

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG LOCAL DIVISION, JOHANNESBURG)

CASE NO: 2022/11209

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED
Date 08 April 2022 Signature

In the matter between:

TOOTS COACHES BUS HIRE

First Applicant

MAMSI TOURS (PTY) LTD

Second Applicant

MNOTHO TOURS

Third Applicant

K.A NTULI BUS SERVICE

Fourth Applicant

AUPA PHADI BUS SERVICE

Fifth Applicant

THANDINHLELA COACHES

Sixth Applicant

BONGINDLELA COACHES

Seventh Applicant

BAKUBUNG TOURS

Eighth Applicant

and

MEC FOR EDUCATION, GAUTENG

First Respondent

MEC FOR FINANCE AND

E-GOVERNMENT, GAUTENG

Second Respondent

ZAMAR TEQ-PHAKATHI TRANSPORT JV

Third Respondent

BIDDERS UNDER

RFP NO. GT/GDE/007/2021

(LISTED IN ANNEXURE "A")

Fourth to Six Hundred and Forty

Seventh Respondents.

Summary: Urgent application. Test for urgent application restated. Primary requirements and secondary requirements of urgency restated. Issuing a tender after the extension period had expired amount to acting outside authority as envisaged in PAJA. Decision reviewable on the ground of lack of authority.

JUDGMENT

Molahlehi J

Introduction

[1] The purpose of this judgment is to provide the reasons for the order made in favour of the applicants on 4 April 2022. The order provided for the following:

1. The forms and service provided for in the Uniform Rules of Court are disposed of, and this application is treated as one of urgency in terms of rule s6 (12) of the Uniform Rules of Court.
2. Leave is granted to Gauteng Small Bus Operators Council (GASBOC) to intervene in the application.
3. It is declared that the award of the tender under RFP No.GT/GDE/007/2021 by the Gauteng Department of Education, alternatively by the Gauteng Provincial Treasury, to the third respondent and to any other successful bidders that are not known to the applicants (the award) is unlawful and invalid and, is hereby set aside.
4. The first and second respondents to initiate a fresh tender for scholar transport services to and from schools in Gauteng.
5. Pending the completion of the tender process contemplated in

paragraph 4, above, the parties and all current service providers under the contract, G T/GDE075/2017, shall continue to render school transport services to and from schools in Gauteng in accordance with the existing service level agreements, as if those agreements have been extended to the date upon which the above tender process is completed.

6. The first and second respondents are directed to pay the costs of this application with costs shall include the costs of two counsel.

[2] The Gauteng Small Bus Operators Council (GASBOC) which was granted leave to intervene, is a chapter of the South African National Small Business Council established by the national Department of Transport, which is independent and run by its members

[3] The order was made following the urgent application launched by the applicants and the intervening party, GASBOC. The application relates to the tender, which had been awarded by the respondents to the third respondent and unknown others. The applicants sought to review, to declare as invalid and set aside a tender under RFP number, GT/GDC/007/2021 issued by the respondents. They also prayed to have the provisions of the scholar transport services made under the same tender issued to them to continue until the new contracts and a lawful

tender was issued.

Background facts

[4] The applicants have been providing the service of scholar transport to the schools, in the Gauteng Province on behalf of the first respondents for a number of years. They provided the service after they were awarded the tender by the first respondent. The tender, which was for three years was awarded in 2017 and was extended on various occasions.

[5] The applicants responded to the 2021 tender, which closed on 5 March 2021. The respondent's bid documents indicate that each bid would be kept open for hundred twenty days.

[6] It was further indicated in the bid documents that bidders, who did not receive a response for from the respondents after hundred and twenty days of the closing date of the bid should regard the application as being unsuccessful. The respondents also indicated that the first respondent would conduct site visits in respect of the shortlisted bidders.

[7] On 11 January 2022 the applicants were before the start of the school term, advised by the first respondent in a text message that they would continue to provide the services on a month-to-month basis. The message advised them that a confirmatory letter would be sent to them in that regard.

[8] On 24 January 2020 the applicants' attorneys of record addressed a letter to the first respondent, complaining, amongst others that although they met the requirements of the bid they had not received any response from the respondents.

[9] On 8 February 2022 the first respondent issued a letter to the South African National Small Bus Operators (SANSBOC), indicating that the 2021 tender process has not been finalized.

[10] On 9 February 2020 the applicant's attorneys addressed a letter to the first respondent inquiring as to whether site visits were still to be conducted. In response to the letter, the first respondent indicated that "the process is not yet finalised," It was therefore not in a position to respond to the query raised by the applicants.

[11] On 14 February 2022 the first respondent addressed a letter to the applicants wherein it indicated that the 2017 tender had been extended on a month-to-month basis effective from 1 January 2022 to 31 March 2022.

[12] On 22 February 2020 the applicant's attorneys addressed the letter to the first respondent wherein the following issues were raised:

“40.1. It was noted that the department had advised us that the 2021 tender adjudication process had not been finalized and that no further information had been forthcoming.

