



IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

**Reportable /
Not reportable**

Case no:4222/2023

In the matter between

**TSELA TSWEU CONSULTING ENGINEERS
(PTY) LTD**

APPLICANT

and

MANGAUNG METROPOLITAN MUNICIPALITY

RESPONDENT

**Neutral citation: Tsela Tsweu Consulting Engineers (Pty) Ltd v
Mangaung Metropolitan Municipality**

Coram: Chesiwe J

Heard: 22 April 2024

Delivered: This judgment was handed down in open court and electronically
by circulation to the parties' representatives by email and released to SAFLII.

The date and time for hand-down is deemed to be 10h00 on 19 September
2024.

Summary: Review application in terms of Rule 53 read with Rule 6 (12) in which the Applicant seeks the review and setting aside of a decision by the Respondent for a submitted Tender - Applicant disqualified for not meeting the requirements of the tender bid – Respondent decision be reviewed and set aside, alternatively declared unlawful.

ORDER

1. The application is dismissed with costs, including costs of one Counsel on scale B.
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JUDGMENT

Chesiwe J

Introduction

[1] This is a review application in terms of Rule 53 read with Rule 6 (12) in which the Applicant seeks the review and setting aside of a decision by the Respondent for a submitted Tender No. MMM/BID 670:2022/2023 – W2103: PROVISION OF PANEL OF PROFESSIONAL ENGINEERING SERVICES TO THE MANGAUNG METROPOLITAN MUNICIPALITY FOR A PERIOD ENDING 30 JUNE 2025, whereby the Applicant was disqualified for not meeting the requirements of the tender bid. The application is opposed.

The relief claimed

[2] Applicant seeks the following relief as noted in the Notice of Motion:

"1. That the Tsela Tsweu's non-compliance with the court rules related to time periods and service is condoned and the application is heard as an urgent review application in accordance with the provisions of Rule 53, read with Rule 6(12).

2. That the Municipality's decision to disqualify the Applicant's bid for Tender NO. MMM/BID 670: 2022 / 2023 = W2103: PROVISION OF PANEL OF PROFESSIONAL ENGINEERING

SERVICES TO THE MANGAUNG METROPOLITAN MUNICIPALITY FOR A PERIOD ENDING 30 JUNE 2025, is reviewed and set aside, alternatively is declared unlawful.

3. The Respondent is ordered to place the Applicant – in accordance with section 8 of the Promotion of Administration Justice Act, 3 of 2000- on the panel for which it had solicited bids and to which the decision mentioned in prayer 2 applies.
4. Alternatively to prayer 3 above, the Respondent is ordered to re-evaluate the Applicant's bid for said tender, with the proviso that the Respondent's bid is found as having been compliant with all the requirements and the bid is to be further evaluated for functionality.
5. The Respondent ordered to pay the costs of this application.
6. Further and/or alternative relief."

Background

[3] The Respondent on the 12 October 2022, had called for tenders in which various professional engineering firms would provide services related to civil works, municipality and transportation infrastructure. The tender was advertised in the local newspaper as well as on the Respondent's notice board. The deadline for the submission for the tender was 31 October 2022. Applicant submitted its bid timeously.

[4] The front page of the tender document required that prospective contractors were to indicate which services that were marked A – H it tendered for, with a *proviso* that failure to adhere to the requirements such bid will be disqualified. Applicant submitted its bid for sections A, B, C, E and F. Applicant with nine (9) other bidders did not select the relevant section for which they were bidding for.

[5] Subsequent to the submission of the tender, the Applicant heard nothing from the Municipality until 19 July 2023. When the Applicant allegedly heard a rumour that the tender has been awarded to various bidders. Based on not receiving any feedback from the Respondent, Applicant requested for reasons for being disqualified. The reasons and the record of the proceeding were provided on 4 August 2023. Applicant approached its Attorneys and launched the current review

application on an urgent basis. According to the Applicant, it became evident when the opposing affidavit was filed, that the reasons for being disqualified were stated in the opposing affidavit.

