

In the High Court of South Africa
KwaZulu-Natal Local Division, Durban

Case No : 1100/2015

In the matter between :

Secureco (Pty) Ltd

Applicant

and

Ethekwini Municipality

First Respondent

Affirmative Portfolios CC

Second Respondent

Pierian Services (Pty) Ltd

Third Respondent

Cadwel Trading Enterprise

Fourth Respondent

Naidu Consulting (Pty) Ltd

Fifth Respondent

Rich Rewards Trading 34 t/a Sigma Int

Sixth Respondent

Staffing Direct Training Academy

Seventh Respondent

Total Labour Force CC

Eighth Respondent

Foundation for Professional Development (Pty) Ltd

Ninth Respondent

Judgment

Lopes J

[1] This is an application to review and set aside the award of a tender by the first respondent, the Ethekewini Municipality, to the second respondent, Affirmative Portfolios CC.

[2] The history of this matter is summarised as follows :

- (a) for fifteen years, the applicant, Secureco (Pty Ltd, conducted business with the Municipality, supplying to it payroll services.
- (b) In February 2012, the Municipality advertised for tenders under tender number WS.6160, headed '*Preparation of Payroll for Staff Earning a weekly wage in terms of the Expanded Public Works Programme.*' Secureco submitted a bid prior to the closing date which was the 12th March 2012.
- (c) In terms of tender WS.6160, the tenders remained open for acceptance by the Municipality for 85 calendar days following the date upon which the bids were opened. No tender was accepted, and the tender process lapsed.
- (d) On the 31st May 2013 the Municipality advertised for new tenders under tender number S.4028. It is common cause that that tender was for precisely the same services sought under tender number WS.6160.
- (e) Tender number S.4028 closed on the 29th June 2013. Secureco was not aware of this call for tenders, having not been aware of the advertisement.
- (f) Tender S.4028 came to the attention of Secureco on the 2nd July 2013 when an employee of the Municipality enquired of an employee of Secureco why it had not submitted a tender. It is common cause that no-one contacted

Secureco to inform them that the process under tender number WS.6160 had been abandoned and was now the subject of tender S.4028.

- (g) As none of the tenders submitted under tender S.4028 were accepted within 85 calendar days, the process lapsed on the 21st September 2013.
- (h) Almost one year later, on the 21st August 2014 the Municipality notified Affirmative Portfolios CC that its tender had been accepted.
- (i) On the 14th November 2014 Secureco appealed against the decision to award the new contract in terms of tender number S.4028.
- (j) On the 24th November 2014 the Municipality notified Secureco that its services were terminated. Presumably pursuant to representations by Secureco's attorneys, Secureco's services were extended to the 31st December 2014.
- (k) On the 8th January 2015 Secureco was notified that its appeal had been dismissed.

[3] When the matter was argued before me, Ms *Steinberg*, who appeared for Secureco together with Ms *Pudifin-Jones*, submitted that tender number S.4028 had lapsed after the 85 days had expired – i.e. on the 21st September 2013. The subsequent award of the lapsed tender was invalid and fell to be reviewed and set aside. Ms *Steinberg* also submitted that the decision to dismiss the appeal of Secureco fell to be reviewed and set aside.

[4] Mr *Topping* SC, who appeared on behalf of the Municipality took only one point, viz that Secureco had no standing to seek the relief which it claimed.

[5] With regard to the lapsing of tender number S.4028 :

- (a) It is common cause that the tender process would have lapsed on the 21st September 2013 unless extended from time to time by the Municipality until the date the tender was awarded – i.e. the 21st August 2014. It is evident from the records of the Bid Adjudication Committee that the Municipality was of the view that the tenders expired in November 2013.
- (b) In answer to the allegations that the tender had lapsed for failure to extend it, the Municipality denied the allegations, and alleged that the tender validity had been extended from November 2013 to April 2014, ‘before expiry’. The Municipality further pointed out that no invalid tenders are approved, and no letters awarding contracts pursuant to such tenders are issued, without proof of such validity.
- (c) In apparent support of this is an extract from the minutes of the Bid Evaluation Committee held on the 10th March 2014 recording that an item relating to the turnover of Affirmative Portfolios CC was deferred at a meeting held on the 15th January 2014. The minute states :

‘The department was requested ... to extend the transfer validity as it expired in November 2013 ...’

