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

Application Number: A917/2014

In the matter between:-

SETHAKATSHIPA BUSINESS ENTERPRISE	1^{st} Applicant
LEFCON TRADING	2^{nd} Applicant
KEHELELWE CONSTRUCTION	3^{rd} Applicant
E.T. MOSHOEU TRANSPORT	4^{th} Applicant

And

MANGAUNG METROPOLITAN MUNICIPALITY Respondent

CORAM: MOCUMIE, J *et* LEKALE, J

JUDGMENT: LEKALE, J

HEARD ON: 9 FEBRUARY 2015

DELIVERED ON: 10 MARCH 2015

INTRODUCTION AND BACKGROUND

[1] On 8 January 2014 the respondent published an invitation for tenders for emergency door to door domestic refuse collection

services in the Bloemfontein, Botshabelo and Thaba Nchu regions with 24 January 2014 as the closing date. The applicants, who were already contracted to the respondent as providers of such services for a period of two years expiring on 12 June 2014, each submitted a tender for the Bloemfontein region in response to the invitation. They were, however, not successful in their respective bids.

[2] The services required entail the collection of domestic refuge bags from appropriate containers in specified areas, transportation of the same to designated areas as and when required and submission of required reports on the work done. As a minimum requirement all tenderers were to submit proof that they each own or have access to at least a three-ton truck. The bids had to be in the prescribed form, comply with prescribed formalities, and be accompanied and supported by prescribed documentation, such as original tax clearance certificates and original or certified copies of BBBEE status level verification certificates.

[3] The tender contract furnished by the respondent left the space provided for the price payable per household blank and, further, advised that bids would first serve before the Supply Chain Management unit (SCM) for evaluation as to whether they complied with the prescribed SCM criteria. Tenders that did not comply were to be disqualified.

[4] The applicants attended a compulsory tender clarification meeting

as required in the tender contract where service providers were, inter alia, advised about the issues they needed to take into account when making their proposals. The applicable evaluation criteria was based on a 90/10 preference point system with the price being allocated 90 points and 10 preference points being reserved for BBBEE status as a specific goal in terms of the Preferential Procurement Policy Framework Act 5 of 2000 (PPPFA).

[5] The first and third applicants got disqualified at the first or assessment stage by the SCM unit and could, as such, not proceed to the evaluation stage because they were allegedly non-responsive in that their respective bidding prices per household viz. R9.00 were substantially low. The second applicant proceeded to the evaluation stage where it was scored 83.74 preference points for its bidding price and 0 points for BBBEE status after it was found to have declined to claim preference points for such specific goal, by submitting an uncertified copy of its BBBEE status level verification certificate. It was, thus, outscored by other bidders. The fourth applicant's bid, on its part, was also disqualified at the first stage for being invalid in that a photo copy, as opposed to the original tax clearance certificate was submitted.

[6] The Bid Evaluation Committee (BEC) recommended that the respondent, through its City Manager or her delegate, negotiate an average price of R9.84 per unit with the 25 preferred service providers recommended for Bloemfontein region as no acceptable

price was predetermined. The preferred bidders were eventually appointed at R9.28 per household.

[7] On or about 4 July 2014 and before the court could entertain their urgent plea for intervention following a delay on the part of the respondent to furnish reasons and documents relative to their unsuccessful bids, the applicants eventually secured the same.

[8] They each feel aggrieved by the respondent's decision not to award them the relevant tenders and now approach us in terms of Rule 53 of the Uniform Rules of Court, read with the provisions of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) for, inter alia, an order that:

> **"2. The respondent's failure to award the contract and place the applicants on its roster for purposes of performing emergency door-to-door waste collection within the Mangaung Metropolitan Municipality, Bid no MMM/BID149: 2013/2014 be reviewed and set aside.**
>
> **3. In accordance with section 8 of the Promotion of Administrative Justice Act, 3 of 2000, that the respondent be ordered to place the applicants on the roster for the provision of said services in the Mangaung Metropolitan Municipal area.**
>
> **4. Alternatively to prayer 3, that the respondent be ordered to reconsider the bids submitted by the applicants for the provision of the service mentioned directly hereinabove.**

> **5. That the respondent be ordered to pay the cost of the application."**

[9] The respondent opposes the motion and contends that it is not guilty of any irregularities contemplated by PAJA in respect of the relevant bids.

DISPUTE

[10] The parties are at variance on whether or not the respondent's decision not to award each applicant the contract it tendered for is tainted with reviewable irregularity or irregularities, regard being had to the reasons furnished for disqualifying 1st , 3rd and 4th applicants' bids and for the score allocated to the 2nd applicant's tender.

