



**IN THE HIGH COURT OF SOUTH AFRICA
[EASTERN CAPE LOCAL DIVISION, MTHATHA]**

CASE NO: 1771/2021

In the matter between:

JOLWANA MGIDLANA INC

Applicant

and

PORT ST JOHNS LOCAL MUNICIPALITY

First Respondent

MUNICIPAL MANAGER: PORT ST JOHNS LOCAL

MUNICIPALITY

Second Respondent

W.T MNQANDI AND ASSOCIATES

Third Respondent

BATE CHUBB AND DICKSON INC.

Fourth Respondent

SIYATHEMBA SOKUTU ATTORNEYS

Fifth Respondent

MAGQABI SETH ZITHA ATTORNEYS INC.

Sixth Respondent

JUDGMENT

DAWOOD J:

[1] The applicant herein instituted review proceedings against the respondents wherein it claimed the following relief:

- “1 Reviewing and setting aside the decision by the first respondent (as embodied in the letter of the second respondent dated 24 February 2021, a copy of which is attached to the founding affidavit as annexure “JOL1”) to reject the applicant’s bid.
- 2 Reviewing and setting aside the decision of the first respondent (as embodied in the letter by the second respondent dated 13 April 2021, a copy of which is attached to the founding affidavit as annexure “JOL2”) dismissing the applicant’s appeal against its exclusion from adjudication under the tender.
- 3 The adjudication of all tenders for Bid No.: PSJLM-MM-2020/21-15 for serving on a panel of law firms for a period of three years is remitted to the first respondent for reconsideration by the first respondent’s Bid Evaluation Committee, Bid Adjudication Committee and by the second respondent.
- 4 In adjudicating all tenders in terms of prayer 3 above, the first respondent’s Bid Evaluation Committee, Bid Adjudication Committee and the second respondent are directed to do so having regard to the following:
 - 4.1 The applicant has satisfied the requirement of possession of an indemnity certificate.
 - 4.2 All bidders who have submitted a valid fidelity fund certificate must be regarded as having submitted a valid indemnity certificate.
- 5 The first respondent shall make its final decision regarding the success of the applicant’s tender within 30 calendar days of the grant of this order.
- 6 The respondents are ordered to pay the costs of this application, including the costs of three counsel.
- 7 That further and/or alternative just and equitable relief be granted in the applicant’s favour”.

[2] It is common cause that the applicant’s bid to be on the panel of law firms was not successful and the following reasons were furnished: -

“JOLWANA MGIDLAN INC

13 April 2021

Dear Sir or Madam

RE: LETTER OF OBJECTION –PSJLM-MM 2020/2021-15 TENDER FOR SERVING IN A PANEL OF LAW FIRMS FOR A PERIOD OF THREE YEARS

We refer to your letter of objection dated 10th March 2021, we hereby confirm that your tender was received and adjudicated fairly as other bidders your bid was responsive up to the stage of tender administration.

Your bid was not successful on the functionality in terms of tender document page 28 (find attached) KEY COMPETENCE required that the bidder to be in possession of an INDEMNITY CERTIFICATE.

Upon perusal of your tender document, it was noted that you did not attach the required document as a key competence

Yours in developmental local government

Mr H.T Hlazo”.

[3] The applicant alleged inter alia: -

(a) That the decision made on 24 February 2021 was made without good reason as at that stage no reasons were provided nor were they informed of their right to appeal the decision to reject their bids or of their right to request reasons for the decision and accordingly that the court should make the presumption that the decision was made without good reason. (As can be seen from paragraph 2 above reasons were provided albeit at a later stage not at the stage that the decision was initially conveyed to the applicant.)

(b) The applicant alleged further that the decision to reject the applicant`s bid was based on reasonable suspicion of bias.

(i) The applicant based this on the fact that the basis of the rejection was because of the failure to attach a professional indemnity whereas it is common cause that possession of a valid fidelity fund certificate entitles the applicant and its directors to a professional indemnity cover by the Legal Practitioners Indemnity Fund and the applicant was in possession of a valid fidelity fund certificate at the relevant time.

