

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

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

4 November 2024  
DATE

  
SIGNATURE

**CASE NO: 121053/2023**

In the matter between:

**FUMANI HOLDINGS (PTY) LTD**

**Applicant**

and

**MINISTER OF FINANCE**

**1<sup>st</sup> Respondents**

**35 OTHER RESPONDENTS**

**2<sup>nd</sup> -36<sup>th</sup> Respondents**

---

**JUDGMENT**

---

*(The matter was heard in open court on 4 September 2024. Having heard counsel for the parties, judgment was reserved. The reserved judgment was handed down by uploading the judgment onto the electronic file of the matter on CaseLines. The date of the judgment is deemed to be the date of the uploading thereof onto CaseLines)*

**BEFORE: HOLLAND-MUTER J:**

[1] The Applicant (referred to as *"Fumani Holdings"*), seeks to review the decision by Treasury (the organ acting on behalf of the Minister of Finance), who disqualified the Applicant's tender for the supply and delivery of sedan, light and heavy commercial vehicles, busses, motorcycles, agricultural tractors, construction plant and equipment to the State for a period of three years under bid number RT57-2022. Bidders were invited to submit bids in respect of nine (9) categories of vehicle, with each category comprised of multiple subcategories.

[2] Although 35 other respondents, although not *in nomine*, were cited in the application, the application only proceeded against the Minister of Finance (The first respondent referred to as "Treasury" in the judgment).

[3] The tender was a transversal tender. Transversal contracts are contracts facilitated by Treasury on behalf of the State. Treasury normally issues transversal contracts when there is more than one Organ of State that requires the supply of certain services or vehicles. The participating organs in this instance included national and provincial departments, public entities and municipalities.

[4] The transversal term contract that is the subject of this tender applies to general purpose pool vehicles for the State, including hybrid and electrical

vehicles, sedan/hatch vehicles, light commercial vehicles, high mobility vehicle trucks, multi-purpose and or sport utility vehicles, busses, panel vans, motor cycles, emergency medical response vehicles and construction plant, equipment and tractors.

[5] In light of the vast quantum, scope and length of the advertised tender, Treasury needed credible information about the bidders to ensure that tenderers appointed would be able to execute their mandates. Treasury accordingly prescribed expressly mandatory and material conditions in the **Special Conditions of Contract (SCC)** for the tender. *The prescribed conditions are not disputed.* The interpretation of the contents of **clause 5.3.3 (e)** is the subject of the dispute. See authority to set requirements, below.

[6] **Clause 5.3.3 (e)** of the SCC has the following express material terms for the tender:

6.1 **Clause 5.3.3 (e)( i )** of the SCC clearly and unambiguously states that the prescribed letter may *“not be from a dealership”*.

6.2 **Clause 5.3.3(e)(ii)** provides that the principal manufacturer must underwrite the warranties for all items offered under the contract, including warranty repairs and services through existing service centres or dealerships.

6.3 **Clause 5.3.3(e)(iii)** requires that the letter from the vehicle manufacturer or importer must be on the third party’s letterhead and originally signed.

6.4 **Clause 5.3.3(e)(iv)** states that the letter from the vehicle manufacturer or importer must list all item numbers and descriptions.

6.5 **Clause 5.3.3(e)(vii)** requires that the manufacturer or importer must note the SCC.

[7] **Clause 5.3.3(f)** of the SCC clearly states that the prescribed requirements in **clause 5.3.3(e)** be confirmed and that a bidder's bid, other than a manufacturer or importer, who fails to give the authorisation letter from the vehicle manufacturer or importer as required, will be invalidated for the bid for the items offered if non-compliance occurs.

[8] It is an established core of tenant procurement that Treasury has executive authority to prescribe prerequisites for the validity of tender submissions and that the failure of a tenderer to comply with material conditions prescribed by Treasury would result in the disqualification of a bid as an unsuccessful tenderer under the auspices of the **Preferential Procurement Policy Framework Act 5 of 2000 (the "PPPFA")**.

