

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

Case No: **171/2022**

**Reportable: NO
Of Interest to other Judges: NO
Circulate to Magistrates: NO**

In the matter between:

ROADMAC SURFACING (PTY) LTD

(Registration number: 1992/001299/07)

Applicant

and

**MEC FOR THE DEPARTMENT OF POLICE, ROADS &
TRANSPORT, FREE STATE PROVINCE**

1st Respondent

TAU PELE CONSTRUCTION (PTY) LTD

(Registration number: 2003/020819/07)

2nd Respondent

CORAM: MOLITSOANE, J et POHL, AJ

HEARD ON: 07 NOVEMBER 2022

JUDGMENT BY: POHL, AJ

DELIVERED ON: 14 NOVEMBER 2022

I INTRODUCTION

[1] In this application, the applicant seeks an order that the decision by the first respondent to disqualify the applicant in a tender and/or the award of the tender to the second respondent be reviewed and set aside.

[2] During March 2022, the applicant applied for interim relief, in the form of an interdict, pending the outcome of the present application for review. On Monday, 28 March 2022 Daffue J, issued the following orders:

“1. The first respondent is interdicted from giving instructions to the second respondent and/or any other tenderer to perform any further work under **Tender No: PR&T18/2021/22**.

2. The second respondent is interdicted from commencing with any further work under **Tender No: PR&T18/2021/22**.

3. The orders in paragraphs 1 and 2 shall serve as interim interdicts with immediate effect pending finalisation of the review application to be instituted on/or before 22 April 2022 by the applicant against the decision of the first respondent to award **Tender No: PR&T18/2021/22** to the second respondent.

4. The costs of 28 January 2022, 10 February 2022 and 24 March 2022 shall stand over for later adjudication.

5. The reasons for the orders will follow in due course.”

[3] Daffue J, duly delivered his reasons on 2 June 2022.

II THE PARTIES

[4] The applicant is Roadmac Surfacing (Pty) Ltd, represented by Adv N Snellenburg SC assisted by Adv JJ Buys, they being instructed by York Attorneys, Bloemfontein.

[5] The 1st respondent is the MEC for the Department of Police, Roads and Transport, Free State Province, represented by Adv L Bomela, instructed by the State Attorney, Bloemfontein.

[6] The 2nd respondent is Tau Pele Construction (Pty) Ltd, represented by Adv S Grobler SC, instructed by Peyper Attorneys, Bloemfontein.

III THE RELIEF CLAIMED

[7] The applicant claims the following relief from this Court in the notice of motion:

“...an order in the following terms:

1. That the decision of the first respondent to disqualify the applicant in **Tender no: PR&T 18/2021/22** and/or to award **Tender No: PR&T 18/2021/22** to the second respondent be reviewed and set aside.

2. That the contract concluded with second respondent pursuant to and as a result of the award of the tender under **Tender No: PR&T 18/2021/22** be set aside.

3. That the tender under **Tender No: PR&T 18/2021/22** be awarded to the applicant in terms of section 8(1)(c)(ii)(aa) of the Promotion of Administrative Justice Act 3 of 2000 (“PAJA”), *alternatively* remitting the aforesaid tender for bid evaluation by the first respondent subject to such directions as the Court deems meet and with due consideration of the Court’s findings herein in terms of section 8(1)(c)(i) of PAJA.

4. That the first respondent be ordered to pay the costs of this application on an attorney and client scale.

5. That the second respondent be ordered to pay the costs of this application if the application is opposed by the second respondent.

6. Further and alternative relief”

IV BACKGROUND AND TENDER DOCUMENTATION

[8] Upon invitation by the Department of Police, Roads and Transport, Free State Province, several construction companies submitted tenders for “the special maintenance on Route P44/1&2 between Deneysville and Jim Fouché from section one (01) to section four (04).”¹

The duration of the project was advertised to be six months only. Once the tender had been awarded, the applicant, being one of the unsuccessful tenderers, decided to embark on litigation.

