



**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, JOHANNESBURG)**

- (1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.



SIGNATURE

DATE: 23 October 2023

Case No. 2023-052811

In the matter between:

AFRIRENT (PTY) LTD

Applicant

and

RAND WEST CITY LOCAL MUNICIPALITY

First Respondent

FLEET HORIZON SOLUTIONS (PTY) LTD

Second Respondent

JUDGMENT

WILSON J:

- 1 The applicant, Afirent, tendered unsuccessfully for a contract to provide specialised vehicles and fleet support services to the first respondent, Rand West. The tender was ultimately awarded to the second respondent, Fleet Horizon. Afirent then filed papers launching a wide-ranging attack on the legality of the tender process. When its application came before me, however, Afirent ultimately restricted its case to the contention that the tender process

was vitiated by three material irregularities. On the strength of any one of these irregularities, Afrirent seeks to review and set aside the decision to award the tender to Fleet Horizon and asks for an order directing that the tender process be started again from scratch.

- 2 The three alleged irregularities to which Afrirent adverts are: first, that its bid was irrationally disqualified on the basis that it had failed to provide Rand West with a detailed statement of its liability to the South African Revenue Service (SARS); second, that Fleet Horizon was awarded the tender despite not having provided Rand West with three years' worth of audited financial statements, the production of such statements being a mandatory regulatory requirement; and third, that the award of the tender to Fleet Horizon was made subject to a condition that was never fulfilled.
- 3 A fourth irregularity Afrirent initially pursued in oral argument was that Fleet Horizon was awarded the tender despite not having provided Rand West with a tax clearance certificate. However, that allegation fell by the wayside during the hearing, once it became clear that, whether or not such a certificate had been physically handed over to Rand West, Fleet Horizon had plainly provided a document bearing its SARS Tax PIN, which placed Rand West in a position to download a tax clearance certificate from SARS' website. There was in any event no suggestion that Fleet Horizon did not in fact have tax clearance.
- 4 I now turn to deal with the three alleged irregularities with which Afrirent ultimately persisted.

Afirent's disqualification

- 5 There is no dispute that Afirent owes SARS a great deal of money. Just how much is not clear. There is a dispute between Afirent and SARS on that score, and it is only the fact of the dispute, rather than its contours, that is relevant to this case. While assessing Afirent's tender, Rand West was alerted by SARS to the fact of Afirent's debt. SARS initially suggested that it was about to nominate Rand West as a third-party collector of Afirent's tax debt, as it is empowered to do in terms of the Tax Administration Act 28 of 2011. The effect of such a nomination would have been to require Rand West to pay what was due to Afirent under any contract between Rand West and Afirent directly to SARS in reduction of Afirent's tax debt.
- 6 This possibility obviously excited a degree of concern. Rand West asked Afirent, Fleet Horizon, and another shortlisted bidder to provide a copy of their full SARS statements, in addition to the tax clearance certificates that they had already provided. As any taxpayer will know, a SARS statement provides an account of tax liability against tax actually paid, and allows anyone who reads it to understand whether, and to what extent, a taxpayer owes SARS money. A tax clearance certificate, on the other hand, simply confirms that a taxpayer is in good standing with SARS. That may be because the taxpayer has paid all that is due. However, it could just as easily mean that the taxpayer owes SARS, but has entered into an arrangement to pay the amount owing instalments, or that the obligation to pay the amount has been suspended pending the determination of an objection to a tax assessment, and an ultimate reckoning of the taxpayer's liability.

- 7 Fleet Horizon and the other bidder both promptly handed over their tax statements. For reasons that have never been explained, Afrirent did not. It was argued before me that the failure to hand over the SARS statement was no more than a good faith oversight. But there are no primary facts alleged anywhere on the papers that would allow me to accept that proposition. The facts that are on the papers do not support it. Afrirent was asked to provide a statement. It initially simply resubmitted its tax clearance certificate. Afrirent was then told again that what was required was a statement, not a clearance certificate. It did not then respond to that second request to provide the statement.
- 8 The failure to provide the statement caused Rand West's bid evaluation committee to draw two separate, but related, conclusions. The first was that Afrirent had something to hide. As the committee summed things up in its report, the fear was that Afrirent does "not want to disclose the amount [it] owe[s] to SARS as it might indicate the high-risk rating that the municipality will face if [Afrirent is] appointed". The second conclusion was that Afrirent's tax liability – apparently in the region of R50 million at the time – might affect Afrirent's ability to perform on any contract that Rand West ultimately concluded with it. If Afrirent's bid was successful, and SARS went through with its threat to nominate Rand West as a third party collector, the money that would have to be paid over to SARS would amount to about a third of the value of Afrirent's R150 million bid. In those circumstances, faced with a substantial reduction of the value of Rand West's contract with it, Afrirent may have decided, or have been forced, not to perform under the contract.

