

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE

CASE NUMBER: 4663/2021

(1)	REPORTABLE: YES /NO
(2)	OF INTEREST TO THE JUDGES: YES /NO
(3)	REVISED
DATE: 22/03/2022 SIGNATURE: [REDACTED]	

In the matter between:

MONKWE DIETETICS SERVICES (PTY) LTD

FIRST APPLICANT

ALLJOY TRADING ENTERPRISE (PTY) LTD

SECOND APPLICANT

EKPERECHI TRADING PROJECTS (PTY) LTD

THIRD APPLICANT

and

MEC: DEPARTMENT OF EDUCATION

FIRST RESPONDENT

SUCCESSFUL BIDDERS

SECOND RESPONDENT

JUDGEMENT

MANGENA AJ

- [1] The Department of Education, Limpopo advertised a tender for the supply and delivery of foodstuff to quintiles 1 to 3 schools for a period of three years. The applicants submitted their bids for consideration and appointment. In the fullness of time, the Department announced a list of successful bidders and applicants were not on the list.
- [2] Aggrieved by the outcome, applicants approached this court for a relief in the following terms:
- (a) The decision to disqualify the applicants in the functionality assessment of their bids for appointment under Bid NO: LDE/B 52/2019/20, be declared unlawful, reviewed and set-aside.
 - (b) The decision not to appoint the applicants, under Bid NO: LDE/B 52/2019/20, be reviewed and set-aside, and replaced with a decision appointing the applicants as service providers under Bid No: LDE/B 52/ 2019/20.
 - (c) In the alternative to (b) above, that the applicant's bid under Bid NO LDE/B 52/2019/20 be remitted back to the First Respondent for re-evaluation and adjudication, with any such directives deemed appropriate by the Honourable Court.

- [3] In support of their prayers, applicants contend in the main that the department was biased against them, considered irrelevant factors, failed to take into account relevant factors and that the decision not to award them the tender is unlawful alternatively unreasonable and therefore susceptible to review under the provisions of the Promotion of Administrative Justice Act 3 of 2000.
- [4] The Department opposed the application and defended the validity of the decision taken. In *limine*, the department raised a triad of objections for determination by the court prior to the merits. By agreement with the parties, the *points in limine* were argued together with the merits on an understanding that the outcome thereof will be incorporated in the judgment. I propose to deal first with the *points in limine*.

Non- Compliance with Rule 41A of the Uniform Rules

- [5] Rule 41A of the Uniform Rules requires of the party instituting the proceedings to serve on the other party a notice indicating whether he or she agrees or oppose referral of the dispute to mediation. The respondent avers that the rule is peremptory and applicant is not permitted to elect not to comply with it. The non-compliance with peremptory provisions of the rule renders the application defective such that it must be visited with an order of struck off the roll.

- [6] The applicants admit non-compliance and submit that compliance would not have served any purpose in view of the nature of the dispute, namely the validity of an administrative act. It was argued on authority of Oudekraal principle that an administrative act remains valid until set aside and in the circumstances of this case an invitation to mediation would not have assisted as the parties could not on their own have done anything without obtaining a court order. I have a difficulty with this argument as it conflates the process with the outcome. As I understand it, Rule 41A serves an important purpose of facilitating an expeditious and cost-effective resolution of a dispute between litigants. Of course, mediation being a voluntary process, it always helps to know in advance whether the opponent is amenable to discuss the issue amicably and find a common solution than to expend time and money on an issue that could have resolved over the table. Once settlement is reached, the parties can approach the court to have their agreement endorsed.
- [7] The above notwithstanding, I do not think that it would be appropriate to uphold the point and struck the matter off the roll. The rule also requires the respondent/defendant before filing a plea or an answering affidavit to file its own notice indicating whether it agrees or opposes referral to mediation. The department has not done so and is guilty of the contravention. What's sauce for the goose is sauce for the gander. The rule is procedural in nature and it is not in every instance where non-compliance should be visited with striking off. Justice is best served when

technical points are obviated and matters disposed of on their merits. The *point in limine* is dismissed.

