

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No. : 513/2011

In the matter between:-

JORIAN CONSTRUCTION CC

Applicant

and

THE MANGAUNG LOCAL MUNICIPALITY
THE CHAIRMAN: BID ADJUDICATION
COMMITTEE: CONTRACT W0905B
PRO-CARE CIVILS (PTY) LTD

1st Respondent

2nd Respondent

3rd Respondent

CORAM: MUSI, JP *et* NAIDOO, AJ

JUDGMENT BY: MUSI, JP

HEARD ON: 21 NOVEMBER 2011

DELIVERED ON: 22 DECEMBER 2011

INTRODUCTION

[1] This is a review application in terms of which the applicant seeks the following orders:

1. The awarding of the contract no. **W0905B**, for the Addition to Northern WWTW: Sewer Station & Pumphines by the second respondent, under the auspices of the first respondent, such contract having been awarded to the third

respondent, be reviewed and set aside.

2. The awarding of said contract be referred back to the first and second respondents for deliberation and awarding afresh.
3. The first respondent be ordered to pay the costs of the application. Alternatively, and in the event of any of the other respondents opposing, then and in that case, such respondent, jointly and severally, payment by one the other to be absolved.

The facts of the case are largely undisputed and are briefly set out hereunder.

FACTUAL BACKGROUND

- [2] During April 2010 the City Manager of the first respondent municipality called for tenders to be submitted in respect of work to be done on two projects. The one project went under the name W09058, for sewer mains, and the other W0905B for a sewer pump station and pipelines. The applicant tendered for contract W0905B and this is the only contract with which these proceedings are concerned. There were other bidders but the tender was ultimately awarded to Pro-Care Civils (Pty) Ltd, the

third respondent herein. Clearly, the third respondent has an interest in these proceedings but it has not filed any papers and will presumably abide the decision of the court. Henceforth any reference to the respondents shall be reference to the first and second respondents collectively.

- [3] The assessment and evaluation of the bids went through several stages. Firstly, the respondents engaged the services of engineering consultants by the name of Aurecon, which did the initial evaluation of the bids and awarded points to each bidder. They awarded the applicant the highest points, followed by the third respondent. Aurecon's report went to the Tender Evaluation Committee of the first respondent's municipality, which adopted Aurecon's report save in one major respect. They disqualified the applicant on the basis that it was being investigated by the first respondent's Anti-fraud and Corruption Unit. This referred to allegations of fronting, about which more is to follow. The Tender Evaluation Committee recommended that the tender be awarded to the third respondent. The Tender Evaluation Committee report then went to the Bid Adjudication Committee of the first respondent, which endorsed the recommendation that the tender be awarded to the third

respondent. Finally, all the reports went to the first respondent's City Manager, Mr Msibi, on whose shoulders the final decision rested. He endorsed the recommendation to award the contract the third respondent and duly did so. It is this decision that forms the subject of these proceedings.

- [4] It should be noted at this juncture that Aurecon had no power of recommendation and in fact made no recommendation. It can be accepted that they based their assessment purely on the documentation placed before them by the respondents. The tender evaluation and bid adjudication committees, on the other hand, are component structures of the municipality and each had the power to make recommendations, as they indeed did. It may also be noted that each of these committees applied their minds independently to the process as shown by the fact that whereas the Tender Evaluation Committee had recommended that both contract A and B be awarded to the same entity, the Bid Adjudication Committee disagreed and decided that tender A be awarded to a separate entity. I think it can also be accepted that Aurecon, being an outsider, would not necessarily be privy to some of the information that the tender evaluation and bid adjudication committees would have had.

