REPUBLIC OF SOUTH AFRICA

# IN THE HIGH COURT OF SOUTH AFRICA
# LIMPOPO DIVISION, POLOKWANE

**CASE NO:5267/2019**

(1) REPORTABLE: ~~YES/NO~~
(2) OF INTEREST TO THE JUDGES: ~~YES/NO~~
(3) REVISED.

DATE: 28/1/2021 SIGNATURE: [redacted]

In the matter between:

**GRETER TZANEEN LOCAL MUNICIPALITY** **APPLICANT**

**AND**

**TSHIAMISO TRADING 135 (PTY) LTD** **RESPONDENT**

(Registration no: 2013/110686/07)

## JUDGMENT

**MG PHATUDI J**

## INTRODUCTION:

[1] "The apparent rigour of declaring conduct in conflict with constitution and PAJA unlawful is ameliorated in both the Constitution and PAJA by providing for a just and equitable remedy in its wake. I do not think it is wise to attempt to lay down inflexible rules in determining a just and equitable remedy following upon a declaration of unlawful administration action. The rule of law must never be relinquished, but the circumstances of each case must be examined in order to determine whether factual certainty requires some amelioration of legality and, if so, to what extant.....[1]

[2] The underlying dispute in this case between the parties, as I understand, is that this court should order as appropriate "just and equitable remedy" within the meaning of the provisions of section 172 (1) (b) of the Constitution Act 1996[2] (RSA) ("Constitution").

## FACTUAL BACKGROUND:

[3] On 12 October 2018 the Applicant published two separate invitations to tender in the local newspapers within Mopani District

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[1] Bengwanyama Minerals V Genoral Resources 2011 (4) SA 113 (CC) at para 85 per Froneman J. Act 108 of 1996, as amended.

[2] Act 108 of 1996, as amended

namely, the Letaba Herald and Mopani Herald dated 12 and 26 October 2018, respectively.

3.1 These invitations were annexed to the Applicant's papers and identified as "BS[2]" and "BS[3]", respectively.

3.2 I shall for the purpose of completeness refer to annexure "BS[2]" being Bid no: SCMU 15/2018 for the upgrading of Mulati access road as "the mulati Tender" while annexure "BS[3]", being Bid no: SCMU 21/2018 for the upgrading of Nkowankowa Codesa Street to Hani Street as "the Codesa Tender".

3.3 Both tenders were evaluated on the 80/20% preference point scoring system on pricing. A successful bidder would be required to be evaluated and attain a minimum score of 70% in respect of functionality.

3.4 There is no dispute that both tenders were compliant with the Applicant's Supply Chain Management Policy[3]. ("SCM"). The tender documents referred to includes a Bill of Quantities ("BOQs") with attached rates for each bid.

[3] Full details of the SCM Policy appear in annexure "BS[6]" to founding affidavit, paginated Index, page 8-12. Annexures "BS[9]" and "BS[10]" relate to pricing instructions for both Mulati ans Codesa tenders, respectively.

3.5 The scoring of all bids according to the Applicant were based on the bidder's tender price and not the rates for individual items offered.

[4] I consider it unnecessary for present purposes to set out in detail how the Respondent allegedly circumvented the arithmetical exactitudes or methodology to secure its appointment in respect of both Mulati and Codesa bids. Full details are, however, provided in the founding affidavit ("FA") (pp13-14") and It seems to me are common cause or at least not being disputed as "miscalculations or errors" in the answering affidavit. I shall focus deeper into these apparent disparities when I evaluate the evidence in the course of this judgment.

[5] It was these "errors" or call "misrepresentations" in the pricing of both tenders that the Applicant concluded that they had tipped the scales in favour of the Respondent to have had two bids awarded to the latter as the lowest in the prices.

## THE ISSUES:

[6] Fast-tracking. On 20 December 2018 the Applicant awarded the Codesa tender referred to in favour of the Respondent. The amount awarded was R 9 217 610.99. Subsequent thereto, and within a

month, on 21 January 2019, the Respondent was awarded a further tender for Maluti access road. ("the Mulati tender").The amount awarded was R 26 842 512.88.

[7] By law[4] both tenders had to awarded to a bidder who scored the highest points using 80/20% for pricing thereof.

7.1 This appears to be the case as no objective criteria was stipulated in the tenders as envisaged by Regulations 11(2) of the PPP Framework Regulations 2017 currently applicable[5].

