THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not reportable
Case No: 837/2015

In the matter between:

HEAD OF DEPARTMENT, MPUMALANGA DEPARTMENT OF EDUCATION	**APPELLANT**
and	
VALOZONE 268 CC	**FIRST RESPONDENT**
SAMOLLO TRADING (PTY) LTD	**SECOND RESPONDENT**
SIYAKHANYA BUSINESS ENTERPRISES CC	**THIRD RESPONDENT**
ICONIC VENTURES (PTY) LTD	**FOURTH RESPONDENT**
IBHOKO TRANSPORT & TRADING (PTY) LTD	**FIFTH RESPONDENT**
AN YENDE CC	**SIXTH RESPONDENT**
ASITHUTHUKENI BUSINESS ENTERPRISES CC	**SEVENTH RESPONDENT**
MAIPO TRADING CC	**EIGHTH RESPONDENT**

Neutral citation: *Head of Department, Mpumalanga Department of Education v Valozone 268 CC* (837/2015) [2017] ZASCA 30 (29 March 2017)

Coram: Maya AP, Bosielo and Van der Merwe JJA and Schoeman and Fourie AJJA

Heard: 4 November 2016

Delivered: 29 March 2017

Summary: Administrative law: review of decision to cancel and re-advertise public tender: decision not authorised by regulation 8(4) of the Preferential Procurement Regulations, 2011 and irrational: decision correctly set aside.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Kubushi J sitting as court of first instance):

1 The appeal is dismissed with costs, including the costs of two counsel.

2 Paragraphs 2 and 3 of the order of the court a quo are deleted and substituted with the following:

'The respondent is ordered to consider and adjudicate all qualifying bids in terms of the evaluation methodology prescribed in paragraph 9 of the bid document, within 30 (thirty) days of the granting of this order.'

JUDGMENT

Van der Merwe JA (Maya AP and Bosielo JA and Schoeman and Fourie AJJA concurring):

[1] During August 2013, the appellant, the Head of the Department of Education of the Mpumalanga Province, invited bids by way of publication of a tender document with number EDU/069/13/MP (the tender). The tender envisaged the implementation and management of the National School Nutrition Programme. The main purpose of the tender was to ensure that 'needy school learners from the disadvantaged and deprived communities (being the target population) receive a nutritious supplementary meal per day'. In terms of the tender, successful tenderers would be appointed as service providers in terms of three year contracts, with the option, upon satisfactory service, to extend the duration thereof for another two years. The obligations of the service providers would be to operate warehouses and to supply bulk dried food and fresh vegetables and fruit to schools in eight municipalities in Mpumalanga. Separate service providers would be appointed for each municipality.

[2] The tender closed on 11 September 2013 at 12h00. It was contemplated that the tender would be implemented when the schools opened in January 2014. Unfortunately this did not materialise. As will appear from the extended history of the matter set out below, the principal issue in the appeal is whether the court a quo (Kubushi J in the Gauteng Division of the High Court, Pretoria) correctly reviewed and set aside the decision taken by the appellant on 23 June 2014, to cancel and re-advertise the tender.

[3] The respondents timeously submitted bids to be awarded parts of the tender. The first to seventh respondents were unsuccessful. The tender was awarded to seventeen tenderers, including the eighth respondent. The first to seventh respondents consequently applied in the Gauteng Division, Pretoria for the review and setting aside of the award of the tender. They cited, inter alia, the appellant and the seventeen successful tenderers as respondents in that application. They relied on several irregularities in respect of the award of the tender. These included that some of the successful tenderers failed to submit documents that were compulsory in terms of the tender; that the tender was awarded to a tenderer that had been finally deregistered; that during the evaluation of the bids, points were incorrectly allocated to the first to seventh respondents and to the successful tenderers and that the tenderers were not treated fairly or equally, in that a condition of the tender was subsequently imposed and in any event not consistently applied. None of the respondents in that application filed answering affidavits.

[4] In a judgment dated 26 May 2014, Janse van Nieuwenhuizen J reviewed and set aside the award of the tender. She also ordered the following:

‘4. The bid is remitted to the fourth respondent for reconsideration, who is ordered and directed to consider and adjudicate upon the bid, having due regard to this judgment, within 1 (one) month of the granting of this order.