(ii) The fidelity fund certificate of two of the directors were attached at the time the second respondent took the decision to reject the applicant`s tender on the basis that it had failed to prove that they had indemnity cover.

(iii) The bid evaluating committee concluded that the applicant had met all the requirements and recommended the appointment of the applicant, together with 11 other bidders.

(iv) The bid adjudication committee made the finding that the applicant's tender was responsive and functional. It concurred with recommendations of the first respondent's bid evaluation committee.

(v) The second respondent rejected the applicant's tender on the basis that the applicant had not provided an indemnity certificate.

(vi) The second respondent disregarded the fidelity fund certificate that the applicant had submitted as part of its tender.

(vii) The second respondent awarded the tender to the fifth and sixth respondents in circumstances where the fifth and sixth respondents attached a proof of indemnity insurance from the Legal Practitioners Indemnity Insurance and relied on the Legal Practitioners Indemnity Fund as to the issue of an indemnity certificate.

(viii) The third respondent was appointed in circumstances where the third respondent had failed to attach proof of qualified staff members.

(ix) The policy by the Legal Practitioners Indemnity Insurance Funds provides that it covers every attorney and legal practice with a fidelity fund certificate.

(x) The policy was before the second respondent when he rejected the applicant's tender.

(c) The applicant on the above basis alleged that the decision not to award the tender to the applicant and in awarding the tender to the other respondents, the second respondent:

(i) was influenced by bias;

(ii) the second respondent ignored relevant considerations and took into account irrelevant considerations;

(iii) was so unreasonable and acted in a manner so unlawful, unconstitutional and irrational that a reasonable and rational decision maker would not have made such a decision;

(iv) took a decision that is not rationally connected to the purpose for which it was taken;

(v) took a decision that is not rationally connected to the reasons given for it by him;

(vi) took a decision that is not rationally connected to the information that was before him when he took the decision;

(vii) acted in a manner that is procedurally unfair so that the decision itself was unfair;

(viii) acted in a manner that is substantially irrational so that the decision itself was irrational.

(d) In any event the requirement to submit an indemnity certificate was irrational, immaterial, unreasonable, capricious and procedurally unfair since the indemnity cover is extended to the whole class of bidders equally and with uniformity and the first respondent did not specify in the tender documents if it needed indemnity cover over and above what is statutorily offered to all attorneys by the Legal Practitioners Insurance Indemnity.

(e) The applicant accordingly prayed:

(i) That the second respondent's decision rejecting the applicant's tender is reviewed and set aside.

(ii) The second respondent's decision which is contained in JOL2 is reviewed and set aside.

The matter is remitted to the second respondent for reconsideration with or without the following requirements:

i) There is no applicable requirement for possession of indemnity certificate to be met in respect of bidders who are in possession of a valid fidelity fund certificate;

ii) No party or bidder that submitted a bid under the tender should be penalised or excluded or disqualified because it has failed in its bid submission to include an indemnity certificate when that party or bidder has furnished a valid fidelity fund certificate.

(f) In the further supplementary affidavit the applicant averred inter alia: -

(i) that Section 1 of the Procurement Act defines an acceptable tender as any tender which, in all respects, complies with the specifications and conditions of tender as set out in the tender document.

(ii) A municipality is accordingly obliged to consider an “acceptable” tender.

(iii) Under key competencies “Possession of Indemnity Certificate” was listed.

The applicant`s bid was disqualified because the first respondent considered that: -

a) It was a requirement of the bid document that a bidder had to attach a copy of its indemnity certificate; and

b) that the applicant did not meet this requirement in that it had not attached a copy of its indemnity certificate.

(iv) The applicant went on to set out the requirements of the bid: -

(aa) It is the responsibility of the bid specification committee to compile the bid specifications and such specifications must be clearly set out in the bid document itself.