THE ISSUES

- [5] The applicant's case is that it should have been awarded the tender based on its highest score. It contends that the decision not to award the contract to it offends against the applicable statutory provisions, is not based on any reasonable grounds and is irrational.
- [6] This case essentially turns on the reasons advanced by the respondents for not awarding the contract to the applicant, for it is not disputed that ordinarily the bidder with the highest points wins the tender. The reasons advanced are briefly that the Tender Evaluation Committee suspected, on reasonable grounds, that the deponent to the applicant's founding affidavit, M/s Elizabeth Mojatau ("Mojatau"), who is alleged to be the sole member of the applicant close corporation is in fact fronting for someone else. This allegation goes to the root of the allocation of points, and if true, it would mean that the applicant was awarded the points to which it was not entitled. In other words, that the points would have been allocated to it fraudulently. For a better understanding of the crucial role played by the allocation of points in the awarding of tenders, it is necessary to

give a brief outline of the relevant statutory framework.

STATUTORY FRAMEWORK

- [7] The foremost relevant statutory provision is section 217 of the Constitution which stipulates in subsection 1 that when an organ of state, such as the first respondent, contracts for goods or services it must do so in accordance with a system that is fair, equitable, transparent, competitive and cost effective. However, subsection 2 thereof specifically allows for a procurement policy that provides for categories of preferences in the allocation of contracts and for the protection or advancement of persons or category of persons disadvantaged by unfair discrimination.
- [8] The Preferential Procurement Policy Framework, Act 5 of 2000 ("the Procurement Act") was enacted precisely in fulfilment of the injunction of section 217(3) of the Constitution in order to prescribe a framework within which the policy of preferring certain categories of persons in the awarding of state contracts should be implemented. Of particular importance for present purposes are the Regulations promulgated by the Minister of Finance on 10 August 2001 under the Procurement Act. The

regulations give *inter alia* a definition historically disadvantaged individuals (“HDI”) and describe the criteria for allocation of points. Significantly, Regulation 2 stipulates that a maximum of 20 points maybe awarded to a tenderer for being an HDI. Regulation 13 deals with the principles applicable to allocation of preference points and item 4 thereof specifically prohibits the allocation of preference points in respect of HDI’s who are not actively involved in the management of an enterprise or business and who do not exercise control over the enterprise which is commensurate with the degree of their shareholding or ownership.

- [9] The effect of these regulations is that Mojatau, an HDI, may have had a 100% ownership of the applicant but if she was not actively involved in its management and did not exercise control over it that was commensurate with the degree of her ownership (100% in this case) then applicant was not entitled to be allocated preference points. It is not disputed that the applicant would not have scored the highest points had it not been awarded preference points. Viewed in this context, the allegation of fronting is crucial.

SUSPICION BASED ON REASONABLE GROUNDS

[10] The suspicion that Mojatau is fronting arose from a statement that she made during December 2009, annexure “MK4” to the respondent’s answering affidavit. The contents of this statement can be summarised as follows:

- (a) She started work as a businesswoman in 2007 but struggled because she did not have the necessary experience.
- (b) She then met Mr Steyn with whom she had previously worked and appointed him manager. Steyn kept her in the dark about the finances of the business and she did not know how the funds were utilised. She was only paid a salary of R6 000,00 per month.
- (c) Steyn informed her about the contracts that he had secured and showed her the sites in the various towns. However, he did not tell her how much money was paid in respect of the work, how much was spent and how much was outstanding (profits made).
- (d) She then went about investigating quietly until she came across people with knowledge.
- (e) Some people came to enquire about the jobs and she

explained to them what was happening but they did not come back to her. She now wants justice to be done and is asking the police to investigate.

[11] Now, the contents of this statement have not been disputed.

When read together with the affidavits filed of record, it can be inferred that the work or job she is talking about relates to tenders, that the person she had appointed as manager of her business, Mr Steyn, was in charge of securing the contracts through tendering, carried out the work and was in charge of the finances of the business. She was shown the sites where the work was to be done but was not actively involved and was kept in the dark about how much money was paid for the work, how much was disbursed and what was the profit. She only received a monthly salary.

