REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

LIMPOPO DIVISION, POLOKWANE

CASE NO: 8279/2022

(1) REPORTABLE: ~~YES~~/NO
(2) OF INTEREST TO THE JUDGES: ~~YES~~/NO
(3) REVISED.

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………………………

DATE 18|05|26 SIGNATURE [redacted]

In the matter between:

TAINAMA CIVILS (PTY) LTD Applicant

And

THULAMELA LOCAL MUNICIPALITY First Respondent

FARIZA CONSTRUCTION J.V Second Respondent

FARIZA CONSTRUCTION Third Respondent

TBS MANAGEMENT CONSULTANT AND PROJECTS Fourth Respondent

JUDGMENT

NKOANA A.J

Introduction

[1] The First Respondent issued bid number 27/2021/2022 for the upgrading of Tshilamba Street, Phase 3. The tender was adjudicated and awarded to the Second Respondent on 19 January 2022.

[2] Aggrieved by this administrative action, the applicant instituted these review proceedings

The Parties

[3] Only the Applicant and the First Respondent actively participated in these proceedings. The Second, Third and Fourth respondents took no part.

Applicant's Case

[4] The applicant instituted the review proceedings on 29 July 2022, while the impugned administrative action was taken on 19 January 2022. By the time the application was launched, the 180-day period prescribed by PAJA had expired.

[5] The Applicant in its Founding Affidavit embodied a condonation application. It is important to state that the applicant's application exceeded the 180-day period by approximately 11 days. The reasons proffered by the Applicant on why the review application was launched late can be summarized as follows.

[6] Upon learning, in the latter part of December 2021, that the tender had been awarded to the Second Respondent, the Applicant engaged its legal team, who briefed counsel to consider the merits of a possible review. On 7 January 2022, and prompted by reports that the tender had been awarded to the Second Respondent, the Applicant requested access to the First Respondent's records. The First Respondent replied on 14 January 2022, stating that no award had yet been made.

[7] First consultation took place on 14 January 2022, which was followed by a second consultation on 17 May 2022, whereafter a decision was made, that a second request to access the First Respondent's record had to be submitted.

[8] The said request was made on 25 May 2022 and on 22 June 2022 a representative of the First Respondent contacted the Applicant's legal representative's office and instructed them to send a courier to collect the documentation relating to the matter. Once the documents were received, then the review application was concluded.

[9] The condonation application is opposed in that it is argued that the review proceedings were not launched within a period of 180 days as provided for in Section 7(1) of PAJA.

[10] Given that the application was launched only 11 days after the expiry of the 180-day period, and after the applicant received the documents relating to the administrative decision on 22 June 2022, the Court is satisfied that condonation for the late institution of the review application should be granted.

[11] I will now turn to the Applicant's case. The Applicant contends that the decision taken by the First Respondent's Municipal Manager to award the tender to the Second Respondent is an administrative action which adversely affected the Applicant's rights as a prospective bidder.

[12] The Applicant's relies on Section 217 of the Constitution which states that "*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 the system which is fair, equitable, transparent, competitive and cost-effective.*"

[13] The Applicant also relies on the Preferential Procurement Policy Framework Act 5 of 2000, which was enacted to give effect to Section 217(3) of the Constitution.

[14] Furthermore, the Applicant relies on The Local Government:Municipal Finance and Management Act, Act 56 of 2003 ("the MFMA"). It is the Applicant's case that in terms of Section 111 of the MFMA, each Municipality must have and implement a supply chain management policy which gives effect to the provisions of Part I of Chapter 11 of MFMA. Other provisions of the MFMA are also relied upon, including its regulations.

[15] The Applicants' gripe with the First Respondent's handling of the tender, which led to the impugned decision are in the main as appearing below.

[16] It was stated in terms of the score for functionality that experience of the construction company, as demonstrated to company experience on similar projects and past performance in road construction will weigh 50 points, proof of plant and equipment or lease agreement will weigh 30 and financial references 20 points respectively.

[17] It was also stated that failure to comply with tender conditions or to supply the necessary information in tender closure will result in the tender being rejected. It was also stated that bidder submissions will be evaluated based on compliance with certain criteria to determine their responsiveness to the bid requirement. The bid closed on 29 October 2021.

[18] On 11 November 2021, the Bid Evaluation Committee ("BEC") considered all of the submitted tenders. also.

[19] On 15 November 2021, the BEC chairperson tabled relevant scores of each bidder and after considering the tender documents for 29 contractors and service providers, it was determined that 17 did not qualify for further evaluation and 12 remained.