[11] In the event of the preceding question being decided in the affirmative, the next enquiry is whether or not it is just and equitable to substitute the court's decision for that of the respondent as opposed to remitting the matter to the respondent for reconsideration, regard being had to, inter alia, the fact that the successful bidders would not be adversely affected by such an order because they are not cited in the present proceedings and the public, on its part, only stands to benefit from applicants' experience in rendering the relevant services.

APPLICANT'S CONTENTIONS

[12] Mr Grobler for the applicants submits that the fact that a price of R9.28 per unit was eventually allocated as an average price is consistent with the applicants' case that at the compulsory tender meeting prospective service providers were advised that the price would not be determinative in the award of tenders because the respondent would negotiate the price payable for each ad hoc instruction. The fact that the price was not determined prior to the calling of tenders is not in line with the regulations under the PPPFA. He reiterates that in law it is an irregularity to disqualify a bid on the basis that it is unrealistically low without first affording the bidder an opportunity to explain the reason behind such a bid. In his view the eventual awarding of preference points for prices vitiates the entire process because bidders were initially advised that prices were not to be taken into account. Such an exercise not only prejudiced first and third applicants, but was also detrimental to the second applicant's bid, in that other bidders scored higher in that regard and eventually outscored it according to him.

[13] The second applicant was scored 0 for BBBEE status level in circumstances where it was not in dispute that it had the relevant certificate as a level 3 contributor. The reason for disqualifying it was, according to Mr Grobler, capricious insofar as the respondent did not apply its mind because it was aware of the second applicant's BBBEE status level from its previous service in the same position. Prospective bidders were not made aware, in the

invitation for tenders and other relevant documents, that failure to submit originals or certified copies **<u>shall</u>**, as opposed to **<u>may,</u>** invalidate a bid. The use of "**may**" in relation to failure to comply with the relevant requirements obliged the respondent to apply its mind before it disqualified the affected bidders.

[14] The respondent, further, failed to properly consider the fourth applicant's tender and was wholly irrational insofar as its case is that the aim of the requirement for original valid tax clearance certificate was only compliance with a pre-existing rule as opposed to determining whether or not a tenderer's tax affairs were in order. Failure to apply its mind to the question whether or not the tenderer's tax affairs are in order in the present matter is a reviewable irregularity in his view.

[15] There, further, exists no document or evidence according to him to show that functionality was, in fact, considered and, if so, how insofar as it was essential, for evaluation of the bids, for the respondent to know if a bidder would be able to function if and when awarded the contract.

[16] The award of contracts in the instant matter was unlawful and should be declared as such. A substitution order, as opposed to a remission order, is just and equitable in the circumstances of the matter as it would afford the applicants administrative justice and would, further, advance efficient and effective public administration.

RESPONDENT'S CONTENTIONS

[17] Mr Lechwano appearing for the respondent, submits that the actions of the respondent in relation to the impugned administrative action, factually viewed, do not constitute irregularity within the contemplation of PAJA. In his view the fourth applicant only has itself to blame for failing to comply with the SCM policy requirements by submitting a copy of the tax clearance certificate as opposed to original valid tax clearance certificate. The relevant policy and the tender invitation clearly warned bidders that failure to comply **shall** result in automatic disqualification.

[18] The second applicant failed to submit at least a certified copy of its BBBEE status level verification certificate as required by the PPPFA and SCM policy according to him. The rationale for requiring originals or certified copies of such a document is to prevent fraud. Prospective tenderers were cautioned in tender documentation that failure to submit the required verification certificate will be interpreted to mean that preference points for BBBEE status level of contribution was not being claimed. All those who failed to comply were treated likewise.

[19] In the case of first and third applicants the respondent, in his view, appears to have been overzealous at the 'gatekeeper' first stage in that the R9.00 bidding price submitted by the two applicants does

not appear to be very low so as to justify their disqualification, regard being had to the average price of R9.28 per unit given as an estimate.

[20] Functionality was considered as part of the criteria for identification of service providers for progression to the functional evaluation stage.

[21] The court should, when it considers a just and equitable remedy in the present matter, note that the third applicant was listed on the National Treasury's list of restricted service providers on or about 24 February 2014 at the behest of the respondent's City Manager.

