

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

Case No: **19716/2024**

Before the Hon. Justice Slingers

Hearing: **20 February 2025**

Judgment Delivered: **5 March 2025**

In the matter between:

MPUZI BUSINESS ENTERPRISE CC

Applicant

and

ESKOM HOLDINGS SOC LTD

First Respondent

BAZILOR (PTY) LTD

Second Respondent

HOUSE OF NNYANE (PTY) LTD

Third Respondent

JTB GROUP (PTY) LTD

Fourth Respondent

KOTANI PROJECTS (PTY) LTD

Fifth Respondent

SANDRA CORPORATION (PTY) LTD

Sixth Respondent

TINCOL GROUP (PTY) LTD

Seventh Respondent

WASTECH INVESTMENTS (PTY) LTD

Eighth Respondent

This judgment is handed down electronically by circulation to the parties' legal representatives' email addresses. The date of hand-down is deemed to be 5 March 2025.

JUDGMENT

SLINGERS J

Introduction

- [1] During May 2024 the first respondent published an invitation to tender for the provision of vegetation management services on its western grid lines in respect of tender number WCTX 1098SL (**'the tender'**). The invitation for tender was part of the first respondent's vegetation management plan which it strives to do

as economically as possible and without causing unnecessary environmental damage and without impacting on the rights and requirements of the landowner and other interested and affected parties. The tender was for a period of 5 years on a '*as and when required*' basis.

[2] The applicant submitted a bid in respect of the invitation to tender but was informed that it was unsuccessful and that the tender had been awarded to other bidders.

[3] In this application, the applicant seeks the following substantive relief:

(a) the review and setting aside of the first respondent's decision taken on or about 20 April 2024 to award tender number WCTX 1098SL (**'the tender'**) to the second to eighth respondents (**'the successful tenderers'**) and not to include the applicant amongst the successful tenderers; and

(b) substituting the first respondent's decision with a decision including the applicant amongst the successful tenderers, alternatively, remitting the applicant's bid in respect of the tender to the first respondent for reconsideration.

[4] During the hearing of the matter, advocate Quixley for the applicant informed the court that it no longer sought substitution of the first respondent's decision and that it would seek remission of the tender for reconsideration, if successful.

[5] The applicant relies on two principal grounds for the relief it seeks. Firstly, it avers that the first respondent deviated from the prescribed procedure set out in the invitation for tender. This rendered the decision awarding the tender irregular and procedurally flawed. Secondly, it appears from the technical evaluation report that bidder 44 failed to submit mandatory documentation pertaining to first aid and firefighting. This failure should have rendered bidder 44's bid non-

responsive resulting in disqualification. However, instead of being disqualified, bidder 44 was awarded the maximum score of 200 points. This was irrational and compromised the legitimacy of the tender award.

- [6] The application was only opposed by the first respondent whose answering affidavit was deposed to by Ayanda Gcotyelwa Velani (**'Velani'**) who is employed as a procurement manager for the Western Cape.¹ Velani signed off on the invitation to tender.

- [7] In awarding the tender, the first respondent followed a three-stage process. Stage one tested for responsiveness. In the event that a bidder does not submit the mandatory documents at tender closing, it would be deemed non-responsive and disqualified from progressing to the next stage.

- [8] Stage two tested compliance with the minimum functionality threshold requirements. Functionality was evaluated on a total weight of a hundred percent, with a minimum threshold for vegetation management areas being 86% for bush and tree clearing and 70% for substation weeding and herbicide. A bid which failed to meet the minimum threshold for vegetation management would be disqualified from progressing to the third stage.

- [9] Stage three entailed the process of weighted scoring. All bidders were awarded 80 points in respect of price as the bidders were compelled to accept the mandatory standard rates. Bidders were awarded points out of 20 in respect of specific goals.

- [10] At the end of all three stages the bidders would be ranked from highest to lowest in accordance with price (which was uniform in this tender) and specific goals. In the event of a deadlock, the bidder with the highest points for specific goals

¹ Velani is employed by NTCSA who, since 1 July 2024, is the successor of the first respondent.

would be awarded the tender. In the event that two or more bidders scored the same total points in all respects, the tender would be awarded by the drawing of lots.

[11] The applicant and the first respondent (**‘the parties’**) adopted different interpretations of the phrase *‘in all respects’*. The meaning ascribed to *in all respects* is material as it determines eligibility to participate in the deadlock breaking mechanism of drawing lots. The applicant submits that it includes functionality, price and specific goals whereas the first respondent submits that it excludes functionality and only includes price and specific goals.