[6] For determination by this Court is whether the Applicant's bid had met the requirements of the tender documents and whether the disqualification was unlawful.

[7] Council on behalf of the Applicant, in oral argument submitted that: The Applicant had complied with the tender documents and had the Municipality studied the documents properly, it would have seen that the Applicant had ticked the correct box. That the Respondent in not accepting the Applicant's bid, it acted irrational and committed an irregularity in disqualifying the Applicant for missing to tick one box on the tender document. And the omission of not ticking the correct box, does not change the material/contents of the bid. Counsel submitted that the rest of the tender document was complied with and was correctly completed. And requested that the Court ought to grant Applicant the relief sought in the Notice of Motion.

[8] Counsel on behalf of the Municipality, in oral argument, submitted as follows: Applicant did not meet the requirements of the tender documents, by not indicating its selection for the services that it was bidding for. Counsel stated that the table on the documents is the entry point for meeting the requirements. That it is the Applicant's own fault in not ticking the required box for the services it was going to tender for. And that the Applicant has conceded that it did not complete the first page of the tender documents.

Urgency

[9] The matter was set down to be argued on 10 August 2023. On 4 August 2023, the Respondent sent the requested documents to the Applicant and as a result urgency became moot. Even though prayer one of the Notice of Motion is that the matter is still to be heard as an urgent review application.

[10] Rule 6(12) provides that in an urgent application, the Court may condone non-compliance with the Rules regarding forms and service.¹ The Court, in dispensing with the forms and service provided for in the Rules, may also make such orders as it deems fit. However, the procedure set out in Rule 6(12) is not there for the taking. Applicant has to set forth explicitly the circumstances which it avers renders the matter urgent. More importantly, the Applicant must state reasons why it claims that it cannot be afforded substantial redress at a hearing in due course. The question of whether a matter is sufficiently urgent to be enrolled and heard as an urgent application is underpinned by the issue of absence of substantial redress. The Rules allow Courts to come to the assistance of such a litigant where, if the latter were to follow, the normal course laid down by the Rules will not obtain substantial redress. Applicant must make out its case in that regard.

[11] In terms of Rule 14 of the Rules of Procedure for Judicial Review of Administrative Action,² ("the PAJA Rules") the court may shorten a period prescribed in the PAJA Rules regarding review proceedings before it.

[12] In *Millenium Waste Management v Chairperson, Tender Board*,³ the SCA said the following: "It appears that in some cases, the High Court is approached promptly for relief but these cases are not expeditiously heard and as a result by the time the matter is finally determined, practical problems militating against the setting aside of the challenged decision would have arisen. Consequently the scope of granting an effective relief to vindicate the infringed rights becomes drastically reduced. It may help if the High Court to an extent possible, gives priority to these matters." (my emphasis)

[13] Applicant on discovering that the bid was unsuccessful, immediately requested its legal representative to request reasons from the Municipality. The Municipality failed to provide the requested reasons and the Applicant launched an urgent application under case number 3932/2023. However, the documents were provided before the application could proceed. The Applicant then launched the current application under case number 4222/2023. Which in my view is to be

¹ *Commissioner, SARS v Hawker Air Services (Pty) Ltd* 2006 (4) SA 292 at 299 par 9.

² Promulgated in Government Notice R966 of 9 October 2019 in accordance with section 7(3) of the Promotion of Administrative Justice Act 2000, (PAJA).

³ 2008 (2) SA 481 (SCA), par 34

regarded as urgent, as Rule 53 (b) provides that within 15 days after receipt of the Notice of Motion the Applicant is to be supplied with the record of the proceedings.

[14] Applicant was within its constitutional right to obtain the record of proceedings as it is imperative to have the record for purposes of the review application. Applicant did not comply with the truncated time periods as set out in the notice of motion, as such truncated times had to be revised due to the late delivery of the the tender documents.