[9] If a bidder participating in a transversal tender is successful, the bidder is included in a pool of approved bidders and individual organs of state can contact the approved bidder directly. In this instance, a pool of approved bidders has been created for each sub-category of vehicles or equipment included in the tender.

[10] Treasury does not have the inherent power to condone a failure by a bidder to comply with peremptory requirements if specified in the SCC, and has not been clothed with the discretion to do so.

#### **BACKGROUND:**

[11] Treasury received 94 bids to this tender. The Applicant (Fumani Holdings), submitted a bid in respect of multiple items related to two main categories. In total Fumani Holdings submitted a bid for 65 sub-categories of items specified in the tender. Fumani Holding's bid was largely unsuccessful and its bid was successful in respect of one category.

[12] Treasury evaluated the bids over the following three phases:

**Phase 1:** Pre-Qualification Criteria: The bids from tenderers that failed to meet the pre-qualification criteria were disqualified. Provisional successful bids are forwarded to Phase 2 for evaluation.

**Phase 2:** Fumani Holding's bid was not disqualified in Phase 1 and together with the other 91 bids, were evaluated during Phase 2. During this phase the bids are evaluated based on submitted documents for administration compliance and mandatory requirements. 56 of the bidders did not meet the mandatory requirements. Fumani Holdings was one of the unsuccessful bidders during this evaluation.

**Phase 3:** Price and B-BBEE requirements are applied using the 90/10 points system. It is not relevant because Fumani Holdings' bid was unsuccessful during the evaluation in Phase 2.

[13] Fumani Holdings' bid met the requirements during phase 1 and was subjected to the phase 2 evaluation to determine whether the bid comply with the administrative compliance and mandatory requirements.

[14] National Treasury requires creditable information about the bidders and the SCC expressly stipulated several mandatory material conditions. Should a

bidder fail to comply with the mandatory requirements, the bid will be disqualified.

[15] One of the mandatory requirements is the "Authorisation Declaration" as stipulated in clause 5.3.3 of the SCC. The clause provides that all bidders must complete the authorisation declaration for all services and goods in full, sign the declaration and submit it together with the bid response at the closing date and time for the bid. Failure to submit a duly completed declaration and signed Authorisation declaration together with required annexures, will invalidate the bid.

[16] The State (Treasury) reserves the right to verify any information supplied by the bidder and should the information be found to be false or incorrect, the State can exercise its remedies, including disqualifying the bid.

[17] The SCC further stipulates that should any offer not be that of the actual manufacturer or the importer of the vehicle, a letter from the vehicle principal manufacturer is required to confirm the supply arrangements between the parties. The authorisation declaration *must* include inter alia the following:

17.1 A letter confirming supply of vehicles from the manufacturer or importer, but not from a "*dealership*".

17.2 The principal manufacturer should underwrite the warranties for all items offered under the contract including warranties repairs and services through existing service centres and dealerships.

17.3 The letter must also be on the Third-Party letter head, dated and originally signed. Failure to comply with these mandatory requirements will invalidate the bid.

[18] Fumani Holdings's bid failed phase 2 because Fumani Holdings. On its own submission, Fumani Holdings was neither a manufacturer nor importer of the vehicles it tendered to supply. Fumani Holdings did annex several letters to its bid purporting to be authorisation letters from UD Trucks Newcastle, John Deere (Pty) Ltd— "**John Deere SA**") and AFGRI (Agri Services (Pty) Ltd — "**Afgri**").

#### **UD Trucks Newcastle:**

[19] Fumani Holdings submitted a letter from UD Trucks Newcastle to confirm the supply arrangements between the parties. This letter did not comply with clause 5.3.3 of the SCC because UD Trucks Newcastle is not the manufacturer or importer of the vehicles to be supplied. The principal manufacturer also did not underwrite the warranties for all items offered under the contract.

