



**HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

CASE NO: 38145/2022

(1) REPORTABLE: NO.
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.
DATE: 18 JUNE 2024
SIGNATURE [Redacted Signature]

In the matter between:

**KEEGANS AUTO SPARES AND ACCESSORIES CC
t/a JAYMEES MIDAS**

Applicant

and

NATIONAL TREASURY OF SOUTH AFRICA

First Respondent

CHIEF DIRECTOR: TRANSVERSAL

CONTRACTING OFFICE, NATIONAL TREASURY

Second Respondent

THE ACTING DIRECTOR GENERAL,

NATIONAL TREASURY

Third Respondent

THE MINISTER OF FINANCE

Fourth Respondent

THE MINISTER OF POLICE

Fifth Respondent

THE NATIONAL COMMISSIONER OF POLICE

Sixth Respondent

ALLPARTS (PTY) LTD

Seventh Respondent

KAIZEN MSD (PTY) LTD

Eighth Respondent

AHK MOTOR PARTS (PTY) LTD

Ninth Respondent

DAR AUTOMOTIVE (PTY) LTD

Tenth Respondent

BOUTIQUE LEASING COMPANY (PTY) LTD

Eleventh Respondent

Summary: *application for leave to appeal a decision refusing review of a tender – unsuccessful tenderer's bid non-compliant – decision objectively rational – no reasonable prospects of success – no other compelling reasons – leave to appeal refused.*

ORDER

The application is refused with costs, including costs of two counsel, where employed.

J U D G M E N T

(In the application for leave to appeal)

This matter has been heard in open court and is otherwise disposed of in terms of the Directives of the Judge President of this Division. The judgment and order are accordingly published and distributed electronically with the effective date of judgment being 18 June 2024.

DAVIS, J

Introduction

[1] The applicant was the unsuccessful bidder in a tender to supply automotive parts and tools to the South African Police Service. The court refused an application to have the decision not to award the applicant a tender reviewed and set aside. The applicant now seeks leave to appeal that refusal.

The application for leave

[2] The applicant raised numerous grounds in its application for leave to appeal why it contended that this court had erred. Twelve of the thirteen grounds centered around the issue of warehousing. In the bid documents the applicant had been required to disclose sufficient warehousing capacity to satisfy the “footprint” requirement of the tender.

[3] I have perused the record yet again and had due regard to the argument presented on behalf of the applicant but none of the arguments convinced me that the applicant in fact had submitted a true, correct and compliant bid. All the surrounding arguments on behalf of the applicant, stumble at this hurdle. This is principally the hurdle which the applicant needed to overcome to indicate reasonable prospects of success on appeal.¹

[4] In addition, it appears that the applicant’s contention that the National Treasury needed guidance as to how it should conduct its due diligence or “*other verifications in Transversal Contracts*” has been made without the necessary factual foundations. This contention was advanced as a “compelling reason”² why leave to appeal should be granted.

[5] I shall deal with these two aspects hereunder when considering the respondents’ opposition to the application for leave to appeal.

¹ Section 17(1)(a)(i) of the Superior Courts Act, 10 of 2013 (the Act).

² Section 17(1)(a)(ii) of the Act.

The first to fourth respondents' arguments

[6] These respondents firstly argued that the hearing of an appeal would have no practical effect and that the application for leave to appeal should be refused on this ground alone.³

[7] The reason for this contention is that the extended date of the bid validity period was 8 April 2022. The applicant did not claim that the whole tender be set aside and during argument did not persist with the relief that the award of the tender to two other successful tenderers, being the seventh and eighth respondents, be set aside.

[8] The argument was that if leave is granted, and the decision is remitted for reconsideration of the applicant's bid, both the bid validity and the tender period would have expired.

[9] I am not entirely convinced that the bid itself would have lapsed as a remittal would entail the reconsideration of a validly submitted bid. What is however a relevant factor is the expiration of the tender itself. It has been in operation since 7 March 2022 and the tender period is 36 months. It therefore expires in about 8 months, having been in operation for more than two years. It is doubtful whether an appeal, a remittal and reconsideration would be able to take place prior to the expiry of the tender. Even if the applicant were to be successful in both these aspects, the practical effect would be very little.

[10] The additional argument of these respondents was that, while the parties were all *ad idem* that a successful bidder need not have indicated a physical presence inside the province for which it was bidding in order to satisfy the

³ See Section 16(2)(a)(i) of the Act.

footprint requirement, it at least had to indicate a “physical and geographical space” (warehouse) from which it intended to supply parts from.

