

**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

Case no: **12092/2021**

In the matter between

**LUVTHIS TRADING & INVESTMENTS (PTY) LTD
t/a INDAWO CONSTRUCTION**

Applicant

and

THE CITY OF CAPE TOWN

1st Respondent

AR PROJECTS & DEVELOPMENT (PTY) LTD

2nd Respondent

Hearing date: **20 May 2024**

Delivered this 27th day of May 2024 by electronic mail to the parties.

JUDGMENT

NDITA, J et SIDAKI, AJ

[1] This is an application to review and set aside the decision of the First Respondent to award a tender for the repair and maintenance of its buildings to the Second Respondent. The Applicant also seeks to set aside the First Respondent's appeal authority's decision refusing the Applicant's internal appeal. Thus, the relief sought by the Applicant is couched in the following terms:

“1. An order reviewing and setting aside the decision taken by the first respondent on 15 June 2000 awarding the tender issued under tender number 345Q/2018/19: “Term tender for the repairs and maintenance of the external façade and associated external works to City of Cape Town Buildings” (the tender”) to the second respondent.

2. An order reviewing and setting aside the first respondent’s appeal authority’s decision dated 19 January 2021 refusing the applicant’s internal appeal in terms of section 62 of the Local Government: Municipal Systems Act 32 of 2000 against the award of the tender to the second respondent.

3. An order that any contract concluded between the first respondent and the second respondent as a result of the award, be declared void ab initio, alternatively, that any such contract be set aside.

4. An order that the bid adjudication process conducted under tender number 345Q/2018/19 be set aside, and that the first respondent be directed to consider afresh the responsive bids in response thereto.

5. An order that the costs of this application be paid by the first respondent, alternatively, and in the event of the second respondent opposing the relief sought, by the first and second respondents jointly and severally, the one paying the other to be absolved.”

The parties

[2] The Applicant is **Luvthis Trading & Investments (Pty) Ltd t/a Indawo Construction**, a company with limited liability duly incorporated in accordance with the company laws of the Republic of South Africa, with its registered address situated at Unit 2 Transnet Park, Robert Sobukwe Road, Bellville.

[3] The First Respondent is the **City of Cape Town** (“the City”), a metropolitan municipality as defined in section 1 of the Local Government: Municipal Structures Act 117 of 1998, with its principal place of business situated within the jurisdiction of this Court at the office of the City Manager, Civic Centre, 12 Hertzog Boulevard, Cape Town.

[4] The Second Respondent is **AR Projects & Developments (Pty) Ltd**, a company with limited liability duly incorporated in accordance with the company laws of the Republic of South Africa, with its principal place of business situated at Unit 4, Glenkey Mews, Sheffield Business Park, Purdey Road, Phillipi, Cape Town.

Factual background

[5] On 26 April 2019, the City advertised a tender for a framework contract for the repair and maintenance to the exterior façade of the City’s buildings and associated external works, under tender number 345Q2018/19 (“the tender”). The duration of the tender would be for a period of 36 months from the commencement date following the award of the tender. The tender was divided into four areas, namely, Area 1, Area 2, Area 3 and Area 4. The papers reveal that the Applicant tendered for all four areas, although it indicated Area 1 as its preference, followed by Area 3, 2 and 4 respectively.

[6] According to the Applicant, the tender was a so-called “framework agreement tender”, which means a tender for the supply of goods, services or construction work of an ad hoc or repetitive nature, on “instructed basis”, where the terms are approved for use over a predetermined period without a guarantee as to the extent of the expenditure under the contract. The Applicant avers that nineteen bids were submitted, but ultimately only three bids (including the applicant’s) were considered as responsive. On 15 June 2020, the City’s Bids Adjudication Committee (“BAC”) decided to award the tender to the Second Respondent (“the decision”) and no standby tender was appointed. The Applicant was informed on 30 June 2020 that its bid was unsuccessful.

On 20 July 2020, the Applicant lodged an internal appeal against the decision in terms of section 62 of the Local Government: Municipal Systems Act 32 of 2000 (“the Act”). The appeal was amplified on 24 August 2020 and again on 28 December 2020, following receipt of the information requested from the First Respondent. However, the appeal was dismissed on 19 January 2021 and the appellant so advised on the same day.

[7] Pursuant to the dismissal of the appeal, the Applicant launched the present proceedings seeking to review the decision of the City to award the tender to the Second Respondent. The City opposes the application.

The grounds of review

[8] The Applicant advances the following grounds on the basis of which it alleges that the tender process was flawed and, in the circumstances, the award must be reviewed in terms of section 6 of the Promotion of Administrative Justice Act 3 of 2000:

8.1 A mandatory and material condition prescribed by an empowering condition was not complied with in that the Second Respondent was not in good standing with the Building Industry Bargaining Council (“BIBC”) when the tender was awarded. According to the Applicant, the mandatory Clause F.2.1.4.7 of the tender document referred to as Part T1: Tender Notice and Invitation to Tender, provides that a bidder must be in good standing with the BIBC at the time of the award.

