

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE LOCAL DIVISION, EAST LONDON)**

Case No:1525/17

ECD: 4125/17

In the matter between:

HEMIPAC INVESTMENTS (PTY) LTD Applicant

And

BUFFALO CITY MUNICIPALITY First Respondent

STHATHU FUNDING (PTY) LTD Second Respondent

JOHN MULENGA KAYULA NO Third Respondent

VUYOKAZI KAYULO NO Fourth Respondent

JONATHAN ANDREW RADEMEN NO Fifth Respondent

JUDGMENT

TOKOTA J:

[1] This is an application for the review and setting aside of the decision of the first respondent to disqualified the applicant and award a tender to the second respondent. Only the first respondent has decided to take issue with the review. Although the second respondent initially filed a notice of opposition it later withdrew and decided to abide the decision of this court.

Factual matrix.

[2] The factual background of the matter can be summarised as follows: On 11 October 2016 the first respondent issued an invitation to tender for THE PROVISION OF OFFICE ACCOMMODATION: ENTERPRISE PROJECT MANAGEMENT OFFICE. On 16 November 2016 (which was a closing date) the applicant submitted two tenders. First, it tendered Caxton House Building comprising of an area of approximately 694.4 square metres with a monthly rental of R67 496.00.00. Second, it offered its building at Sanlam Building with a space of 723.8 square metres and a monthly rental of R62 904.00.

[3] The first respondent received four bids namely; Mk Consulting, SKG Properties, Hemipac Investments comprising of Caxton house and Sanlam Building (the applicant); and Sthathu Funding. Mk Consulting was disqualified on the basis that it did not meet safety standards required for occupation. Both bids from the applicant were disqualified for being non-responsive in that they did not offer the required area of 850m². The Bid Evaluation Committee (BEC) recommended that the tender be awarded to the second respondent. On 7 June 2017 the Bid Adjudication Committee (BAC) approved the recommendation. On 29 June 2017 the second respondent was advised that it was successful in the bid. On 7 July 2017 the applicant was advised that both its bids were unsuccessful.

[4] Subsequently the applicant sought, in vain, the reasons as to why it was unsuccessful and the bid documents of the successful bidder. Having failed to obtain reasons and the bid documents it ultimately launched the present proceedings on 14 December 2017. There was a considerable effort to obtain an undertaking not to implement the award. Although the first respondent did not formally accede to the request, during argument I was informed that the tender had not been implemented and no lease agreement has been signed. I was referred to a letter written by the second respondent's attorneys which confirmed that the award has not been implemented.

Conduct of the first respondent.

[5] The review proceedings have been launched in terms of rule 53 of the Uniform rules of this court. Consequently the first respondent was obliged to deliver the record relevant to its decision together with any such reasons it may have in reaching at its decision. There was some form of reluctance, on the part of the first respondent, to deliver the record to the extent that the applicant had to invoke the provisions of rule 30A (1) compelling the first respondent to deliver such record. The record was ultimately delivered in dribs and drabs. The final supplementary record was delivered on 4 July 2018 more than six months after the launch of the proceedings. As will appear in this judgment the record was still incomplete when it was delivered in July 2018. I will deal immediately with the reasons why it is important to deliver a full record.

The significance of the record to be delivered in terms of rule 53.

[6] For some reasons unbeknown to the applicant the first respondent acted as if it was reluctant to file the record in terms of rule 53. The same goes with the reasons for the decision it made to the extent that such reasons had to be furnished by its

legal representatives. There is no need to overemphasize that public bodies are obliged to give reasons for the decisions affecting other people's rights both in terms of the Constitution and the Promotion of Administrative Justice Act No.3 of 2000 (PAJA). These reasons must indicate how the decision was arrived at and must not merely amount to conclusions. Full reasons will enable the person affected thereby to decide whether or not the ultimate decision was justified. The learned author¹ puts it thus:

*'(I)t is apparent that reasons are not really reasons unless they are properly informative. They must explain why action was taken or not taken; otherwise they are better described as findings or other information.'*²

[7] It still remains a mystery to this court as to why the first respondent adopted an uncooperative attitude. It is by now settled law that the award of a tender is an administrative action. Section 33 of the Constitution of the Republic of South Africa Act 1996 (the Constitution) provides that: *"(1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.*

(2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.

(3) National legislation must be enacted to give effect to these rights, and must-

(a) provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;

(b) impose a duty on the state to give effect to the rights in subsections (1) and (2); and

(c) promote an efficient administration."

