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**

Review No.: A83/2016

In the review between:-

ZZZ BUILDING CONSTRUCTION & SECURITY SERVICES Applicant

and

GOLDFIELDS TVET COLLEGE 1st Respondent

ICEBERG TRADING 735 CC 2nd Respondent

CORAM: MUSI, AJP *et* VAN ZYL, J

DELIVERED ON: 6 FEBRUARY 2017

JUDGMENT BY: MUSI, AJP

DELIVERED ON: 16 MARCH 2017

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[1] This is a review application in terms of Rule 53 of the Uniform Rules. The applicant sought the following order:

1. That the decision of the first respondent to award the tender to the second respondent be reviewed and set aside.
2. That any contract pursuant to the award of the tender be declared to be of no force and effect and be set aside.
3. That the applicant be declared to be the successful bidder and that the first respondent be directed to enter into contract with the applicant.
4. That the first respondent be ordered to furnish the applicant with written reasons for deviating to award the tender to the applicant as the recommended bidder in terms of section 33 of the Constitution of the Republic of South Africa, 1996 (the Constitution) and section 5 (1) of PAJA.
5. That the 1st respondents pay the costs of this application unless the 2nd respondent opposes in which event the 2nd respondent be ordered to be liable for the applicant's costs jointly and severally with the 1st respondent the one paying the other to be absolved…"

[2] The applicant is aggrieved that the 1st respondent (College) granted a tender for security services to the 2nd respondent. During the latter part of 2015 the College invited interested parties to submit tenders for security services at its central offices, Tosa and Welkom campuses. Many companies responded to the invitation. The adjudication committee of the College met on 2 December 2015 in order to adjudicate on the companies that responded to the invitation. Some companies quoted more than the College's budget allowed for security services. All the companies that were above budget were disqualified. After this process of elimination only 5 companies qualified for consideration. The applicant and the 2nd respondent were part of the companies that qualified for consideration. However the adjudication committee found some discrepancies in the documents of both the applicant and the 2nd respondent. In respect of the applicant the adjudication committee found that ID copies and the qualifications of support staff were not certified. The 2nd respondent's documents were found to be lacking because COIDA, ID copies of support staff and insurance (Public Liability Documents) were not certified. The adjudication committee resolved not to

adjudicate the security services tender after it found that none of the remaining five companies met all the strict tender requirements. It resolved to start the process afresh because there was no qualifying company.

[3] On 14 January 2016, the acting principal of the College, Mr MPW Pinkoane, wrote a memorandum to Ms CB Bovungana, wherein he stated the following:

> "Adjudication committee has recommended that the tender for security services be re-advertised, however noting the process of re-advertising and the financial implications attached thereto, and also that the same companies will re-apply, I therefore duly request that the (sic) hold the Evaluation Committee meeting and do the following:
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> - Recall all submitted bids/tenders that were within budget to be re-evaluated.
> - Evaluation Committee have a meeting with bidders to give them an opportunity to certify documents that were not certified, update all relevant documents, and re-submit for evaluation.
> - Bidders prices should not be changed.
>
> Kindly expedite the matter so that a new security company is appointed on the 01 March 2016 (sic)."

[4] On 28 January 2016 the evaluation committee met with representatives of the five companies that qualified. During this meeting the bidders were given back their tender documents, after it was explained to them that the purpose of the meeting was to point out that their documents were not in order and to give them an opportunity to rectify their documents. They were informed that the due date for the resubmission of the tender documents would be 4 February 2016 at 10:00.

[5] The Bid Evaluation Committee met on 9 February 2016 to *inter alia* evaluate the security services tender. Three of the five companies were disqualified for various reasons. The applicant and the 2nd respondent were the only companies left in respect of this tender. The 2nd respondent quoted R1 545 600 while the applicant quoted R1 680 000. A functionality test in terms of the Preferential Procurement Policy Framework Act 5 of 2000 (PPPFA) was done on both

companies. The 2nd respondent scored hundred points whilst the applicant scored 92.7 points. The Bid Evaluation Committee resolved as follows: "Iceberg Trading 735 recommended as per PPPFA point system and functionality test done from the previous amount of evaluation". It therefore recommended that the 2nd respondent be given the tender.

