

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MTHATHA)**

Case No. 4797/2023

Heard on: 31 January 2024

Date delivered: 28 March 2024

In the matter between:

**PHARAOHS CONSTRUCTION JV
KUZOBALULA**

Applicant

And

INGQUZA LOCAL MUNICIPALITY

First Respondent

MAONA CHIA JV

Second Respondent

JUDGMENT

MAJIKI J:

[1] The applicant approached court in two parts, for interdict pending review and the review. In Part A the applicant urgently sought to interdict and restrain Ingquza Hill Municipality (the municipality) from implementing or giving effect to a certain specified bid award to **Maona CHIA JV (CHIA)** or taking steps to give effect to the purported withdrawal or re-advertisement or taking steps pursuant thereto in respect of the said bid. It also sought certain documents relating to the decisions to giving of notice to award and withdrawal of the bid.

[2] The municipality and the applicant had raised respective objections regarding the applicant's stringent truncated time frames and the delay in the filing of the answering affidavit and other related issues. Nonetheless, on 12 December 2023 when the matter was in court for the opposed interdict proceedings, it was ordered that the matter be postponed to 23 January 2024 for the hearing of the review

application in Part B. The litigants were afforded an opportunity to file further affidavits.

[3] In the review application the applicant sought-

- ‘1. **THAT** the decision of the First Respondent to award the Bid for the construction of new municipal offices in Lusikisiki (Ref no.: ILHM/117/2022-23/roads) (“**the Bid**”) to the Second Respondent be and is hereby set aside;
2. **THAT** the decision of the First Respondent to withdraw the Bid be and is hereby set aside;
3. **THAT** the First Respondent be and is hereby directed to discontinue the tendering process initiated in substitution for the Bid;
4. **THAT** the First Respondent be and is hereby directed to implement the recommendation of its Bid Adjudication Committee with regard to the Bid by awarding the contract for the construction of new municipal offices in Lusikisiki (Ref no.: ILHM/117/2022-23/roads) to the Applicant and concluding the required Service Level Agreement with the Applicant within 10 (ten) days of the order.

This is the opposed review application that was eventually heard. The applicant abandoned the rule 30 application and supplementary affidavit filed on its behalf.

BACKGROUND

[4] On 6 April 2023 the municipality advertised in the daily dispatch, a tender inviting bids for the construction of offices in Lusikisiki, bid number IHLM/117/2022-23 Roads (the bid). The closing date for submission of bids was 23 May 2023. The tender validity period was extended to 6 October 2023. The cost of the project was over R90 million.

[5] The tender advertisement contained various requirements which the bidders were required to comply with. They included construction specifications, latest central supplier data base, signed joint venture agreement, where applicable, proof of registration with Construction Industry Development Board (CIDB), compulsory declarations, annual audited financial statements for the past five years (five year

financial statements) and etc. The tender document further set out the details of tender procedures, compulsory returnable documents, tender evaluation, scoring, pricing instructions, bill of quantities and construction specifications. Bidders who met the requirements were scored for functionally and thereafter price and preference.

[6] Clause F2.1 specifically required the tenderers to register with CIDB for a 8GB or higher class of construction work. For joint ventures the lead partner had to have 8GB or higher class of grading, and each member of the joint venture had to be registered with CIDB. Clause F.2.23 required CIDB contractor, if satisfies grading through joint venture, to submit contractor registration certificate in respect of each partner. Among compulsory returnable documents MBD8, a declaration of bidder's past supply chain management practice, had to be signed by all the partners in a joint venture, with a separate declaration in respect of each partner.

[7] The applicant and Chia were among the entities that submitted bids. The applicant's bid price was 97, 879, 634.72, Chia's bid price was 94, 737, 685.37. All bids received were entered in a tender closing register, which is a public document.

[8] The Bid Evaluation Committee (BEC) established in terms of the management policy considered each bid and evaluated the bid for responsiveness and compliance, in terms of the criterion which was comprehensively contained in the bid document. It considered the applicant to be the preferred bidder and recommended it to the Bid Adjudication Committee (BAC) as such.

[9] On 10 October 2023, after several enquiries, the applicant learnt from a representative of Ikwezi newspaper that the intention to award bid was published in the said newspaper on 6 October 2023. That newspaper is published in Kokstad, KwaZulu Natal the area of Chia, and not in the Eastern Cape, where the municipality is situated. The notice was not published in the daily dispatch, the Eastern Cape newspaper, as the original tender document on 6 April 2023.

[10] The notice gave information that the municipality intended to award the tender to Chia. Chia had neither achieved functionality nor scored on price and preference.

[11] On 11 October 2023, following the notice of the intention to award the bid, the applicant wrote a letter to the municipality requesting reasons why its bid was not successful as well as reasons for awarding tender to Chia.