7.2 The said regulations envisaged that "if an organ of state intends to apply objective criteria in terms of section 2(1)(f) of the Act, the organ of state must stipulate the objective criteria in the tender documents"

7.3 It is not clear why the Applicant's officials charged with the procurement process and management of the SCM Policy palpably elected not to stipulate the objective criteria in the advertised bid documents as prescribed in the said regulation.

[8] Failure by the Applicant to adhere to the precept laid down in the regulation referred to .in my view, boardered on arbitrary abdication of administrative accountability. This failure invariably resulted in the

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[4] Section 2(1) (f) of Act 5 of 2000. The PPP framework Act, 2000.
[5] The Previous Regulations were repealed on 01 April 2017. (i.e. "2011 Regulations")

illegality complaint of. This also because the beginning of a comedy of errors in this matter.

[9] To obviate these "miscalculations" or" inadvertent errors" the Respondent was required to apply simply a method of adding up the total figures at the end of each leaf of the BOQs to arrive at the total tender price, applying simple arithmetic.

9.1 However, what the Respondent did in both impugned tenders, was to calculate the total amounts attached to the BOQs incorrectly. These incorrect calculations are said in the "AA" to be "casting errors". But, there is no plausible explanation as to how the Respondent succeeded in ensuring that the alleged "casting errors" came about to have it catapulted as a successful bidder in respect of the two multi-million rand tenders it had won in a short space of time as already indicated. Here, one could sense the "smell of Denmark", so to speak.

**EVALUATION OF THE EVIDENCE:**

[10] The respondent in its answering affidavit[6] ('AA") intimated in paragraph 3.6 that:-

[6] Paginated Index. Page 365 et seq

"Both the tenders contain "casting errors" in that the figures appearing in the body of the bill of quantities("BOQs") as individual line items were incorrectly brought forward on to the summary page. These casting errors were not deliberate, but rather in-adverted".

10.1 The 'casting errors' referred to were confirmed to by one Mr Samuel Kaputa ("Kaputa") in a confirmatory affidavit[7].

10.2 The deponent, Kaputa, a self-confessed qualified civil engineer himself, testified therein on behalf of the Respondent that he had attended to compete the tenders in haste and "on their closing date" He, in error, allegedly used subtotals as opposed to the totals. These miscalculations were collated in figures for both tenders.

10.3 Incidentally, similar miscalculated figures were made in respect of both tenders[8].

10.4 Kaputa, in the penultimate paragraph of his affidavit, noted that he was "embarrassed of the quality of my work, which was as stated before, was prepared in haste". He furthermore, tendered an apology to his employer, (the Respondent) the Applicant, and to the court for his mistakes.

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[7] Ibid. p467, annexure "A5", "AA"

[8] Ibid p469, para 2.5 to 2.6

[11] This court having noted these comedy of errors, however can only express its sentiments that the explanation for the errors is viewed in a dim light. This is particularly so for the following reasons: -

11.1 The Respondent's "AA" depicts itself as a company established in 2008 which also possesses both "C.I.B.D" certificate in construction industry and Level B- BBEE status.

11.2 The Respondent is also portrayed as an experienced business entity particularly in construction tenders. Its company profile evince that it has acquired "established track record in securing tenders". That much is borne out by the fact that it "has been involved in 35 successful tenders "in the past.

11.3 Against this backdrop, one can only wonder how with its repository of knowledge, skills and past experience, that accurate pricing of the bids managed to skip through kaputa's fingers.

11.4 The time period within which the two tenders where awarded to the Respondent for such amounts, also raises questions. (± 1 month punctuated by the festive season)

11.5 Moreover, what was even disconcerting was failure by Kaputa to explain why the casting errors had the very fortuitous effect that the Respondent's prices were by a narrow margin the cheapest if not the lowest. What is more, is that this unusual coincidences occurred in respect of the two tenders and in respect of the same company.

11.6 Furthermore, there is no explanation as to the reasons why from the closing date of the two bids to the date prior to date of appointment the Respondent conveniently failed to apprise the Applicant of the "casting errors" it was aware of.

[12] On a semblance of these discrepancies, I am of the view that the explanation proffered by the Respondent is not only illogical, but completely spurious. It must therefore be discounted for lack of credibility.

[13] That said, the answers the Respondent purported to provide in justification of the miscalculations made, suggest that there was clearly a well calculated misrepresentation of the tender price or rates offered, be it intentional or negligent misrepresentation, the effect of which misled the Applicant resulting in the allocated bids.

