



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

**CASE NO: 2022/060450
DATE: 06 JANUARY 2023**

In the matter between:

SOUTH AFRICAN YOUTH MOVEMENT First Applicant
(in a joint venture with the second applicant)

COMMUNITY ENTERPRISE FUND Second Applicant
(in a joint venture with the first respondent)

THE SAYM-CHEF JOINT VENTURE Third Applicant
(the JV between the first and second applicant)

and

**THE MINISTER OF FORESTRY, FISHERIES AND
THE ENVIRONMENT** First Respondent

**THE DIRECTOR-GENERAL OF FORESTRY,
FISHERIES AND THE ENVIRONMENT** Second Respondent

KISHUNGU HOLDINGS (PTY) LTD Third Respondent

WORKING ON FIRE (PTY) LTD

Fourth Respondent

KISHUGU FLEET SOLUTIONS (PTY) LTD

Fifth Respondent

(to be joined)

KISHUGU AVIATION (PTY) LTD

Sixth Respondent

(to be joined)

KISHUGU TRAINING ACADEMY (PTY) LTD

Seventh Respondent

(to be joined)

JUDGMENT

KOOVERJIE, J:

I Urgent application

[1] In this urgent application, the applicants effectively seek reasons for the rejection of their tender bid and further that the implementation of the R4.2 billion tender contract with Kishugu (“*the third to seventh respondents*”) be stayed pending the production of the said reasons which would enable the applicants to consider their position. This entails that the contract with Kishugu be extended.

[2] For the purpose of this judgment the first and second respondents will be referred to as the Department. The third to seventh respondents will be referred to as Kishugu.

II Background

- [3] It is not in dispute that a R4.2 billion tender bid with Kishugu had been approved. The applicants have highlighted that the bid approval has been shrouded in secrecy.
- [4] The applicants received information from an anonymous whistle-blower who alleged *inter alia* that there were irregularities in the tender process and that Kishugu's bid approval was cast in stone. The Department had, as far back as 18 November 2022, issued a pre-award letter to Kishugu. Consequently all the competitors, including the applicants, were disqualified from bid process.
- [5] A WhatsApp message was circulated by Kishugu confirming that they were successful in their bid.

"Good day Everyone

Herewith official communication regarding the 5 year tender.

Thank you for your ongoing support continues hard work and effort during very difficult times. Please ensure that the video is communicated to all staff".

- [6] In essence the applicants are challenging the new tender award in favour of Kishugu, primarily on the evaluation process and the whistle-blower's information.
- [7] For the new contract to come into effect by 6 January 2023, there could be no doubt that a service level agreement with Kishugu had to be in place by 6 January 2023. It was alleged that since the approval, the negotiations between the Department and Kishugu have been ongoing.

III Urgency

- [8] Before traversing into the merits and addressing the various interlocutory

applications instituted by all three parties, I will deal with the urgency issue.

- [9] The respondents' contentions on urgency are *inter alia* the following:
- (i) the application is premature as a final decision on the tender has not been made;
 - (ii) the applicants would only be entitled to reasons once the final decision of the Department is communicated;
 - (iii) the Department in any event tendered to give reasons at the appropriate time (annexure "FA2");
 - (iv) the urgency was self-created;

[10] It cannot be disputed that it was upon receipt of the answering affidavit that the applicants became privy to the pre-award letter and were advised that they were not successful.

[11] I am of the view that the matter deserves urgent attention particularly in light of the fact that the conclusion of the new tender contract is imminent. It has been alleged that the new contract comes into effect from 6 January 2023 with the successful bidder.

[12] The applicants cannot be faulted for the institution of this application. In fact the applicants have been in constant consultation with the respondents since November 2022 pertaining to the outcome of the bid.

[13] Despite the Department awarding the tender around November 2022, it failed to communicate this fact to the applicants. The applicants only learnt of the pre-award after filing this application. The pre-award letter was only disclosed in the answering papers around 23 December 2022.

