

**HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

CASE NO: 38145/2022

(1) REPORTABLE: NO.

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED.

DATE: 12 DECEMBER 2023

SIGNATURE

In the matter between:

**KEEGANS AUTO SPARES AND ACCESSORIES CC
t/a JAYMEES MIDAS**

Applicant

and

NATIONAL TREASURY OF SOUTH AFRICA

First Respondent

**CHIEF DIRECTOR: TRANSVERSAL
CONTRACTING OFFICE, NATIONAL TREASURY**

Second Respondent

**THE ACTING DIRECTOR GENERAL,
NATIONAL TREASURY**

Third Respondent

THE MINISTER OF FINANCE

Fourth Respondent

THE MINISTER OF POLICE

Fifth Respondent

THE NATIONAL COMMISSIONER OF POLICE

Sixth Respondent

ALLPARTS (PTY) LTD

Seventh Respondent

KAIZEN MSD (PTY) LTD

Eighth Respondent

AHK MOTOR PARTS (PTY) LTD

Ninth Respondent

DAR AUTOMOTIVE (PTY) LTD

Tenth Respondent

BOUTIQUE LEASING COMPANY (PTY) LTD

Eleventh Respondent

ORDER

The application is dismissed with costs, including the costs of two counsel, where employed.

J U D G M E N T

This matter has been heard in open court and is otherwise disposed of in terms of the Directives of the Judge President of this Division. The judgment and order are accordingly published and distributed electronically.

DAVIS, J

Introduction

[1] On 21 May 2021, the National Treasury of South Africa (the Treasury) called for bids for the supply of automotive parts and tools for the State, primarily for use by the South African Police Service. The applicant, Keegans Auto Spares and Accessories CC t/a Jaymees Midas (Keegans) unsuccessfully bid for this tender. The Treasury maintains that the reason for Keegans' failure was that it did not meet the requirement of demonstrating a "footprint" in the provinces for which it had submitted bids. It consequently disqualified Keegans from the award of a tender for any of the provinces. It is this decision which Keegans sought to have reviewed.

The parties

[2] The Treasury was cited as the first respondent and the Chief Director: Transversal Contracting Office and the Acting Director General, both of the Treasury, were cited as the second and third respondents respectively. The Minister of

Finance was cited as the fourth respondent and the Minister of Police and the National Commissioner of Police were cited as the fourth and fifth respondents respectively. The seventh to eleventh respondents were the other bidders, of which the seventh and eighth respondents had been successful.

The tender

[3] The tender in question was for the “Supply and Delivery of Automotive Parts and Tools to the State” for a period of 36 months, labelled RT45-2021.

[4] The bidding process, supervised by the Treasury (due to the fact that “Transversal Contracts” were envisaged) was subject to “General Conditions of Contract” (GCC) requirements, issued in accordance with Treasury Regulation 16A (GNR 225 of 15 March 2005 – Amendment of Treasury Regulations in terms of Section 76) issued in terms of the Public Finance Management Act 1 of 1999 (the PFMA) as well as the Preferential Procurement Policy Framework Act, 5 of 2000 (the PPPFA). In addition, “Special Conditions of Contract” (SCC), as provided for in the GCC, were also applicable.

[5] The scope of works for the tender was to provide the South African Police Service with automotive parts and tools on a nationwide basis. The successful bidder was expected to have the capacity and capability to render the service as required. A prospective bidder could bid for any number of provinces and/or a combination of provinces.

[6] In addition to the above, bidders were required to complete an “Authorization Declaration” (in terms of clause 5.3.5 of the SCC, provided for in a prescribed format, labelled TCBD1).

[7] The Authorisation Declaration required an indication as to whether the goods to be supplied would be acquired from a “third party”. If so, the bidder was required to declare that the goods were sourced from a third party, in respect of which the bidder needed to supply particulars of the bid items and the brands thereof to be supplied by each third party. In respect each third party the bidder also had to supply the name, physical address and contact particulars. In addition the bidder

had to supply an unconditional written undertaking from each third party to supply the specified goods “... *in accordance with the terms and conditions of the bid document* ...”.

[8] In addition to the above, the bidder was required to acknowledge in the bid documents “... *that the State reserved the right to verify the information contained therein and, if found false or incorrect, may involve any remedies available to it in the bid documents* ...”.