[12] On 20 October 2023 the municipality issued letters to the bidders advising that the municipal manager decided to cancel the tender process and had the intention to issue an updated tender advertisement in due course. However, according to the applicant the said letter was not sent to the applicant. On 24 October, 6 November and twice on 9 November 2023 the applicant sent emails to the municipality raising concerns about the bid process and failure to receive a response directly or through its attorneys. The one response from the municipality on 6 November 2023 was only an acknowledgement of the correspondence and made no reference to the letter of 20 October 2023. The letter of cancellation was only received on 14 November 2023.

THE REVIEW

[13] According to the applicant fourteen (14) bids were received. VCM2, attached by the municipality which recorded eleven (11) bids related to a tender closing register dated 4 October 2022. Clearly it was in respect of a process prior to the current bid which closed on 23 May 2023.

[14] According to the applicant the municipality's decision to withdraw the tender is an administrative action as defined in the Promotion of Administrative Justice Act, 3 of 2000 (PAJA). The applicant avers further that both the award of the bid to Chia and the purported withdrawal are unlawful and irregular, they should be set aside. The decision that the applicant was the preferred bidder also constitutes a binding administrative action which ought to have been given effect to, as required by the Preferential Procurement Policy Framework Act 5/2000 (PPPF) and the PPPFA regulations, 2022 (current regulations). The bid committee was *functus officio*. The applicant acquired vested rights and a legitimate expectation to be awarded the bid.

[15] According to the applicant the grounds for review of the three decisions, even on the municipalities version are:

- 15.1 The decisions not to award the bid to the applicant and award it to Chia did not meet the standards of lawfulness, fairness, competitive bidding, price effectiveness as contemplated in section 217 of the Constitution. No objective criteria was published justifying the award of the tender to another tenderer other than the one who scored the highest points as provided for in section 2(1) (f) of PPPFA.
- 15.2 The decision to prefer Chia evidenced bias and falls to be set aside under section 6(2) (a) (1) and (111), (b), (c), (e) (f), (h) and (i) of PAJA.
- 15.3 The decision to withdraw the bid was purportedly taken in terms of an enabling provision that had been repealed and was, not effective at the time. That is a ground in terms of section 6(2) (a) (i) PAJA and on the grounds of legality. Consequently, the reliance on regulation 13 of the 2017 PPPFA regulations was misplaced and is irrational.
- 15.4 The municipality's failure to comply with notice requirement of the enabling provision in terms of which it purported to withdraw the tender but not publish the decision to withdraw, constitute a ground for review in terms of section 6(2) (b) of PAJA.
- 15.5 Failure of the municipality to explain reasons to withdraw the bid and to afford bidders a hearing prior the said decision constitutes a ground for review in terms of section 6(2) (c) of PAJA. The compliant bidders were not given an opportunity to be heard before that decision was made. Further, the erroneous belief that the regulations prohibit the five year financial statement requirement in order to make a decision constitutes an error of law and is reviewable in terms of section 6(2) (d) of PAJA.

[16] The decision to withdraw the tender process affects the rights and interests of persons like the applicant as the preferred candidate by the committees.

[17] According to the applicant, it scored the highest points in the bid evaluation process. Chia on the other hand was awarded the tender despite the fact that it did

not meet the bid requirements, it did not achieve functionality and was not scored by the bid committees.

[18] The conduct of the municipal manager was not open and transparent. The applicant did request, on numerous occasions, information concerning the bid award, relevant bid documents and the decision to award the bid to Chia. The municipality refused to furnish the information.

[19] The applicant advised the municipality that it was going to take legal action. The municipality then informed the applicant that the tender was withdrawn and would be re-advertised.

[20] The applicant sets out the bid process that was followed, which the municipality did not dispute. The first stage was that only bidders who complied with compulsory returnable documents were eligible to be scored for functionality. The second stage was that the bidders had to be scored against criteria, set out in tables at pages 3 and 4 of the tender document. Bidders were required to score 70 out of 100 points to achieve functionality. The third stage was that the bids were scored on price and preference in accordance with the PPPFA. The PPPFA established a framework which provided preference point system in which points are allocated for specific goals and price. The ⁹⁰/₁₀ preference point system was applied because the contract exceeded R50 million. The lowest acceptable tender would score maximum of 90 points for price.

[21] The applicant's enquiries on 11 October 2023 reveal that the status of the lead partner of Chia was suspended by the CIDB. At best, on 5 December 2023 Chia only had a grading of 7GB and 2GB respectively, when considering information supplied in the answering affidavit. The municipality cannot rely on annexure VCM 10, the extracted information therein does not meet the required grading, the lead partner had to have 8GB grading or higher. The second member of the joint venture was not registered with CIDB. Further searches on 19 and 20 October indicated that by those dates Chia still did not meet the required grading. Chia therefore did not meet the mandatory CIDB registration, prior to the evaluation of submissions and

ought to have been disqualified. According to annexure FA7 to the answering affidavit, Chia's CIDB was suspended.

