

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE.

CASE NO. 354/2022

(1)	REPORTABLE: <u>YES/NO</u>
(2)	OF INTEREST TO THE JUDGES: <u>YES/NO</u>
(3)	REVISED. _____
07-05-2024 DATE..... SIGNATURE	

In the matter between:

**MOPANI FLYING SQUAD AND ALARM RESPONSE
(PTY) LTD**
(REG NO: 2014/109386/07)

APPLICANT

and

MOPANI DISTRICT MUNICIPALITY

THE A TEAM TASK FORCE (PTY) LTD
(REG NO: K2018/589674/07)

FIRST RESPONDENT

SECOND RESPONDENT

JUDGMENT

Heard on 22 January 2024.

Delivery: This judgment was handed down electronically by circulation to the parties' legal representatives via email and release to SAFLII. The date and time of hand-down is deemed to be the 7 May 2024 at 11:00.

SEMENYA DJP.

[1] The applicant instituted a judicial review application in terms of the Promotion of Administrative Justice Act 3 of 2000, against the respondents in which, in the main, the following order is sought:

- a) Review of the decision of the first respondent (the municipality) to appoint the second respondent (the A Team task Force) under bid number MDM 2021/22-105 for the provision of security services to the municipality for a period of 36 months; and
- b) to declare the decision of the municipality to appoint the A Team Task Force to be invalid.

The application is opposed by the two respondents.

[2] The background facts that led to the application are that on the 03 October 2021, the municipality advertised a tender for the provision of security services to it under Bid 2021/22-150. The duration of the tender was for a period of 36 months. The closing date for the submission of the bid documents was the 2 November 2021. The bid requirements which

prospective bidders were to comply with were clearly outlined in the advertisement and the tender documents. One of the requirements which is relevant for the adjudication of the issues before the court was that the bidders were to submit their audited or reviewed company annual financial statements for the last three years. The prospective bidders were informed, in no uncertain terms, that the Municipality will not be bound to accept the lowest bid or any bid. It also reserved the right to accept the bid in whole or in part, to appoint and to cancel or to negotiate further conditions in terms of the Municipal Finance Management Act, 56 of 2003 and the Municipal Supply Chain Regulations.

[3] The prospective bidders were informed that it is only bidders who meet the prerequisite conditions of the tender who will be evaluated on the functionality test. It was further stated that only bids that met the minimum functionality test points would be evaluated on a scale of 80/20 in terms of the Preferential Procurement Policy Framework Act, 2000 (PPPFA) and the Regulations promulgated in relation thereto.

[4] It is common cause that after the evaluation of the bids, the municipality appointed and awarded the tender to the second respondent together with other eight entities to provide the security services to the municipality in

terms of the tender. Aggrieved with the decision of the municipality, the applicant approached this court with this application.

[5] The first respondent avers that eight successful bidders were appointed after an evaluation of all bids which took place in a manner which was procedurally fair, lawful and reasonable. The first respondent argues that the applicant was not appointed mainly on the ground that it submitted incomplete financial statements. The averment of the municipality is the applicant submitted annual financial statements of one year instead of three as required in the tender document. It therefore failed to comply with a mandatory requirement.

[6] It is necessary at this stage to outline the event that took place before the hearing of oral arguments on behalf of the parties. The first respondent served the applicant with a notice to oppose the application. The record of the proceedings sought to be reviewed were filed with the registrar of the Polokwane High Court on the 07 February 2022 as envisaged in rule 53. On the 28 January 2022 the attorneys of the first respondent wrote a letter to the applicant's attorneys in which they requested the applicant to provide the first respondent with proof of service of the application on the first respondent. On the 10 February 2022, the first respondent addressed

yet another letter to the applicant in which they informed the applicant that they are still waiting for the reply to the letter dated the 28 January. The applicant was further requested to remove the matter from the unopposed roll of the 8 March 2022 to the opposed roll as it has since become opposed.