[9] The “bid documents” (in this case, the SCC) provided for three phases of evaluation of bids. Phase 1 encompassed the “Pre-qualifying Criteria” and required that only bidders having a B-BBEE contributor status level of 1 – 8 would qualify (Keegans was able to satisfy this requirement).

[10] Phase 2 encompassed “Mandatory Requirements and other Bid Requirements”. This included as clause 5.3.4 of the SCC the following (due to the “footprint” issue being the crux of the dispute, the clause is quoted in full):

“5.3.4 *FOOTPRINT*

- (a) *It is a requirement of this bid that bidders provide the details of their footprint in the province they are bidding for.*
- (b) *For each province a bidder bids for, the bidder must provide a list of their offices/warehouses and details of activities taking place in that office/warehouse. The details of activities must amongst others over the following:*
 - (i) *Address of the offices/warehouses.*
 - (ii) *Type of office (office/warehouse).*
 - (iii) *Parts or stock held at that office/warehouse in that particular province.*
 - (iv) *Areas that are served by that office/warehouse in that particular province.*
- (c) *Annexure A: Footprint Declaration of undertaking form must be used to provide details of the footprint. No other format will be accepted for this purpose.*

- (d) *Over and above the submission of Annexure A, bidders must submit proof of existence of such office/warehouse by submitting any document (not older than 3 months) but not limited to the below:*
- (i) *Utility bill, e.g. municipal water and lights account or property managing agent statement;*
 - (ii) *Municipal rates and taxes invoice;*
 - (iii) *Telephone statement;*
 - (iv) *Letter from municipality confirming business address.*
- (e) *Bidders will be disqualified if they don't provide information".*

Keegans' bid and the evaluation thereof by Treasury

[11] Timeously before the extended closing date, Keegans submitted its bid for the North West Province, Gauteng Province, Limpopo Province, Free State Province and the Mpumalanga Province.

[12] Keegans' bid, together with 22 other bids were evaluated by a Bid Evaluation Committee (the BEC). All twenty-three bids passed the pre-qualification phase and progressed to the second phase.

[13] Sixteen of the twenty-three bidders failed to submit the required information and/or documents necessary to comply with the mandatory requirements of phase 2. The remaining seven bidders, including Keegans and the seventh and eighth respondents were considered responsive and were then evaluated for compliance with phase 2.

[14] Keegans "Footprint Declaration", signed by the deponent to its affidavit delivered in support of this review application, contained the following declaration: "*I, Manmadam Verdapen Govinder ... do hereby provide an undertaking that the offices/warehouses provided in the table are our offices/warehouses and will be utilised for the purpose of providing services as required by this bid, should we be awarded any portion of the contract*" (my emphasis). This was followed by a table containing the following particulars:

	<u>Province</u>	<u>City/Town/Area</u>	<u>Address</u>	<u>Office/Warehouse</u>
1.	Gauteng	East Rand	2 Gordon Ave, Linbro Park	Warehouse
2.	North West	Pretoria	Unit 2A April Malan S Moot, Pretoria	Warehouse
3.	Mpumalanga	Nelspruit	15 Fuschia Str, Nelspruit	Warehouse
4.	Free State	Bloemfontein	2 Blignanlt Str, Bloemfontein	Warehouse
5.	Limpopo	Polokwane	Corporate Park 2, Polokwane	Warehouse

For each of the warehouses it was indicated that the “entire range” of parts would be held thereat.

[15] The BEC conducted a due diligence exercise to verify that the declared information indicated a “... *capacity to deliver the services tendered for, by way of a “footprint” of offices and/or warehouses from where the goods will be stored, ordered and delivered*”. It found that the warehouses indicated by Keegans actually belonged to an entity named Parts Incorporated Africa Ltd t/a Motus Aftermarket Parts (Motus). The BEC therefore on 15 February disqualified Keegans from progressing to phase 3. This was done in accordance with clause 5.3.4(e) of the SCC quoted in par [10] above.

