets of proceedings all instituted by the applicant under the same case number. Counsel indicated that the applicant persisted with paragraphs 1 and 2 of the second notice of motion but sought the joinder of these two parties in the applications not the review.

[25] Paragraph 3 of the second notice of motion sought the relief set out in paragraph 2 of the first application. There the applicant sought a rule *nisi* and interim relief pending a review to be instituted, with the interim relief formulated as follows:-

- '2.1 The Respondent is interdicted and restrained forthwith from implementing cancellation in a notice of cancellation dated 2 December 2022, pending finalisation of the review application to be launched within fifteen (15) days of this order.
- 2.2 The Respondent's notice of termination dated 2 December 2022 is declared unlawful, of no force and effect.'

[26] It will be apparent from the factual matrix set out at the start of this judgment that the 2 December 2022 notice of cancellation was not implemented. Counsel for the applicant submitted however that the 6 March 2023 cancellation followed ineluctably from the cancellation of 2 December 2022 so the earlier cancellation

¹ The quote is indeed verbatim.

notice remained relevant. I engaged counsel for the applicant on whether it was possible to grant declaratory relief on an interim basis as envisaged by paragraph 2.2 of the first notice of motion and whether the declarator and the validity of the Municipality's termination decision were not matters properly for the review court rather than the court considering interim relief pending the review. Counsel for the applicant accepted that the declaratory relief was properly a matter for the review court and the applicant did not persist in seeking the relief in paragraph 2.5 of the first notice of motion.

[27] Counsel for the applicant agreed that the declaratory relief in paragraph 4.5 of the second notice of motion was likewise a matter for the review court. He abandoned paragraphs 4.3 and 4.4 of the second notice of motion, for which there was in any event no evidentiary basis, and accepted that events had overtaken the relief envisaged in paragraph 4.2 which was therefore abandoned.

[28] The only portion then of paragraph 4 of the notice of motion of the second application in which the applicant sought to persist was the interdict in paragraph 4.1. The difficulty with that however, is that paragraph 4.1 envisages a prohibitory interdict and the termination decision of 6 March 2023 had already been implemented before the second application was instituted, some months the applications served before me. The relief as originally formulated was therefore incapable of being granted. Counsel indicated that the applicant wished instead to seek a mandatory interdict, directing the Municipality to do what was necessary to reverse the implementation of its 6 March 2023 decision and, to the extent necessary, its 2 December 2022 decision. The applicant claimed to be entitled to this relief on the basis that it had sought further and/or alternative relief in paragraph 4.7 of the notice of motion in the second application. I shall assume without deciding that relief in this altered form can properly be pursued under the rubric of alternative relief.

[29] The relief sought by the applicant is therefore in the nature of an interim interdict, albeit now mandatory rather than prohibitory. It therefore behoves the applicant to demonstrate the long established requirements of a *prima facie* right, a

well-grounded fear of irreparable harm if the interim relief is not granted, the balance of convenience and the absence of any other satisfactory remedy.²

[30] As the interim relief is sought pending the finalisation of the review, I must also be satisfied that the applicant has good prospects of success in the review. In *Economic Freedom Fighters v Gordhan and Others and a related matter* 2020 BCLR 916 (CC) para 42, the Constitutional Court explained the applicable test and approach as follows:

‘The claim for review must be based on strong grounds which are likely to succeed. This requires the court adjudicating the interdict application to peek into the grounds of review raised in the main review application and assess their strength. It is only if a court is convinced that the review is likely to succeed that it may appropriately grant the interdict.’³

[31] The Municipality argues that in addition to these requirements, the applicant must demonstrate that exceptional circumstances warrant the grant of an interdict because the relief the applicant seeks is of the nature that was at issue in *National Treasury and Others v Opposition to Urban Tolling Alliance and Others* 2012 (6) SA 223 (CC) (*OUTA*).

[32] *OUTA* concerned an interdict which affected the executive domain as it prevented a functionary from exercising a public power conferred upon it.⁴ The Constitutional Court held that such relief intruded on the separation of powers and should therefore be ‘granted only in the clearest of cases and after a careful consideration of separation of powers harm’.⁵ *OUTA* explained that the *Setlogelo* test needed to be applied cognisant of the normative scheme and democratic principles that underpin the Constitution, so the balance of convenience enquiry must now have proper regard to separation of powers harm.⁶

² *Setlogelo v Setlogelo* 1914 AD 221 at p 227.