- 9 Rand West ultimately concluded that the risk presented by Afirent's apparent lack of candour about its tax affairs was too great to ignore. It disqualified Afirent from consideration on that basis. This was explained in a letter from Rand West's Municipal Manager to Afirent dated 10 May 2023.
- 10 Afirent contends that the decision to disqualify it on that basis was unlawful. Its first reason for saying so was that, as things turned out, there was never any serious threat that Rand West would be nominated as a third-party collector of Afirent's tax debt. Afirent was clearly tax compliant, whatever Rest West's misgivings might have been. Afirent had a tax clearance certificate. SARS had confirmed that it had come to an agreement with Afirent about how the question of its tax liability was to be resolved. Any dispute between Afirent and SARS could be addressed without resort to the drastic step of essentially garnishing Afirent's contract with Rand West. Moreover, Afirent contended, if Rand West had taken a step back, and evaluated Afirent's alleged tax liability in light of its overall turnover (which is well in excess of R1 billion), Rand West could have assumed no serious risk in awarding the tender to Afirent.
- 11 Even if this is true, it misses the point entirely. What worried Rand West, fundamentally, was that Afirent had not been candid about its tax affairs. That lack of candour presented a risk. It does not matter that the nature of the risk the bid evaluation committee set out in its report turned out to be more apparent than real. The non-disclosure was itself enough to ground a rational disqualification. If I were to accept Afirent's argument, I would have to find that an unsuccessful bidder could review its disqualification from a tender

process notwithstanding its failure to disclose information that the state reasonably believed was material to the assessment of the bid, merely because the bidder was itself sure that the information requested would have made no difference to the strength of its bid.

- 12 But that cannot be. Rand West was right to be concerned. It acted rationally in seeking more information. When that information did not come, it acted rationally in disqualifying Afrirent merely on the basis of its failure to disclose the SARS statement.
- 13 A second prong to Afrirent's attack was that the decision to disqualify Afrirent on the basis of its failure to provide a tax statement was inconsistent with the bid conditions Rand West stipulated in its invitation to tender. What the bid conditions required, so it was argued, was the submission of a tax clearance certificate. Afrirent submitted such a certificate. Rand West was not at large to change the rules halfway through the tender process by demanding a SARS statement and then disqualifying Afrirent on the basis that it failed to provide one.
- 14 This argument is not supported by a realistic interpretation of the conditions themselves. Clause 2 of Part B of Rand West's "Terms and Conditions for Bidding" deals with the "tax compliance requirements" that prospective bidders had to meet. The first of these requirements was that "bidders must ensure compliance with their tax obligations". The second to seventh of the requirements set out various ways in which documentary evidence of that compliance had to be provided. But those documentary requirements cannot sensibly be read as coterminous with the overall requirement that a bidder

actually be tax compliant. That condition goes further than any documentary evidence that may be proffered to satisfy it. If the documents listed at clauses 2.2 to 2.7 of the conditions did not satisfy Rand West that a bidder was tax compliant, the bid conditions allowed Rand West to ask for more documentation, even if it that documentation was not explicitly set out in the conditions themselves. Of course, had Afrirent been disqualified for failure to supply a document not listed in the conditions, and for which it had never been asked, that would have breached the bid conditions. But that is not what happened.

15 It follows that Afrirent's bid was lawfully and rationally disqualified on the strength of its failure to disclose documents about its tax affairs that were material to the viability of its bid.

16 It was contended on behalf of Rand West and Fleet Solutions that Afrirent's case should end there. The argument was that a properly disqualified bidder has no legal interest in the ultimate decision to award the tender, because the disqualified bidder could never have been awarded the contract anyway.

17 That argument had some superficial attraction, but I do not think that I can accept it. The question is whether Afrirent has a direct and substantial interest in the relief it seeks. The relief ultimately sought from me is a review of the decision to award the tender to Fleet Horizon and a direction that the process should be run again. There is no suggestion that, if I were to grant that relief, Afrirent would not be able to compete for the contract in the new tender process. That, I think, is reason enough to find that Afrirent retains an interest in relief setting aside the ultimate decision to award the contract to Fleet

Horizon, even if Fleet Horizon's failure in the initial tender process would not automatically have led to the award of the contract to Afrirent.

- 18 It follows from all of this that, even though I have rejected Afrirent's arguments against its own disqualification, I must still consider its attack on Fleet Horizon's ultimate selection as the successful bidder.

Fleet Horizon's non-submission of audited financial statements

- 19 Where a tender is put out for a contract valued at more than R10 million, paragraph 21.1 (d) of Rand West's Supply Chain Policy obliges a bidder that is "required by law" to have its financial statements audited to submit three years' worth of audited financial statements together with their bid. This is no more than a repetition of the requirement to submit audited financial statements set out in Regulation 21 (d) of the Municipal Supply Chain Management Regulations, 2005 (GN 868 in GG 27636) ("the Regulations"). It is common cause that Fleet Horizon submitted only two years' worth of statements, together with a third set of statements – its most recent – which had not yet been audited. Afrirent says that this invalidated Fleet Horizon's bid.

