



**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, EAST LONDON CIRCUIT COURT**

CASE NO. EL395/2021

In the matter between:

EL IDZ FIBRE MAINTENANCE VENTURE

Applicant

and

**EAST LONDON INDUSTRIAL DEVELOPMENT
ZONE SOC LTD**

Respondent

JUDGMENT

LAING J

[1] This is an application for leave to amend, brought in terms of rule 28(4) of the Uniform Rules of Court. The applicant seeks to amend its notice of motion.

Background

[2] On 7 April 2021, the applicant instituted proceedings for the review and setting aside of the respondent's decision to nominate a third party, Shanti Africa Construction, as the preferred bidder for the supply, installation and maintenance of fibre network

services. It also sought the review and setting aside of the evaluation process and the respondent's decision not to award any points to the applicant in relation to the latter's B-BBEE level of contribution. The applicant, furthermore, sought the remittal of its bid to the respondent for re-evaluation.

[3] As an unincorporated joint venture, the applicant had submitted separate B-BBEE verification certificates for its constituent members. The respondent had scored the applicant the highest number of points for price but had scored it zero out of a possible 20 points for having failed to submit a consolidated B-BBEE verification certificate for the unincorporated joint venture itself. The applicant contended that the tender documents had not stipulated that a consolidated certificate was required.

[4] On 24 August 2021, the respondent opposed the application. It raised several points *in limine*, including the assertion that Shanti Africa Construction, as the successful bidder, had not been joined to the proceedings. The main defence, however, was that the applicant's failure to have submitted a consolidated certificate was fatal; this was a requirement under the relevant code of good practice issued in terms of the Broad-Based Black Economic Empowerment Act 53 of 2003 and the implementation guide issued by the National Treasury regarding the Preferential Procurement Regulations, 2017.

[5] The respondent subsequently applied for leave to file further affidavits, explaining that the project had been completed. No purpose would be served by either setting aside the award of the tender to Shanti Africa Construction or by re-evaluating the bids submitted. Similarly, the applicant applied for, *inter alia*, leave to amend its pleadings or file further affidavits so that it could deal with the new information.

[6] On 19 May 2022, Zilwa J granted leave to the respondent to file further affidavits and directed the applicant to respond thereto. The matter was postponed to 25 August 2022.

[7] Prior to the hearing, the applicant gave notice of its intention to amend its notice of motion. The intended changes were as follows:

1. By deleting paragraph 5 of the Notice of Motion in its entirety.¹
2. By adding the following new paragraphs immediately following the deleted paragraph 5 of the Notice of Motion:
 5. That the respondent is liable to pay just and equitable compensation to the applicant in accordance with the provisions of section 8(1)(c)(ii)(bb) of the Promotion of Administrative Justice Act 3 of 2000 ('PAJA');
 6. Postponing the matter *sine die* for a determination of the quantum of the applicant's loss of profits that it would have made had the respondent awarded it the tender issued under tender number PROJ-ICT-092 by the respondent, or alternatively the amount of compensation that is determined by the court to be just and equitable on the fact of this matter;
 7. Granting the parties leave to file further affidavits in relation to the quantum determination as provided in paragraph 6 above, with the court to provide directives to the parties in relation to the procedural timelines for the filing of the further affidavits;
 8. In the alternative to the orders in paragraph 7 above, referring the determination of the quantum of the of the applicant's loss of profits that it would have made had the respondent awarded it the tender issued under tender number PROJ-ICT-092 by the respondent, or alternatively the amount of compensation that is determined by the court to be just and equitable on the fact of this matter, for *viva voce* evidence; with the court to provide directives to the parties in relation to the procedural steps leading up to the hearing of *viva voce* evidence."

¹ The relevant paragraph was a prayer for the remittal of the applicant's bid to the respondent for re-evaluation. The applicant sought, in the same prayer, a directive that the respondent recognizes the applicant as a Level 1 B-BBEE contributor.

3. By renumbering what is currently paragraphs 6 and 7 in the Notice of Motion, to be paragraphs 9 and 10 respectively.'

[sic]

[8] The respondent objected to the intended amendments. The grounds of the objection are, *inter alia*, that: the applicant was directed to respond to the respondent's further affidavits, rather than to file a notice of intention to amend; the respondent's defences are fatal to the relief sought by the applicant, whether under its existing notice of motion or under any amendment thereto; and no case has been made out by the applicant for the amended relief now sought. This prompted the applicant to file the present application, in terms of rule 28(4).

Issues to be decided

[9] The order of Zilwa J seems to suggest that the main review application was postponed to 25 August 2022. On the date of the hearing, however, the parties appeared to have been *ad idem* that only the application for leave to amend was before the court, not the main review application. The court will decide the matter accordingly.

[10] The primary issue for decision is simply whether to grant leave to the applicant to amend its notice of motion as intended.