[14] The above observation, it appears to me finds credence by the concession made by Mr. Hlamani Bruce Mohlala on behalf of the Respondent that: -

**"Kaputa made mistakes, which appear to have misled the Applicant into awarding the Respondent's both tenders."**

14.1 The Respondent's attention regarding the alleged "casting errors' was drawn to it to be the effect that the Applicant had been led astray when it made the award of the tenders to the former. Furthermore, and in a more definitive concession "it further appears from the tender documents attached to the founding affidavit that, but for the casing errors, the Respondent would not have been the successful tenderer in either tenders."[9]

[15] To that extent, and against the submission by the Respondent that it only opposed the present application on the basis of the relief sought by the Applicant in Paragraphs 6 and 7 of the notice of motion, I am reinforced in my view that the Respondent in as much as it has conceded to the illegality of the awarded bids, could not have without more countervailed the said unlawfulness.

[16] In the result, I am obliged to declare, as I hereby do, pursuant to the provisions of section 172(1) (a) of the Constitution, that the decision of the Applicant to award both Mulati and Cosesa tenders to the Respondent are from inception unlawful and invalid. Similarly, the declaration of invalidity would naturally taint the agreement

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[9] Ibid. p366 para; 3.9, "AA"

concluded by the parties arising from the impeached tenders awarded equally unlawful and of no force or effect.

**THE ISSUES:**

**JUST AND EQUITABLE REMEDY:**

[17] It is common cause that the prayers sought in the notice of motion, in particular, paragraph 1 to 5 are not in dispute. That much is borne out in the answering affidavit, (Para: 3.12, "AA") in terms of which the Respondent had consented thereto. Both parties agree that the impugned decision is impeachable.

17.1 While consenting to the granting of the said prayers, there remains in dispute the question whether or not to consider the remedies as proposed by the Applicant on the one hand among others things, to compensate the respondent for the actual expenses incurred in the execution of both tenders, or to claim from the Respondent the pecuniary loss suffered occasioned by excess payment to it. The latter claim is, in essence, one founded upon the principles of unjustified enrichment (*condictio sine causa*) for over payment, if any, and in circumstances where the Applicant was impoverished.

17.2 In an alternative to the foregoing proposals, (para:3 to 7 of the prayers) is what form of a just and equitable relief would in terms of section 172(1) (b) of the Constitution be deemed appropriate in the circumstances.

17.3 The Respondent, on the other hand contended that the engineer of both projects be mandated, at its costs, to determine the market related value of the work actually executed and the work still to be executed, and if successful, the Applicant be ordered to compensate the latter accordingly for the market value thereof.

[18] I find myself at variance with this submission for the following reasons: -

18.1 No doubt, both Mulati and Codesa tenders were unlawfully awarded to the Respondent. The decision to award the bids flouted the Applicant's SCM Policy.

18.2 The decision to have awarded the two tenders had also clearly offended the provisions of section 217(1) of the Constitution. This section is the cornerstone of procurement process sought by organs of state at all tears of government in South Africa. I shall revert later in this judgment to deal with its constitutional imperatives.

[19] Counsel for the Applicant, Mr. Maritz SC made several submissions in favour of offering payment for actual expenses the Respondent has incurred. He contended, among other things, that the counter application technically seeks an order to have the tender awarded to the respondent regard being had to paragraphs 5,6 and 7 of the counter application. To do so will be to allow an indirect replacement of the BOQs initially offered with new ones drawn up by the respondent's own civil engineers views of market related rates. I agree.

19.1 If one were to follow the approach as proposed by Mr. Ripp SC for the respondent, it would amount to this court usurping the constitutional mandate set apart for the Applicant which is an organ of state. See in general, **Trencon Construction (Pty) Ltd v IDC of South Africa**[10]. No exceptional circumstances exist to enable this court to do so.

19.2 Furthermore, the submission made on behalf of the Respondent that it be allowed to complete the remaining portion of the work on both Mulati and Codesa projects is, with respect, legally untenable. To do so, would be indirectly

[10] 2015(5) SA 245 (CC) para 49

asking for an order to perpetuate the illegality. This will not be fair or equitable in the public interest nor interests of justice.

19.3 In other words, such a relief would also be contrary to the common law adage *ex turpi causa non oritor actio*. (from a dishonourable cause no action arises). This is simply because the law will not benefit a litigant for relief if it arises from own tortious act.

