



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

REPUBLIC OF SOUTH AFRICA

CASE NO: 28952/2020

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|-----|----------------------------------------|
| (1) | REPORTABLE: NO |
| (2) | OF INTEREST TO OTHER JUDGES: NO |
| (3) | REVISED: NO |
| (4) | DATE: 3 MAY 2023 |
| (5) | SIGNATURE: ML SENYATSI |

In the matter between:

LETHABULUMKO GROUP (PTY) LTD

Applicant

And

GAUTENG DEPARTMENT OF EDUCATION

Respondent

Neutral Citation: *Lethabulumko Group (Pty) Ltd v Gauteng Department of Education* (Case No: 28952/2020) [2023] ZAGPJHC 415 (3 May 2023)

Delivered: By transmission to the parties via email and uploading onto Case Lines the Judgment is deemed to be delivered.

JUDGMENT

A. INTRODUCTION

[1] This is an opposed application to review and set aside the decision of the Gauteng Department of Education (the respondent) to disqualify the applicant's bid submitted in response to tender number GT/GDE/071/ 2019 ("the tender"). The tender was for the procurement, storage, supply and delivery of groceries to schools in the Gauteng province. This application is brought in terms of the Promotion of Administrative Justice Act of 2000 ("PAJA").

[2] The applicant seeks narrow relief in the sense that it does not seek to set aside the award of the tender to the panel of 26 bidders who were awarded the tender and who are the contractors to the respondent. All the applicant seeks, if the court is with it, is the remittance of the decision to the respondent for re-consideration.

B. BACKGROUND

[3] The respondent published the tender which, *inter alia*, included the technical mandatory requirements that the bidders had to comply with. The tender was

published during November 2019 and the closing date was the 13th of December 2019. The applicant submitted its bid on time with all its documentation.

- [4] The tender document made it clear in in paragraph 5.2 (a) to 5.2 (d) which included a certified copy of the Certificate of Acceptance (the COA), that bids which did not contain the documents stated in these paragraphs would be disqualified. The documents required in terms of the mandatory requirements included the certified copy of the COA.
- [5] In response to the tender, the applicant compiled and submitted its documents which also included an uncertified copy Certificate of Acceptance (“the COA”). The COA had to do with the procurement and storage of groceries that had to be kept. The requirement was that the COA had to be consistent with the original document or a certified copy thereof.
- [6] The applicant submitted a copy of the COA which was not certified as required by the tender procedural mandatory requirements. It contended that during March 2020 the officials of the respondent came to its premises to satisfy themselves that there was compliance with the bid requirements and were later shown the original documents including the COA. It is for that reason, so goes the contention, that the uncertified copy was not material and stands to be condoned.
- [7] During the evaluation of the tender by the respondent, the applicant was disqualified and the reasoning advanced was that the COA was not compliant because only an uncertified copy was submitted. It can be inferred from this arrangement that the inspection of the COA as alleged by the applicant was

carried out by the officials of the respondent outside of the mandatory requirements of the tender itself.

C. ISSUE FOR DETERMINATION

- [8] The issue for determination in this matter is whether failure to comply with the strict procedural requirements of the tender could render the bid to be disqualified. The respondent contends that it should and the applicant contends that for that to be answered it strongly depends on the materiality of the requirement and that in this case based on PAJA the decision to disqualify it should be reviewed and set aside.

D. THE LAW AND REASONS FOR THE JUDGMENT

- [9] Procedural compliance in tender disputes has been pronounced upon by our courts. The leading case is *Allpay Consolidated Investments Holdings (Pty) and Others v Chief Executive Officer of the South African Social Security Agency and Others*¹ where the Constitutional Court held that in order to determine the irregularity of the administrative action required to be reviewed, the tender requirements and the procedural compliance stated therein should be interpreted in accordance with the normal established principle of our law.

¹ *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others* (CCT 48/13) [2013] ZACC 42; 2014 (1) SA 604 (CC)

[10] In tender mandatory procedural requirements, the courts should ensure insistence on compliance with process formalities which has three-fold purpose², namely:

- (a) it ensures fairness to the 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.

[11] The constitutional court in *Allpay*, held as follows on the approach that the public interest in procurement matters requires greater caution in finding that grounds for judicial review exist in each matter, and concluded that that notion should be dispelled and continued to state:

“[23] To the extent that the judgment of the Supreme of Court of Appeal may be interpreted as suggesting that the public interest in procurement matters requires greater caution in finding that grounds for judicial review exist in a given matter, that misapprehension must be dispelled. So too the notion that even if proven irregularities exist, the inevitability of a certain outcome is a factor that should be considered in determining the validity of administrative action.

[24] This approach to irregularities seems detrimental to important aspects of the procurement process. First, it undermines the role procedural requirements play in ensuring even treatment of all bidders. Second, it overlooks that the purpose of a fair process is to ensure the best outcome; the two cannot be severed. On the approach of the Supreme Court of

² *Supra* at para [27]

Appeal, procedural requirements are not considered on their own merits, but instead through the lens of the final outcome. This conflates the different and separate questions of unlawfulness and remedy. If the process leading to the bid's success was compromised, it cannot be known with certainty what course the process might have taken had procedural requirements been properly observed.”

[12] The applicant submits that since the mandatory requirements of the bid on the certified copies of the COA were not material, the disqualification of its bid by the respondent, rendered that decision irregular because the COA was inspected by the officials of the respondent subsequent to the closure of the bids during March 2020 or for that matter June 2020. This contention by the applicant based on the *All pay* case is without merit. In the *All pay* case, SASSA choose not to enforce its bid requirements which is not the case in the instant matter, as the respondent is seeking strict compliance with the clear terms of the tender documents.

[13] This is so when regard is had to the fact that the tender document makes it clear that failure to comply with the mandatory requirements would lead to a disqualification of the bid submitted. It will not be consistent with the principles spelled out in the *Allpay* case to hold that the decision to disqualify the applicant's bid is reviewable because, unlike in *Allpay* case, in this case the respondent is enforcing the strict compliance with its procedural requirements. It finds the support for such enforcement in paragraphs 5.2 (a) to 5.2 (d) of the tender requirements. There is therefore no basis for this court to hold otherwise.

[14] It matters not, in my considered view, that the COA which was not certified when the bid was submitted on the 13th of December 2019 was allegedly cured by the subsequent inspection thereof by an officials of the respondent three months after the closure of the tender. If this was to be permissible, this would undermine the procedural compliance requirements of the tender which other bidders were required to comply with. It does not matter that the applicant does not seek to interdict the execution of the tender. It can only be inferred that the other 26 contractors who were appointed to carry out the service complied with all the mandatory requirements including ensuring that the COA's submitted were certified.

[15] It therefore follows in my view that the disqualification of the applicant's bid based on non-compliance with the mandatory procedural requirements was regular. Accordingly, there is no basis to interfere with the administrative decision taken to disqualify the applicant's bid.

ORDER

[16] The following order is made:

(a) The application is dismissed with costs.

ML SENYATSI
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

DATE JUDGMENT RESERVED: 01 November 2022

DATE JUDGMENT DELIVERED: 03 May 2023

APPEARANCES

Counsel for the Applicant: Adv M Augustine

Instructed by: Lawtons Africa

Counsel for the Respondent: Adv K Mvubu

Instructed by: State Attorney