

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

Case No: A90/2015

In the matter between

ICON CONSTRUCTION (PTY) LTD

Applicant

and

The DIHLABENG LOCAL MUNICIPALITY

1st Respondent

**GRIDON TRADING CC t/a SINETHEMBA
CONSTRUCTION**

2nd Respondent

UDUMO 26 (PTY) LTD t/a ULTIMATE DYNAMIC

3rd Respondent

ESOR CONSTRUCTION (PTY) LTD

4th Respondent

CORAM:

NAIDOO, J et C REINDERS AJ

JUDGMENT:

NAIDOO, J

HEARD ON:

22 JUNE 2015

DELIVERED ON:

10 SEPTEMBER 2015

- [1] This matter was brought before us as a review in terms of Section 6 of the Promotion of Administrative Justice Act 3 of 2000 (PAJA), read with Rule 53(4) of the Uniform Rules of Court. The 4th respondent (Esor) was initially not a party to these proceedings and brought an application to intervene, which was not opposed by the applicant (Icon) and the 2nd and 3rd respondents (Sinethemba and Ultimate Dynamic respectively).

Leave was granted for it to intervene and it was consequently joined as 4th respondent. I should mention that the first respondent (the Municipality) initially opposed the application by the applicant, but prior to the hearing of this matter on 22 June 2015, it withdrew its opposition, following an agreement between it and Icon that the latter would not pursue a costs order against the Municipality. Ultimate Dynamic brought a counter-application in which it claimed, in essence, that the decision of the Municipality to award the tender for Contract PW47/2014 to Sinethemba be reviewed and set aside, and that the tender should be awarded to Ultimate Dynamic. At the hearing of this matter, Ultimate Dynamic indicated that it would not proceed with the counter-application. We ultimately granted an order on 22 June 2015 in the following terms:

- 1.1 The application succeeds to the extent that an order in terms of prayer 1 of the Notice of Motion is granted;
- 1.2 The decision is referred back to the first respondent to re-advertise, within 30 days, the invitation to bid for the works, should it decide to proceed with the works forming the subject matter of this application;
- 1.3 The second respondent is directed to pay the applicant's costs
- 1.4 The reasons for this order are to follow.

The following are the reasons mentioned in the order.

- [2] The Municipality called for tenders on 12 November 2014 for certain works which it described as "Contract No. PW47/2014, Dihlabeng Bulk Water Supply Scheme, Construction of Bulk Water Pipeline and Appurtenant Works between Paul Roux and Rosendal" (the works). Icon and others submitted tenders for the works to be undertaken for and on behalf of the Municipality. The Municipality in its advertisement initially called for tenders from contractors with a 6 CEPE grading as determined

by the Construction Industry Development Board (CIDB) but at a compulsory pre-bid briefing meeting, it advised bidders that this was an error and that only contractors with a CIDB 7CE grading will qualify. Icon's tender was rejected and the Municipality awarded the tender to Sinethemba. Icon then approached this court for an urgent interim order in which it sought immediate cessation of the implementation of the contract that would follow the granting of the tender. An order was ultimately granted by agreement between the parties, on 14 May 2015, in terms whereof dates were agreed for the filing of process and documents in furtherance of this review application.

- [3] In assailing the Municipality's decision to award the contract to Sinethemba, Icon set out in detail the process involved in the evaluation, adjudication and award of bids/tenders, as well as the outcomes at the various stages of the process in respect of its bid and those of Sinethemba and Ultimate Dynamic. It is not necessary to repeat all the details in this judgment. I will, however, refer to those aspects which bear on the validity/regularity of the process involved in the tender which is the subject matter of this application. Icon starts by asserting that it has a CIDB grading of 9CE, which entitles it to perform contracts of any monetary value. It also has a Broad Based Black Economic Empowerment (BBBEE) rating of Level 3. The Municipality, through its engineer, Rudnat Projects CC (Rudnat), conducted a pre-bid estimation of the value of the works and determined it to be Sixty Two Million Eight Hundred and Eighty Thousand Nine Hundred and Ten Rand and Sixteen Cents (R62 880 910.16). As I indicated in paragraph [2] of this judgment, the Municipality called for bids from contractors with a CIDB 7CE grading. The parties in this matter are in agreement that the ceiling limit for a contractor with a 7CE grading is a contract not exceeding R40 million in value. Ultimate Dynamic and Esor support Icon's application for

review and request a referral back to the first respondent for re-evaluation and reconsideration of all bids. Icon also sought, in its Notice of Motion, a referral back to the first respondent of all bids for re-evaluation and reconsideration. It sought, in the alternative, an order that the first respondent be directed to re-advertise the contract and call for new tenders in respect of the works. I will return to this aspect later.

