



**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, JOHANNESBURG)
REPUBLIC OF SOUTH AFRICA**

CASE NO: 22/18028

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: NO
DATE: 16 MARCH 2023
SIGNATURE: **ML SENYATSI**

In the matter between

FUMANA THUTO CONSULTING

APPLICANT

And

ESKOM HOLDINGS

RESPONDENT

Delivered: By transmission to the parties via email and uploading onto Case Lines
the Judgment is deemed to be delivered. The date for hand-down is deemed to be 16
March 2023.

JUDGMENT

SENYATSI J:

- [1] This matter was set down on 15 March 2023 on the unopposed court roll. Advocate Krog, who appeared on behalf of the applicant, asked for the matter to stand down to 16 March 2023 as the parties were attempting to finalise the consent order. The court granted the indulgence and adjourned the matter to 16 March 2023.
- [2] The application concerns the review and setting aside of Eskom's decision to disqualify the applicant from the tender no KZN0072/DG and KZN0073/DG based on the Promotion of Administrative Justice Act 3 of 2000. The applicant contends that the financial criteria used to disqualify it was not spelt out in both tenders as part of the requirements.
- [3] The proceedings were initiated during May 2022. No opposition documents were filed. The matter was correctly set down in the unopposed roll,
- [4] The wording on the consent order could not be finalized as the parties had disagreement with whether there ought to be reference to financial criteria in the order. Advocate Louis who appeared for Eskom stated that the proposed wording by the applicant was unacceptable to it because it sought to impose the financial criteria of the CIDB as the criteria to be used by Eskom in evaluating the applicant. This was the position on the 16 March 2023 when the matter resumed.

- [5] Both parties were in agreement that the decision to disqualify the applicant based on the financial criteria that were not part of the tender requirement had to be reviewed and set aside. 6 March 2023 Advocate Krog and Advocate Louis appeared before me.
- [6] Having considered the papers and having regard to the fact that the tender documents do not make references in the Standard Terms and conditions as published to any financial criteria to be used in evaluation of the tenderer. On the contrary, the tender documents are silent on this aspect.
- [7] Eskom also attempted to file notice to oppose the application and an opposing affidavit on 16 March 2023. It concedes to the review and setting aside of its decision but contests the imposition of the CIDB financial criteria as proposed by the applicant's draft order.
- [8] Having considered the papers filed of record and the fact that no financial criteria to be used was spelt out in both tender document, Eskom had no legal and factual basis to disqualify the applicant from both tenders for failing to meet the financial criteria.
- [9] Eskom's minimum CIBD requirements was that the tender had to have level 3EP or higher of the of the CIDB grading. The applicant was graded as level 6 EP and consequently more than met the minimum grading requirement.
- [9] Accordingly, the application must succeed.

ORDER

[10] Having read the documents filed of record and having considered the matter:

IT IS HEREBY ORDERED THAT:

- (a) the decision by the respondent that the applicant did not meet the financial criteria of the tenders KZN0072/DG and KZN0073/DG is reviewed and set aside.
- (b) Order the respondent to further consider and evaluate the applicant's tender bids in terms of the tender criteria, excluding the financial criteria applied.
- (c) Order that should the evaluation of the applicant's tender bids qualify it as a successful tenderer excluding the financial criteria applied, that an agreement be concluded by the respondent with the applicant on the same terms and conditions as the other successful tenderers.
- (d) The respondent to pay the costs of the application.

ML SENYATSI
JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

DATE APPLICATION HEARD: 16 March 2023

DATE JUDGMENT DELIVERED: 16 March 2023

APPEARANCES

Counsel for the Applicant: Adv W Krog

Instructed by: Knowles Husain Lindsay Inc

Counsel for the Respondent: Adv C Louis

Instructed by: Lulama Prince Inc