[9] On 11 January 2022 the applicant became aware that the tender had been awarded to the second respondent. It immediately reacted and requested reasons to be provided by 14 January 2022. No reasons were provided. On 18 January 2022 its application for urgent relief, set down for 28 January 2022, was issued.

[10] On 28 January 2022 an order was granted by agreement. The first respondent was directed to on or before 7 February 2022 file “full and written reasons” for the decision not to award the tender to the applicant. The reasons² then followed as indicated above, and thereafter the application for the interim relief referred to in paragraph [2], *supra*. The reasons thus furnished by the first respondent reads as follows: “It is a known fact that pre-qualification being stage one(1) is compulsory for the contractor must complete 30% subcontracting amount. The criteria found its way in terms of Section 14 subparagraphs 14.1 to 14.6 of the Preferential Procurement Regulations, 2017 pertaining to the Preferential Procurement Policy Framework Act of 2000. We further refer Roadmac to SDB 6.1

¹ Index review application, p 77

² Index review application p396

of its tender whereby it says “Not Applicable” while it MUST to give subcontracting amount as part of terms and conditions of the tender. We further refer Roadmac to Tender Bulletin advertisement no. 75 dated 3rd December 2021 as to pre-qualification criteria (PPR2017). Based on non compliance of 30% subcontracting, it was deemed not to be responsive to pre-qualification at stage 1.”

[11] The present review application was then issued on 22 April 2022 which was opposed by the first and second respondents. Opposing affidavits were filed by the respondents and a replying affidavit was filed by the applicant.

[12] It is necessary to refer to the following portions of the tender documentation to give context to the cases put forward by the respective parties.

[13] The tender notice and invitation to tender has the following paragraph on the first page thereof:³ “The successful tenderer must subcontract a minimum of 30% of the value of the contract to Targeted Enterprises through Contract Participation Goals (CPG)”

[14] At the portion of the documentation, just above the applicant’s representative’s signature, where the applicant was required to stipulate its price for the bid, it stated that it offered the amount of R38 803 821.40 VAT included. Just below that amount, printed in bold as part of the tender documentation, the following words appear: **“WHICH WILL INCLUDE A MINIMUM SUBCONTRACTING VALUE OF:”**⁴ That portion was however not completed by the applicant but for the acronym “TBC”. According to counsel it means “To be concluded” or “To be calculated”. Despite the fact that this part of the tender document requesting the subcontracting amount in rand to be written in, the applicant did not do so.⁴

³ Index review application p81

⁴ Index review application, p264

[15] Clause F.1.4 of the Tender data requires that all communication between the Employer and the Tenderer must be in writing between the Tenderer and the Employer's engineers or agent.⁵

[16] Clause F.2.3 of the Tender data, which deals with the Tenderer's obligations, requires the Tenderer to check the tender documentation for completeness and to communicate any discrepancy or omission with the Employer.⁶

[17] Clause F.2.8 requires the tenderer to seek clarification from the Employer at least 2 days before closing time where clarification is needed.⁷

[18] Clause F.2.14 requires "Information and data to be completed in all respects" and further "Accept that tender offers, which do not provide all data or information requested completely and, in form, required may be regarded by the Employer as non-responsive."⁸

[19] Clause F.3.8.1, that deals with the test for responsiveness under the heading dealing with the employers obligations and reads as follows: "Determine, on opening and before detailed evaluation, whether each tender offer properly received: a) meets the requirements of these Conditions of Tender, b) has been properly and fully completed and signed, and c) is responsive to the other requirements of the tender documents. (emphasis added)

[20] Clause F.3.8.3 then requires the Employer to reject a a non responsive tender offer.⁹

[21] In the portion of the tender documentation that deals with the returnable schedules, a note appears that the tenderer must realise that failure to complete the

⁵ Index review application, p89

⁶ Index review application, p 90

⁷ Index review application, p91

⁸ Index review application, p92

⁹ Index review application, p95

said documentation to the satisfaction of the Employer, “may lead to rejection on the grounds that the tender is non-responsive.”¹⁰