(bb) The bid specifications committee stipulated: -

which documents had to be attached to a bid and what information had to be submitted as part of the bid and what the consequences would be of a failure to attach a document to a bid or submit it as part of the bid.

(cc) It does say any other information to support the project must be provided.

(dd) It stipulates that a failure to provide any of the above particulars may render the bid invalid.

(ee) Bidders shall submit with their bids the information that is applicable and as may be required in respect of the specifications.

(ff) The employer reserves the right, in the event of such details being insufficient, to call for further information from the bidder.

(v) In relation to a bidder's indemnity certificate and fidelity fund certificate, nowhere in the bid specifications, bid documents or the advertisement does the first respondent state that a bidder was required to attach the indemnity certificate or the fidelity certificate. The bid specifications, bid document or the advertisement does not specify how the fact that a tenderer is in possession of the certificates had to be conveyed to the first respondent.

(vi) The applicant submitted a fidelity fund certificate which served the functions of informing the first respondent that the applicant was in possession of a fidelity fund certificate and in possession of indemnity cover which accrues automatically to a practitioner if he or she has a fidelity fund certificate.

(vii) The first respondent was entitled to call for further information if it was uncertain more especially where such uncertainty arose from its failure to specify in express terms how a particular requirement was to be satisfied.

(viii) The bid adjudication committee misunderstood the bid specifications and the applicant's bid:

(aa) it was not a requirement of the bid that a bidder attach its indemnity certificate;

(bb) secondly, it was not correct that the applicant did not have an indemnity certificate or that it had failed to provide proof thereof.

(cc) Nowhere in the bid document or the advertisement is it stipulated that a tenderer should attach the indemnity certificate as part of its tender.

(dd) The actual requirement is that the tenderer ought to be in possession of an indemnity certificate or be in a possession of an indemnity cover. The applicant had indemnity cover.

(ee) The document itself under key competencies states:

(3) possession of Indemnity Certificate;

(4) possession of Fidelity Fund Certificate.

(ff) The other tenderers had submitted copies of Indemnity Policy issued by the Legal Practitioners Indemnity Insurance Fund.

(gg) The bid evaluation committee found that the applicant's claim was responsive and should be considered for appointment. The score sheet indicates that the bid evaluation committee considered that the applicant had not attached a copy of its indemnity certificate and penalised it by giving it 0 (zero) for failure to attach a copy of its indemnity certificate.

(hh) The bid adjudication committee concurred with the bid evaluation committee that all 13 bidders were responsive on compliance and functionally but disagreed with it on the "functionality assessment" because 9 bidders that the Bid Evaluation Committee recommended did not adhere to the core competencies that was requesting that the bidders must provide the Indemnity Certificate as is stated on the tender document as a fundamental requirement.

(ii) The bid adjudication committee considered the indemnity certificate as a fundamental requirement. Non-compliance thereof would lead to disqualification. On the other hand, it says that all the bids were responsive. This means that the committee considered that all bids complied with the fundamental requirements and should not be disqualified.

(jj) The first respondent was not permitted to disqualify the applicant on the basis that it had failed to provide an indemnity certificate. At worst for the applicant, it could have given the applicant zero points as the Bid Evaluation Committee had done.

(kk) The bid document did not provide that failure to attach an indemnity certificate would lead to disqualification of a bidder. They failed to properly consider all the information that had been placed before them.

(ll) The second respondent accepted the recommendations of the Bid Adjudication Committee and accordingly adopted the problems highlighted above.

(mm) The applicant was disqualified on the basis of a requirement that did not form part of the bid specifications.

(nn) Bids should only be evaluated in respect of the criteria stipulated in the bidding document and that to amend the criteria after the closure of the bids would jeopardise the fairness of the system.