[22] Further, the MBD 8 form was only signed by one partner of the joint venture. The BEC's report recorded 'Mandatory documents not fully attached'. MBD forms had to be completed in terms of Treasury instructions. The bid notice prescribed that, failure to have joint venture signed by both parties would lead to disqualification.

[23] On 13 October 2023 following further enquiries about information regarding the bid evaluation, in particular, the functionality, from the municipality, the municipal manager responded. He stated that various factors were taken into account when considering the tender, such as price, functionality etc. According to the applicant that information was vague. Furthermore, that approach could not be reconciled with the intention to re-advertise the bid. As regards the request for documents he said the documents were privileged and private information, despite the fact that minutes are public documents. Even the bid document after submission becomes a public document. The applicant in a review is entitled to all information relevant to the impugned decisions or proceedings especially if such documents throw light on the decision making process.

[24] A photo of a single page from the minutes of BAC from an anonymous person was sent to the applicant. It indicated that only four (4) bidders, **Drop dot, Temi Construction JV Mvumba Trading Enterprise, Rapid Builders Constructors** and the applicant achieved functionality. The applicant scored 3,5 out of 10 for specific goals and 90 points for price as the lowest acceptable tender.

[25] The applicant avers that it should have been awarded the bid by virtue of section 2(1) (g) of the PPPFA read with regulation 5(4) of the current regulations. It was improper for the municipality not to award the tender. It was also irregular for the municipality to disguise its irregularity by not properly advertising the bid award and not to inform the bidder of the outcome of the bid process. Section 75 (1) (a) and (g) of the Local Government Municipal Finance Management Act 56 of 2003 (the MFMA) read with MFMA circular 62 issued by the national treasury and circular 83 of MFMA require the bid award to be placed on the municipality website. The bid

award was not published in the municipal website and e-tender publication portal. That was a clear effort to hide the bid process.

[26] On 9 November 2023 the applicant recorded the applicant's objection to the intention to award the bid to Chia. Had there been no appeal under section 62 of the Municipal Systems Act or an objection under paragraphs 49 and 50 of the municipality's SCM policy, the decision would have been implemented. According to the applicant the intention to award constituted a decision. The applicant had also stated that if documents previously requested were not furnished in 24 hours, it could take action.

[27] With no reason being given for the withdrawal, the applicant submits that the withdrawal was malafide. The municipality was not entitled to unilaterally withdraw the bid. The conduct of the municipality and the municipal manager is suspicious in relation to the decision about the award of the bid, the improper advertisement of the outcome and that of withholding the bid documents.

[28] The applicant received documents following the order for the delivery of record in terms of rule 53. However, the applicant says it was furnished with limited documents. The applicant submits that the decisions made by the municipality are contradictory, unlawful and irrational. They fall to be reviewed and set aside. It identified the applicant as the preferred bidder; it stated its intention to award the bid to Chia and that it announced that the tender had been withdrawn. The applicant avers that this is an exceptional matter where substitution should be ordered in terms of section 8(1)(c) (ii) (aa) of PAJA. It would be equitable to direct the municipality to implement the recommendations of BEC and award the tender to the applicant.

[29] There was no lawful justification to prefer Chia. The municipal manager had no power to substitute the recommendation of the BEC. The decision evidences unfair preference and bias.

[30] It was erroneous for the municipal manager to believe that the regulation prohibits a bid requirement of five (5) years' financial statements. The three year requirement is a minimum period. The municipality is not precluded from setting

more stringent standards. That would not be surprising considering that the scale of the project and the cost of construction works was over R90 million.

[31] According to the applicant no explanation is given by the municipality for the irregularities. The tender process was manipulated to come to the conclusion of awarding the bid to Chia. The municipality manufactured documents in order to evade responsibility for its actions. It attached annexure VCM3 as if it was the F11 attached in the founding affidavit. Items 8, 9 and 10 are not the same. The last paragraph of F11 appears on the next page in VCM3. VCM9, the attached Municipal Finance Act regulations also omitted paragraphs 23 to 50. Paragraph 23 provides for publishing of bid results, paragraphs 49 and 50 provides for appeal and objections procedures.

[32] The municipality had set requirements which ensured that the successful bidder was technically able to undertake the construction works, had resources to do so and was financially sound. These included appointment of a principal agent (resident engineer, Masilakhe Consulting) in advance to assist to compile the bid. With regard to the financial statements requirements, the municipality could have applied the three year threshold and issued a clarification or briefing note as it usually happens with complex bid processes.