[22] Paragraph 7 of the said documentation then deals specifically with sub-contracting. The first question is: “Will any portion of the contract be sub-contracted?”¹¹ There is then a tick box with the options of “yes” or “no”. No box was ticked and the applicant’s representative dealt with this section by drawing a line through it and writing in pen “not applicable”.¹²

[23] The applicant’s tender in the amount of R38 803 821.40 was the lowest of the 14 tenders. The second respondent’s bid was in the amount of R51 615 000.00.¹³

V THE PREFERENTIAL PROCUREMENT REGULATIONS

[24] In the decision of *Afribusiness v The Minister of Finance*¹⁴, the Preferential Procurement Regulations were declared invalid by the Supreme Court of Appeal and the order of invalidity lapsed on 2 November 2021. An application for leave to appeal was directed to the Constitutional Court requesting that the order of the Supreme Court of Appeal be set aside. The matter was heard on 25 May 2021 and the Court handed down judgment on 16 February 2022 in which the invalidity was confirmed.

[25] In terms of section 18 (1) of the Superior Courts Act, the Supreme Court of Appeal’s judgment was suspended when the application for leave to appeal was launched. The tender in casu was duly advertised, published and closed during the time after the Constitutional Court had heard the appeal and before it handed down judgment. In the premises the Preferential Procurement Regulations, 2017, found application and was in full force and effect in respect of this matter that serves before this Court.

[26] The relevant portion of Regulation 4 reads as follows:

¹⁰ Index review application, p104

¹¹ Index review application, p152

¹² Index review application, p152

¹³ Index review application, p269

¹⁴ 2021 (1) 325 (SCA)

“Pre-qualification criteria for preferential procurement

4. (1) If an organ of state decides to apply pre-qualification criteria to advance certain designated groups, that organ of state must advertise the tender with specific tendering condition that only one or more of the following tenders may respond-

(a) a tenderer having a stipulated minimum B-BBEE status level of contributor;

.....

(2) A tender that fails to meet the pre-qualifying criteria stipulated in the tender documents is an unacceptable tender.”

[27] The relevant portion of Regulation 9 reads as follows:

“Subcontracting as a condition of tender

9.(1) If feasible to subcontract for a contract over R30 million, an organ of state must apply subcontracting to advance designated groups.”

[28] In the applicant's papers there is an affidavit by the applicant's business development manager, Mr Maluleke. In this affidavit he alleges that he contacted Mr Ndaba, who was the Project Manager of the project and he was employed by the Free State Department of Police, Roads and Transport. The reason why he contacted him was to get clarity about the sub-contracting.¹⁵ According to him, Mr Ndaba told him that applicant need not deal with the sub-contracting, as that will be done with the successful tenderer, once the tender has been awarded. In opposing the application, the first respondent filed an affidavit by Mr Ndaba. In this affidavit, Mr Ndaba then denied that he ever said that sub-contracting was not an issue or that sub-contracting will be discussed at a later stage with the successful tenderer.¹⁶

¹⁵ Index review application, p315

¹⁶ Index review application, p498

There is thus a substantial factual dispute between the applicant and the first respondent on this aspect.

VI THE APPLICANT'S CASE

[29] The applicant's case in essence was that it should have been awarded the tender. It submitted that its tender was responsive and it should have scored the highest points based on price (the lowest) and B-BBEE.

[30] First respondent, in discarding the applicant's tender and awarding same to second respondent, utilised a process that was not fair, equitable, transparent, comparative or cost-effective.

[31] The reasons advanced by the first respondent amounts to reviewable irregularities.

[32] The 30% sub-contracting requirement was not a pre-qualification requirement in terms of the eligibility criteria, being the first stage of the evaluation process.

VII THE DEFENCES

[33] The respondents relied on several defences which can be summarised as follows:

33.1 It was submitted that at the heart of this application lay at the applicant's contention that its bid was invalidly and irregularly disqualified. The true reason for the disqualification is however because it submitted an incomplete bid. The bid was incomplete because it did not indicate with whom and in what value it will subcontract.