8.2 The Second Respondent was unfairly promoted ahead of the Applicant. The Applicant had a better Broad-Based Black Economic Empowerment score.

8.3 The tender process and the award was procedurally unfair. This, according to the Applicant, is so because clause F.3.11.1 of the Tender Bid prescribes that each tenderer may be awarded a maximum of two areas. Yet, the

City awarded all four areas to the Second Respondent in the absence of any evidence having been provided to it that the Second Respondent had the capacity to service all those areas, and without affording the Applicant an opportunity of presenting evidence of its own capacity in undertaking work in multiple areas.

8.4 The award was made because irrelevant considerations were taken into account and relevant considerations were not considered.

8.5 The award was not rationally connected to the information before the City.

8.6 The exercise of the power or the performance of the function authorised by the empowering provision in pursuance to which the award was made, was so unreasonable that no reasonable person could have so exercised the power or performed the function; and

8.7 The tender process and the award was otherwise unconstitutional and unlawful.

[9] The Applicant further avers that the City is under investigation by the Commercial Crimes Unit in respect of several tenders similar to the present one.

[10] It is common cause that after the City had delivered the rule 53 record, comprising in excess of 11 000 pages, two interlocutory disputes ensued. The Applicant brought an application in terms of rule 30A for the production of certain documents it contended ought to have formed part of the rule 53 record. The City also brought a rule 30(1) application seeking a declaration to the effect that the Applicant's rule 30A application constituted an irregular step. On 17 January 2023, the Applicant's rule 30A application was dismissed with costs on a punitive scale and the City's rule 30(1) application was equally dismissed but with no order as to costs. After the judgment was handed down, the Applicant had until 1 February 2023 to amend and/or supplement its

founding papers in the review application. It did not. On 21 November 2023, the City delivered its notice in terms of rule 6(5)(d)(iii) of the Uniform rules of Court.

The City's application in terms of rule 6(5)(d)(iii)

[11] In its notice, the City raises the following questions of law:

“1. Whether the application has become moot by virtue of the tender coming to an end on 30 June 2023, as appears from the pleadings filed of record:

1.1 . . .

2. Whether the applicant's review application still presents an existing or live controversy, given that the applicant seeks an order reviewing the decision of the first respondent to (1) award the tender to the second respondent, and (2) to dismiss the applicant's appeal against the award (notice of motion), paragraphs 1 and 2), in circumstances where the tender has lapsed and the any [sic] ruling made by the court in respect of the appeal will have no practical effect.

3. Whether an order obtained in the applicant's review application would have a practical effect on either the parties or on others, given that:

3.1 The applicant seeks an order that any contract concluded between the first respondent and the second respondent's award be declared void, ab intio, alternatively that any such contract be set aside (notice of motion, paragraph 3), in circumstances where the contract concluded pursuant to an award came to an end by 30 June 2023.

3.2 The applicant further seeks an order that the bid adjudication process conducted under the tender be set aside, and that the first respondent be directed to consider afresh the responsive bids received in

response thereto (notice of motion, paragraph 4), in circumstances where the contract concluded pursuant to the tender has come to an end by effluxion of time.

4. Whether the determination of the substantive relief sought by the applicant in the review application will achieve legal certainty.”

[12] In light of this application, the City did not file an answering affidavit to the review application.

Analysis

[13] It is evident from the foregoing that before delving into the merits, should it become necessary, this court must first determine whether notwithstanding the obvious mootness, the determination of the merits is in the interests of justice. The approach to be adopted in assessing whether an issue is moot is restated by the Constitutional Court in *Normandien Farms (Pty) Ltd v South African Agency for Promotion of Petroleum Exportation and Exploitation SOC Limited and Others* 2020 (4) SA 409 (CC) at para 47-50 thus:

“[47] Mootness is when a matter “no longer presents an existing or live controversy”. The doctrine is based on the notion that judicial resources ought to be utilised efficiently and should not be dedicated to advisory opinion or abstract propositions of law, and that courts should avoid deciding matters that are “abstract, academic or hypothetical”.

[48] This Court has held that it is axiomatic that “mootness is not an absolute bar to the justiciability of an issue [and that this] Court may entertain an appeal even if moot, where the interests of justice so require. This Court “has discretionary power to entertain even admittedly moot issues”.

[49] Where there are two conflicting judgments by different courts, especially where an appeal court's outcome has binding implications for future matters, it weighs in favour of entertaining the moot matter.

