IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Appeal No: A214/2017

In the matter between:

RICHARD KHUDUGA N.O.	First Appellant
MARTHA PAULINA KHUDUGA N.O.	Second Appellant
LYNNZAY PRECETHY WYMERS N.O.	Third Appellant
and	
THE FREE STATE DEVELOPMENT CORPORATION	First Respondent
REGISTRAR OF DEEDS, FREE STATE PROVINCE	Second Respondent
BOTLOKWA HOLDINGS	Third Respondent
THOKO ALICE MALEMBE	Fourth Respondent
ALICE MALEMBE N.O.	Fifth Respondent
LEBOHANG SAMUEL MOLEKO N.O.	Sixth Respondent

HEARD ON: 05 FEBRUARY 2018

CORAM: JORDAAN, J *et* LOUBSER J *et* MOLITSOAN, AJ

JUDGMENT BY: LOUBSER, J

DELIVERED ON: 22 FEBRUARY 2018

[I] **INTRODUCTION**:

[1] This is an appeal against the Judgment of Chesiwe, AJ, dismissing an application for the review of a decision by the First Respondent to sell by tender a certain filling station situated at Botshabelo to the Third and/or Fourth and/or the MMAT Trust represented by the Fifth and Sixth Respondents. In the Notice of Motion ancillary relief is also sought to the effect, in a nutshell, that the Second Respondent be interdicted from registering the property in the name of any of the abovementioned entities pending the finalization of the review application, that the First Respondent be ordered to have the property registered in the name of the Appellants in their capacity as trustees of the Khuduga Family Trust, alternatively to revisit the process of deciding upon a suitable purchaser, and that the First Respondent be ordered to provide the Appellants with all

information pertaining to the process followed and the decision made in awarding the sale to the Respondents as mentioned above.

[2] In her Judgment, the Trial Judge dismissed with costs the application for a review and for the ancillary relief altogether, and the Khuduga Family Trust now comes in higher contention against that decision. The Notice of Appeal contains many grounds for the appeal alleging, *inter alia*, that the Trial Judge had made certain factual errors in her Judgment, which she had failed to determine in the review application and that she had dismissed the whole application on the basis that the balance of convenience does not favour the Appellants.

[II] <u>**FACTS PRESENTED BY APPELLANTS**</u>:

[3] The First Appellant avers in his Founding Affidavit that he had already indicated to the First Respondent in 2005 and in 2007 that he was interested in purchasing the filling station in question, but that he had heard nothing of any intention to sell the property ever since. Then, on or about the 22nd April 2015, a Mr Schalk Van der Merwe, the property manager of the First Respondent,

contacted him and requested a meeting with him. They met at the Wimpy Restaurant at Preller Square, Bloemfontein, on the following day, namely 23rd April 2015, where the First Appellant was informed that the First Respondent intended to sell the property and that a notice to this effect was already published. After the meeting, Mr Van der Merwe handed a document to him purporting to be an invitation or advertisement for the sale of the property.

[4] In this document interested persons are informed that the First Respondent intends to dispose some of its significant assets or land, and black persons or black owned entities are invited to submit proposals for purchasing some of its land. It was common cause that the filling station in question formed part of the assets to be sold.

[5] The advertisement went on to inform that "*a compulsory briefing session will be on 10 April 2015 at the FDC Head Office Board Room address 33 Kellner Street, Bloemfontein at 12H00 pm. No attendance will be recorded after 12H15. Please note that the FDC may invite detailed proposals or presentations to those who have attended the briefing session and submitted expressions of*

proposals. The FDC retains the right to or not to accept proposals including to approach certain persons, entities or consortia should proposals received not be satisfactory or conditions not be met by the successful bidder and such will be done entirely at FDC's discretion. The discretion to accept proposals will be entirely based on BBBEE proposition and intended use for the land to be purchased. The highest amount offered will not necessarily be a final determining factor for the acceptance of a proposal." At the bottom of the advertisement it is indicated that the closing date for proposals would be 30 April 2015 at 12H00 pm.