[12] Then there is the affidavit appearing at page 120 of the record, which was also annexed to the answering affidavit. It was made in connection with a previous tender under contract number W0626 submitted to the first respondent. The deponent is N. E. Miya, who is apparently the same person as Mojatau. She is cited as a member who owns a 100% equity in

the tendering enterprise. The purpose of the affidavit was to confirm the deponent's shareholding and that she/he was actively involved in the management and has control over the business. But interestingly the affidavit is signed by Mr Steyn. As can be seen at the bottom of the affidavit, the tendering business is described as Jorian Construction, the applicant herein. This affidavit is *prima facie* evidence of fraud. It strengthens the inference that it is Steyn who had been submitting tenders on behalf of the applicant, using Mojatau's HDI status.

- [13] The applicant and its legal representatives do not seem to appreciate the seriousness of this fraudulent affidavit. In the applicant's papers, it is simply dismissed as an incorrect affidavit. The applicant's counsel, Mr Grobler, similarly dismissed it as a mistake. His attitude appears to be that since the relevant tender was withdrawn, the fraud can simply be wished away. Mr Moerane, for the respondents, pointed out that the deponent was initially Johan Steyn but this was altered to N. E. Miya. Counsel suggested that the alterations were probably made after the Commissioner of Oaths had signed it. Either way, the document points to manipulation of the first

respondent's tender processes.

ARGUMENTS AND DISCUSSION

[14] Now, Mr Grobler challenged the respondent's reliance on the allegations of fronting on a number of grounds. Firstly, he pointed out that Mojatau's statement related the events that took place in 2009 long before the impugned decision was made. He argued that the City Manager (Mr Msibi) made it clear in his answering affidavit that the alleged fraud had been investigated and that such investigations had been concluded. Counsel submitted that the investigations had failed to establish any wrongdoing on the applicant's part. This being the case, it was irrational to rely on the suspicion of fronting, so the argument went. Counsel further argued that the City Manager could not be believed when he says that his decision was based on the suspicion of fronting because of the contradictions inherent in his answering affidavit.

[15] There is indeed a contradiction between paragraphs 5.5 and 5.6 of the answering affidavit. The Tender Evaluation Committee disqualified the applicant's bid on the basis that the applicant was being investigated and that the investigations

were still pending. The City Manager endorsed this in paragraph 5.5. Yet in the next paragraph 5.6 he makes it clear that the investigations had been concluded and that they revealed that the deponent was a manager and an alleged 100% shareholder who did not receive financial benefits proportionate to her ostensible shareholding and that she did not exercise control over the enterprise.

[16] The difficulty one has is that no affidavit has been filed by any of the members of the Tender Evaluation Committee and it may well be that when they disqualified the applicant the committee was under the mistaken impression that the fronting allegations were still under investigation. What is clear, in my view, is that the City Manager himself was aware that there were no investigations pending. A perusal of the rest of his affidavit clearly reveals that he relied for his decision on Mojatau's statement and the fraudulent affidavit, both of which were annexed to his affidavit. Viewed in this context, the contradiction does not detract from the essence of the respondent's case and is not material.

[17] In dealing with this matter, it is important to keep in mind that it

is the decision of the City Manager that is sought to be reviewed and not the decision of the committee that disqualified the applicant. Although the City Manager was guided by the recommendation of such committee, he was the decision maker, and the buck stopped with him. At the end of the day, it is the City Manager's reasons and the facts on which they are based that must be scrutinised. And there can be no doubt that his decision amounts to administrative action as defined in section 1 of the Promotion of Administrative Justice Act, nr 3 of 2000 ("PAJA"). On the other hand, it is doubtful that the decision of the Tender Evaluation Committee to disqualify the applicant is administrative action. In any event, the disqualification was endorsed by the City Manager and forms part of his decision.

[18] The cardinal question is whether the impugned decision was reasonable and procedurally fair. This is an issue that can only be decided upon a conspectus of all the evidence on record and I proceed to deal therewith.