[16] When the above was discovered by Keegans after the delivery of the record, it delivered an amended notice of motion and supplemented its founding affidavit (as it was entitled to do). The relief claimed by Keegans was then for a review and setting aside of the BEC’s decision whereby Keegans was disqualified, a setting aside of the BEC’s decision not to disqualify the eighth respondent, a setting aside of Treasury’s decision to award tenders to the seventh and eighth respondents and a setting aside of the contracts concluded with these two respondents. A remittal to the BEC and costs were also claimed.

Keegans' attack on the BEC's inspection and subsequent decision

[17] As a first line of attack, Keegans alleged that the "footprint" requirement per province was "... *so vague as to be unreasonable, irrational and unfair*".

[18] As a second attack, the lack of minutes of the BEC's consideration of the bids during the course of 11, 12, 13 and 14 October 2021 as well as on 15 February 2022 led to an accusation that the meetings were "... *conducted in a clandestine manner, were inherently flawed, irregular and untransparent*".

[19] The primary attack, was however, was that despite the fact that two letters had been sent to Keegans, indicating proposed site inspections at a "Jet Park" address (at 10h00 on 14 February 2022) and at Keegans' "Linbro Park" address (at 14h00 on the same day), that only one inspection took place at 14h00 at "Jet Park" and a promised alternate inspection at a Florida warehouse never took place.

[20] The minutes of the BEC of 15 February 2022 (incorrectly dated "2021") indicated the identity of the five BEC members who had attended to the site meeting at Jet Park. They included two Treasury officials and three members of the South African Police Service. The notes were taken by a Ms Gumede. Also in attendance were two representatives of Motus and three staff members of Keegans.

[21] At this site visit it was (correctly) established that the warehouse does not belong to Keegans. It is in fact a Motus warehouse, being operated on leased premises. Keegans complained that, at the site meeting, it was indicated to those conducting the inspection that Keegans owns a warehouse in Florida and that "*at all relevant times during and after the site visit, [Keegans] was under the impression and had a reasonable expectation that a proper site visit will be conducted at the Florida warehouse. Having made reference to the Florida warehouse in the minute, the BEC had an obligation to conduct the site visit prior to taking a decision to exclude [Keegans]*".

[22] In the supplementary affidavit Mr Govinder disclosed that the Florida warehouse also does not actually belong to Keegans, but to him personally. As he was the sole member of Keegans, he considered this difference immaterial. He

furthermore relied on Ms Gumede's oral indication that the BEC would also visit the Florida warehouse. A failure to do so, so Keegan averred, amounted to an exclusion of relevant considerations when the BEC considered Keegans' bid.

[23] In argument, adv. Maritz SC, who appeared for Keegans together with adv Wessels, strenuously advanced two main arguments, the first was that Treasury was "never" permitted to perform a "footprint" due diligence investigation. The second was that the "footprint requirement" did not require that a successful bidder had to own, lease or manage a warehouse in the province in respect of which it had submitted a bid.

Treasury's response

[24] In answer to the above, Treasury firstly submitted that it always had a right to perform a due diligence exercise, which included the right to inspect warehouses. It maintained that, in respect of the Jet Part warehouse that was inspected, being an address nominated by Keegans, it had been found that Motus was the owner and as there had been no service or supplier agreement between Keegans and Motus and that Keegans *"... had been unable to explain in these circumstances what role it would be playing"* Keegans had not satisfied the "footprint" requirement, being a material requirement in terms of the SCC.

[25] After having dealt with the peripheral issues raised by Keegans (such as the obvious date error on the minutes of the site visit, the correct chronology of the e-mail correspondence and the purported quorum issue of the inspection team), it was argued by adv Chabedi SC on behalf of Treasury that a review application is a "backward-looking" process whereby it must be determined whether the decision-maker's decisions was lawful, rationable and reasonable.

[26] She further argued that, if Keegans is correct that only a supplier due diligence exercise was permitted, then even on that basis Keegans had not sufficiently indicated that Motus was a mere supplier. The inspection had revealed that Motus would in fact do "everything" that Keegans had tendered to do.

