

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

LIMPOPO DIVISION, POLOKWANE

CASE NO: 13528/2022

(1)	<u>REPORTABLE: YES/NO</u>
(2)	<u>OF INTEREST TO THE JUDGES: YES/NO</u>
(3)	<u>REVISED</u>
.....	
DATE <u>28-02-2025</u>	SIGNATURE <u>[Redacted]</u>

In the matter between:

MAXIMUM PROFIT RECOVERY (PTY) LTD

APPLICANT

(Registration number: 2001/005576/07)

And

MOGALAKWENA LOCAL MUNICIPALITY

FIRST RESPONDENT

THE MUNICIPAL MANAGER,

MM MALULEKE

SECOND RESPONDENT

PK FINANCIAL CONSULTANTS

THIRD RESPONDENT

(Registration no: 2001/037349/23)

JUDGMENT- APPLICATION FOR LEAVE TO APPEAL

MASHAMBA AJ

INTRODUCTION

- [1] The Applicant made an application for leave to appeal against the orders and judgment granted by the above honourable court on the 13th September 2024. The application is opposed by the First Respondent, Mogalakwena Local Municipality, Second Respondent, Mr Maluleke, the Municipal Manager and Third Respondent, PK Financial Consultants ("the Respondents").
- [2] This application is premised on the grounds set out in the application for leave to appeal filed on the 02nd October 2024. In brief the grounds of appeal are as follows;
- 2.1 that the learned judge erred in finding that the First Respondent did not commit any irregularity in disqualifying the Applicant from the tender.
- 2.2 that the learned judge erred in finding that the Applicant should approach the appropriate forum to investigate the allegation of tender fraud and that the effect of the judgment of the court a quo is that tender fraud and / or serious irregularities will be allowed to stand.
- [3] The application was set down for hearing on the 29th of January 2025.

FACTUAL BACKGROUND

- [4] The First Respondent advertises a tender for the appointment of a panel of service providers for the specific disciplines. One of the disciplines included in the tender was VAT recovery and

review of VAT returns ("the tender"). The Applicant submitted the tender in respect of the VAT recovery portion. The Applicant did not succeed with his bid for the tender, as he was disqualified. The Applicant was furnished with reasons for his disqualification. The first reason was that the Applicant did not complete full rates on the MBD 3.1 Form (pricing schedule). The Applicant only proposed a percentage rate for VAT recovery/review and left blank space for the required percentage for the amount recovered¹. The second reason was that the Applicant's Senior Manager did not meet the qualification requirements as per the tender document.

[5] The tender required the following qualification for 40 points;

5.1 Senior Manager (qualified CA's, SAIPA, Internal Auditor, Tax Practitioner: (10 years' experience);

5.2 Senior Manager (qualification CA's, SAIPA, internal Auditor, Tax Practitioner); 5-9 years post qualification relevant experiences;

5.3 Senior Manager (qualified CA's, SAIPA, Internal Auditor, Tax Practitioner): 4 years or less post qualification relevant experience each (no points will be awarded without a CV, certified copies of qualification.

[6] The Applicant neglected to attach crucial qualification which led to the tender adjudicators to disqualify his tender application. The Applicant got zero point on functionality. The Applicant did not attach CFA membership certificate of the senior manager². The Applicant failed to send a complete record of his senior manager's qualifications as per the tender requirements. The referred CFA membership certificate of the Senior Manager was only provided in the Applicant's replying affidavit but did not form part of the records which was before the tender adjudicators.

¹ Index to application, vol 6, page 597

² Index to application, vol 7, page 609-610, annexure SA6a-SA6aa.

- [7] It is undisputed that the Third Respondent satisfied the tender requirements as he properly completed the MBD 3.1 Form (pricing schedule) and further attached all required qualifications.
- [8] The Applicant made a review application to the court a quo in terms of the Promotion of Administrative Justice Act³ ("PAJA") for an order to review and to set aside the decision of the First Respondent to award the tender in respect of VAT recovery and review VAT returns to the Third Respondent. The Applicant further requested the court a quo to declare that the appointment of the Third Respondent in respect of VAT recover is constitutionally invalid, to be reviewed and to be set aside. The Applicant requested the court a quo to grant a substitution order, allowing him to replace the Third Respondent and continue with the tender. The Applicant alleged that the Respondents committed fraud because they failed to comply with section 217 of the Constitution of the Republic of South Africa⁴, ("the constitution") and the Preferential Procurement Policy Framework (PPPFA)⁵. The court a quo dismissed the review application with cost, attorney and client cost, including the cost of two counsel. The court a quo concluded that there are no proof of irregularities committed by the Respondents. In exercising his rights, the Applicant made an application for leave to appeal before this Court.