[20] Treasury had no discretion to condone the failure by Fumani Holdings to comply with Clause 5.3.3 (e) (vii). There was no confirmation from the manufacturer or importer as required by clause 5.3.3. UD Trucks Newcastle is a dealership and the SCC forbids contracts with dealerships.

#### **John Deere SA and Afgri:**

[21] Fumani Holdings submitted three purported authorisation letters under clause 5.3.3 (e) that were sent by a dealership AFGRI and a representative, John Deere SA in respect of the applicable items in the bid. The first letter submitted on 3 August 2022 was sent by John Deere SA. The letter had a

heading ***"AFGRI Sub-dealer Application for Fumani Holdings"***. This letter claims that John Deere SA acts on behalf of John Deere Asia (Singapore). The letter however was not on the letterhead of John Deere Asia (Singapore) and also not originally signed by John Deere Asia (Singapore).

[22] The letter also did not allege that John Deere SA was the principal manufacturer or importer of the AFGRI items. The letter failed to comply with clause 5.3.3 (e)(i) of the SCC as it was neither manufacturer or importer. The letter further failed to confirm the parties' supply arrangements as required in clause 5.3.3(e) of the SCC.

[23] The letter also mentioned that Fumani Holdings was approved as a sub-dealer of AFGRI to sell John Deere Agricultural & Turf Equipment. Fumani Holdings is limited to AFGRI's South Africa's dealer agreement except for National Government tenders which will be open to all dealers to tender. This does not comply with the mandatory material requirements of clause 5.3.3(e) the SCC because it describes Fumani Holdings as a dealer.

[24] The letter further does not list the list of item numbers and descriptions and this is a further disqualification of the bid.

[25] The follow-up letter of 8 November 2022 submitted by Fumani Holdings in respect of the AFGRI items was drawn by John Deere SA. This letter claims that John Deere SA acts on behalf of John Deere Construction & Forestry Company in relation to AFRGI items. This contradicts the previous letter claiming John Deere SA acts on behalf of John Deere Asia (Singapore). This is a clear contradiction. The letter does not allege that John Deere SA is a manufacturer or importer and fails the mandatory material requirements of clause 5.3.3 (e) of the SCC.

[26] There are further aspects that disqualify the bid. The aspect of warranties by the principal manufacturer is absent in this letter. It is safe to hold that the bid did not pass the phase 2 evaluation on the material requirements in the SCC. Treasury had no discretion to condone these non-compliances by Fumani Holdings and communicated its decision to Fumani Holdings.

[27] Fumani contends that the decision by Treasury is ultra vires and ought to be reviewed.

[28] Treasury provided Fumani with reasons for refusing to approve the other remaining tender items. The reasons why Treasury refused Fumani's bid on the other items was the non-compliance with clause 5.3.3(e)(i) of the Special Conditions of Contract (SCC), which required bidders, if the bidder was not a manufacturer or importer of a vehicle they intended to supply, to provide an **"authorisation declaration"** from the manufacturer or importer of the equipment they intend to supply. The issue of manufacturers' warranties were also lacking.

[29] Treasury explained that Fumani Holdings submitted authorisation declarations from dealerships who are not manufacturers or importers. This disqualified Fumani Holding's tender because the bids were non-compliant with clause 5.3.3(e) of the SCC.

[30] Fumani Holdings contends that the decision by Treasury to disqualify its bid is *"bad at law"* for the following reasons:

- Treasury treated Fumani Holding's bid differently by subjecting it to a process that was not applied equally to all bidders. Fumani Holdings alleges that Treasury provided other bidders an opportunity to *"clarify"* that bidder's non-compliance with various provisions of section 5.3.3 (e)

of the SCC and that Treasury did not provide Fumani Holdings same opportunity to "*clarify*" its bid. This resulted in Treasury violating its constitutional obligation to treat all bidders equally. Fumani Holdings contends that this is a ground to set aside the decision of Treasury on review.

