



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

Case number: 19/27011

REPORTABLE: Not
OF INTEREST TO OTHER JUDGES: Not
REVISED.
09 November 2021

Signature

In the matter between:

ROADMAC SURFACING (PTY) LTD

Applicant

AND

JOHANNESBURG ROADS AGENCY (SOC) (PTY) LTD

First Respondent

SHONISANI RAMBOAU CONSTRUCTION (PTY) LTD

Second Respondent

SP SURFACING (PTY) LTD AND SEPEDI

DEVELOPMENT PROJECTS JOINT VENTURE

Third Respondent

GAU FLORA CC

Fourth Respondent

ACTPHAMBILI TRADING ENTERPRISE CC

JOINT VENTURE

Fifth Respondent

IMVULA ROADS AND CIVILS (PTY) LTD

Sixth Respondent

Delivery: This judgment was handed down electronically by circulation to the parties' legal representatives by email. The date for hand-down is deemed to be on 09 November 2021

Summary: Application- review of decision to allocate a tender to six of the service providers for road surfacing in the City of Johannesburg. The principles of fairness and transparency and constitutionalism in review of tender applications restated.

JUDGMENT

Molahlehi J

Introduction

[1] This is an application to review and set aside the decision of the first respondent, the Johannesburg Road Agency (SOC) (Pty) Ltd, in appointing the second to the sixth respondents as service providers. The order prayed for by the applicant reads as follows:

- "1. The proceedings under Tender JRA/19/001 in terms of which the Second- to the Sixth Respondents have been appointed by the First Respondent as successful tenderers/contractors/service providers under Tender JRA/19/001 be reviewed and set aside;
2. The award of Tender JRA/19/001 by the First Respondent to the Applicant and the Sixth (6) lowest compliant tenderers.
3. The appointments and/or contracts awarded by the First Respondent under Tender JRA/19/001 of and/or to the Second- to the Sixth Respondents be declared unconstitutional, invalid and void ab initio;
4. The First Respondent be ordered to pay the costs of this application as well as the cost of the Application under Case no: 18422/2019 on an attorney own client scale."

The parties

2. The applicant, Roadmac Surfacing (Pty) Ltd, is a company registered in terms of the company laws of the Republic of South Africa.

3. The first respondent, the Johannesburg Road Agency (the JRA), is an organ of state-mandated in terms of its service delivery agreement with the Metropolitan City of Johannesburg (the City) to complete construction, and maintenance and management of networks associated with roads, road services, storm water, footways, railway sidings and traffic mobility management within the City.

4. The second to the sixth respondents (the respondents) are companies registered in terms of the company laws of the Republic of South Africa, who were awarded the impugned tender by the JRA.

Background facts

5. It is common cause that during October 2018, the JRA invited interested contractors to submit bids for appointment as contractors for resurfacing roads in the City's roads for three years on an "as and when" basis.

6. The applicant and the respondents submitted tenders on the invitation under tender JRA/19/001. The deadline for the submission of the tenders was 22 November 2018. The applicant, including all the respondents, submitted their tenders within the prescribed time frame.

7. The applicant became aware on 25 April 2019 that the tender was awarded to the respondents in March 2019. The following day, 26 April 2019, the applicant requested the reasons for its non-appointment to the tender through its attorneys of record. The JRA did not respond to the letter requesting the reasons for non-appointment.

8. On 24 May 2019, the applicant launched an urgent application under case number 18422/2019 seeking an order compelling the JRA to provide reasons for its decision to award the said tender to the respondents. It further sought an interim interdict restraining the respondents from commencing with work under the tender pending the outcome of the review of the decision to appoint the respondent.