[6] On 10 February 2016 the Bid Adjudication Committee met in order to adjudicate the bids. The Bid Adjudication Committee considered the tender documents of the five companies that initially qualified. The adjudication committee confirmed the disqualification of the three companies that were disqualified by the evaluation committee. It considered the documents of the 2nd respondent and found that the 2nd respondent's tax clearance certificate expired in December 2015 and that the 2nd respondent attached a letter from its auditors stating that it is still waiting for a new tax clearance certificate.

It resolved as follows:

> "The auditor's letter is not a tax clearance certificate.
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> The tax clearance certificate is the only valid document to be taken.
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> No company should be given a tender if it does not have a valid tax clearance certificate according to the guidelines from treasury.
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> The adjudication committee resolved that Iceberg trading 735 be disqualified based on the reasons mentioned above."

[7] The Bid Adjudication Committee recommended that the applicant be given the tender and that a report be given to the principal of the College. On 23 February 2016 Mr Leteane, wrote a submission requesting approval from the acting principal to appoint the applicant to supply security services to the College. The recommendation of Mr Leteane was supported and approved by Mrs Smith. The acting principal rejected the recommendation and stated the following:

> "Iceberg Trading 735 is approved. The company's expired in December 2015 and they are awaiting the updated (sic). ZZZ Security guards complained to the College about various issues. The letter of complained is attached (sic)."

[8] It is clear from the letter of complaint that only 2 employees lodged various complaints against the applicant. They *inter alia* complained about the late payment of their salaries, salaries which were not paid in full, unfair dismissal of employees and intimidation of employees, employees who do not receive their monthly pay slips, lack of communication between employees and their employer and the fact that employees do not have employment contracts. The computer generated date stamp clearly shows that the letter relating to these complaints was written on the 9 September 2014.

[9] The applicant was not happy with the state of affairs and approached its attorneys in order to get the relevant documentation from the College. After its attorneys perused the relevant documentation they wrote a letter, dated 15 March 2016, to the acting principal requesting to be informed what procedure, if any, was used during the deviation from the Bid Adjudication Committee's recommendation and the reasons for the deviation. No reasons were forthcoming. On 23 March 2016 the applicant's attorneys again wrote to the acting principal requesting reasons for the deviation and the procedure that was followed during the deviation. On 29 March 2016 the acting principal responded as follows:

> "Kindly note that the Supply Chain Management Policy of the College empowers the Accounting Officer (College Principal) to award a bid other than the one recommended by the Bid Adjudication Committee and the policy does not specify any procedure to be followed when deviating from but Adjudication Committee's recommendation (sic)."

[10] Mr Majaphage, on behalf of the applicant, submitted that the tender was given to the 2nd respondent in a manner that was unlawful and procedurally unfair. He contended firstly that the tax clearance certificate of the 2nd respondent had

already expired at the time that the tender documents were submitted on 5 February 2016. Secondly that there was no rational reason why the recommendation of the Bid Adjudication Committee was not followed by the acting principal of the College. Thirdly that the acting principal was supposed to at least inform the applicant that he was going to consider the complaints lodged against it in 2014 in deciding whether to accept or reject the recommendation of the Bid Adjudication Committee.

[11] Mr Reinders, on behalf of the 1st respondent, submitted that the tax clearance certificate of the 2nd respondent was in order during December 2015 when it responded to the invitation. He submitted that the acting principal acted lawfully when he considered that the tax clearance certificate of the 2nd respondent was in order when the tender closed. He was however constrained to concede that the reason relating to the complaints was irrational.

[12] The issue to be decided in this matter is whether the contract was awarded lawfully to the 2nd respondent.

