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IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

DATE: 04/02/15

CASE NO: 1066/2014

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ~~YES~~/NO
(2) OF INTEREST TO OTHERS JUDGES: YES/~~NO~~
(3) REVISED

4/2/2015 ......
DATE SIGNATURE

In the matter between:

DDP VALUERS (PTY) LTD	APPLICANT
And	
MADIBENG LOCAL MUNICIPALITY	1ST RESPONDENT
DIJALO PROPERTY VALUERS	2ND RESPONDENT

JUDGMENT

MAKGOBA, J

[1] The applicant seeks the review and setting aside of the first respondent's decision to award Tender Number RFT10/3/2013 for the Complication of a New General and Supplementary Valuation Roll for the period 2014-2018 ("the Tender") to the second respondent. The applicant also

asks the court for an order declaring that it be substituted as the successful bidder.

[2] The applicant has also brought an interlocutory application to strike out certain portions of the second respondent's answering affidavit on the grounds that they constitute opinion evidence and are irrelevant and also on the grounds that they constitute hearsay evidence.

[3] The interlocutory application was opposed by the second respondent and was extensively argued before1 me. However, in view of the decision I have arrived at regarding the point *in limine* raised by both the first and second respondents, it is immaterial to make any ruling on the interlocutory application.

[4] The first respondent ("the Municipality") issued an invitation to tender ("RFP") for the compilation of a New General and Supplementary Valuation Roll for the period 2014-2018 on 10 May 2013. Fifteen bidders responded to the RFP. Both the applicant and second respondent ("Dijalo") were shortlisted.

[5] Dijalo submitted its bid on 10 June 2013. It was ultimately successful in its bid and was awarded the tender. Dijalo was appointed to perform the services listed in the agreement with effect from 9 September 2013 until 30 June 2018 in terms of the Service Level Agreement signed on 25 September 2013.

[6] The applicant is the former municipal valuers of the Madibeng Municipality for the period preceding September 2013. The applicant was one of the unsuccessful tenderers in the tender under review.

[7] The applicant seeks the review and setting aside of the award of the tender to Dijalo on the following grounds:

7.1 That the Bid Evaluation Committee ("BEC") evaluated the tender on criteria in respect of functionality that differ from that stated in the Tender Documentation.

7.2 That a perusal of Table 2 makes it clear that there were huge discrepancies in the points awarded to both the applicant and to Dijalo.

7.3 An ad hoc committee comprising of three members evaluated the tender on functionality. Because the BEC did not have the requisite expertise to evaluate the tender on functionality, the BEC simply rubberstamped the recommendation of the ad hoc committee.

7.4 That contrary to the dictates of Regulation 4(5) of the Preferential Procurement Regulations the BEC subjected the tender for a further evaluation on responsiveness instead of evaluating the tender in terms of the preference points system prescribed in PP Regulations 5 and 6.

[8] The respondents raised a point *in limine* that the applicant has not exhausted its internal remedies against the Municipality before launching the judicial review proceedings. They argued that the upholding of the point *in limine* will be dispositive of the whole case before me.

[9] Section 7(2) of the Promotion of Administrative Justice Act 3 of 2000 ("PAJA") provides:

> "*2(a) Subject to paragraph (c), no court or tribunal shall review an administrative action in terms of this Act unless any internal remedy provided for in any other law has been exhausted.*
>
> *(b) Subject to paragraph (c), a court or tribunal must, if it is not satisfied that any internal remedy referred to in paragraph (a) has been exhausted, direct that the person concerned must first exhaust such remedy before instituting proceedings in a court or tribunal for judicial review in terms of this Act.*
>
> *(c) A court or tribunal may, in exceptional circumstances and on application by the person concerned, exempt such person from the obligation to exhaust any internal remedy if the court or tribunal deems it in the interest of justice.*"

[10] Section 7(2) of PAJA essentially provides that unless exceptional circumstances are found to exist by a court on application by the affected person, PAJA, which has a broad scope and applies to a wide range of administrative actions, requires that available internal remedies be exhausted prior to judicial review of an administrative action.