(oo) The decision to disqualify the applicant`s tender on the basis that it had not attached a copy of its Indemnity Certificate to its bid document:

(i) was based upon a reason not authorised by the empowering provision, see Section 6 (2)(e)(i) and (f) (1) of PAJA;

(ii) was based upon irrelevant considerations, Section 6 (2)(e)(iii) of PAJA;

(iii) was taken arbitrarily and capriciously, Section 6 (2)(e)(vi) of PAJA;

(iv) was not rationally connected to the purpose for which it was taken, the purpose of the empowering provision, the information before the first respondent.

(pp) If the Bid Adjudication Committee had been consistent, the failure of the third respondent to employ at least two appropriately qualified staff should have been resulted in it being disqualified. Yet he was not disqualified but recommended to be appointed. The fifth respondent was given zero by the Bid Evaluation Committee for not being in possession of a valid fidelity fund certificate but he was not disqualified and instead recommended for appointment and the second respondent accepted the recommendation.

(qq) It is to be noted that upon perusal of the document submitted there was indeed a fidelity fund certificate by the fifth respondent.

(rr) The approach adopted by the Bid Adjudication Committee was inconsistent and it was endorsed by second respondent.

(ss) The applicant`s decision to reject the applicant`s tender and to disqualify the applicant should be set aside.

(hh) Prayer: -

(aaa) The decision to reject the applicant`s tender to disqualify the applicant should be set aside.

In the alternative;

(bbb) Set aside the decision of the second respondent and the decision of the Bid Adjudication Committee and refer the adjudication of the tenders back to the Bid Adjudication Committee for reconsideration of all tenders with instructions to consider the bid of each tenderer who submitted proof that it was in possession of a valid fidelity fund certificate and therefore in possession of indemnity cover with the Legal Practitioners Indemnity Insurance Fund NPC,

[4] The first respondent states inter alia in the answering affidavit that: -

(i) the applicant has fundamentally misconceived of not only a key aspect of the tender document, but of the nature of insurance a firm of attorney must and may hold.

(ii) that the applicant has failed to demonstrate how the tender process was flawed and that its tender was compliant;

(iii) the first respondent emphasises that there is no challenge to the invitation to bid document which lists six key competencies and if any of the listed items are not satisfied by a bidder then the bid is non-compliant and cannot be accepted.

(iv) Item 3 and 4 concern different concepts;

(v) Item 3 states “possession of indemnity certificate”, item 4 states “possession of fidelity fund certificate”.

(vi) A Fidelity Fund Certificate is not an indemnity certificate and contrary to the applicant`s submissions are wholly different; and

(vii) one cannot serve to prove the other;

(viii) the two are dealt with by different institutions and their purposes are different.

(ix) Indemnity cover is not satisfied by the “protection” a fidelity fund certificate offers.

(x) the Professional Indemnity Insurance Policy is issued by the Legal Practitioners Indemnity Insurance Fund NPC.

This body is distinct from the Legal Practitioners Fidelity Fund and has a different purpose.

(xi) the first respondent concedes that every legal practitioner, who is in possession of a valid Fidelity Fund Certificate automatically enjoys a certain level of professional indemnity cover in terms of the Legal Practitioners Indemnity Insurance Fund policy.

(xii) the first respondent however states that items 3 and 4 of the invitation to bid competencies clearly envisaged that as part of the bid an applicant attorney must demonstrate that it (the bidder) has indemnity cover over and above what it may enjoy solely by virtue of being in possession of a fidelity fund certificate evidenced by these being set as different and separate items.

(xiii) The invitation to bid required a bidder to demonstrate that it had both a fidelity fund certificate and separate indemnity cover.

(xiv) The separate indemnity cover is not the policy issued by the Legal Practitioners Indemnity Insurance Fund as an automatic consequence of having a Fidelity Fund Certificate which only covers liability in respect of those items contemplated by Section 55.

(xv) The applicant is accordingly covered by the Section 55 conduct but not separate indemnity cover, as required by the bid document and accordingly the applicant has failed to demonstrate that it has satisfied the bid requirements.

(xvi) The first respondent avers that the applicant seeks an order affecting the entire tender process in paragraph 3 of the amended notice of motion failing to take into account any contracts that may

have been entered into between Port St Johns Municipality and any of the successful bidders.