[20] The Applicant and the Second Respondent each scored 30 out of 30 for similar projects and road construction experience, and both achieved an overall score of 93 out of 100.

[21] Mr Mulaudzi, the chairperson of the BEC, recommended to the Bid Adjudication Committee("BAC") that the tender should be awarded to the Second Respondent as they had scored the highest points.

[22] On 23 November 2021, the chairperson of the BAC directed an e-mail to the BEC in terms of which they were asked to consider doing re-evaluation of the bid in question, to address some issues raised by the adjudication committee.

[23] The BEC chairperson on 24 November 2021 wrote back to the BAC chairperson and requested to be furnished with a list of all the items that need to be reconsidered for evaluation. The BAC chairperson, Mr Mudzili replied on the same day and listed the issues of experience, plant, authenticity of some clients used as references and the issues of highlighted similar works, municipal rates issues and other critical issues that might be picked up in the process.

[24] The BEC replied on 1 December 2021 and stated that in respect of similar work, they used the same evaluation which they had applied to similar projects and that there was consistency in the evaluation process. The Applicant's case goes further to state that the BEC misinterpreted what was considered of them and whether a bidder had complied with the compulsory requirements in the tender project.

[25] The BEC submitted the evaluation report to the BAC without any further changes. Then on 15 December 2021, the BAC directed a memorandum to the Municipal Manager of the first respondent in terms of which they recommended that certain issues must be observed before the bid is finalised.

[26] The BAC recorded the difficulties that they had encountered with specific reference to each tender, which issues were erroneously or irregularly considered by the BEC.

[27] On 22 December 2021, the Municipal Manager responded to the BAC, stating that, after considering the issues it had raised, he was satisfied that the concerns had been clarified and that there was no need for the BEC to undertake a second re-evaluation. He accordingly approved the BEC's recommendation to appoint the Second Respondent as the service provider.

[28] The Applicant contends that the Municipal Manager's conduct was inconsistent with section 29 of the First Respondent's Supply Chain Management Policy, which required the BAC either to make the final award or to recommend that the Municipal Manager do so. On the Applicant's case, that function did not lie with the BEC.

[29] The decision to award the tender to the second respondent is attacked on several grounds as listed in Section 6 of PAJA.

[30] In its Notice of Motion, the Applicant sought condonation for the late delivery of the review application. Second, it sought that the decision of the First Respondent to award the tender 27/2021/2022 to the Second Respondent be reviewed and set aside in terms of Section 8(1)(c) of PAJA and it also sought costs.

[31] On 12 October 2023, the applicant filed a notice of intention to amend its notice of motion by introducing paragraph 3 as an alternative prayer, seeking a declaration that the First Respondent's decision to award tender 27/2021/2022 to the second respondent was unlawful. Furthermore, that the decision be reviewed and set aside.

[32] The Applicant also introduced a just and equitable compensation remedy in accordance with section 8(1)(c)(ii)(bb) of PAJA which was followed by a referral to *viva voca* evidence to determine the loss of profits and other ancillary orders. The amended papers were delivered with the Registrar on 27 October 2023.

[33] On 11 November 2024, the Applicant made an application to be allowed to deliver a supplementary affidavit. In the main, the Applicant stated that additional facts came to its attention relating to the fact that the First Respondent in its Answering Affidavit suggested that since the contract was envisaged for a period of 12 months. By the time the matter was to be adjudicated, the tender would have been concluded and therefore the relief sought will be moot.

[34] The Applicant stated that it recently came to know of correspondence between the First Respondent and Second Respondent, which will be relevant to the determination of the issues in the review.

[35] In the correspondence the Respondents seemed to suggest that the completion of the contract was delayed by a period of seven months, and that the Second Respondent had abandoned site on November 2023, thereby failing to fulfil its contractual obligations.

[36] The applicant relied on letters dated 19 February 2024 and 4 March 2024. The purpose of the supplementary affidavit was to show that the contract did not run for only 12 months and had not yet been finalised when the application for leave to file that affidavit was brought.

<u>*The First Respondent's case*</u>

[37] The First Respondent, in its answering affidavit raised points *in limines*. The first one dealt with the fact that the application was brought outside the 180 days period as provided by Section 7(1) of PAJA. I need not say more about this as I have already concluded that condonation must be granted.

[38] The second point raised was that of mootness, in that they stated that when the matter would be finally heard in the Opposed motion Court, the execution of the tender would have been concluded. Therefore, the application is moot.

