IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, DURBAN

CASE NO: 9959/2016

In the matter between:

KWAFEL CC **APPLICANT**

and

KWA DUKUZA MUNICIAPLITY **FIRST RESPONDENT**

LAMULA BENJAMINI TRADING **SECOND RESPONDENT**

SIYAJABUKA UMHLABA TRADING CC **THIRD RESPONDENT**

SBUSAHLE TRADING ENTERPRISES CC **FOURTH RESPONDENT**

TJDK TRADING CC **FIFTH RESPONDENT**

KISSOONLAL INVESTMENTS CC t/a

K.K GARDEN WORLD **SIXTH RESPONDENT**

ORDER

The following order is granted:

The application is dismissed, the applicant to pay the first respondent's costs on an attorney and client scale.

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JUDGMENT

D PILLAY J

[1] The applicant seeks an interdict to restrain the respondents from taking any steps to implement certain tenders for grass cutting and verge maintenance for Kwa Dukuza on the KwaZulu-Natal North Coast. It also wants the second respondent to produce the record of the tender adjudication and bid process as well as a copy of the record of the proceedings in respect of its objection. It challenges the award of the tender to the second to sixth respondents on various technical grounds.

[2] The first respondent opposes the application on two preliminary points which could be dispositive. The first ground raised was that the person signing the tender documents did not have authority to do so because the resolution of the applicant, a close corporation, was to authorise Dhamini Sing to sign the tender document. But the manager of the applicant, Mr Arunachellam signed the tender bid and the applicant's founding affidavit. In its replying affidavit Mr Arunachellam states that Dhamini Sing and Khoreesha Sing are members of the applicant who resolved that he should sign the bid documents for the applicant. Affidavits from the two members were filed confirming that they read his affidavit and that of Anganth Hurbans Singh and confirm their contents in so far as they relate to them.

[3] For the purposes of this application I am satisfied that the members of the applicant are aware of these proceedings and, by extension, the fact that they were aware that Mr Arunachellam signed the bid documents on behalf of the applicant. The disparity in the resolution and the person signing the tender bid for the applicant was not an issue that concerned the Tender Adjudication Committee (TAC). It was not the reason for rejecting the applicant's bid. Hence I need say no

more about the authority of the persons representing the applicant in the tender process.

[4] The second ground of the *locus standi* challenge was that the tender was non-responsive from the outset in that it failed to comply with the requirements regarding a waste management plan which was a compulsory requirement that led to the disqualification of the applicant's tender.

[5] On the facts the applicant's bid was processed to finality through the tender process until it the TAC rejected it. To the applicant's advantage the first respondent and the TAC did not treat the applicant's bid as being unresponsive from the outset. Did the applicant meet the minimum peremptory requirements of the tender?

[6] The first respondent published a notice of tender MN 113/2015 for grass cutting and verge maintenance for KwaDukuza zone 3 (Wards 4, 6, 21). In the notice the first respondent stipulated that a compulsory clarification meeting would be held at 10h00 on 17 July at the Supper Room corner King Shaka Street and Chief Albert Luthuli Street KwaDukuza. The time for submitting the tender was 12h00 on 24 July 2015 when the tenders would be opened in public.

[7] One of the qualifying requirements was that the contractor had to provide the first respondent with a Waste Management Plan for all refuse that it collected. It defined the Waste Management Plan as follows:

> 'The Solid Waste Management Plan is a document/plan that establishes goals and programs for the handling of solid waste in a manner that meets local needs and is consistent with the countr[y's] solid waste management priorities. The plan also describes the method used to collect and transport

solid waste and recyclables to disposal and processing facilities in an environmentally sound manner.'[1]

[8] At its meeting on 4 July 2016 the TAC rejected the applicant's bid for the following reason:

'The tenderer did not submit a Waste Management Plan'[2]

[9] By a letter dated 12 July 2016 the first respondent notified the applicant that its tender was unsuccessful and that the TAC had awarded it to the third respondent, Siyajabuka Umhlaba Trading CC. It awarded tender MN114/2015 to the second respondent, Lamula Benjamini Trading and tender MN122/2015 to the fourth respondent Sbusahle Trading Enterprises CC, the fifth respondent TJDK Trading CC and the sixth respondent Kissoonlal Investments CC.

[10] On 1 August 2016 the applicant objected to the award of tenders MN126/2015, MN122/2015, MN113/2015 and MN114/2015. Its grounds of objection ranged from the first respondent re-arranging the venue for the clarification meeting, not furnishing an addendum that was supposed to have been circulated to the attorneys at the site briefing, sending out the 'letters of regret' on different dates, the parties colluding amongst themselves, and allowing the lapse of a year from the closing date to the awarding of the tender.