- 20 However, Fleet Horizon says that, as a matter of fact, it is not "required by law" to have its financial statements audited. In paragraph 45.7 of its answering affidavit, Fleet Horizon explains that this is because it (a) is a private limited company that (b) holds no assets in a fiduciary capacity (c) does not compile its statements internally, but rather employs an external accounting firm to do so, and (d) is not the type of company that is required to audit its financial statements in the public interest. These allegations are confirmed by an

affidavit from an accountant at the firm Fleet Horizon uses to independently produce its financial statements.

- 21 Whether or not Fleet Horizon is “required by law” to audit its financial statements is a mixed question of law and of fact. The answer depends on whether the character of Fleet Horizon as a going concern is such that it attracts a legal obligation to audit its accounts. This being an application for final relief, I am required to accept Fleet Horizon’s allegations of fact about the kind of entity it is. If those facts are accepted, then, at least on the face of it, Fleet Horizon is not “required by law” to audit its financial statements.
- 22 Afrirent does not take issue with this conclusion. Nor does it dispute the facts on which the conclusion rests. Afrirent rather seeks to capitalise on the fact that, at the time Fleet Horizon submitted its bid, Fleet Horizon erroneously believed that it was “required by law” to audit its financial statements, and that Fleet Horizon stated as much in its bid documents. In its replying affidavit, Afrirent accuses Fleet Horizon of attempting to amend its bid after the closing date.
- 23 I think that rejoinder is misguided. Either the Regulations enjoined Fleet Horizon to submit audited financial statements, or they did not. If they did, then Fleet Horizon’s bid did not comply with the requirements of the tender, and it would be necessary to consider whether that non-compliance should have been fatal to Fleet Horizon’s bid. However, on the undisputed facts, the Regulations did not require Fleet Horizon to submit audited financial statements, because Fleet Horizon was not “required by law” to prepare them.

There can accordingly be no suggestion that Fleet Horizon's bid was non-compliant.

Failure to fulfil the condition under which the tender was awarded

24 Fleet Horizon's bid was the cheapest qualifying bid once Afrirent was disqualified. However, it was not lost on Rand West that Fleet Horizon's bid was still around R100 million more expensive than Afrirent's. Accordingly, in its award letter, Rand West made clear that Fleet Horizon was to be appointed as the service provider under the terms of the tender "subject to a negotiation" aimed at "decreasing" Fleet Horizon's bid to a more "affordable amount". It seems clear on the papers that, whatever negotiations ensued, Fleet Horizon's price was never reduced. What happened instead is that Fleet Horizon increased the range of services it was willing to provide for the price it had originally bid to do the work.

25 This, Afrirent contended, was a failure to fulfil the condition Rand West placed on the award, which vitiated the award of the tender. But I cannot agree. The condition Rand West imposed was not that Fleet Horizon's price had to come down, but that there had to be a negotiation aimed at that result. There plainly was such a negotiation. It did not achieve that result, but it did achieve an increase in the value of the services Rand West would receive for the same price. In these circumstances, I fail to see how the condition Rand West imposed was not fulfilled.

Order

- 26 In this case, Rand West sought the best price it could get to procure vehicles needed provide essential municipal services. The best price it might have got was that tendered by Afrirent. But Afrirent scuttled its own bid by refusing to provide tax documentation that any responsible organ of state would have asked for on the information available to Rand West at the time. Because of this, Rand West had to settle for a more expensive bid from Fleet Horizon, but Rand West still did its best, through post-award negotiation, to enhance the value of the services it would receive under that bid.
- 27 It is not as if it was open to Rand West not to provide the services it sought to procure through the invitation to tender. Nor could Rand West reasonably have been expected to put up with Afrirent's refusal to be candid about its tax affairs, the murkiness of which, at least at the time, gave rise to a reasonable appreciation of risk in accepting Afrirent's bid.
- 28 I can find no basis on which to impugn the rationality or the lawfulness of the process Rand West adopted on these facts. For that reason, the review must fail.
- 29 The application is dismissed with costs, including the costs of two counsel where they were employed.



S D J WILSON
Judge of the High Court

This judgment is handed down electronically by circulation to the parties or their legal representatives by email, by uploading to Caselines, and by publication of the judgment to the South African Legal Information Institute. The date for hand-down is deemed to be 23 October 2023.

HEARD ON: 10 October 2023

DECIDED ON: 23 October 2023

For the Applicant: AJP Els
Instructed by Albert Hibbert Attorneys

For the First Respondent: V Maleka SC
(Heads of argument drawn by V Maleka SC and
M Salukazana)
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For the Second Respondent: AC Botha SC
(Heads of argument drawn by AC Botha SC and
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