[15] It has been emphasized by the Courts in several review matters that without the records, a Court cannot perform its constitutionally entrenched review function.⁴ The consequences of lack of such information will, in turn, affect a litigant's rights in terms of Section 34 of the Constitution⁵, and thus violate those rights and such a litigant will not have a fair public hearing before Court, without the record of proceedings. Consequently, I find that Applicant's application fell to be treated as urgent, as tenders generally have a limited lifespan.

Authorities relating to reviews

[16] Section 217 of the Constitution ⁶, is the starting point for an evaluation of the proper approach to an assessment of the constitutional validity of State procurement processes. It reads as follows:

1. "When an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective.
2. Subsection (1) does not prevent the organs of state or institutions referred to in that subsection from implementing a procurement policy providing for - (a) categories of preference in the allocation of contracts; and (b) the protection

⁴ *Democratic Alliance v The Acting National Director of Public Prosecution* (288/11) 2012 ZASCA 15 20 March 2012.

⁵ Act 108 of 1996

⁶ *Ibid*

or advancement of persons, or categories of persons, disadvantaged by unfair discrimination.

3. National legislation must prescribe a framework within which the policy referred to in subsection (2) must be implemented.”

[17] In order to comply with s 217(3) the legislature adopted the *Preferential Procurement Policy Framework Act*⁷ (“the PPPFA”). “Acceptable tender” is defined in s 1 of the PPPFA as “any tender which, in all respects, complies with the specifications and conditions of tender as set out in the tender document”.

[18] In *Chairperson: Standing Tender Committee and Others v JFE Sapela Electronics (Pty) Ltd and others*⁸, Scott JA pointed out that the definition of “acceptable tender” must be construed against the background of s 217 of the Constitution and continued as follows: “In other words, whether the tender in all respects complies with the specifications and conditions set out in the contract documents must be judged against these values.” In terms of s 2(1)(f) of the PPPFA “the contract must be awarded to the tenderer who scores the highest points (calculated in accordance with s 2(1)(b), unless objective criteria in addition to those contemplated in paragraphs (d) and (e) justify the award to another tenderer.”

[19] The proper legal approach pertaining to procurement processes was set out in the following *dictum* by Froneman, J in *Allpay Consolidated v Chief Executive Officer, SASSA*⁹, which I quote:

“[22] This judgment holds that:

- a. The suggestion that ‘inconsequential irregularities’ are of no moment conflates the test for irregularities and their import; hence an assessment of the fairness and lawfulness of the procurement process must be independent of the outcome of the tender process.
- b. The materiality of compliance with legal requirements depends on the extent to which the purpose of the requirements is attained.

⁷ Act 5 of 2000

⁸ [2005] 4 ALL SA 487 (SCA) at paragraph [19]

⁹ 2014 (1) SA 604 (CC) at para [22]

- c. The constitutional and legislative procurement framework entails supply chain management prescripts that are legally binding.
- d. The fairness and lawfulness of the procurement process must be assessed in terms of the provisions of the Promotion of Administrative Justice Act, 3 of 2000 (PAJA).
- e. Black economic empowerment generally requires substantive participation in the management and running of any enterprise.
- f. The remedy stage is where appropriate consideration must be given to the public interest in the consequences of setting the procurement process aside."

[20] Applicant in its founding affidavit at para 10 the following is noted:

"10.5 In the tender document itself, prospective contractors were required to indicate which sections A – H it tendered for. Tenderers were entitled to submit a tender for the entire spectrum and I append as "FA1", the front page of the tender document.

10.6 The court will see that tenderers were required to – on the very front page – indicate for which of the services the tender is submitted.

10.7 Tsela Tsweu indicated that it submitted bids for sections A, B, C, D, E, and F. I refer the court to the appendix for the commensurate description of the works associated with sections identified...."

[21] The Applicant in its founding affidavit goes further at para 12.4 and 12.5 as follows:

"12.4 This obviously an error. I had personally attended to the filling -in of the Tsela bid and had personally ticked the boxes on the first page of the tender as indication that Tsela submitted a bid for categories A, B, C, E, and F.