33.2 The applicant's case should thus be seen as one of a disappointed tenderer seeking to avoid the consequences of a failure to submit a complete and compliant bid.

VIII EVALUATION OF THE EVIDENCE AND THE APPLICABLE LEGAL FRAMEWORK

[34] Section 217(1) of the Constitution¹⁷ provides that an organ of state contracting for goods or services must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective. Section 2(1)(f) of PPPFA provides that:

“The contract must be awarded to the tenderer who scores the highest points, unless objective criteria... justify the award to another tenderer.”

[35] In *Chairperson, Standing Tender Committee and Others v JFE Sapela Electronics and Others*¹⁸ the Supreme Court of Appeal had this to say about an “acceptable tender”:

An 'acceptable tender' in turn is defined in s 1 as meaning 'any tender which, in all respects, complies with the specifications and conditions of tender as set out in the tender document'. It is well established that the legislature and executive in all spheres are constrained by the principle that they may exercise no power and perform no function beyond those conferred upon them by law. This is the doctrine of legality. The acceptance by an organ of State of a tender which is not 'acceptable' within the meaning of the Preferential Act is therefore an invalid act and falls to be set aside. In other words, the requirement of acceptability is a threshold requirement.”

[36] In *Millennium Waste Management (Pty) Ltd v Chairperson, Tender Board: Limpopo Province and Others*,¹⁹ Jafta JA (as he then was), writing for a unanimous bench of the Supreme Court of Appeal, considered the definition of “acceptable tender” and held as follows, quoting Scott JA’s dictum in *JFE Sapela Electronics* with approval:

¹⁷ See also *Metro Project CC and Another v Klerksdorp Local Municipality and Others* 2004 (1) SA 16 (SCA) at paras 11 – 13 and numerous judgments thereafter, and *inter alia Millennium Waste Management (Pty) v Chairperson Tender Board: Limpopo Province and Others* 2008 (2) SA 481 (SCA) at paras 17 - 21

¹⁸ 2008 (2) SA 638 (SCA) at para 11

¹⁹ 2008 (2) SA (SCA) at paras 18 & 19

“[18]Therefore the definition in the statute must be construed within the context of the entire s 217 while striving for an interpretation which promotes 'the spirit, purport and objects of the Bill of Rights' as required by s 39(2) of the Constitution. In *Chairperson: Standing Tender Committee and Others v JFE Sapela Electronics (Pty) Ltd and Others* Scott JA said (para 14):

‘The definition of 'acceptable tender' in the Preferential Act must be construed against the background of the system envisaged by section 217(1) of the Constitution, namely one which is 'fair, equitable, transparent, competitive and cost-effective'. In other words, whether 'the tender in all respects complies with the specifications and conditions set out in the contract documents must be judged against these values'.

[19] In this context the definition of tender cannot be given its wide literal meaning. It certainly cannot mean that a tender must comply with conditions which are immaterial, unreasonable or unconstitutional. The defect relied on by the tender committee in this case is the appellant's failure to sign a duly completed form, in circumstances where it is clear that the failure was occasioned by an oversight. In determining whether this non-compliance rendered the appellant's tender unacceptable, regard must also be had to the purpose of the declaration of interest in relation to the tender process in question.”

[37] In evaluating the evidence and drawing the conclusions in this review application, this Court takes due cognisance of the well formulated judgment by Daffue J. It must however be remembered that his judgment was delivered when the applicant applied for the interim relief as referred to in paragraph [2], supra. In doing so, it is a fact that at that stage of the proceedings, the test that the Court then had to apply is vastly different to the test and the further evidence that this Court now has to consider and apply in deciding this review application. Where Daffue J pronounced on the merits of the review, this Court will seriously consider same, although his references to the merits may well be regarded by it as orbiter.

