

**IN THE HIGH COURT OF SOUTH AFRICA
(EAST LONDON CIRCUIT LOCAL DIVISION)**

Case No: EL 1450/2017

In the matter between:

HEYDRICKS CIVILS CC

Applicant

and

AMATOLA WATER BOARD

First Respondent

MAMLAMBO CONSTRUCTION CC

Second Respondent

THE MINISTER OF WATER & SANITATION

Third Respondent

JUDGMENT

MALUSI J:

[1] This is an application to review and set aside a tender award to the second respondent (*Mamlambo Construction*) and for that tender to be awarded

to the applicant (*Heydricks Civils*). There is a conditional counter application by the first respondent (*Amatola Water*) which assents to the tender award be set aside but opposes the award of the tender to the applicant. Amatola Water contends that the tender must be referred back to it for adjudication and award. Both the second and the third respondents have not participated in the application and have filed notices to abide the decision of this court.

[2] Heydricks Civils is a close corporation with a commendable track record in the construction of water reservoirs.

[3] Amatola Water is a wholly owned state entity with a statutory responsibility for the provision of bulk water supplies to various municipalities coupled with construction and maintenance of infrastructure to fulfil its purpose.

[4] The material facts relating to the tender award are largely common cause. Amatola Water invited bids for the construction of a 10ML post-tensioned, reinforced concrete water reservoir at Misty Mount within the King Sabata Dalindyebo Local Municipality. This particular project was part of the series of 14 construction projects aimed at providing water supply services to the Municipality. Amatola Water took a decision that all 14 projects would be undertaken in the same bidding process.

[5] Some of the requirements the bidders needed to satisfy as contained in the bid documents were the following:

- (i) a CIDB contractor grading of 7CE or in the case of an emerging enterprise a CIDB grading of 6CE;¹
- (ii) an objective criteria of at least 51% black ownership.

[6] The bid evaluation process by Amatola Water involved two committees. The bids were initially evaluated by the Bid Evaluation Committee (*BEC*). This involved a three stage process by the BEC:

- 6.1 Step 1 is the tender evaluation process wherein the BEC eliminates all non-responsive tenderers.
- 6.2 Step 2 is the price and preferential points adjudication during which responsive tenderers are adjudicated against all the Provisions of the Preferential Procurement Policy Framework Act 5 of 2000 (*PPPFA*).
- 6.3 Step 3 is the application of objective criteria to determine which tenderer is the best suited candidate for the project.

[7] The process provides that the BEC prepares an evaluation report with a recommended tenderer. The evaluation report is submitted to the Bid Award Committee (*BAC*). The BAC considers the recommendation and further undertakes an assessment to determine the likely risk of the tenderer not being

¹ The Construction Industry Development Board is a statutory body which registers, regulates and grades all entities operating in the building and infrastructure sphere according to their capability.

able to successfully complete the work and meet all the contractual obligations. A list of eight factors are considered at this stage of the evaluation. The BAC recommends a tenderer who is ordinarily awarded the tender by Amatola Water.

[8] On 28 September 2015 Amatola Water advertised a tender inviting bids for the project and the closing date for submission of bids was 30 October 2015. In response to the advertisement twenty four bids were received from various bidders including Heydricks Civils and Mamlambo Construction.

[9] For undisclosed reasons the BEC met to evaluate the bids only on 15 March 2016. Heydricks Civils and Mamlambo Construction were determined as non-responsive bidders due to their CIDB grading being suspended at the time. After evaluation the BEC recommended WK Construction, a third party, as the preferred bidder.

[10] Exactly a month later, on 15 April 2016 the BAC met to consider the BEC recommendation. It resolved to remit the bids to the BEC as WK Construction did not meet the 51% black ownership requirement.

[11] The BEC considered the referral by the BAC. The full deliberations of the BEC are not known as the minutes of the meeting are missing. Suffice to say it appears that it recommended a third party bidder, Xesibe Construction, after it

revised the risk threshold from 6% to 20% in order to evaluate and analyse a broader scope of bids.

[12] On 10 May 2016 the BAC met to consider the revised recommendation of the BEC. It resolved to support the recommendation on the proviso that the first respondent was satisfied with the quality of work by Xesibe Construction on previous projects.

[13] On 24 June 2016 the BAC met ostensibly to '*finally conclude*' on the appointment of a tenderer. It had to consider the financial stability of the recommended tenderers in the series of projects. On the instruction of the former CEO of Amatola Water the objective criteria was retracted with immediate effect at that late stage in the process. The BAC decided to refer the appointment of the bidders back to the BEC.

[14] For some undisclosed reason the risk assessment was increased and the previous threshold of 6% was applied once more. The consequence of the revision of the objective criteria and the risk assessment was that the only bidders that qualified were Mamlambo Construction and WK Construction. Both aforementioned entities were considered low risk during the assessment and WK Construction was recommended on this project. Again, no minutes of the BEC deliberations are available and this summary is gleaned from the BAC minutes.

