



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

Case Number: 6198/2018P

In the matter between:

IIAH INDIZA AVIATION SERVICE (PTY) LIMITED

Applicant

and

**MSUNDUZI MUNICIPALITY
XOLISISIZWE TRADING AND PROJECT CC**

**First Respondent
Second Respondent**

JUDGMENT

Delivered on 23 July 2019

Mbatha J

[1] The applicant brought an application for review in terms of rule 53 of the Uniform Rules of Court, whereby it sought the following relief: a review and setting aside of the first respondent's decision to appoint the second respondent as a service provider pursuant to an award of a tender to provide technical and non-technical infrastructure services at the Pietermaritzburg Airport; that the second respondent be disqualified from the tender; that the first respondent be directed to award the tender to the applicant, and other ancillary relief.

[2] The first respondent did not oppose the relief sought by the applicant pertaining to the review application, save for the order for punitive costs sought against it, and an order to refund the fee paid by the applicant for the aborted internal appeal process. The position of the first respondent was made clear in the answering affidavit wherein it concedes to the review and setting aside of the award of the tender to the second respondent.

[3] Though conceding to the relief sought by the applicant, the first respondent did not concede that the applicant's bid was not defective. The first respondent argued that the relief sought by the applicant should not preclude the second respondent from having an opportunity to make out a case that it should be retained as a contractor in the interests of justice and equity, as the applicant's bid was also non-responsive in various respects. In the light of the argument by the first respondent that the applicant's bid had deficiencies, the first respondent did not concede that the tender be awarded to the applicant, but sought to abide by the decision of the court.

[4] The second respondent failed to file an answering affidavit, and its attorneys of record withdrew on 11 October 2018. On the date of the hearing of the opposed application, the following orders were taken by consent between the applicant and the first respondent:

- '1. that the applicant is exempted from exhausting internal remedies as ordinarily required by section 7(2)(c) of the Promotion of Administrative Justice Act of 2000 (PAJA) before approaching the court for review;
2. that the decision of the first respondent to name and designate the second respondent as the preferred bidder in the tender be and is hereby reviewed and set aside;
3. that the first respondent be directed to refund to the applicant the fee which it paid for the aborted Internal Appeal process;
4. that in so far as it may be necessary the applicant is granted an extension of time in terms of section 9(1)(b) of PAJA;
5. that the costs of the application be costs on an opposed basis, excluding the costs of the preparation of the interdict for the new tender such costs to be costs on a party and party scale.'

[5] The only outstanding issues for determination by the court were whether the court should disqualify the second respondent from the tender process, and whether to award the tender to the applicant.

[6] The court was addressed on the reasons given by the Bid Evaluation Committee ('BEC'), which led to the disqualification of the applicant. Counsel for the applicant submitted that the criterion required for the tender was the assessment of price and the BBBEE status of the applicant. According to the applicant's counsel, the report reflected that the minimum required score mark for functionality was 6 per cent, and the applicant was awarded 55 per cent. The applicant was not awarded

any points for company experience, aviation lighting, and electrical configuration. The reason given by the BEC was that though the applicant provided a list of subcontractors, it did not submit any written and signed contracts between the applicant and the subcontractors. It was submitted by the applicant that this was an irrelevant consideration as this was not a requirement of the tender.

[7] Secondly, the applicant was disqualified for not having submitted a record of having worked together with its subcontractors in similar environments, or in any other contracts. In that regard the applicant stated that it appropriately, and fully described its prior experience and relationship with the subcontractors. However, the applicant was not awarded any points for that.

[8] The applicant's submission was that the extensive experience of the applicant in the management of airports, as well as the relevant experience of its subcontractors, was extensively set out in the tender documents. It is on this aforementioned basis and other factors, which I do not see fit to repeat, that the applicant contended that it should have been awarded the tender instead of the second respondent.

[9] The first respondent's averments refers to a fatal defect in the bid proposal, in that the BEC ought to have applied a tender condition that the contract could only be awarded to tenderers subcontracting a minimum of 40 per cent to companies which are 100 per cent black owned. Counsel for the applicant stated that instead of adhering to the prescribed 51 per cent requirement, the first respondent prescribed a 100 per cent black owned requirement, which is irregular and not supported by the enabling legislation. The applicant's submission was that it complied with the Preferential Procurement Policy Framework Act 5 of 2000 and with regulation 4(1)(c)(i)¹ which provides that 'a tenderer subcontracting a minimum of 30% to an EME or QSE which is at least 51% owned by black people'.

[10] The applicant found this to be irregular as the second respondent appeared not to have met that criterion either, as it did not file any certificates to show compliance therewith. In conclusion, it was submitted that the high bar of 100 per cent by the first respondent should be taken as *pro non scripto*, as it was not a requirement in terms of the legislation. In that regard the applicant asserts that it is entitled to the award.

¹ Preferential Procurement Regulations, 2017, GN R32, GG 40553, 20 January 2017.

[11] The applicant's view was that the second respondent should be disqualified from the tender, because it did not comply with the mandatory conditions of the tender. It highlighted the following non-compliance: that the BBBEE certificate did not bear the commissioner of oath's signature; that the second respondent failed to provide the subcontractors' certificate; that the second respondent had submitted an expired employment equity policy, and that it had no aviation radio technician.

