



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU NATAL DIVISION, PIETERMARTIZBURG**

CASE NO. 4855/2021

In the matter between:

KEY TRUCK DURBAN (PTY) LTD
(Registration No: 2019/476713/07)

FIRST APPLICANT

KEY TRUCK (NEW GERMANY) (PTY) LTD
(Registration No: 1982/002144/07)

SECOND APPLICANT

KEY TRUCK & CAR (PINETOWN) (PTY) LTD
(Registration No: 1973/008640/07)

THIRD APPLICANT

KEY TRUCK & CAR (DURBAN) (PTY) LTD
(Registration No: 1981/006105/07)

FOURTH APPLICANT

and

ETHEKWINI MUNICIPALITY

FIRST RESPONDENT

**THE TENDER APPEAL AUTHORITY:
ETHEKWINI MUNICIPALITY**

SECOND RESPONDENT

**ISIPHO CAPITAL MOTORS (PTY) LTD
t/a BATES MOTORS**

THIRD RESPONDENT

This judgment was handed electronically by transmission to the parties' representatives by email.
The date and time for hand down is deemed to be handed down on 31 October 2022.

ORDER

- (1) The decision of the first respondent to reject the applicants' tender bids for Tender No. CF/93/19 is hereby reviewed and set aside.
- (2) The decision of the second respondent to uphold the first respondent's rejection of the applicants' tender bids for Tender No. CF/93/19 is hereby reviewed and set aside.
- (3) The award of Tender No. CF/93/19 to the third respondent as sole preferred bidder is hereby reviewed and set aside.
- (4) The tender process in respect of Tender No. CF/93/19 is remitted back to the first respondent's Bid Evaluation Committee for re-evaluation.
- (5) The applicants are directed to pay the wasted costs of the application on 23 July 2021.
- (6) The first respondent is directed to pay the wasted costs occasioned by the adjournment on 28 October 2021.
- (7) The first respondent is ordered to pay the costs of the application for Part B of the notice of motion, such costs to include those consequent upon the employment of two counsel where so employed.

JUDGMENT

Delivered on 31 October 2022

Balton J

- [1] The applicants have brought a review application regarding the decision of the first respondent and/or the second respondent to exclude the applicant's bids for tender CF/93/19.

[2] This application commenced as an urgent application by the applicants on 23 July 2021 for relief in terms of Parts A and B of the notice of motion. Pursuant to an undertaking by the first respondent not to implement the award of the tender, the interdictory relief sought in Part A of the notice of motion was withdrawn by consent between the parties.¹ Accordingly, the applicants seek an order in terms of Part B of the notice of motion. On 28 October 2021 due to the first respondent's failure to file its heads of argument and condonation application in compliance with Practice Directive 9.4., the matter was adjourned to 16 March 2022 and costs were reserved.

[3] The applicants are independently operated corporate entities and form part of the Key Motor Group (Pty) Ltd, which company owns a majority shareholding in each of the applicants. The Key Motor Group (Pty) Ltd is a subsidiary of Key Holdings (Pty) Ltd. The first and second applicants compete in the truck industry and the third and fourth applicants compete in the light commercial and passenger vehicle industry. The applicants are registered on the first respondent's supplier database.

[4] The first respondent is the Ethekwini Municipality (the 'Municipality').

[5] The second respondent is the Tender Appeal Authority: Ethekwini Municipality established in terms of the Ethekwini Municipality Supply Chain Management Policy, 2017.

[6] The third respondent also tendered for the bids and was awarded the tenders.

Factual Background

[7] The background facts to this dispute are the following:

- (a) During February 2020, the Municipality advertised Tender No. CF93/19: 'Supply and delivery of Opel, Chevrolet and Isuzu spares, provisions of services and repairs to vehicles as and when required for a period of thirty six months'.
- (b) Three different categories of bids were called for, namely:

¹ Page 515 of the indexed papers.