- [4] There are four main grounds on which Icon attacks the validity of the Municipality's decision to award the tender to Sinethemba, which Esor and Ultimate Dynamic agree with:
- 4.1 Sinethemba did not have the required CIDB grading at the time of submission of its bid, the closing date for which was 15 December 2014;
 - 4.2 The Municipality allowed Sinethemba to submit further documentation after the closing date for submission of bids in order to prove its CIDB status. This was allowed by the Tender Appeal Committee, in spite of the recommendations, to the contrary, by the Bid Evaluation and Bid Adjudication Committees;
 - 4.3 Sinethemba submitted an incorrect BBBEE certificate, upon which it was awarded points. This was not detected by either the consulting engineer or the Municipality; and
 - 4.4 The Tender Appeal Committee did not conduct a risk analysis in respect of Sinethemba, in spite of this being a requirement to qualify for the award of the tender
- [5] It is common cause that Sinethemba, at the closing date for submission of bids, being 15 December 2014 held a CIDB grading of 6 CEPE. After

the pre-bid briefing meeting in November 2014, it appears that Sinethemba applied to the CIDB for an upgrading of its grading to 7CE. It merely submitted, with its bid, a confirmation of the receipt of such application. Nothing else was mentioned in regard to its grading, for example that it was capable of being registered in a 7CE or higher class, prior to the evaluation of submissions, as was required by the tender document (see F.2.1). Icon, Ultimate Dynamic and Esor all hold the view that as Sinethemba did not hold a 7CE grading at the time it submitted its bid, its bid was non-compliant, did not qualify as an acceptable tender and should not have been considered any further. The upgrading applied for was granted subsequent to the closing date for bids and Sinethemba was allowed to file such confirmation in February 2015, on the basis that this was before the bid was evaluated on 11 March 2014. The Bid Evaluation and Bid Adjudication Committees rejected Sinethemba's bid. Sinethemba lodged an internal appeal and the Tender Appeal Committee upheld the appeal and subsequently, after considering the bids of Icon, Ultimate Dynamic and Esor as well, awarded the contract to Sinethemba.

- [6] Sinethemba submitted a BBBEE certificate dated 2 December 2014, which reflected that it had 55% Black ownership and a BBBEE score of 78. A score of 0 (zero) was allocated on this certificate for socio-economic development. It appears that this is an "incorrect" certificate, as Sinethemba does not have any Black ownership. It attached to its opposing affidavit another certificate, which bears the same date as the incorrect certificate, but which reflects that it in fact has no Black ownership. This certificate now reflects an allocation of 19 points for socio-economic development. Sinethemba's explanation is that the incorrect certificate was erroneously attached to its tender documents by one of its assistants. The evaluation of its bid and award of points was

clearly based on the "incorrect" certificate. There is no explanation for the allocation of 19 points for socio-economic development in the second certificate