[12] It is trite that the materiality of compliance with legal requirements depends on the extent to which the purpose of the requirements is attained. The constitutional and legislative procurement framework requires supply chain management prescripts which are legally binding.² This court accepts that material and mandatory conditions are legally binding, and may not be disregarded at the whim of the state organ.³

[13] The first respondent correctly conceded to the setting aside of the tender award to the second respondent, as the mandatory requirements were not complied with by the second respondent. The most significant challenge to the process was the change of the BBBEE score percentage, which was contrary to the legislative prescripts. The judgment in *Dr JS Moroka Municipality v Betram (Pty) Ltd*⁴ is relevant as the court held that:

'Essentially it was for the municipality, and not the Court, to decide what should be a prerequisite for a valid tender, and a failure to comply with prescribed conditions will result in a tender being disqualified as an "acceptable tender" under by the Procurement Act unless those conditions are immaterial, unreasonable or unconstitutional.'

Similarly, the court also held in *WDR Earthmoving Enterprises & another v The Joe Gqabi District Municipality & others*⁵ that:

'A failure to comply with prescribed conditions would result in a tender being disqualified as an acceptable tender under the Act, unless those conditions were immaterial, unreasonable or unconstitutional.'

[14] The first respondent decided to play it safe by not consenting to the order awarding the tender to the applicant, and to the disqualification of the second respondent from participating in the difficult situation. The first respondent only

² *AllPay Consolidated Investment Holdings (Pty) Ltd & others v Chief Executive Officer, South African Social Security Agency & others* 2014 (1) SA 604 (CC).

³ *Joubert Galpin Searle Inc & others v Road Accident Fund & others* 2014 (4) SA 148 (ECP).

⁴ *Dr JS Moroka Municipality v Betram (Pty) Ltd* [2013] ZASCA 186 para 10.

⁵ *WDR Earthmoving Enterprises & another v The Joe Gqabi District Municipality & others* [2018] ZASCA 72 para 30.

consented to the review and setting aside the award of the tender to the second respondent. It would have been a different case had the first respondent fully supported the decision to award the tender to the second respondent. I consider that it was a wise decision on the part of the second respondent not to oppose the application. It has not been shown by the applicant that the second respondent played any untoward role in the award of the tender to it.

[15] I have to consider firstly if this court can grant the substitution remedy in favour of the applicant in terms of s 8(1) of PAJA.⁶ Section 8(1)(c)(ii) empowers the court to set aside the decision and in exceptional circumstances substitute or vary the administrative action or correct a defect. Exceptional circumstances can include the following: Where the end result is a foregone conclusion and it would serve no purpose to refer the matter back to the original decision maker; where further delays would cause undue prejudice to the applicant; where the original decision maker exhibits bias or incompetence to such a degree that it would be unfair to expect the applicant to submit to its jurisdiction again; where the court is in a good position as the original decision maker to make a decision; the willingness of the administrator to re-apply its mind to the issues at stake and change in circumstances. In this case the applicant has failed to show any circumstances that warrants an order in line with the provisions of s 8(1)(a)(ii) read with the provisions of s 8(1)(c)(ii) of PAJA. The doctrine of separation of powers requires that the court should not be 'so overzealous' as to replace the decisions of the functionary or administrator with their own decisions save in exceptional circumstances. In *Piet Bok Construction CC v Minister of Public Works & others*⁷ the court quoting with approval from Hefer AP in *Commissioner, Competition Commission v General Council of the Bar of South Africa and others*⁸ where it was held (references omitted):

'It is not necessary to deal at length with a reviewing Court's power to substitute its own decision for that of an administrative authority. Suffice it to say that the remark in *Johannesburg City Council v Administrator, Transvaal, and Another* that "the Court is slow to assume a discretion which has by statute been entrusted to another tribunal or functionary" does not tell the whole story. For, in order to give full effect to the right which everyone has to lawful, reasonable and procedurally fair administrative action, considerations of fairness also enter the picture. There will accordingly be no remittal to the administrative authority in

⁶ Promotion of Administrative Justice Act 3 of 2000.

⁷ *Piet Bok Construction CC v Minister of Public Works & others* [2012] ZAGPPHC 168 para 28.

⁸ *Commissioner, Competition Commission v General Council of the Bar of South Africa and others* 2002 (6) SA 606 (SCA) para 14.

cases where such a step will operate procedurally unfairly to both parties. As Holmes AJA observed in *Livestock and Meat Industries Control Board v Garda*

“ . . . the Court has a discretion, to be exercised judicially upon a consideration of the facts of each case, and . . . although the matter will be sent back if there is no reason for not doing so, in essence it is a question of fairness to both sides.”⁹

[16] Having considered all the relevant facts in this case, this court is not satisfied that the applicant has shown exceptional circumstances for the court to award the tender bid to the applicant. It is also not persuaded that it should bar the second respondent from participating in the bid. The second respondent did not participate in the evaluation of the tender bids, and cannot be said to be the author of his own misfortune. Furthermore, this court does not have the necessary technical skills for evaluation of tender bids and finds that the best decision should be to refer the matter back to the first respondent. No prejudice will be suffered by the applicant as it is currently services to the first respondent in terms of a previous contract.

[17] In light of the stance taken by the first respondent to abide by the decision of the court in respect of these two outstanding issues, it is my view that each party should pay its own costs.

[18] Accordingly I make the following order:

1. The application is dismissed;
2. The matter is remitted back to the first respondent to start the tender process afresh;
3. Each party is to bear its own costs.

Mbatha J

Date of Hearing: 22 March 2019 (F Court)

Date of Judgment: 23 July 2019

Appearances

⁹ See also *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and others* 2004 (4) SA 490 (CC) paras 48 and 57.

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