- (i) Category A for the supply and delivery of spares.
 - (ii) Category B for the provision of service, maintenance and repairs to passenger and light commercial vehicles below and equal to 1 ton.
 - (iii) Category C for the provision of service, maintenance and repairs to heavy commercial vehicles equal to 1.1 ton and above.
- (c) The applicants are registered on the Municipality's database, and the second, third and fourth applicants were awarded contracts through the Municipal Supply Chain Management Regulations on contracts similar to Tender No. CF 93/19 during December 2018 to January 2021.
- (d) The applicants submitted four separate bids as follows:
- (i) The first and second applicants submitted tender bids in respect of categories A and C;
 - (ii) The third and fourth applicants submitted tender bids in respect of categories A and B.
- (e) A report by the Ethekwini Municipality, City Fleet Division ('City Fleet') to the Municipality's Bid Evaluation Committee ('the BEC') dated 21 August 2020 recommended that the applicants and the third respondent all be approved as successful bidders for tender CF/93/19.²
- (f) At a meeting of the BEC on 10 November 2020, the recommendations were deferred, and a request addressed to the City Fleet Division that an addendum report be prepared excluding the applicants' bids on the basis that 'they colluded'.³
- (g) The addendum report prepared by City Fleet⁴ indicates that the applicants were excluded due to anti-competitive behaviour.⁵ The report states *inter alia*:
 'The purpose of this report is to exclude bidders from the Key Motor Group in the recommendation and proceed with Isipho Capital Motors (Pty) Ltd, t/a Bates Motors.'
- (h) On 1 December 2020, the BEC approved the award of the tender to the third respondent.⁶

² Page 483 to page 508 of the record.

³ Page 520 of the record.

⁴ Page 522 – 529 of the record.

⁵ Page 524 of the record.

⁶ Para 8, page 531 of the record.

- (i) The Municipality's Bid Adjudication Committee (the 'BAC') approved the BEC's recommendation on 18 January 2021.⁷
- (j) On 21 April 2021, the applicants were notified that their bids were unsuccessful and that the third respondent was the sole successful bidder.⁸
- (k) The applicants lodged an internal appeal in terms of Regulation 49 of the Municipality Supply Chain Management Policy (the 'SCM') on 3 May 2021. This appeal was referred to the second respondent for decision.

[8] The Municipality's procurement documents for the tender consists of ten sections, which include: Conditions of Tender (Section 2), Special Conditions of Tender ('SCT') and Additional Conditions of Tender ('ACT') (Section 3) and Returnable Tender Documents (Section 4).

[9] The following returnable documents had to be included in prospective bidders' bid submissions:

- (a) a MBD 9: Certificate of Independent Bid Determination ('the MBD 9 Certificate');
- (b) a MBD 4: Declaration of Interest; and
- (c) a MBD 6.1: B-BBEE Status Level Verification Certificate.

[10] Section H of the Tender Procurement Document which deals with the MBD 9 Certificate, reads inter alia as follows:⁹

'The following MBD serves as a certificate of declaration that would be used by institutions to ensure that, when bids are considered, **reasonable steps are taken to prevent any form of bid-rigging.**

In order to give effect to the above, the following Certificate of Bid Determination must be completed and submitted with the bid. The undersigned, in submitting the accompanying bid, in response to the invitation for the bid do hereby make the following statements that I certify to be true and complete in every respect:

1.0 I have read and I understand the contents of this Certificate;

2.0 I understand that the accompanying bid will be disqualified if this Certificate is found not to be true and complete in every respect;

⁷ Page 548 of the record.

⁸ Pages 444 – 448 of the indexed papers.

⁹ Pages 7-78 of the indexed papers.

3.0 I am authorized by the bidder to sign this Certificate, and to submit the accompanying bid, on behalf of the bidder;

4.0 Each person whose signature appears on the accompanying bid has been authorized by the bidder to determine the terms of, and to sign, the bid, on behalf of the bidder;

5.0 For the purposes of this Certificate and the accompanying bid, I understand that the word "competitor" shall include any individual or organization, other than the bidder, whether or not affiliated with the bidder, who:

- **has been requested to submit a bid in response to this bid invitation;**
- **could potentially submit a bid in response to this bid invitation, based on their qualifications, abilities or experience;**
- **provides the same goods and services as the bidder and/or is in the same line of business as the bidder.**

6.0 The bidder has arrived at the accompanying bid independently from, and without consultation, communication, agreement or arrangement with any competitor. ...

7.0 In particular, without limiting the generality of paragraphs 6 above, there has been no consultation, communication, agreement or arrangement with any competitor regarding:

- prices;
- geographical area where product or service will be rendered (market allocation);
- methods, factors or formulas used to calculate prices;
- the intention or decision to submit or not to submit, a bid;
- the submission of a bid which does not meet the specifications and conditions of the bid;
- bidding with the intention not to win the bid.