(xvii) The applicant without impugning the terms of the bid seeks to amend the bid document by seeking an order directing Port St Johns Municipality to consider all bidders who have submitted a Fidelity Fund Certificate to be regarded as having submitted a valid indemnity certificate.

(xviii) The relief has procedural and substantive difficulties. Port St Johns Municipality has made it clear that it invited attorneys who possess both a valid Fidelity Fund Certificate and Indemnity Cover.

(xix) If Port St Johns Municipality only intended to require a Fidelity Fund Certificate, it would have not set out two separate competencies (possession or having a Fidelity Fund Certificate and possession of a certificate concerning Indemnity Cover as it did in the invitation to bid document.

(xx) The rejection of the applicant's bid was lawful. It was not unreasonable, arbitrary or capricious. The applicant avers at paragraph 22 that the bid requirements are irrational, unreasonable and capricious yet it seeks no relief in respect of the bid requirements.

(xxi) The applicant by not challenging the bid requirements as unlawful, must be regarded as accepting the lawfulness of the bid requirements.

(xxii) A tender which is irregular or has shortcomings may not lawfully be accepted.

(xxiii) The applicant does not and did not possess a separate certificate reflecting that it has and had separate indemnity cover and to rely on the fidelity fund certificate is misplaced.

(xxiv) The applicant is correct that it was rejected because it did not possess and provide a certificate reflecting indemnity cover.

(xxv) The fidelity fund certificate provided by the applicant does not satisfy the separate requirement of indemnity cover.

(xxvi) The acceptance or otherwise of other bids which included different documentation is irrelevant to the application.

(xxvii) The first respondent averred that the fact that the applicant misread or misunderstood the bid is unfortunate for it. But that does not mean the bid process was in any way flawed.

[6] (i) With regard to the second supplementary affidavit the respondent stated that two separate and different certificates were contemplated and it cannot be correct for the applicant to contend that the fidelity fund certificate served the two identified functions.

(ii) The first respondent accepted that it knew the legal industry and the legal framework governing legal services as set out in paragraph 3 of the applicant's further supplementary affidavit and that is why it included the requirement of both a Fidelity Fund Certificate and a certificate concerning Indemnity Cover.

(iii) The applicant did not have the indemnity cover and did not possess a certificate proving it as required by the bid specification requirements, and as a fact, it did not attach it.

(iv) The applicant's bid was lawfully rejected by Port St Johns Municipality.

(v) The applicant does not possess an indemnity certificate.

[7] In its replying affidavit the applicant inter alia: -

(i) Avers that the second respondent's understanding of the tender requirements and the bid document submitted by the tenderers is at odds with the views of these committees.

(ii) The Bid Adjudication Committee and the Bid Evaluation Committee did not have a uniform approach to key competences.

(iii) The Bid Adjudication Committee found the tender responsive but gave it zero for the Indemnity Certificate whereas the Bid Evaluation Committee found it responsive but rejected it or disqualified it because it failed to comply with a fundamental requirement.

(iv) Hlazo does not identify where in the bid specifications, bid document or tender advertisement it states that as part of the bid, an applicant attorney must demonstrate that it has indemnity cover over and above the cover that it may enjoy solely by virtue of having a Fidelity Fund Certificate.

(v) If Hlazo`s understanding is correct then the applicant does not meet the requirements. But Hlazo`s argument is wrong. There is nothing contained in the bid specification, bid document or tender advertisement to support his argument.

(vi) He has awarded a tender to two tenderers in direct conflict with his own understanding of the tender requirements without furnishing an explanation.

(vii) The applicant alleged that the understanding as expressed in the answering affidavit was a recent fabrication.

[8] Issues for adjudication: -

(i) The most vital issue for determination is whether or not the applicant complied with a key competency since it is evident that if they demonstrate that there has been compliance then the decision was wrong and must be set aside on one or more of the grounds set out in PAJA.