[38] The factual dispute referred to in paragraph [26], *supra*, should in my judgment be dealt with by applying the so-called “Plascon-Evans Rule”. It is trite that this rule that emanates from the well known case of *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*.²⁰ In essence, this entails that the relief the applicant claims should only be granted if the facts stated by the respondent, together with the admitted facts in the applicant’s affidavits, justify the order. In applying this rule, it follows that the case should be adjudicated on this aspect, on the basis that Mr Ndaba did not tell Mr Maluleke of the applicant that subcontracting was not an issue and that it will only be dealt with the successful tenderer, after the tender had finally been awarded. Over and above this, it must be remembered, as is indicated in paragraph [15], *supra*, that the tender documentation clearly stipulates that communication between the tenderer and the employer must be in writing and with the employer’s engineer or agent. That did not happen.

[39] In the premises, it follows in my judgment, that the evaluation of the applicant’s bid must be done on the tender documentation itself and how it was completed or not completed by the applicant itself and applying that to the applicable legal framework.

[40] In an affidavit of Mr Monyane²¹, filed by the first respondent, he explained that he was the person who drafted the “reasons” referred to in paragraph [10], *supra*. He explained that he had the so-called “Implementation Guide: Preferential Procurement Regulations” before him. In that guide, Regulation 9, on which he actually relied, is discussed under paragraph 14 of the guide.²² The incorrect reference to “Regulation 14” by Mr Monyane matters little in my judgment. It is clear from a proper reading of his reasons that the first respondent rejected the applicant’s bid because of the applicant’s failure to complete the forms with regards to the 30% subcontracting and that is the subject matter of Regulation 9.

[41] It is patently clear for the following reasons that the applicant failed to submit a complete and compliant bid:

²⁰ 1984 (3) SA 623 (A)

²¹ Index review application, p543-567

²² Index review application, p560

41.1 As is indicated in paragraph [13], supra, the invitation to tender clearly required the successful tenderer to subcontract a minimum of 30% of the value of the contract. When any bidder sees that invitation and responds thereto, it surely wants to be the successful tenderer. The fact that the invitation refers to “successful tenderer”, does not mean the 30% subcontracting only comes into play once the eventual successful tenderer is identified.

41.2 As is indicated in paragraph [14], supra, the applicant’s representative failed to stipulate the monetary value of the subcontracting, despite the tender documentation clearly and in bold print, requesting it to do so. Instead, he wrote “TBC”.

41.3 As is indicated in paragraph [22], supra, and at the portion of the tender documentation which specifically deals with subcontracting, the applicant’s representative simply drew a line through it and wrote not applicable.

41.4 As is indicated in paragraph [16], supra, there was throughout the tender process an obligation on the applicant to ensure that its documentation was complete.

41.5 As is indicated in paragraph [18], supra, requires the first respondent to check that all information and data is completed in all respects and entitles it to reject tender offers as non-responsive, when the tenders do not comply with same.

41.6 As is indicated in paragraph [19], supra, the tender documentation places an obligation on the first respondent to “determine on opening and before detailed evaluation, whether each tender offer properly received :...has been properly and fully completed and signed, and..is responsive to the other requirements of the tender documents”. If not responsive, it should be rejected (paragraph [20] supra), which is exactly what happened here.

[42] In terms of the abovementioned Regulation 4 (2) a tender that fails to meet the pre-qualifying criteria stipulated in the tender documents, is an unacceptable tender. Having regard to the tender documentation above, the applicant has failed to meet the said pre-qualifying criteria and its bid was thus correctly rejected on this score as well.

VIII CONCLUSION

[43] In the final analysis, I find that the tender documentation was clear, both in relation to the duty to fill in the required documents completely and fully, as well as the subcontracting requirements. The applicant did not do so and its bid was therefore correctly rejected.

[44] The following order is thus made:

1. The application is dismissed with costs.

L. LE R. POHL, AJ

I concur:

P. E. MOLITSOANE, J

On behalf of Applicant:

Instructed by :

Adv N Snellenburg SC & JJ Buys

L&V York Attorneys

BLOEMFONTEIN

On behalf of 1st Respondent:

Instructed by :

Adv L Bomela

State Attorney

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