[14] The urgency could not have been self-created. If one has regard to the

correspondence between November and December 2022:

- 14.1. On 11 November 2022, the applicants requested the Department for information regarding the status of the tender after receiving information from a whistle-blower that the tender process was irregular.
- 14.2. On 16 November 2022, the Department advised the applicants that it was inappropriate to respond as the procurement process has as yet not been finalised and an award has not as yet been made in respect of the tender.¹ The pre-award letter was issued on 18 November 2022.²
- 14.3. On 22, 23 and 24 November 2022, the applicants informed the Department that they had become aware that in fact a decision regarding the bid was made. The Department has once again given a fair opportunity to respond.³
- 14.4. On 9 December 2022, after receiving no response, they placed the Department on terms. A reply was requested by no later than 13 December 2022.
- 14.5. Eventually the applicants commenced with their urgent papers and filed same around 15 December 2022.
- 14.6. It was also on 15 December 2022 that the Department advised the applicants that a pre-award letter was issued to Kishugu.

[15] The court in **East Rock Trading 7 (Pty) Ltd and Another v Eagle Valley Granite (Pty) Ltd and Others**⁴, the court stated:

“The question of whether a matter is sufficiently urgent to be enrolled

¹ Annexure “FA3”.

² Annexure “AA3”.

³ Annexure “FA5” and “FA6”.

⁴ (11/33767) [2011] ZAGPJHC 196 (23 September 2011).

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.”

[16] This is clearly an instance where the applicants would not have obtained substantial redress in the normal course of proceedings. The Department made the disclosure of the pre-award at the last hour. The applicants were justified in instituting this application.

IV Administrative Action

[17] Section 1 of the Promotion of Administration of Justice Act (“PAJA”) defines administrative action to be (a) a decision of an administrative nature; (b) by an organ of state or a natural or juristic person; (c) exercising of public powers of performing a public function; (d) in terms of any legislative empowering provision; (e) that decision adversely affects the right of any person; or (f) has a direct external legal effect; and (g) does not fall under any of the exclusions listed in that section.

[18] The respondents contended that the pre-award decision does not constitute an administrative action as it does not amount to a final decision in terms of the bidding process. A final decision is only made once the negotiations and a service level agreement are signed and the conditions are set out. The Department advised that the award only becomes final upon successful negotiations and signing of a contract with the successful bidder.⁵

[19] In my view their argument is misplaced. The decision to award the tender to Kishugu and rejecting the applicants’ bid adversely affected their rights.

[20] The court in **Grey’s Marine Hout Bay (Pty) Ltd and Others v Minister of Public Works and Others**⁶ qualified the said term. It expressed:

⁵ Annexure “NPM1”.

⁶ [2005] ZASCA 43; 2005 (6) SA 313 (SCA) at para 24.

“adversely affect the rights of any person” means in section 1 of PAJA, when seen in conjunction with the requirement that it was probably intended to convey that administrative action is action that has a direct and external effect.”

[21] In **Chairman of the State Tender Board v Digital Voice Processing (Pty) Ltd; Chairman of the State Tender Board v Sneller Digital (Pty) Ltd and Others⁷**, the

“[20] Generally speaking, whether an administrative action is ripe for challenge depends on its impact and not on whether the decision-maker has formalistically notified the affected party of the decision or even on whether the decision is a preliminary one or the ultimate decision in a layered process ... Ultimately, whether a decision is ripe for challenge is a question of fact, not one of dogma.”

[22] There can be no doubt that the decision of the Department constitutes administrative action.

V The right to reasons

[23] Section 217(1) of the Constitution reads:

“When an organ of state in the national, provincial or local sphere of government or any other institution identified in national legislation contracts for goods and services, it must do so in accordance with system which is fair, equitable, transparent, competitive and cost-effective”

[24] The very essence of section 217 is to curb irregular and unlawful tender processes which are funded from public funds. The State has an obligation to be transparent at all times during these processes. Hence there can be no

⁷ 2012 (2) SA 16 at paragraph 20.

impediment in furnishing reasons in order to enable them to determine if their rights to fair administration had been infringed.