12.5 This is an error committed in the evaluation, apparently an oversight but it does not materially impact upon the decision the Municipality had taken to disqualify the Tsela Bid. This - I am told – constitutes a ground for review under section 6 of PAJA."

[22] The Respondent in its opposing affidavit gave a detail and extensive explanation of the different stages which the tender process goes through, in order to select the bidders that met the requirements. Respondent indicated that failure to meet the bid document as it was listed per item would result in the bidders bid being disqualified:

"1. All bidders must select their selection (s) of choice to bid for, on the table below."

[23] In response to the Respondent's opposing affidavit and it explaining the reason for the disqualification of the Applicant, at paragraph 5.5 of its replying affidavit (page 80) stated as follows:

"I do admit – due to a *bona fide* oversight – that I did not fill in the part of the Tsela Tender. I had laboured under the impression that should I fill in the tender as I told the court I did in my Supplementary Affidavit, that it would be sufficient. I understood the tabulated form of this document to mean that the substance of the bid, a clear indication must be given and that the table was there for illustrative purposes. Given what the tender elsewhere required, this apprehension was more than reasonable."

[24] Applicant actually conceded that it did not complete the box as required in the tender document. Applicant on its own version could explained that it ticked the box to indicate that the tender was submitted for A, B, C, E and F, but concedes in the Replying Affidavit. And in the Supplementary Affidavit indicates that, it cannot explain how the box was not ticked, even though it remembers ticking the box to indicate the service it tenders for. Ten (10) bidders did not select or tick the require box and were also disqualified. Even though Applicant's bid went up to the SCM Minimum Requirements and was found to be responsive.

[25] At the stage of Project Minimum Requirements, where all bidders had to select their section of choice from the table provided, failure to do so resulted in being disqualified. Applicant failed to comply at the Project Minimum Requirements by not ticking the required box. Clause F2.1 (c) of the Tender Data under Tenderer's obligation it clearly stated that: "All bidders must select their section(s) of choice for, on the table below..."

[26] According to the Respondent, Applicant has been on the panel for number of years and has assisted the it in implementing projects as a principal agent.¹⁰ Meaning that this was not Applicant's first time in completing tender documents with the Respondent. Applicant for the years it had worked with the Respondent is expected to have sufficient experience and knowledge as to how tender processes work. Applicant's error in not complying with the requirements cannot not be placed

¹⁰ See *Opposing Affidavit* page 56, para 56.

at the door of the Respondent, nor can the Respondent be faulted for having complied strictly with the requirements. Applicant must take the responsibility for not having ticked the box or there being an oversight on its part.

[27] A tender process implemented by an organ of State is an “administrative action” within the meaning of the *Promotion of Administrative Justice Act* ¹¹ (“PAJA”). (See: *Logbro Properties CC v Bedderson NO and Others* 2003 (2) SA 460 (SCA) at para [5]). Parties in a tender process are entitled to a lawful and procedurally fair process and outcome. However, not every administrative error, whether innocent or not, can rightly be said to be ‘unlawful’ or ‘improper’. If Applicant’s right to a fair tender process was indeed unlawful or improper or the Bidding Committee failed to follow the correct procedures, then the Court would ordinarily direct that the tender be reconsidered.

[28] The Bid Evaluation Committee (BEC), went through several stages in terms of the sections that were chosen by the successful bidders, that is A – H to ensure that no bidder is prejudiced. And each bidder was evaluated according to the sections that they chose. Applicant was disqualified already at round one and the BEC could not be evaluated since no section was chosen. From the time the tender was advertised to the end of the evaluation process, the Municipality had an open tender process and there was transparency at each and every stage of the evaluation.

[29] It is well established that the executive in all spheres is constrained by the principle that they may exercise no power and perform no function beyond those conferred upon them by law. The BEC therefore recommended the appointment of the successful companies in respect of the sections that were chosen. These were the bidders who made their intentions known, and this is where the Applicant failed to make its intention known for its tender.