[6] In a Supplementary Affidavit, the First Appellant mentions that he later found out that the advertisement was published in two newspapers seven (7) days and five (5) days respectively before the 10th April 2015 when the briefing session was held. He alleges that it is apparent that insufficient time and exposure was offered for any persons to make submissions or to attend the compulsory meeting.

[7] Following the meeting at the Wimpy, the First Applicant went to see the MEC clothed with responsibility over the First Respondent

on 28th April 2015. He showed the MEC the advertisement, and he told him that he had difficulty to find the documents to submit a proposal. He further informed the MEC that he always wanted to purchase the property but that he never got the opportunity to do so. According to the First Appellant, the MEC then assured him that he and the Premier will not allow that "*they treat me in that fashion.*" The MEC then immediately telephoned someone at the First Respondent and instructed that the period for the submission of proposals be extended to 15th May 2015. The First Appellant was later furnished with a letter by the First Respondent confirming that proposals must be submitted before 12H00 on 15th May 2015. He then goes on to point out that he indeed then submitted his proposal timeously.

[8] More than a year later it came to the knowledge of the First Appellant that the filling station was eventually sold to the Third Respondent and/or the MMAT Trust. The First Appellant then embarked upon his endeavours to obtain information pertaining to the sale to these entities, especially in view of the fact that the offer made by the MMAT Trust was apparently for R1.5 million less than the purchase price the Khuduga Family Trust was willing to pay, namely R5.5 million. Not being satisfied with the

response of the First Respondent to the request for the said information, the Applicant Trust included the prayer in the Notice of Motion that the First Respondent be ordered to provide the said information.

[III] **FACTS PRESENTED BY FIRST RESPONDENT**:

[9] The Divisional Executive of the First Respondent indicates in his Answering Affidavit on behalf of the First Respondent that he is not aware of the meeting that allegedly took place at the Wimpy. He further indicates that the First Appellant came to see him during April 2016. This date seems to be a typing error, because it is clear from what is said further in the affidavit that it was actually in April 2015 when the First Appellant met with him at the offices of the First Respondent. The First Appellant told him that he was aware that there was a tender issued for the purchase of the property, but the problem was that he missed the compulsory briefing session as required in the advert. He requested for an extension or for permission to be allowed to submit his proposal late. According to the deponent, he then confirmed that there was a compulsory briefing session held which was attended by other bidders, and he informed the First Appellant that it was his

choice to submit his bid late, and that he should understand that his bid might be considered non-responsive because of his failure to attend the compulsory briefing session. The deponent further confirms that the date was indeed extended, but he emphasized the fact that the date was only extended to enable all bidders who had attended the briefing session to submit their proposals as they had received the documents only a few days before the closing date.

[10] The deponent further informs that the compulsory briefing session was attended by no less than fifty nine (59) aspirant bidders who had responded to the newspaper advertisements referred to earlier. He also confirmed that the property had been sold to a third party eventually. He also confirms that the First Appellant submitted a proposal on 10th May 2015 offering to purchase the filling station for an amount of R5.5 million. He also states that the information requested by the First Appellant have indeed been provided to the Applicants at the time of deposing to his affidavit.

[11] Lastly, it is mentioned on behalf of the First Respondent that the proposal from the First Appellant suggested to the First

Respondent to dispose of its asset in a manner circumventing pre-requisite Supply Chain Management Policy of the FDC, relevant legislation and other regulative framework dealing with disposal of FDC property. The deponent submitted that the proposal of the First Appellant failed to comply with the disposal management system set up by the First Respondent in that it was not going to be fair, equitable, transparent and/or cost-effective and competitive. He emphasizes that the disposal management system of the FDC involves a process that has to be fair and equitable.

[IV] **<u>FINDINGS OF THE TRIAL JUDGE</u>**:

[12] On the facts outlined above, the Trial Judge made the following findings, *inter alia*:

(a) The Applicants have failed to allege anything other than a *prima facie* right to review and to set aside the decision. The Applicants have failed to satisfy the applicable test and the requirements for an interdict.

(b) Proper compliance with the procurement process is necessary for the process to be lawful for a fair outcome in a tender award – the process itself must be fair. Fundamental to a fair process is the requirement that all bidders should be treated equally.