[12] I turn firstly to the applicant’s challenge in respect of bidder 44.

Bidder 44

[13] Sixty bids were received in response to the invitation for tender with twenty-eight bidders passing the technical evaluation and progressing to the third stage. One tenderer submitted documentation with the incorrect tender and number and documentation and was immediately disqualified.

[14] The twenty-eight bidders were shortlisted for potential appointment, with nine bidders being awarded a total score of 200. Bidder 44 was amongst the nine bidders who achieved this score and was deemed eligible to participate in the deadlock breaking mechanism of drawing lots which took place on 16 November 2023.²

[15] The following appear from the technical tender evaluation report:

- (i) the bid enquiry was a formal tender document;

² This is on the first respondent’s interpretation of the phrase.

- (ii) there were gatekeeper returnables, i.e., failure to submit gatekeeper returnables automatically resulted in the tenderer failing;
- (iii) the basis of the evaluation was transparent to all suppliers;
- (iv) the applicant passed the technical criteria gatekeepers and achieved a score of 200;
- (v) aside from the applicant, 9 other tenderers passed the technical criteria gatekeepers and achieved a score of 200; and
- (vi) it was commented in respect of bidder 44, who obtained a score of 200, that:

'...docs found. Supervisors for Substations don't have first aid and fire fighting on file.'

- [16] The invitation to tender prescribes that the bidder's team leader / supervisor should have training certificates for firefighting and first aid level 1 and 2. It goes on to state that:

'N.B.: A tenderer that does not submit mandatory documents required above (the training certificates) and at tender closing as stipulated in the tender returnable on this ITT will be deemed non-responsive.'

- [17] The applicant argues that as bidder 44 failed to submit the mandatory documents it was irrational to award it the 200 points and that doing so compromised the legitimacy of awarding the tender.

- [18] In responding to the allegations pertaining to bidder 44, the first respondent explained that:

- (i) the note that *'Supervisors for Substations don't have first aid and firefighting on file'* was recorded by a member of the bid committee;
- (ii) the note *'docs found'* was a subsequent annotation made;
- (iii) the first aid and firefighting documents (**'the requisite documents'**) were placed in a separate folder and not in the mandatory requirements folder;
- (iv) the requisite documents were found as a result of a thorough sweep of bidder 44's documents; and
- (v) the requisite documents were submitted in the Health and Safety folder.

[19] Emile Adams (**'Adams'**), an adult male who is employed by NTCSA as its engineer in the high voltage plant department for the Western Cape deposed to a confirmatory affidavit to Velani. He states:

- 3. *I have read the affidavit of Ms Ayanda Gcotyelwa Velani, dated 13 December 2024. I confirm the contents thereof in so far as they relate to me, more particularly paragraphs 33 and 34.*
- 4. *More specifically, I confirm that I found the missing supervisor fire-fighting and first aid certificates in relation to bidder 44. I furthermore was the person that added the subsequent note "docs found" in the Technical Tender Evaluation Report. I therefore confirm and corroborate the contents of paragraph 33 and 34.'*

[20] Paragraphs 33 and 34 of the answering affidavit state:

- 33. *Annexure SA1 of the applicant's supplementary affidavit is Eskom's Technical Tender Evaluation Report (**"Technical Report"**). At page 12 of the Technical Report an initial note is recorded by a member of the bid*

committee in relation to bidder 44 – the note states that “Supervisors for Substations don’t have first aid and firefighting on file”. This note refers to the necessary first aid and firefighting certificates required for Technical Mandatory requirements.

34. *A subsequent note, above this note, states “docs found”. The reason for this note is that the certificates were placed in a separate folder in the bidders file and not under the mandatory requirements folder. Only through a further sweep of bidder 44’s bid documents was it discovered that the documents were submitted in the Health and Safety Folder. Accordingly, the subsequent note “docs found” was recorded in the Technical Report.’*

[21] It is clear from reading the confirmatory affidavit of Adams together with paragraphs 33 and 34 of the answering affidavit that:

- (a) Adams made the note ‘docs found’, he did not make the note recording the absence of the requisite documents;
- (b) a member of the bid committee made the note recording the absence of the requisite documents;
- (c) neither Adams nor Velani allege that Adams is a member of the bid committee.

[22] Neither Adams nor Velani explain or address:

- (i) why Adams performed a further sweep of bidder 44’s documents;
- (ii) what role, if any, Adams played in respect of receiving and/or evaluating the bids received;

- (iii) at what stage of the tender award process Adams performed the further sweep of bidder 44's documents; and
- (iv) whether the further sweep of bidder 44's documents were part of a process applied uniformly to all bids received.