[7] On the 14 February, the applicant's attorneys responded to the letters dated the 28 January and the 10 February and informed the first respondent that they are not in possession of the return of service and further that they note the request to remove the matter from the unopposed roll. The first respondent addressed yet another letter to the applicant, dated the 28 February, in which they wanted the applicant to explain what its lawyers mean when they say that they are not in possession of the return of service. The first respondent further informed the applicant that it should have filed amended its notice of motion and supplemented its founding affidavit within ten days of receipt of the record filed as envisaged in rule 53(4) and that it has failed to do so. The applicant's attorneys were requested to indicate whether the applicant intends to file any amendments to the notice of motion and the founding affidavit so as to enable the first respondent to proceed with the filing of the answering affidavit. The first respondent's attorneys informed the

applicant that they note that they have no record of the removal of the matter from the unopposed roll. The first respondent again requested the applicant to remove the matter.

[8] On the 4 March 2022, the first respondent addressed another letter to the applicant informing the applicant that should they not receive the notice of removal of the matter on even date at 14:00, they will appoint counsel who will then seek punitive costs against the applicant's lawyers. The first respondent's attorneys placed it on record in the letter that they have not yet been informed whether the applicant intend to amend its notice of motion and founding affidavit following service of the rule 53 record. On the 20 May 2022, the first respondent's attorneys addressed a letter to the applicant's attorneys in which they noted that they have filed their answering affidavit on the 4 April and that the second respondent filed theirs on the 4 May. The first respondent further noted that the applicant failed to file their replying affidavit within the prescribed time frames. The first respondent's attorneys requested the applicant's attorneys to take instructions from client as to whether the it intends to proceed with the application after receipt of the record. They further informed them that they are instructed to seek allocation of the hearing

date with the intention to have the application dismissed, should they not receive an answer to their letter within ten days.

[9] On the 2 June 2022, the applicant's attorneys responded to the first respondent and stated that they have not received the affidavits of the respondents as stated in the first respondent's letter dated the 20 May. The first respondent's attorneys, in a letter dated the 10 June, transmitted a copy of the served answering affidavit to the applicant's attorneys. They attached an email received from the attorneys of the second respondent in which they advised the first respondent that they have served their answering affidavit on the applicant on the 4 May 2022. The second respondent's answering affidavit which was served on first respondent was attached to the same letter. It was brought to the attention of the applicant's attorneys that they have omitted to advise the first respondent as to whether their client intends to pursue or abandon the application and that they should do so by the close of business on the 14 June, failing which they will proceed to seek allocation of the hearing date and to argue punitive costs against them.

[10] The applicant's attorneys replied to the letter on the 13 June and informed those of the first respondent that the sheriff failed to serve the

answering affidavits in time. They placed it on record that their amended papers incorporating condonation application will be filed on the 24 June. They further confirmed that they have been given instructions to proceed with the review application. The first respondent replied to the letter on the 14 June and placed on record that they will vigorously oppose the application for condonation in view of the record of correspondence that they have been exchanging with the applicant and the prejudice which the first respondent will suffer as a result of the intended condonation application. It was further placed on record that it is not clear as what papers was the sheriff supposed to file on time.

[11] The first respondent proceeded to seek allocation and the matter was allocated the date of the 9 February 2023. The applicant was accordingly served with the notice of set down. On the 30 January 2023, the applicant's attorneys addressed a letter to the first respondent's lawyers informing them that they have perused the roll of the 9 February and that the matter was not on the opposed roll. The first respondent replied to the letter on the 2 January 2023 informing the applicant that they have proceeded to court on the 1 February to finally enrol the matter. They stated that they were informed that the registrar has told them that this could be an error on the part of the staff in the general office and that they

have obtained a new date on the opposed roll of the 22 January 2024. The notice of removal from the roll of the 9 February 2023 and set down for the 22 January 2024 was then and there transmitted to the applicant.

