

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 116843/2023

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|-----|---------------------------------|
| (1) | REPORTABLE: NO |
| (2) | OF INTEREST TO OTHER JUDGES: NO |
| (3) | REVISED: NO |

In the matter between:

MABOTWANE SECURITY SERVICES CC
Applicant

and

MADIBENG LOCAL MUNICIPALITY
Respondent

First

MUNICIPAL MANAGER, JK MASHIGO N.O.
Respondent

Second

HWIDIDU GROUP (PTY) LTD
Respondent

Third

MTUNGWA TLASEGO PROJECT JV
Respondent

Fourth

TRIOTIC (PTY) LTD
Respondent

Fifth

MOKGANYA SUPPLY AND PROJECTS CC
Respondent

Sixth

**ANY RESPONDENT WHO WAS AWARDED A
TENDER UNDER RFT BIDS 62,63,64 OR 65/2022/23**
Respondent

Seventh

JUDGMENT

[1] DE VOS AJ

- [1] The applicant seeks the urgent review of a tender. The relief is for a final order reviewing and setting aside the tender awarded by the first respondent (“the Municipality”) to the third, fourth, fifth and sixth respondents (“successful bidders”). In addition, the applicant seeks an order for substitution in terms of section 8(1)(c)(ii) of the Promotion of Administrative Justice Act that it be declared the successful bidder. The Municipality opposes the relief. Its position is that the successful bidders scored the highest points.
- [2] The tender relates to an invitation to bid extended by the Municipality to provide physical security services at various sites. The Municipality received multiple bids. It followed an evaluation and adjudication process. It organised its sites into four clusters and awarded the tender to the highest bidder for each cluster. The fourth respondent was the highest-scoring bidder in Cluster 1, the sixth respondent was awarded Cluster 2, and for Cluster 4, the third respondent was the highest scorer. For cluster 3, the bidder with the highest score was already appointed for cluster 1. The Municipal Manager then decided to appoint the bidder with the second highest points scored, the fifth respondent, as the successful bidder.
- [3] The central controversy is whether the successful bidders met the mandatory requirements of the Bid Evaluation Document. The tender was regulated by a Bid Evaluation Document, which marked the award with three phases. The first is administrative compliance, the second is evaluation of functionality, and the third is price and specific goals. The document contains a warning in bold: “N.B. Bidders who fail to comply with the requirements of Phase 1 and 2 respectively will not

proceed to the next stage of evaluation". The bid document then lists 27 items which a bidder must submit as part of the administrative compliance phase. If the bidder fails to submit these documents, it is disqualified from progressing to the next phase of the process.

- [4] The applicant contends that the successful bidders did not provide the documents listed under items 16, 23 and 25 of the submission document. Item 16 is proof of registration with the Bargaining Council, item 23 is quality system approval, and item 25 is proof of a control room approval by PSIRA. The applicant's case is that the successful bidders did not submit these documents, and therefore, they should have been disqualified, should not have proceeded to the next stage of the process and could not have been awarded the tenders.
- [5] The case requires the Court to test whether the successful bidders complied with items 16, 23 and 25. The contentious item is item 25, and I will deal with it last.

Item 23: Proof of compliance with ISO 9001: 2015

- [6] Item 23 states -

"Proof of compliance with ISO 9001: 2015, which sets out the criteria for a quality management system in an entity. NB, Proof of an externally audited system (ISO 9001: 2015) is mandatory in conjunction with accredited personnel in the employ of the bidder Security service provider."

- [7] The applicant contends that the third respondent did not comply with this requirement as it should failed to submit proof of compliance with ISO 9001:2015.
- [8] The Municipality alleges that the third respondent did submit proof of compliance with ISO 9001 and that this proof formed part of the documents considered by the Municipality. However, when preparing the record for purposes of the hearing, the officials at the Municipality's Supply Chain Management Unit accidentally left the proof out when compiling the record for this hearing. The Municipality supplied the certificate, and the third respondent's bid is attached to its answering affidavit. On the Municipality's version, the third respondent did submit the proof, and the Municipality had regard to it. However, it was erroneously left out when the Municipality prepared the record for this review.
- [9] The applicant cannot deny this version. Even if it could, and the Court was presented with a dispute of fact in this regard, the Municipality would benefit from

the *Plascon-Evans* rule. The facts before this Court, properly considered, are that the third respondent did submit the necessary proof.