[11] The Supreme Court of Appeal has noted in ***Nichol and Another v Registrar of Pensions and Others*** **2008 1 SA 383 (SCA) at [15]**:

> *"It is now compulsory for the aggrieved party in all cases to exhaust the relevant internal remedies unless exempted from doing so by way of a successful application under s 7(2)(c). Moreover, the person seeking exemption must satisfy the Court of two matters: first that there are exceptional circumstances and second, that it is in the interest of justice that the exemption be given."*

[12] Upon being advised that the tender was awarded to Dijalo, the applicant exercised its rights in terms of the provisions of Regulation 49 and 50 of the Preferential Procurement Regulations, 2011, promulgated under the Preferential Procurement Policy Framework Act 5 of 2000 and published under GN R502 in Government Gazette 34350 of 8 June 2011, and directed a letter of objection dated 1 October 2013 to the Municipality.

[13] The contents of the said letter is of paramount importance hence portions thereof are reproduced hereunder.

The heading of the letter reads thus:

> "OBJECTION IN TERMS OF REGULATION 49 OF THE SUPPLY CHAIN MANAGEMENT REGULATIONS, AGAINST THE DECISION OF THE MUNICIPALITY IN TENDER NO RFT 10/03/2013: COMPILATION OF GENERAL AND SUPPLEMENTARY VALUATION ROLL."

The contents of the letter reads:

> "*1* ...
>
> *2. Please take note that we hereby formally submit an objection/complaint to the Municipality, with the appointment of the new municipal valuer, in terms of Regulation 49 of the Supply Chain Management Regulations and to have the dispute/objection/complain resolved as is provided for in Regulation 50 of the SCM Regulations.*
>
> *3. It was ruled in the Supreme Court of Appeal Judgment of* ***Tetra Mobile Radio (Pty) Ltd v The MEC for Works and others 2008 1 SA 438 (SCA)*** *that an unsuccessful bidder is entitled to have at least the information to enable it to formulate its appeal properly.*

4. *On the authority of the SCA judgment and to enable us to properly formulate the objections and complaints the following information is required:-*

....

....

5. *Please note that this letter already constitutes the lodging of an objection/complaint in terms of Regulations 49 and 50 of the Municipal Supply Chain Management Regulations that is binding on the Municipality.*

6. *We further require the Municipality:*

   (a) *to provide this office with the information listed in paragraph 4 above on or before 14 October 2013.*

   (b) *that the Municipality in terms of Regulation 50 of the Supply Chain Management Regulations appoint a competent and qualified person to assist in resolving the dispute between ourselves and the Municipality; and*

   (c) *that the Municipality pends or place the successful bidder on hold in doing any work until the due and proper resolution of the dispute."*

[13] There is no doubt that the abovementioned letter constitutes an objection, complaint or appeal against the decision of the Municipality to award the tender to the successful bidder. The applicant even goes on to call upon the Municipality to "appoint a competent and qualified person to assist in resolving the dispute". Clearly, the applicant was quite aware of its rights and did in fact initiate the process to exhaust its internal remedy.

It is surprising that along the way the applicant abandoned this due process and embarked on the legal process of launching the present judicial review proceedings.

[14] In an effort to justify its failure to exhaust the internal remedy Counsel for the applicant relied on regulation 50(7) which provides that:\

> "*(7) This regulation must not be read as affecting a person's rights to approach a Court at any time.*"

The reliance on the above provision is misplaced. Section 7(2) of PAJA is peremptory and the provisions of the above regulation, being a subordinate legislation, cannot override a statutory enactment such as section 7(2) of PAJA. In any event the applicant should still have approached this court on application for an exemption as required in terms of section 7(2)(c) of PAJA.

[15] It seems that an official of the municipality was unwilling to correspond directly with the applicant after receipt of the objection letter. However,

the official of the municipality did not appear to have made a decision for or against the applicant in respect of the objection/complaint or appeal nor does the applicant allege that such a decision was made. Whatever the merits of the dispute about the lack of correspondence from the municipality, it does not absolve the applicant from complying with the requirement that it exhaust its internal remedies in terms of section 7(2)(c) of PAJA.

