

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

Case number: A62/2022

Reportable: YES

Of Interest to other Judges: NO

Circulate to Magistrates: NO

In the matter between:

HT PELATONA PROJECTS (PTY) LTD

Applicant

And

TSWELOPELE LOCAL MUNICIPALITY

First Respondent

**NSM PROFESSIONAL SERVICES AND GENERAL
PROJECTS (PTY) LTD**

Second Respondent

[as joint venture partner of NSM Professional Services
and General Projects JV Tamane Civils]

TAMANE CIVIL CONSTRUCTION (PTY) LTD

Third Respondent

[as joint venture partner of NSM Professional Services
and General Projects JV Tamane Civils]

CORAM:

MATHEBULA, J *et* MOLITSOANE, J

HEARD ON:

08 AUGUST 2022

JUDGMENT BY:

MATHEBULA, J

DELIVERED ON:

This judgment was handed down electronically by circulation to the parties' representatives by email and by release to SAFLII on 13 OCTOBER 2022. The date and time for hand-down is deemed to be on 13 OCTOBER 2022 at 14H30.

Introduction and relief sought

[1] The applicant seeks, on review, to declare as unlawful and set aside certain decision made by the first respondent. There are other ancillary orders sought as well. The discontent of the applicant emanates from the appointment made by the highest decision making body of the first respondent on 26 February 2022. The grounds for review are dealt with sufficiently in the founding affidavit. The first respondent is opposing the application while the second and third respondents abide the decision of the court.

[2] On 23 May 2022 the applicant approached the court on an urgent basis for an interim interdict before Daffue J. It was granted and the costs related thereto remains an issue that will be dealt with later in this judgment. The notice of motion issued on 27 May 2022 was subsequently amended to incorporate the prayer to declare and set aside the contract entered into by and between the respondents. The amendment, we presume, was necessitated by the receipt of the full record of the decision which brought to the fore more facts and concomitant further grounds for review.

Facts

[3] Sometime in January 2022, the first respondent, a municipality duly constituted in terms of the governing laws published a notice for bid number SCM/TSW/11/2021-2022 for the refurbishment of the sewer pump station at Phahameng Township, Bultfontein. The requirements and closing date are set out in

the copy of the advertisement annexed to the founding affidavit¹. It is common cause that the applicant, second and third respondents submitted bids.

[4] The Bid Evaluation Committee (BEC) of the first respondent evaluated the bids in accordance with the specifications contained in the bid invitation as well as the applicable points system. The other important factor considered was the ability of the bidder to execute the contract. At the end of its meeting held on 16 February 2022 it submitted its report and recommendations to the Bid Evaluation Committee (BAC) for the award of the bid². The second and third respondents, as a joint venture, were named the preferred bidders. The applicant was named the second preferred bidder. The budget of the first respondent for the works was set at R7 million. The bid of the successful bidder was R11 081 891.96 while that of the applicant was R15 652 851.29. Both of them were over the budget in varying amounts.

[5] The bid committee system provides that the BAC may be required to make recommendations therein to the municipal manager for the award of the bid. In this matter, it was in agreement with the recommendations of the BEC as recorded in the minutes of its meeting held on 25 February 2022. The appointment of the successful bidder was conveyed as such in the letter from the municipal manager dated 21 February 2022. The decision was sanctioned by the Executive Committee of the first respondent. Although the date of the letter from the municipal manager precede the date of the meeting of the BAC, none of the parties raised any issue around it. The court does not express any opinion on this apparent anomaly whether it constitutes an irregularity or it is a plain error. For the purpose of this judgment the court will shy away from discussing the powers of the municipal manager in the event he/she disagrees with these committees.

[6] Clearly dissatisfied with the outcome, the applicant readied itself for challenging it. Sensing that there might be some irregularities committed, the applicant requested documents and records and reasons that informed the decision. These were set out in the letter to the first respondent dated 24 February 2022. The

¹ Page 26 of the indexed papers.

² Page 40 to 50 of the indexed papers.

response of the first respondent in a letter dated 1 March 2022 specifically pointed out that the applicant was the second preferred bidder and that the Broad Based Black Economic Empowerment Certificate (BBBEE) annexed for the purpose of the bid had already expired on 31 December 2021. It was also mentioned that the certificate could not have made a difference in the final adjudication of the bid and the first respondent could not accept any documents after the closing date of the bid which was on 26 January 2022.