[11] By letter dated September 14 2016 the first respondent replied to the objection pointing out that the change of venue was to the Town Hall, which was in the same vicinity as the Supper Room where the meeting had been scheduled initially. The addendum had been included with the applicant's tender and therefore the applicant had to have received it. The 'letters of regret' were sent on different dates because they were advertised individually and dispatched as and

[1] Page 233 of the pleadings
[2] Page 378 of the pleadings

when the tender evaluation committee and the TAC completed each zone. The bidding was competitive and the first respondent had no control on the prices submitted by the tenderers. The Tender Specification Committee stipulated the waste management plan as a compulsory returnable. The applicant's bid was for only MN126/2015, MN122/2015, MN113/2015 and MN114/2015; it was eligible to appeal the rejection of only those bids.[3]

[12] In conclusion the first respondent pointed out that the applicant had attended the briefing session and had never raised any queries. It had withdrawn its objection to the change of the venue. The first respondent gave notice of its intention to proceed with awarding the tenders without objection from the applicant. The minutes of the meeting of the TAC to consider his objection held on 14 October 2016 resolved the following: to dismiss the applicant's appeal in three tenders and pointed out that no award was made for the fourth, tender MN126/2015. As for the validity period none was stipulated in the tender specification.[4]

[13] The applicant's Waste Management Plan read as follows:

(a) 'The business entails the dumping of **organic matter only** (grass, leaves and branches).

(b) This process is arranged via KDM with Dolphin Coast Waste Management based on a need to dump principal.

(c) We reserve the right to negotiate separately with farmers and other persons who wish to take the waste for composting.'[5] (*sic*)

[14] The crux of the question is whether this response of the applicant to tender specification 3.n that stipulated that the contractor must provide the

[3] Page 149 of the pleadings
[4] Page 409 of the pleadings
[5] Page 310 of the pleadings

municipality with a waste management plan for all refuse[6] met the first respondent's definition of 'Waste Management Plan' above.[7]

[15] The applicant's response to the first respondent's reasons for rejecting its bid was that the first respondent erred because:

> '[G]iven that no small business has its own waste disposal site and will make use of the appropriately approved facilities when executing the work. A contract in this regard can only be negotiated and signed after the business knows that it has been awarded the tender.'[8]

Implicit in this response is the applicant's acknowledgment that it did not meet the prescribed definition; the response was merely an explanation for not doing so.

[16] Although the definition is neither an elegant draft nor a model of clarity, at its most basic it calls for a document that sets out how the tenderer would collect, transport and dispose of solid waste. The applicant's response clearly does not describe these three key elements of the plan let alone the more normative requirements of establishing goals and programmes for handling solid waste. As this is not a review and no record has been filed in these proceedings, I am also unable to assess how the applicant's waste management plan compared with the successful tenderers' plans.

[17] In this case it is common cause that the singular reason for rejecting the applicant's bid was that his waste management plan did not comply with the tender specifications. On the evidence before me I must find in favour of the first respondent. Manifestly, the applicant's plan does not meet the minimum requirements to even qualify as a valid tender. Consequently, the second *locus standi* point is upheld.

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[6] Page 234 of the pleadings
[7] Page 233 of the pleadings
[8] Page 147 of the pleadings

[18] The applicant chose to apply urgently for an interdict pending the launching of a review or some other process in due course. It brought the application in terms of Rule 53. It calls on the first respondent to deliver a copy of the record in these proceedings. The review of administrative action is governed the Promotion of Administrative Action Act, 3 of 2000 (PAJA). Decisions pertaining to the awarding of a tender are administrative actions. The review begins with a request for reasons for administrative action. However, the applicant launched this application without requesting reasons for the first respondent's administrative action in terms of s 5 of PAJA or complying in any other way with PAJA.

[19] The applicant had to request reasons in terms of s 5(1) of PAJA 'within ninety days after the date on which [it] became aware of the action or might reasonably have been expected to become aware of the action'. The applicants request for reasons are not included in this application. I was advised from the bar that the request was dispatched on 13 October 2016. If that was not after the ninety days had expired from 12 July 2016 or shortly thereafter when the applicant received the letter advising that its bid was unsuccessful, then the request was delayed without any explanation. Judicial review must be instituted within 180 days after internal remedies are concluded or 'on the date on which the person concerned was informed of the administrative action, became aware of the action and the reasons for it or might reasonable be expected to have become aware of the action and the reasons.' Instead the applicant launched this Rule 53 application as late as 3 October 2016. In addition to the delay it is an abuse of process that attracts an adverse costs order. However, blame cannot lie at the door of the applicant alone, as its junior counsel who prepared the application ought to have known the procedure.

[20] However the applicant must take responsibility for some of the grounds on which it challenged the awards; it alleged flaws had occurred from the outset. The applicant should have stopped the tender process immediately instead of allowing the process to continue to completion and then objecting to it. Furthermore, it

revived objections that it had already withdrawn. In these circumstances I do not make an award of costs *de bonis propriis* against the applicant's junior counsel.

[21] The application is dismissed, the applicant to pay the first respondent's costs on an attorney and client scale.

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D Pillay J

APPEARANCES

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Date of Hearing	:	08 December 2016
Date of Judgment	:	5 January 2017