APPLICABLE LEGAL PRINCIPLES

[22] The parties are correctly and effectively in agreement that the enquiry in a matter of the present nature is firstly whether or not, on the facts before the court, there exists an irregularity. If an irregularity occurred, the next enquiry is whether or not same amounts to a ground of review under PAJA regard being had to the materiality of the deviation from applicable legal requirements, where appropriate, by considering the question of compliance against the purpose of the relevant legal provision. [See **Allpay Consolidated Investment Holdings and Others v Chief Executive Officer of South African Social Services Agency and Others** 2014 [1] BCLR 1 [CC] para 28].]

[23] It is a reviewable irregularity to declare a bid as unrealistically low without affording the tenderer any audience on the matter according to case law. [See **<u>Glo Bul Roads (Pty) Ltd v Premier North West Province and others</u>** case number 1620/11 (North West High Court) and **<u>Road Mac Surface Pty Ltd v MEC for the Department of Transport and Roads North West Province and others</u>** 2006 ZANW HC 54].

[24] It is correct that according to paragraph 16.2.16.2 (b) of the respondent's SCM policy **"non-responsible"** tenders mean, *inter alia*, tenders with a price that is very high or very low.

[25] The use of **"may**" in the invitation to tender and in relation to tender requirements may, generally and depending on the context in which it is used, convey a permissive and non-mandatory meaning consistent with bestowal of a discretion. [See **<u>Allpay Consolidated Investment Holdings and Others v CEO, SASSA</u>** (*supra*) at para [63] with regard to the effect of the use of **"should**" in a circular prescribing the composition of the bid evaluation committee].

[26] If and where bidders were made aware thereof the respondent's SCM policy and the tender invitation "... read together with constitutional and legislative procurement provisions, constituted the legally binding and enforceable framework within which tenders had to be submitted, evaluated and awarded." [See **<u>Allpay Consolidated Investments Holdings and Others v CEO, SASSA</u>** (*supra*) para [38].

APPLICATION OF LEGAL PRINCIPLES AND FINDINGS

[27] The parties are ad idem that the City Manager, who deposed to the affidavit filed in opposition of the present motion, did not attend the compulsory tender clarification meeting. It is, further, common cause between the parties that the respondent's official, who chaired the relevant meeting, did not file any affidavit in support of the respondent's case. No reason is apparent *ex facie* opposing papers as to why evidence from such an official is not and cannot be made available.

[28] The applicants are clear in their deposition on what transpired at the relevant meeting **i.e. that the issue of pricing was never hammered on** as **the most critical requirement which was as fatal as it subsequently turned out.** It is, further, difficult to accept that they are mistaken as to what was communicated to attendees at such a meeting because they were familiar with the respondent's workings and tendering processes as they were, at that stage, rendering similar services to the respondent. The City Manager's evidence in this regard is simply not reliable and is rejected accordingly to the extent that it is inconsistent with the applicants' version.

[29] The applicants' version, on the other hand, is accepted as being most probable, regard being had to the fact that the price was

clearly not determined before tenders could be called for or during the evaluation process but was, in fact, negotiated with successful bidders after adjudication stage of the process and on a collective basis. As contended for the applicants this was clearly in contravention of regulation 3(b) of Preferential Procurement Regulations of 2011 which requires an organ of state, in the position of the respondent, to plan and determine the costs of the works prior to making an invitation for tenders. In this regard the respondent committed an irregularity and the question is whether or not same was material so as to constitute a reviewable irregularity in terms of PAJA.

[30] The purpose underlying the requirement to determine the costs of services or goods to be tendered beforehand appears to be the need to ensure fairness to participants in the bid process as well as a desire to obviate corruption insofar as an objective price is determined before and without knowledge of the bids. Such a purpose is fundamental to a tender process and failure to comply with the same materially undermines the process, in my view. The irregularity concerned is therefore reviewable under PAJA.

[31] Even if I am wrong in the preceding findings, I am persuaded by available case law that fairness dictates that, before disqualifying first and third applicants’ tenders as non-responsive, the respondent was supposed to have afforded them a hearing in line with the rules of natural justice. Failure to afford them audience is a material

irregularity and constitutes a reviewable irregularity in terms of Section 6(2) (c) of PAJA.

[32] Even if I am further wrong in the aforegoing finding, we are satisfied, as Mr Lechwano correctly concedes, that the bidding price of R9.00 per household was not so low as to render the two bids non-responsive. The parties are correctly and effectively in agreement that the difference between the proposed R9.00 and the eventually determined or agreed price of R9.28 per unit is not unreasonably huge as to render the two bids unreliable. In fact in our view such a bid was meritorious and stood to benefit the public by ensuring that it gets value for its money. In this regard sight should not be lost of the fact that the relevant bids came from service providers who were, at that stage, rendering the same services to the respondent and who were, as such, familiar with the costs attendant thereon.