PAJA was enacted to give effect to the rights stipulated in section 33 of the Constitution.

¹ Hoexter

² Hoexter The new constitution and administrative law vol.2 at 244

[8] The review is aimed at maintaining legality and not correcting a decision on merits. In review matters of this nature the only way one can scrutinise the lawfulness or otherwise of a decision to award or not to award a tender is to scrutinise the record of all the stages to see the steps that were taken to arrive at such decision. For the review is concerned with manner in which the decision is taken and not whether or not the decision was right or wrong.³ The record which is called for in terms of rule 53(1)(b) enables the applicant and the court to determine what informed the impugned decision under review. It should mirror the manner in which such decision was arrived at and the reasons therefor. *'The important thing is that Judges should not use the opportunity of scrutiny to prefer their own views as to the correctness of the decision, and thus obliterate the distinction between review and appeal'*⁴). Rule 53 was therefore designed to cater for this situation. The Constitutional court has recently set out the purpose of rule 53 in **Helen Suzman Foundation v Judicial Service Commission 2018 (4) SA 1 (CC)** as follows:

"[13] The purpose of rule 53 is to 'facilitate and regulate applications for review'. The requirement in rule 53(1)(b) that the decision-maker file the record of decision is primarily intended to operate in favour of an applicant in review proceedings. It helps ensure that review proceedings are not launched in the dark. The record enables the applicant and the court fully and properly to assess the lawfulness of the decision-making process. It allows an applicant to interrogate the decision and, if necessary, to amend its notice of motion and supplement its grounds for review.

[14] Our courts have recognised that rule 53 plays a vital role in enabling a court to perform its constitutionally entrenched review function:

'Without the record a court cannot perform its constitutionally entrenched review function, with the result that a litigant's right in terms of s 34 of the Constitution to have a justiciable dispute decided in a fair public hearing before a court with all the issues being ventilated, would be infringed.'

³ Pretoria Portland Cement Co Ltd v Competition Commission 2003 (2) SA 385 (SCA) [35] Review is not directed at correcting a decision on the merits. It is aimed at the maintenance of legality, at the B administration of 'the law which has been passed by the Legislature' as Bell J put it on the same page of Meintjies's case.

⁴ Hoexter op cit p.185:

[15] The filing of the full record furthers an applicant's right of access to court by ensuring both that the court has the relevant information before it and that there is equality of arms between the person challenging a decision and the decision-maker. Equality of arms requires that parties to the review proceedings must each have a reasonable opportunity of presenting their case under conditions that do not place them at a substantial disadvantage vis-à-vis their opponents. This requires that —

'all the parties have identical copies of the relevant documents on which to draft their affidavits and that they and the court have identical papers before them when the matter comes to court'.⁵ (footnotes omitted)

[9] In this case it is not immediately apparent from the record, which consisted more than 900 pages, as to how the decision was taken and precisely at what stage and on what basis. The decision making organs are the Specification Committee, the BEC and the BAC. No one from these bodies deposed to an affidavit and explained to court what informed the impugned decision. The minutes of each of these bodies have not been filed except those of the BEC dated 20 April 2017. The BEC filed a report and there is a paragraph from which one can glean that the BAC approved the recommendations. What we have is a finding that the applicant was non-responsive for failure to tender for the requested size of the space for the lease.

[10] It is not clear from the record as to why, in the face of the requirements of the lease and the fact that the space is not defined in exact terms, there was a finding that the applicant was non-responsive. This aspect should have been dealt with in the reasons. Full reasons may have explained the precise basis of the findings even on affidavit.

[11] The Municipal Manager confessed that he was not part of the decision making body as a result he could not comment on most of the allegations made on behalf of the applicant. Mr Roderick Owen who purported to confirm his affidavit does not appear in the record as the person who was either part of the BEC that made

⁵ See also *DA v Acting NDPP 2012 (3) SA 486 (SCA)* para.37

recommendations or the BAC that took the final decision. His version is that he was “involved” in all the stages. He does not inform the court in what capacity was he involved. Nowhere does his name appear in these decision making bodies. In light of this one wonders whether the first respondent acted transparently as it is required to do so by the Constitution. Conduct of this calibre may lower a sense of confidence in the administration by public bodies. In certain circumstances it may warrant a cost order being made against the functionaries responsible irrespective of the outcome of the case.

