

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MAKHANDA)**

Case no: 673/2023

Reportable YES/NO

In the matter between:

**LIKUNGA PROTECTION & SECURITY
SERVICES (PTY) LTD**

Applicant

and

EMALAHLENI LOCAL MUNICIPALITY

First respondent

SOV SECURITY SERVICES CC

Second respondent

JUDGMENT

Cengani-Mbakaza AJ

Introduction

[1] By way of the amended notice of motion filed of record and issued on 23 June 2023, the applicant, a security services provider and a private company registered in terms of the Companies Act No. 71 of 2008, seeks an order reviewing and setting aside the decision made by the first respondent (“the Municipality”).¹ The decision relates to the award of the tender (“a tender or a bid”) under bid ELM/1/7/2022T in favour of the second respondent. Furthermore, the applicant seeks an order that either: (a) substitutes the Municipality’s decision with one that appoints it, alternatively; (b) to remit the decision to award the second respondent back to the Municipality for reconsideration. The application is opposed by both the Municipality and the second respondent.

¹ The municipality is an organ of the state with separate legal entity which is duly constituted in terms of section 2 of the Local Government Municipal Act 32 of 2000.

[2] On 27 July 2022, the Municipality's Bid Evaluation Committee ("Municipality's BEC") issued a request for the bid ("RFB") for the provision of security services for a period of three years. The bid's closing date was 26 August 2022.

[3] The details on the conditions of the bid were fully outlined at pages 25-78 of the RFB, *inter alia*, as follows:

'Bidders will be adjudicated in accordance with the Municipality's Supply Chain Management Policy in terms of Preferential Procurement Policy Act new regulations 2017 and will be based on 80/20 points system...

Completed MBD 1, MBD 3.3, MBD 4, MBD 6.1, MBD 7, MBD 8 and MBD 9.

All other relevant pre-requisites as detailed in the bid documents shall apply.

Failure to complete all the supplementary information will result in bidder being deemed non-responsive ...'

[4] Among the set of documents that were to be completed and duly signed, one in particular included the MBD 5 where it was expected of the bidders to declare whether they were by law, required to submit a three-year Annual Financial Statements ("AFS") for auditing and, if so, to submit same. The MBD 5 was to be completed for all the procurement that exceeded R10 million rand.

[5] The applicant submitted its bid along with other 24 bidders. The Municipality's Bid Adjudication Committee ("the Municipality's BAC") disqualified the applicant's bid due to its omission to submit a three-year audited AFS. Subsequently, the Municipality's BAC recommended the appointment of the second respondent. It is against this background that the second respondent is cited in the proceedings.

[6] The crisp issue is whether the Municipality committed a reviewable irregularity when it excluded the applicant on account of failing to furnish the audited AFS for the previous three years.

The applicant's case

[7] In his supplementary founding affidavit, Mr Mbulelo Vincent Mxoli, the applicant's director asserts that the requirement to submit the audited three-year AFS which is MBD 5 of the tender documentation was not consistently applied to other bidders. He further concedes that he failed to submit an AFS. The following is extracted in paragraph 15 of his supplementary founding affidavit:

'15. The Applicant admits not having submitted the audited AFS as an oversight as its MBD 5 was completed and referred to the AFS as attached. Please refer to 'R1' attached. However, the Applicant's contention is that the submission of the AFS was not a mandatory requirement to test the responsiveness of the bids and, if it is found that indeed it was a requirement for responsiveness, the requirement was not applied consistently and unfairly applied on the Applicant as more fully set out hereunder.' [Footnote omitted.]

[8] The applicant further avers that the second respondent failed to submit an audited three-year AFS. The statements submitted were not signed.

The Municipality's case

[9] In his answering affidavit Mr Thobela Terrence Javu, the Municipality's erstwhile manager, avers that the listed documents in section F of the RFB were inclusive of the MBD 5. The applicant completed the MBD 5 and indicated that it was by law required to prepare the three-year AFS. It also indicated on the form that it would attach and submit the requisite AFS but failed to do so.

[10] All the bidders were informed about the requirement to submit AFS. The second respondent, so it is averred, submitted the three-year audited AFS and won the tender.

The second respondent's case

[11] In his answering affidavit, Mr Viwe Mbobo, who completed and furnished all the documents required in the RFB on behalf of the second respondent, declares

that he understood the tender conditions. Consequently, he made it his business to submit the second respondent's audited AFS for 2019/2020, 2020/2021 and 2021/2022 financial year.

[12] He states that the copies attached to the applicant's founding affidavit are not the best of the clear copies, the lack of signature may be that the copies were made from another copy. In his answering affidavit, the second respondent has annexed the three-year AFS as VM-1, VM-2 and VM-3 respectively.