This item was then simply deferred to the next meeting of the Bid Evaluation Committee. It evidences the fact that the Municipality was of the view that the

tender had expired in November 2013. This is evidently why it claimed to have extended the tender from November 2013 to April 2014.

[6] Ms *Steinberg* submitted that on the Municipality's version, even if the tender had been validly extended and had not lapsed after the 21st September 2013 and before November 2013, the tender lapsed before the award on the 21st August 2014.

[7] Ms *Steinberg* submitted that the only defence put up by the Municipality is that Secureco lacks standing because it did not participate in the tender process, and that the facts in the case relied upon by Mr *Topping*, *Trans Creations KZN CC v City of Cape Town and Another* (19367/2014) [2015] ZAWCHC 32 (23 March 2015) are distinguishable from the facts in the present case. In *Trans Creations*, the applicant was an unsuccessful tenderer. It did not seek to impugn the City of Cape Town's decision to reject its own tender, but instead sought an order reviewing and setting aside its decision to award the tender to a competitor. This was on the basis that a particular clause in the tender bid was ambiguous and misleading. The court in *Trans Creations* rejected the submissions of ambiguity. Ms *Steinberg* submitted that in *Trans Creations* the tender process had been a lawful and valid tender process, whereas in the present case the tender did not exist when it was awarded. Here the award of the tender was unlawful because the tender process had lapsed.

[8] Ms *Steinberg* also referred me to *Tactical Security Services CC v Ethekwini Municipality and Others* an unreported decision of this Court (Case No 7553/2014)

which considered the question whether the validity of bids can be extended by agreement after they had expired. For the reasons set out in his judgment, Ploos van Amstel J held that they could not. The learned judge pointed out that a tender is defined in the Preferential Procurement Regulations as ‘a written offer in the prescribed or stipulated form in response to an invitation by an organ of state for the provision of services, works or goods, through price quotations, advertised competitive tendering processes or proposals’. Without an extension, the tender, like any other offer, falls away if it is not accepted in time.

[9] In my view the Municipality has put up no defence to the allegation that the tender had lapsed prior to its acceptance. Mr *Topping* conceded that tender number S.4028 had not been continuously extended, and could not have been extended retrospectively. Mr *Topping* submitted, however, that the unlawful issue here, the lapsing of the tender, was not a material one. He submitted that as there is no suggestion of impropriety, and, as the contract is continuing, no-one has been prejudiced. The harm to Secureco occasioned by the tender acceptance period not having been extended, occurred after Secureco knew that it had missed the advertisement.

[10] Mr *Topping* further submitted that only persons involved in a tender after the submission of bids, have standing to apply for the review of a decision to accept a tender. He also submitted that the appeal process of the Municipality was not relevant. If the Municipality is successful in its objection the standing of Secureco, it

could not have been part of an appeal process. If the Municipality was unsuccessful on the point of standing, the appeal process would also be rendered unnecessary.

[11] Ms *Steinberg* submitted that in determining the standing of an applicant, the court must assume that the allegations made by the applicant are true or correct. (See : *Zulu and Others v Ethekezwini Municipality and Others* 2014 (4) SA 590 (CC) para [21].)

[12] Ms *Steinberg* also relied upon the *dictum* in *Giant Concerts CC v Rinaldo Investments (Pty) Ltd and Others* 2013 (3) BCLR 251 (CC) where Cameron J stated at para [41] :

‘These cases make it plain that constitutional own-interest standing is broader than the traditional common law standing, but that a litigant must nevertheless show that his or her rights or interests are directly affected by the challenge of law or conduct. The authorities show :

- (a) To establish own-interest standing under the Constitution a litigant need not show the same “sufficient, personal and direct interest” that the common law requires, but must still show that a contested law or decision directly adversely affects his or her rights or interests, or potential rights or interests.”
- (b) This requirement must be generously and broadly interpreted to accord with constitutional goals.
- (c) The interests must, however, be real and not hypothetical or academic.
- (d) Even under the requirements for common law standing, the interests need not be capable of monetary valuation, but in a challenge to legislation purely financial self-interest may not be enough – the interests of justice must also favour affording standing.

- (e) Standing is not a technical or strictly-defined concept. And there is no magical formula for conferring it. It is a tool a court employs to determine whether a litigant is entitled to claim its time, and to put the opposing litigant to trouble.
- (f) Each case depends of its own facts. There can be no general rule covering all cases. In each case, an applicant must show that he or she has the necessary interest in an infringement or a threatened infringement. And here a measure of pragmatism is needed.'