[13] Procurement by the state is regulated by the Constitution and other legal instruments. Section 217 of the Constitution of the Republic of South Africa, 1996 reads as follows:

> "(1) When an organ of state in the national, provincial or local sphere of government, or any other institution identified in 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.
>
> (2) Subsection (1) does not prevent the organs of state or institutions referred to in that subsection from implementing a procurement policy providing for-
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> *(a)* categories of preference in the allocation of contracts; and
>
> *(b)* the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination.
>
> (3) National legislation must prescribe a framework within which the policy referred to in subsection (2) must be implemented."

[14] The PPPFA sets out the framework within which the procurement policy and services must be implemented by an organ of state. The procurement policy of the 1st respondent is also of importance because it sets out the manner in which it should procure goods and services.

[15] In terms of section 33 of the Constitution everyone has the right to administrative action that is lawful, reasonable and procedurally fair. PAJA was enacted to give effect to the right to just administrative action. Section 6 of PAJA reads follows:

> "(1) Any person may institute proceedings in a court or a tribunal for the judicial review of an administrative action.
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> (2) A court or tribunal has the power to judicially review an administrative action if-
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> *(a)* the administrator who took it-
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> (i) was not authorised to do so by the empowering provision;
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> (ii) acted under a delegation of power which was not authorised by the empowering provision; or
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> (iii) was biased or reasonably suspected of bias;
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> *(b)* a mandatory and material procedure or condition prescribed by an empowering provision was not complied with;
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> *(c)* the action was procedurally unfair;
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> *(d)* the action was materially influenced by an error of law;
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> *(e)* the action was taken-
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> (i) for a reason not authorised by the empowering provision;
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> (ii) for an ulterior purpose or motive;
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> (iii) because irrelevant considerations were taken into account or relevant considerations were not considered;
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> (iv) because of the unauthorised or unwarranted dictates of another person or body;
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> (v) in bad faith; or
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> (vi) arbitrarily or capriciously;
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> *(f)* the action itself-
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> (i) contravenes a law or is not authorised by the empowering provision; or
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> (ii) is not rationally connected to-
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> *(aa)* the purpose for which it was taken;

(bb) the purpose of the empowering provision;

(cc) the information before the administrator; or

(dd) the reasons given for it by the administrator;

(g) the action concerned consists of a failure to take a decision;

(h) the exercise of the power or the performance of the function authorised by the empowering provision, in pursuance of which the administrative action was purportedly taken, is so unreasonable that no reasonable person could have so exercised the power or performed the function; or

(i) the action is otherwise unconstitutional or unlawful.

(3) If any person relies on the ground of review referred to in subsection (2) *(g)*, he or she may in respect of a failure to take a decision, where-

(a) (i) an administrator has a duty to take a decision;

(ii) there is no law that prescribes a period within which the administrator is required to take that decision; and

(iii) the administrator has failed to take that decision,

institute proceedings in a court or tribunal for judicial review of the failure to take the decision on the ground that there has been unreasonable delay in taking the decision; or

(b) (i) an administrator has a duty to take a decision;

(ii) a law prescribes a period within which the administrator is required to take that decision; and

(iii) the administrator has failed to take that decision before the expiration of that period,

institute proceedings in a court or tribunal for judicial review of the failure to take the decision within that period on the ground that the administrator has a duty to take the decision notwithstanding the expiration of that period.”

[16] In terms of clause 4.14 of the applicant’s Supply Chain Management Policy, the following documents must form part of a bid invitation:

- Invitation to bid.
- Original tax clearance certificate or letter of arrangement from SARS.

[17] In terms of clause 4.13 of the Supply Chain Management Policy the Accounting Officer may decide to award a bid to a person other than the one recommended by the Bid Adjudication Committee. When he or she decides to deviate reasons

for the deviation should be recorded and should be made available for audit purposes. The reasons must be justifiable and defendable in a court of law.

[18] It is common cause that the Bid Adjudication Committee decided to recommend that the applicant should be appointed to deliver the security service. The Accounting Officer who is the principal of the applicant decided to deviate from the recommendation. The crucial question is therefore whether there are any justifiable and defendable reasons for the deviation.