[50] Moreover, this court has proffered further factors that ought to be considered when determining whether it is in the interests of justice to hear a moot matter. These include:

- (a) whether an order which it may make will have some practical effect on the parties or others;
- (b) the nature and extent of the practical effect that any possible order may have,
- (c) the importance of the issue;
- (d) the complexity of the issue;
- (e) the fullness of the arguments advanced;
- (f) resolving the dispute between different courts.

[14] In *Minister of Justice and Correctional Services and Others v Estate Late James Stransham-Ford and Others* 2017 (3) SA 152 (SCA) at paragraph 22, the Court explained the discretionary power that a Constitutional Court has in deciding whether a determination of a moot issue will have a practical effect, thus:

“... It is a prerequisite for the exercise of the discretion that any order the court may ultimately make will have some practical effect either on the parties or on others. Other factors that may be relevant will include nature and extent of the practical effect that any possible order might have, the

importance of the issue, its complexity and the fulness or otherwise of the argument.”

[15] Counsel for the Applicant in the heads of argument contended that the application still presents an existing or live controversy and will have a practical effect on the parties as well as achieve legal certainty for the following reasons:

“[55] The grounds of review relate to the manner in which the City interpreted its tender documents and whether it is permissible for the City to apply hidden benchmarks;

[56] If left unaddressed the City will continue to interpret its tender documents in the manner set out in its Appeal Authority’s notice of decision, and will continue to be permitted to apply hidden benchmarks and criteria which is at odds with the principle of transparency, fairness, competitiveness, rationality, legality and equality;

[57] This is clearly not in the public interests and legal certainty is therefore required to determine whether the City’s (i) interpretation of its tender document and (ii) application of benchmarks and criteria based on undisclosed /hidden “market related rates” and “capacity evaluations” pass constitutional muster (the applicant submits that it is not).”

[16] According to these contentions, it is in the interests of justice for this court to determine this matter regardless of the expiration of the contract as the benefit of the court’s pronouncement on the manner in which the City conducts and applies the Preferential Procurement Policy Framework Act (PPPFA) will extend beyond the parties themselves to the general public and will set the tone for the City’s future conduct.

[17] During argument, Counsel for the Applicant prudently placed on record that the Applicant no longer pursues the relief set out in paragraph 3 and 4 of the notice of

motion, since they would have no practical effect, but persisted with the relief sought in terms of paragraphs 1 and 2.

[18] Counsel for the City contended that an order by this court in this matter will have no practical effect because (a) the impugned decision has run its course, (b) the tender contract came to an end on 30 June 2023 and there is no extant contract to set aside; and (c) it would serve no purpose whatsoever for the City to adjudicate all of the original qualifying bids. Furthermore, the Applicant's grounds of review are primarily directed at the transparency of the bid evaluation process, and are specific and traverse only factual issues and issues of interpretation, including:

18.1 whether the Second Respondent was in good standing with the BIBC;

18.2 the BBBEE requirements in this tender;

18.3 the capacity of ARP to undertake the works;

18.4 the BEC's determination of market-related rates and the negotiations prior to the award of the tender.

Accordingly, so concludes the City, the matter does not raise questions of general importance and there is no discrete legal principle that requires the court to decide the merits. Thus, it is not in the interests of justice to resolve the issues raised in the review application which have become moot.

[19] The Supreme Court of Appeal held in *Spagni v The Director of Public Prosecutions, Western Cape and Others* (455/2022) [2023] ZASCA 24 (13 March 2023), para 10, that as to the question of mootness, the general principle is that an application is moot when a court's ruling will have no direct practical effect; The reasoning behind this principle is that courts' scarce resources must be used to determine live legal disputes rather than abstract propositions of law; Courts should

refrain from giving advisory opinions on legal questions that are merely abstract, academic or hypothetical and have no immediate practical effect or result (National Coalition for Gay and Lesbian Equality v Minister of Home Affairs 2000 (2) SA 1 (CC)[1999] ZACC 17; 2000 (1) BCLR 39 (CC) para 21; JT Publishing (Pty) Ltd and Another v Minister of Safety and Security [1996] ZACC 23; 1997 (3) SA 514 (CC); 1996 (12) BCLR 1599 (CC) para 15))

[20] It is unquestioningly clear in these proceedings that the determination of the review will not have any practical effect notwithstanding the fact that the Applicant has abandoned prayers 3 and 4 of the notice motion. The same applies to the prayers persisted with (prayers 1 and 2) for the setting aside of the decision awarding the tender to the Second Respondent and the decision of the internal appeals authority dismissing the Applicant's appeal. The setting aside of the remaining prayers would also have no practical effect as the impugned decision has run its course and there is no longer a contract to set aside. Therefore, regard being had to the factual background, the decision and the relief sought by the Applicant would have no practical effect.

