REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Case Number: 088485/2023

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

11 February 2025 [redacted]

DATE SIGNATURE

In the matter between:

PHAMBILI SERVICES (PTY) LTD Applicant

And

NATIONAL TREASURY OF THE REPUBLIC OF SOUTH AFRICA First Respondent

DIRECTOR GENERAL: NATIONAL TREASURY OF THE REPUBLIC OF SOUTH AFRICA Second Respondent

DIRECTOR OF THE OFFICE OF THE CHIEF PROCUREMENT OFFICER: TRANSVERSAL CONTRACTING Third Respondent

HEAD OF ADJUDICATION COMMITTEE Fourth Respondent

MINISTER OF FINANCE OF THE REPUBLIC OF SOUTH AFRICA Fifth Respondent

This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail and released to SAFLII. The date and time for hand-down is deemed to be 10h00 on 11 February 2025.

JUDGMENT

Mudau, J:

[1] The applicant, Phambili Services (Pty) Ltd ("Phambili"), seeks an order reviewing the decision made by the National Treasury on 14 July 2023, not to award a tender to Phambili for some of the items specified in tender number RT57-2022 ("the tender") pursuant to sections 5 and 6 of the Promotion of Administrative Justice Act[1] ("PAIA").

Background and salient facts

[2] On 30 September 2022, the National Treasury advertised the tender. The extended bid closing date was 27 January 2023. The tender, which is vast regarding quantum, scope and length, concerns the supply and delivery to the State of sedan, light, and heavy commercial vehicles, busses, motorcycles, agricultural construction plant, and equipment ("the vehicles") for the period 1 July 2023 to 30 June 2026 through transversal term contracting[2]. The approved budget for the tender is well over R10 billion. The participating organs of state include certain National and Provincial Departments, Public Entities and Municipalities.

[3] There are two categories of material conditions in the special conditions of contract for the tender ("the SCC") prescribed by the National Treasury that are relevant for determination of the matter regarding Phambili's bid in the tender. Firstly, clause 5.3.3(e) of the SCC sets forth specific requirements for bidders

[1] 2 of 2000.
[2] "A transversal term contract is a centrally facilitated contract arranged by the National Treasury for goods or services required by one, or more than one, institution."

who are neither manufacturers nor importers of vehicles in the tender. These bidders were expressly required to provide a letter from the vehicle manufacturer confirming the supply arrangements between the parties ("the prescribed letter"). Clause 5.3.3(e) also imposed mandatory conditions that the prescribed letter must not originate from a dealership (clause 5.3.3(e)(i)), the principal manufacturer must guarantee the warranties for all items, including warranty repairs and services through existing service centres or dealerships (clause 5.3.3(e)(ii)), the prescribed letter must be on the third party's letterhead and originally signed (clause 5.3.3(e)(iii)), and it must list item numbers and descriptions, as well as note the SCC by the manufacturer or importer of the vehicle (clauses 5.3.3(e)(iv) and (vii)).

[4] Secondly, in terms of clause 5.3.4(1)(a) of the SCC, Phambili was itself obliged to "subcontract a minimum of 10% of the value of the Contract (items awarded on the contract) to an EME or QSE which is at least 51% owned by black people". Clause 5.3.4(1)(c) of the SCC further required Phambili and the sub-contractor "to enter into an agreement relating to service deliverable on the ensued contract."

[5] The materiality of all the requirements prescribed in clause 5.3.3(e) of the SCC is confirmed in clause 5.3.3(f) of the SCC, which expressly provides that the failure by a bidder, other than a manufacturer or licenced importer, to give the letter from the vehicle manufacturer or importer as per the requirements will invalidate the bid for the items offered.

[6] Phambili's bid was for the supply of UD Trucks, Eicher and FAW heavy vehicles and for Iveco and Isuzu heavy vehicles. It is common cause that Phambili's bid was unsuccessful. It is common cause Phambili's authorisation letters relating to the Iveco and Isuzu vehicles were not compliant. The applicant concedes as much. In this regard, the letter pertaining to Isuzu dated to 2019 (it was accordingly not considered as current) and the Iveco letter was from a dealer (not the manufacturer).