³ Although *EFF v Gordhan* concerned an interdict which would prevent the functionary from exercising public power in a manner which impacted on the separation of powers, the requirements have been held to be of general application: *IPID v Minister of Police* 2015 JDR 0547 (GP) para 11.

⁴ *OUTA* paras 22 and 44 – 47.

⁵ *OUTA* para 47.

[33] The applicant, however submits that what is sought to be restrained is not executive power but administrative action. For the reasons set out by Olsen J in *Reaction Unit South Africa (Pty) Ltd v Private Security Industry Regulatory Authority* 2020 (1) SA 281 (KZD) paras 31 to 35, I am of the view that there is much force to this argument. By virtue of the approach which I take in this matter, it is however unnecessary for me to make a firm finding in this regard, and I assume in favour of the applicant, without deciding the issue, that the applicant need not demonstrate exceptional circumstances.

Joinder

[34] The effect of the applicant's changed position is that no relief is sought against Wise or Royal, the parties the applicant sought to join to the applications. Wise had taken no part in the proceedings but Royal had opposed the joinder application, filed papers and briefed counsel. Mr Khuzwayo SC who appeared at the hearing with Mr Sibeko for the applicant, was commendably candid in his acceptance that as it was the applicant that had brought Royal before court only to abandon seeking any relief against it, its joinder was unnecessary and it was just and equitable for the party who had attempted to join it to be ordered to pay its costs. He stressed however, that it would not be appropriate for costs to be granted on a punitive scale as Royal requested, because the applicant had not pursued the joinder out of malice but due to practical concerns regarding giving effect to the interdictory relief. I deal with the question of costs holistically at the end of this judgment.

[35] There is an additional issue relating to joinder. The Municipality contends that the joinder of the Auditor-General was mandatory and the applications are therefore fatally defective for non-joinder. Mr Moodley SC, who appeared with Mr Flemming for the Municipality did not persist in this contention, but made it clear that he was not abandoning it either. It is therefore necessary for me to decide this point. The applicant submits that the joinder of the Auditor-General is unnecessary because the applicant challenges the decision of the Municipality, not the Auditor-General who has no power to cancel a contract the Municipality has concluded and did not purport to do so. I agree.

- [36] I turn then to deal with the central issues in the applications:
- [a] was the applicant's bid unresponsive?
 - [b] if so, does the Municipality have a contractual right to cancel?
 - [c] if not, is it permitted to raise the irregularities in the tender process by way of a reactive challenge in these proceedings despite not having applied for self-review?
 - [d] if so, what are the merits of its reactive challenge?

Unresponsive Bid?

[37] The applicant contends that its failure to supply three years' annual financial statements was not material and the Municipality's supply chain management policy grants the BEC powers 'to condone or waive certain requirements within minimum scale'. The applicant argues that the BEC and BAC were better placed than the Municipal Manager to decide whether to condone non-compliance and whether non-compliance was material or not. The effect of this, submits the applicant, is that the award of the tender and the conclusion of the SLA are lawful and the tender could only be cancelled after award if one of the grounds in Regulation 13 of the 2017 PPPFA Regulations was present. In this latter regard, the applicant relied on *Head of Department, Mpumalanga Department of Education v Valozone* 286 CC [2017] ZASCA 30 (*Valozone*) para 16.

[38] Regulation 13 lists four grounds upon which an organ of state can cancel a tender before award, one of which is a material irregularity in the tender process. *Valzone* concerned a decision to cancel a tender before an award had been made in circumstances where none of the grounds in the 2011 PPFA regulation equivalent to Regulation 13 were present. Neither Regulation 13 nor *Valozone* applies on the facts of this matter where the cancellation decisions were made after the award. Be that as it may, the validity of the applicant's bid is the logical starting point of the enquiry.