40.2. Despite this it has come to our attention that certain service providers had been appointed. Even though we were still providing services to the department, we needed to know whether our status as service providers would be confirmed, either in terms of the 2021 tender or through any other authority or contract. It was expressly indicated that because of the nature of our business, “we cannot work in limbo without any certainty regarding our status.

40.3 We therefore sought confirmation from the Department

on a permanent basis, failing which we would assume that our appointments would be confirmed.

department as to whether we were providing services to the department on a permanent basis, failing which we would assume that our appointments would be confirmed.”

[13] The first respondent did not respond to the letter.

[14] The applicants addressed another letter to the first respondent raising the various issues including seeking an undertaking from the first respondent that no formal appointments would be made until proper bid evaluation and adjudication in terms of the criteria is done.

[15] In response to the above, the first respondent indicated that it "is still in the process of evaluating the tender in question," and thus it was not able to respond.

[16] On 16 March 2022 the applicant became aware that the respondent had awarded the tender to the third respondent which was to come into operation on 1 April 2022. On the same day 16 March 2022 the applicant addressed a letter to the first respondent and requested

confirmation as to the outcome of the applicants' tender application.

Termination of applicant's contract.

[17] The applicants complained that the service level agreements were unlawfully terminated because the respondents did not give sufficient or reasonable notice period for the termination of their contract. They say at the time of the termination they were expecting that they would be afforded permanent contracts. The notice period according to them was unreasonable, because it happened in the context of having to wind up the operations and the complexity of having to plan in terms of the service, securing drivers and ensuring vehicle capacity.

[18] The respondent in the answering affidavit contended that the process of the tender terminating the service level agreement of the applicants were transparent. According to them the applicants knew about the termination of their contracts and the reason for the extension of the tender.

[19] They further contend that it was made clear that the RFP would be evaluated on the preferential procurement regulations of 2017 as

envisaged in the Preferential Procurement Framework Act.¹

[20] In terms of this Stage 1(c) of Site Visit Evaluation, the site visits would be done with prior arrangements and conducted at the shortlisted bidders only and based on the established criteria.

[21] As concerning urgency, the respondents contend that the process followed in appointing the service providers is well known to the applicants. One of the things known to the applicants is that the notice of successful leaders is published in the National Treasury website and therefore there was no need to contact the unsuccessful bidders. The applicant would accordingly have known about the awarding of the tender for some considerable time to the point at which they decided to launch the application.

Principles governing urgency.

[22] The test for determining urgency in an urgent application is set out in Rule 12 of the High Court Rules. The primary requirements for the test are (a) the applicant has to set out explicitly the circumstances which is

¹ Act number 5 of 2000.

renders the matter urgent, (b) give reasons why the applicant could not be afforded a substantial redress at a hearing in due course.

[23] The test was explained in *East Rock Trading 7 (Pty) Ltd and Another v Eagle Valley Granite (Pty) Ltd*,² in the following terms:

"[T]he procedure set out in rule 6(12) is not there for taking. An applicant has to set forth explicitly the circumstances which he avers render the matter urgent. More importantly, the Applicant must state the reasons why he claims that he cannot be afforded substantial redress at a hearing in due course. The question of whether a matter is sufficiently urgent to be enrolled and heard as an urgent application is underpinned by the issue of absence of substantial redress in an application in due course. The rules allow the court to come to the assistance of a litigant because if the latter were to wait for the normal course laid down by the rules it will not obtain substantial redress.

It is important to note that the rules require absence of substantial redress. This is not equivalent to the irreparable harm that is required before the granting of an interim relief. It is something less. He may still obtain redress in an application in due course but it may not be substantial. Whether an applicant will not be able obtain substantial redress in an application in due course will be determined by the facts of each case."

² [2011] ZAGPJHC 196.

[24] The secondary requirements are amongst others the need to explain any delay in instituting the proceedings, and enrolling a matter on a Thursday for a hearing on the following Tuesday.

[25] In granting the order referred to earlier, and upholding urgency I took into account the background facts and circumstances within which the application was instituted. It is not in dispute that the applicants transport more than 14,000 scholars on a daily basis using 225 buses, and employ 326, employees, including the drivers to provide the service.

[26] It is apparent to me from the papers and the submissions made during the hearing that the applicants will not in the nature of the service rendered and the nature of their business be able to obtain a substantial redress in due course if they were to approach this court on the ordinary course in instituting the review proceedings. It is also important to note that the relationship between the applicants and the respondents is that envisaged in section 217 of the Constitution. It is for instance not a contractual relationship where the relief they may seek in the future could be breach of contract or contractual damages.

[27] If this was a case involving breach of contract it could be said that the remedy would be found either in specific performance or a claim for

a breach of contract. In the present matter the applicants' cause of action is based failure by the respondent to act within their authority as envisaged in PAJA.