(ii) The subsidiary issue is:

(a) Since there is no challenge to the bid specifications, bid document or the advertisement what exactly were the key competencies as set out in the document and how was compliance to be demonstrated.

(iii) Prof Cora Hoexter eloquently explained the nature of judicial review as follows:

‘The nature and scope of review limit its potential effectiveness as a mechanism for controlling administrative action and providing relief to aggrieved individuals. Although the distinction between legality and the merits is increasingly difficult to uphold, a central and enduring feature of judicial review is the courts’ reluctance to encroach too freely on the preserve of administrators. The carefully crafted rules of administrative law thus aim to ensure that the scope of a judge’s inquiry is restricted, and that the courts do not deal with the substantive issues that lie at the heart of administrative disputes. For this reason, appeal on the merits to an administrative tribunal is often a better way of achieving the substantive

satisfaction that judicial review tends to preclude. Judicial review is largely incapable of giving the applicant what he or she really wants: a substantively favourable decision.¹

(iv) The applicant alleged that nowhere in the advertisement, the bid specifications or the bid documents did the first respondent state that a bidder was required to attach the indemnity certificate or the fidelity fund certificate. Thus uncertainty arose from its failure to specify in express terms how a particular requirement was to be satisfied.

(v) The applicant however despite this averment, has failed to challenge the advertisement, the bid specifications or the bid documents or request that it be set aside.

(vi) In any event the applicant seems to have understood that it needed to attach a document to establish that it was in possession of the same. It attached the Fidelity Fund Certificate claiming that it satisfied both requirements. Accordingly, the argument that the bid document did not set out how possession was to be demonstrated does not avail the applicant in this case.

(vii) The criticism levelled is however warranted in that the first respondent ought to have specified that the Fidelity Fund Certificate and the Indemnity Insurance Certificate should be submitted for absolute clarity.

(viii) The most substantive basis by the applicant for the attack on its exclusion, is that the applicant was disqualified on the basis of a requirement that did not form part of the bid specifications.

(ix) In *Down Touch Investments v Matjhabeng Local Municipality and Another*² the court had the following to say: -

“ (8) It is common cause that the applicant was eliminated during the second phase of the evaluation process. It is also undisputed that the sole reason advanced by the first respondent for not awarding the tender to the applicant was the fact that the applicant had not submitted completion certificates for

¹ Cora Hoexter *Administrative Law in South Africa* 2 ed (2011) at p 167.

² *Down Touch Investments (Pty) Ltd v Matjhabeng Local Municipality and Another* (1172/2016) [2016] ZAFSHC 131 (8 April 2016)

purposes of proving its experience in respect of similar projects. The first respondent revealed that non-submission of completion certificates resulted in the applicant being allocated zero points for the key staff and experience component of the functionality criteria, which in turn led to the conclusion that the applicant did not achieve the minimum threshold of 60% on functionality, resulting in the applicant's disqualification.

(9) The nub of the applicant's case is that the submission of completion certificates was not stipulated as one of the requirements for the tender and, as a result, its subsequent disqualification from the tender process on account of a requirement that was not disclosed to tenders was unfair, irrational and unlawful. The applicant further asserts that the decision to award the tender to the second respondent violated its right to participate in a tender process that is transparent and fair and falls to be reviewed and set aside. (Own emphasis)

(11) Section 217 of the Constitution³ enjoins a constitutionally fair, equitable, transparent, competitive and cost-effective procurement system. The legislative framework under that section provides the context within which judicial review of state procurement must be assessed.⁴ Given the fact that a decision to award a tender constitute administrative action, the provisions of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) apply, thus granting a cause of action for the judicial review of tender process.⁵

(15) With regard to the merits of the review application, it is necessary to consider whether the evidence on record establishes the factual existence of contraventions of PAJA, and whether there is a justification for the setting aside of the award. Of great importance is whether there is any evidence showing that the submission of completion certificates was one of the requirements of the tender...