8.0 In addition, there have been no consultations, communications, agreements or arrangements with any competitor regarding the quality, quantity, specifications and conditions or delivery particulars of the products or services to which this bid invitation relates.

9.0 The terms of the accompanying bid have not been, and will not be, disclosed by the bidder, directly or indirectly, to any competitor, prior to the date and time of the official bid opening or of the awarding of the contract.'

[11] Section I of Section 4(d) of the Tender Procurement Document, which deals with the Confirmations, Authorities, Certifications, Acknowledgements and Signatures, states *inter alia* the following:

'That the undersigned, who warrants that he/she is duly authorised to do so on behalf of the enterprise:

**...
4.0 Confirms that I/we are not associated, linked or involved with any other tendering entities submitting tender offers and have no other relationship with any of the bidders or those responsible for compiling the scope of work that could cause or be interpreted as a conflict of interest.'**¹⁰

¹⁰ Page 78 of the indexed papers.

Issues

[12] The applicants raised two preliminary issues in their replying affidavit, namely that in the opposing affidavit, the Municipality attempted to rely on firstly, facts not placed before the second respondent and secondly, on the restrictive practices as defined in the Competition Act 89 of 1998 ('the Competition Act').

[13] The main issues in dispute are whether:

- (a) The impugned decision to reject the applicants' tender bids for Tender number CF/93/19 ought to be set aside.
- (b) The third respondent's bid was non-compliant with the conditions of tender.

Preliminary Issues

[14] The applicants contend that the additional facts on which the Municipality seeks to show that the applicants colluded (or did not act independently) are on the basis that two individuals allegedly initialed each page of the applicants' bids and MJ van Niekerk of Isuzu Motors South Africa (Pty) Ltd signed a letter on 24 March 2020 confirming that *'the Applicants are duly authorised by Isuzu'*.

[15] The applicants submit that these additional facts lack merit as the signatures appearing on the applicants' bid documents are those of the deponents thereto and the commissioner of oaths. Further, the letters issued by Isuzu to each individual applicant are not evidence of collusion as these letters were returnable documents, which the applicants were obliged to include in the tender submissions.

[16] The Municipality denies that it has placed new evidence before this court, and contends that the points raised by the applicants in the preliminary issues were contained in the tender documents that form part of the tender bids submitted by the applicants. This information was before the BEC when it made its recommendation and the BAC

when it approved the submissive tender. Further, the tender documents of all bidders were before the second respondent when it made its Ruling.¹¹

[17] In my view the second respondent's Ruling indicates that the issues raised by the applicants in their first preliminary point were indeed considered by the second respondent and are not new facts arising in the municipality's opposing affidavit.

Competition Act

[18] The applicants contend that the second respondent's reliance on the restrictive practices as defined in the Competition Act is misplaced as such disputes fall within the exclusive jurisdiction of the Competition Act. In terms of s 65 of the Competition Act, any disputed tender will remain valid until declared void by either the Competition Tribunal or the Competition Appeal Court. The tender itself caters for the referral of suspicious bids to the Competition Commission for further investigation.

[19] The Municipality submits that the Competition Act is one of the empowering provisions referred to in the MBD 9 and the Municipality's reliance on it is limited to its reference on the MBD 9 document. It is a statutory provision that must be considered when making a determination on collusive bidding. The Municipality has not made any allegations to the effect that the tenders are void as stipulated in the applicants' replying affidavit.

[20] In my view, the second respondents Ruling does not indicate that the Municipality or the second respondent relied on the restrictive provisions of the Competition Act or that any action has been taken in terms of the Competition Act.

[21] Accordingly, the preliminary issues raised by the applicants are without merit and are dismissed.

¹¹ Pages 601 – 625, Volume 7 of the record.

Main Issues

[22] The first issue to consider is whether the impugned decision rejecting the applicants' bids for Tender number CF/93/19 ought to be set aside. In this regard, I will firstly consider the decision of the Municipality to disqualify the applicants' bids and secondly, the decision of the second respondent.