[33] The fact that the estimated price per household was left blank in the tender invitation lends credence to the applicants' view that the respondent appears to have used pricing to disqualify bidders only to disregard, in the end, the very same prices that catapulted successful bidders to the podium by determining a uniform price.

[34] It is, further, correct that there is nothing ex facie the papers before us to show that bids were evaluated for functionality. The preceding notwithstanding the fact that the minimum functional requirement was given in the invitation as at least a three-ton truck. The

contention that functionality, as an evaluation criterion, was applied is, thus, not expressly supported by available evidence. The fact that the Bid Bulletin indicates **"none**" under functionality buttresses our conviction that the three-ton truck minimum requirement was intended to sift and assess bids for acceptability and not for determination or evaluation of functionality. In my view the papers suggest that tenders were most probably assessed for gate keeping purposes by reference to a minimum functional requirement of ownership or access to at least a three-ton truck and the functionality evaluation task ended there with no bid being disqualified for failure to meet the same. For the purposes of the instant matter functionality, as an evaluation criterion, was limited to that minimum requirement and was, as such, most probably complied with.

[35] Submission of at least a certified copy of BBBEE status level verification certificate was a bid requirement. It is apparent from the papers that all those who did not submit the same effectively received no preference points therefor. The requirement for such a certificate was clearly in line with regulation 10(2) of Preferential Procurement Regulations 2011, read together with instructions to bidders in the bid documentation. There is, however, no evidence before us showing that such information was, in fact, specifically conveyed to bidders before they could submit their bids. Be that as it may, we are persuaded that the irregularity relating to the price also affects the second applicant because it was scored on a price it

bid.

[36] It is true that the tender invitation as published warned prospective bidders that failure to comply with the requirements relating to, inter alia, submission of valid original tax clearance certificates may invalidate the bids. The warning in question further indicated that the respondent's SCM policy and Preferential Procurement Policy Framework Act as well as its regulations shall be applied. In terms of Regulation 14 of PPPFA regulations no tender may be awarded to any person whose tax matters have not been declared by the South African Revenue Service to be in order. Paragraph 24.2 of SCM policy, on its part, provides in imperative terms that failure to submit a valid original tax clearance certificate shall result in automatic disqualification of non-compliant bidders. While the Preferential Procurement regulations effectively grant organs of state, in the position of the respondent, a discretion to award contracts to bidders whose tax affairs have not been declared to be in order by the SARS insofar as Regulation 14 employs the permissive **"may**" in the relevant context, the SCM policy is concerned about authenticity and regulates acceptance of tax clearance certificates submitted by penalising non-compliance with automatic disqualification. The SCM policy is applicable and its peremptory provisions cannot be ignored. Its relevant provisions were, however, not set out expressly in the bidding documents, while the tender invitation clearly stated that failure to comply **"may**" invalidate the bid. Read together the two, *to wit* the relevant part of

the invitation and the SCM policy, are reasonably capable of confusing prospective tenderers insofar as they are mutually vague and contradictory. In my opinion it would serve the tendering public better for the respondent to attend to promoting certainty in such documents by reconciling them.

[37] In my judgment, it is correct that in the context of the relevant warning to tenderers, the use of the word "**may"** confers a discretion on the SCM unit and/or Bid Evaluation Committee which had to be exercised judiciously and not capriciously. The disqualification of the fourth applicant was, thus, irregular insofar as the criterion applied with regard to tax clearance certificates was unfair in that it was uncertain and the decision taken thereon capricious. The requirement for fairness in the tendering process demands certainty in the applicable criteria and promotes equality among tenderers by eliminating opportunity for corrupt practices with no room being left for different interpretations of applicable evaluation criteria. [See **Minister of Social Development and Others v Phoenix Cash and Carry - PMB CC** 2007 (3) ALL SA 115 (SCA) at para [2].]

[38] The decisions not to award the contracts to the four applicants are reviewable under PAJA and fall to be set aside.

RELIEF

[39] Mr Grobler submits that the award of contracts to successful bidders

was clearly unlawful and falls to be declared as such. He, however, submits that successful bidders were deliberately left out of the instant proceedings because no relief is sought against them and considerations of fairness and the interests of the public, which has been receiving services from them since June 2014 indicated against joining them. In his view it is fair and equitable to substitute the respondent's decisions rather than to remit the matter because there is no suggestion that the applicants will not be able to attend to the execution of the works successfully and such an order will not affect the rights of the successful tenderers. The respondent will also not be detrimentally affected thereby in his submission.