[25] In **Aquafund (Pty) Ltd v Premier of Western Cape**⁸ the court held that:

“... the right to which the applicant is seeking to protect is not the right to have the decision of the court reviewed with a view to eventually being awarded the contract. It is right to obtain such information as will enable it to determine whether or not its right to fair administrative action has been infringed and not the right to review the decision of the tender board with a view to eventually being awarded the contract.”

[26] Hence, the respondents’ contention that the applicants are entitled to reasons once a final decision is made, has no merit.

[27] In **Aquafund** the court went further to say at 617F:

*“I do not understand the applicant to contend that it has a right to defend and that it is able to demand that a tender be accepted. As already said, the applicant merely contend that it is entitled to lawful administrative action. I find the consideration of tender was an administrative act and that the applicant was accordingly entitled to lawful administrative action as meant in section 24 of the Constitution”.*⁹

[28] In terms of section 33 of the Constitution read with section 5 of PAJA, a party is entitled to reasons the moment their rights have adversely been affected. This principle was endorsed in **JFE Sapela Electronics (Pty) Ltd and Another v Chairperson: Standing Tender Committee and Others**¹⁰ the court held that:

“A person whose rights have been materially and adversely affected by administrative action is in terms of section 33(2) of the Constitution and

⁸ 1997 (2) ALL SA 608 (C) at 610.

⁹ A right to lawful administrative action in section 24 of the interim constitution is now enshrined in section 33 of the final constitution.

¹⁰ 2004 [3] ALL SA 715 (C).

section 5(1) of PAJA entitled to be given reasons for the action. A tenderer whose tender was rejected has a right to be given reasons for the rejection of his tender... a tender condition provides that no reasons will be given if invalid has been in conflict with the provisions of section 33 of the Constitution”.

[29] The aforesaid authorities reinforce the applicants’ right to lawful administrative action. They are entitled to the relevant information in order to establish whether or not its right to lawful administrative action has been violated. This would allow them to make an informed decision as to whether their administrative rights have been affected.

[30] In **Nextcom** the court remarked¹¹:

“The justification for administrative action and executive decisions is only possible if there is transparency. Free flow of information is the very essence of justification.”

[31] The court went on to state it may well be that Nextcom will never be able to establish that it is entitled to review the entire process or any part thereof. This is irrelevant at this stage. Nextcom and the other bidders are entitled to the information which they require to consider their position.

VI The stay of the implementation of the service level agreement

[32] In addition to the reasons, the applicants sought relief the stay on the tender process which includes the implementation of the service level agreement with Kishugu. The stay should remain until such time as the Department furnishes the applicants with reasons, which would then determine if they have been fairly excluded from the bid.

[33] The applicants’ relief is premised in terms of section 38 of the Constitution. The term appropriate relief connotes a wide discretion on the part of the

¹¹ Nextcom (Pty) Ltd v Funde NO and Others 2000 (4) SA 491 at 510.

court. This would depend on the circumstances of each matter and may include an interdict, a declaration of rights, a *mandamus* or such other relief as may be required to ensure that the rights enshrined in the Constitution are protected.

[34] The applicants relied on the matter of *Nextcom*¹² where the interdict was granted precluding the successful bidder from taking office until such time as the unsuccessful bidders were given an opportunity to consider the reasons for their bids being rejected.

[35] The applicants submitted that the court should follow the *Nextcom* approach and the interdictory relief sought is justified in the circumstances. The applicants further argued that the separation of powers is a red herring tactic to steer the court away from the issues at hand.

[36] I cannot ignore the fact that the relief sought, would interfere with the powers of the executive.

[37] It is necessary to emphasise that the court in the **Outa** matter warned that in addition to the requirements for an interdict at court is further obliged to take into consideration the doctrine of separation of powers. This court is obliged to recognise and accept the impact of the temporary restraining order.¹³

[38] The applicants are requested to satisfy the requirements for an interdict. They may have established their rights to be furnished with a reason but this court must be satisfied that the relief sought is justified.

[39] I appreciate that in exercising its discretion, the court weighs *inter alia* the prejudice to the applicants if the interdict is withheld against prejudice to the respondents if it is granted, known as the balance of convenience.¹⁴

[40] In the **National Treasury and Others v Opposition to Urban Tolling**

¹² 2000 (4) SA 491.