The decision of the Municipality to disqualify the applicant's bid

[23] The applicants submit that:

- (a) The BEC did not give reasons for its decision that the applicants' bids had to be excluded because they had colluded.
- (b) There is no evidence that the applicants conspired with each other to raise prices or lower the quality of goods and/or services or that there was any agreement between the applicants not to compete.
- (c) The first and second applicants competed with each other and the third and fourth applicants competed with each other.
- (d) The finding of the BEC that the applicants colluded falls to be set aside in terms of s 6(2)(d) of the Promotion of Administrative Justice Act 3 of 2000 ('PAJA'), in that the finding was materially influenced by an error of law, namely the incorrect interpretation of what constituted 'collusive bidding' for the purposes of section 4 of the Tender Procurement Document.

[24] The Municipality submits that:

- (a) The applicants failed to take cognizance of the entire tender document, in particular the importance of the MBD 9. The purpose of the MBD 9 certificate and the declaration is to prohibit and prevent collusive bidding within the meaning of the Competition Act and to prevent other forms of abuse in the wide sense in terms of the Municipality's Supply Chain Management ('the SCM') policy.
- (b) The MBD 9 refers to s 4(1)(b)(iii) of the Competition Act which states that 'collusive bidding is a per se prohibition meaning that it cannot be justified under any grounds'.¹²

¹² *National Asphalt (Pty) Ltd v Ethekwini Municipality and Others* – unreported judgment of Topping AJ – dated 12 August 2019 at paragraph 21-23.

- (c) It follows that the MBD 9 was instructive, and the sanction was disqualification if the bidder fell foul of its provisions.
- (d) The applicants' tender bids violate several of the peremptory provisions contained in the MBD 9 declaration, read with s 4(b)(iii) and regulation 38(1) of the Municipal Supply Regulation; a certificate of declaration whose primary purpose is to ensure the prevention and prohibition of collusive bidding.
- (e) The applicants have not complied with the peremptory requirements of the MBD 9, read with the statutory requirement of section 4(b)(iii) of the Competition Act. They have not arrived at the accompanying bids independent from, and without consultation, communication, agreement or arrangement with each other.
- (f) It cannot be accepted that there has been no consultation, communication, agreement or arrangement with each other relating to prices, geographical area where the product or service will be rendered, methods, factors or formulas used to calculate prices and/or the intention or decision to submit or not submit a bid.
- (g) The Municipality was correct in its finding that the applicants' ought to be excluded from the procurement process on the basis that they colluded.
- (h) It is common cause that the each applicant signed the declaration contained in the MBD 9 and in doing so, the applicants' confirmed that they are not associated, linked or involved with any other tendering entities submitting tender offers and have no other relationship with any of the bidders or those responsible for compiling the scope of work that could cause or be interpreted as a conflict of interest and they accept that, in addition to cancellation of a contract, action may be taken against them should the declarations prove to be false.

Evaluation

[25] The Municipality's main contention is that the applicants have breached the MBD 9 Certificate in that the certificates were found to be not true and that the bid documents were not independently completed. The purpose of the certificate of declaration is to prevent collusive bidding.

[26] In terms of the SCT 14, the evaluation process consists of a two-step process.¹³ Step one which is set out in SCT 14, and ACT4 of the Additional Conditions of Tender ('ACT4'), prohibited the applicants and other companies with similar corporate structures from submitting bids for the tender. The fifth bullet point of SCT 14 read as follows:

'Bidders in the same group of companies, in horizontal relationships or within the same directorship are barred from competing against each other for this tender enquiry as their tender responses will be automatically disqualified and classified as collusive behaviour submissions. Submissions will only be considered if the parties submit one bid response for the group with a listing of branches the group intends to deploy for the supply of goods and provision of services or from one nominated entity within the group that will respond to the tender enquiry.'

[27] ACT4 had a similar provision with the following heading 'PROHIBITION OF TENDER RESPONSES FROM COMPANIES IN THE SAME GROUP'.¹⁴

[28] On 19 March 2020, the Municipality invited prospective bidders to attend a compulsory clarification meeting.¹⁵ It issued an amended notice by deleting the wording of the fifth bullet point in SCT 14 and it also amended the similar provision in ACT4 which echoed the above fifth bullet point in the SCT 14 except that instead of the word "Bidders" in SCT 14 the word "Companies" in ACT4 was used.