- [7] It is common cause that an essential stage in the process of evaluating, considering and ultimately awarding a contract is a risk analysis of the various bidders. There is no indication in the minutes of the Tender Appeal Committee that a risk analysis was specifically conducted in respect of Sinthemba. One of the more important purposes of a risk analysis is to determine whether the rates quoted by a bidder are market related and whether the bidder has the capability of undertaking and completing the works satisfactorily at those rates. This analysis also assists in assessing the cost-effectiveness of the bid. Skewed figures would logically yield an incorrect assessment. It is not in dispute that Sinthemba's bid was approximately 27% - 28% below the Municipality's pre-bid estimate. Icon alleges that a 10% variance with the estimate is allowable whereas Sinthemba indicates that a 20% variance is in fact permissible. Either way, Sinthemba's bid exceeded the permissible/acceptable variance rate. In the opposing affidavits put up by the Municipality, the acting Municipal Manager, Mr Molatseli, as well as Mr Khiba, the Municipality's Budget and Expenditure Manager who was also the Chairperson of the Appeal Committee, both of whom were the deponents to those affidavits, indicated that Sinthemba previously successfully completed construction contracts in excess of Nine Million Rand (R9 000 000.00). On this basis, and in spite of Sinthemba's tender price being substantially lower than the pre-bid estimate as well as the tender prices of the other bidders, the Tender Appeal Committee was of the view that Sinthemba could successfully undertake and complete the works in the present matter. No other substantiation is provided for this view.

[8] Section 33 of the Constitution provides as follows :

- “(1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.
- (2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.”
- (3) National legislation must be enacted to give effect to these rights, and must –
 - (a) provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;
 - (b) impose a duty on the state to give effect to the rights in subsections (1) and (2); and
 - (c) promote an efficient administration”

The Promotion of Administrative Justice Act 3 of 2000 (PAJA) is the national legislation envisaged in section 33 of the Constitution. Section 6(1) of PAJA empowers a person to institute action in a court for the judicial review of an administrative action. The relevant provisions of Section 6 (2) of PAJA provide that

“A court or tribunal has the power to judicially review an administrative action if –

- (a)....
- (b) a mandatory and material procedure or condition prescribed by an empowering provision was not complied with;
- (c) the action was procedurally unfair;
- (d) the action was materially influenced by an error of law;
- (e) the action was taken –
 - (i)....
 - (ii)....
 - (iii) because irrelevant considerations were taken into account or relevant considerations were not considered;
 - (iv)....
 - (v)....
 - (vi)....”

- [9] The parties in this matter are in agreement that the decision taken in this matter is an administrative action as defined in PAJA. When the process involved in the awarding of the contract to Sinethemba is viewed in the light of the relevant provisions of PAJA, it becomes evident that the Municipality, in taking such administrative action, did not comply with the peremptory provisions of the Bid Document, which usually takes account of the provisions and requirements of the various policies and legislation relevant to the Municipality, for example, the Municipality's Supply Chain Management Policy, with reference to the Local Government: Municipal Systems Act 32 of 2000 and the Preferential Procurement Policy Framework Act 5 of 2000. Sinethemba clearly did not hold a CIDB 7CE rating, as required by the Bid Document, at the closing date for submission of bids and did not meet the requirement that it should have done more than simply file an acknowledgement of receipt of its application for an upgrading of its status. The onus was on Sinethemba to indicate, and submit documentation to substantiate, that it was capable of being registered in the class grading 7CE. In allowing it to file these documents almost two months later, the Municipality rendered the process unfair to all other bidders. I agree with the submissions of Icon and Esor that the interpretation of and reliance placed by the Municipality on Regulation 25(1A) of the Regulations to the Construction Industry Development Board Act 38 of 2000, is incorrect. If the words in Regulation 25(1A) *"...but who is capable of being so registered prior to the evaluation of those submissions may be evaluated..."* were intended to mean that documentation to supplement a bid can be filed at any time up to the date that the bids are physically assessed, it would not only make a mockery of the closing date for submissions, but would lead to an untenable situation that those who did not qualify at the closing date, and only later did so, would be unduly preferred, to the prejudice and detriment of other bidders who met all requirements at the closing date.

It can probably be argued that such “late filing” of Sinethemba’s grading certificate may have been accepted had Sinethemba filed, together with its bid documents, proof of its application for such registration, from which it was apparent that it had satisfied the requirements for such registration. Similarly, the Tender Appeal Committee indicates that it invoked Regulation 25(9) to accept the CIDB 7CE certificate after the closing date for submission of bids as that Regulation empowered it to do so in order to ensure that Sinethemba was registered as a 7CE contractor. Esor correctly points out that Regulation 25(9) does not come into play when assessing the bid at the initial stages, but is a verification process at the end. The Municipality appears to concede this in its opposing affidavits and refers to it as an “error in judgment” In my view, this is an error in the interpretation of the law rather than an error in judgment. I agree, therefore, that the Tender Appeal Committee erred in allowing the evaluation of Sinethemba’s non-qualifying bid and thereafter awarding the contract to Sinethemba , rendering the process irregular and unfair.