- Fumani Holdings avers that Treasury failed to appreciate that it did provide valid authorisation declarations as required. The decision is therefore irregular because it was based on a mistaken view that Fumani Holdings failed to comply with section 5.3.3(e) of the SCC.
- Fumani Holdings further contends that Treasury acted unfairly by disqualifying Fumani Holding's bid without requiring from Fumani Holdings to clarify the alleged problematic areas of concern in the authorisation letters. Treasury therefore disqualified Fumani Holding's bid without seeking clarification although Treasury is empowered by the bid conditions to do so. This failure amounts to unfair treatment and renders the bid procedure followed irregular.

[31] Although the matter was enrolled for the ordinary opposed motion court, both parties' counsel in the written heads of arguments argued the alleged urgency of the matter. In view thereof that the matter was enrolled in the normal cause of practice, it is not necessary to consider the issue of urgency.

[32] *Fumani Holding's* attack was threefold namely (i) that Treasury treated Fumani Holding's bid unfair and unequal, (ii) Fumani Holdings alleges that there was actual compliance by it with the tender process, and (iii) Treasury acted irregular by not requesting Fumani Holdings for "*clarification*" from Fumani Holdings regarding the alleged non-compliance held by Treasury.

[33] Treasury's view of the grounds of review advanced by Fumani Holdings against the impugned decision are (i) Fumani Holdings's primary case for review is that Treasury "*committed a reviewable irregularity by deciding to disqualify the bids on the basis that Fumani Holdings **failed** to provide valid authorisation declarations as required*", (ii) Fumani Holdings contended that the impugned decision was unlawful as Treasury has previously awarded a tender using similar terms as submitted in this tender- leading to the inference that Treasury should have considered to remedy the previous award to Fumani Holdings, and (iii) that Treasury treated Fumani Holdings *unfairly* by not requesting Fumani Holdings to clarify certain aspects while Treasury requested other bidders to clarify certain aspects in their bids.

[34] It is clear that the authorisation declaration letters submitted by Fumani Holdings failed to meet the mandatory requirements of clause 5.3.3(e) as discussed supra where UD Trucks Newcastle and AFGRI and John Deere were dealt with. It need not be repeated here.

[35] The second ground that Treasury has awarded tenders to other bidders and also in the past on similar authorising declaration letters. Treasury denies this allegation and it must be borne in mind that alleged previous irregular action, if such exists, does not permit it to be continued. A previous wrong can never justify that mandatory and material requirements must be overlooked to allow invalid applications.

[36] Treasury can request clarification from bidders on non-mandatory and material aspects, as it did with other bidders and with Fumani Holdings. Non-compliance with mandatory and material requirements cannot be clarified. Fumani Holdings' non-compliance with mandatory and material requirements falls beyond the clarification permitted in terms of the SCC.

#### **RELEVANT LEGAL PRINCIPLES:**

[37] **Section 217** of the **Constitution** is the source of Treasury's powers and functions when engaging with the public procurement of goods or services as an organ of State. See **AllPay Consolidated Investment Holdings (Pty) Ltd v Chief Security Agency 2014 (1) SA 604 CC at [32]**. Section 217 (1) provides that an organ of State, when contracting on behalf of government must act fair, equitable, transparent, competitive and cost-effective.

[38] It was held in **Steenkamp N O v Provincial Tender Board of the Eastern Cape 2007 (3) SA 121 CC at [33]** that Treasury must take into account efficient, economic and effective use of resources and provide impartial, fair and equitable service without any bias.

[39] Section 217 (2) of the Constitution provides that organs of State are not precluded from implementing a procurement policy providing for preference in the allocation of contracts protecting persons or categories of persons disadvantaged by unfair discrimination.

[40] In terms of section 217(3) of the Constitution the framework for preferential procurement must comply with PPPFA. The procurement policy may contain a framework which disqualifies tenders which do not comply in all respects complies with specifications and conditions. The SCC in clause 5.3.3(e) is therefore justified and Treasury has to follow such.