LEGAL PRINCIPLES

- [9] Applications for leave to appeal are governed by the provisions of section 17 of the Superior Courts Act⁶ 10 of 2013. Section 17(1) provides as follows:

"(1) Leave to appeal may only be given where the judge or judges concerned are of the opinion that:

- (a) (i) the appeal would have reasonable prospect of success; or*

³ Promotion of Administrative of Justice Act 3 of 2000

⁴ The Constitution of the Republic of South Africa, Act 108 of 1996, as amended

⁵ Preferential Procurement Policy Framework Act, 5 of 2000

⁶ The Superior Courts Act 10 of 2013

(ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration;

[10] The traditional test that was applied by the courts in considering leave to appeal applications have been whether there is a reasonable prospect that another Court may come to a different conclusion to the one reached by the court *a quo* as said in *Commissioner of Inland Revenue v Tuck* 1989 (4) SA 888 (T) at 890B. With the enactment of section 17, the test obtained statutory force. In terms of section 17(1)(a)(i) leave to appeal may now only be granted where the Judge or Judges concerned is of the view that the appeal would have a reasonable prospect of success, which made it clear that the threshold to grant leave to appeal has been raised.

[11] In *Mont Chevant Trust v Tina Goosen and 18 Others supra*, at para 6, it was held that:

"It is clear that the threshold of granting leave to appeal against a judgment of a High Court has been raised in the new Act. The former test whether leave to appeal should be granted was a reasonable prospect that another Court might come at a different conclusion, see Van Heerden v Cronwright & others 1985 (2) SA 342 (T) at 342H. The use of the word "would" in the new statute indicates a measure of certainty that another Court will differ from the Court whose judgment is sought to be appealed against." In Notshokuvu v S (2016) ZASCA 112 at para 2, it was indicated that an Appellant faces a "higher and stringent" threshold under the Superior Courts Act. Thus, in relation to the said section 17, the test for leave to appeal is not whether another Court "may" come to a different conclusion, but "would" indeed come to a different conclusion.

[12] With regard to the meaning of reasonable prospects of success, it was held in *S v Smith* 2012 (1) (SCA) 570, at para 7, as follows:

"What the test of reasonable prospects of success postulates is a dispassionate decision, based on the fact and the law, that a court of appeal could reasonably arrive at a conclusion different to that of the trial court. In order to succeed, therefore, the appellant must convince this court on proper grounds that he has prospects of success on appeal and that those prospects are not remote but have a realistic chance of succeeding. More is required to be established than that there is a mere possibility of

success, that the case is arguable on appeal or that the case cannot be categorised as hopeless. There must in other words, be a sound, rational basis for the conclusion that there are prospects of success on appeal."

- [13] In the decision of *Ramakatsa v ANC* which it was [(724/2019) [2021] ZASCA 31 (31 March 2021)] it was held that:

"I am mindful of the decision at High Court level debating whether the use of the word "would" as oppose to "could" possible mean that the threshold or granting the appeal has been raised. If a reasonable prospect of success is established, leave to appeal should be granted... The test of reasonable prospect of success postulates a dispassionate decision based on the facts and the law that a Court of Appeal could reasonably arrive at a conclusion different to that of the trial court' [at para 10].

SUBMISSIONS

- [14] The Applicant argued that the tender should have been awarded to him due to his lower tendered rate of 4.3% when compared to the Third Respondent tendered rate of 12.5%. The Applicant further alleged that the Respondents committed fraud due to the First Respondent's failure to consider a low rate and tendered with the Third Respondent who quoted the higher rate. The Applicant further alleged that the service agreement between the First and Second Respondent was entered into with a tendered rate of 15%, which should be considered exorbitant.
- [15] The Applicant submitted that section 217 of the Constitution, *inter alia*, demands fair competition and cost effectiveness. The Applicant indicated that he should have been given preference since he had tendered with a low rate and that when there is honest competition, a low rate should ordinarily result in cost-effective procurement.
- [16] The Respondents argued that the Applicant failed to submit the required qualifications as per the tender requirements and that the tender adjudicators cannot be faulted for their decision to disqualify the Applicant. The Respondents further submitted that the Applicant did not properly complete the tender document as required. The Respondents emphasised that there was no fraud committed and that the Third Respondent complied with all necessary requirements.

- [17] The Third Respondent submitted that the PPPFA⁷ provides that procuring entities should consider only “acceptable” tenders. An acceptable tender is defined in section 1(i) of PPPFA as:

“1,,,any tender which, in all respects, complies with the specifications and conditions of tender as set out in the tender documents.”