¹³ Paragraph 66 of *Outa* judgment.

¹⁴ *Erickson Motors Welkom Limited v Protea Motors Warrenton and Another* 1973 (SA) 685 AS 691D – G.

Alliance and Others¹⁵ matter the court contended that granting interdicts in the domain of government, one must be sensitive to the doctrine of the separation of powers. The court specifically in the stated at paragraph 47:

“The balance of convenience enquiry must now carefully probe whether and to which extent the restraining order will probably intrude into the exclusive terrain of another branch of Government. The enquiry must, alongside other relevant harm, have proper regard to what may be called separation of powers harm. A court must keep in mind that a temporary restraint against the exercise of statutory power well ahead of the final adjudication of a claimant’s case may be granted only in the clearest of cases and after a careful consideration of separation of powers harm.”

[41] At paragraph 71 the court in **Outa** advised that before granting interdictory relief pending a review, a court must in the absence of *mala fide* fraud or corruption examine carefully whether will trespass upon a terrain of another arm of government in a manner inconsistent with the doctrine of separation of powers.

[42] In terms of **Plascon-Evans** it is trite that the applicants are required to establish a *prima facie* case and consideration should be given to the facts given by the applicants together with the facts set out by the Department which cannot be disputed and thereby make a finding, having regard to the inherent probabilities whether the applicants are entitled to the relief.

[43] On their papers the applicants allege various discrepancies in the tender process evaluation. They refer to the five stage evaluation process conducted by the Department and set out in the Terms of Reference (TOR):

- (i) stage 1: pre-compliance
- (ii) stage 2: mandatory subcontracting requirement

¹⁵ 2012 (6) SA 223 (CC).

- (iii) stage 3: local production and content
- (iv) stage 4: functional evaluation criteria
- (v) stage 5: price and B-BBEE

[44] By virtue of the (TOR), only the bids that pass phases 1, 2 and 3 would be evaluated on functionality at phase 4. A bidder must score at least 75% on functionality in phase 4. In phase 5 on assessment the price and the B-BBEE assessment is conducted.

[45] Ultimately, the bid should on their understanding be awarded to the bidder with the highest points on price and B-BBEE, provided that the bidder passes all the phases and complied with the tender requirements set out in the tender documents.

[46] Argument was advanced that Kishugu's price was R4 186 062 689.00 (R4.2 billion) whereas the applicants' price was R2.6 billion. Both satisfied the B-BBEE level 1 contributor requirement. Since the applicants' tender price was substantively lower than Kishugu, they should have been preferred above Kishugu.

[47] In addition, in the letter of 11 November 2022 (annexure "FA2") they set out the information obtained from the whistle-blower which *inter alia* alleged that the bidders besides Kishugu were incorrectly awarded a functionality score of below 75 points so that they could be disqualified from the bid. This made Kishugu the only bidder awarded with more than 75 points.

[48] The further irregularities pointed out was that the Department was in collusion with Kishugu to award an additional R16 million to it and that former government employees were in the employ of Kishugu and which fact was not declared by Kishugu.

[49] At the hearing the applicants maintained that they have a strong *prima facie*

case even if they abandon the truth of the allegations of the whistle-blower. The court should however take cognisance that there was whistle-blowing regarding the tender in issue.

[50] The bid evaluation process on its own revealed alarming irregularities more particularly the difference of approximately R1.6 billion in the tender price.

[51] At paragraph 42 of the applicants' papers, the applicants submitted that:

"The difference is astonishing given that a price in formula was set out in annexure 3 (price breakdown), in the (TOR)." In other words, the Department actually gave all bidders the number of participants at 5 300 people were their payroll scale. There was little and no room for any serious variation between bidders in relation to this aspect of a contract price.

Another aspect is a price related to the provisions of the PPE, equipment, suitable vehicles and training. Again, this was based on the same fixed number of participants, basis training hours etc. There was a limited social variation. The bidders should have priced themselves by quite similarly. A massive differential of R1.6 billion is difficult to understand in these circumstances. The applicants followed the pricing formula in annexure 3. I know because I prepared the applicants' bid as Kishugu Group had done same, there is simply no way that its price could have been R1.6 billion more expensive than that of the applicants."