[19] When the Bid Adjudication Committee decided not to recommend the 2nd respondent it stated the following:

- Auditor's letter could not replace a tax clearance.
- Tax clearance certificate is the only valid document.
- No company should be given a tender without a valid tax clearance.

[20] It is undisputed that at the time that the Bid Adjudication Committee made its recommendation the 2nd respondent did not have a valid tax clearance certificate. The letter by the 2nd respondent's auditors was also not an arrangement with SARS. The Bid Adjudication Committee was therefore aware that the 2nd respondent is waiting for a new tax clearance certificate. Armed with that knowledge it still decided not to recommend the 2nd respondent. The reason given by the Accounting Officer that the company is still awaiting its tax clearance certificate is something that was considered by the Adjudication Committee.

[21] The second reason given for the deviation is, to say the least, strange. The Accounting Officer took into consideration complaints that were leveled against the applicant during 2014 by two security officials who were employed by the applicant. He did so without informing the applicant that he intends considering those complaints as part of the question whether to approve the recommendation of the adjudication committee. The complaints could have emanated from two disgruntled employees who might have had an axe to grind with the applicant.

The Accounting Officer of the 1st respondent took the complaints as gospel and held that against the applicant without following any due process. The *audi alteram partem* principle which is an incident of the rule of law ensures fairness because the other side is given the opportunity to state his or her case and thereby refute allegations that are made against him or her without any foundation. The applicant was not given the opportunity to state its version to the Accounting Officer. A prejudicial decision was taken without regard to the rule of law.

[22] The policy of the College makes it plain that reasons for any deviation should be given and that such reasons must be justifiable in a court of law. The reasons in this case, as was correctly conceded, cannot be classified as justifiable. The administrative action of the Accounting Officer was therefore unlawful and irrational.

[23] When important decisions are based on irrational reasons or taken contrary to the express prescripts of a policy or the law it taints the entire decision-making process. It gives rise to the perception that the decision-maker took the decision for ulterior reasons or that the decision-maker is corrupt. In this country we read at least once a week about tenders that were allegedly granted unlawfully. Our courts are also inundated with applications to set aside tenders granted or contracts entered into after a public procurement process. It is therefore of utmost importance that persons, such as the Accounting Officer in this matter, who are reposed with the power to take such decisions should be very circumspect and act lawfully. Although there is no allegation of corruption in this matter, the decision of the Accounting Officer was unfair, unlawful and irrational and the resultant contract null and void.

[24] Security services are essential at public institutions like the College. It would be placed in harm’s way if it is left without security services. The best remedy which

is just under the circumstances would be to make an order for the seamless legalization of the situation.

[25] We have considered granting the contract to the applicant but decided against it because the entire documents were not placed before us. The bid invitation was not put before us. We do not know the duration of the contract. We do not know whether the applicant is still in a position to supply the services. We are in any case not satisfied that this is an exceptional case for us to substitute the administrative action. Paragraph four of the notice of motion has been complied with. A just and equitable order would be for the first respondent to reconsider its decision in light of this judgment and the information that was before the Bid Adjudication Committee and other relevant information.

[26] I make the following order.

(i) The decision of the first respondent to award the tender for security services to the second respondent is set aside.

(ii) The resultant contract entered into between the first and second respondents is declared null and void and set aside.

(iii) The matter is remitted to the first respondent to reconsider its decision within 14 days of the date of this order. The decision should be implemented within 30 days of the date of this order. Pending the implementation of the decision the second respondent may provide security services in terms of the contract in (ii) above.

(iv) The first respondent is ordered to pay the applicant's costs.

C.J. MUSI, AJP

I agree.

C. VAN ZYL, J

On behalf of Applicant	Mr G.K. Majaphage Instructed by: Machaka Attorneys BLOEMFONTEIN
On behalf of the 1st Respondent:	Adv S.J. Reinders Instructed by: Rosendorff Reitz Barry BLOEMFONTEIN
On behalf of the 2nd Respondent:	Mr O.D. Molatedi Instructed by: Ngwane & Associates Attorneys BLOEMFONTEIN