[33] With regard to cancellation of the tender on the basis of alleged material irregularity, the municipality relied on replaced regulations, regulation 13 of 2017 preferential procurement regulations. The said regulations were replaced by the current regulations which do not have such cancellation provision. Even old regulation 13 made provision for cancellation of tender before the award of tender. According to the applicant the award herein had already been made to Chia. It was also not published in the same manner as the invitation to tender.

[34] There is no confirmation, by the member of BEC, of the averment that the BEC reconvened and resolved to stand by its earlier decision. No minutes of the meeting or written resolution has been furnished in that regard. The email annexed as VCM5 was not from Eastern Cape Provincial Treasury as the municipality averred. The content of the email is to the effect that the project could be evaluated

or re-advertised. There was no advice that the tender be cancelled. The municipality also said the treasury advised it not to deviate from its own bid requirements.

[35] The applicant disputes that the publication of the notice of intention to award the tender had a neutral effect. It permitted appeal and objection processes in terms of section 62 of the Systems Act or paragraphs 49 and 50 of SCM regulations. None of the objections raised the five (5) year financial statement requirement, which the municipality said was a motivating factor to withdraw the tender. The municipality has also not transparent about the internal legal advice regarding the said requirement.

JUST AND EQUITABLE RELIEF

[36] The applicant submits that the court must declare the municipality's action unlawful and make a just and equitable order. The circumstances of this case are exceptional. The municipality should be directed to implement the recommendations of the BEC and award the tender to the applicant. There has not been a change in the applicant's circumstances regarding its ability and capacity to perform the work. There would be no basis for the municipality to reconsider a bid for the construction works. The applicant submits that the provision of the services is necessary and enhances public services. The re-advertising and re-evaluation of new bids would have the effect of validating the municipality's irregular and unlawful conduct which would result in a great injustice. It would further a wasteful and inefficient use of resources.

THE RESPONDENTS' VERSION

[37] According to the municipality, the recommendation of any bidder as the preferred bidder does not necessarily imply that the said bidder is absolutely and conclusively the preferred bidder. The BAC that receives the views and reasons of the BEC still do consider if it agrees with BEC. The BAC, depending on its delegation in terms of Section 59(1) of the Local Government Municipal System Act of 2000 (Systems Act) may make a final award of the preferred bidder. The BAC through the municipal delegation makes recommendations to the municipal

manager, the accounting officer. If the BAC detects irregularities, it may still remit the matter back to the BEC to reconsider the matter in the light of irregularities. The recommendation complained of, that of appointing Chia, could also be changed anytime by the BAC or municipal manager in the execution of the Municipality's Supply Chain policy and applicable prescripts.

[38] The BAC viewed the requirement of five year financial statements requirement as unlawful. The supply chain regulations from national treasury (SCM regulations) require those financial statements to be for three (3) years. Then, the BAC returned the matter to the BEC recommending that the tender be cancelled and that it be re-advertised with the correct requirements. The BEC considered what BAC recommended but did not alter its decision that recommended the applicant as a preferred bidder. The BEC received advice from the provincial treasury that in the light of the two inconsistent decisions of the committees, the tender should be cancelled and be re-advertised.

[39] The municipal manager's view was that he was not bound by the two committee recommendations. He considered that if the five (5) year requirement was substituted with three (3) years, Chia would be the most compliant bidder, based on price and functionality, it would be the preferred bidder.

[40] The municipal manager issued the notice of intention to award the tender to the second respondent. Simultaneously he sought internal legal advice as to whether the five (5) year financial statement requirement was a material irregularity. The notice to award was not an award, he could still seek advice, but the notice was meant to test whether bidders felt prejudiced by the five (5) year requirement.

[41] According to the municipality there was nothing irrational about issuing the intention to award. It was a neutral act as the final award had not been made. Even after the final award was made, if he was later advised that the five (5) year requirement for audited financial statement was a material irregularity, the municipal manager could approach the courts for self-review.

[42] When the municipality received objections on that very issue of five (5) year audited financial statements, that became one of the motivating factors to take the decision to withdraw the tender before the award and re-advertise in a manner compliant to regulations. The internal advice was also that the said requirement was contrary to the regulations. According to the respondent that constituted an irregularity justifying the cancellation of the tender process.

[43] In terms of regulation 13 of the 2017 PPPFA regulations the organ of state may cancel the tender invitation if there is a material irregularity in the tender process. Municipality supply chain practices are constitutionally obliged to be fair, transparent and cost effective. Requiring information that is contrary to the PPPFA regulation was unfair to the would be bidders, who did not bid due to that requirement. In terms of Regulation 21 of the regulation under Local Government Municipal Finance Management Act, 2003 (Municipal Finance Act) the requirement is for three (3) year financial statements. It was within the municipal manager's inherent power and authority to regularise administrative defects that would affect fairness of the tender process, even in the absence of the regulations.