[10] If proof of ISO 9001 had not been part of the documents considered by the Municipality and it was being added to the documents the Municipality considered in making its decision, ex post facto, that would be a different situation. That is not what happened in this case. The document did serve before the Municipality, and it did form part of the Municipality's decision-making process. However, it was left out of the formal compilation of the record.

[11] The applicant has not proven the factual basis to sustain this ground of review.

25 Proof of Control Room registration issued by PSIRA

[12] Item 25 requires proof of control room registration issued by the Private Security Industry Regulation Agency ("PSIRA"). PSIRA is regulated by the Private Security Industry Regulation Act 56 of 2001.

[13] The applicant contends that item 25, properly interpreted, requires proof of control room registration in the form of a certificate. The applicant contends that not one of the successful bidders presented such a certificate.

[14] The Municipality argues that item 25 must be interpreted in line with the provisions of the PSIRA Act. The Municipality points out that the PSIRA Act contains no provisions which empower PSIRA to issue a control room certificate. While the PSIRA Act contains provisions dealing with the registration as a security service provider (sections 20 – 27), it does not make provision for the registration of a control room or for the issuance of a certificate for control room registration.

[15] The PSIRA Act, in section 23(2)(b), provides that a business can apply for registration as a service provider if such a security business meets the prescribed requirements with respect to the infrastructure and capacity necessary to render a security service. To determine if a business meets the requirements, PSIRA may, in terms of section 23(3), cause an inspection to be held, which it deems necessary to establish if the requirements in section 23(2)(b) have been met. The only certificate provided for in the PSIRA Act relates to a certificate as proof of registration as a service provider. There is nothing in the PSIRA Act referring to a control room certificate.

- [16] The Municipality contends that the only interpretation of item 25 which makes sense is one that relies on section 23(3) of the PSIRA Act, which allows PSIRA to inspect a service provider's premises for purposes of establishing infrastructure suitability and capacity. However, as the PSIRA Act does not empower PSIRA to issue a control room certificate, item 25 could not demand such a certificate. The only requirement, read with the enabling legislation, is that of inspection conducted by the inspectors appointed by PSIRA.
- [17] In compliance with its interpretation of item 25, the Municipality has attached the inspection reports of the successful bidders. This, the Municipality contends, complies with item 25, as read with the enabling legislation.
- [18] The applicant, itself did not submit a control room certificate issued by PSIRA. The applicant submitted a letter confirming that an inspection was conducted to assess the control room infrastructure at the applicant's office in Johannesburg. This, of course, is in line with the clear provisions of the PSIRA Act and in harmony with the Municipality's interpretation of item 25 of the PSIRA Act.
- [19] The Court concludes that item 25 must be read with the PSIRA Act. When read together, item 25 cannot demand a certificate that the PSIRA Act does not authorise PSIRA to issue. The only requirement that item 25 could impose, properly interpreted in line with the empowering legislation, would be a successful proof of inspection of the control room. The successful bidders complied with this requirement. Whilst these inspection reports provided requests for further information, there is nothing on the face of these reports that could be interpreted as anything other than proof of a successful inspection.
- [20] This ground of review is dismissed as the applicant's interpretation of item 25, requiring the submission of a certificate relating to the control room, is not supported by the PSIRA Act.

Item 16: Proof of registration with the Bargaining Council

- [21] Item 16 of the submission of required "proof of registration with the Bargaining Council". The applicant contends that the fourth respondent did not submit proof of its registration with the Bargaining Council. It is, however, common cause that its J.V. partner did submit proof of registration with the Bargaining Council. The

applicant contends that based on this, the fourth respondent's bid should have been disqualified.

[22] The Municipality contends that joint venture bids were not required to submit a document evidencing proof of registration with the Bargaining Council separately. The Municipality contends that one partner in a joint 50/50 venture partnership meets the requirement if it is registered with the Bargaining Council. The Municipality's case is that there was, in fact, no deviation from the requirements, but even if there was, there is substantial compliance as the one partner did provide proof of registration with the Bargaining Council.