(c) The tender invitation ... set out the criteria as well as the requirements for an acceptable tender, including a compulsory briefing which would be held, and that non-attendance would be recorded after 12H15.

(d) It should be strongly frowned upon when a tenderer has a separate private meeting with officials of the Organ of State that is advertising the tender process.

(e) It would not be equitable for the Court to substitute the Applicants as the successful bidder and set aside the decision of the bidding committee. There is no reasonable likelihood that the tender would be awarded to the Applicant, and the Applicants have therefore failed to prove any, or some, of all the requisites for an interim interdict.

(f) In the light of these findings, she is not convinced that the balance of convenience is in favour of the granting of the Order requested by the Applicants. She is satisfied that on that basis, she should exercise her discretion against the Applicants and dismiss the application.

[13] Mr Cronjé, appearing for the Appellants before us, contended that the Trial Judge ought to have found, amongst other things, that the compulsory briefing session had no real purpose and that the failure of the Appellants to attend the session, could never serve to disqualify them from the tendering process. Mr Manye for the Respondents, on the other hand, argued that the tender process *in casu* required strict and equal compliance by all competing tenderers, and that the non-attendance of the briefing session rendered the proposal of the Appellants non-responsive and without any effect. He pointed out that the Appellants had in any event submitted a written tender on 16th April 2015, that is way before the initial closing date for tenders on 30 April 2015. A copy of this tender document found its way into the papers, and formed part of the documents placed before the Trial Judge.

[V] <u>THE RELEVANT STATUTORY PROVISIONS AND LEGAL PRINCIPLES</u>:

[14] The Constitution of our country provides that: "*When an Organ of State in the National, Provincial or local sphere of Government, or any other institution identified in the National Legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective.*" (Section 217(1) of Act 108 of 1996). Section 3(1) of the Promotion of Administrative Justice Act no. 3 of 2000 provides that administrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair.

[15] Our Courts have on a number of occasions pronounced itself on the principles arising from the above and other statutory provisions where tendering processes were concerned. Amongst the relevant principles highlighted in those decisions, are the following:

(a) Proper compliance with the procurement process is necessary for the process to be lawful for a fair outcome in a tender award – the process itself must be fair. (Westinghouse Electric Belgium SA v Eskom Holdings (SOC) Ltd and Another 2016 (3) SA 1 (SCA) at para 38 and 39).

(b) A tenderer has the legitimate expectation that the contractor will award a contract in accordance with its own preferred and published procedure, chosen presumably in the interests of its own administrative efficiency. Non-compliance with its own procedure will be a form of procedural unfairness. (Total Computer Services v Potchefstroom Local Municipality 2008 (4) SA 346 (TPD) at 365 I.)

(c) A just and equitable approach in the context of the tender award involves a process of striking a balance between the interests of the Appellants on the one hand, and the interests of the Respondents on the other hand. (Millennium Waste Management v Chairperson, Tender Board 2008 (2) SA 481 (SCA) at 489 G).

[VI] APPLICATION OF THE STATUTORY PROVISIONS AND LEGAL PRINCIPLES TO THE EVIDENCE:

[16] The provisions referred to above are clear in their wording and cannot leave any doubt as to their ordinary meaning and substance, while the principles arising therefrom have already become trite in our law.

[17] The history of the matter as outlined by the facts contained in the application papers, leaves little doubt that the First Appellant was desirous to acquire the filling station over a long period of time, either for himself in his personal capacity or for the Khuduga Family Trust. It is also equally clear that his attempts over the years failed to attract much enthusiasm from the First Respondent, if any at all. On a balance of probabilities, this was so due to the fact that the First Respondent could not simply dispose of its assets to anyone without following a specific tender procedure in terms of some internal supply chain policy or some legislative frameworks it was bound to implement.

[18] The invitation or advertisement published by the First Respondent to dispose of some of its assets, including the filling station, gave

the first indication that it was now ready to sell. The invitation to prospective purchasers to submit their proposals or tenders, informed in no uncertain terms that a compulsory briefing session would be held on 10 April 2015 at the offices of the First Respondent, and that non-attendance would be recorded after 12H15. It is common cause that the First Appellant failed to attend the briefing session.

