

IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN

Case number: **4568/2022**

Reportable: YES/NO

Of Interest to other Judges: YES/NO

Circulate to Magistrates: YES/NO

In the matter between:

DS CONSORTIUM

Applicant

and

**THE MEC: FREE STATE PROVINCIAL DEPARTMENT
OF SPORTS, ARTS, CULTURE AND RECREATION**

First Respondent

C-SQUARED GROUP (PTY) LTD

Second Respondent

Reasons for the Orders handed down on 3 October 2022

[1] On 3 October 2022 I handed down the Orders of Court in this application, and I informed that the reasons for the Orders made would be made available today, 6 October 2022, to the Registrar of this Court and the attorneys

representing the parties by e-mail. Due to the large number of opposed applications this duty Court had to deal with in the past week, this was the only option left to ensure that the parties in this application be informed of the Court's decision as soon as possible.

[2] The application concerned the award of a tender by the First Respondent to the Second Respondent to provide event management services for the Macufe Festival in Bloemfontein, which festival has already commenced on 25 September 2022, and will be held until 9 October 2022. The Applicant contends that the awarding of the tender was tainted by administrative irregularities, in that it deviated from the tender specifications published by the First Respondent. It therefore moves for the reviewing and setting aside of the decision to award the tender to the Second Respondent.

[3] The tender notice inviting bids from prospective service providers contained the tender specifications in respect of the dates and venues of the Macufe events as follows:

3.1 A Gospel Music Show at Vista University or the Molemela Stadium on 2 October 2022.

3.2 A Film Expo at PACOFS on 4 October 2022.

3.3 A Comedy Show at PACOFS on 5 October 2022.

3.4 Theatre Event at the Civic Theatre on 6 October 2022.

3.5 A Fashion Show at the Bloemfontein Showgrounds on 6 October 2022.

3.6 A Divas Show at the Vista University or the Molemela Stadium on 6 October 2022.

3.7 A Hip-Hop Show at the Rose Gardens on 7 October 2022.

3.8 A Boxing Event at the Bloemfontein City Hall on 7 October 2022.

3.9 A main Jazz Music Festival at the Rose Gardens on 8 October 2022, and

3.10 A Soccer or Rugby match at the Free State stadium on 9 October 2022.

[4] It appears to be common cause that the Applicant was one of those who submitted an acceptable bid based on these tender specifications. On 26 August 2022, however, the Applicant saw in the media that the tender had been awarded to the Second Respondent. It was only on 9 September 2022 that the Applicant came across the promotion of certain of the Macufe events as they were published on the First Respondent's website. It transpired that except for the Rugby or Soccer match at the Free State Stadium, the Theatre event at the Civic Theatre, the event at the Rose Gardens, the Film Expo at PACOFS and the Boxing event at the City Hall, all of the Macufe events contemplated by the bid invitation would now be held at a single venue, namely the marquee tent of the Second Respondent already erected at Old Greys sports club.

[5] The bid of the Applicant amounted to R22 960 962.40, while the bid of the Second Respondent was markedly lower, namely R16 849 863.80. The Applicant is of the view that by requiring bidders to price their bids on the basis that the services were required at multiple venues across Bloemfontein, while eventually the First Respondent deviated from these requirements by awarding the tender on the basis that a number of the events were to be held at a single venue, other bidders such as the Applicant were deprived from a fair opportunity to price their tenders competitively. Competitors should be treated equally in the sense that they should all be entitled to tender for the same thing, the Applicant says.

[6] The Applicant contends that the change in venues has a direct influence on bid prices, because if equipment and services had to be moved from one venue to another, there would be significant additional costs involved, such as costs

relating to labour, transportation and cleaning services. Had it known that a number of the events could be hosted at a single event, its bid would have been significantly lower, according to the Applicant.

[7] It was argued before me on behalf of the Respondents that the application is not urgent, because the Applicant had already known on 26 August 2022 that the tender had been awarded to the Second Respondent. Subsequently the Applicant had queried the award in correspondence with the First Respondent on certain grounds. It is clear, however, that those grounds were baseless, and that the event which triggered the application presented itself on 9 September 2022, when it became known that a number of events would be held at a single venue. The application was filed on 19 September 2022, or put differently, 6 court days later. The question is then whether the Applicant could be afforded substantial redress if the application was brought in the normal time periods. It speaks for itself that this could not have been possible. The application was therefore found to be compliant with the requirements of urgency.

[8] As for the merits of the application, I find it significant that the First Respondent does not dispute the allegation that the management services would be cheaper if all or some of the events are held at the same venue. Nor does it dispute that if the Applicant had known that multiple events could be hosted at a single venue, the Applicant's bid would have been lower than the bid it had submitted. Furthermore, in its opposing papers the First Respondent does not tell on what basis the tender was awarded to host events at a venue that was different to what was specified in the bid invitation. All that the First Respondent put up as a defence is that it was entitled to negotiate a change in venues with the Second Respondent after the tender was already awarded to the Second Respondent.