[27] Adv Chabedi SC emphasized however, that Treasury sought to satisfy itself that the information provided by a bidder, in particular in respect of its ability to readily supply parts in the provinces for which it had bid, could be relied on. She referred the court to an e-mail sent by Treasury to all bidders on 7 February 2022, requesting clarity on details of the respective footprints, as it was entitled to do in terms of clause 16.1 of the SCC¹. Keegans had responded by way of a letter dated 8 February 2022. The letterhead indicated Keegans' address at No 9 Goldman Street, Florida, an address not listed in its Footprint Declaration. The letter then listed warehouse addresses for each of the provinces contained in its bid with the invitation: *"Please feel free to contact all the above warehouse managers to understand the delivery route between towns on a daily basis"*.

[28] It was when an actual inspection was carried out at one of the addresses nominated by Keegans, being the Jet Park address (which address Keegans say in its founding affidavit it had nominated despite the fact that it did not feature in its Footprint Declaration), that it was found that the warehouse was in fact not a Keegans warehouse, but a Motus Warehouse.

[29] In this regard, Keegans had submitted a letter from Motus which confirmed the availability of its distribution centres for the required parts across South Africa as proof of Keegans' third-party sources.

[30] Treasury however pointed out that "sourcing parts from a third party" is not the same as using a third party's warehouse to provide the service. The reason for this submission can be found in clause 5.3.5(e) of the SCC which provides that *"(e) in the event that a bidder is sourcing goods from a third party, the following hierarchy of parties MUST be adhered to and observed:*

- i) *the bidder must be sourcing goods directly from the manufacturer or an accredited distributor of the manufacturer in question;*

¹ Clause 16.1 of the SCC (quoted in the said e-mail) provides that *"National Treasury may communicate with bidders where clarity is sought after the closing date of the bid and prior to the award of the bid"*.

- ii) *it is not allowed to have intermediaries between the bidder and the manufacturer of the goods concerned other than the accredited distributor of the manufacturer*
- iii) *where a bidder is sourcing the products from an accredited distributor, the bidder must submit with the bid at the closing date and time, proof from the manufacturer that indeed the accredited distributor in question is appointed by the manufacturer”.*

[31] After having received the report of the site visit, the BEC inter alia concluded that what Keegans intended doing was effectively sub-contracting the entire service for which it had submitted a bid to Motus despite it expressly having stated in paragraph 7.1 of its bid that it would not be sub-contracting. Despite Keegans’ denial of sub-contracting in its papers in the review application, it could not explain what role it and Motus respectively would be playing. Treasury further maintained that there was no service or supplier agreement between the Keegans and Motus. At best, Keegans had submitted as part of its bid a letter from Motus confirming the position as follows: *“This letter serves to confirm that Keegans Auto Spares t/a Jaymees Midas ... is a long-standing customer of Parts Incorporated Africa, a division of Motus Aftermarket Parts”.*

[32] The supplementary affidavit by Keegans contained (without supporting source documents) the following statement: *“The applicant is a franchisee and, accordingly, it can source the ‘parts’ (the stock) from the various braches in the Motus Group. Applicant has the benefit to access the stock held by the various branches in all the provinces tendered for should the need arise to provide emergency deliveries”.*

[33] In reply to Treasury’s answering affidavit, Keegans stated *“The site visit was merely intended to illustrate that the Applicant will have access to all the parts housed in the warehouse of the franchisor as part of its supply chain. The applicant has not subcontracted any part of the agreement to Motus and Motus merely provides the applicant with additional parts (from time to time)”.*

Seventh respondent’s case

[34] The seventh respondent (AllParts) submitted that, as Keegans had omitted to disclose in its bid documents that it intended to perform under the tender by making use of warehouses owned or operated by Motus, it had failed to comply with peremptory SCC requirements. This failure resulted therein that Treasury had no option but to disqualify Keegans.

[35] Insofar as Keegans complained that it had no opportunity to make representations to Treasury prior to being disqualified, the opportunity to provide particulars of the relationship between a bidder and a third party or a supplier as provided for in the bid documents, provided a sufficient opportunity to make representations.

[36] In respect of its own successful bid (which is also attacked by Keegans) AllParts submitted that its bid had correctly been found compliant and that it was able to perform in terms of the tender. The fact that the site visit in respect of its nominated warehouse was done after the BEC meeting was irrelevant as such verification by inspection was a permissible and not peremptory option exercised by Treasury and in any event, it had passed that due diligence exercise. Its later agreement with Treasury to supply the same parts, albeit by way of alternate brands of parts, did not render it non-complaint. There was therefore no reason to set aside the contract it had entered into with Treasury subsequent to the acceptance of its bid.