The legal framework

[13] The Constitution of the Republic of South Africa ("the Constitution") and the Procurement Preferential Policy Framework Act² ("PPPFA") set out a legislative framework in terms of which decisions may be taken in the procurement process. The general rule under s 217 of the Constitution is that all public procurement must be effected in accordance with a system that is fair, equitable, transparent, competitive and cost-effective.³

[14] These core principles of public procurement are given effect by a range of statutes and subordinate legislation such as the regulations made in terms of the PPPFA and policies and guidelines, such as supply-chain management policies of bodies.⁴ In *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer, South African Social Security Agency and Others*⁵, Froneman J emphasized that 'compliance with the requirements for a valid tender process, issued in accordance with the constitutional and legislative procurement framework, is thus legally required', and that they are not merely internal prescripts that may be disregarded at whim'.

[15] In terms of section 239 of the Constitution, the Municipality is an organ of the state, therefore a decision to reject a tender is an administrative action as defined in

² The Preferential Procurement Policy Framework Act 5 of 2000 is a national legislation as contemplated in terms of section 217(3) of the Constitution.

³ *Airports Company South Africa SOC Ltd v Imperial Group Ltd and Others* 2; [2020] 2 All SA 1(SCA); 2020 (4) SA 17 (SCA) at para 64.

⁴ *Joubert Galpin Searle Inc. and Others v Road Accident Fund and Others* 2014 (4) SA 148 (ECP) A 2014 (4) SA p148 at para 57. See also *WDR Earthmoving Enterprises and Another v Joe Gqabi District Municipality and Others* (ECG) unreported case no CA 298/2016 of 13 March 2017.

⁵ 2014 (1) SA 604 (CC) at para 40.

terms of section 1 of the Promotion of Administrative Action Act 3 of 2000 (the PAJA). The power to review an administrative action is sourced in the Constitution⁶ and PAJA.⁷

The parties' legal submissions and analysis by the court

[16] Mr Mphithi, counsel for the applicant argued that the submission of the AFS was not a mandatory requirement. He further criticized the manner in which the RFB was formulated. He argued that the failure by the Municipality to include MBD 5 in the RFB and in particular in the list of the section that specified the required documents rendered the RFB vague.

[17] Mr Bodlani SC, counsel for the Municipality, on the other hand, argued that as part of the requirements for the tender, the Municipality had stipulated that the bids would be adjudicated in terms of the Municipality's Supply Chain Management Policy and PPPFA. In terms of the Municipal Finance Management Act, 56 of 2003 (MFMA), if the value of the transaction is expected to exceed R10 million vat included, and if the bidders are required by law to prepare annual financial statements for auditing, they are required to furnish their audited annual financial statements for the past three years as part of the tender conditions.

[18] Counsel further argued that the Municipality clearly stipulated the tender conditions and the failure to submit the audited three-year AFS was communicated with the applicant and it failed to comply with the tender conditions. Ms Nxazonke-Mashiya, counsel for the second respondent raised similar submissions to those made by counsel for the Municipality.

[19] Whenever a court is called upon to review a decision of a public body, its powers are limited. The court's duty is not to usurp the functions of the administrative agent. Section 8 of the PAJA provides for remedies in proceedings for judicial

⁶ Section 33 of the Constitution provides:

'Just administrative action' (1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.'

⁷ Section 6 of the PAJA sets out a list of 'grounds' on which courts can review administrative action. These grounds of review include illegality, procedural unfairness, irrationality, unreasonableness, and other unconstitutional or unlawful action.

review, and in particular section 8(2) provides for a court to grant an order that is just and equitable. The full Court in *WDR Earthmoving*⁸, Plasket J (as he then was) held:

‘Administrative action may only be set aside by a court exercising its review powers if it is irregular. It may not be interfered with because it is a decision a judge considers to be wrong’.

[20] Whether the applicant’s tender offer was correctly declared as non-responsive has to be decided in the context of the decision in *Dr JS Moroka Municipality & Others v Betram (Pty) (Ltd) & Another*⁹, where it was held that it was for the Municipality and not the court to decide the prerequisites for a valid tender. It is well-established that a failure to comply with the prescribed conditions would result in a tender being disqualified as an “acceptable tender” unless those conditions were immaterial, unreasonable and unconstitutional.

[21] In the present instance, I disagree with the arguments raised by the applicant’s counsel for the following reasons: Section 168 of the Local Government; MFMA, in particular Regulation 21(d) provides:

‘A supply chain management policy must determine the criteria to which bid documentation for a competitive bidding process must comply, and state that in addition to regulation 13 the bid document must

...

(d) If the value of the transaction is expected to exceed R10 million (VAT included), require bidders to furnish—

(i) If the bidder is required by law to prepare annual financial statements for auditing, their audited annual financial statements-

(aa) for the past three years;or

⁸ *WDR Earthmoving* (note 4 above) at para 10.