(24) The Constitutional Court held that the suggestion that "inconsequential irregularities" in a tender process were irrelevant when reviewing the tender amounted to a conflation of the test for irregularities and their import. It held that an assessment of the procurement process must be independent of the outcome. The *AllPay1* judgment recognises the important role that

³ Section 217 of the Constitution Act 108 of 1996.

⁴ *AllPay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others* 2014 (1) SA 604 (CC) (*Allpay* Judgment).

⁵ 2014 (1) SA 604 (CC) at para 41.

compliance with specified procedural requirements plays in levelling the playing fields by ensuring equal and fair treatment of all bidders and simultaneously acknowledges that the purpose of a fair process is to ensure the best outcome of the tender process: - The following extract from that judgment is apposite: "Deviations from fair process may themselves all too often be symptoms of corruption or malfeasance in the process. In other words, an unfair process may betoken a deliberately skewed process. Hence insistence on compliance with process formalities has a three-fold purpose: (a) it ensures fairness to participants in the bid process; (b) it enhances the likelihood of efficiency and optimality in the outcome; and (c) it serves as a guardian against a process skewed by corrupt influences."

(26) The court is alive to the fact that the need for the upgrading of roads is indeed a crucial service that needs to be delivered to communities. This, however, is not to say that such projects must be undertaken at all costs, to the extent of dispensing with the checks and balances that procurement processes have put in place with a view to enhancing the likelihood of efficiency and optimality in the outcome of the tender process. A consideration of the ITB and the Tender Data makes it clear that the overarching objective is to ensure that the tender is awarded to a company that not only has technical capacity resources for the completion of the Works within the contract period but one that can do so cost effectively. It is common cause that the difference between applicants bid and the second respondent's one is R847 667.76. under such circumstances, it cannot be said that the purpose of the stipulated tender requirements was objectively achieved. I can do no better than to simply re-iterate what was stated in the **AllPay 1 judgment**: "*Once a ground of review under PAJA has been established, there is no room for shying away from it*".

(27) I am therefore satisfied that the applicant has, in its review application adduced evidence that has conclusively shown that the first respondent's decision to award the tender to the second respondent was unfair, irrational and unlawful. The applicant has established a ground of review as contemplated in section 6 of PAJA. Since the purpose of the tender requirements has not been achieved, the award of the tender to the second respondent must be set aside.

(x) The applicant accordingly pleaded that to amend the criteria after the closure of the bid would jeopardise the fairness of the system. *Down`s* case support this proposition.

(xi) This aspect needs to be interrogated as to whether or not indeed the criteria was amended in this offer after the closure of the bid as if it had that result then the fairness of the system would be jeopardised as per the dicta in *Down`s* case cited above which aptly, eloquently and correctly, in my view deals with the issue.

(xii) The first respondent, in response states that the bid competencies clearly envisaged that as part of the bid an applicant must demonstrate that it has indemnity cover over and above that which it may solely enjoy by virtue of being in possession of a Fidelity Fund Certificate. There was no amendment to the criteria but rather an enforcement of the provisions of the tender as it was, if one has regard to their argument.

(xiii) The first respondent avers that this is demonstrated by the fact that these were set as different and separate criteria and also had different points allocated to them.

(xiv) The bid document admittedly did not explicitly state that what was envisaged was that the applicant must demonstrate that it was in possession of indemnity cover over and above that which was automatically available to all attorneys who were in possession of a valid fidelity fund certificate.

(xv) It clearly is not a model of clarity particularly having regard to the fact that 9, and if we consider the documents attached by two of the respondents, at least 11 firms of attorneys did not understand the requirement.

(xvi) As already indicated above the legality of the bid documents was unfortunately not challenged.

(xvii) The bid documents set out two (2) separate, distinct and different key components: -

(3) possession of indemnity insurance;

(4) possession of fidelity fund certificate.

(xviii) The applicant submitted and the first respondent accepted that it was aware that all practitioners who were in possession of a valid Fidelity Fund Certificate qualified for automatic albeit limited indemnity insurance.