[19] Mr Cronjé, on behalf of the Appellants, submitted that the publication of the invitation only a few days before the briefing session, was unreasonable and that, as a result, his clients were not aware of the session on 10 April 2015. This argument, however, does not carry much weight in view of the common cause fact that no less than fifty nine (59) interested persons did attend the briefing session. The further argument of Mr Cronjé to the effect that the purpose and the content of the briefing session is unknown and therefore somewhat dubious, and that it was nowhere indicated that non-attendance would result in disqualification, also holds no water for the following reasons:

[20] Whatever the purpose and the content of the briefing session might have been, the fact remains that the terms of the invitation

document relating to it were couched in peremptory language by the use of the word "*compulsory*". In terms of Section 1(i) of the Preferential Procurement Policy Framework Act no. 5 of 2000, an "*acceptable tender*" means any tender which, in all respects, complies with the specifications and conditions of tender as set out in the tender document. No further information appears from the papers pertaining to the terms and the nature of the briefing session, and therefore we are not in a position to decide, for instance, whether the session represented an unreasonable requirement in the invitation document, or not.

[21] What we do know, is that the decision of this Court must be just and equitable (Section 8 of the Promotion of Administrative Justice Act no. 3 of 2000) in the sense that a balance between the interests of the Appellants, on the one hand, and the interests of the Respondents, on the other hand, has to be maintained.

[22] It is apparent that the First Appellant became aware of the closing date for proposals during April 2015 because he did submit a proposal on 16th April 2015. On the probabilities of the case, an official of the First Respondent met with the First Appellant at the Wimpy on 23rd April 2015 to inform him that his proposal was

invalid in that there had already been a compulsory briefing on 10th April 2015, which he had missed. This probability is given some weight by the Divisional Executive of the First Respondent in his Answering Affidavit, where he states that he met with the First Appellant thereafter at the offices of the First Respondent, and that the First Appellant told him that he was aware that there was a tender issued out for the purchase of property, "*but the problem was that he missed the compulsory briefing session as required in the advert.*"

[23] By the admission of the First Appellant himself, he then went to see the MEC concerned to complain about the situation, and the MEC then caused the closing date of 30 April 2015 to be extended to 15th May 2015. It is common cause that, following this extension, the First Appellant submitted another proposal on 10th May 2015. When the First Appellant eventually realized that his failure to attend the briefing session was still haunting him, he decided to change his tactics by requesting information as to how it came about that the filling station was awarded to the relevant Respondents. As he was not satisfied with that outcome, he continued his quest to leave no stone untouched to acquire the

filling station, and he then approached the Trial Court for the relief sought.

[24] For a tendering process to be fair, it speaks for itself that all bidders should be treated equally. The result hereof is that other bidders, including the successful bidders, who had complied with the laid down procedure of attending the briefing session, would not receive equal and fair treatment if the bid of the Appellants were now to be considered while the Appellants had not attended the briefing session as required.

[25] I therefore find, in the absence of anything pointing to the contrary, that the compulsory briefing session was a valid requirement in the tendering process, and that non-attendance rendered the proposals made by the Appellants non-responsive. The effect hereof is that the ultimate relief sought by the Appellants, namely the setting aside of the tender award on review, cannot succeed. A setting aside would open the back door to the Appellants in their bid to acquire the filling station, and this in turn would result in the relevant Respondents not receiving equal and fair treatment.

[26] It follows that the remaining relief sought, namely an interim interdict pending the outcome of the review application, and an order compelling the First Respondent to furnish information relating to the award of the tender, becomes mostly irrelevant.

[27] I am therefore in agreement with the Court *a quo* that the application cannot succeed. Although I come to this conclusion for slightly different reasons than those pronounced by the Trial Judge, the result is that the appeal is dismissed with costs.

P. J LOUBSER, J

I concur:

A. F JORDAAN, J

I concur:

P. E MOLITSOANE, AJ

/dbloem