[23] The purpose of registration with the Bargaining Council is to ensure the employees gain the advantage of the main collective agreement that applies within the Council. The absence of such proof means that there is no assurance that the employees are receiving employment conditions in line with industry standards set by the Council, except if the main agreement has been extended to non-parties.

[24] The Municipality has referred the Court to the judgment in *Allpay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer, S.A. Social Security Agency* ("*All-Pay*")¹ as authority for the proposition that substantial compliance is sufficient.

[25] *All-Pay* is not the authority for the proposition that a Court will take a relaxed approach to procedural requirements in the context of tender reviews. On the contrary, *All-Pay* identifies the three-fold purpose of compliance with the process: (a) it ensures fairness to 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.² Rather than introducing a lax approach to procedural requirements, the Court sets the test as one requiring a principled evaluation of whether the decision accords with section 217 of the Constitution, which demands that the decision is expected to be made "in accordance with a system which is fair, equitable, transparent, competitive and cost-effective".³ The approach is not to set aside instances of deviations but rather to assess the tender process in light of the principles espoused in section 217 of the Constitution.

¹ 2014 (1) SA 604 (CC)

² *Id* at para 27

³ Millennium Waste (above) para 4

Deviations that do not materially impact the fairness, lawfulness or reasonableness of the process cannot serve to vitiate the decision.⁴ Deviations from the procedure will be assessed in terms of those norms of procedural fairness. That does not mean that administrators may never depart from the system put into place or that deviations will necessarily result in procedural unfairness.⁵

[26] The Court is required to, based on the facts of each case, determine what any shortfall in the requirements of the procurement system – unfairness, inequity, lack of transparency, lack of competitiveness or cost-inefficiency – may lead to procedural unfairness, irrationality, unreasonableness or any other review ground under PAJA. The judicial task,⁶ set by the Constitutional Court, is to assess whether the evidence established justifies the conclusion that any one or more of the review grounds do, in fact, exist.

[27] In accordance with the approach set out above, it is now necessary to consider whether the evidence on record establishes the factual existence of any irregularities and, if so, whether the materiality of the irregularities justifies the legal conclusion that any of the grounds for review under PAJA exist. The Constitutional Court requires this Court to consider whether the “materiality of irregularities is determined primarily by assessing whether the purposes the tender requirements serve have been substantively achieved.”⁷

[28] The purpose of requiring Bargaining Council registration is to protect employees from exploitation. The purpose is laudable.

[29] There is nothing in the bid document which indicates that both J.V. partners need to submit proof of registration. This, the Municipality contends, is sufficient. The Court rejects this submission. It is a deviation from the bid document if a J.V. partner does not comply with the bid requirements. If not, then it permits bidders to avoid certain obligations in the bid process.

⁴ MEC for Education, Gauteng Province and Others v Governing Body, Rivonia Primary School and Others 2013 (6) 582 (CC) at para 49(c).

⁵ All-Pay para 40

⁶ All-Pay para 44

⁷ All-Pay para 58

[30] The question, accepting that there is an irregularity, is whether it is material or not. There is nothing before me to indicate that the applicant was placed in an unfair competition as it was registered with the Bargaining Council whilst only one of the J.V. partners was registered with the Bargaining Council. There is also nothing before me to indicate that the J.V. partner who did not submit proof of registration is not, in fact, registered, that it has employees or even if so – that it is providing conditions of employment lower than that prescribed by the main agreement of the Bargaining Council.

[31] The materiality of the irregularity has, therefore, not been established. For these reasons, the Court concludes that there was an irregularity but that it is not sufficiently material to set aside the award.

Substitution

[32] Having concluded that the grounds of review have not been established, the Court need not consider the issue of remedy. However, as final relief is being sought and the Court wishes to place the parties in a position to exercise their rights of appeal, the Court will follow a belt and braces approach. The Court, therefore, sets out why, even if the applicant had established its grounds of review, the Court could not grant the substitution relief that is being requested.