[44] The BEC decision to select the applicant as a preferred bidder was not a decision in the legal sense. It was a recommendation that did not have external effect and could not be effected. It does not constitute an administrative action, it is a recommendation.

[45] Regarding information requested by the applicant, the municipality avers that it is a public body in terms of the Promotion of Access to Information Act (PAIA). The municipality was also not given reasonable period to supply the information. The applicant ought to have sought information through the relevant processes in terms of applicable legislation. The notice of intention to award the bid published in Ikwezi newspaper was published in the newspaper that circulates within the jurisdiction of the municipality. It is only the publication that is done out of Kokstad.

[46] The municipality denies that it had information demonstrating that Chia's CIDB status was suspended. Chia in its tender document included information which showed that its CIDB status was valid. As for the confidentiality of BEC report, it was

based on the fact that such report involved information about third parties. The procurement process had not been completed as no award had been made.

[47] The municipality denies the relevance of section 75(1)(e) of the Municipality Management Finance Act regarding the publication of the notice to award the tender. There were no unsuccessful bidders at that stage as there was no decision to award the tender to any bidder. The withdrawal letter of 20 October 2023 was sent to the email address obtained from the applicant's official documents and its central supplier database registration.

[48] The withdrawal of the tender was not mala fide. The municipality denies illegality on its part. There was an irregularity in the tender process. The withdrawal was done to prevent an illegality or harm to all bidders. The applicant will get another opportunity to submit a bid. If there was any illegality the applicant would be entitled to compensation under section 8 of PAJA.

[49] During the hearing the municipality raised the point, for the first time, that the tender was not valid beyond 6 October 2023. On 6 October the municipality only issued a notice to award the tender to the second respondent. On 10 October 2023 when the applicant learnt of the said intention and on 11 October 2023 when it enquired as to why it was not successful no final award had been made. The notice of intention to award, allowed the tenderers to make representations before the final award was made.

[50] The issue for determination is whether any of the actions complained of constituted an administrative decision in terms of PAJA and therefore reviewable. Further, whether an order for substitution is justifiable in the circumstances of this case.

[51] The issue about the validity of the tender does not seem to be consistent with the municipality's pleaded case. The municipality in its version issued the notice to award on the date to which the period of the tender was extended. It is not clear what the municipality would do with representations, objections to or appeal against its intention to award to Chia, if it considered the tender to have been invalid. An

important observation regarding finality of the decision to award a tender was made in **Mixshelf 1(Pty) Ltd**; [2010] ZAWCHC 70 (9 February 2010) at paragraph 32, that is only against an effective decision that an appeal ordinarily lies. However, therein a clear decision to award the tender had been made. In the present case had the notice of intention to award not attracted objections the award to Chia would have gone through. I do not agree that the said notice had a neutral effect or had no effect, such that beyond 6 October 2023 the tender would have been withdrawn at will or the procurement process in these circumstances would have come to an end. In the municipality's version the tender was withdrawn for a different reason that of non-compliance with SCM regulations. In any event, I agree with the applicant, the notice of award interrupted the period of validity of the tender, having been made on the date the tender would have expired.

[52] Section 1 of PAJA defines an administrative action.

In **Minister of Defence and Military Veterans v Motau and others** 2014 (3) SA 69 CC at paragraph 25 broke down the definition as follows:

- (a) there must be a decision of an administrative nature
- (b) by an organ of state or a natural or juristic person.
- (c) exercising public power or performing public function
- (d) in terms of any legislation or empowering provision
- (e) that adversely affects rights
- (f) that has a direct external legal effect
- (g) and that does not fall under any of the listed exclusions.

[53] In **Madibeng Local Municipality v DDP Valuers** [2020] ZASCA 70 (19 June 2020) paragraphs 16,17 the court had to determine whether an organ of state's decision to cancel a tender is reviewable under PAJA. It differentiated between the decision to cancel prior to adjudication of the tender and tender cancelled during the tender process. Therein tender was cancelled after an award had been made but set aside. **City of Tshwane Metropolitan Municipality and others v Nambiti Technologies (Pty) Ltd** 2016 (2) SA 495 [24-34] states:

“[24] Whether the cancellation of a tender before adjudication is administrative action in terms of these requirements depends on whether it involves a decision of an administrative nature and whether it has direct, external legal effect. I do not think that the decision in this case satisfied either of these criteria.