[15] On 15 September 2016 the BAC met and decided that Xesibe Construction did not have the financial capacity to execute more than one project at a time. A revised tender evaluation report was presented to the BAC. Mamlambo Construction was then included as a responsive tenderer. This was a reversal of the March 2016 determination by the BAC. No reason was provided for this decision nor is it available anywhere. The BAC resolved to refer the appointment in the project to the former CEO of Amatola Water. Mamlambo Construction was appointed apparently by the former CEO in a letter dated 3 February 2017 which was only dispatched and received on 26 July 2017. The reason for the appointment is unknown as neither the BEC nor the BAC recommended the appointment. Despite the diligent efforts of the current CEO the reason for the appointment could not be established.

[16] At the hearing of this application Amatola Water raised the point that Heydricks Civils had unreasonably delayed in launching the review proceedings. It was contended that the review proceedings had been launched more than:

- 16.1 Eighteen months after Heydricks Civils was notified that its bid was not successful;
- 16.2 Fourteen months after its own presumption of administrative action;
- 16.3 Fourteen months after its own stance that Amatola Water has failed to take a decision or proceed with Heydricks Civils' objection.

It was further submitted that Heydricks Civils has neither sought condonation nor provided sufficient evidence for its non-compliance to be excused.

[17] Heydricks Civils argued out that it launched the present proceedings initially for the provision of documents by Amatola Water to enable it to prepare for the appeal. The further relief was to compel Amatola Water to convene an appeal relating to Heydricks Civils' objection to the award of the tender. It was argued that the appeal was pending until the application was launched.

[18] Section 7(1) of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) provides:

“any proceedings for judicial review in terms of section 6(1) must be instituted without unreasonable delay and not later than 180 days after the date –

(a) subject to subsection (2)(c), on which any proceedings instituted in terms of internal remedies as contemplated in subsection (2)(a) have been concluded; or

(b) where no such remedies exist, on which the person concerned was informed of the administrative action, became aware of the action and the reasons for it or might reasonably have been expected to have become aware of the action and the reasons.”

[19] The mechanism for extensions is provided in sec 9 of PAJA. It has been held that when the delay is longer than 180 days, a court is required to consider whether it is in the interest of justice for the time period to be extended. It was stated that the standard to be applied in assessing delay under both PAJA and legality review is whether the delay was unreasonable. In both assessments the calculation of time starts from the date that the applicant became aware or reasonably ought to have become aware of the action taken. The assessment

between the two reviews differs and is not the same. A distinction between the assessments of the delay under PAJA and that under the principle of legality turns on the prescribed time period of 180 days provided in PAJA.²

[20] A consideration of the evidence in *casu* indicates that the award decision was taken by Amatola Water on 16 May 2016. Heydricks Civils requested further information so as to decide whether or not to lodge an appeal on 19 May 2016.

On 23 May 2016 Heydricks Civils launched an appeal against the award of the tender. That appeal was styled as '*an objection to the award of bid*'.

[22] Mr Kotze, who appeared on behalf of Amatola Water conceded that it is merely semantics to contend that the objection was not an appeal. On the same day the objection was lodged the former CEO of Amatola Water requested Heydricks Civils to provide '*reasons or grounds for appeal*'. On 25 May 2016 Heydricks Civils provided reasons or grounds for appeal to Amatola Water. In my view it is abundantly clear that the appeal was lodged a mere 7 days after Heydricks Civils was informed that its bid was unsuccessful.

[23] On 24 June 2016 Heydricks Civils' attorneys of record indicated in a letter of demand that they persist with the '*objection and appeal*'. They demanded specified documents so as to amplify and supplement the grounds of appeal. They persisted with the request for the information to be provided in a letter

² *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd* 2019 (6) BCLR 661 (CC); 2019 (4) SA 331 (CC) at para 49.

dated 12 September 2016. On 17 October 2017 the attorneys again reminded Amatola Water that the appeal had not yet been processed and there had been no hearing. Amatola Water acknowledged the demand for the documents for the first time on 25 October 2017.

[24] Heydricks Civils launched the present application on 28 November 2017. The substantial relief sought related to provision of documents and the hearing of the internal appeal. During the course of the litigation the parties consented to a draft order to regulate the conduct of the proceedings. It was agreed that Heydricks Civils will no longer prosecute the internal appeal. Amatola Water agreed to furnish the documents that had long been requested by Heydricks Civils within 5 days of the order. Heydricks Civils was allowed to amend its application to be a review of the award.

[25] In my view it is abundantly clear that the review was not launched later than 180 days from the date in which the appeal was concluded. A proper reading of the papers clearly indicates that the parties agreed to conclude the appeal process in the draft order. A proper calculation of the 180 days must start from the date of that draft order. On the facts of this matter I find no merit in the contention that there has been an unreasonable delay in launching the review proceedings.

[26] It is manifest on a reading of the synopsis of the process followed in the award of the bid that the award was not in accordance with the set procedures of Amatola Water as neither the BEC nor the BAC recommended Mamlambo Construction. The award was tainted by substantial and material flaws which rendered it unlawful and invalid. Both on the PAJA review by Heydricks Civils and on the legality review by Amatola Water it is self-evident that the bid award must be set as both reviews are pivoted on the same facts.