⁹ [2014] 1 All SA 545 (SCA). See also *Alfred Nzo Municipality and Others v Tekoa Consulting Engineers (Pty) Ltd* (ECG) unreported case no CA07/2023 of 20 June 2023.

(bb) since their establishment if established during the past three years.’

[22] From this extract, it is clear that the submission of the AFS for a three-year period in cases where the value of the transaction is expected to exceed R10 million is a mandatory requirement. *In casu*, it is common cause that the tender was for more than R10 million. The applicant’s counsel criticized the Municipality for its failure to list the MBD 5 in the section that dealt with checklist of the documents that were required. Considering the fact that the MBD 5 was annexed in the RFB as part of the documents that were required to be completed by the tenderers, this criticism has no basis. The Municipality was very explicit in what it intended to achieve.

[23] The applicant’s completion of MBD 5 document clearly illustrates that the applicant was fully aware of what the Municipality intended to achieve. Furthermore, the applicant admitted that the failure to submit the audited three-year AFS after it completed MBD 5 was due to an oversight on its part. In a competitive environment, as in the present case, the Municipality cannot be blamed for the omissions caused by a tenderer who failed to pay attention to the stipulations of the RFB. The obligation to furnish the audited three-year AFS is statutorily prescribed. The Supreme Court of Appeal in *WDR Earthmoving Enterprise & Another v Joe Gqabi District Municipality and Others* (“WDR Earthmoving”) acknowledged that the failure to provide the requisite audited AFS cannot be regarded as trivial, or of a minor nature. Consequently, the requirement cannot be described as immaterial, unreasonable or unconstitutional.¹⁰ Based on the aforesaid, the Municipality was correct in concluding that the applicant’s bid was non-responsive, therefore it was entitled to disqualify the applicant’s tender.

[24] The two further arguments raised by the applicant’s counsel need consideration. Referring to the SCA’s decision in *WDR Earthmoving*,¹¹ the applicant’s counsel argued that the second respondent submitted statements which were unaudited and therefore its bid should have been declared non-responsive in accordance with the tender conditions. Had the submission of the AFS been a

¹⁰ (392/2017) [2018] ZACSA 72 (30 May 2018) at para 21.

¹¹ *Ibid*.

requirement, the second respondent would not have been awarded the tender, so the argument continued. The three- year AFS that were annexed in the second respondent's offer were unaudited on the basis that they were unsigned, he argued. The applicant's counsel further argued that the first respondent's decision to award the tender to the second respondent should be remitted to the Municipality for reconsideration. By contrast, the second respondent submitted that the three-year AFS were properly signed by the auditors and the applicant's copies faded because a lot of copies were made from the original.

[25] It is observed that *WDR Earthmoving* case has distinct elements that make it different from the present case, and these differences are relevant to the decision-making process. In the case of *WDR Earthmoving*, there was a consensus that the AFS were not audited. The SCA ruled that the fourth respondent's tender was deemed non-responsive due to its failure to submit audited AFS for a period of three years. In the current case, there is a disagreement about whether the three-year AFS were audited or not, and this dispute triggers the application of *Plascon Evans*¹² principle.

[26] After examining the second respondent's three-year AFS, I specifically requested that the applicant's counsel provide a convincing argument to support their claim regarding the second respondent's three-year AFS. However, their argument was unconvincing because the second respondent's three-year AFS, which is part of the documents submitted to the court bear the signature of one Mr Tshabalala with practice number BAP (SA) 1725 purportedly the auditor, on page 1 of the documents. Although the signature appears on the first page of the filed documents and not on the other pages, it is undisputed that the AFS were audited by the same firm of auditors, and each statement includes the following components: accountant's report, member's approval, audit committee responsibilities, statement of comprehensive income, statement of financial position, statement of cash flows, and statement of changes in equity. The inclusion of all these requisite components in the AFS squarely rebuts the applicant's claim that the Municipality's decision lacked reasonable grounds or justification. Therefore, the applicant's claim that the

¹² In terms of the *Plascon Evans* principle, when factual dispute arises, relief should be granted only if the facts stated by the respondent, together with the admitted facts in the applicant's affidavits justify the order. *Plascon Evans Paints Ltd v Van Riebeeck (Pty) Ltd* 1984 (3) 623.

Municipality acted arbitrarily or capriciously in awarding the tender to the second respondent lacks legal merit. It stands to reason therefore that the applicant has failed to make out a case for the relief sought. In the exercise of my judicial discretion, I find no compelling reason to deviate from the established principle that the successful party should be awarded costs, and therefore, I rule that the costs should follow the event.

Order

[27] The following order shall issue:

The review application is dismissed with costs.

**N CENGANI-MBAKAZA
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA**

APPEARANCES:

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