[16] The Constitutional Court has described the requirement of exhausting internal remedies as "valuable and necessary" and held as follows in ***Koyabe and Others v Minister of Home Affairs and Others* 2010 4 SA 327 (CC)**:

> "*[35] Internal remedies are designed to provide immediate and cost-effective relief, giving the executive the opportunity to utilise its own mechanisms rectifying irregularities first, before aggrieved parties resort to litigation. Although Courts play a vital role in providing litigants with access to justice, the importance of more readily available and cost-effective internal remedies cannot be gainsaid.*
>
> *[36] First, approaching a court before the higher administrative body is given the opportunity to exhaust its own existing mechanisms undermines the autonomy of the administrative process. It renders the judicial process premature, effectively usurping the executive role and functions.*"

See also ***Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others*** **2004 4 SA 490 (CC) at [45]**.

[17] Allowing an internal appeal under regulation 49 and 50 in the circumstances of this case would enhance the autonomy of the administrative process and provide the possibility of immediate and cost-effective relief prior to aggrieved parties resorting to litigation. An internal appeal process would also allow the municipality to develop guidelines for the proper application of the Supply Chain Management policy in future decisions on tenders.

Compare: ***Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others*** 2011 4 SA 113 (CC) at [50].

[18] The duty to exhaust internal remedies is a valuable and necessary requirement in our law. However, that requirement should not be rigidly imposed nor should it be used by administrators to frustrate the efforts of an aggrieved person or to shield the administrative process from judicial scrutiny. PAJA recognised this need for flexibility, acknowledging in section 7(2)(c) that exceptional circumstances may require that a court condone non-exhaustion of the internal process and proceed with judicial review nonetheless. Such condonation can only be granted upon application by the party seeking judicial review.

[19] It is common cause that in the present case the applicant failed to bring an application for condonation in terms of section 7(2)(c) of PAJA. The applicant's contention is that it could not continue to embark on the

process it initiated in its letter of objection dated 1 October 2013 because the first respondent refused or was reluctant to communicated with it through further correspondence. There is no merit in the applicant's contention. The fact remains that the applicant did not bring an application for condonation before this court and shows no exceptional circumstances as a basis for a claim to be exempted from exhausting the available internal remedies.

[20] The applicant's further contention is that the purported internal remedy would not be effective and/or its pursuit would be futile in that the internal tribunal would not have the powers to declare the award of the tender invalid and set it aside. In my view, it was still incumbent upon the applicant to approach this court on application for exemption in which event this court may permit the applicant to approach the court on review directly. So too where an internal appellate tribunal has developed a rigid policy which renders exhaustion futile. See ***Koyabe*** case, *supra* at paragraph [39].

[21] The applicant's Counsel relied on the decision in ***Reed and Others v Master of the High Court of SA and Others*** **[2005] 2 All SA 429 (E)** and argued that it was not necessary for the applicant to exhaust internal remedies before launching review proceedings. In that case a point was raised that as this was an application to review an administrative action, the applicants were obliged in terms of section 7(2) of PAJA to exhaust internal remedies before launching review proceedings. This point failed and it was held that the Administration of Estates Act 66 of 1965 did not provide any internal remedies.

The case is clearly distinguishable from the present case. In the present case there are regulations, namely Preferential Procurement Regulations, 2011 promulgated under the Preferential Procurement Policy Framework Act 5 of 2000, specifically providing internal remedies in regulations 49 and 50.

The reliance on the ***Reed*** case is therefore misplaced.

[22] I accordingly make a finding that the applicant's judicial review application is premature and the applicant was first required to exhaust the available internal remedies. In the light of the provisions of section 7(2)(b) of PAJA the applicant is directed to proceed with the exhaustion of internal remedies before it embarks on a judicial review, if necessary.

[23] Having decided that the applicant has failed to exhaust internal remedies and thus launched these review proceedings prematurely, I am of the view that this issue is dispositive of the whole case before me. It is therefore unnecessary to consider the merits of the review application.

[24] In the result the application is dismissed with costs.

E M MAKGOBA

JUDGE OF THE GAUTENG DIVISION, PRETORIA

1066/2014/sg

Heard on:	27-28 January 2015
For the Applicant:	Adv BC Stoop SC
Instructed by:	Coetzer & Partners
For the 1st Respondent:	Adv MA Dewrance
Instructed by:	Kunene Ramapala & Botha Inc
For the 2nd Respondent:	Adv N Rajab-Budlender
Instructed by:	Edward Nathan Sonnenbergs c/o Gerhard Botha & Parners
Date of Judgment:	4 February 2015