NON-JOINDER

- [8] The Department contends that the applicants should have joined the successful bidders to these proceedings as they, according to the department have a direct and substantial interest in the outcome of this proceedings, especially if the court were to find in favour of the applicants. A favourable finding would necessitate stopping the implementation of the awarded tenders and re-opening the entire evaluation and adjudication process. This apprehension by the Department is unjustified. The applicants cited all the successful bidders and annexed a full list as annexure A to the notice of motion. The applicants further requested the respondent to make available to them email addresses supplied by all the successful bidders for the purpose of service. There is no indication on file whether the department obliged on this request. Given the tenacity with which they advanced the argument, it does not appear to me that such information was ever given. I find it strange that the department will impede notification by failing to make information available and then turn around and accuse the applicants of non-compliance with non-joinder. In any case, the applicants have indicated that they do not seek any order against the successful bidders.

[9] The principles governing joinder or non-joinder dispute are well-established. The test is whether a party that is alleged to be a necessary party, has a direct and substantial interest in the subject matter, which may be affected prejudicially by the judgment of the court proceedings concerned. This has been found to mean that if the order or judgment cannot be sustained and carried into effect without necessarily prejudicing the interest of a party or parties not joined in the proceedings then that party or parties have a legal interest in the matter and must be joined. (**Gordon v Department of Health, Kwazulu –Natal, 2008(6) SA 522 (SCA)**) at para 9.

[10] In **Judicial Service Commission and Another v Cape Bar Council and Another, 2013 (1) SA 170 (SCA)** at Para [12], the principle was elucidated when the court said as follows:

*“12” It has now become settled law that the joinder of a party is only required as a matter of necessity –as opposed to a matter of convenience – if that party has a direct and substantial interest which may be affected prejudicially by the judgment of the court in the proceedings concerned (See e.g. **Bowring NO v Vrededorp Properties CC, 2007 (5) SA 391 (SCA) para 21**). The mere fact that a party may have an interest in the outcome of litigation does not warrant a non-joinder plea. The right of a party to validity raise the objection that the other parties should have been joined to the proceedings, has thus been held to be a limited one.”*

- [11] To determine whether the order granted will prejudicially affect a third party, it is necessary that a real and true nature of the dispute be ascertained. The applicant's dispute relates to their exclusion on the list of the successful bidders and as I understand their case, all what they need is to have their bids fairly adjudicated and scored in accordance with the criteria. The relief they seek has got no bearing on the successful bidders as nowhere was it stated that a successful bidder will be allocated a certain amount or quota of work. Having ascertained the true nature of the dispute, I am not persuaded that the successful bidders have a direct and substantial interest in this matter such that they would be prejudicially affected by the judgment. The contention of the respondent that they be joined to these proceedings is without foundation and is dismissed. **(See Council for Advancement of the South African Constitution and Others v The Ingonyama Trust and Others, 2022 (1) SA 251 (KZP).**

AFFIDAVIT NOT PROPERLY COMMISSIONED

- [12] The last of the *points in limine* raised related to the failure of the applicant to depose to the founding affidavit. This point was a bit difficult to grasp as the original in the court file was properly signed and commissioned. During oral submissions I raised this issue with Adv. Gaisa, counsel for the respondent and he maintained his position that the copy in his client's possession has not been properly commissioned. There was an

explanatory affidavit deposed by the attorney explaining the error and how it would have happened. In the light of the fact that the original in the court file was properly deposed, I do not think the respondent stood on firmer grounds on this point. The *point in limine* is dismissed.

[13] What remains now is whether the decision taken by the department reviewable on any of the grounds is relied upon by the applicants. The central question is whether the department was correct not to allocate points to the applicants in relation to certain criteria during the evaluation process. The facts are brief and summarised below.

[14] As stated in the proceeding paragraphs, the Department of Education, Limpopo issued an invitation for bids for the supply and delivery of foodstuff to designated primary and secondary schools. The bidders were required to submit a properly completed bid document and comply with certain mandatory requirements mentioned in clause 5 of the document. Clause 6 dealt with the reservation of rights and reads as follows on the relevant part:

Limpopo Department of Education reserves the right to:

6.2 Request further information from any bidder after the closing date of the bid or visit the physical address provided by the successful bidder to verify any information provided in the bid document.