[41] This was confirmed in **Chairperson: Standing Tender Committee and Others v JFE Sapela Electronics (Pty) Ltd 2008(2) SA 638 SCA at [14]** holding that tenders must be judged against the values set out in procurement policies and specific specifications and conditions contained in the tender. Treasury followed these conditions and mandatory material requirements when considering the tender by Fumani Holdings.

[42] Treasury, like all other Organs of State, may not in general deviate from the mandatory requirements and conditions specified in the tender document. There are a series of case law in this regard ranging from **Millennium Waste Management (Pty) Ltd v Chairperson of the Tender Board: Limpopo Province 2008(2) SA 481 CC; SA Eagle Co Ltd v Bavuma 1985(3) SA (A) at [16] &[19]**.

#### **THE GROUNDS FOR REVIEW:**

[43] Fumani Holdings primary ground of review is that the reasons provided by Treasury are "bad" in law. Fumani Holdings avers that in rejecting the bids for UD Trucks Newcastle items and AFGRI items, Treasury failed to take into account relevant considerations and made a decision that is arbitrary and capricious. It further avers that the decision was not rational based on the provided information, unreasonable and irrational.

[44] The above averments made are founded that Treasury committed irregularity and disqualified bids on the basis that Fumani Holdings' authorisations failed to comply with the requirements.

[45] It is clear from above why Treasury disqualified Fumani Holdings' bid for non-compliance with mandatory and material requirements. Treasury is further not permitted to condone failure to comply with mandatory requirements. There is further no foundation laid or specified considerations by Fumani Holdings' what Treasury failed to take into account.

[46] I could find no justification for the alleged ground that Treasury made any unreasonable decision or failed to consider relevant information. Fumani Holdings failed to set out why it alleges that the decision taken was irrational or why the decision amounts to an unreasonable decision. The decision can never be irrational if Treasury considered the prescribed requirements.

[47] Fumani Holdings did not challenge the validity of the mandatory requirements stipulated in clause 5.3.3 (e) of the SCC. Treasury has the necessary authority to lay down requirements. The issue of the exclusion of *dealership status* from bidding is also not challenged.

[48] Having considered all relevant arguments and perusing the contents of all the affidavits and annexures, the court is of the view that the application cannot succeed.

### **COSTS:**

[49] Treasury seeks a cost order on a punitive scale, including the costs of counsel. Costs are always within the discretion of the court. When awarding costs, the court takes into consideration various factors. See **Herbstein & Van Winsen, The Civil Practice of the Supreme Court of South Africa 4<sup>th</sup> Ed p 701-717.**

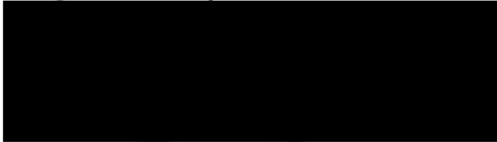
[50] The purpose of an award of costs is to a successful litigant, is to indemnify the party for the expense incurred to initiate or defend litigation. The normal rule is that costs normally follow success. The respondent was successful in this matter and should be awarded costs.

[51] Ordinarily a court will award costs on a party-and-party scale unless there are reasons justifying deviating from the normal award. When considering the scale on which costs be awarded, the court will take into account the conduct of the parties, whether a party should display its dissatisfaction with the conduct of a party by awarding costs on a punitive scale such as on an attorney- and-client scale. The court will consider whether the litigation was vexatious or unreasonable or that the party against whom such costs order is made conducted itself improperly.

**ORDER:**

The following order is made:

1. The application is dismissed
2. The Applicant is to pay the Respondent's costs on a party-and-party scale including the costs of counsel. The appropriate scale will be Scale "C".



HOLLAND-MUTER J

Judge of the Pretoria High Court

4 November 2024

**APPEARANCES:**

Applicant: Adv C Seape with Adv M Kritzinger

Respondent: Adv D Sive

Matter heard on 4 June 2024

Judgment delivered on 4 November 2024