- [10] The facts surrounding Sinethemba’s BBBEE certificate create a sense of disquiet, as one would have expected that, in view of the error in the document being pertinently within the contemplation and knowledge of Sinethemba’s Mr Schonken, greater care would be taken to ensure that the correct document was submitted. The disturbing aspect is that Sinethemba was aware that it received points on an incorrect certificate but tries to gloss over it by alleging that even if those points were deducted, it would still have scored higher than the other bidders, completely ignoring the irregularity of such a situation. Even more worrying is that this was not detected by the Engineer or the Tender Appeal Committee. The attempt in the Municipality’s opposing affidavit to brush this aside by saying that it took the decision to award the tender

on the basis of documentation provided, without acknowledging the irregularity of the situation, is equally unsettling. The failure to undertake a risk assessment with regard to Sinethemba is, in my view, a serious irregularity as this could have a large cost implication for the Municipality, and is certainly not in the interests of the community for whose benefit the works are intended.

The pre-bid estimate is substantially more than Sinethemba's tender. This coupled with the fact that there is no evidence of Sinethemba successfully completing a contract in such an amount, or even Forty Million Rand (R40 000 000.00) which is the ceiling limit for a contractor with a CIDB 7CE grading, should have set the red lights flashing. Instead the Tender Appeal Committee justifies this by alleging that Sinethemba has successfully completed contracts in excess of R9 000 000.00 and that it was satisfied that Sinethemba could successfully undertake the works in this matter. I am constrained to accept the logic or validity of such a submission. In my view, these were very relevant considerations which went to the heart of the fairness and regularity of the process, which the Municipality failed to appreciate and take into account.

[11] For the reasons set out above, I am of the view that the decision of the Municipality falls to be set aside. While Icon, Sinethemba, Ultimate Dynamic and Esor have asked that the matter be referred back to the Municipality for reconsideration and re-evaluation, I am of the view that the fairest outcome is to direct the Municipality to re-advertise its invitation for tenders for the works, as prayed for, in the alternative, by Icon. I say this for the following reasons:

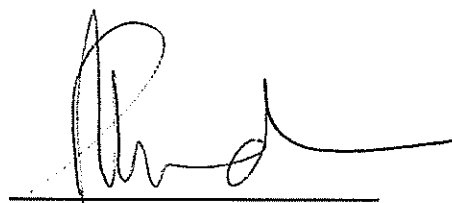
11.1 There is consensus between the parties that a contractor with a CIDB 7CE grading may undertake work up to R40 000 000.00. The pre-bid estimate was pegged at R62 880 910.16. There is nothing on record to

indicate that the call for tenders from contractors with a CIDB 7CE grading is correct or appropriate. The Municipality is silent on this. If this in fact is an incorrect requirement and the call should have been made for contractors with a higher CIDB grading, then many of the bidders who already submitted bids would be disqualified, for example Sinethemba. The other possibility is that a number of appropriately qualified contractors would now be able to bid if the correct grading is called for, which would clearly be in the public interest and in keeping with principles of good governance.

11.2 If the matter were referred back for re-evaluation, the current disputes amongst Icon, Ultimate Dynamic and Esor may not be resolved, resulting in further delays and possibly even further litigation. The works in this matter relates to the provision of water, which is a basic right, to residents in the Municipality's area of jurisdiction. Further delays can only cause serious prejudice to these residents.

11.3 The tenders which have been submitted already were valid for 90 days. That period has long passed and it would, in all probability, be a futile exercise to re-evaluate these bids.

[12] We were advised by counsel for the parties in this matter that if the route of re-advertising were followed, the process could be back on track within 2-3 months. In view of this and all of the circumstances mentioned above, we were of the view that the order set out in paragraph [1] above was the most appropriate order to have made.

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S. NAIDOO, J

I agree

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C REINDERS AJ

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