[7] The National Treasury received a total of 94 bids in response to the advertised tender including that of the applicant. In its bid submission, Phambili included various documents that it said, constituted authorisation letters in terms of the material conditions prescribed by clause 5.3.3(e) of the SCC regarding the vehicles it tendered to supply. Phambili also by way of example included submitted a sub-contracting agreement between NMI- Durban South Motors (Pty) Ltd ("NMI") and Multi Cranes & Platforms (Pty) Ltd ("MCP") ostensibly in compliance with clause 5.3.4 of the SCC. NMI was, however, as pointed out by the respondents, a competing bidder with Phambili in the tender and accordingly fails to the material requirements imposed by clause 5.3.4 of the SCC.

[8] The respondents contend that each of the grounds upon which the purported authorisation letters failed to satisfy the mandatory conditions prescribed by clauses 5.3.3(e) and 5.3.4 of the SCC independently precluded the National Treasury from awarding the tender to Phambili in respect of the relevant vehicles. Instead, it was required to disqualify Phambili's bid for each vehicle in the event of non-compliance. The first respondent contends,correctly, that in line with its constitutional responsibilities as an organ of state, and principal agent of the Constitution, to respect the rule of law and use public resources efficiently, economically and effectively, the National Treasury duly proceeded not to award the tender for the relevant items to Phambili.

[9] On 7 July 2023, the National Treasury wrote to Phambili to communicate that its bid was unsuccessful. When the applicant addressed correspondence to the National Treasury to enquire as to the reasons for its bid being unsuccessful, it was informed, on 11 August 2023, that it failed to provide the "authorization letter from the manufacturer or importer as per paragraph 5.3.3 of the Special Conditions"; failed to submit a subcontracting agreement as per paragraph 5.3.4 (of the Special Conditions); and letters from suppliers confirming supply through a dealership, not through the applicant.

[10] It is Phambili's position that the bids for the remaining vehicles were, however, fully compliant in all respects, which includes the authorisation letters and the

subcontracting requirement. It explains in the replying affidavit that the applicant, for purposes of its bid submission, enlisted the services of BB Truck and Tractor (Pty) Limited, a firm based in Pretoria and an authorised franchisee for inter alia PAW, UD Trucks and Eicher. Several other bidders followed the same modus operandi.

[11] In this regard, Ms. Liza-Marie Gibson, the General Manager of BB Truck and Tractor deposed to an affidavit, in which various bidders who intended to participate in the RT57-2022 Tender approached her for assistance with the tender pricing and completion of bid documentation. This included the applicant. As part of the assistance rendered, Ms Gibson arranged authorisation letters from several vehicle manufacturing companies. These authorisation letters were drafted in a standard format. After the tender had closed, Ms. Gibson was alerted to a concern regarding a particular phrase in the manufacturer's authorisation letter that she had provided. The phrase being the following: "in conformance with the said arrangements we also appoint BB Truck Rosslyn as the sole vehicle provider dealership for the contractor". By way of email, Gibson confirmed that she on behalf of BB Truck and Tractor had arranged the manufacturer authorisation letters for the companies listed in the letter, which includes the applicant.

[12] It is common cause that, as Ms. Gibson confirms, not all the bidders for whom the standard authorisation letters were prepared and submitted, were disqualified. It is the high-water mark for the applicant's case that, the tender rules (and the SCC, which provided the important bid conditions) were simply not consistently applied. Bids for the supply of FAW, UD Trucks and Eicher were nevertheless awarded to inter alia Mathabatha; Matamba Supply Services; Key Spirit Trading; and Ratshikuni Asset. The applicant contends that this suggests irregularities of the nature contemplated in inter alia section 6(2)(e)(iii) of PAJA on the authority of *Minster of Water and Sanitation v Sembcorp Siza Water Pty Ltd & Another*[3].

[3] 2023 (1) SA 1 (CC) at para 44 onwards.

[13] The National Treasury sought this Court's discretion to permit the filing of its further affidavit under Rule 6(5)(e) of the Uniform Rules to respond to allegations made in Phambili's replying affidavit contending for the first time as indicated above that several successful bidders used the same "modus operandi" adopted by enlisting the services of BB Truck and Tractor.