Grounds of review:

[12] The grounds for review can be summarised as follows:

The applicant contends that the first respondent failed to consider relevant factors. In this regard Mr Pretorius, who appeared for the applicant, submitted that the applicant complied with the tender conditions. He submitted that the bid document has to be read as a whole and interpreted in the context of the requirements of the bid. He submitted that if one has regard to the specification, the bid requirements have been met by the applicant. He submitted that if the applicant was disqualified for being non-responsive, by the same token the second respondent should have been disqualified in that notwithstanding its offer for 850m² there is no key to the layout plan and that the area specified on the plans of the lettable area comes to 781m² which is less than 850m². He submitted further that the applicant should have been awarded the tender because it tendered the lowest price and therefore scored the highest points.

[13] Mr Patterson SC, who together with Ms Ntsepe, appeared for the first respondent, submitted that the bid specification required that the lettable area must be 850m² and the applicant failed to meet such a requirement. He submitted that the first respondent was therefore entitled to disqualify the applicant and award the

tender to the second respondent. He argued that the discrepancy of the layout in the plan of the second respondent regarding the lettable space was explained at the site of the second respondent. The difficulty I have with this argument is that in terms of the General Conditions of Tender⁶BCMM (Buffalo City Metropolitan Municipality) must request a clarification in writing. The reason for this is obvious. Every step of the procurement process must be fair, transparent and all bidders must be treated equally. No such request in writing was made and no such explanation was made in writing.

[14] It is true that the administration cannot be expected to share with individuals every phase of its final decision-making process.⁷However, in light of the provisions of the General Conditions of Tender as contained in the first respondent's bid and section 217 of the Constitution, it is not unreasonable to expect the first respondent to be transparent and treat the applicant the same way it did with second respondent. It does not help the second respondent to offer a space of 850m² and yet its plan reflects less space.

[15] Furthermore, if one has regard to the Bid Specification, which was approved on 16 September 2016, the tender was for "(t)he Provision of Office Accommodation: Enterprise Project Management Office (EPMO)". Again if one has regard to the bid invitation which was published on 11 October 2016 the same description appears in the advertisement. In both instances no reference is made to the size of 850m². Although a reference to '*approximately*' 850m² is made in terms of the bid documents this does not tally with the analysis of the requirements of the lease as described in the bid specification.

[16] The applicant contends that according to the requirements of the first respondent the required area is 510m² excluding one kitchen and two restrooms. The size of the kitchen is not more than 10m² and the size of the restroom is not

⁶ Para.14

⁷ Baxter Administrative Law p.548

more than 10m². It contends that the total requirements would therefore be 540m². These requirements are set out in the Bid Specification where it is stated: *“Buffalo City Metropolitan Municipality is seeking first class office accommodation within the Central Business District of East London for its Enterprise Project Management Office (EPMO). The space requirement is approximately 850 square meters, inclusive of passage ways and common walkways. The table below indicates the requirements.”* The table then continues to specify the requirements and sizes thereof.

[17] Mr Pretorius submitted that the table referred to above as indicating the requirements shows that 540m² was the space required. It was on this basis that the applicant offered its bid.

[18] The applicant's bid included a letter from its architect which explained that 850m² space was available. Mr Pretorius submitted that the first respondent failed to consider the architect's letter.

Was the disqualification of the applicant justified?

[19] In interpreting the first respondent's bid it is necessary to take into account the circumstances attendant upon the coming into existence of the need. For this reason the whole documentation of the bid must be considered cumulatively. The document refers to the requirements and an estimation of *“approximately 850m²”* is made. The requirements are specific and measurements thereof are analysed in the bid specification. The interpretation of *“approximately”* must therefore take into account the specified requirements which, according to the applicant, do not get to 850m². The briefing session as envisaged in clause 19 of the General Conditions of the Bid would have afforded the first respondent an opportunity to explain these contradictions. This was not done. In my view the tender needed clarification in order to avoid different interpretations by the tenderers.

[20] In **Allpay Consolidated Investment Holdings (Pty) Ltd and others v CEO, SASSA 2014 (1) SA 604 (CC)** it was said:

“The purpose of a tender is not to reward bidders who are clever enough to decipher unclear directions. It is to elicit the best solution through a process that is fair, equitable, transparent, cost-effective and competitive. Because of the uncertainty caused by the wording of the request for proposals and bidders notice that purpose was not achieved in this case.” In my opinion this is apposite in the present case.