Eighth respondent's case

[37] The award of a tender to the eighth respondent (Kaizen) was also attacked by Keegans. In its defence, Kaizen also argued that once Keegans had been found to rely exclusively on Motus' resources in order to fulfill the intended tender and had been found to have factually incorrectly stated that it owned the warehouses listed in its Footprint Declaration, it mattered little whether this had been labelled a misrepresentation or whether there had been "a misunderstanding" regarding the sites to be inspected – the simple fact remained that a due diligence exercise had exposed Keegans' non-compliance with the SCC requirements. Its disqualification by Treasury was therefore justified.

[38] Kaizen also shed more light on how the Jet Park address had been nominated by Keegans for inspection. The answer was in a letter from Keegans to Treasury dated 10 February 2023. The relevant contents thereof read as follows: *“Initially when our tender was submitted, the entire parts basket for Gauteng was kept at 2 Gordon Ave, Linbro Park. Subsequently we learned yesterday the entire warehouse was now being moved to Cnr Kolly and Yaldwya Road, Jet Park. The reason why we didn’t know when the move will be completed, is because we place our orders and drop shipments online for delivery ...”*.

[39] It was only after receipt of this letter that Treasury confirmed the site visit at Jet Park and also confirmed that, during the site visit, it would require a presentation to *“indicate live demonstration on how the systems work on rendering of services to the State”* and required a physical inspection of the storage facility and to see *“how everything runs”*. The subsequent presentations made during the inspection exclusively consisted of Motus’ capabilities, infrastructure and supply chain distribution facilities.

[40] All that the attack on the award of a tender to Kaizen demonstrated in respect of its alleged non-compliance, was a comment that in respect of its warehouse which had been inspected the warehouse was found to have “some” health and safety issues. This, however, related to warehouse cleanliness. Another attack was that the BEC considered whether Kaizen had underquoted. None of these issues had been found to be decisive at the time. Kaizen also submitted that since it had been awarded a tender, it supplied parts at the quoted prices and therefore any suggestion that it had underquoted mere in order to obtain a tender with a view to thereafter charge higher prices, was factually unsubstantiated.

Evaluation

[41] The allegation that the “footprint” requirement was so vague that it rendered the whole tender process void, can summarily be dispensed with. Starting with the language employed in the tender documents, a “footprint” means not only “an impression left by a foot” but also “the amount of space that something fills” or “the

shape and size of the area something occupies”². When read together with the warehouse and address requirements, there can be no doubt that bidders were in their Footprint Declaration required to indicate a physical and geographical “space” (warehouse) from which it intended to supply parts to a specific province for which it submitted a bid.

[42] The parties were all *ad idem* that the footprint requirement was not as stringent as requiring a physical presence inside a particular province. Keegans put the requirement as follows in its founding affidavit³ “*The requirement does not require a bidder to own the specific warehouse in each province but requires it to have access to a warehouse in a specific province or illustrate another manner in which the footprint requirement can be satisfied*”. Treasury agreed with this interpretation, thereby rendering the voidness argument without force.

[43] Treasury’s argument was that bidders were not obliged to submit bids to provide services in the whole of the Republic. Bidders were also allowed to source parts from third parties, but then only if they complied with the conditions referred to in para [30] above, thereby complying with clause 5.3.5(e) of the SCC.

[44] Treasury therefore submitted that the wording of the SCC regarding the footprint requirement was clear and required no interpretation or construction. I agree.

[45] The basic premise on which the BEC evaluated bids and on which Treasury relied was that, in terms of clause 5.3.4 of the SCC, bidders were assessed based on the information they themselves provided and that “... *if a bidder declares that it owns or has access to a warehouse, the bidder must be able to demonstrate that it does*”.

[46] The reservation by Treasury in the bid documents to perform due-diligence exercises on the information contained in bid documents, corresponds with the

² See: *The Concise Oxford English Dictionary* and *Collins Dictionary*.

³ At para 9 thereof.

above premise, the provisions of the PFMA⁴ and the basic requirement that a bidder's bid must truthfully reflect the facts on which the bid was based.