9. The JRA provided the reasons for disqualifying the applicant in the answering affidavit to the urgent application on 11 June 2019. The essence of disqualifying the applicant from the appointment to the tender was that the applicant did not obtain the necessary score to proceed to Phase 2 of the tender evaluation being 'Technical/ Functionality' criteria. A minimum score of 70% was required to move to Phase 3. The three reasons for the JRA to say that the applicant did not meet the threshold of 70% are the following:

"18.3.1 The Applicant did not have the required 5 years' experience in the field of road surfacing of road rehabilitation;

18.3.2 The Applicant's Site Agent is not the same person as the name on the SACPCMP certification; and

18.3.3 The Applicant's Safety Officer did not have the necessary experience of 3 years or more."

10. The applicant's case is that it had in its bid satisfied the tender requirements and thus qualified to be awarded the tender. It specifically contended that it satisfied the above requirements in that:

- a. Although it has twenty-one years of experience, it listed in its tender four projects it had done from "2014 to 2018 which amounts to a total of five (5) years' experience." The reason for not including the other projects done over the years was, according to the applicant, because the space allotted in the bid form allowed for listing of only four projects.
- b. Raldo Butler is the same person as Petrus Johannes Butler, who has three years of experience.
- c. Wille Venter has the required experience of three years.

11. The applicant contended that the decision by the JRA not to appoint it as one of the successful tenderers constituted an administrative action and is thus reviewable. It further contended that it had a legitimate expectation to be awarded the tender for the following reasons:

- (a) The only respondent whose tender price was lower than it is that of the second respondent.
- (b) It passed the preferential points system of 80/20.

12. As concerning the score in the tender evaluation the applicant contended that it should have been scored 95% for functionality at Phase 2, Stage 2 which would

have placed it at above 70%. This would, the applicant submitted, have qualified it for further evaluation at the third phase for price and B-BEEE.

13. The applicant abandoned prayers one and three of the Notice of Motion during the hearing.

14. The JRA opposed the application on the ground that the applicant did not progress to the final phase in the tender evaluation process. The tender evaluation process consisted of three phases: the pre-compliance evaluation stage, the pre-qualification stage, the functionality evaluation phase, and the BE-BBEE and financial evaluation phase.

15. The two main reasons the JRA disqualified the applicant from progressing to the second phase of the bid evaluation were that the applicant failed to satisfy the requirement of five years' company experience and the safety officer mentioned in the bid did not have more than three years' experience.

16. The issue of the safety agent, Mr Venter, not satisfying more than three years' experience fell away as the JRA conceded to the averment of the applicant in this regard during the urgent application hearing.

Legal principles

17. It is common cause that the JRA is an organ of State. Thus, awarding the respondents the tender and disqualifying the applicant was an administrative action as envisaged in section 1 of the Promotion of Administrative Justice Act (PAJA).¹

18. Section 217 (1) of the Constitution Act (the Constitution),² requires an organ of State when contracting for services to do so through a system which is fair, equitable, transparent, competitive and caused effective.

19. Section 2 (1) (f) of the Preferential Procurement Policy Framework Act,³ provides:

"the contract must be awarded to the tenderer who scores the highest points, unless objective criteria. . . justify the award to another tenderer."

20. In *Metro Project CC and Another v Klerksdorp Local Municipality and Others*,⁴ the Supreme Court of Appeal held that an organ of State in the local government sphere is obliged to act in accordance with a fair, transparent, competitive, and costs effective system in accordance legislation and the Constitution.

21. The Court further pointed out that the other reason why an organ of State is required to act fairly in issuing and awarding tenders is because in doing so the organ of State is exercising public power which is an administrative process.⁵

¹ Act number 3 of 2000.

² Act number 108 of 1996.

³ Act number 3 of 2000

⁴ 2004 (1) SA 16 (SCA) at paragraphs 11 and 12.

⁵ See *Logbro Properties CC v Bedderson NO and Others* 2003 (2) SA 460 (SCA) at 465F-466C.

22. The power and authority to develop, formulate and determine whether the terms and conditions of a tender has been complied with vests with the organ of the State and not the court. The power of the court in the review is limited to the determination of whether the conditions set out by the organ of State are immaterial, unreasonable or unconstitutional. In dealing with this principle, the Supreme Court of Appeal in *Dr. JS Moroka the Chairperson of the Tender Evaluation committee of Dr. JS Moroka Municipality*,⁶ said:

"Essentially, it was for the municipality, and not the court, to decide what should be a prerequisite for a valid tender, and a failure to comply with prescribed conditions will result in a tender being disqualified as an 'acceptable tender' under by the Procurement Act unless those conditions are immaterial, unreasonable or unconstitutional."