(Footnotes omitted).

[13] In the present matter, the following considerations are relevant :

- (a) Secureco participated in the first tender process under tender number WS.6160;
- (b) that tender process was allowed to lapse by the Municipality. No explanation whatsoever is given why the Municipality allowed it to lapse. Having put the tenderers to the expense and trouble of preparing tenders and submitting them, the Municipality allowed the process to lapse, and apparently failed to communicate its reasons for so doing to any of the tenderers.
- (c) A new tender process was then started without notifying any of the previous tenderers (or at least not notifying Secureco). Ms *Steinberg* abandoned any reliance on a reasonable expectation in this regard. Some criticism may be levelled against Secureco for not being alert to the fact that the first tender had lapsed and for not enquiring as to what had occurred. The lapsing of the first tender is not explained by the Municipality, nor is any reason given for not notifying tenderers of the lapsing. This would not only have benefitted Secureco, but also the Municipality. It is obviously to its benefit that the

maximum number of parties who wish to tender be notified. This is the purpose of the advertising process. However, in circumstances where a tender has simply been abandoned, it seems odd, to say the least, that the previous tenderers were not notified.

- (d) The facts alleged by Secureco are the ones to be considered in applying the test for standing. An employee of Secureco alleges that he was told by an employee of the Municipality that instructions were given to another Municipal employee to notify all the tenderers for WS.6160 that a new tender process would begin. This was not done.
- (e) There is also the question of public interest to be considered. It is not in the public interest that such a manifest waste of time and effort by Municipal officials should simply be ignored. This is particularly so when the decision ultimately made by the Municipality is one which is invalid. Indeed, as pointed out by Ms *Steinberg*, there is an obligation on the Municipality to approach a court to undo its mistakes. (See *MEC for Health, Eastern Cape and Another v Kirkland Investments (Pty) Ltd t/a Eye and Lazer Institute* 2014 (3) SA 481 (CC), para 65.) The challenge by Secureco goes to the lawfulness of the Municipality's conduct.

[14] The attitude of the Municipality in opposing the standing of Secureco is puzzling. I say this because it allowed the first tender to lapse and then recommenced the process. Had the Municipality simply wanted to extend the first tender process, they would have had to have given notice to each of the tenderers.

It would surely have been cheaper and easier to have requested the initial tenderers to extend the tender acceptance period.

[15] As is made clear in para 34 of *Giant Concerts*, an own-interest litigant may be denied standing even though the result is that an unlawful decision stands. It is really a question of the correct remedy being sought by the correct person in the correct proceedings. Cameron J however cautions that courts should be hesitant to dispose of cases on standing alone, where there are broader concerns of accountability and responsiveness which may require investigation and determination of the merits.

[16] In these circumstances I find that the decision of the Municipality to award the tender to Affirmative Portfolios CC was an unlawful one. It is in the public interest to set that decision aside. To do otherwise would be to non-suit Secureco because it failed to notice the lapse of the 85 day period when, on the Municipality's version, it also failed to notice it.

[17] In view of the decision at which I have arrived, there is no need to deal with the appeal against the award of the tender.

[18] I make the following order :

1. The decision of the Ethekwini Municipality to award a tender for the provision of cheque printing services to the Municipality under tender S.4028 is reviewed and set aside.
2. The tender process S.4028 is declared to be unlawful and invalid.
3. Any contract concluded pursuant to the award of tender S.4028 is set aside.
4. The Municipality is directed forthwith to commence a fresh tender process in respect of the *Preparation of Payroll for Staff Earning a weekly wage in terms of the expanded Public Works Programme* and to comply with all legal requirements including the Local Government : Municipal Finance Management Act, 2003, Municipal Supply Chain Regulations and EThekwini Supply Chain Management policy.
5. The first respondent is directed to pay the applicant's costs of this application on an opposed scale, including the costs of two counsel.

Date of hearing : 11th March 2016

Date of judgment : 1st April 2016

Counsel for the Applicant : Ms C Steinberg with Ms S Pudifin-Jones (instructed by Blake Bester de Wet & Jordaan)

Counsel for the Respondent : Mr I Topping SC (instructed by S D Moloi & Associates)