[7] The applicant launched an appeal in terms of Section 62 of the Local Government: Municipal System Act 32 of 2000³. The matter served before the Executive Committee of the first respondent on 12 April 2022 and it was dismissed. The first respondent gave no undertaking of halting the works while the applicant was still considering its remaining options, and that resulted in the launching of the urgent application before Daffue J.

[8] As to whether the order he granted was final in effect or not was considered by Reinders ADJP who ruled that it was not. Her well-reasoned judgment was delivered on 13 June 2022. It appears that in the interim the second and the third respondents continued with the works. At the time of the oral hearing of this matter, the court was informed that 78% of the works was already concluded. It is imperative to set out the background to understand the context that informed the decision of the court.

Grounds of review

³ Section 62 reads as follows: (1) A person whose rights are affected by a decision taken by a political structure, political office bearer, councillor or staff member of a municipality in terms of a power or duty delegated or sub-delegated by a delegating authority to the political structure, political office bearer, councillor or staff member, may appeal against that decision by giving written notice of the appeal and reasons to the municipal manager within 21 days of the date of the notification of the decision. (2) The municipal manager must promptly submit the appeal to the appropriate appeal authority mentioned in subsection (4). (3) The appeal authority must consider the appeal, and confirm, vary or revoke the decision, but no such variation or revocation of a decision may detract from any rights that may have accrued as a result of the decision.

(4) When the appeal is against a decision taken by-

(a) a staff member other than the municipal manager, the municipal manager is the appeal authority.

[9] The applicant has raised various grounds of review. Chief among them is the averment that the second and third respondents did not meet the peremptory Construction Industry Development Board (CIDB) grading requirements in terms of the tender data. The key point made is that any bidder was in a position to submit a bid only if the bid met the criteria stated in the tender data. The second ground relied upon is that the second and third respondents, that is their new entity as the joint venture, failed to submit mandatory returnable documents. The document referred to is that its bank rating could not be verified. The third ground is that the bid awarded was in excess of the budget for the works in issue. The amount approved for the two (2) respondents was in excess of R10 million. All the stated grounds are vehemently opposed by the first respondent.

Submissions

[10] Both counsel made compelling submissions and referred us to a wealth of authorities. They presented and interpreted the facts and the law from diametrically opposing views. It is imperative to briefly repeat them.

[11] Mr van Aswegen submitted for the applicant that procurement in the public domain is underpinned by the requirements of fair and competitive processes. On this matter the first respondent has strikingly failed through non-compliance with mandatory requirements. On that score alone he opined that the opposition to the application should fail. This point is strongly reliant on the notice on evaluation which provided that the bids with errors or omissions on peremptory requirements will be deemed non responsive.⁴ The document in issue is the bank rating certificate which was not submitted and verified on behalf of the third respondent. The second document was the company profile. He argued that the non-compliance thereof carried with it consequences that such a bidder should be disqualified.

[12] He raised another issue relating to the CIDB registration requirements. The fact is that the third respondent was not registered in the Mechanical Engineering (ME) class. The works involved Mechanical and Construction Engineering capabilities. That being the mandatory requirement and non-compliance thereto

⁴ Page 83 of volume 1 of the indexed papers.

should have led to disqualification of the joint bid of the second and third respondents.

[13] The other ground argued was whether a bidder had to be registered at level of four or higher in both mechanical and construction engineering class. The contention between the parties is that the bid invitation required 4CE/4ME PE or higher. The lead partner was not registered in both and relying on the report of NEP Consulting Engineers, he posed a question as to what was done with the incongruities mentioned in it. He submitted that upon proper interpretation of the document, a bidder was required to be registered at the set level in both classes.

[14] The last ground argued was that the form of offer and acceptance was in excess of R10 million.⁵ The first respondent contracted with the two respondents for the amount exceeding the budget. My brother broached it with counsel as to how we should read the agreement which was in excess of R10 million with the letter of appointment which specifically provided that the contract amount was R9 969 447.24 VAT included.⁶ His response was that he was unsure as to how it will play out should a dispute arise between the respondents. He plainly conceded that it was a conundrum.

[15] He launched a scathing attack on the issue that the funds were spent by the first respondent to purchase the material. That, he argued, was a fertile ground for malfeasance. Despite its submitted bid being almost double the budget, the applicant was committing to complete the works within the stated cap. The cornerstone of his submissions was that the courts were perfectly placed to make a far reaching order of substituting the joint venture with the applicant. We pointed out to him that the horse may have bolted in that over 70% of the works was already completed. He sharply differed and responded that it was only the purchase of the material and site establishment. The nub of his submission was that substantial work still had to be done and that there is no evidence that the applicant will be unable to complete it.