[19] In her supplementary affidavit filed after the record of the proceedings had been filed, Mojatau says that she had been

wholly unaware of the investigations pertaining to the fronting allegations, that she had not been contacted at all and had been afforded absolutely no audience. But interestingly she omits to disclose that she had in fact been contacted by the first respondent's officials and had made a statement to them wherein she complains about being excluded from the operations of her business. She deliberately concealed the statement and when it was produced, she tried to explain herself by alleging, falsely in my view, that the contents were dictated to her. Mojatau is clearly untruthful and unreliable. Further instances of untruthfulness and unreliability emerge in her replying affidavit. She attempts to explain the incriminating statement by saying that she had not been active in the business because of illhealth. This is what she says:

“4.4 Between **2007** and **2008** I had fallen extremely ill. This necessitated that I to a large extent (in that period) hand the management of the entire business to Mr **Steyn**. The only reason for this was because of my illness.

4.5 It is correct that during that time, I was visited by three officials of first respondent. I cannot recall their names.”

Two questions arise. Firstly, if it is true that she had been

inactive in the business because of illhealth and that she had handed over the running of the business to Steyn, why then complain about being excluded from the management thereof? Secondly, she does not explain why the statement was made in 2009. She is clearly lying.

[20] The statement discloses that she is not actively involved in the running of the business and that she does not exercise control over its operations, let alone control commensurate with her 100% shareholding in it. It is noteworthy that in her replying affidavit she does not provide any details of her role in the operations of the business. All she says is that she holds a 100% interest, that she is an employee and that she is assisted by people like Mr Steyn. She has literally left the contents of her incriminating statement undisturbed. It is also noteworthy that instead of dealing with these serious allegations she shifts focus to the fact that she had not be given a hearing and her contention that the respondents failed to produce proof of wrongdoing.

[21] I agree with Mr Moerane, for the respondents, that it cannot be correct to insulate the investigation conducted in respect of the

2009 tender from the tender involved in this case. The investigations were about the HDI status of the applicant and what was discovered then equally applies to the instant tender. The matter would have been different had Mojatau given a credible explanation of her role in the tendering enterprise or how the situation had changed. She has failed to do so and instead tried to mislead this court. The result is that the reasons for suspecting that she is fronting remained valid in respect of the present dispute.

REGULATION 15¹

[22] There was a dispute in argument whether regulation 15 was applicable to the instant matter. Counsel for the applicant argued that this regulation could only be invoked where a tender had been awarded and it is discovered that preference points had been fraudulently obtained and not in a case, such as the present, where a tender had not yet been awarded when the applicant was disqualified. Counsel for the respondent, on the other hand, argued that once the allegations of fraud had

¹ Subregulation 1 thereof reads as follows: "An organ of state must, upon detecting that a preference in terms of the Act and these regulations has been obtained on a fraudulent basis, or any specified goals are not obtained of the performance of the contract, act against the person awarded the contract."

come to the attention of the Tender Evaluation Committee, it was entitled to act in terms of the regulation.

[23] In my view, regulation 15 is indeed applicable to the instant matter. The case of **VIKING PONY AFRICA PUMPS (PTY) LTD t/a TRICOM AFRICA v HIDRO-TECH SYSTEMS (PTY) LTD AND ANOTHER** 2011 (1) SA 327 (CC) provides authority for this. There it was held that once information was brought to the attention of the organ of state considering a tender disclosing that preference points may have been obtained fraudulently, the organ of state was obliged to act in terms of regulation 15. The Court interpreted the word “detect” as meaning *inter alia* no more than discovering or getting to know of the relevant allegations. The words “act against” were interpreted as including institution of an investigation into the allegations made against the tendering entity. In **VIKING** the complaint related to previous tenders, it being alleged that **VIKING** been awarded the tenders based on preference points that were fraudulently awarded.

[24] In my view, it makes no difference that *in casu* the tender had not yet been awarded. What is important is that preference

points had already been awarded to the applicant and information had come to light that the points may have been fraudulently obtained. At this stage, the Tender Evaluation Committee was entitled to act in terms of regulation 15. The only question is what form of action should the respondents have taken.