[23] Therefore, on the papers filed on record the awarding of 200 points to bidder 44 did not occur in a fair or transparent manner and was, therefore, contrary to section 217(1) of the Constitution. The award of 200 points to bidder 44 was procedurally irregular, irrational and compromised the legitimacy of the tender award process.

[24] The award of the tender stands to be reviewed and set aside on this ground alone.

[25] I turn now to the interpretation of the phrase *in all respects*.

Interpreting the phrase '*in all respects*'

[26] Section 217 of the Constitution is the starting point in this interpretative exercise as it sets out the minimum requirements for a valid tender process and for contracts concluded following an award of a tender to a successful bidder.³ Section 217 is headed '*Procurement*' and provides that:

'(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.'

³ *Millenium Waste Management (Pty) Ltd v Chairperson of the Tender Board Limpopo Province and Others* 2008 (2) SA 481 (SCA)

(2) *Subsection (1) does not prevent the organs or 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 or advancement of persons, or categories of persons, disadvantaged by unfair discrimination.*

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

[27] This was recognised in *Minister of Finance v Afribusiness NPC*⁴ where the court held:

‘As stated above, it is a settled principle of our law that legislation must be read in a manner that is consistent with the Constitution. This means that s2 of the Procurement Act, and indeed the entire Act, must be read with s 217, especially because they share a constitutional bond envisaged in s 217(3). ’

[28] The applicable interpretative principles were summarised in *Capitec Bank Holdings Limited and Another v Coral Lagoon Investment 194 (Pty) Ltd and Others*⁵ with the court stating:

‘It is the language used, understood in the context in which it is used, and having regard to the purpose of the provision that constitutes the unitary exercise of interpretation. I would only add that the triad of text, context and purpose should not be used in a mechanical fashion. It is the relationship between the words used, the concepts expressed by those words and the place of the contested provision within the scheme of the agreement (or instrument) as a whole that

⁴ 2022 (4) SA 362 (CC) at paragraph 76

⁵ 2022 (1) SA 100 (SCA)

constitutes the enterprise by recourse to which a coherent and salient interpretation is determined.'

[29] Furthermore, it is trite that interpretation is an objective process in which a sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document.

[30] The tender was evaluated based on the ability of the bidder to provide the services for which the invite to tender was issued.⁶ Paragraph 3.13 of the invitation to tender set out the functionality requirements and provided that:

*'Functionality requirements **are applicable***

Functionality will be evaluated on a total weight of 100% with a minimum threshold for each of the vegetation management areas as follows:

- 1. Bush clearing and tree clearing -86%*
- 2. Substation weeding and herbicide – 70%*

Failure by the tenderer to meet the above minimum threshold will lead to disqualification.'

[31] The invitation to tender states further that the prices of the response to tender will be on a preference point system of (80/20). Furthermore, all tenderers would be allocated a score of 80 points on price as the price rate for the contract was standard.

[32] Paragraph 3.18 is described as *Ranking of tenders*. The process is headed PPFA and Preference Points. The invitation to tender provided that bidders would be ranked based on their scores as per PPPFA scoring. After scoring the

⁶Para 4 of the Technical Tender Evaluation Report, page 50

bidders points for specific goals which was out of 20, the first respondent would add these points to the points allocated for pricing to rank the bidders from the highest to the lowest in terms of this combined score.

- [33] The deadlock breaking mechanism would be employed when two or more bidders scored the same number of points. In terms of the deadlock breaking mechanism, if two or more bidders scored an equal number of points then the tender would be awarded to the bidder that scored the highest points for specific goals. However, if two or more bidders scored an equal number of points in all respects, then the bid would be awarded by the drawing of lots. Paragraph 3.18 of the invitation to tender echoes regulation 8 of the Preferential Procurement Regulations 2022 which is applicable to the tender.⁷
- [34] The first respondent interpreted the phrase *in all respects* to refer only the points awarded in the third stage of the tender process, i.e. points awarded for price and specific goals. Thus, points awarded for functionality would not be considered. On this interpretation, bidder 44 was eligible to participate in the drawing of lots and the applicant was not.
- [35] The applicant adopted a different approach and interpreted the phrase to include points for functionality, price and specific goals. On this interpretation, the applicant would have qualified to participate in the drawing of lots.
- [36] Adv Mokale for the first respondent referred the court to various authorities limiting the role of functionality as a qualification (and not an award) criteria and/or as an additional objective factor within the context of section 2(1)(f) of the

⁷ Regulation 8 reads as follows: '**8 Criteria for breaking deadlock in scoring**

(1) *If two or more tenderers score an equal total number of points, the contract must be awarded to the tenderer that scored the highest points for specific goals.*
 (2) *If two or more tenderers score equal total points in all respects, the award must be decided by the drawing of lots.'*

Procurement Act. The present case is distinguishable as it does not pertain to the award of a tender *per se* nor to the situation envisaged by section 2(1)(f) of the Procurement Act.