[40] Mr Lechwano, on the other hand, feels that a substitution order will not be fair and equitable in the case of the third applicant because it was listed on the National Treasury's list of restricted suppliers on or about 24 February 2014 at the instance of the respondent's City Manager for poor performance of contracted work. He, however, correctly concedes that there is no evidence before the court that the third applicant is, in fact, so listed by Treasury insofar as the only proof presented is copy of a letter dispatched to Treasury by the City Manager.

[41] Section 8 of PAJA empowers the court to grant any order that is just and equitable, including, in exceptional cases, an order substituting the impugned administrative action. The question as to whether or not there exists cause for not remitting the matter for reconsideration

by the functionary is one of fairness to the parties, regard being had to the entire context of the case. [See **Premier Province of Mpumalanga and Another v Executive Committee of the Association of Governing Bodies of State- Aided Schools: Eastern Transvaal** 1999 (2) BCLR 151 (CC) para 51-51].

[42] In the opposing affidavit the City Manager indicates that the third applicant was also disqualified for being a listed supplier, although same was never advanced as a reason for the unfavourable decision taken against it. The issue did not play a role when the impugned decision was made and is, as such, not part of the context of the facts of the present matter. It simply has no role whatsoever to play in the determination of a just and equitable remedy in the circumstances.

[42] The question is whether or not "upon a proper consideration of all the relevant facts, a court is persuaded that a decision to exercise a power should be left to designated functionary" regard being had to established principles and the constitutional requirement for a lawful, reasonable and procedurally fair administrative action. [See **Gauteng Gambling Board v Silverstar Development** 2005 (4) SA 67 (SCA) para [28] – [29].]

[43] It is true that just and equitable remedies contemplated by PAJA are meant to "afford the prejudiced party administrative justice, to advance efficient and effective public administration compelled by constitutional precepts and at the broader level to entrench the rule of law". [See **Steenkamp NO**

<u>v Provincial Tender Board, Eastern Cape</u> 2007 (3) SA 121 (CC) Para [29].]

[44] The grounds advanced by Mr Grobler in support of a substitution order seek, in my judgment, to highlight how such an order would not prejudice the successful bidders and the respondent. They do not show why the default situation of remitting the matter to the designated functionary should not prevail.

[45] The facts of the present matter, however, show that the relevant contracts are for three years and that they have been running since about June 2014. More than seven months have now lapsed, leaving some 29 months on the contracts. Time appears to be of essence to the applicants who seek to benefit from the contracts as they clearly point out in the papers when they deal with urgency. It is, further, correct, as pointed out for the applicants, that the reason why only 25 contractors, as appointed, can perform the relevant contracts has not been furnished by the respondent although it had ample opportunity to do so.. In my view, there *prima facie* appears to be no prejudice to the respondent if the applicants are placed on the roster together with successful bidders to perform the job on *ad hoc* basis, as and when they each get their turn. On its part the respondent is not required to increase the budget allocated for the project in question. The successful bidders are, however, likely to feel prejudiced, in my view, if the list is increased because they would each have to wait a bit longer for their respective turns. This

calls for a balancing act between the interests of such bidders and those of the applicants. The applicants enjoy the same right to just administrative action as their successful counterparts and, on their part, the successful bidders have been on the list since June 2014. In order for the applicants to obtain optimality in their success, as opposed to securing a hollow victory, it is just and equitable for their names to be placed on the list of preferred service providers without any delay. In my opinion exceptional circumstances exist to justify substitution as an order because the respondent has no discretion left to exercise and the outcome is, thus, a foregone conclusion. I may also mention that remitting the matter to the respondent for reconsideration would, in my view, serve no conceivable purpose save for delaying finalisation. The irregularities involved cannot reasonably possibly be rectified so as to afford the applicants administrative action which is lawful, fair and equitable without compromising uniformity in applicable prices, among others.[**Grinaker LTA LTD and Another v Tender Board (Mpumalanga) and others** [2002] 3 All SA 336 (T) para [86].] The applicants are entitled to their costs.

ORDER

[46] In consequence an order in terms of prayers 2, 3, 4 and 5 in the notice of motion is granted.

L. J. LEKALE, J

I concur.

B. C. MOCUMIE, J

On behalf of the applicants:	Adv. S. Grobler Instructed by: Lovius Block BLOEMFONTEIN
On behalf of the respondent:	Adv. A. I. B. Lechwano Instructed by: Maduba Attorneys BLOEMFONTEIN