[12] The matter came before court on the 22 January 2024 and the applicant had not, as at that date, filed its amended notice of motion and supplemented affidavit on the two respondents. Counsel who appeared on behalf of the applicant stated that he is standing in on behalf of the applicant's counsel and that his mandate is to apply for a postponement. The applicant did not bring a substantive application for postponement and has instead moved it from the bar. After hearing the argument by counsel for the first respondent, I dismissed the application. The matter proceeded without representation on behalf of the applicant and the second respondent.

[13] In the founding affidavit filed in support of the application, the applicant draws the court's attention to the functionality criteria part of the bid document. The applicant avers that had a proper evaluation been done, the applicant would have scored more points than the second respondent on the functionality criteria. The applicant avers that the first respondent followed a procedure which is biased, unfair, unreasonable

and unlawful in its evaluation of the bids. The applicant further states that the second respondent lacked the necessary experience and capacity.

[14] The applicant states in its affidavit that it is relying on the provisions of PAJA. Section 6(2) (a) to (i) of PAJA provides a list of circumstances under which a court or tribunal may review an administrative action. It is not clear from the applicant's affidavit upon which of the grounds listed in section 6 (2) is the applicant launching the application. The applicant avers that the first respondent's administrative action is reviewable in that the decision was taken without proper evaluation of all bids. It further avers that the first respondent was biased, unreasonable and unfair. The applicant failed to provide substantive facts upon which it relied to arrive at that conclusion. It simply made vague statements to that effect. I agree with counsel for the first respondent that the applicant failed to set out the grounds of review upon which the application hinges.

[15] The Constitutional Court in **Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others**¹ said that:

¹2004 (4) SA 490 (CC) at [10]

“...I am prepared to assume, in favour of the applicant, for the purposes of this case, that its failure to identify with any precision the provisions of PAJA upon which it relied is not fatal to its cause of action. However, it must be emphasised that it is desirable for litigants who seek to review administrative action to identify clearly both the facts upon which they base their cause of action, and the legal basis of their cause of action...”

In the absence of a clear statement from the founding affidavit with regard to which of the grounds provided in section 6(2) is the applicant relying, I am inclined to accept the first respondent's assumption that the applicant must be relying on section 6(2)(b) of PAJA.

[16] It is common cause that the second respondent was awarded the tender together with eight other bidders. On this point, the first respondent raised a point of law of non-joinder of the seven other bidders. The first respondent avers that the seven other bidders who were awarded the tender have a direct and substantial interest in the outcome of their case and the applicant's failure to join them constitutes non-joinder as envisaged in rule 10. It is now settled that the mere fact that a party may have interest in the outcome of the litigation does not in itself justify the

raising of a point of law of non-joinder- **Judicial Service Commission v Cape Bar Council.**²

[17] The applicant avers that the first respondent would have found that the second respondent lacks experience and capacity and that had the first respondent acted properly, it would have rejected the second respondent's bid. I am of the view, based on this fact, that it was not necessary to join the other seven if the applicant is of the view that they did not lack experience and capacity like the second respondent. I further fail to find how the setting aside of the award in respect of the second respondent would affect the rights of the other seven bidders. In any event, the first respondent fails to show the court how the order will be carried out without affecting the rights of the seven other bidders. The point of law of non-joinder raised by the first respondent is found to be without merit.

[18] The applicant failed to amend, add or vary the notice of motion and to supplement its founding affidavit after it was furnished with rule 53 record. The applicant failed to do so despite numeral letters written to its

² 2013 (1) SA 170 (SCA)

attorneys urging it to do so. The founding affidavit is drafted in such a way that any diligent litigator would have seized the opportunity given to him/her/it by the opponent. The applicant missed that opportunity. The facts contained in the first and second respondents' answering affidavits, read together with the record of the proceedings that led to the decision sought to be reviewed, and which served on the applicant in terms of rule 53(1)(b), are left unchallenged.

