

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 116843/2023

- (1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: NO

Date: 28 May 2024

In the matter between:

MABOTWANE SECURITY SERVICES CC

Applicant

and

MADIBENG LOCAL MUNICIPALITY

First Respondent

MUNICIPAL MANAGER, JK MASHIGO N.O.

Second Respondent

HWIDIDU GROUP (PTY) LTD

Third Respondent

MTUNGWA TLASEGO PROJECT JV

Fourth Respondent

TRIOTIC (PTY) LTD

Fifth Respondent

MOKGANYA SUPPLY AND PROJECTS CC

Sixth Respondent

**ANY RESPONDENT WHO WAS AWARDED A
TENDER UNDER RFT BIDS 62,63,64 OR 65/2022/23**

Seventh Respondent

JUDGMENT

DE VOS AJ

- [1] The Municipality extended an invitation to bid for the provision of security services. The applicant tendered its bid, but was unsuccessful. The Municipality awarded the bid to the second to sixth respondents (“successful bidders”). The applicant sought to urgently review the award. In the urgent review, the applicant contended that the successful bidders did not meet three of the mandatory requirements of the Bid Evaluation Document. The Court concluded that the successful bidders had complied with the three requirements and to the extent they did not, the non-compliance was not sufficiently material to set aside the award. The Court dismissed the application. The applicant now seeks leave to appeal against the dismissal.
- [2] In the leave to appeal, the applicant submits that the Court had erred in relation to its consideration of these three requirements. The grounds of appeal are considered separately, as they relate to each of the three requirements.

First requirement

- [3] The applicant contends that the third respondent (“Hwidiu”) did not provide proof of compliance with a specific standard expressed as ISO 9001:2015 (“proof of compliance”). The bid evaluation requires the submission of proof of compliance. The applicant points out that there was no such proof of compliance in the record submitted to Court for Hwidiu.
- [4] The Municipality pleaded that Hwidiu had submitted proof of compliance, it did form part of the record and was considered. However, the proof of compliance was then inadvertently left out of the record filed in Court.
- [5] The Court accepted this explanation by the Municipality. There is no dispute of fact in this regard before the Court. Even if there was a dispute of fact, the Municipality would benefit from the *Plascon-Evans* rule, as the applicant was seeking final relief. The facts before this Court, properly considered, are that Hwidiu did submit the necessary proof of compliance, but it was originally left out of the record that served before this Court.

- [6] The applicant submits in its leave to appeal that the Court erred in accepting the Municipality's version, as the deponent to the Municipality's papers did not have knowledge of these events and could not depose to these allegations. This requires closer consideration. The Municipality's deponent is the Acting Municipal Manager and states the record of this matter was presented and explained to him. In addition, the Municipal Manager pleads that "the Chairperson of the Bid Adjudication Committee and the SCM official inadvertently left out certain copies of Hwibidu's documents during the compilation of the record which was submitted to the Municipality's attorneys". The affidavit then refers to a confirmatory affidavit by the Chairperson and the SCM official attached as annexures.
- [7] When presented with these allegations, counsel for the applicant conceded that they address the first ground of appeal. There is, on this first ground of appeal, no prospects of success.

Second requirement

- [8] The second requirement, as identified in the bid specification, is that the bidders provide proof of control room registration. The applicant's case is that the successful bidders did not provide proof of "control room registration".
- [9] Everyone before the Court accepts that "control room registration" does not exist. None of the bidders, including the applicant submitted such a document. In the record presented to court, running to 3000 pages, no such registration was found.
- [10] Everyone also accepts that there is no such thing as "control room registration" in the applicable legal framework. The Private Security Industry Regulation Act 56 of 2001 regulates the security industry and is the applicable legislation. It contains no reference to control room registration. The parties focused the court's attention on section 23. Section 23 provides for inspections of control rooms and registration of service providers. This is the closest approximation of "control room registration". However, nowhere does "control room registration" appear. In short, the bid requested proof of something which does not exist.
- [11] The applicant's submission, at the stage of leave to appeal, is that its control room inspection reports are superior to that of the successful bidders. In fact, in relation to one of the successful bidders, there is no inspection report at all. I accept this may be

so. However, to succeed in its review, the applicant has to prove that the successful bidders did not comply with the mandatory requirements of the bid specifications. That is the ground of review it must prove. It has failed to do so. It matters not that the applicant's inspection reports are superior – as that was not what the bid required – nor is it the applicant's case on review. The bid required something which did not exist. The award cannot be set aside on the basis that the successful bidders did not comply with a requirement which does not factually or legally exist.

[12] On this ground also, there are no reasonable prospects of success.

Third requirement

[13] Third, the bidders had to show registration with a Bargaining Council. One of the successful bidders, the fourth respondent, is a JV. One of the partners of the JV did not submit proof of registration. The applicant's contention was that the award to the fourth respondent ought to be reviewed on this basis. The ground of review is therefore limited to the award to the fourth respondent. The Municipality contended that the bid did not require individual proof of registration by each partner to the JV and, alternatively, that one partner's proof was sufficient as the deviation was not material, premised on the jurisprudence in *Allpay*.¹ The Court accepted the Municipality's reliance on *Allpay* and concluded that the non-compliance was not sufficiently material to set aside the award.

[14] The applicant seeks leave to appeal on the basis that the Court erred in this regard, it relies, centrally, on the Supreme Court of Appeal judgment in *Minister of International Relations and Co-operation and Others v Simeka Group (Pty) Ltd and Others* ("Simeka").²

[15] In *Simeka*, the Supreme Court of Appeal set aside a tender as one of the partners to a JV had not complied with the bid specifications. The bid required audited financial statements. The Court held that as not all partners to the JV had presented audited financials, the award was to be reviewed and set aside.