[20] Accordingly, this court finds that the impugned decision cannot be permitted to morph into a valid act as "a court of law play the role of abiter of legality"

[21] The enquiry therefore is as stated in the preamble (para 1) regarding what relief this court should grant as a 'just and equitable' remedy. That is the crisp issue.

[22] The starting point should be the guidance provided by section 217(1) of the Constitution. It provides that: -

"When an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for gods or services, it must do so in accordance with the system which is fair, equitable, transparent, competitive and cost-effective."

**PROCUREMENT**

**SECTION 217 (1):**

22.1 The language of section 217(1) is plain. It applies whenever an organ of state 'contracts for goods or services'. These words are unambiguous and are crystal clear.

22.2 By the same token, section 217(1) requires of an organ of state such as the Applicant, when contracting for goods or services to be mindful of a system that is 'fair, equitable, transparent, competitive and cost-effective'.

[23] It follows therefore that any procurement contracted by an organ of state which is not responsive to the imperative language of section 217(1) would, in my view, be at odds with that constitutional provision and therefore invalid. The requirements under section 217 must be understood within the realm of the constitutional precepts on administrative justice in Section 33 and through the prism of the broad fundamental values and principles governing administration. (chapter 10)

[24] The other subsidiary legislation yet crucial, is the Preferential Procurement Policy Framework Act, 2000[11]. ("PPPFA"). It provides that "**an acceptable tender" is any tender which in all respects, complies with the specifications and conditions of tender as set out in the tender document…** [12]. As already indicated, the two

[11] Act 5 of 2000, as amended
[12] Section 1 of PPPFA

tenders under scrutiny are replete with inaccuracies, miscalculations and' casting errors', so-called. It can therefore not be said that it fulfils the requirements of section 1 of PPPFA, nor that the procurement process was fair[13A].

[25] The above observation resonate well with the sentiment expressed by Schults JA in the case of **PREMIER, FREE STATE AND OTHERS V FIRECHEM FREE STATE (PTY) LTD**[13] Where the learned Judge stated that:-

"One of the requirements... is that the body adjudicating tenders be presented with comparable offers in order that its members should be able to compare... yet another requirement is that competitors should be treated equally, in the sense that they should all be entitled to tender for the same thing. Competitiveness is not served by only one or some of the tenderers. Knowing what is the true subject of the tender... that would deprive the public of the benefit of an open competative process". I cannot agree more.

25.1 The Applicant *in casu* failed to meet the threshold laid down by Schultz JA in that case when it awarded the tender in a manner that was not fair, transparent, or competitive.

[26] Against this backdrop, and having declared the decision to have awarded the two tenders to the Respondent (Para:16) unlawful and therefore constitutionally invalid, the next step is to make an order

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[13A] See, Metro Projects and Another v Klerksdorp Local Municipality 2004(1) SA 16 (SCA) at para:12
[13] 2000 (4) SA 413(SCA)

for a just and equitable remedy. This is in line with the approach adopted by the court in **ALL PAY INVESTMENT HOLDINGS (PTY) LTD V CHIEF EXECUTIVE OFFICER SASSA AND OTHERS**[14]

[27] Section 127(1) (a) of the Constitution grants this court a wide judicial discretion when dealing with constitutional matters. The relevant section provides that:

**SECTION 127(1) (a):**

"When deciding a constitutional matter within its power, a court -

(a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and

(b) may make any order that is just and equitable, including –

(i)---

(ii)---"

[28] It is common cause that this court is required in terms of section 172(1)(b) to find a 'just and equitable' remedy that is justifiable in the circumstances peculiar to the present case. The merits of each case

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[14] 2014(1) SA 604 (CC) at 626 para:56

will determine a particular just and equitable remedy which, of course, is a discretionary matter.

[29] This court in the matter of **EPHRAIM MOGALE LOCAL MUNICIPALITY v INKOKELI PROJECTS (PTY) LTD AND OTHERS**[15]cited with approval a passage from ALL PAY Consolidated' case above that:-

["49]

It is against this backdrop that "logic, general legal principle, the Constitution and the binding authority of this court all point to a default position that requires the consequences of invalidity to be corrected or reversed where they can no longer be prevented. It is an approach that accords with the rule of law and principle of legality".