[29] In terms of the amendment, ACT4 reads as follows:

'ACT4 PROHIBITION OF COLLUSIVE BIDDING
Collusive bidding is prohibited'

[30] The Municipality amended the requirements for the tender bids by deleting the requirements that bidders in the same group of companies in horizontal relationships or within the same directorship could not compete against each other. This accordingly meant that either the first or second applicants could bid against the third or fourth applicants. The first and second applicants were in the trucking industry, and they could not bid against each other, likewise the third and fourth applicants were in the light motor vehicle industry and could not bid against each other.

¹³ Para 29, Page 16 of the indexed papers.

¹⁴ Page 52 of the indexed papers.

¹⁵ First respondent's answering affidavit, para 13, page 616 of the indexed papers.

[31] As previously referenced earlier in this judgment, section H of the Tender Procurement Document which deals with the MBD 9 Certificate, reads as follows:¹⁶

'Section 4(1)(b)(iii) of the Competition Act 89 of 1998, as amended, prohibits an agreement between, or concerted practice by, firms, or a decision by an associations of firms, if it is between parties in a **horizontal relationship and if it involves collusive bidding (or bid rigging)**. Collusive bidding is a *per se* prohibition (sic) meaning that it cannot be justified under any grounds. Municipal Supply Regulation 38 (1) prescribes that a supply chain management policy must provide measures for the combating of abuse of the supply chain management system, and must enable the accounting officer, among others, to:

- (a) take all reasonable steps to prevent such abuse;
- (b) reject the bid of any bidder if that bidder or any of its directors has abused the supply chain management system of the municipality or municipal entity or has committed any improper conduct in relation to such system; and
- (c) cancel a contract awarded to a person if the person committed any corrupt or fraudulent act during the bidding process or the execution of the contract.

[32] The Tender Procurement Document defines bid rigging as:¹⁷

'Bid rigging (or collusive bidding) occurs when businesses, that would otherwise be expected to compete, secretly conspired to raise prices or lower the quality of goods and/or services for purchasers who wish to acquire goods and/or services through a bidding process. Bid rigging is, therefore, an agreement between competitors not to compete.'

[33] In *Tourvest Holdings (Pty) Limited v Airports Company of South Africa Limited* 2014 JDR 0851 (GP), the court held that:

'In *Competition Commission v Aveng (Africa) Limited*, the Competition Tribunal described collusive tendering as conduct which resulted in the "tender process being distorted". It went to say:

Collusive tendering therefore applies to agreements or concerted practices which have as their object or effect the prevention, lessening, restriction and distortion of competition in South Africa.'

[34] The Competition Commission webpage defines collusive tendering as follows:

'Collusive tendering, commonly called "bid rigging", is an agreement amongst competitors not to compete on the bids they submit after being invited to tender. For these purposes, firms will be regarded as competitors if they are in the same line of business.'

Together with price fixing and market allocation, collusive tendering falls within the class of conduct referred to as "cartel activity".

Collusive tendering may take many forms, for example:

- complementary bidding: firms may agree on their bids in advance by deciding that one of them will submit the lowest bid or will submit the only bid containing acceptable terms;
- bid suppression: in this form, some firms may agree to refrain from bidding;
- bid rotation: firms may decide to bid high so that a predetermined bidder will win.

¹⁶ Page 77-78 of the indexed papers.

¹⁷ Page 73, para 4 of the indexed papers.

Supply chain management practitioners should note that collusive tendering is often accompanied by an agreement to cede portions of a tender to the losing bidder should the tenders not be awarded as had been agreed upon by the firms involved.

All forms of collusive tendering are prohibited by section 4(1)(b)(iii) of the Act, which states that: *"An agreement between, or concerted practice by firms or a decision by an association of firms is prohibited if it is between parties in a horizontal relationship and if it involves collusive tendering."*

[35] Collusion is defined in Wikipedia as:

'[A] deceitful agreement or secret cooperation between two or more parties to limit open competition by deceiving, misleading or defrauding others of their legal right.'

[36] Considering the above definitions of collusive tendering, there is no evidence on the papers that the applicants engaged in bid rigging or collusion. The definition of collusion is strict and in any event the Municipality allowed the applicants to compete against each other when it amended the SCT14. Accordingly, the BEC's decision that the applicants colluded is unsubstantiated and is accordingly wrong and ought to be set aside.