[47] The true facts surrounding Keegans' bid was that it did not own any of the warehouses disclosed in its Footprint Declaration. It also did not own the warehouse in Florida belonging to its sole member, which warehouse it had not relied on in its bid documents and which in fact, would provide no warehouse function. Keegans would not stock any parts in warehouses from which it would service any of the provinces for which it had submitted bids and all indications in its bid documents that it would do so, was false.

[48] The true facts were that Keegans would simply, apparently as franchisee, rely on Motus' "footprints", conduct online orders, shipments and "drop-offs" via Motus without any supplier or third party agreements either in place or having been disclosed in its bid documents.

[49] In my view, the purpose sought to have been achieved by Treasury, as the entity exercising public power, namely to only have a properly verified bid qualify for acceptance, had been achieved. Treasury's decision to disqualify Keegans was therefore, objectively viewed, rational⁵.

[50] Once this is so, as I find it is, the principle that then "*not every slip in the administration of tenders is necessarily to be visited by judicial sanction*"⁶ applies.

[51] Borrowing from Adv Chabedi SC's argument, in looking back on the tender process, I do not find that there was any irregularity which was so material that it overshadows the ultimate objective reasons for Keegans' disqualification. This includes Keegans' argument that the reasons furnished by Treasury do not exactly accord with the BEC's memorandum.

⁴ Which has as a stated purpose to prevent unauthorised, irregular or wasteful expenditure as contemplated in sections 38(1)(g) and 76(2)(e).

⁵ See: *Pharmaceutical Manufacturers Association of SA: In re: Ex parte Resident of RSA* 2000 (2) SA 674 (CC) and *Masethla v President of the RSA* 2008 (1) SA 566 (CC) at par 81.

⁶ See *Altech Radio Holdings (Pty) Ltd v City of Tshwane Metropolitan Municipality* 2021 (3) SA 25 (SCA) at par 54.

[52] Keegans further complained that there was a procedural irregularity in that it had not been afforded the opportunity to make representations prior to disqualification, but this is not entirely true: it was asked by letter for clarification of its warehousing position prior to the site inspection and was invited to make a presentation in respect thereof.

[53] In view of the above, Keegans' further "expectation" that its member's warehouse in Florida would also be visited (another of Keegans' complaints), also cannot have been a procedural irregularity. An expectation that a site visit to an address not contained in the bid documentation should operate as a pre-requisite to a decision being taken, cannot be a reasonable one, even if the possibility of such an expectation may have been expressed by a member of the inspection team⁷.

[54] To sum up then (from the 30 000 pages of the record and the hundreds of pages of documents filed in the review application): I find that the "footprint" requirement is not as Keegans had claimed, "so vague as to be unreasonable, irrational and unfair" that it rendered the whole tender process invalid. Keegans' suggestion that the BEC had initially found Keegans' documents compliant with phase 2 of the evaluation process, precluded the BEC from conducting a due diligence exercise, cannot stand, neither in terms of the reserved right in the SCC to do so and neither in terms of the PFMA. Keegans' complaint that it had not been afforded a sufficient opportunity to make representations is factually incorrect. Keegans' argument regarding expectations of inspection of its member's warehouse was neither valid nor did the absence thereof amount to a procedural irregularity.

[55] I therefore find that there had been no material irregularities in the evaluation process and that Treasury had correctly disqualified Keegans as having not demonstrated compliance with the "footprint" requirement of the tender it had bid for.

[56] There were a number of further minor peripheral arguments advanced on behalf of Keegans, none of which I find detract from the above.

⁷ See: *Duncan v Minister of Environmental Affairs and Tourism* 2010 (6) SA 374 (SCA) at par 15 and *SA Veterinary Council v Szymanski* 2003 (4) SA 42 (SCA).

Costs

[57] I find no cogent reason to depart from the general principle that costs should follow the event. This includes the costs of the seventh and eighth respondents.

Order

[58] The following order is made:

The application is dismissed with costs, including the costs of two counsel, where employed.

N DAVIS

Judge of the High Court
Gauteng Division, Pretoria

Date of Hearing: 14 June 2023

Judgment delivered: 12 December 2023

APPEARANCES:

For the Applicant:

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For the 1st to 4th Respondents:

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For the 11th Respondent:

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