⁵ Page 37 of volume 1 of the indexed papers.

⁶ Page 386 of volume 3 of the indexed papers.

[16] The contrasting approach of Mr Ayeye was to refer to the amended notice of motion as a basis upon which the application should be dismissed.⁷. The proper enquiry was whether or not a review ground has been established in terms of section 6 of Promotion of Administrative Justice Act 3 of 2000 (PAJA). Once the ground has been established, the court is enjoined with the discretion to determine the just and equitable remedy. Turning to the distinct prayers in the notice of motion, he pointed out that the applicant was timidly pursuing prayer number 5. The gist of his argument was that the applicant did not make a case in its papers that entitled it to be awarded the bid. The case made found its traction on the default position in the event the second and third respondents were removed.

[17] The reasoning that this argument is fallacious is found on Regulation 21 of the Municipal Supply Chain Regulation. The substitution relief cannot be sustained given its value. He referred to the tender notice and invitation which requires that 30% of the work must be allocated to a local contractor within the municipal area of the first respondent. Therefore, there is nothing much left on the works still to be completed by the applicant in the context of the bid.

[18] Turning to the values set out in the law pertaining to procurement he argued that there is no absolute standard to explain a particular value mentioned in section 217 of the Constitution of the Republic. The joint venture bid was competitive in terms of price. The mere fact of the existence of irregularities does not establish a ground for review. The centrepiece of his argument was that the irregularities referred to must be adjudged to transgress all values not one or two that are suitable to the applicant. In essence not every slip in the process can be visited by judicial scrutiny and sanction.

[19] In answer to more questions from the court, he pointed out that this was not a case where both partners of the joint venture did not provide the bank rating certificate. In the present matter only one partner mainly the third respondent did not do so. The bank rating certificate of the second respondent was sufficient on its own. On the issue of the company profile, he argued that the BEC did not place much emphasis on it. It was not part of the checklist of key documents submitted by

⁷ Page 107 of volume 2 of the indexed papers

bidders. This information was nothing more than an information provided by the entity concerned about itself.

[20] On the CIDB registration, he readily conceded that the third respondent was not registered. However, the third respondent was not on its own but had partnered with the second respondent who had more than what was required. Another concession was that there were conflicting requirements set out in various documents. Notwithstanding these problems, the list of returnable documents was explained in the compulsory site meeting. Therefore, the bid of the applicant was not jeopardised or prejudiced by allowing the third respondent to bid.

[21] He made light work of the complaint pertaining to the grading level. According to him the bidders simply had to have either or but not both. In order to fortify his point, he referred to the document circulated during the compulsory bid briefing which required that a bid must comply with tender data. Paragraph F.2.1 of the tender data required a bidder to have one not both of the grading level in different categories. He conceded that the first respondent had overlooked the requirements of the second respondent to register in ME class, but it was superfluous, so he submitted. It did not work to directly prejudice the applicant. Importantly it had the negative effect of excluding joint ventures. He beseeched the court to dismiss the application. In the alternative, should we find for the applicant on prayer 1, taking all circumstances into consideration we should not struck down the service agreement.

Discussion

[22] The starting point of the discussion in procurement matters is fixed firmly in section 217 of the Constitution of the Republic of South Africa Act 108 of 1996. The section provides that an organ of state must acquire goods and services in accordance with a system which is fair, equitable, transparent, competitive and cost effective. Flowing from this section is a myriad of other acts, regulations and policies that buttress this point. There is no doubt that any evaluation and adjudication of a bid can only take place when any decision meet these requirements. These cardinal values must exist at the same time for the process to be compliant. The decision to

award a bid is an administrative action and must comply with the prescripts of the Promotion of Administrative Justice Act 3 of 2000.

[23] The contentions always centres around the interpretation and application of these noble principles to the facts and circumstances on hand. That is the crux of this matter. It is to the wealth of authorities that this court will turn to in an effort to unlock this difficult conundrum. It must be understood that the courts are not there to legislate or inform broad policy decisions for other spheres of government. The returnable documents lie at the heart of the dispute between the parties. The matter is not made any easier by the apparent obfuscation created by documents emanating from the first respondent which do not talk to each other in material respects. At times they seem to be prejudicial and onerous to a particular category of bidders like the joint venture.