¹ *Allpay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer, S.A. Social Security Agency* ("All-Pay")

² (610/2021) [2023] ZASCA 98; [2023] 3 All SA 323 (SCA) (14 June 2023)

- [16] The applicant contends that *Simeka* is support for the argument that all partners to a JV must comply with the bid specifications. With this authority in hand, the applicant submits that as the fourth respondent had not submitted individual proof of registration for each partner with the Bargaining Council, the award of the tender must suffer the same fate as that in *Simeka*.
- [17] The Court must carefully consider the judgment in *Simeka*. *Simeka* dealt with the appointment of a development partner for the design, construction, operation, maintenance and financing of a suitable and sustainable office and residential accommodation for South African diplomatic missions in Manhattan, New York City, New York. The successful bidder was itself required to provide finance for the construction of the office and residential accommodation. With this in mind, the bid specification required audited financial records of each partner of a JV. Without such audited financials, it would be impossible for a bidder to obtain funding for the project. In addition, the bid specification clearly indicated that each partner to the JV needed to have presented audited financial records. This requirement was clearly spelt out in the request for proposals which required that: (i) each bidder should provide audited financial statements for the immediate past three years; (ii) in the case of a Joint Venture, each one of the parties forming part of the Joint Venture would be required to provide audited financial statements.
- [18] There was then “a new twist of events that ultimately scuppered the entire project”.³ In the wake of allegations that had enjoyed wide-spread publicity to the effect that a member of the Joint Venture, ie Regiments Capital, was associated with a notorious “family perceived to have corruptly siphoned vast sums of money from the government and more especially from State-owned entities, the National Treasury expressed grave misgivings about granting its approval”.⁴
- [19] In these circumstances, the Supreme Court of Appeal found that the failure of one partner to the JV to provide an audited financial report, was fatal and reviewed and set aside the award.

³ *Simeka* above para 22

⁴ *Id*

- [20] The applicant in this matter relies on the outcome of *Simeka*. The outcome was to set aside a tender as a partner to a JV had not complied with the bid specifications. However, the reasons provided by the Supreme Court of Appeal for its conclusion is what weighs with the Court. The Court has considered these reasons.
- [21] In *Simeka*, the Supreme Court of Appeal leaned on the judgment in *Allpay*. In *All Pay*, the Constitutional Court held that the appropriate test is to have regard of “the facts of each case.”⁵ On the facts before it, the Supreme Court of Appeal concluded that the bid specification expressly required each partner to the JV to submit their audited financial statements.
- [22] Here the facts are different. There is no requirement in the bid specification that each partner to the JV must provide individual proof of Bargaining Council registration. On this basis, not only is *Simeka* factually distinguishable, but the very fact on which the decision in *Simeka* turns, is absent in this case. In *Simeka* it was the requirement that each partner to the JV must comply with the requirement which led the Court to conclude the award must be set aside. The converse must then be true, the absence of such a requirement – that each party to the JV must provide proof - indicates that a review is not appropriate. In this way, *Simeka* supports the approach the Court followed.
- [23] In addition, in *Simeka* the Court also had regard to the following passage in *Allpay* that “the materiality of irregularities is determined primarily by assessing whether the purposes the tender requirements serve have been substantively achieved.”⁶ In *Simeka* the materiality of the irregularity was determined on the basis that the tender could not be implemented without the bidder being able to source funding – which was impossible without audited financials. Financial institutions would not give *Simeka* the necessary funding it required to implement the tender without audited financials. The non-compliance meant the purpose of the tender requirements could not be achieved.
- [24] Before this Court, the applicant made out no case that the purpose of the tender requirements were not substantially achieved. The applicant did not make out a case

⁵ *Simeka* above para 42

⁶ *Simeka* above para 46

as to why each partner to the JV had to provide proof of registration. To the contrary, this Court was not presented with submission that the tender requirements had not been substantially achieved. On this basis also, the reasoning of the Supreme Court of Appeal in *Simeka* supports the conclusion reached by this Court.

[25] In *Simeka*, the Supreme Court of Appeal concluded that the award is to be set aside as (i) the award could not be implemented without each JV partner providing proof of audited financials and (ii) the bid specifications specifically required each partner to the JV to provide audited financial statements. The facts of this case are diametrically opposed as there is no proof that registration was required for the tender to be implemented and the bid specification did not require that each party to the JV must comply with the requirements.

[26] The Court concludes that the reasoning of the Court in *Simeka* is itself another reason why the application for leave to appeal bears no prospects of success. None of the reasons, factual and substantive, which underpinned the Court's approach in *Simeka* are present in this matter. The absence of these factors, indicate that the reasons the Court set aside the tender in *Simeka* are not present in this matter.

Costs

[27] As to the issue of costs, the general rule is that costs must follow the result. However, *Biowatch* provides that if a party wishes to litigate a fundamental right, it must not be mulcted in costs. The applicant has asserted its rights under section 34 of the Constitution. The Municipality has not provided any reason not to apply *Biowatch* in these circumstances. In these circumstances, the Court does not award any costs.

Order

[28] As a result, the following order is granted:

- a) The application for leave to appeal is dismissed.



I de Vos
Acting Judge of the High Court

Delivered: This judgment is handed down electronically by uploading it to the electronic file of this matter on CaseLines. As a courtesy gesture, it will be sent to the parties/their legal representatives by email.

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Instructed by:	M.L. MATEME INCORPORATED
Counsel for the first and second respondents:	OK Chwaro
Instructed by:	ME TLOU ATTORNEYS
Date of the hearing:	17 April 2024
Date of judgment:	28 May 2024