[21] The only issue that can be said to be live relates to costs of the review application. Courts will not entertain a review application with no practical effect simply because there is an outstanding costs issue. Therefore, it would relate to the costs of the review application.

[22] Counsel for the Applicant insisted that the merits of the review ought to be determined because of the constitutional implications impacting on the tender process. According to this contention, the court is required to castigate the City for flouting the rules and this will have an impact on the future conduct of the City. The Applicants place reliance on the decision of this court in *Habitat Council v The City of Cape Town and Others* 2022 (6) SA 383 (WCC). There is no basis for relying on this matter at all as it does not support the contentions raised by the Applicant. The converse is true. At paragraph [77], the court deals with a similar contention and states:

“[77] What real purpose would such an order serve? To tell the City that it was wrong and that in future it should do its job properly? I am not sure that this is quite what s 172 (1)(b) contemplates...”

[23] Gamble, J, then found that the review application was moot in that it raised no live issues between the applicant and the City. Likewise, in the matter at hand calling upon the court to castigate the City for acting improperly when there is no discrete legal point of legal interest which would be affected does not constitute a ground for determining a matter which is moot.

[24] In *The Laser Transport Group (Pty) Ltd and Another v Elliot Mobility (Pty) Ltd and Another* (835/2018) [2019] ZASCA 140 (01 October 2019), the Court dismissed the appeal on the basis that the four-year contract concluded with the respondents in 2015 would be expiring approximately three months from the date of the hearing of the appeal, a decision that would have no practical effect, and that the application did not concern a discrete point of public importance that would affect matters in the future. At paragraph [20], it remarks as follows:

“[20] ... the only way the decision sought would have a practical result or effect would be by extension of the contract (based on the August 2015 tender) beyond the November 2019 expiry date. As submitted on behalf of the respondents, the result would be contrary to the terms of the August 2015 award and there could be no basis, on the facts of this case, for the commencement date of the contract to be on a date beyond the period of the contract. The tender was intended for commencement in 2015 on terms and conditions (especially the pricing conditions) that existed then. One hardly needs evidence to show that, four years later such conditions have changed...”

[25] Regarding the Applicant’s argument that the consideration of the matter involves constitutional issues impacting on the City’s procurement procedures, something that

might affect similar matters in the future, the Court in *The Laser Transport Group* case, *supra*, held thus:

“[21] . . . even where constitutional issues are implicated, if the decision is case specific, there are no grounds for the court to exercise its discretion in favour of entertaining an appeal that is moot. Even if the assessment of objective factors under s 2(1)(b)(i) of the PPPFA was incorrectly applied, or the tender process was tainted by illegality or the Full Court’s substitution of the tender award was wrong, no basis was laid for a conclusion that the matter raised issues of public importance.”

[26] The issues in the present matter arise out of a contract which is specific to the parties. On these papers, there is no justification for concluding that this matter raises issues of public importance. This principle is reaffirmed in *Mabotwane Security Services CC v Pikitup SOC (Pty) & others (1027/2018)* [2019] ZASCA 164 (29 November 2019) as follows:

“[25] I find myself in no such dilemma. *Allpay* is no authority for the proposition that a court is compelled, in terms of the Constitution, to review and set aside an unlawful administrative act, where doing so will have no practical effect or result in terms of s 16(2)(a)(i) of the Act. But, in any event, even if it were to be assumed in favour of the appellant, that the conduct of the first respondent was unlawful and that this court was legally obliged to declare it so, it would not be just and equitable to grant the orders sought by the appellant, in terms of s 172(1)(b) of the Constitution, when they could have no practical effect or result in terms of s 16(2)(a)(i) of the Act.”

[27] In this matter, it is our judgment that there is no important discrete question of law of public importance.

[28] The conclusion reached above in relation to mootness renders it unnecessary to make a determination on the merits of the review application. The Constitutional Court cautioned in *Albutt v Centre for the Study of Violence and Reconciliation, and Others* [2010] ZACC 4; 2010 (3) SA 293 (CC); 2010 (2) SACR 101 (CC); (2010 (5) BCLR 391) para 82, that '[s]ound judicial policy requires us to decide only that which is demanded by the facts of the case and is necessary for its proper disposal'. In this case it has not been shown that the interests of justice nevertheless militate a consideration of the matter on the merits of the review.

[29] It also cannot be ignored that it is the Applicant who failed to amend its papers and allowed the contract to lapse. Even, at the stage of the hearing, there was no indication of the reason why the Applicant took no action to have this matter determined whilst it was still live. It follows that the review application must be dismissed with costs.

[30] In the result, the following order is issued:

The application is dismissed with costs, including the costs of two counsel on the "C" scale.

NDITA, J

SIDAKI, AJ

Counsel for Applicant

Adv Herna Beviss-Challinor

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