- [18] The Third Respondent further submitted that section 2 (1)(f) of PPPFA allows an entity to award a contract to a bidder who has the highest scoring bidder unless where objective criteria in addition to those contemplated in paragraphs (d) and (e) justify it. The Applicant did not make a case that he was the highest scoring bidder among all the companies appointed to the panel.
- [19] The Third Respondent further submitted that in the entire submissions made by the Applicant, the Applicant failed to show that he has a reasonable prospect of success in the appeal as required by Section 17 (1) of the Superior Courts Act⁸. The Applicant did not show that there is some other compelling reason why the appeal should be heard.

THE DISCUSSIONS AND COURT’S FINDINGS

- [20] The Applicant did not deny that certain important qualifications of their Senior Manager were not forming part of the records before the tender adjudicators. Although the Applicant argued that they completed tender MBD 3.1 form as required, the court noted that the referred form was not properly complete.
- [21] The claim of fraud against the Respondents remains a speculation without proof. The court finds that the Applicant cast aspersion on the Respondents because he was disqualified. The main concern raised by the Applicant was that the service agreement entered into between the Respondents have a fee rate of 15% which he considers very high compared to his rate of 4.3%. The Applicant’s submission was that due to their lower rate of 4.3% they should have been appointed because of cost effectiveness as required by section 217 of the constitution. The Applicant further indicated that the Third Respondent rate was at 12.5% was altered to 15%, which is against the principles in section 217 of the constitution.

⁷ Preferential Procurement Policy Framework Act, No. 5 of 2000.

⁸ Ibid page 4

- [22] The Applicant did not request reasons in terms of section 5(1), of PAJA⁹, from the Respondents as to why the tender rate was altered from 12.5 % to 15% as appears in the service agreement. The Applicant submitted that the request for reasons was not made but the fraud committed by the Respondents is clear. The court is of the view that there is no clear fraud committed by the Respondents as alleged by the Applicant.
- [23] The court finds that the issues regarding tender fraud is a triable issue. The court a quo could not have decided the issue of fraud on papers. Therefore, the Applicant's tender fraud against the Respondents remains unfounded speculation. The Respondents vehemently denied committing fraud in the tender process, and because of the conflicting version of the event, the version of the Respondents is to be accepted, unless in the opinion of the court the Respondents did not raise a genuine dispute of fact. This court is of the opinion that there is no fraud committed by the Respondents during the tender processes. The court considered the following case of **Wightman t/a JW Construction v Headfour (Pty) Ltd and Another**¹⁰, the approach adopted was as follows:
- "An applicant who seeks final relief on motion must in the event of conflict, accept the version set up by his opponent unless the latter's allegations are, in the opinion of the court, not such as to raise a real, genuine dispute of fact or are so far-fetched or clearly untenable that the court is justified in rejecting them merely on the papers".*
- [24] The court a quo ordered that the Applicant pays attorney and client cost to the Respondents, including the cost of two counsel due to the fact that the Applicant's case was found to be very weak and that the Respondents had to waste their scarce resources due to unnecessary litigation.
- [25] The court finds that the appeal has no reasonable prospect of success and that no other court would come to a different conclusion. The Applicant did not show that there are some compelling reasons why the appeal should be heard. I am therefore of the view that the application for leave to appeal should be refused.

⁹ Promotion of Administrative Justice Act, 3 of 2000 as amended

¹⁰ **Wightman t/a JW Construction v Headfour (Pty) Ltd and Another** 2008 (3) SA 371 (SCA) at para 12

[26] The cost of this application should follow the successful party, unless there is any reason to deviate from the general rule. This court is of the view that the Applicant should pay the cost.

ORDER

[27] In the circumstances, I make the following order;

1. The application for leave to appeal is dismissed.
2. The Applicant is ordered to pay party and party costs, incurred by the first, second and third respondent, including counsel fee, scale B.



E MASHAMBA
ACTING JUDGE OF THE HIGH COURT, POLOKWANE,
LIMPOPO DIVISION

APPEARANCES

FOR THE APPLICANT: ADV APJ ELS SC

INSTRUCTED BY: ALBERT HIBBERT ATTORNEYS

EMAIL: albert@hibbertlaw.co.za ; jaco@hibbertlaw.co.za

FOR THE FIRST AND SECOND RESPONDENT: ADV D WILLIAMS SC

INSTRUCTED BY: P MAAKE ATTORNEYS

EMAIL: admin@pmaakeattorneys.co.za ; pcmaake@pmaakeattorneys.co.za

FOR THE THIRD RESPONDENT: ADV L.M MAUNATLALA

INSTRUCTED BY: NCUBE INCORPORATED

EMAIL: lebo.m@ncubeinc.co.za; matjitji@group621.co.za

DATE OF HEARING: 29th January 2025

DATE OF JUDGEMENT: 28th February 2025