[24] The notice and invitation to bid required bidders to be registered with the CIDB in both Civil Engineering (CE) and Mechanical Engineering (ME) class of Construction Works (Grade 5 CE/ME or higher, 4 CE/ 4 ME PE (Potentially Emerging Contractors) or higher). On the other hand, paragraph 12 (a) of the Notice on Evaluation reads as follows: - **“Failure to provide written proof of registration with the CIDB, in an appropriate contractor grading designation 4CE / 4ME PE or higher, as required in the bid document”**. On plain reading of the provision, it will appear that there is no longer a requirement for registration in both categories.

[25] The battle cry for the applicant is that the first respondent did not comply with its own processes and that should put paid to the opposition of the first respondent. Only strict compliance will be considered to be satisfactory. This proposition is reliant on the decision of **Dr J.S. Moroka Municipality and Others v Betram (Pty) Ltd and Another**. In that matter the court held that it was for the applicant (municipality), and not the court, to decide what should be the prerequisite for a valid bid. The failure to comply thereto would result in a tender being disqualified as an acceptable tender. It seems that the only acceptable excuse will be where the condition(s) is/are immaterial, unreasonable and unconstitutional.⁸

⁸ 2014 (1) All SA 545 (SCA) at para 10.

[26] The decision of Dr J.S. Moroka *supra* was predicated on an earlier decision of the same court where Brand JA in *Minister of Environmental Affairs and Tourism v Pepper Bay Fishing*⁹ stated : -

“As a general principle an administrative authority has no inherent power to condone failure to comply with a peremptory requirement. It only has such power if it has been afforded the discretion to do so.”

The point made pertinent to this matter is that the first respondent on any reading of the bid invitation document did not possess any discretion.

[27] The first respondent relies *inter alia* on the judgment of the Supreme Court of Appeal in **Millennium Waste Management (Pty) Ltd v Chairperson, Tender Board: Limpopo Province and Others**. On paragraph 17 the court said the following: -

“Moreover, our law permits condonation of non-compliance with peremptory requirements in cases where condonation is not incompatible with public interest and if such condonation is granted by the body in whose benefit the provision was enacted (*SA Eagle Co Ltd v Bavuma*). In this case condonation of the appellant's failure to sign would have served the public interest as it would have facilitated competition among the tenderers. By condoning the failure, the tender committee would have promoted the values of fairness, competitiveness and cost-effectiveness which are listed in s 217. The appellant had tendered to provide the needed service at a cost of R444 244, 43 per month whereas the consortium had quoted and was awarded the tender at the amount of R3 642 257, 28 per month”.¹⁰

[28] The notice of evaluation circulated at the meeting is substantively different to the notice and invitation to bid. It seems that during the briefing session the bidders who did not even qualify were told they could qualify. The question is whether the fact that certain irregularities existed does mean that there is a ground for review. The second respondent provided the bank rating certificate which if it submitted the

⁹ 2004 (1) SA 308 (SCA) at para 31.

¹⁰ 2008 (2) SA 481 (SCA).

bid on its own would have been sufficient. Therefore, there is no merit in the argument that because the third respondent did not attach the bank rating certificate it is fatal to the joint bid.

[29] Obviously the purpose of the returnable documents must be assessed in context. The importance of the bank rating certificate is to establish the financial muscle of the bidder to complete the work. This is clearly demonstrable in the bank rating certificate provided by the third respondent. This is distinguishable from a situation where both partners of the joint venture failed to provide the same. That the second respondent has not provided the bank rating certificate is immaterial in the bigger of scheme of things. The court takes the view that substantial compliance with the returnable documents was achieved on this aspect.

[30] The failure to annex a company profile does not take the matter on behalf of the applicant any further either. The court agrees with counsel for the first respondent that this is the document that an entity presents itself to the public primarily for marketing purposes. Most of what is required without which a proper assessment of a bid cannot take place are already provided in other returnable documents. A curious observation about the crucial importance of this document (if any) can be found in the report compiled by the Supply Chain Management (SCM) practitioner on the closing ceremony of tenders. It was not among the list of documents which were considered for all bidders to determine the responsiveness of any bid by bidders. On the papers before us, it cannot be said to have played any role to advantage or disadvantage any bidder.

[31] Then there is an issue of the registration with CIBD grading requirements. The lead partner in the joint venture more than qualify as per the requirements. The case for the applicant may be predicated on the confusion created by documents that do not tally with each other. Clearly the tender data require a grading designation of 4CE or 4ME PE or higher. This defeat the argument of the applicant that what was required was either CE and ME. The applicant cannot succeed on this point.