Legal framework

[11] It is well-established that the main purpose of allowing an amendment is to ensure the proper ventilation of the dispute between the parties, to determine the real

issues between the parties, so that justice can be done.² The applicable principles were summarised in *Commercial Union Assurance Co Ltd v Waymark NO*:³

1. The Court has a discretion whether to grant or refuse an amendment.
2. An amendment cannot be granted for the mere asking; some explanation must be offered therefor.
3. The applicant must show that *prima facie* the amendment 'has something deserving of consideration, a triable issue'.
4. The modern tendency lies in favour of an amendment if such 'facilitates the proper ventilation of the dispute between the parties'.
5. The party seeking the amendment must not be *mala fide*.
6. It must not 'cause an injustice to the other side which cannot be compensated by costs'.
7. The amendment should not be refused simply to punish the applicant for neglect.
8. A mere loss of time is no reason, in itself, to refuse the application.
9. If the amendment is not sought timeously, some reason must be given for the delay.⁴

[12] Generally, the court's discretion regarding the granting of a material amendment is limited only by considerations of prejudice or injustice that may be caused to the other party.⁵

[13] The above principles constitute the basic legal framework for the court's exercise of its discretion. These must be applied to the facts of the present matter.

² *Rosenberg v Bitcom* 1935 WLD 115, at 117. The principles have subsequently been applied in a long line of case, but see, more recently, *Blaauwberg Meat Wholesalers CC v Anglo Dutch Meats (Exports) Ltd* [2004] 1 All SA 129 (SCA), at 133 h-i; and *Macsteel Tube and Pipe, a division of Macsteel Service Centres SA (Pty) Ltd v Vowles Properties (Pty) Ltd* (unreported, SCA case no 680/2020, dated 17 December 2021), at paragraph [24].

³ 1995 (2) SA 73 (Tk), at 77F-I.

⁴ The summary was cited with approval in *Affordable Medicines Trust v Minister of Health* 2006 (3) SA 247 (CC), at 261C.

⁵ DE van Loggerenberg, *Erasmus: Superior Court Practice* (Jutastat, RS 18, 2022), at D1-332.

Application of the law to the facts

[14] Admittedly, the applicant's intended amendment in the present matter would not appear to affect the actual dispute between the parties, viz. whether the awarding of no points to the applicant for its B-BBEE level of contribution was unlawful (and consequently whether the award of the tender to Shanti Africa Construction was unlawful). If the main issue between the parties remains the same, argues the applicant, then a court will generally allow an amendment.

[15] The authority for this is *Tomassini v Dos Remedos*,⁶ where the applicant had initially claimed specific performance of a contract regarding the sale of a business, only to apply, later, to amend his pleadings to claim damages after the sale could not be implemented. The court identified the main issue as being whether the parties had indeed concluded a contract; this was common to either of the applicant's claims in question. The amendment was allowed because the main issue stayed the same.

[16] It is important to observe, however, that the applicant in the present matter has not denied the respondent's allegations in its further affidavits to the effect that the project is complete. Consequently, there appears to be no basis upon which the applicant could persist in its prayers for the review and setting aside of the decision to nominate Shanti Africa Construction as the preferred bidder, the evaluation process, and the decision not to award any points to the applicant for its B-BBEE level of contribution. There also appears to be no basis upon which to seek the remittal of its bid.⁷ To all intent and purposes, the dispute between the parties has become moot. The only remaining issue seems to be that of costs, unless the applicant can place new

⁶ 1961 (1) SA 226 (W), at 227F-228E.

⁷ The applicant has expressly indicated its intention to abandon such relief by deleting paragraph 5 of its notice of motion, as evident from its notice of intention to amend.

information before court in response to the respondent's further affidavits (which it has so far failed to do).

[17] The amendment sought by the applicant would introduce new issues. These are whether the applicant has suffered a loss of profit and whether (and to what extent) the applicant would be entitled to just and equitable compensation. The immediate difficulty facing the applicant is that there is little support in the founding papers for the relief claimed. The closest that the applicant comes in this regard is the following averment:

'Due to the respondent's wrongful action, the applicant is suffering financial loss due to the fact that the applicant is losing out on the ability to make a profit from the project to which the tender relates and the ability to claim the credit which would come with having undertaken the project and having completed it.'

[sic]

[18] Leaving aside the question of whether the applicant can, in these circumstances, convert its application to a claim for damages, as opposed to instituting action proceedings, the more serious difficulty is that the case law demonstrates that no claim lies for a loss of profit as a result of irregularities in the tender process.⁸ The claimant is required to prove dishonest or fraudulent conduct on the part of the defendant's officials before any such claim will be entertained.⁹ The principle was confirmed by the Constitutional Court in *Steenkamp NO v Provincial Tender Board, Eastern Cape*,¹⁰ where Moseneke DCJ held that:

'...Compelling public considerations require that adjudicators of disputes, as of competing tenders, are immune from damages claims in respect of their incorrect or negligent but honest decisions. However, if an administrative or statutory decision is made in bad faith or under corrupt circumstances or completely outside the legitimate scope of the empowering provision, different public considerations may well apply.'

⁸ *Olitzki Property Holdings v State Tender Board and another* 2001 (8) BCLR 779 (SCA), at paragraph [31], subsequently cited with approval in *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 (3) BCLR 300 (CC).