- 6.3 Verify information and documentation of respective bidder from SARS, CIPC, Accredited financial Institutions, or any other relevant entity and to visit the premises of the bidder at any time without notice. Any information received which does not correspond with the one provided in the bid document will render the bid *null and void*.
- [15] The section dealing with mandatory requirements and reservation of rights concludes by informing bidders in bold and black capital letters that “failure to comply with the above minimum requirements, the instructions in the bid advertisement and special conditions shall be regarded as being invalid. Furthermore, bidders own terms or conditions shall not be accepted.”
- [16] Under evaluation, it is recorded that the bid will be evaluated on functionality, price and Broad-Based Black Economic Empowerment. A bidder that scores less than 70% functionality will not be considered for further evaluation on Price and B-BBEE stages and bid will be regarded as non—responsive. The criteria under functionality was divided into six (06) segments each with its allocated maximum points adding up to 100.
- [17] The applicants contend that they have submitted bids in compliance with the mandatory requirements and had they been properly evaluated and scored, they would have met the minimum threshold of 70% on functionality and automatically qualified for further assessment on price and BEE. They argue that the Department failed to allocate them points

on two segments under functionality, namely delivery vehicles and capacity. The failure to allocate them points was actuated by bias, unreasonableness and resulted in the decision being unlawful.

[18] The Department contends otherwise and states that their bids were non-responsive as they fell below the threshold of 70%. The applicants did not qualify for allocation on the disputed segments as they failed the audit and verification process. It was submitted on behalf of the department that the vehicles which were listed in their bids were also listed by other bidders and in certain instances, the owner (s) of those vehicles had also submitted their bids. In this instance, same vehicles may not obtain a score /points more than once.

[19] I do not follow the logic of this argument. It was never a requirement of the bid that a bidder should not list vehicles listed by other bidders. This is so because such a requirement would have been onerous as none of the bidders would know in advance whether the vehicle he or she intends to lease had been offered to another bidder or not. In relation to the evidence required to qualify for points, a bidder only needed to submit certified copies of the vehicle registration certificates, if owner and in case of a lease, a duly signed lease agreement of transport. The reason given by the Department for failing to allocate points to the applicants under the delivery vehicle segment amounts to an introduction of a new requirement and vitiates the fairness of the process. What was required was demonstrable ability to source a delivery vehicle in the event the

tender/bid is awarded. Applicants have done so by submitting lease agreements concluded with vehicle owners who were willing to release those vehicles for the purpose of transportation of goods. It requires no rocket science to understand and appreciate that the lease agreements were conditional upon the awarding of the bid to the bidder. The contention by the Department that they disqualified applicants as a risk-mitigating factor is unmeritorious.

[20] The other area of contest between the parties related to the allocation of points under financial capacity. The department argued that the applicants were not allocated points because they did not submit original letters from an accredited financial institution confirming that they have a revolving credit, overdraft or cash. In the answering affidavit, the department's representative states that it was a term of reference that an original letter from the accredited financial institution be submitted.

[21] I have not come across any requirement that bidders should submit an original letter as a mandatory requirement. The reference to the original letter from the accredited financial institution is found under evaluation and it is stated that such a letter will be used together with the management account of the bidder. I must mention that submission of management account prepared by a registered accountant or auditor is a mandatory requirement under clause 5.2.1. Had the department wanted the original letter from the financial institution for purpose of evaluation and scoring, such a requirement should have been listed

under the mandatory requirements. This is so because clarity and certainty are important pillars of administrative justice in so far as procurement is concerned. This much was said by the Constitutional Court in **All Pay Consolidated v Chief Executive Officer, Sassa 2014(1) SA 604 (CC)** where Froneman J said: Vagueness and uncertainty are grounds for review under S6(2) (i) of PAJA. Certainty in legislation and administrative action has been linked to the rule of law. Vagueness can render a procurement process, or an administrative action procedurally unfair under S6 (2) (C) of PAJA. After all, an element of procedural fairness which -applies to the decision making process -is that persons are entitled to know the case they must meet.