[25] To determine if action by an organ of state is administrative action requires an analysis of the nature of the action in question and a positive decision that it is of an administrative character.⁸ Here the decision related to a matter of procurement. The issue of a tender indicated that the City wished to procure certain services. But its desire to procure them was always provisional. That follows from the terms of the advertisement of the tenders, which contained the caveat that ‘the lowest or any tender will not necessarily be accepted’. In the standard conditions of tender, which counsel agreed applied to both tenders, clause F.1.5.1 provided even more explicitly that the City ‘may cancel the tender process and reject all tender offers at any time before the formation of a contract’. In cancelling tender CB204/2012 the City was doing no more than exercising a right it reserved to itself not to proceed to procure those particular services on the footing set out in that tender.

[26] It is possible that these express reservations merely made explicit what would in any event have been the position, namely, that it is always open to a public authority, as it would be to a private person, to decide that it no longer wishes to procure the goods or services that are the subject of the tender, either at all or on the terms of that particular tender. (I stress that there is no allegation in this case that the decision was tainted by impropriety such as improper political influence, fraud, bribery or corruption, where different considerations may apply.)

[27] In saying this I am aware that reg 10(4) of the Procurement Framework Regulations 2011,⁹ provides that prior to awarding a tender an organ of state may cancel a tender in three circumstances, namely if:

- due to changed circumstances there is no longer a need for the services, works or goods requested;
- funds are no longer available to cover the total envisaged expenditure;
- no acceptable tenders are received.

[28] In *Trencon*¹⁰ it was said that this regulation constrained the discretion afforded an organ of state by the terms of the tender and that a tender could only be cancelled if one of the grounds set out in the regulations existed. It is unclear what is meant by ‘changed circumstances’ in this regard. Would it be a changed

circumstance if the organ of state concluded that the terms of the tender were detrimental to its interests? What if the goods or services were still required, but the terms of the tender were no longer thought to be favourable? Why should an organ of state be constrained by the necessity to demonstrate a change of circumstances, in order to cancel a tender for goods or services that it had decided it no longer needed? A change in control of a municipality could easily lead to a change in priorities. Is it suggested that the incoming council would be forced to go ahead with procurement decisions with which it did not agree? Take the simple example of a tender to purchase a new mayoral car. That the mayor needed a car might not be in dispute. But the outgoing council might have issued a tender for the acquisition of a luxury vehicle, while the incoming council might believe that something more modest would be appropriate. Would that be a sufficient change of circumstances?

[29] These are difficult questions. *Trencon* was not concerned with the cancellation of a tender. It was concerned with whether the court should have made a substitution order that a tender awarded to one company unlawfully be awarded to the tenderer whose bid had been unlawfully excluded. It is not clear in what context the argument was advanced that the public body concerned was not obliged to award any contract at all. That was not the factual situation with which the court was confronted. Assuming that to have been correct, the reality was that a contract had been awarded and it was the intention to proceed with the work. So cancellation was not an issue. Furthermore, the statement in question was based on a concession by counsel that was accepted as correct without explanation.

[30] The regulation is couched in permissive, not mandatory, terms. There is nothing to show that it is intended to be restrictive in regard to an organ of state's powers to cancel a tender. In addition the organ of state is equally obliged to conduct the tender process strictly in accordance with the tender conditions, which also have a statutory provenance. But there is no need to resolve these questions because in this case there was a change in circumstances. The needs of the City had been reviewed and it no longer required that SAP support services be provided to it for the period stipulated in CB 204/2012 or on the same terms as those in that tender. Its requirements changed and that is why it cancelled the tender. In terms of the regulation it was entitled to do so. No contrary argument was advanced in Nambiti's heads of argument.

[31] Until the tender was issued the City was entirely free to determine for itself what it required by way of SAP support services. The evidence showed that it had decided that it did not want those services on the conditions set out in CB204/2012. In other words it decided to deal with its requirements for SAP support services on a different basis. That was a decision it could have reached at the very outset and Nambiti would have had no grounds for complaint. I cannot think that because it thought initially that a fresh contract on the basis of CB204/2012 was desirable and then, on reconsideration changed that view, the decision to cancel CB204/2012 constituted administrative action. While there are instances where a decision not to do something may constitute administrative action, as in the case of a failure to issue a passport or an identity document, inaction is not ordinarily to be equated with action. Even less so is it administrative in nature. Administration is concerned with the implementation of the policies and functions of government after those policies and functions have been determined, usually through the political process or as a result of actions by the executive. A decision not to procure certain services does not fit easily into that framework.

[32] But the second aspect seems to me, if anything, clearer. A decision not to procure services does not have any direct, external legal effect. No rights are infringed thereby. Disappointment may be the sentiment of a tenderer, optimistic that their bid would be the successful one, but their rights are not affected. There can be no legal right to a contract and counsel did not suggest that there was. When asked to identify the direct, external, legal effect of cancelling tender CB204/2012 his sole submission was that his client had a reasonable expectation that its tender would be considered by the Bid Evaluation Committee (BEC) and thereafter by the BAC. But that expectation was dependent on there being an ongoing tender process, where principles of just administrative action are of full application. Once the entire tender was cancelled any expectation that the tenders submitted by tenderers would be adjudicated by the BEC and the BAC fell away.