[32] The preceding point is also reliant on the report authored by the Consulting Engineers. The copy attached to the founding papers is unsigned and does not

appear to be an official document. There is no confirmatory affidavit about its status or the weight to be attached to its contents. The only point made is that it found its way into the papers because the first respondent made it available to the applicant. Nevertheless, counsel for the applicant correctly conceded that it is not his assertion that it is an official document. What remains then is what is its role in the appointment or non-appointment of any bidder. Seemingly none and therefore the applicant cannot succeed on the strength of this point.

[33] The applicant raised a problematic point that the bid was awarded for an amount in excess of R10 million. This is as a result of the difference in the bid amount between the letter of appointment and the agreement entered into by the parties. This court is not called upon to adjudicate the point which one of the two documents can validly be relied upon by them. The question whether the letter of appointment takes precedence over the agreement or *vice versa* does not arise in these proceedings. What seems apparent is that the appointment was made for an amount less than R10 million.

[34] Without a determination being made between the two, this point cannot be sustained. Counsel for the applicant was at pains to argue around it and could only speculate what could be the cause of action in the event of a dispute arising between them. In the absence of any conclusive evidence and substantive argument on this aspect, this ground falls to be rejected.

[35] The conclusion is that the irregularities pointed out did not distinctly work against the applicant. The stark reality is that there is no perfect bid process. This should not be interpreted to mean that administrators can bend the procurement system according to their whims and deviate for the sake of it. This was made clear in **Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer, South African Social Security Agency and Others**.¹¹ It may well be so that public officials may bend the requirements in order to weaken efforts to achieve good administrative and governance practices.

Remedy

¹¹ 2014 (1) SA 604 (CC) at para 40.

[36] Even if the court is wrong in reaching the conclusion it did, the remedy sought by the applicant cannot be afforded it. There are numerous practical problems which militate against. We have been informed conclusively that about 78% of the works have been concluded. The applicant argued that it is willing to carry out the works on the same conditions as those agreed upon by the respondents. Not only that but also that the percentage referred to only cover the non-essentials of the agreement. It is not the duty of the court to negotiate agreements between the parties. They are free to do so themselves without the intervention of the court. We broached it with counsel that these may stem from incorrect material procured by the first respondent or poor workmanship on the part of the other respondents. There may also be contractual dispute that may come to the fore. Chief among these of course, it is the interest of the community who are on the receiving end because of this bitter wrangle between the parties.

[37] It is trite that an appropriate relief will undoubtedly be determined by the circumstances of that case. The court must make a just and equitable relief after consideration of all factors which must extend beyond those of the parties but the public as well. This requires a delicate balancing act of all these competing interests.¹² In the exercise of its wide discretion, the court may not even choose one alternative relief based on what is just and equitable in the circumstances of the case.

[38] It is not the case of the applicant that the first and second respondents were in any conceivable manner complicit in the awarding of the bid to themselves. The Supreme Court of Appeal has pointed out there must be a distinction drawn between the lawbreakers and innocent parties. The court recognised that those who fall in the former category should not be allowed to benefit from their unlawful conduct. At the same time, innocent parties must not suffer any loss as a result of the invalidation of a contract.¹³

¹² Residents of Industry House, 5 Davies Street, New Doornfontein, Johannesburg and Others v Minister of Police and Others 2022 (1) BCLR 46 (CC) at para 114.

¹³ Central Energy Fund SOC Ltd and Another v Venus Rays Trade (Pty) Ltd and Others 2022 (5) SA 56 (SCA) at para 42.

[39] Taking all the facts and circumstances of the matter on hand the court conclude that it will not be just and equitable to invalidate the contract. The sizeable bulk of the works in terms of the contract has been performed. The first and second respondents are an innocent party and will be hard done to be punished for the wrong they did not commit. Most importantly, the community is desperate for service delivery in that regard to improve the quality of life and restore its dignity. It is a well-known fact how bureaucratic ineptness will impact negatively on service delivery should the allocated funds be returned to the Treasury coffers. The process of starting the bid process *de novo* is not a palatable option in the circumstances. The cost of further delay is too much to contemplate.

Costs

[39] The applicant sought urgent interim relief pending finalisation of the application on review. The costs were reserved in the sense that they will be dealt with as costs in the cause. In that way, they will be dealt with in accordance with the principle that the losing party must pay the costs. There is no reason why the court should depart from the principle mentioned above.

Order

[40] The following order is made: -

40.1. The application for review is dismissed with costs which includes the reserved costs of 23 May 2022.

M.A. MATHEBULA, J

I concur,

P.E. MOLITSOANE, J

On behalf of the applicant:

Instructed by:

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On behalf of the second respondent:

No appearance.

On behalf of the third respondent:

No appearance.