[9] Now this defence relied upon by the First Respondent does not take cognisance of a letter written by the Second Respondent's attorneys to the Department prior to the submission of its tender. This letter was disclosed to the Court by the Applicant by way of a supplementary affidavit one court day before the hearing. Incidentally, the Department did not disclose this letter to the Court

in its opposing papers, and when it did become disclosed, the Department failed to deal with it.

[10] In the said letter it is pointed out that the Second Respondent intends to bid for the services called for, but it is also pointed out that the Second Respondent is organising entertainment events under its own umbrella that will take place during the same time frame in Bloemfontein than the envisaged Macufe Festival. It is said in the letter that the Second Respondent does not want to compete with the Department in respect of the events, and it is suggested that "the parties meet amicably to consider how to enter into a public private partnership agreement where our client could extend assistance to the Department to ensure that the entertainment value of the event is a success". The letter further suggests that "the parties come together as soon as possible to find common ground and to prevent a duplication of events which would not serve the best interest of the local Macufe patrons and might lead to fruitless expenditure".

[11] In my view, this letter provides a perfect explanation for the award of the tender to the Second Respondent on terms outside the tender specifications. The failure of the Department to deal with this letter in its papers only lends support to this view. It needs mentioning that also in the record of decision filed by the Department, there is not a word of reference to this letter and the effect it had on the award of a tender. I regard this omission as highly suspicious, to say the least.

[12] In the answering affidavit filed by the Second Respondent, it mainly raised technical objections, for instance that the Applicant lacked *locus standi* since it is a joint venture comprising of two different companies, and that a joint venture does not have legal personality. This objection has no merit, since the only shareholder and director of the one company duly authorised the only shareholder and director of the other company to launch the application in name of both companies, or then the joint venture. The Second Respondent further denied any urgency in the application. I have already dealt with the issue of urgency. In addition, the Second Respondent contends that the Applicant failed to disclose a cause of action. I will briefly deal with this aspect hereunder.

[13] Having regard to all the papers filed in this application, I have no hesitation in finding that the award of the tender to the Second Respondent was the result of a tender process that was not fair, equitable and competitive. It means that the First Respondent acted in contravention of Section 217 of the Constitution. Section 217 provides that when an organ of state in the national, provincial or local sphere of government contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective. By deviating from the venues specified in the tender invitation without informing the Applicant and the other tenderers, the Department defeated the objectives as set out in Section 217.

[14] In the premises, I have granted prayers 1, 2, 3 and 5 of the Notice of Motion in so many words. In prayer 4, the following orders are sought:

4. That the tender be awarded to the Applicant, alternatively that the First Respondent be ordered to re-evaluate the bids submitted and that the tender be awarded in accordance with the following process:

4.1 The Second Respondent's bid must be excluded from re-evaluation;

4.2 The tender must be awarded to the qualifying bidder who achieved the highest score according to the 80/20 preference points system;

4.3 If the highest bidders have equal scores, the tender must be awarded to the bidder who scored the highest number of preference points;

4.4 If the bidders are still equal, the tender must be awarded to the bidder who scored the highest points for functionality; and

4.5 If the bidders are still equal, the winner must be decided by the drawing of lots.

[15] Now as far as these prayers are concerned, I am mindful of the facts alleged by the Applicant that the Macufe Festival is one of the largest emerging festivals in Africa, and that when it was last hosted in 2019, it attracted approximately two hundred thousand patrons. I am also mindful of what is alleged by the Second Respondent, namely that the first event of the festival had already taken place on 25 September 2022, to wit the Macufe soccer match in the Free State Stadium. That was the day before this application was heard.

[16] The effect hereof is unescapable: the Macufe festival is already underway and in full swing. Prayer 4 of the Notice of Motion deals with the suggested remedy should the award decision be reviewed and set aside. I do not think that orders in terms of prayer 4 would be in the public interest because it would, in all probability, bring an abrupt end to the festival. It would also have financial repercussions for many institutions and patrons. It is for this reason that I have refrained from granting the orders contemplated in prayer 4. It is best to leave the way forward in the hands of the parties without interference by the Court, which could have a disastrous effect on a wide front.

[17] Section 172 of the Constitution provides for the powers of courts in constitutional matters. Section 172(1)(a) provides that a court must declare that any conduct that is inconsistent with the Constitution, is invalid to the extent of its inconsistency. This is what this court has done in the present case. Section 172(1)(b) provides that a court may make any order that is just and equitable. In the present case, I regard it as just and equitable not to make any order in terms of prayer 4 in the circumstances.

P. J. LOUBSER, J