[52] It was alleged that the Department has a constitutional obligation to spend taxpayers' money responsibly. There can be no question that the respondents should be called to explain. It was further pointed out that the respondents failed to address the alleged irregularities concerning the tender.¹⁶

¹⁶ Pages 2 – 24 and 2 – 25.

[53] The version of the applicants should be considered with the version of the respondents. The first and second respondents submitted *inter alia* the following:

- (i) the applicants failed to demonstrate that they have reasonable prospects of succeeding in the review;
- (ii) the applicants' relief infringes on the "*separation of powers principle*". This court is precluded from assuming the functions that fall within the domain of the executive;
- (iii) the extension of the current contract would infringe the executive powers and is impermissible.

[54] Kishugu in the papers further raised the following concerns, namely:¹⁷

- (i) the annual wage costs of 5 300 firefighters were estimated at approximately R300 million. The applicants' bid would be underpriced on this basis. It was also contended that the Department is not obliged to appoint a bidder offering a lesser amount;
- (ii) the WoF program is a complex integrated system that involves complex activities with a vast number of firefighters, numerous vehicles are sourced and the project carries complex policy and socio-economic considerations;
- (iii) the Department cannot, on its own accord, extend the contract. Approval from National Treasury is necessary. In fact National Treasury should have been joined in these proceedings;
- (iv) the interdict sought may give rise to a period where no contract with the service provider is in place. This would place the country at risk where there would be no service providers dealing with wildfires;

¹⁷ Pages 02 – 340 to 02 – 343.

- (v) the interdict would be intrusive to the Department thereby constraining them to fulfil their duties;
- (vi) the very reason for the tender process was to comply with proper procurement process. At least three extensions were granted to WoF and Kishugu;
- (vii) there is further a history of litigation with Kishugu regarding the current tender;
- (viii) moreover, this court should be cautious in interfering in the contractual relationship between the two parties.¹⁸

[55] At this juncture, I find the sentiments expressed in Outa at paragraph 26 to be instructive:

“A court must be alive to and carefully consider whether the temporary restraining order would unduly trespass on the sole terrain of the branches of government even before the final determination of the review grounds. A court must be ascribe not to stop dead the exercise of executive or legislative power before the exercise has been successfully and finally impugned on review. This approach accords well with the committee of the court and to other branches of government provided they act lawfully...”

[56] This court must be mindful that the present circumstances do not constitute an ordinary application for an interdict but is an interdict restraining the exercise of the executive powers. It is only in exceptional cases and when strong case is made, that an interdict of this nature is justified.

[57] The primary responsibility of a court is not to make decisions reserved for the domain of other branches of government and further it should be careful not to usurp such powers as the Constitution entrusts specific functions and

¹⁸ Pages 02 – 334 to 02 – 336.

powers on various organs of state. That would frustrate the balance of power implied in the principle of separation of facts. However, this does not mean that in every instance an organ of state is immunised from interference.

[58] The court in **Outa** gave guidance when confronted with an application for a temporary interdict that has the potential of impinging on the legitimate preserve of another arm of national government needs to be determined that question first. It must ask, is this a case where national legislative or executive powers will be transgressed by a temporary interdict. If the answer is yes, the court will grant the remedy only in the clearest of cases. It is not possible to define what will constitute the clearest of cases, but one of the important considerations will be to what extent the fundamental constitutional rights of persons may be affected by the grant of a temporary interdict.¹⁹

[59] At this point the Department's reasons on the scoring had not been disclosed. The applicants' version on the evaluation of their bid in my view does not place the balance of convenience in their favour.

[60] I am of the view that in this instance a strong case is not prevalent. The applicants have illustrated discrepancies according to their understanding of the Terms of Reference. The nub of their case centres on the price discrepancies and their insistence that they scored more than 75 points. Consideration was given to the aforesaid after the whistle-blower's information surfaced.