⁹ *Minister of Finance and others v Gore NO* [2007] 1 All SA 309 (SCA), at paragraph [90]; *South African Post Office v De Lacy and another* [2009] 3 All SA 437 (SCA), at paragraph [4].

¹⁰ See n 8, *supra*.

... Imposing delictual liability on the negligent performance of functions of tender boards would open the prospect of potential claims of tenderers who had won initially. This will be to the detriment of the invaluable public role of tender boards. A potential delictual claim by every successful tenderer whose award is upset by a court order would cast a long shadow over the decisions of tender boards. Tender boards would have to face review proceedings brought by aggrieved unsuccessful tenderers. And should the tender be set aside it would then have to contend with the prospect of another bout of claims for damages by the initially successful tenderer. In my view this spiral of litigation is likely to delay, if not weaken the effectiveness of or grind to a stop the tender process. That would be to the considerable detriment of the public at large. The resources of our state treasury, seen against the backdrop of vast public needs, are indeed meagre. The fiscus will ill-afford to recompense by way of damages, disappointed or initially successful tenderers and still remain with the need to procure the same goods or services.¹¹

[19] The above approach has been followed consistently by our courts.¹²

[20] In the present matter, the applicant makes no allegation that the conduct of the respondent's officials was dishonest or fraudulent. There is no evidence at all to that effect.

[21] Similarly, regarding the claim for just and equitable compensation, the applicant has not demonstrated why this is an exceptional case, such that an order directing the respondent to pay compensation would be warranted. The provisions of section 8(1)(c) (ii)(bb) of the Promotion of Administrative Justice Act 3 of 2000 ('PAJA') are clear:

8. Remedies in proceedings for judicial review.—(1) The court or tribunal, in proceedings for judicial review in terms of section 6(1), may grant any order that is just and equitable, including orders—

(a) ...

(b) ...

¹¹ At paragraph [55].

¹² See, for example, *Trustees of the Simcha Trust (IT1342/93) v De Jong and others* [2015] 3 All SA 161 (SCA), at paragraph [30].

- (c) setting aside the administrative action and–
 - (i) ...
 - (ii) in exceptional cases–
 - (aa) ...
 - (bb) directing the administrator or any other party to the proceedings to pay compensation...’

[22] A recent decision of the Supreme Court of Appeal clarifies what is required of a litigant before relying on section 8(1)(c)(ii)(bb) of PAJA. In *Esorfranki (Pty) Ltd v Mopani District Municipality*,¹³ the court observed that:

‘...It is settled law that negligence and incompetence is insufficient to ground liability in the context of public procurement. Only where there is “something more” can a plaintiff recover her lost bargain. In the same vein section 8(1)(c)(ii)(bb) provides that only in exceptional circumstances could payment of compensation be a just and equitable remedy. It appears that “something more” or an “exceptional circumstance” occurs where the tender is vitiated by fraud or where there was bad faith and malice on the part of the tender board...’¹⁴

[23] Consequently, it would be necessary for the applicant to prove that there was something unusual, out of the ordinary, or special, about the respondent’s tender process to justify an order directing the respondent to pay compensation. The applicant has made no allegations in that regard.

[24] In short, no cause of action exists on the papers to sustain the relief sought by the applicant in terms of the intended amendment.

Relief and order to be granted

¹³ [2021] 3 All SA 686 (SCA).

¹⁴ At paragraph [90].

[25] It is a well-established principle that an amendment will not be allowed where excipiability would result.¹⁵ The respondent has pointed out that the applicant relies on alleged unlawful administrative action as a result of an error in law and pursuant to a decision taken capriciously, arbitrarily, and irrationally. The applicant has simply not demonstrated that the conduct of the respondent's officials was dishonest or fraudulent; it has not demonstrated why this is an exceptional case, such that section 8(1)(c)(ii) of PAJA should be applied.

[26] Consequently, the court is not satisfied that the intended amendment will, with reference to the principles summarised in *Commercial Union Assurance Co Ltd v Waymark NO*, give rise to anything deserving of consideration or a triable issue. If allowed, then the amendment would constrain the respondent to pursue its opposition to an application for relief that cannot be sustained on the papers. An exception would be bound to follow. Overall, the potential prejudice to the respondent, if leave is granted, is plain to see.

[27] In the circumstances, the following order is made:

- (a) the application for leave to amend is dismissed; and
- (b) the applicant is directed to pay the respondent's costs.

JGA LAING

JUDGE OF THE HIGH COURT

¹⁵ *Heydenrych v Colonial Mutual Life Assurance Society Ltd* 1920 CPD 67; see, too, more recently, *YB v SB* 2016 (1) SA 47 (WCC), at 51E-F.

APPEARANCE

For the applicant: Adv Coto, instructed by Tshangana Attorneys, East London.

For the respondent: Adv Buchanan SC, instructed by Smith Tabata Inc, East London.

Date of hearing: 25 August 2022.

Date of delivery of judgment: 22 November 2022.