[39] Thirdly, they raised a point *in limine* of non-joinder of interested parties. These are the parties who will be affected by the order sought and the parties have not been joined in these proceedings.

[40] On 18 November 2024, the first respondent filed a supplementary affidavit in response to the applicant's supplementary affidavit of 11 November 2024, with the aim of clarifying any confusion arising from it.

[41] The First Respondent confirmed that they terminated the contract with the Second Respondent on 4 March 2024. When the contract was terminated, the Second Respondent had completed 92% of the project task and the remaining 8% was completed and finalised by the First Respondent through its internal processes.

[42] The First Respondent further stated that the contract works were certified as complete on 13 September 2024, as reflected in the certificate of completion annexed to their affidavit as "CC1".

[43] The First Respondent contended that the matter had become moot because, by the time the Applicant filed its supplementary affidavit and the matter was heard on 21 November 2024, the tender had already been concluded and finalised. It is therefore necessary to consider the issue of mootness first, as my finding on it may be dispositive of the matter.

Mootness

[44] The matter was argued on 21 November 2024. By that date, the factual position was no longer in dispute. The First Respondent placed before the Court evidence that the contract awarded pursuant to the impugned tender process had been completed on 13 Septemfinber 2024. It is further common cause that the contract with the initially appointed contractor had been terminated on 4 March 2024, and that the subsequent appointment was fully implemented and finalised.

[45] On these facts, the impugned administrative action has been fully spent. No practical or effective relief can now be granted to the Applicant. The Constitutional Court has consistently held that courts do not decide abstract or academic questions where the underlying dispute has ceased to exist. The doctrine of mootness is rooted in judicial economy, the separation of powers, and the principle that courts adjudicate live controversies, not hypothetical disputes.

[46] The Applicant urged the Court to determine the matter notwithstanding mootness, relying on the seriousness of the alleged procurement irregularities. These include the contradictory understanding of the process between the BEC and BAC, the absence of a final BAC recommendation, and the Municipal Manager's intervention in awarding the tender solely on the BEC's recommendations and the basis of Municipal Infrastructure Grant ("MIG") and Municipal Disaster Relief Grant ("MDRG") funding deadlines.

[47] These allegations, if established, would undoubtedly raise concerns about compliance with the MFMA and the municipality's SCM policy. However, the test is not whether the allegations are serious, but whether the interests of justice require the Court to pronounce on a matter that is no longer live.

[48] The Constitutional Court has identified limited circumstances in which a court may decide a moot matter: where the issue is of public importance and likely to recur; where legal certainty is required; or where the conduct complained of is capable of repetition yet evading review. The discretion is narrow and must be exercised sparingly.[1]

[49] The SCA had this to say regarding mootness in the case of ***Radio Pretoria v Chairman, Independent Communications Authority of South Africa, and Another 2005 (1) SA 47 (SCA) para***

> *[41] It is clear that the question of a temporary licence is no longer a live issue. That question is moot. No order by us will impact on Radio Pretoria's ability to continue broadcasting until the litigation concerning ICASA's decision to refuse the four-year licence application has been finally resolved. Courts of appeal often have to deal with congested court rolls. They do not give advice gratuitously.*
>
> *They decide real disputes and do not speculate or theorise (see the Coin Security case, supra, at paragraph [7] (875A–D)). Furthermore, statutory enactments are to be applied to or interpreted against particular facts and disputes and not in isolation.*

[50] The Constitutional Court also had an occasion to consider the issue of mootness in ***Minister of Tourism and others v Afriforum NPC and another 2023 JDR 0761 (CC) para***

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[1] Independent Electoral Commission v Langeberg Municipality2001 (3) SA 474(CC)para 9

[23] A case is moot when there is no longer a live dispute or controversy between the parties which would be practically affected in one way or another by a court's decision or which would be resolved by a court's decision. A case is also moot when a court's decision would be of academic interest only. In National Coalition for Gay and Lesbian Equality it was said:

> *"A case is moot and therefore not justiciable, if it no longer presents an existing or live controversy which should exist if the Court is to avoid giving advisory opinions on abstract propositions of law.*

[51] In the present matter, the alleged irregularities do not, in my view, justify the Court departing from the ordinary rule.

[52] First, the procurement process at issue was unique to this tender, and the factual matrix, particularly the contradictory BEC/BAC interpretation of how functionality points must be calculated and the MIG/MDRG funding related urgency is highly specific. While procurement irregularities are regrettably not uncommon, the Court is not persuaded that the precise pattern of issues is likely to recur in a manner that would evade judicial scrutiny.