[33] No other direct external legal effect was suggested to us and I can think of none. Nambiti's legal entitlement to provide SAP support services to the City would expire at the end of December 2012. Thereafter it had no right to provide those services. It had a right to a fair adjudication of tender CB204/2012, but only so long as that tender remained extant. Once it was cancelled none of the tenderers had any rights

in relation to, or arising from, it. In the words of King Lear 'Nothing will come of nothing.'¹¹ There is no scope in that situation for the king's injunction to think again.

[34] It follows that the decision by the City to cancel the tender was not administrative action and was not susceptible of review in terms of PAJA. As that was the sole basis upon which the review was brought it should have failed on this ground. But even if the decision had been susceptible to judicial review on the grounds of unfairness advanced by Nambiti it should not I think have succeeded. It is appropriate briefly to state my reasons for saying that (footnotes omitted).

[54] Therein the tenders were opened on 13 November 2012. On 30 November 2012 a resolution to fast-track and finalise tender was made following declined request of 23 November 2012 to extend existing contract after review of the terms of tender in the light of the city's needs. The review found services sought in the tender were inconsistent with the city's need. Then a decision to cancel the tender was made on 7 December 2012.

[55] The time from the opening of tender to its cancellation, with the review undertaken in between and decision to cancel tender, present different scenario than the present case. The reason to cancel herein is said to be irregularity, the decision to cancel was made after numerous enquiries about outcome of the tender, during the process of the award, not for any change in municipality's needs. The BEC had already recommended, the notice of intention to award was already issued. I agree with applicant that the decision to withdraw or cancel the tender did not flow from a policy decision related to the need to procure. The municipality held a view that the five (5) year requirement was unlawful. The process of award was only intercepted by objections. The notice of intention to award was out there in the public domain. In the municipality's view it was testing if any tenderer would have felt prejudice, logically if there was none, the award would have been final.

[56] Section 2(1)(f) of PPPFA provides that the contract must be awarded to the tenderer who scores the highest points, unless there is an objective criteria justifying the award of the tender to another tenderer other than the one who scored the highest points.

[57] Section 217 of the Constitution of the Republic of South Africa, 1996 (the Constitution) provides:

“when an organ of state in the national, provincial or local sphere of government or any other institution identified in national legislation, contracts for goods and services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost effective.”

[58] The municipality's reasons for not awarding the tender to the preferred bidder are; its view that the five year financial requirement was unlawful; it was contrary to the regulations and unfair to would be bidders; the BEC and BAC inconsistent decisions; reliance on non-existent regulation 13 of 2017 PPPFA to cancel the tender before an award is made, if there is a material irregularity. It denies that the CIDB grading did not meet the tender requirements and that it was obliged to publish in terms of 75 (1) (e) of MMFA. The municipality avers that the applicant could claim for compensation if illegality was proved.

[59] It is not in dispute that even on the version of the municipality as at 5 December 2023 from Chia's supplied grading calculator 8 GB grading was for calculated grading and class of work for the joint venture and not lead partner. Further, it is common cause that MBD8 was signed by one partner of the joint venture. The BEC recorded in annexure VCM3 to the answering affidavit that mandatory documents were not fully attached by Chia.

[60] Chia was therefore not eligible to have its tender evaluated, in terms of clause F.2.1 of standard conditions of tender. The notice of intention to award the tender was not pursued. No award was made. Consequently, it is not necessary to determine the issue of whether PAJA applied thereto.

[61] Regarding the decision to withdraw the tender, the municipality relied on regulation 13, of the 2017 PPPFA regulations. In relation to its belief that SCM regulations prohibited five (5) year annual financial statements requirement. Also, that the advice of provincial treasury was to cancel and re-advertise in the light of BEC and BAC not agreeing on the course to be taken about the tender and non-compliance with SCM regulations. In actual fact the applicable current regulations

do not contain a provision similar to the one in regulation 13 of 2017 PPPFA regulations. SCM regulations did not prohibit the five (5) year period. Regulation 21(d) requires that in certain circumstances, bidders should furnish financial statements for the past three years. There is no requirement that the said period is a maximum period. Instead, depending on the circumstances, in order to prove that the entity is financially sound, it prescribes the period not to be less than three (3) years. The period of more than the said three (3) years provide more security of the entity's financial stability. That was an error on the part of the municipality. Its considerations were also irrelevant and unreasonable.