[39] The Municipality's supply chain management policy was not part of the papers in either of the applications or the voluminous review record, and counsel for

the applicant did not refer to any particular provision of the policy in support of his submissions in this regard. To the extent that reference can be had to the policy as a public document available on the Municipality's website, clauses 28 and 29 which deal with bid evaluation and bid adjudication committees respectively do not speak to a discretion of the sort for which the applicant contends. However, even if one were to assume that these committees are accorded a measure of discretion in the evaluation and adjudication of bids, the extent and nature of any such discretion would necessarily be informed by the law and the terms of the tender at issue, specifically whether a particular requirement was mandatory or not.

[40] Relying on *AllPay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer South African Social Security Agency and Others* 2014 (1) SA 604 (CC) (*AllPay*), paras 22 and 58, the applicant submitted that regardless of whether any express discretion was accorded to the BEC and BAC, as a matter of law, immaterial irregularities could be overlooked as not all flaws are fatal. The question, it was submitted, is whether the purpose the tender requirements were intended to serve had been substantially achieved.

[41] At a level of general principle, that is undoubtedly correct, but there is a difference between minor defects in procedure, and requirements which constitute prerequisites for the validity of a bid.

[42] Whilst *AllPay* did deal with the materiality of irregularities, it stressed that procedural requirements were not merely technicalities and that defects in procedure are not to be taken lightly. It sounded the following alarm:-

'..deviations from fair process may themselves all too often be symptoms of corruptions or malfeasance in the process. In other words, an unfair process may betoken a deliberately skewed process. Hence insistence on compliance with process formality has a threefold purpose: (a) it ensures fairness to participants in the bid process; (b) it enhances the likelihood of efficiency and optimality in the outcome; and (c) it serves as a guardian against a process skewed by corrupt influences.'⁷

⁷ *AllPay* para 27.

[43] Even if one could apply the materiality test to non-compliance with mandatory requirements, the general purpose the pre-qualifying criteria served was to ensure that only those bids which met a minimum threshold would be eligible for consideration. The BEC's failure to disqualify the applicant's bid coupled with its disqualification of other bidders who had failed to submit their annual financial statements meant that this purpose was not served and also rendered the process unfair. The mandatory requirement that bidders submit three years' audited annual financial statements was intended to enable the Municipality to assess prospective service providers' financial soundness. It was plainly not an irrelevant or unconstitutional requirement. By submitting conflicting financial statements for a single financial year, the applicant deprived the Municipality of the opportunity to make a proper assessment of its financial situation. In the result, the purposes that the pre-qualifying criteria were intended to serve were not achieved at all, much less substantially.

[44] More fundamentally however, *All Pay* is not authority for the proposition that failure to comply with mandatory pre-qualifying criteria can be condoned or regarded as immaterial. Our law goes the other way.

[45] In *Dr JS Moroka Municipality and Others v Bertram (Pty) Limited and Another* [2014] 1 All SA 545 (SCA) (*Dr JS Moroka*) para 16, the Supreme Court of Appeal held that there was no discretion to condone a failure to comply with prescribed minimum prerequisites for validity. It also dealt with the statement in *Millennium Waste Management Chairperson Tender Board, Limpopo Province and Others* 2008 (2) SA 481 (SCA) (*Millennium Waste*) that 'our law permits condonation of non-compliance with pre-emptory requirements in cases where condonation is not incompatible with public interest and if such condonation is granted by the body in whose favour the provision was enacted.'⁸ The Supreme Court of Appeal explained that such a proposition offended the principle of legality and insofar as *Millennium Waste* may be construed as accepting that a failure to comply with a pre-emptory requirement of a tender may be condoned by a functionary if he was of the view that

⁸ *Millennium Waste* para 17.

it would be in public's interest for such a tender to be accepted, it should be regarded as incorrect.⁹

[46] The position is rather that an organ of state is at liberty to determine what should be a prerequisite for a valid tender, and a failure to comply with such prerequisites will result in a tender being disqualified as unacceptable unless the conditions are immaterial, unreasonable or unconstitutional.¹⁰ Subject to these exceptions, as explained in *Minister of Environmental Affairs and Tourism v Pepper Bay Fishing (Pty) Ltd*; *Minister of Environmental Affairs v Smith* 2004 (1) SA 308 (SCA) para 31, once an organ of state has set minimum qualifying requirements in the tender invitation:

‘(a)s a general principle an administrative authority has no inherent power to condone failure to comply with a pre-emptory requirement. It only has such power if it has been afforded the discretion to do so.’