23. In general, unless provided otherwise in policy, legislation or empowering documentation of the State or an entity in the local government sphere, the principle of fairness which underlies the adjudication of public tenders binds an organ of State or an entity in the sphere of local government. This means that the State or an entity within the local government sphere has no inherent power to condone the non-compliance with the peremptory requirements of the tender. In *the Minister of Environmental Affairs and Tourism v Pepper Bay Fishing (Pty) Ltd; Minister of Environmental Affairs and Others v Smith*,⁷ the Supreme Court of Appeal held:

"As a general principle an administrative authority has no inherent powers to condone failure to comply with a peremptory requirement. It has such power if it has been afforded the discretion to do so."

⁶ 2015 ZASCA1 86 [29 November 2013] at paragraph 10.

⁷ 2004 (1) SA 308 [SCA] paragraph 31.

24. The proper approach in an application of this nature was set out in *All Pay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the Social Security Agency and others*, where the Constitutional Court,⁸ said:

"[22] This judgment holds that:

- (a) The suggestion that "inconsequential irregularities" are of no moment conflates the test for irregularities and their import; hence an assessment of the fairness and lawfulness of the procurement process must be independent of the outcome of the tender process.
- (b) The materiality of compliance with legal requirements depends on the extent to which the purpose of the requirements is attained.
- (c) The constitutional and legislative procurement framework entails supply chain management prescripts that are legally binding.
- (d) The fairness and lawfulness of the procurement process must be assessed in terms of the provisions of the Promotion of Administrative Justice Act (PAJA).
- (e) Black economic empowerment generally requires substantive participation in the management and running of any enterprise.
- (f) The remedy stage is where appropriate consideration must be given to the public interest in the consequences of setting the procurement process aside." (footnotes omitted.)

The point in limine

25. The JRA raised a point *in limine* concerning the alleged failure by the applicant to lead evidence in support of its prayers set out in the notice of motion.

⁸ 2014 (1) BCLR (CC) at paragraph 22.

Another point raised in this regard is that the applicant failed to substantiate some of prayers including failure to show any irregularity in the awarding of the tender to the respondents.

26. The JRA did not pursue the point *in limine* in argument at the hearing of this matter. It, however, pursued the points raised therein in the argument about merits of the review.

Evaluation and analysis

27. The issues for determination in this matter are whether the JRA was correct or committed an irregularity in allocating 0 points to the applicant concerning company experience and 0 points out of a total of twenty points concerning the qualification of a safety officer.

28. The case of the applicant, as I understand it, is not that the terms and conditions set out in the tender documents are immaterial, unreasonable or unconstitutional. The essence of the applicant's case is that it complied with the terms and conditions set out in the tender and was thus entitled to be awarded the tender.

29. **The five years' company experience:** The applicant's case, as appears from the discussion above, is that it complies with the requirements of the five years' company experience in road surfacing or rehabilitation. In calculating the years of company experience, the applicant relies on the four projects it ran between October

2014 and April 2018. The projects which the applicant relies on in calculating its five years of experience are set out as follows:

- a. The first project ran from 28 October 2014 to 27 July 2015.
- b. The second project ran from 15 January 2015 to 19 October 2017.
- c. The third project ran from 1 April 2016 to 19 July 2017.
- d. The fourth project ran from 1 April 2017 to 20 April 2018.

30. It is apparent from the above that the second project ran concurrently with the first project. The third project runs concurrently with the second project, and the same applies to the fourth and the third project.

31. The applicant did not challenge the criteria of twenty points for a company with five or more years' experience or fifteen points for a company with five years' experience.

32. In my view, the method used by the applicant to calculate the period spent in doing the four projects and arriving at the conclusion of five years' experience is unsustainable. In paragraph 19.9 of its founding affidavit, the applicant contends that it has sixty-three months of experience based on the period spent on the above projects. However, on a proper calculation, the total number of months spent on the four projects is forty-one months, equal to three years and five months. This means the applicant had less than five years' experience and thus did not qualify to be awarded fifteen points. Therefore, the JRA cannot be faulted for unreasonableness or irregularity in awarding the applicant zero out of the fifteen points.