[61] Having regard to the submissions of both parties, I am not satisfied that this is an instance of a strong and a clear case. The respondents have illustrated that not only the tender process but the contractual aspects are complex and are subject to various legislative and policy prescripts.

[62] More notably, the budgetary implications have to be considered. Treasury has a hand to play in budgetary decisions and extension of contracts. Furthermore state organs have limited powers regarding extension of

¹⁹ Paragraph 90 of Outa judgment.

contracts.

[63] At this juncture the applicants have not demonstrated actual harm.

VII Costs

[64] In the main application, the applicants have been successful. They were justified in demanding reasons and doing so on an urgent basis.

[65] The applicants were however not successful on the interdictory relief sought which in their view was the pivotal to this application. In exercising my discretion, I am however inclined to order that the respondents jointly and severally be liable for the costs of the main application. Both respondent parties entered litigation arena and argued substantially on all the issues raised in the application.

VIII Interlocutory applications

(i) Joinder

[66] The applicants' sought the joinder of the fifth to seventh respondents. Effectively the fifth to seventh respondents have a substantial interest in this matter and are accordingly joined. There was no opposition to this application.

(ii) Application to amend and striking out

[67] The applicants sought an amendment to the relief claimed. It was submitted that this was necessary after the respondents' version set forth in the answering affidavit, pertaining to the fact that a pre-award was made. The applicants requested costs as both respondent parties opposed the relief sought. In my view the amendment was necessary as the applicants were entitled to reasons after learning that a decision had already been made by the Department.

[68] On the issue of the striking out, the court is of the view that a dispute exists I have been placed with two different versions which in my view should be ventilated fully. A dispute of fact persists on this issue.

(iii) Application to compel

[69] The third and fourth respondents sought the applicants' bid documentation, particularly in light of the allegations made by the whistle-blower. This application was however not pursued at the hearing. The applicants opposed the respondents' entitlement to the bid submission as it is considered confidential. It is their argument that confidentiality of the bid document is not an acceptable reason not to furnish the bid submission. In this instance the applicants are entitled to their costs as well.

VIII Conclusion

[70] In conclusion, the applicants are entitled to their reasons at this point and I am amenable to truncate the periods for the furnishing of reasons. There can be no doubt at this stage that a final decision has been made by the Department.

[71] The following order is made:

- (1) The matter is urgent and in accordance with Rule 6(12) and the usual forms and manner of service are dispensed with to the extent necessary.
- (2) The first and second respondents' decision recorded in its letter to Kishugu Group on 8 November 2022 in which the first and second respondents notified Kishugu Group of its decision to select Kishugu Group from the pool of bidders as a successful party in the tender bid number T041 (2022 to 2023) constitutes administrative action as contemplated in section 1 of the Promotion of Administrative Justice Act 3 of 2000 (PAJA).

- (3) The first and second respondents' decision to disqualify the applicants from the tender at stage 4 of the evaluation constitutes administrative action as contemplated in section 1 of PAJA.
- (4) The first and second respondents are directed to provide the applicants with reasons for the two decisions in terms of section 33(2) of the Constitution read with section 5 of PAJA by no later than 10 January 2023.
- (5) In order to give effect to the time period in paragraph 4 above, the 90 (ninety) day time period referred to in section 5 of PAJA is hereby reduced in the manner contemplated by section 9(1)(a) of PAJA.
- (6) The applicants shall inform the Department of their position by no later than 17 January 2023. This includes their intention to persist with review proceedings or any other proceedings they intend persisting with.
- (7) The respondents are liable for the costs of the main application jointly and severally.
- (8) The respondents are liable to pay the costs of the interlocutory application to amend the relief sought by the applicants.
- (9) The third to the seventh respondents are ordered to pay the costs in respect of the interlocutory application to compel.

H KOOVERJIE
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Heard on: 04 January 2023

Appearance:

Counsel for Applicants: Adv Kevin Hopkins SC

Counsel for 1st and 2nd Respondents: Adv De Villiers-Jansen SC
Adv Ria Matsala

Counsel for the 3rd and 4th Respondents: Adv Myron Dewrance SC
Ms Bashni Rowjee