[47] Regulation 4(2) of the 2017 PPPFA Regulations underscores this principle. It provides that a tender that fails to meet any pre-qualifying criteria stipulated in the tender document is an unacceptable tender.

[48] Here, the invitation to tender made it plain that the submission of audited financial statements for the previous three years was a prerequisite for the validity of bids. Clause 8.4.1.1 stated that any bidder who had not complied with the pre-qualification criteria ‘shall be deemed unresponsive and shall not be assessed, evaluated or adjudicated’. Clause 8.4, which set out the evaluation criteria, included a table listing the 22 mandatory and returnable documents, next to the description of which appear boxes for the bidder to tick, confirming the documents have been submitted. Item 19 of the list read: ‘The Bidder shall submit Audited Financial Statements for the past three financial years’. The applicant ticked this item, thereby representing that it had complied with that specific criterion. Under the table, the following appears in bold type:

‘A Bidder that fails to submit any of the mandatory/returnable documents specified above shall be deemed unresponsive and will not be considered for any evaluation and/or adjudication.’

⁹ *Dr J S Moroka* paras 17 – 18.

¹⁰ *Millennium Waste* para 19.

[49] The BEC and BAC thus had no power to condone a failure to comply with the pre-emptory requirements the Municipality had set.

[50] This finding makes it unnecessary to deal in any detail with the facts upon which the applicant contends that the BEC acted consistently in its approach to disqualification, thus rendering the process fair. Consistency could never render lawful that which was unlawful, and in any event, the facts do not demonstrate the consistency for which the applicant contends. The applicant's submission that the BEC only disqualified bidders who had failed to submit more than one category of mandatory documents is incorrect. The BEC's evaluation report reveals that two of the bidders who were disqualified had failed to submit only one category of the documents.

[51] It follows that the applicant's contention that its failure to comply with the mandatory submission requirements of the bid was not material and could be condoned is bad in law. The applicant's failure to include the mandatory documents meant that its tender was, as a fact, non-responsive and should have been disqualified. That being so, the award and SLA which followed upon it, were invalid from inception.¹¹

[52] The real question is whether the applicant is correct in its assertion that the Municipality is precluded from resisting the applications to enforce that unlawful and invalid contract because it has not applied to review and set aside its original decisions to accept the applicant's bid and conclude the SLA.

[53] The applicant's argument is based on two Constitutional Court cases, although neither of them was actually referenced in the heads of argument. *MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd t/a Eye & Lazer Institute* 2014 (3) SA 481 (CC) (*Kirland*) para 64, established that where government has taken an invalid decision, it should generally not be exempt from applying formally to court to set aside the defective decision. This is done by way of

¹¹ *Municipal Manager: Qaukeni Local Municipality and Another v FV General Trading CC* 2010 (1) SA 356 (SCA) para 16.

a legality self-review as explained in *State Information Technology Agency SOC Ltd v Gijima Holdings (Pty) Ltd* 2018 (2) BCLR 240 (CC) (*Gijima*).

[54] The Municipality seeks to overcome the challenge of not yet having applied to self-review in two ways. First, it invokes a contractual right to cancel on a month's notice in terms of the SLA. Second, if I were to find that the claimed contractual right is unavailing, the Municipality contends that it is entitled to raise a reactive challenge to the applicant's attempts to enforce the SLA in these proceedings.

Contractual Right to Cancel?

[55] The Municipality did not invoke a contractual right to cancel in either of its termination notices. In its answering affidavit in the second application however, the Municipality claimed a contractual right to cancel based on clauses 6.1 and 6.2 which describe the contract as a month-to-month contract and terminable on a month's notice, and on clause 17.4.3 which deals with the Municipality's entitlement to cancel for reputational damage. At the hearing it only persisted with its reliance on the duration clauses.