[27] The next issue is the appropriate remedy. The applicant sought as a just and equitable relief that it be awarded the tender by the Court. The relief sought is based on the provisions of sec 8(1)(c)(ii)(aa) of PAJA which provides:

“The court or tribunal, in proceedings for judicial review in terms of s 6(1), may grant any order that is just and equitable, including orders-

Setting aside the administrative action and-

In exceptional cases-

Substituting or varying the administrative action or correcting a defect resulting from the administrative action.”

[28] It has been held in *Trencon Construction*³ that exceptional circumstances must be viewed in the context of what is just and equitable in the prevailing circumstances of a particular case. A Court has a wide discretion upon consideration of the facts to refuse to remit a decision back to the administrator if

³ *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd & Another* 2015 (5) SA 245 (CC) at paras 35-47.

there is no reason to do so. A Court may decline to remit a decision to the administrator where:

- 28.1 It would be a waste of time for the administrator to reconsider the matter;
- 28.2 An extensive amount of time has unjustifiably been lost by the bidder to whom time is of significant value and a further delay caused by reference back would result in prejudice; or
- 28.3 Where the administrator has exhibited bias or incompetence to such a degree that it would be unfair for the bidder to submit to its jurisdiction again.

[29] The exceptional circumstances test postulated in *Trencon Construction* requires:

- 29.1 That the Court is in as good a position as the administrator to make a decision; and
- 29.2 That the decision of the administrator to appoint the unsuccessful bidder is a foregone conclusion.

[30] Heydricks Civils contended that the adjudication process at Amatola Water was fraught with bias and incompetence. In its view its bid was not guaranteed to be subjected to a fair tender process. It argued that in such circumstances it would not be fair for it to be required to again submit its tender for adjudication before Amatola Water.

[31] In my view Amatola Water appears to have turned a new leaf since the fatally flawed bid adjudication process. The Board of Directors has appointed a new Chief Executive Officer. The CEO has brought the counter-application to set aside the bid award in what appears to be a cleaning of the Augean stables.

[32] The applicant was excluded from the bid adjudication process right at the onset as indicated earlier in this judgment. It is clear from the evidence before me that the adjudication of the bids involves a value judgment by administrators with the necessary skills and expertise to evaluate the bids. The Court is not vested with the skills and the expertise required to adjudicate the bids. In my view the Court is not in as good a position as the administrators as administrative skills and expertise still need to be applied in the adjudication and the Court is not in possession of those.

[33] The situation may well have been different if Heydricks Civils had been included in the evaluation process but the irregularity occurred towards the conclusion of the process and it was a foregone conclusion that Heydricks Civils must be appointed. In a process so fraught with irregularity as the one in *casu* it is only fair and just that the matter be remitted to Amatola Water for a proper evaluation to be done under the current administration. It is prudent and proper in this case to rely on the new administration being able to take the correct decision in accord with the principle of separation of powers and deference to the administrators.

[34] It appears that other eligible bidders were similarly affected as Heydricks Civils and their bids were unfairly not considered. Heydricks Civils placed much reliance on the *Groenewald*⁴ decision in arguing that other bidders ought not be considered as they did not participate in this review. The *Groenewald* decision involved an internal appeal in a municipality by a disgruntled bidder against the award of a tender. The appeal was in accordance with s62(1) of the Municipal Systems Act 32 of 2000.

[35] In my view *Groenewald* is distinguishable from the present matter which is a review. I have already found that the evaluation of the bids was invalid and the evaluation process has to be started afresh. Thus all the bidders ought to be considered unless there were exceptional circumstances. I find that *Groenewald* is not applicable in *casu*.

[36] The other factor I have considered relates to the delay from 16 May 2016 when the bid was awarded. A significant period has elapsed which may materially affect the prices and operational conditions in the execution of the bid. It does not appear fair and just for the Court to substitute the decision of Amatola Water after the elapse of such a significant amount of time.

⁴ *Groenewald NO & Others v MS Developments (Cape) (Pty) Ltd* 2010 (5) SA 82 (SCA) paras 22-25.

[37] The last issue relates to costs of the application. Amatola Water has, correctly in my view, tendered costs up to the filing of the supplementary affidavit by Heydricks Civils. The costs tender appears to be fair in the circumstances of this matter. Heydricks Civils was substantially successful in setting aside the bid award. Each party should bear their own costs incurred beyond the date of the filing of the supplementary affidavit.

[38] In the circumstances and for the above reasons the following order will issue:

- 38.1 The first respondent's decision to award the tender for the construction of a 10ML reservoir at Misty Mount under project reference AW2015/16/17 is declared unlawful, invalid *ab initio* and consequently of no legal force or effect;**
- 38.2 The matter is remitted back to the first respondent for the adjudication of all the bids received to start *de novo* before the Bid Evaluation Committee and the Bid Award Committee.**
- 38.3 The first respondent is ordered to pay the applicant's costs up to the date of the filing of the applicant's supplementary affidavit. Each party is to pay its own costs beyond that date.**

T MALUSI

JUDGE OF THE HIGH COURT

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Heard on: 01 November 2018

Judgment delivered: 22 August 2019