[30] It is trite that proper compliance with the procurement process is necessary for the process to be lawful for a fair outcome in a tender award, the process itself must be fair.¹² Fundamental to a fair process is the requirement that all bidders

¹¹ Act 3 of 2000

¹² *Westinghouse v Eskom* 2016 (3) SA 1 (SCA) par 38

should be treated equally, they should be entitled to tender for the same thing to ensure that a proper evaluation is done of what is available at what price. This also ensures cost effectiveness and competitiveness.¹³

[31] In *AllPay Consolidated Investment Holding (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others*,¹⁴ the Court stressed the importance with the compliance of the requirements for a valid tender process, that is issued in accordance with the constitutional and legislative procurement framework. Legally what required is that, those requirements are not there merely for internal prescripts that may be regarded at a whim.

[32] In *Pepper Bay Fishing*, the following was said:

"As a general principle an administrative authority has no inherent power to condone failure to comply with the peremptory requirements. It only has such powers if it has been afforded the discretion to do so.... The decision-maker derives all his (delegates) powers and authority from the enactment constituted by the general notice. If the general notice therefore affords him no discretion, he has none. The question whether he had a discretion is entirely dependent on a proper construction of the general notice."

[33] Counsel for the Applicant submitted that there was no reason as to why the Applicant should not have been added to the list of the successful tenderers, so that they are on the list should their services be required by the municipality. And that the mere *bona fide* omission of not ticking the box, should not be the reason to disqualify the Applicant.

[34] The Respondent for obvious reasons is confined to the budget that was allocated to its respective department when the tender was approved and published. The funds would have accordingly been utilised to meet the requirements of the successful tenderer in respect of that department. To simply add on the Applicant, would indeed affect the department's budget, including the contract obligations that the respective department already signed with the successful tenderers. There would therefore, be no purpose in adding the Applicant to the list.

¹³*Tetra Mobile Radio (PTY) v MEC, Department of Public Works and others 2008 (1) SA 438 (SCA) para [9]*

¹⁴*AllPay Consolidated Investment Holding (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others [2013] ZACC, 42*

[35] The relief sought by the Applicant will have a direct impact on the Respondent as the tender has been finalized and closed. It would also be unfair on the unsuccessful bidders who were also disqualified for the same reason of not ticking the said box on the tender document. The Respondent is already bound to the new contract with the successful bidders/tenderers and also bearing in mind the possible adverse financial implications that it will suffer if the Applicant was to be added to the tender process for a tender that is already awarded.

[36] I considered the requirements as set out in *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Limited and Another*,¹⁵ and took into consideration what the court said in *Intertrade Two (Pty) Ltd v Mec for Roads and Public Works, Eastern Cape and Another*,¹⁶ Plasket J cautioned that: "Courts, when considering the validity of administration action, must be wary of intruding even when with the best motives, without justification into the terrain that is reserved for the administrative branch of government. These restraints on powers of the courts are universal in democratic societies such as ours and necessarily mean that there are limits on the powers of the courts to repair damage that has been caused by a breakdown in the administrative process."

Evaluation of evidence

[37] It is clear that Applicant did not comply with the bid in terms of the requirement of the tender document. Applicant completed and complied with the required section on the inside of the document, but not on the front page of the document.

[38] On the first page of the bid document, the bidder is required to set out and indicate the section it is bidding for. The Deponent of the founding affidavit insisted that the boxes were ticked and in the Replying affidavit conceded that the boxes were not ticked. The filled-out form was indeed, not ticked in the required boxes to indicate the services that were being bidding for. The versions of the Applicant and that of the Respondent cannot both be correct. The one version must be false. The

¹⁵ 2015 (5) SA 245 (CC)..

¹⁶ [2007] 149, 2007 (6) 442 (CK), [2008] ALL 142 (CK) (*Intertrade*) at para 46.

Respondent has shown evidence that the form was incomplete. Thus, the version of the Respondent must be the correct one.