[56] The question of when and to what extent administrative law principles apply to a contract between an organ of state and a private party, and the circumstances under which state conduct in relation to a contract is 'purely contractual' has been the subject of some dissonance in our law. The prevailing view, as I understand it, is that 'one cannot divorce a contract arising from the performance of statutory functions and the exercise of statutory powers from its statutory background.'¹² By virtue of the view I take on the applications, it is however unnecessary for me to make any firm finding on the Municipality's rights in this regard. I propose accepting without deciding, again in favour of the applicant, that the Municipality had no purely contractual right to cancel.

[57] On that basis, the Municipality is confined to public law remedies. The parties accept that it was open to the Municipality to approach the Court for self-review as

¹² *President of the Republic of South Africa v Reinecke* 2014 (3) SA 205 (SCA) para 16.

required by *Gijima*, the question is whether it is without remedy because it has not done so and seeks instead to raise a reactive challenge.

Reactive Challenge

[58] The applicant contends that the Municipality's only remedy is self-review. That stance is clearly wrong. The applicant's submissions on this score lose sight of the very nature of a reactive or collateral challenge. In *Merafong City Local Municipality v AngloGold Ashanti* 2017 (2) SA 211 (CC) (*Merafong*), Cameron J described collateral challenges as follows:

'Relying on the invalidity of an administrative act as a defence against its enforcement, while it has not been set aside, has been dubbed a collateral challenge – "collateral" because it is raised in proceedings which are not in themselves designed to impeach the validity of the act in question. While the object of the proceedings is directed elsewhere, invalidity is raised as a defence to them.'(footnotes omitted)¹³

[59] Collateral challenges (or reactive challenges as Cameron J held they were better described¹⁴) are thus a defence against the enforcement of an administrative act which has not been set aside, raised in proceedings not directed at the impeachment of that administrative act. Hence 'the remedies of review and collateral challenge differ distinctly in object, application and scope.'¹⁵

[60] Confronted with this difficulty, the applicant changed tack and argued that the Municipality was obliged to raise its collateral challenge in the review and could not do so in response to the applications for interim relief. That line of argument is not sustainable. It would be illogical in the extreme to permit a collateral challenge to be raised in response to a review, but not in proceedings seeking interim relief, the grant of which is dependent on prospects of success in the review. That aside, *Merafong* stressed that South African law has always allowed a degree of flexibility in reactive challenges to administrative action, and that there was no absolute duty of proactivity on public authorities to self-review absent which they were obliged to accept an unlawful decision as valid.¹⁶ A reactive challenge should be available

¹³ *Merafong* para 23.

¹⁴ *Merafong* para 26.

¹⁵ *Merafong* para 32.

¹⁶ *Merafong* paras 44 and 55.

where justice requires it to be, which will depend in each case on the facts.¹⁷ Justice demands that a reactive challenge should be available on the facts here.

[61] The applicant's argument also runs contrary to *Department of Transport v Tasima* 2017(1) BCLR1 (CC) (*Tasima*), in which the Constitutional Court made it plain that an organ of state was entitled to raise a reactive challenge when faced with coercive action based on a constitutionally invalid act.¹⁸ The applications for interim relief seek to implement a constitutionally invalid tender award and are therefore coercive proceedings of the type envisaged by *Tasima*.

[62] The applicant sought to distinguish *Tasima* because there the organ of state had brought a counter-application¹⁹ and here there is none. Absent a counter - application, so the argument ran, the award of the tender and the conclusion of the SLA remained and the Municipality had to give effect to them.

[63] At a level of practicality, the applicant's contentions entail certain difficulties. The enforcement proceedings in *Tasima* sought final relief. A counter-application in such proceedings was therefore entirely appropriate. Where however, the enforcement proceedings take the form of applications for interim relief pending the finalisation of other proceedings in which the validity of the state conduct will be finally determined, it would manifestly be more appropriate for the counter-application to be brought in the main proceedings. That is precisely what the Municipality has indicated it intends to do in the review. Practicality aside, the applicant's argument cannot be sustained for two reasons.