33. **The safety officer's qualification:** The second ground of review is also unsustainable. The requirement in this regard was that each of the tenderers was required to provide a curriculum vita (CV) and certified copies of their safety officer's qualifications.

34. It is common cause that the applicant submitted the details of Mr Raldo Butler as its safety officer and indicated that he had seventeen years of experience as a safety officer. However, he failed to attach his relevant qualification, which was one of the tender requirements. The CV attached to the tender documentation is a diploma in engineering and the SACPCMP certificate of Mr Petrus Johannes Frederick Butler (Petrus). The applicant contends that although the two may be different names it is, in fact, the same person. There is no evidence in the tender documents that the two names belong to the same person, i.e., Raldo and Petrus are names of the same person.

35. The other argument of the applicant is that the JRA ought to have known that these are the names of the same person based on the similarity of the surname. This proposition is unsustainable in the context where the JRA had to process forty-three voluminous tender bits and had to rely on the submissions made by each tenderer. It does not make sense and is, in my view, unreasonable to expect the JRA to identify and reconcile inconsistencies in each application. It was the applicant's duty to ensure that its tender complies with the requirements and to explain any inconsistency in the name of the site officer in its tender.

36. In light of the above, I agree with the JRA that the applicant has in its application failed to:

- a. establish the ground/s of review;
- b. demonstrate how the JRA is said to have committed an irregularity in awarding the tender to the respondents.
- c. demonstrate in what manner the JRA deviated from the requirements of legislation or policy and, if so, how such deviation is material.

In summary, there is no reasonable basis to conclude that an irregularity was committed by the JRA in refusing to award the applicant the tender.

Costs

37. The issue that remains for consideration is costs of both these proceedings and those in the urgent court under case number 18422/2019. The two items of relief which the urgent court dealt with are:

- a. The JRA was required to furnish the reasons for refusing to award the applicant the tender.
- b. Interdicting the JRA from contracting with the successful bidders or instructing them to do any work pending the outcome of the review.

38. It is apparent from the reading of the urgent court's judgment that the applicant was successful in relation to the issue of furnishing the reasons for the refusal to award it the tender.

39. In relation to the second item of the relief, it is common cause that at the time of the urgent application the JRA had not yet concluded contracts with the five

successful tenderers. The court resolved the issue of whether the JRA should be interdicted from concluding contracts with the successful tenderers in the following manner:

- 1) "Pending the outcome of a review application by the applicant in respect of Tender Nr. JRA/19/001, the respondent shall contract with successful bidders on terms which do not oblige the respondent to guarantee any fixed or permanent percentage of the total contract budget to any bidder.
- 2) This order shall not inhibit the respondent from concluding such a term with the bidders who are selected for the panel of contractors, once the review has been decided, regardless of the outcome of the review and regardless of whether or not the application is concluded in a recomposed panel with other contractors or not.
- 3) The respondent shall be entitled to conclude the above mentioned contracts at a time of its choosing and give work instructions as it deems appropriate, within the bounds of the contract.
- 4) The cost of this application shall be costs in the cause in the review."

40. In light of the above, I am of the view that, the applicant in the urgent application was partially successful and is thus entitled to 50% of the costs thereof. On the other hand, the JRA in the present matter is successful and thus, in applying the well-established principle that costs follow the results it is entitled to the costs of the application.

Order

2. In the premises I make the following order:
 1. The First Respondent, shall pay the Applicant the costs of the urgent application on a 50% basis.
 2. The applicant's application to review the decision of the First Respondent is dismissed with costs.

E Molahlehi
Judge of the High Court
Gauteng Local Division;
Johannesburg

Representation:

For the Applicant: Adv. JJ Buys

Instructed by: L and V Attorneys

For the First Respondent: Adv. P Mafisa with Adv K Mokoena

Instructed by: Nomathembe George Attorneys

Date of the hearing: 28 July 2021

Delivered: 10 November 2021