[28] Although there is some suggestion of delay in instituting the proceedings it is clear that the awarding of the tender came to the attention of the applicant on 16 March 2022. It is also clear that the applicant did not rush to the court soon after the issue arose, but rather sought to resolve the issue by way of engagement with the respondents.³

Grounds of review

[29] The applicants seek to review the decision of the respondents in terms of section 217 of the Constitution read with the Promotion of Administration Justice Act (PAJA).⁴

[30] Section 217 of the Constitution provides that where an organ of state contracts for goods and services it must be done in accordance

³ South African informal traders for him and others v City of Johannesburg and Others, 2014 [4] SA371 at paragraph 3.

⁴ Act number 3 of 2000

with the principles of fairness, equality, transparency, competitiveness, and cost- effectiveness.

[31] It is not in dispute that in awarding the tender to the third respondent the respondents acted in terms of an administrative act as envisaged in PAJA and thus the applicants are entitled to bring the review application under that Act.

[32] The applicants contend that the awarding of the tender by the respondents is reviewable because the validity of the tender had lapsed by the time it was issued to the third respondent and thus it could not be validly awarded. The awarding of the tender to the third respondent, according to the applicants, was procedurally unfair in that it did not comply with the provisions of PAJA. The review is brought in terms of sections 6 (2)(a) (i), 6 (2) (b), 6 (2) (d), 6 (2) (f) and 6 (2) (i) of PAJA.

[33] The applicants further contend that the tender process was not transparent, equitable or competitive as they expected the first respondent to follow the terms of the tender documents either to award or not award the tender within the validity period.

[34] It is contended that the respondents breached the Supply Chain Management Guide to Accounting Officer issued by National Treasury.

in that there was never a request to the bidders for a further extension of the period prior to the expiry of the hundred and twenty days. In other words, the awarding of the tender is invalid because it was awarded outside the validity period of the proposal.

The awarding of the tender.

[35] There is no dispute that the first respondent solicited and offered a new service contract to the third respondent and probably other contractors. The service contract is based on the tender process that was initiated by the first respondent in 2021, which as indicated above closed on 5 March 2021. It was however extended for a period of hundred and twenty days and this lapsed on 10 July 2021.

[36] In *Telkom SA Limited v Merid Training (Pty) Ltd and Others; Bihati Solutions (Pty) Ltd v Telkom SA Limited and Others*,⁵ the court in dealing with a similar situation held that:

“[14] The question to be decided is whether the procedure followed by the applicant and the six respondents after 12 April 2008 (when the validity period of the proposals expired) was in compliance with section 217 of the Constitution. In my view it was not. As soon as the

⁵ (27974/2010,25945/2010) [2011] ZAGPPHC 1 (7 January 2011) at paragraph 14.

validity period of the proposals had expired without the applicant awarding a tender the tender process was complete – albeit unsuccessfully – and the applicant was no longer free to negotiate with the respondents as if they were simply attempting to enter into a contract. The process was no longer transparent, equitable or competitive. All the tenderers were entitled to expect the applicant to apply its own procedure and either award or not award a tender within the validity period of the proposals. If it failed to award a tender within the validity period of the proposals it received it had to offer all interested parties a further opportunity to tender. Negotiations with some tenderers to extend the period of validity lacked transparency and was not equitable or competitive. In my view the first and fifth respondent's reliance only on rules of contract is misplaced.”

[37] In my view, what this means is that at the time the third respondent was appointed the hundred and twenty days' extension period had expired. In the circumstances the respondents could not, therefore, lawfully award the tender to the third respondent. Put differently, the respondents were not authorised in awarding the tender after the expiry of the hundred and twenty days. The procedure adopted by the respondents was, accordingly, procedurally unfair. It is for this reason that I found that the tender was unlawfully awarded to the third respondent.

[38] In the circumstances and ensuring fairness, the respondent ought not to have awarded the expired tender to the third respondent and others, but rather to have either initiated a new tender process or abandoned the tender process.

[39] Accordingly, a just and equitable remedy is to allow the applicants to continue rendering the services which they have been doing, pending the issuing and finalization of the new tender.

Terminating of the service level agreement.

[40] As indicated earlier, the first respondent informed the applicant on 14 February 2022 that the service level agreement that had been awarded to them under the 2017 tender would be extended on a month-to-month basis. Attempts by the applicant to obtain clarity as to the meaning of "the month-to-month" notice was unsuccessful as there was no response from the respondents. This is despite the applicant having informed the respondent about the implication to the amount of planning that had to go in with the provision of the service, including ensuring that there are sufficient buses and drivers available.

[41] I agree with the applicants that having regard to the length of the

contract which has been in place for several years, the number of employees involved and the number of buses, the notice was unreasonable.

[42] It was for the above reasons that the above order was made.

-

E Molahlehi

Judge of the High Court

Gauteng Local Division,

Johannesburg.

Representation:

For the Applicants: N A Cassim SC with O Ben-Zeev

Briefed by: Dev Mharaj and Associates Inc. Attorneys.

For the Intervening Party: Q M Dzimba

Briefed by: Mothobi

For the Respondents: L M Montsho- Moloisane SC with J Maisela

Briefed by the State Attorney.

Date of hearing: 31 March 2022

Date judgment delivered: 08 April 2022.