[64] First, the factual difference to which the applicant points does not detract from the rationale articulated in *Tasima* as the basis for permitting organs of state to raise reactive challenges, or the approach required of courts in proceedings such as the present where a party seeks interim relief aimed at preserving a particular *status quo* pending the final determination of the parties' rights:

'Where, as here, the validity of the source of the right the applicant sought to preserve was also impugned on the basis that it was an

¹⁷ *Merafong* para 55.

¹⁸ *Tasima* para 86.

¹⁹ *Tasima* para 48.

illegal source, a court can hardly close its eyes to this and proceed to grant an order preserving an illegally obtained right. Interim relief is not designed to protect an illegal “right”.²⁰

[65] The Constitutional Court lamented the fact that in earlier proceedings, the high court had granted an order which allowed an invalid agreement to be given legal force and effect when it was unconstitutional and unlawful.²¹ *Tasima* held unequivocally that it cannot be right for a court to follow an approach that leads to a party being entitled to an interim order preserving rights until final determination even where those rights flow from an illegal or fraudulent act.²² As a matter of logic those principles apply with equal force to the present proceedings.

[66] Second, the submission is unavailing in the light of the decision of the Supreme Court of Appeal in *Gobela Consulting CC v Makhado Municipality* (Case No. 910/19) [2020] ZASCA 180 (22 December 2020) (*Gobela*) which endorsed a high court decision upholding a collateral challenge and declaring a contract invalid and unlawful despite the organ of state not having launched a counter-application to review and set aside that contract.

[67] The facts were these. The appellant had instituted an action against the Makhado Municipality seeking to enforce a contract it had been awarded following a tender process. The Municipality pleaded, *inter alia*, that the agreement was in contravention of the Local Government Municipal Finance Management Act 56 of 2003 and its supply chain management policy and was therefore unlawful and invalid, but it did not counter-apply for relief setting aside the agreement.²³ This notwithstanding, the high court dismissed the appellant’s claim with costs on the basis that the contract was invalid and unlawful.²⁴ On appeal to the Supreme Court of Appeal, the appellant conceded the contract was invalid but argued that the appeal should be allowed because the high court was not entitled to declare the contract invalid and unlawful in the absence of a counter-application for the contract to be set aside.²⁵

²⁰ *Tasima* para 37.

²¹ *Tasima* para 41.

²² *Tasima* para 42.

²³ *Gobela* para 9.

²⁴ *Gobela*, para 10.

²⁵ *Gobela* para 11.

[68] The Supreme Court of Appeal found that justice required the high court to declare the impugned contract invalid and unlawful despite the municipality not having applied for it be reviewed and set aside, as the validity of the contract had been squarely raised in the pleadings. It held that if the court had not entertained the Municipality's reactive challenge 'the untenable result would be that the court would be giving legal sanction to the very evil which s 217 of the Constitution and all other procurement-related prescripts sought to prevent.'²⁶ The same holds true here.

[69] It follows that nothing about the manner in which the Municipality has raised its reactive challenge precludes me from considering it. Quite the contrary, once a reactive challenge is raised, a court has no discretion to allow or disallow the raising of the defence.²⁷ I am therefore obliged to consider the Municipality's reactive challenge. The only question is whether it has a sound foundation, sufficient to undermine the contractual rights upon which the applicant relies.

[70] The common cause facts demonstrate that the Municipality's challenge is on solid ground. The tender process was irregular and the applicant's bid should never have been considered. Because the SLA was concluded in breach of the legal provisions designed to ensure a transparent, cost-effective and comprehensive tendering process, it was invalid from inception.²⁸ The applicant is consequently unable to establish a right worthy of preservation even *prima facie*, as its alleged right was obtained illegally.²⁹ The applicant is consequently unable to demonstrate prospects of success in the review. This makes it unnecessary to deal with the other requirements for an interim interdict.

[71] As the applicant has not met the threshold for the grant of the interdictory relief it seeks, both applications fall to be dismissed with costs.

Costs

²⁶ *Gobela* para 21.

²⁷ *Merafong* para 32.

²⁸ *Gobela* para 17.

²⁹ *Tasima* paras 37 – 38.