[19] The court's approach when faced with an application of this nature has been set out as follows in **Allpay Consolidated investment Holding (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others**:³

"...the proper approach is to establish, factually, whether an irregularity occurred. Then the irregularity must be legally evaluated to determine whether it amounts to a ground of review under PAJA. This legal evaluation must, where appropriate, take into account the materiality of any deviance from legal requirements, by linking the question of the compliance to the purpose of the provision, before concluding that a review ground under PAJA has been established."

³ 2014(10 SA 604 (CC) at par [25]

[20] The respondents argue that the applicant's affidavit lacks the necessary facts from which this court may establish whether an irregularity has occurred during the evaluation of the bids, which may have afforded the second respondent an unfair advantage over all other bidders. The respondents further contend that the applicant failed to furnish facts upon which this court would be able to assess whether the first respondent was biased against the applicant and that its action is unlawful. There are also no facts upon which this court may find that the first respondent acted irregularly. I agree with the contention made by the two respondents.

[21] Furthermore, there is no evidence on the part of the applicant to gainsay the first and second respondents' averment that the decision sought to be reviewed is compliant with the provisions of section 217 of the Constitution of the Republic of South Africa and its Supply Chain Management Policy. In the same way, there are no facts which may assist the court in determining whether a decision of the first respondent is unreasonable or not.⁴ In the absence of evidence to the contrary, this court has no reason to reject the version of the respondents that proves that the second respondent's bid complied with the requirements of the bid.

⁴ Bato above.

[22] The logical conclusion one may be forgiven to arrive at is that the applicant failed to supplement its founding papers after it was provided with the record is that it could not find facts upon which it can rely to challenge the decision of the first respondent. It was also unable to find facts to support its averment that the second respondent lacks experience and capacity which disqualified it from being awarded the tender. I will, in the circumstances find that the first respondent's administrative action is lawful, reasonable and procedurally fair as envisaged in section 33 of the Constitution.

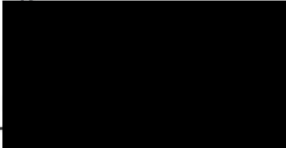
[23] The second respondent denies that it lacked capacity to provide the first respondent with the necessary security. In its affidavit, the second respondent states that it had the number of security radios, firearm licences for hand guns and vehicles. The second respondent further argues, correctly so, that there is nowhere in the applicant's affidavit where it is alleged that the requirements in the bid specification of the first respondent are unconstitutional. The second respondent's submission that the process followed by the first respondent appears from the rule 53 record to open, fair and reasonable. I agree with this submission. In any event, there is no evidence to gainsay this submission.

[24] With regard to costs, I agree with counsel for the first respondent that the manner in which the applicant conducted itself constitute a fragrant abuse of court processes. The applicant was given sufficient opportunity to withdraw the application after it was provided with the record. Its attorneys replied to the applicant's letter by stating that their instructions are to proceed. The applicant was further reminded on numerous occasions to consider to amend its notice of motion and to supplement its founding affidavit. The applicant simply ignored the first respondent's letters until the first respondent decided to apply for a date of hearing of hearing of the application.

[25] I further find that the applicant is not entitled to the Biowatch protection in that it clearly had no intention to proceed with the application. It is clear from the manner in which the applicant conducted its affairs that it launched the application with the purposes of frustrating the two respondents. The applicant is found to be a vexatious litigant as opposed to a litigant who wanted to protect its constitutional rights. I agree with counsel for the applicant that a punitive cost order, in the circumstances of this case, is justified.

[26] In the result I make the following order:

- i. The application is dismissed; and
- ii. The applicant shall pay the first and second respondents' costs on attorney and client scale.



M V SEMENYA
DEPUTY JUDGE PRESIDENT
LIMPOPO DIVISION, POLOKWANE.

APPEARANCES:

For the applicant:

ADV Mothupi:

Instructed by: Dakalo Ramuthaga Attorneys

For the first respondent:

ADV P Mthombeni

Instructed by:

Mahumani Incorporated.

For the second respondent:

ADV S I Mashele

Instructed by Mpho Mashiloane Attorneys.