[11] Based on this, these respondents argued that there was no material difference whether Treasury referred to its verification process as a “due diligence” process in terms of clause 8.1 of the SCC or a verification process in terms of clause 5.3.5 (c) thereof. The fact remains that Treasury had been entitled to verify the truthfulness of the information submitted by a bidder regarding compliance with bid requirements. Not only is this entitlement (or obligation) provided for in the SCC, but it is sourced in the PFMA.⁴

[12] This was exactly the finding in paragraph [49] of the judgment. These respondents contend that the finding was correct. I fail to find reasonable prospects that a court of appeal would find that, in circumstances where the terms of the SCC contemplated compliance with the legislative prescripts of the PFMA, a party should be able to avoid scrutiny because one rather than the other of a set of terms were referred to when a verification exercise was conducted. Surely the substantive issue, namely verification, should prevail over from.

[13] The substance of the facts were that, even while ownership per se was not a requirement in respect of a warehouse, the applicant factually did not have any warehouses of its own, did not have any leased warehouses nor did it have an existing arrangement with the third party from which it could render the services. At best it might have had an undisclosed agreement that Motus would in fact render the service. It is this aspect which Treasury, upon conducting a site visit at the indicated warehouse, found to constitute non-compliance with the tender requirements.

⁴ The Public Finance Management Act,

[14] The applicant's contentions that Treasury was expected to have conducted a further site visit at the "Florida warehouse" simply because it had indicated an intention to do so, takes the matter no further. It in fact indicated that the applicant had presented incorrect (or false) information in its bid by indicating a different warehouse, but moreover, even if such an inspection were to have taken place, it would have revealed that the Florida warehouse did not belong to the applicant and was not designed nor capacitated to render the services bid for.

[15] On all counts there does not appear to be a reasonable prospect that a court of appeal would find that the applicant should not have been found ineligible to be awarded a tender.

The eighth respondent's argument

[16] This respondent also considered and meticulously evaluated the twelve grounds relied on by the applicant in its application for leave to appeal. Without diminishing the evaluative efforts, I find it unnecessary for purposes of this judgment to repeat that process, primarily for the reason that the basic premise namely that Motus (and not the applicant) was the actual party contemplated to render the services and that this fact had not been disclosed in the applicant's bid documents, must prevail.

[17] Motus had not been listed as the applicant's exclusive supplier in table TCBD.1 of the bid documents, where the applicant had been required to do so and neither was it declared as an intermediary between the applicant and the manufacturers of the respective parts and tools. All this was only discovered during Treasury's inspection at the warehouse indicated by the applicant, where Motus' actual role, was explained by the applicant itself. The explanation amounted to a virtual "wholesale abdication" of the tender obligations, so this

respondent contended. This is in fact what this court has also found and, on the evidence presented, there is no indication that this factual finding was incorrect.

[18] In addition to what has been argued by the first four respondents regarding the lack of a practical effect, the eighth respondent pointed out that the initial tender evaluation and consideration period was approximately 6 – 7 months. If this period is factored into the time periods referred to in paragraph [8] above, then it is clear that the probabilities become overwhelming that, even if the applicant were to be granted leave to appeal and even if it were to succeed on appeal in respect of its claim for a remittal, then the validity period of the tender would have expired by the time any reconsideration could be finalised. Having regard to the provisions of section 16(2)(a)(i), leave to appeal should be refused on this ground alone.

[19] In addition, in the circumstances where the applicant has not sought a review and setting aside of the whole tender process and has during the course of litigation elected not to proceed with the review of the awards to the seventh and eighth respondents, the matter became one limited to the applicant only. There was no “discrete legal issue of public importance” which could either satisfy section 17(1)(a)(ii) or which would enjoin a court to exercise its discretion to grant leave to appeal despite the issue in all probability becoming moot.⁵

Summary of conclusions

[20] On the issue of whether the applicant’s bid had been compliant, I find that there are no reasonable prospects of success on appeal. I also find that there are insufficient compelling reasons to otherwise grant leave to appeal. In addition, I find that there is a real prospect that, even if successful on appeal, an order of

⁵ *Qoboshiyane NO v Avusa Publishing Eastern Cape (Pty) Ltd* 2013 (3) SA 315 (SCA) and *Legal Aid South Africa v Magidiwana* 2015 (2) SA 568 (SCA).

remittal would have little or no practical effect and that leave to appeal should also be refused on this ground. I find no cogent reason why costs should not follow the event.

Order

[21] In the premises the following order is made:

The application for leave to appeal is refused with costs, including the costs of two counsel, where employed.


N DAVIS
Judge of the High Court
Gauteng Division, Pretoria

Date of Hearing: 02 April 2024

Judgment delivered: 18 June 2024

APPEARANCES:

For the Applicant:

Attorney for the Applicant:

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For the 1st to 4th Respondents:

Attorney for the 1st to 4th Respondents:

Adv M P D Chabedi SC together
with Adv N January

State Attorney, Pretoria

For the 7th Respondent:

Adv Y Alli together with

Adv S Mohammed

Attorney for the 7th Respondent:

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For the 8th Respondent:

Adv M Cajee together with

Adv M K Peacock

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Taahir Moola Attorney, Norwood

For the 11th Respondent:

Mr M Bouwer (watching brief)

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