[72] Both Royal and the Municipality seek punitive costs. Royal does so on the basis that the second application was an abuse of process as the applicant failed to demonstrate urgency and its allegations regarding the events surrounding the site takeovers were vague, general and unsubstantiated. The Municipality does so on the basis that the applicant has failed despite repeated requests to furnish the two further audited annual financial statements said to have been available and annexed to the applicant's representations of 15 December 2022, and because of the manner in which the papers were indexed incorrectly and incompletely, and indexes changed at a very late stage.

[73] Together with its heads of argument, the Municipality submitted an affidavit by its attorney ostensibly to appraise the court of matters which had transpired in connection with the applications and give the court an understanding of how the matter had progressed. The affidavit dealt with various exchanges of correspondence between the respective attorneys where the Municipality was requesting documents apparently missing from the papers served on it, and complaints about the manner in which the record had been indexed and paginated. In response, the applicant sought to file a supplementary replying affidavit. Neither of these affidavits was necessary, nor do they assist in any way in determining the issues in the applications.

[74] The applicant's failure properly to index and paginate the court papers in the two applications inconvenienced not only the Municipality and Royal in referencing the papers in their heads of argument, but the court in attempting to navigate the papers and prepare for the hearing. The applicant changed the index to the papers after it had been supplied to the Municipality and Royal so the pagination of the court file did not accord with the pagination the Municipality and Royal used in their heads of argument. This occasioned some difficulty in preparation for the hearing and caused the Municipality to update and amend the references to the papers in its original heads of argument, thereby incurring entirely unnecessary costs.

[75] The papers in the court file were also incomplete, I only came to know that volume 7 of the application papers was missing by virtue of that volume being referred to in the Municipality's heads of argument. Efforts through my registrar to

procure the elusive volume from the applicant's attorneys proved unsuccessful. Eventually, it had to be obtained from Municipality's attorneys so that I could at least read all of the papers before the matter was heard.

[76] All of this is unfortunate, but the disarray of the papers and the difficulties that occasioned the Municipality, Royal and the court would not in my view be sufficient on their own to warrant a punitive costs order.

[77] What does however warrant such an order is the fact that the applicant through both urgent applications sought to preserve a manifestly unlawful *status quo* to enrich itself by receiving payments of some R1.7 million a month from public coffers, and the Municipality was obliged to defend the applications using public funds.

[78] The Municipality in its answering affidavit pointed to the fact that it was the *modus operandi* of some security services providers, particularly in relation to the Municipality, to prolong their unlawful contracts with the Municipality by seeking interim relief of the kind which formed the subject matter of these applications. The Municipality cited various examples of this conduct. Bringing applications on an extremely urgent basis, as the applicant did on both occasions here, increases the likelihood of interim orders which preserve an unlawful *status quo* being granted because organs of state are given insufficient time properly to answer the applications. Fortunately, that did not happen here.

[79] However, the applicant did not launch the second application within a reasonable time of receiving the cancellation letter of 6 March 2023. Instead, it waited and brought the second application as a matter of extreme urgency after the cancellation decision had already been implemented and sought relief which was not competent in the terms in which it was framed at the time the second application was launched. That notwithstanding, the applicant persisted with the second application. In its founding affidavit it made entirely bald and unsubstantiated allegations of serious misconduct on the part of Royal, and persisted in those allegations only to abandon all relief sought against Royal at the start of the hearing.

[80] In my view, all this conduct viewed cumulatively, together with the fact that the Municipality litigates from public funds and should not be out of pocket for attempting to combat illegality and corruption, warrants the grant of costs on an attorney and own client scale, including those reserved previously.

[81] This matter is one of considerable importance for the Municipality and warranted the employment of two counsel. The applicant itself employed two counsel for the hearing. The costs order will therefore include the costs consequent upon two counsel where so employed.

Order

[1] I consequently make an order in the following terms: –

1. The application under Notice of Motion dated 21 February 2023 and the application under the Notice of Motion dated 4 April 2023 are dismissed with costs on the scale as between attorney and own client, such costs to include those of two counsel where so employed and all costs previously reserved.

A.M. ANNANDALE, AJ

JUDGMENT RESERVED:

21 JULY 2023

JUDGMENT HANDED DOWN:

24 OCTOBER 2023

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