[25] At this juncture, it is apposite to refer to what Mogeng J (as he then was) said in para [34]:

“[34] Whenever an enterprise is plausibly accused of having furnished false information in its tender documents, the organ of State responsible for the tender is, upon becoming aware of the alleged misrepresentation, under an obligation to investigate the matter. This stems from the tenderer's obligation to vouch for the truthfulness and correctness of the information provided in terms of reg 14. Furthermore, the organ of State has the power to call upon any tendering enterprise to submit satisfactory documentary proof of any issue relating to the tender. This would be done to enable the organ of State to investigate and satisfy itself about the correctness or otherwise of the issues relating to the tender. In sum, reg 15 enjoins the organ of State to 'act against' any tenderer that seems to have flouted the law.”

[26] It is clear that the answer is that the respondents should have conducted a thorough investigation in order to verify the allegations. They would have been entitled to call for more information from the applicant and to demand production of documents but they were not at that stage obliged to give the applicant any audience. However, once they had obtained conclusive evidence they would have been under an obligation, before making any decision adverse to the applicant, to give the applicant a hearing. Now, whereas the respondents had conducted an investigation into the allegations of fronting, no conclusive evidence had been established. What the investigation established is, as I have said, *prima facie* evidence of fronting. If the respondents were not inclined to conduct a thorough investigation in order to obtain conclusive evidence, which they should have done, they should then have given the applicant a hearing before taking the decision to disqualify it. This they failed to do and in this respect, the impugned decision was procedurally flawed.

[27] This does not, however, mean that the decision should be set aside. There are other considerations in this matter that

militates against the setting aside of the impugned decision. In the first place, I have found that there is *prima facie* evidence of fronting in this case. With such cloud hanging over the applicant it is hardly conceivable that it could be awarded the tender. Secondly, a tendering enterprise is under an obligation to play open cards and be honest and truthful in the presentation of its bid. I have found that the deponent to the affidavits filed on behalf of the applicant has been untruthful and unreliable and the fraudulent affidavit points to manipulation of the tender process by the applicant. Most importantly, I take into account that no suggestion whatsoever has been made of any foul play in the awarding of the tender to the third respondent and it is important to note that the third respondent obtained the next highest points. There is not the slightest suggestion of any fraud or corruption in the awarding of the tender to it. One has to take into account also that the tender relates to the provision of services to the residents under the first respondent's jurisdiction. Any further delay in the execution of the contract may adversely impact on the provision of essential services. The Tender Evaluation Committee highlighted in its report the need for the two contracts under W0905A and W0905B to be executed at the same time and it

may well be that these proceedings are holding up the execution of other contract. Finally, it is imperative that the respondents conduct a thorough investigation of the allegations levelled against the applicant and establish the truth in the interest of all the parties². It will be unreasonable that the execution of the contract be delayed further pending finalisation of such investigations.

CONCLUSION

[28] I would in the premises dismiss the application. However, the circumstances of this case are such that no costs order should be made. It is otherwise in the interest of justice that the relevant allegations be fully and properly investigated so as to either confirm them or clear the applicant for purpose of future tenders and I intend to make an order the that effect.

ORDER

[29] In the result, the following order is made:

- (a) The application is dismissed;
- (b) The respondents are ordered to conduct a further and thorough investigation of the allegations of fronting levelled against the applicant, in order to confirm them or clear the applicant, such investigation to be concluded within 6

² If the first respondent's Anti-fraud and Corruption Unit is incapable of proper investigation, the assistance of any of the specialised investigative units of the South African Police Services or a firm of forensic auditors can be sought.

months of delivery of this judgment.

H. M. MUSI, JP

I concur.

S. NAIDOO, AJ

On behalf of the applicant: Adv. S Grobler
Instructed by:
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On behalf of the respondents: Adv. M T K Moerane SC
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