[37] As set out above, in stage 3 of the tender process all the bidders were awarded the same points for price with the points for specific goals being the only variable. On the first respondent's interpretation, the deadlock mechanism would apply as follows in respect of this tender:

- (i) bidders were ranked in terms of the cumulative points awarded for price and specific goals;
- (ii) as there were two or more bidders who received the same points, the tender had to be awarded to the bidder who scored the most points in respect of specific goals. However, as a result of the points allocated for specific goals being the only variable, the position would remain unchanged irrespective of whether or not the award of tender was done on the basis of points for specific goals only or on the basis of points awarded cumulatively for both price and specific goals;
- (iii) thus, as soon as two or more bidders obtained the same points at the end of stage 3, the award of the tender would automatically progress to the drawing of lots. In the circumstances of this tender, a referral to points for specific points upon a deadlock being reached served no purpose and was superfluous.

[38] The first respondent argued that its interpretation was the correct one as it would ensure that new entrants, particularly smaller enterprises could be accommodated in the industry. However, no factual basis was presented in support of this submission.

- [39] On the first respondent's interpretation the phrase *in all respects* would simply mean specific goals. This interpretation is inconsistent with the language used both in the tender invite and in the procurement regulation 8 of 2022 as it did does not refer to specific goals but to *in all respects*.
- [40] Furthermore, the first respondent's interpretation is not consistent with the objectives of section 217 of the Constitution as it did not award the tender in a competitive and cost-effective manner. Furthermore, it is also inconsistent with the first respondent's own vegetation management plan which strives to be economical.
- [41] Taking functionality into account during the second stage of the deadlock breaking mechanism would make the tender process more competitive and would ensure that the successful bidder would also be able to perform and meet the needs of the first respondent. It would ensure that the award of the tender resulted in the best possible value for money being achieved.⁸ This yields a sensible and commercially sound result.
- [42] If the phrase *in all respects* includes functionality and not only price and specific goals, it would avoid the superfluous role assigned to specific goals in the first stage of the deadlock breaking mechanism. This interpretation would also be consistent with the objective sought to be achieved by the deadlock breaking mechanism. Furthermore, it would also further the first respondent's objective of implementing its vegetation management plan in an economical manner.
- [43] In the circumstances, I am in agreement with the applicant's submission that the first respondent's interpretation is inconsistent with the plain language of the phrase *in all respects* as used in the invitation to tender and regulation 8 of the

⁸ *Rainbow Civis CC v Minister of Transport and Public Works, Western Cape and others* (21158/2012) [2013] ZAWCHC 3 (3 February 2013)

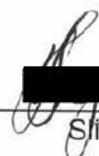
2022 regulations as well as with the objectives of section 217 of the Constitution.⁹

[44] Therefore, after considering the legal principles and factual context, I am of the view that the phrase *in all respects* as used in the deadlock breaking mechanism in the invitation to tender refers to functionality, pricing and specific goals.

[45] As the first respondent applied the incorrect interpretation of the phrase *in all respects*, it failed to comply with the deadlock mechanism set out in the invitation to tender as well as regulation 8 of the 2022 regulations. It failed also failed to consider functionality, which was a relevant consideration when it implemented the deadlock breaking mechanism. This rendered the award of the tender irregular and unlawful. Consequently, the award of the tender stands to be reviewed and set aside.

[46] Therefore, I make the following order:

- (i) the award of tender with tender number WCTX1098SL to the second to eighth respondents is reviewed and set aside;
- (ii) the award of the tender with tender number WCTX1098SL is remitted to the first respondent for reconsideration;
- (iii) the costs occasioned by the postponement on 20 February 2025 shall be borne by the applicant and shall be costs on scale B;
- (iv) save for the costs set out in paragraph (iii) above, the costs of the application shall be borne by the first respondent on scale B.


Slingers, J

⁹ Paragraph 40 of the applicant's heads of argument