[14] It is trite that, in motion proceedings all the necessary allegations upon which the applicant relies must appear in his/her/its founding affidavit, as he/she/it will not generally be allowed to supplement the affidavit by adducing supporting facts in a replying affidavit.[4] There was no opposition to the introduction of the fourth affidavit, which in the exercise of my discretion was duly accepted. In this regard, fairness, demands that the respondents be afforded a fair opportunity to deal with the case that Phambili raises for the review of the impugned decision.

[15] The fourth affidavits points out that, there were investigations and reviews conducted by the National Treasury officials from 7 March 2024 onwards, which benefited from the new information disclosed by Phambili in reply. This included the fact that the identified bidders, including Phambili, had obtained assistance from BB Truck and Tractor. The National Treasury identified the four bidders referred to by the applicant who were unlawfully awarded the tender, but which included a fifth one, Merafe Holdings (Pty) Ltd.

[16] The respondents contend that, the appointment of BB Truck in a prescribed letter of BB Truck Rosslyn as a dealership for a bidder, violates clause 5.3.3(e)(i) of the SCC, as it purports to confirm the supply of vehicles from a dealership, not from the manufacturer or importer as required. The respondents further contend that, any bid, including the successful bids, that included a prescribed letter appointing "BB Truck Rosalyn as the sole vehicle provider dealership for the contractor" ought to have been disqualified by the National Treasury with respect to the relevant vehicles. The respondents contend that unlawfulness of the awards it made to successful bidders who, like Phambili, submitted fatally defective prescribed letters, does not conversely mean that Phambili should have

[4] see *Mauerberger v Mauerberger* 1948 (3) SA 731 (C) at 732; *Passenger Rail Agency of South Africa v Swifambo Rail Agency (Pty) Ltd* 2017 (6) SA 223 (GJ) at 227D–228I; *Mostert and Others v FirstRand Bank Ltd t/a RMB Private Bank* 2018 (4) SA 443 (SCA) at 448D–E.

been awarded the tender for the relevant vehicles, in contravention of the material condition specified in clause 5.3.3(e)(i) of the SCC, as it contends. Such an award would have been unlawful.

[17] There is more. The respondents contend that Phambili's new arguments in its replying affidavit constitutes evidence of unlawful collusive bidding. In this case, bidders that responded to the tender, including Phambili, were required to and did submit signed bidder disclosure declarations inter alia that: they had arrived at their bids "independently from, and without consultation, communication, agreement or arrangement with any competitor". In addition, there had been "no consultations, communications, agreements or arrangements with any competitor regarding the quality, quantity, price specifications, prices, including methods, factors, formulas used to calculate prices, market allocation, the intention or decision to submit or not to submit the bid, bidding with the intention not to win the bid and conditions or delivery particulars of the products or services to which (the) bid invitation relates".

[18] In this case, contrary to the signed declarations made by 15 identified bidders including Phambili, approached BB Truck and Tractor for assistance "with the tender ring and completion of bid documentation", which is impermissible.

[19] The respondents also submit correctly, that Phambili was required to file the record of the impugned decision which was provided by the National Treasury. Its failure to do so is fatal to its review application, as the record is necessary for this Court to undertake the task of determining the regularity of the administrative action sought to be impugned.[5] The Constitutional Court further recognised that public tender processes require strict and equal compliance by all competing tenderers on the closing day for submission.[6] As Phambili's bid for each of the vehicles was inconsistent in several respects with the mandatory conditions articulated in clauses 5.3.4 of the SCC. the National Treasury was accordingly obliged not to condone of non-compliance. It accordingly follows that the

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[5] *Democratic Alliance and Others v Acting National Director of Public Prosecutions and Others* [2012] ZASCA 15; 2012 (3) SA 486 (SCA); 2012 (3) SA 486 (SCA) at para 37.
[6] *Steenkamp NO v Provincial Tender Board of the Eastern Cape* [2006] ZACC 16; 2007 (3) SA 121 (CC) at para 60.

application stands to be dismissed. There is no reason why costs should not follow the result.

[20] Order

The application is dismissed with costs, Scale C.

[redacted]

TP MUDAU

JUDGE OF THE HIGH COURT

JOHANNESBURG

Date of Hearing:	14 August 2024
Date of Judgment:	11 February 2025

APPEARANCES

Counsel for the Applicant:	Adv. AJ Daniels SC
Instructed by:	Logan Naidoo Attorneys
Counsel Respondent:	Adv. D Sive
Instructed by:	State Attorney