IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN

Case no: **D1598/2023**

In the matter between:

NEW GENERATION PROJECTS	**APPLICANT**
and	
UMDONI LOCAL MUNICIPALITY	**RESPONDENT**

Coram: Mossop J
Heard: 9 September 2024
Delivered: 9 September 2024

ORDER

The following order is granted:

The application is dismissed with costs, such to be taxed on scale C.

JUDGMENT

MOSSOP J:

[1] This is an ex tempore judgment.

[2] This application involves, principally, the review of a decision by the respondent to disqualify the applicant from the bidding process in respect of a tender published by it for the construction of two community halls, namely the Dlangezwa Hall, under bid number BID02/2021-MN33/2021and the Mayfield Hall, under bid number BID03/2021-MN34/2021, on the lower south coast of KwaZulu-Natal. Certain other relief is claimed but is dependent on the review succeeding.

[3] The applicant submitted bids to construct both the halls already mentioned but alleges that it was disqualified during the initial phases of the bid evaluation process because it was a sole proprietorship and not an incorporated entity, and the respondent penalised it for that fact by eliminating it unlawfully from the bidding process.

[4] The founding affidavit is a poor piece of work and is thoroughly confusing. Central to the applicant's application is its status. However, it is by no means certain what the status of the applicant is. In paragraph 1 of the founding affidavit, it is stated that the deponent to that affidavit is:

'… an adult female self employed and sole Director of the Close Corporation registered under the Close Corporation Act No. 69 of 1984 per Government Gazette No. 9285, 'a Close Corporation.''

The reference to the close corporation can only be a reference to the applicant. It hardly needs to be mentioned that close corporations do not have directors. Furthermore, a consideration of the heading to the notice of motion and founding affidavit also reveals that the applicant is cited as being 'New Generation Projects', without it being stated that it is a close corporation.

[5] Paragraph 5 of the founding affidavit makes for even more confusing reading when it states the following:

'NEW GENERATION PROJECTS is 100% Black-Woman owned and operated company …'

[6] Then, at paragraph 11 of the founding affidavit, the following appears:

'The applicant has been in business since the registration of the company in 2005.'

And attached to the founding affidavit is a copy of the applicant's brochure setting out its business profile in which it is repeatedly referred to as being a company. No registration details are, however, mentioned.

[7] It appears, however, that despite the references to a close corporation and a company in the founding affidavit and annexures, the applicant is neither but is a sole proprietorship. That this is the case may be discerned from three paragraphs in the founding affidavit. The first is paragraph 11, which reads, in part, as follows:

'There exists no reason to doubt the credentials of the applicant that it could not do the work by being a sole propriety (sic).'

The second is paragraph 15, which reads as follows:

'There was no mention in the invitation issued by the Respondent that sole proprieties (sic) will not be considered, alternatively are barred from submitting bidders (sic). It was on that reason that Applicant tended for the advertised work.'

And the third is paragraph 16, which reads, in part, as follows:

'The reasons given by the Respondent were mainly, the Applicant was a sole proprietor and thus not permitted to bid, secondly, a municipal rates statement had not been included in Applicant's submitted documents.'

[8] The nub of the applicant's complaint is accordingly that it was excluded from participation in the bid process because it is not an incorporated juristic entity, but is a sole proprietorship.

[9] That the applicant was disqualified for that reason is disputed by the respondent. It has advanced two reasons why the applicant was disqualified from the bid process. Neither of those reasons have any relationship to the ground alleged by the applicant, although one of them was mentioned in the last extract referred to above. The first reason is that the applicant did not submit a valid municipal rates certificate with its bid. The second is that the applicant failed to submit a financial statement with its bid. Both these documents were required by the respondent.

[10] The bid specification document issued by the respondent indicates that the following documents were regarded as being returnable with the bid document:

'Tax clearance and Pin Sheet
COIDA
CIDB
Company Registration Certificate
Vat Registration (If Applicable)
Rates Letter/Statement or Proof of Address (not older than 3 months)
1-year Financial Statement
BEE Certificate/Affidavit (certified)'

[11] The respondent had determined that these documents were essential to participate in the bid. This, it was quite entitled to do. As Leach JA stated in *Dr JS Moroka Municipality and others v Betram (Pty) Ltd and another*:[1]

'Essentially it was for the municipality, and not the court, to decide what should be a prerequisite for a valid tender, and a failure to comply with prescribed conditions will result in a tender being disqualified as an "acceptable tender" under the Procurement Act unless those conditions are immaterial, unreasonable or unconstitutional.'

[12] The applicant has not denied that it failed to submit these essential documents. This is because it has not delivered a replying affidavit to rebut what the respondent stated in its answering affidavit. The allegations made by the respondent in its answering affidavit regarding the non-responsiveness of its bid thus remains uncontroverted.[2]

[13] Indeed, the disclosure of the true reason for the applicant's disqualification appears to have brought the applicant's application to a grinding halt. Not only was no replying affidavit delivered, but the applicant failed to deliver a practice note and heads of argument and there was no appearance for it when the matter was called this morning. It appears that the applicant has simply abandoned its own application in the light of the contents of the respondent's answering affidavit.

[14] As a consequence, the respondent's allegations that the applicant's bid was non-compliant for want of a municipal rates certificate and a financial statement remains uncontroverted and must accordingly be accepted as being true.

---

[1] *Dr JS Moroka Municipality and others v Betram (Pty) Ltd and another* [2013] ZASCA 186; [2014] 1 All SA 545 (SCA) para 10.
[2] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* [1984] ZASCA 51; 1984 (3) SA 623 (A).

[15] Those documents sought by the respondent, but not supplied by the applicant, appear to be relevant to a proper adjudication of the capabilities of the bidding parties. Compliance with bid requirements is necessary and has intrinsic value.[3] Where there are bid requirements with which all bidders are required to comply, the fairness of the process is thereby enhanced.

[16] That being the case, it appears to me that the applicant's bid was prima facie unresponsive and that it was correctly eliminated from further consideration by the bid evaluation panel established by the respondent. There is other ancillary relief claimed in the notice of motion, but the founding affidavit is woeful and such other relief cannot be granted if the review sought is not granted.

[17] I accordingly grant the following order:
The application is dismissed with costs, such to be taxed on scale C.

MOSSOP J

<u>APPEARANCES</u>

Counsel for the applicant: No appearance

[3] *AllPay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency and Others* 2014 (1) SA 604 (CC); 2014 (1) BCLR (1) CC para 27.

Instructed by:	Kloppers Incorporated 7 Church Place Westville Durban
Counsel for the respondent:	Mr E M Nkosi
Instructed by:	S D Moloi and Associates Incorporated 39 St Thomas Road Berea Musgrave Durban