[21] In **Premier, Free State and Others v Firechem Free State (Pty) Ltd 2000 (4) SA 413 (SCA)** para 30, where Schutz JA said:

“. . . One of the requirements . . . is that the body adjudging tenders be presented with comparable offers in order that its members should be able to compare. Another is that a tender should speak for itself. Its real import may not be tucked away, apart from its terms. 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 and competitive process.”⁸

[22] In my view taking into account the document as a whole especially with regard to the analysis of the space required relating to the tender and in the absence of a satisfactory explanation from the first respondent the tender was capable of being interpreted in the manner that the applicant interpreted it. The word “*approximately*” is an adverb which is used to show that something is almost, but not completely accurate or exact; but it is roughly.

⁸ See also **Allpay Cons Inv Holdings (Pty) Ltd v CEO, SASSA 2014 (1) SA 604 (CC)** 39; **Steenkamp NO v Provincial Tender Board, Eastern Cape 2007 (3) SA 121 (CC)** para.60.

[23] Roderick Owen who deposed to an affidavit on behalf of the first respondent stated in his affidavit that when the second respondent's tender was first examined he noted and performed the calculations referred to by the applicant relating to 781m². An inspection was then conducted on 7 December 2016 (obviously to verify the lettable space). It was at that inspection that an acceptable explanation for the lettable area was made by the second respondent. If this is correct the second respondent was afforded an opportunity to explain its lettable space, albeit not in writing. Fairness would therefore require that the applicant should have been afforded such opportunity as well. In **Tetra Mobile Radio (Pty) Ltd v MEC, Department of Works, and Others 2008 (1) SA 438 (SCA)**: it was stated:

“(F)airness is inherent in the tender procedure. Its very essence is to ensure that before government, national or provincial, purchases goods or services, or enters into contracts for the procurement thereof, a proper evaluation is done of what is available and at what price, so as to ensure cost-effectiveness and competitiveness. Fairness, transparency and the other facts mentioned in s 217 [of the Constitution] permeate the procedure for awarding or refusing tenders.”

[24] In the circumstances it would seem to me that bidders were not treated equally and the applicant was not treated fairly. In my opinion the applicant should not have been disqualified as being non-responsive without having been afforded an opportunity to be heard. It is trite law that if an administrator contemplates to take a decision which adversely affects your rights you must be afforded an opportunity to be heard before the decision is taken.

In **Masetlha v President of the RSA 2008 (1) SA 566 (CC)** para. 184 Ngcobo CJ said:

“Acting fairly provides the decision-maker with the opportunity to hear the side of the individual to be affected by the decision. It enables the decision-maker to make a decision after considering all relevant facts and circumstances. This minimises arbitrariness. There is indeed an interrelationship between failure to act fairly and arbitrariness. In this sense, the requirement of the rule of law that the exercise of public power should not be arbitrary has both a procedural and substantive component. Rationality deals with the substantive component, the requirement that

the decision must be rationally related to the purpose for which the power was given and the existence of lawful reason for the action taken. The procedural component is concerned with the manner in which the decision was taken. It imposes an obligation on the decision-maker to act fairly. To hold otherwise would result in executive decisions that have been arrived at by a procedure which is clearly unfair being immune from review.”

[25] In the premises I conclude that the first respondent’s decision to disqualify the applicant was irrational. It failed to consider relevant facts. Furthermore the first respondent did not act in accordance with the provisions of s.217 of the Constitution which require the system of procurement to be fair, equitable, transparent, competitive and cost-effective. The application for review in terms of the PAJA is therefore well founded.

[26] With regard to costs, the general rule is that costs are to follow the event. It therefore follows that the applicant, as the successful party, would ordinarily be entitled to a costs order in its favour. This general rule should only be departed from in exceptional circumstances. I see no reason to deviate from this rule.

[27] In the result I make the following order:

1. The decision of the first respondent to disqualify the applicant as non-responsive and to award the tender to the second respondent is reviewed and set aside.
2. The first respondent is ordered to pay costs of the application.

B R TOKOTA

JUDGE OF THE HIGH COURT

Appearances for the Applicant Mr Pretorius

Instructed by Sim & Botsi Attorneys Inc.

For the first respondent M Patterson SC assisted by Ms Ntsepe

Instructed by Smith Tabata and Inc.

Date of hearing: 17 April 2019

Date delivered 2 May 2019.