[53] Second, the Applicant had ample opportunity to pursue interim relief or to seek to interdict implementation of the award pending review. As the *dominus litis* the Applicant should have done more to expeditiously prosecute the review. The fact that the contract proceeded to completion before the hearing, is not a basis for the Court to resuscitate a dispute that has become academic.

[54] Third, while the Municipality's reliance on MIG/MDRG deadlines as justification for bypassing the BAC raises questions of administrative propriety, those questions can be addressed through internal oversight mechanisms. Judicial intervention at this stage would serve no practical purpose.

[55] In all the circumstances, I am not satisfied that the interests of justice require this Court to determine the merits of a dispute that has become moot. The matter is best disposed of on that basis. To proceed to the merits would be to issue what would amount to an advisory opinion, something our courts have repeatedly cautioned against.

[56] It is necessary to emphasise that the applicant approached this Court seeking a judicial review of the tender award. That is the only relief this Court is empowered to determine on the papers before it. A review court does not fashion remedies beyond the statutory and constitutional framework governing administrative action. Its task is confined to determining whether the impugned decision is lawful, rational, and procedurally fair.

[57] However, because the contract has been fully implemented and completed, and because the impugned administrative action has already produced its final consequences, the Court is unable to grant any effective review remedy. The Court cannot set aside a contract that no longer exists, nor can it remit a matter for

reconsideration where the underlying procurement process has been overtaken by events.

[58] The Applicant therefore finds itself in a position where the Court cannot determine the review on its merits, not because the grounds are weak or ill-founded, but because the factual substratum necessary for a review remedy has fallen away. This reinforces the conclusion that the matter is moot and must be disposed of on that basis.

[59] Following the amendment of the notice of motion, the applicant sought, in the alternative, just and equitable compensation in terms of s 8(1)(c)(ii)(bb) of PAJA. This form of relief is exceptional and is granted only in rare circumstances. It presupposes a prior judicial finding that the impugned administrative action was unlawful.

[60] Compensation under PAJA is not a primary remedy. It is contingent upon a court first determining that the administrative action in question is unlawful. Only then does the enquiry shift to whether compensation is appropriate in the circumstances.

[61] In this matter, the Court has expressly declined to determine the merits of the review because the dispute is moot. The Court therefore makes no finding on the lawfulness of the tender award. Without such a finding, the statutory precondition for awarding compensation under s 8(1)(c)(ii)(bb) is absent.

[62] To award compensation in the absence of a finding of unlawfulness would be to grant a remedy without establishing a wrong, something PAJA does not permit. It would also collapse the distinction between review and damages, a distinction our courts have consistently maintained.

[63] The alternative claim for just and equitable compensation must therefore fail, not on its merits, but because the Court cannot reach the merits at all.

Conclusion and Costs

[64] The remaining issue concerns costs. Although the matter falls to be disposed of on mootness, it does not follow that the Applicant should bear the costs of the proceedings. The general rule that costs follow the result is not inflexible, particularly where the litigation has become moot through circumstances not attributable to the applicant.

[65] On the facts, the applicant launched the proceedings at a time when the dispute was live, and when the impugned procurement process had not yet been fully implemented. The applicant cannot be faulted for approaching the Court to challenge what it contended were serious irregularities in the tender process, including the conflicting approaches of the BEC and BAC to the calculation of functionality points and the Municipal Manager's intervention in the absence of a BAC recommendation. These were not frivolous or vexatious grounds; they were matters that, at the time of institution, warranted judicial scrutiny.

[66] In these circumstances, the interests of justice are best served by directing that each party pay its own costs. Such an order recognises the Applicant's legitimate concerns, avoids punishing a party for raising issues that were serious at the time, and reflects the fact that the Court has not determined the merits.

[67] In the result, I make the following order:

67.1 The application is dismissed.

67.2 Each party to pay its own costs.

[redacted]

NKOANA A.J

ACTING JUDGE OF THE HIGH COURT

LIMPOPO DIVISION, POLOKWANE

Heard on 21 November 2024

Judgment delivered on:

This Judgment was handed down electronically by circulation to the Parties' representatives by e-mail, the date and time for hand down of the Judgment is deemed to be 18 May 2026 at 10:00.

For the Applicant

Adv. M Louw

Instructed by DDKK Attorneys Inc

Polokwane

For the First Respondent

Adv M Mojapelo SC

Adv M Matshisevhe

Instructed by Madima M Attorneys Inc.

Thohoyandou