[62] The decision to withdraw the tender and not to award the tender to the applicant as the preferred bidder is not explained by the municipality. Similarly, the intention to award the bid to Chia, despite Chia not being compliant, in that it did not comply with the compulsory conditions of the tender, has not been explained. The actions of the municipality in this regard do not meet the requirements set out in section 217 of the Constitution of lawfulness, fairness and price effectiveness. Section 6(2) (a) (i) of PAJA provides for review of an administrative action if the decision maker was not authorised to do so by the empowering provision. Regulation 13 of 2017 PPPFA regulations was not in existence at the time the decision to withdraw was taken.

[63] According to the BEC report Chia's tender was found to be unresponsive, for non compliance with mandatory term of the tender document. No explanation has been furnished as to how it was scored for functionality and further stages as outlined in paragraphs five and twenty above, for the municipality to aver that had the five (5) year period been substituted it would be the preferred bidder. The letters communicating the notice to award the bid were not sent to the e-mail address furnished by the applicant in its bid document. The objection which the municipality said raised the five year financial statements requirement was not attached to the papers. The attached document has no reference to the said requirement. The actions of the municipal manager, including the ignorance of both the BEC and BAC recommendations, without more than, testing if any of the tenderers would say they were prejudiced, is not satisfactory. The BAC did not refer to Chia at all in its report. The municipality has not been transparent about the processes undertaken in that

regard. Its actions therefore are inconsistent with the provisions of section 217 of the Constitution.

[64] The decision to eventually withdraw the tender has no valid legal basis in the circumstances. There is no objective criteria which has been advanced as to why the preferred tenderer was not awarded the tender. If the municipality was to start the tender process afresh, that would have a potential of allowing non compliant tenderers to regularise those aspects in order to comply with the tender requirements.

[65] Regarding the reason for withdrawal, being to prevent harm on would be bidders due to the requirement of financial statements which exceeded what the SCM regulations require, it is not supported by the actions of the municipality. After all the advice the municipality alleged to have received, it continued to issue the notice to award the tender to Chia. The municipality also referred to a repealed regulation, which was a misconception. It was also not shown that the withdrawal of the tender was prompted by an objection from the tenderers. This court is not persuaded that the withdrawal of the tender is rationally connected to the reasons advanced by the municipality. In contrast the requirement could be viewed as advancing the purpose the regulation sought to achieve, that the entities bidding for the tender were financially sound.

[66] The aspect of not affording the bidders the opportunity to be heard before the withdrawal of the tender is procedurally unfair and offends section 6(2)(c) of PAJA. In the circumstances, the applicant must succeed in having the decision to withdraw the tender reviewed and set aside in terms of section 6 of PAJA.

REMEDY

[67] Even though there is no record that the objections were finalised, the referral of the tender to the municipality would not achieve more as the notice to award was successfully interrupted and the tender was eventually not awarded to Chia. That process restored the position of being left with the recommended preferred bidder. Section 8 (1) (c)(aa) of PAJA provides for substitution or varying of the administrative action or correcting a defect resulting from administrative action, in exceptional

cases. In the founding affidavit the applicant referred to the fact that its ability and capacity to perform the work has not changed. Further, the re advertising and re-evaluation of the new bids would have the effect of validating unlawful conduct and furthering wasteful and inefficient use of resources. The applicant is the tenderer. Section 2 (1)(f) of the PPPFA provides that the bid be awarded to, unless there is an objective criteria justifying the award of the tender to another tenderer. In argument it was submitted on its behalf that all the technical aspects in the evaluation of the tender had been undertaken and it was recommended as the preferred bidder.

[68] In the light of the above, the administrator is not in a better position in the consideration of the matter, the evaluation of technical aspects have concluded. The award of the tender to the applicant is therefore a foregone conclusion. Furthermore, with no justification to prefer Chia, the conduct of the municipality suggests undue favour towards Chia. Consequently, this court is of the view that exceptional circumstances which satisfy the requirements set out in *Trencon Construction (PTY) Ltd v Individual Development Corporation* 2015 (5) SA 245 CC paragraphs 43 and 47 for an order of substitution have been satisfied. The following order then would be just and equitable.

1. The decision of the first respondent to withdraw the bid is hereby set aside;
2. The first respondent is hereby directed to discontinue any tendering and subsequent processes initiated in substitution for the bid;
3. The first respondent is hereby directed to implement the recommendation of the Bid Evaluation Committee to award the contract for the construction of new municipal offices in LUSIKISIKI (Ref no.: ILHM/117/2022-23/roads) to the applicant and concluding the required Service Level Agreement with the applicant within 20 (twenty) days of the service of the order.
4. The first respondent is hereby ordered to pay the costs this application.

B MAJIKI
JUDGE OF THE HIGH COURT

Appearances

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