[33] The Municipality determined specified goals upon which different points were allocated. Specifically, a person historically disadvantaged based on race with at least 51% = 3 points. Persons historically disadvantaged based on gender with at least 51% ownership = 1 point. Persons with at least 51% ownership who are youth = 2 points. Persons historically discriminated against based on disability with at least 51% ownership = 2 points. Local Economic Development companies with directors/shareholders with at least 51% ownership residing within the jurisdiction of the Municipality = 2 points.

[34] All bidders were then allocated preferential points, out of a maximum of 10, premised on the individual specific goals that were pre-determined by the Municipality. The Court has been provided with specific goals, the points allocated for each goal, and the outcome of this process in the form of the score sheet.

[35] The score sheet shows that another bidder, Mamyila Trading, scored better than the applicant. In other words, even if the applicant is correct – and the successful bidders were excluded – the applicant would still not be the successful tenderer. This is a common cause and is supported by objective evidence in the form of the scoresheets.

[36] The applicant has not joined or served Mamyila. It has not been heard in these proceedings at all. The applicant contended that substitution is appropriate as it is a foregone conclusion that it ought to have received the tender. The Court cannot draw that conclusion in light of the scoring of Mamyila, and certainly not in the absence of Mamyila.

[37] Even if the applicant was successful in proving its grounds of review, the relief it sought cannot be granted.

Urgency

[38] The applicant sought relief on an urgent basis. The Municipality opposed the urgency of the matter.

[39] The applicant relies on the limited duration, 36 months, of the contract awarded to the successful bidders. The applicant's concern is one which is often raised in urgent Court: the nature of tender reviews is that, frequently, the contract is served to completion before the review proceedings are finalised. The concern is that the applicant might be in a position where, due to the effluxion of time, even an invalid administrative act will be permitted to stand. The scope of granting effective relief to vindicate the infringed rights becomes drastically reduced. The judgments in *Steenkamp*⁸ and *Pipeline*⁹ indicate the limited scope for a successful attempt to obtain monetary relief in the normal course.

[40] The Court also weighs the Supreme Court of Appeal's view that "it may help if the High Court, to the extent possible, gives priority to these matters."¹⁰ Whilst this may not always be possible, in this particular case, the Court was able to allocate most of

⁸ *Steenkamp N.O. v Provincial Tender Board of the Eastern Cape* [2005] ZASCA 120 at para 33

⁹ *Esofranki Pipelines (Pty) Ltd v Mopani District Municipality* (CCT 222/21) [2022] ZACC 41; 2023 (2) BCLR 149 (CC); 2023 (2) S.A. 31 (CC) ("Pipeline")

¹⁰ *Millennium Waste Management (Pty) Ltd. v Chairperson of the Tender Board: Limpopo Province and Others* (31/2007) [2007] ZASCA 165; [2007] SCA 165 (RSA); [2008] 2 All SA 145; 2008 (2) SA 481; 2008 (5) BCLR 508; 2008 (2) SA 481 (SCA) (29 November 2007)

the day to the hearing of this matter. The parties were well prepared, had delineated the issues into essentially three issues, and provided concise and helpful written submissions. The Court also has been presented with a record of the decision-maker. The matter was, therefore, ripe for hearing.

[41] In addition, it would not be the best use of judicial resources if this Court - already having considered the submissions and read the 3000 pages of pleadings and records – burden another court with the same matter.

[42] For all these reasons, the Court concluded that the matter was urgent.

Costs

[43] As to the issue of costs, the general rule is that costs must follow the result. However, Biowatch provides that if a party wishes to litigate a fundamental right, it must not be mulcted in costs. The applicant has asserted its rights under section 34 of the Constitution. The Municipality has not provided any reason not to apply Biowatch in these circumstances. In these circumstances, the Court does not award any costs.

Order

[44] As a result, the following order is granted:

- a) The application is dismissed.

I de Vos
Acting Judge of the High Court

Delivered: This judgment is handed down electronically by uploading it to the electronic file of this matter on CaseLines. As a courtesy gesture, it will be sent to the parties/their legal representatives by email.

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Instructed by:

OK Chwaro
ME TLOU ATTORNEYS

Date of the hearing:
Date of judgment:

14 December 2023
8 January 2023