(xix) The evaluation criteria on functionality assessment demonstrates that possession of an Indemnity Fund Certificate entitled the bidder to being awarded 22 points and being an accredited member of the Law Society of South Africa and in possession of a fidelity fund certificate accounted for 23 points to be awarded to the bidder.

(xx) The first respondent would not have set it as a separate requirement in circumstances where it is accepted by the applicant that the first respondent was aware that attorneys are entitled to limited automatic insurance by virtue of being in possession of a Fidelity Fund Certificate and the first respondent has confirmed this knowledge on its part. Accordingly, the first respondent could not have envisaged this as the Indemnity Fund Certificate it required since there would have been no need to set this as a separate requirement as possession of the Fidelity Fund Certificate would have sufficed to establish possession of the automatic insurance.

(xxi) The requirement could only be for the bidder to be in possession of indemnity cover over and above the automatic indemnity cover afforded by being in possession of a Fidelity Fund Certificate.

(xxii) Accordingly it was not adding to, or amending the criteria after the closure of the bid since this is a requirement already specified in the bid document admittedly not in an explicit manner. There would have been no need for it to make possession of an Indemnity Fund Certificate a requirement if it intended it to be the automatic one that accrues to all practitioners in good standing who are in possession of a Fidelity Fund Certificate.

(xxiii) There is accordingly no unfairness in requiring the applicant to comply with a key competency. The requirement was not added on after the tender, it appears ex facie the bid document and the advertisement.

(xxiv) The applicant has correctly conceded that if it is found that possession of a separate Indemnity Insurance was a requirement then it did not possess

the same. The applicant accordingly failed to satisfy a key competency. The applicant was accordingly correctly excluded in the circumstances.

(xxv) The applicant unfortunately in the circumstances is not entitled to the relief it seeks as it failed to prove it had complied.

(xxvi) The applicant`s exclusion was warranted as it was not in possession of the requisite Indemnity Cover and accordingly did not comply with a key competency.

(xxvii) There was an objective and lawful reason for the exclusion of the applicant accordingly the rejection was not unreasonable, arbitrary or capricious. The applicant was rejected because it did not possess and provide a certificate reflecting the requisite indemnity cover.

(xxviii) The bids of the unsuccessful candidates according to the averment made by the applicant appear to have been rejected for the same reason that the applicant was demonstrating equal treatment in this regard.

(xxix) The successful candidates who may have had flaws in them are beyond the purview of this court as the applicant did not challenge the successful bids.

(xxx) The first respondent did not deal with the awarding of the bids to the successful bidders as the tender process as a whole was not challenged nor did the applicant seek to set aside the entire bid process or the successful bids on the basis that the process as a whole was tainted by bias or unequal treatment or any of the other grounds set out in PAJA. The fact of the matter is that the applicant was properly rejected for failure to comply.

(xxxi) As I have already indicated the bid document was not a model of clarity and I do not believe that the challenge was reckless particularly having regard to the number of firms of attorneys that misunderstood the requirements.

(xxxii) This clearly is a case where equity and fairness dictates in the circumstances that I exercise my discretion with regard to the question of costs and deviate from the norm that costs follow the result, and instead order that each party pay its own costs.

[9] The order I make is accordingly the following:
The application is dismissed with no order as to costs.

FBA DAWOOD
JUDGE OF THE HIGH COURT

Date heard: 21 April 2022

Judgment delivered: 02 August 2022

Appearances

For the applicant: Adv G Halley SC with Adv AM Bodlani SC,
Adv L Ntikinca and Adv B Maswazi

Instructed by: Z. Mfiki Inc.
No. 63 Cnr Park & Lakeway Road
Mthatha

Tel: 047 531 3255

For the respondents: Adv A Katz SC

Instructed by: V. Funani Attorneys
Unit 3 Phyllis Court
No. 49 Cumberland Street
Mthatha

Tel: 047 531 1719