- [22] The Department takes issue with the format of the contents of the letters submitted by the applicants on the basis that such letters do not meet the express requirement regarding financial capacity. In my view the department is being unnecessarily over-technical and promotes form over substance. As a matter of fact, bidders were not responsible for the drafting of the letters confirming the balance available in their respective accounts. What was required was confirmation of either cash in the account or an existence of a credit facility. If a bidder submits a letter confirming that he has a cash balance of R 500 000-00, that bidder automatically qualified for 25 points at evaluation. If it is established during the audit and verification process that his cash balance has increased to over R2 million, then he should be allocated maximum 40 points. The fact that the letter does not state whether he has a revolving

credit or not is immaterial and irrelevant. Revolving credits and overdrafts are voluntary facilities available for those who wants them. Government cannot as part of its requirement impose an obligation on bidders to have a loan facility. Even if I am wrong on this point, the argument of the department still fails when regard is had to the “words or cash”. What this means is that a bidder should either have a revolving credit confirmed by the bank or cash to qualify for points. Any other interpretation is self-made and intended at obfuscating the real issue calling for determination. Whether the applicants objectively viewed demonstrated financial capacity to carry out the project of delivering and supplying foodstuffs to the designated primary and secondary schools?

- [23] The answer to the question is a resounding yes. The reasons provided by the department to exclude them arise out of a deliberate and intentional disregard of relevant and material information at the disposal of the decision –maker. The decision was actuated either by malice and bias or deliberate distortion of the requirements necessary for a fair award of the bid in a transparent and competitive, manner. I have distinguished this case from that of **Dr JS Moroka Municipality and Others v Chairperson of the Tender Evaluation Committee and Others, [2014] 1 ALL SA 545 (SCA)** where the court held that an administrative body has no authority to condone failure to comply with a peremptory requirement. In that case the issue related to the provision of an original tax clearance and Betram (Pty) Ltd submitted a copy of the tax clearance as opposed to the original. The requirement for original tax is prescribed

by legislation, namely Preferential Procurement Regulations 2001. In this case the submission of an original letter is not a peremptory legislative requirement nor was it provided for under the mandatory requirements.

[24] In conclusion I must record that I have given consideration to the department's argument regarding the applicability of the Plascon –Evans Rule and in my view the rule does not assist them. The fact that there is no replying affidavit does not automatically translate respondent's averments into gospel truth. The issue in this matter is the failure by the Department to allocate points to the applicants and the reasons provided. The fact that the reasons are not disputed in reply does not metamorphose them into cogency and insulate them from invalidity. As stated the reasons given in the evaluation report are spurious and based on an unfair process

[25] For the above reasons, I have no hesitation in concluding that the decision of the Department falls foul of administrative justice and is susceptible to be reviewed and set aside.

Costs

[26] Both counsel agreed that in keeping with the general rule that a successful party is entitled to costs, I should award costs to the successful party. I intend to do so.

[27] Consequently the following order is made.

1. The decision to exclude the applicants from further evaluation on Bid NO LDE/B 52/2019/20 and disqualify them for allocation of points under delivery vehicles and financial capacity criteria under functionality is reviewed and set aside
2. The applicants bids under Bid NO LDE/ B52/2019 /20 is remitted back to the Department /first respondent for re-evaluation and adjudication, within a period of 90 (ninety) days from the date of this order.
3. The Department /First respondent is ordered to pay the costs of this application.

A black rectangular box redacting the signature of the judge.

M.I MANGENA

ACTING JUDGE OF THE HIGH COURT
LIMPOPO DIVISION, POLOKWANE

APPEARANCE:

Counsel for the Applicant	:	Adv MANALA M.E
Instructed by	:	GWEBU INC ATTORNEYS
Counsel for the Respondent	:	Adv RAMAWELE SC with GAISA E.N
Instructed by	:	STATE ATTORNEY
Date of hearing	:	20 JANUARY 2022
Date of Judgment	:	22 FEBRUARY 2022