The Decision of the Second Respondent

[37] The second respondent found that there were similarities in the applicants' bids, which proved that same were not independently prepared. The Ruling dated 18 June 2021 reads inter-alia that:

'4.41 An acceptable bid meant a bid that complied with the bid requirements, in this case, the returnable schedules, specifically MBD 9.

4.42 decision whether or not to exclude a non-compliant bidder from a bid process depend on a variety of factors, among others, the wording of the tender document, the materiality of the unfulfilled requirements, the degree of non-compliance and the purpose of the requirement.

4.43 MBD 9 was instructive in that bids would be disqualified if the certificate was found not to be true and complete in every respect.

4.44 On a conspectus of the above facts, it appears the appellants bids were not acceptable in that they were not independently prepared as required by MBD 9. The respondent, based on MBD 9, disqualified the appellants bids non-competitive behaviour.¹⁸

[38] The applicants contend that the second respondent did not confirm the finding of the BEC that the applicants had been guilty of collusive bidding. It found instead that the applicants had been guilty of breaching the MBD 9 Certificate.

[39] The Ruling reads inter alia that:

¹⁸ Page 622, Volume 6 of the indexed papers.

'4.39.1 In the Bid Documents of the 3rd Appellant and 4th Appellant, there are letters of engagement dated 12 May 2020 attached, among others, stating that *"this letter serves to confirm that the Key Group of Companies has engaged the services of BEE Compliancy for B-BBEE Consulting"* to provide BBEE certificates for the 2nd, 3rd and 4th Appellants;'

[40] The applicants contend that they all used the same verification agency to issue the B-BBEE certificates. I agree with the applicant that this does not indicate that their respective bids were not independently prepared.

[41] The Ruling further reads inter alia that:

'4.39.2 A letter dated 18 May 2020 to the Respondent, signed by Justin Lewis, who also happen to be director (sic) of the 3rd Appellant formed part of the bids of the 2nd Appellant and 3rd Appellant;'

[42] The applicants contend that this finding was factually incorrect. The Municipality does not dispute this error as it admits in paragraph 44 of its answering affidavit that only the third applicant's bid contained a letter from Mr. Lewis.

[43] The Ruling reads inter alia that:

'4.39.3 PJ Emanuel appears as signatory to Resolutions of Directors dated on the same day, 20 May 2020, for 1st Appellant and 4th Appellant;'

4.39.4 In addition, the same PJ Emanuel appears as a signatory to Resolution of Directors dated 19 May 2020 and 20 May 2020 for 2nd Appellant and 3rd Appellant respectively;'

[44] The applicants submit that Mr Emmanuel is the Chairman of the Board of Directors and was obliged to sign all the resolutions and was but one of the signatories to each of the resolutions. Furthermore, the applicants' respective decisions to submit bids was in each instance taken by that applicant at its board level.

[45] The Municipality submits that the applicants' tender documents reveal that Mr Emmanuel is the signatory to the section 4: Authority of Signatory document on all four bids authorising different managing directors to submit the bids on behalf of each applicant. Mr Emmanuel similarly signed all the resolutions in all four tender documents. The fact that Mr Emmanuel is the common director in all four applicants and

signed all four applicants' resolutions, he cannot escape scrutiny and the conclusion that he was aware of what was contained in each bid.

[46] The Ruling reads inter alia that:

4.39.5 The bid documents of the 1st Appellant and 4th Appellant were completed with similar handwriting indicating that they were completed by the same person. In addition, the two bids, that is, 1st and 4th Appellants make reference to the same contact email address mathew.rust@keygroup.co.za¹⁹

[47] The applicants submit that Mr Matthew Rust, a chartered accountant who had the requisite skill and expertise to complete and collate the contended documents, was instructed by both the first and fourth applicants to complete their bids. However, the first and fourth applicants did not submit competing bids. They bid for different portions of the contract. Therefore, the fact that Mr Rust might have completed their documents, does not show a breach of the MBD 9 Certificate.