**<u>CONCLUSION:</u>**

[30] I must commend the Applicant, as an organ of state, for the effort it took *albiet ex post facto* for having 'detected' tender manupilations that were replete with misrepresentations and misstatements which ultimately causally led to the Respondent being awarded the two tenders illegally.

30.1 It was this kind of detection that often casts an obligation upon organs of state to act decisively against any enterprise or institution that obtained a preference on a fraudulent basis.

[15] (Case no: 3298/2018) [2019] ZALMPPHC para:49 delivered 04.02.2019

[31] It was for that reason, and, for which I align myself with the views espoused by Mogoeng J (as he was) in **VIKING PONY AFRICA PUMPS (PTY) LTD t/a TRICOM LTD V HYDRO-TECH SYSTEM (PTY) LTD AND ANOTHER**[16] ,where the learned Judge writing for the court held that:-

"Whenever an enterprise is plausibly accused of having furnished false information in its tender documents, the organ of state responsible for the tender is, upon becoming aware of the alleged misrepresentation, under an obligation to investigate the matter. This stems from the tenderer's obligation to vouch for the truthfulness and correctness of the information provided in terms of regulation"

[33] Accordingly, for an organ of state to 'act' against a 'detected' misrepresentation the existence of conclusive evidence of fraudulent misrepresentation that should trigger responsive action from an organ of state is not essential. **"It is the awareness of information which, if verified through proper investigation, could potentially expose a fraudulent scheme"**[17].(Emphasis added).

## COSTS:

[16] 2011 (1) SA 327 (CC) at 340 para:34

[17] Ibid, para:31 The word 'detect' derives from Regulation 15(1) of the now repealed Regulations under the PPP Act 5 of 2000 (the 2001 Regulations)

[34] It is trite that the costs are in the realm of the court's judicial discretion, and should follow the cause. In *casu* the Applicant had to incur great expenses to obtain corrective action.

[35] Had it not been that the 'detected' casting errors been conceded by the Respondent, the Applicant would have acted much to its detriment with the public fiscus being greatly depleted. My sense of justice dictates that tender fraud must not be countenanced. An appropriate adverse cost order will serve to deter such malfeasance in future.

**ORDER:**

(a) The decision of the Applicant to award Tender SCMU 15/2018 ("the Mulati Tender") and Tender SCMU 21/2018("The Codesa Street Tender") respectively, to the Respondent, is declared unlawful and constitutionally invalid;

(b) The agreements concluded between the Applicant and the Respondent pursuant to the awarding of the Mulati Tender and Codesa Street Tender respectively, are set aside; and

(c) That, it is declared that notwithstanding the setting aside of the agreements referred to in (b) above concluded pursuant to the awarding of Mulati Tender and Codesa Street Tender in (a) above, the Respondent is entitled to claim the actual expenses incurred excluding any profits that the Respondent actually made in executing its obligations in terms of the said tenders. (Mulati Tender and Codesa Street Tender).

(d)Further that, the Applicant in so far as it has paid the Respondent, is entitled to recover from the Respondent an amount that exceeds the actual expenses on either Mulati Tender and the Codesa Street Tender referred to in (a), above.

(e)Further that, the Respondent is ordered to pay the Applicant's costs on attorney and client scale, such costs shall include the costs of two counsel where employed.

[redacted]

**MG PHATUDI**

**JUDGE OF THE HIGH COURT**

**LIMPOPO DIVISION, POLOKWANE**

**REPRESENTATIONS:**

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|---|---|
| **Counsel for Plaintiff** | **: Adv. NGD Maritz SC** |
| | **: Adv. APJ Els** |
| **Briefed by** | **: Maloka Attorneys Tzaneen** |
| **Attorney for defendant** | **: Adv. MM Ripp SC** |
| **Briefed by** | **: Thomas & Swanepoel Inc Tzannen** |
| **Date heard** | **: 05 November 2020** |
| **Date delivered** | **: 25 January 2021** |

**REPRESENTATIONS:**

| | | |
|---|---|---|
| **Counsel for Plaintiff** | : | **Adv. NGD Maritz SC** |
| | : | **Adv APJ Els** |
| **Briefed by** | : | **Maloka Attorneys Tzaneen** |
| **Attorney for Defendant** | : | **Adv MM Ripp SC** |
| **Briefed by** | : | **Thomas & Swanepoel Inc, Tzaneen** |
| **Date Heard** | : | **05 November 2020** |
| **Date Delivered** | : | **28 January 2021** |