[39] The Standard Conditions of the Tender, Clause 2.14 provides that the information and data be completed in all respects and that tenders that do not provide all the data and information that is requested will not be regarded by the employer as responsive. Furthermore Clause F.2.17¹⁷, confirms that if the tenderer fails to comply with the requirements of the tender documents, such tender will be rejected as non-responsive.

[40] I am satisfied that no irregularities occurred during the appointment of the successful bidders, as the whole process was followed in terms of the tender process. There is nothing unconstitutional about the tender process, as long as it was open, transparent and fair. The Respondent complied with s 217 of the Constitution. There is nothing wrong that the Respondent did, and for the fact that the rotational arrangement was not implemented for the first time. Applicant has been part of the this tender process and is not new to the completion of the tender documents. In the documents submitted for reasons for the Respondent's decision, there is nothing that one can deduce to an act of irregularity or unlawfulness on the part of any person. The tender documents were open, in public and in the presence of the Anti-Fraud Department and Risk Management, Supply Chain Management and there is no evidence that the process was tainted.

[41] In *Steenkamp NO v Provincial Tender Board Eastern Cape*¹⁸, the Constitutional court stated that, tender processes require strict and equal compliance by all competing tenderers; compliance with the requirement for a valid tender process, issued in accordance with the constitutional and legislative procurement framework, and it is legally required and are not merely internal prescripts that may be disregarded at a whim.¹⁹ (my emphasis).

¹⁷ Page T 1.2 -9

¹⁸ *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 (3) SA 121 (CC) para [60]

¹⁹ *Ibid*

[42] In my view, if the Respondent's decision was irrational, unlawful and hopelessly irregular, then such decision needs to be set aside. Which is not the case in this regard.

[43] The bid of the Applicant was therefore validly disqualified premised on its failure to comply with the expressed terms and conditions of the tender bid documents. I am thus not satisfied that the Applicant should be granted the relief sought. It would be wrong to direct the Respondent to enter into a contract with the criteria as set out by the Applicant. This means the Court is requested to rewrite the contract between the successful contractors and the municipality, as well as the Applicant. Thus, the relief sought by the Applicant ought not to be granted.

[44] In *Manong & Associates (Pty) Ltd v Minister of Public Works and Another*,²⁰ the court said that State tenders have become a fertile ground for litigation and this was further emphasised in the unreported case of *Red Ant Security Relocation and Eviction Services (Pty) v Department of Human Settlements (Western Cape)*,²¹ that: "Tendering has become a verifiably 'messy business and the courts are increasingly drawn in the quagmire in review proceedings."

Costs

[45] The basic rule of costs is that all costs are in the discretion of the Court. The Court's discretion is wide, though not unfettered and must be exercised judicially upon a consideration of the facts of each case. In essence it is a matter of fairness to both sides, taking into consideration the circumstances of the case; carefully weighing the issues; consider the conduct of the parties and; consider any other circumstance which may have a bearing on the issue of costs.

[46] The Respondent seeks punitive costs against the Applicant. In my view the Applicant did not act unreasonably to bring the matter to court. It only exercised its administrative right with regard to the tender process and cannot be punished for

²⁰ [2009] ZASCA 110, 2010 (2) SA 167 (SCA); [2010] 1 ALL SA 267 (SCA)

²¹ (Western Cape) WCHC Case No 9370/2021, unreported

having approached Court. Thus, costs on a punitive scale are not warranted. In any event costs follow the successful party.

[47] Having considered that the application, there is no reason why the Applicant should not be ordered to pay the costs of the application.

Order

[48] Therefore, the following order is made:

1. The application is dismissed with costs, including costs of one Counsel on scale B.



S. CHESWE, J

I concur.



W J. GROENEWALD, AJ

Appearances

For the Applicant:

Instructed by:

Adv. S Grobler

Peyper Attorneys

Bloemfontein

For the Respondent:

Instructed by:

Adv. D R Thompson

Rampai Attorney

Bloemfontein