[48] The Municipality submits that the bids from the first and the fourth applicants appears to have been completed by the same person. The applicants' have advised that the first and fourth respondents are not competitors. There are two common signatories which have been used to initial each page of all four tender documents. The applicants contend that the signature the Municipality is referring to is that of their commissioner of oaths Mr Gareth John Meyrick Randles (the initial with GR). Assuming this explanation is acceptable, firstly, it still shows that all the tender documents were commissioned by the same individual, despite the fact that all four applicants are spread out in: New Germany, Pinetown and Durban. This indicates that the applicants' worked in concert in concluding their tender bids. Secondly, there is no explanation for the second initial that appears in all the tender documents. It is submitted that the person who initialed the documents, is someone who has authority to sign on behalf of the applicants' and as such, someone who has had sight of all four tender bids prior to the date and time of the official bid opening or of the awarding of the contract.

¹⁹ Volume 6, pages 621-622 of the indexed papers.

Evaluation

[49] The Municipality submits that the letter from Mr Van Niekerk from Isuzu dated 24 March 2020, confirming that the applicants are duly authorised by Isuzu appears in all the tender documents. The Municipality has suggested that this shows that the request was made in concert. The applicants deny this allegation²⁰ and admit that Mr MJ Van Niekerk from Isuzu signed the letter in respect of all four applications and contend that they have no control over which employee of Isuzu is tasked with issuing the certification letters. The applicant's contention in this regard cannot be faulted.

[50] The applicants submit that the second respondent's conclusions drawn from the facts set out in paragraph 4.39 of its Ruling either individually or collectively do not support a finding that there has been a breach of the MBD 9 Certificate. Accordingly, the decision of the second respondent based on these grounds falls to be set aside in terms of sections 6(2)(e)(iii), 6(2)(f)(ii)(dd) and/or 6(2)(h) of PAJA.

[51] The Municipality has conceded that one of the points raised in the Ruling, namely that Mr Lewis was the signatory to all the bids was incorrect and that he only signed the bid in respect of the third applicant. I am accordingly satisfied that it does not appear as if all the relevant information was placed before the second respondent, in particular the information relating to Mr Lewis. The decision of the second respondent accordingly falls to be set aside.

[52] While bid rigging or collusive bidding was not an issue before the second respondent, it is important to note that the decision of the second respondent refers to non-compliance with the MBD 9 and the Competition Act, which takes into account collusive bidding or bid rigging. The second respondent did not make a decision on bid rigging, the Municipality did so.

[53] It is noted that the respondent was at all times aware of the relationship between the applicants and that the first and fourth applicants have previously been awarded

²⁰ Applicants' replying affidavit – para 18, page 598 of the indexed papers.

tenders by the Municipality. There is no evidence on the papers that the applicants engaged in bid rigging. I am satisfied that the applicants have provided an acceptable explanation to the points raised by the second respondent.

[54] I am accordingly satisfied that the decision of the Municipality and the second respondent should be set aside and that the matter should be referred back to the Municipality for reconsideration. The applicants should be given an opportunity to be heard by the Municipality to explain their bids and the Municipality's concerns.

[55] The applicants seek that the tender be remitted to the Municipality for re-evaluation, with the directive that it may not reject same on the basis of collusion, collusive bidding, anti-competitive behaviour or a lack of independence. I do not deem it necessary to issue any directive as the Municipality's guidelines on what an acceptable tender in the circumstances of the tenders in this case is clear. It is indeed the interpretation and the lack of evidence that does not support the Municipality's version in this case.

[56] There is accordingly no need to deal with the second issue raised by the applicants in respect of the third respondent's bid.

Costs

[57] Mr *Pammenter* conceded that the applicants are responsible for the costs of 23 July 2021 and Ms *Mtati* conceded that the Municipality is responsible for the costs of 28 October 2021.

Order

[60] I accordingly make the following order:

- (1) The decision of the first respondent to reject the applicants' tender bids for Tender No. CF/93/19 is hereby reviewed and set aside.
- (2) The decision of the second respondent to uphold the first respondent's rejection of the applicants' tender bids for Tender No. CF/93/19 is hereby reviewed and set aside.
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- (5) The applicants are directed to pay the wasted costs of the application on 23 July 2021.
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- (7) The first respondent is ordered to pay the costs of the application for Part B of the notice of motion, such costs to include those consequent upon the employment of two counsel where so employed.



BALTON J

Date of Hearing:	16 March 2022
Date of Judgment:	31 October 2022
For the applicant:	CJ Pammenter SC / Adv. Pretorius
Instructed by:	Shepstone & Wylie Attorneys Tel No. 031-575 7000 Email: afd@wylie.co.za Ref: AF Donnelly/nm/
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