5. The status *quo* in respect of the implementation of the bid is maintained until the fourth respondent has reconsidered and re-adjudicated upon the bid.’

The appellant was the fourth respondent in that application. The effect of para 5 of the order was that pending the reconsideration of the tender, it would be

implemented by the seventeen tenderers, despite the setting aside of the award of the tender to them. No reasons were given for this part of the order.

[5] After consideration of the judgment, the appellant, on 2 June 2014, called for all the bids submitted in respect of the tender, for purposes of reconsideration of the tender. The appellant appointed a bid evaluation committee (BEC) on 17 June 2014 and a bid adjudication committee (BAC) on 18 June 2014 to assist her for this purpose.

[6] The tender obliged tenderers to submit seven 'compulsory returnable documents'. These included a valid tax clearance certificate, proof of value added tax (VAT) registration or a declaration that the bidder is not registered for VAT and cannot charge VAT, as well as company registration documents. The tender clearly stated that failure to submit any of the compulsory documents would lead to disqualification of the bid. (Regulation 14 of the Preferential Procurement Regulations, GN R502, *GG* 34350, 6 June 2011 made in terms of s 5 of the Preferential Procurement Policy Framework Act 5 of 2000 (the regulations) provides that no tender may be awarded to any person whose tax matters have not been declared by the South African Revenue Service to be in order.)

[7] Therefore the first step in the adjudication of the bids would be to determine which bidders submitted all the compulsory documents and thus qualified to be evaluated in terms of the tender. The tender provided for evaluation of bids by the BEC in two phases. The first phase consisted of evaluation of functionality. During this phase points would be allocated to each bidder in respect of the categories 'appropriateness of the business plan' and 'capacity to deliver on relevant project'. Only bidders that scored 70 points or more for functionality could proceed to the next phase, that is, points allocation for price (90) and equity ownership (10). The tender would then be awarded per municipality in accordance with the Preferential Procurement Policy Framework Act, that is, to the tenderer who scored the highest points, unless objective criteria justified the award to another tenderer.

[8] The BEC commenced its reconsideration of the tender on 18 June 2014 and submitted its report to the BAC on 22 June 2014. It noted that although a bid certificate prepared by the provincial supply chain management unit (the unit) stated that 1116 bid documents had been received, 1099 bids were received by the BEC. The BEC scrutinised the 1099 bid documents. It concluded that 575 bids had to be disqualified and that two bids were irrelevant, as they related to another tender. Notably, four of the seventeen previously successful bids were disqualified. Thus, 522 bids qualified for evaluation. The BEC did not, however, evaluate the qualifying bids in terms of the tender. The BEC observed that three bid documents mentioned in the bid certificate of the unit were not allocated bid numbers. The BEC did not state whether these bids qualified for evaluation or not. It further observed that in respect of two bids, the bid documents were not stamped by the unit at all. Both these bids qualified for evaluation. In respect of a further twelve bids, the bid documents were not stamped by the unit on each page. Six of these bids qualified for evaluation and six did not.

[9] The BEC expressed the view that bid documents may have been tampered with and that if this proved to be correct it could lead to further unnecessary litigation. It resolved not to continue with the evaluation process in terms of the tender. It recommended to the BAC that the latter consider re-advertising the tender.

[10] In its memorandum to the appellant dated 23 June 2014, the BAC recommended that the tender be re-advertised in order to avoid further litigation. The BAC further recommended that the seventeen previously successful tenderers be contracted on a month to month basis to execute the tender pending the re-advertising and fresh award thereof.

[11] The appellant accepted the recommendations of the BAC. In terms of a written decision dated 23 June 2014 (the decision) the appellant resolved:

‘DECISION

7. In conclusion, the Tender for the Appointment of service provider/s to manage, operate warehouses and supply bulk foodstuffs, fresh vegetables and fruits

to schools participating in the National Nutrition Programme with identified CRDP areas for a period of (3) three years, with the option to extend for another (2) two years is to be re-advertised.

8. Furthermore, in order not to disrupt the programme, the current 17 service providers shall be contracted on a month to month basis until the appointment of a new Service Provider or Providers.'

[12] The first to seventh respondents were dissatisfied with the decision and instituted proceedings to have it reviewed and set aside. They relied on three main grounds, namely:

(i) that the order of Janse van Nieuwenhuizen J obliged the appellant to adjudicate and award the tender and did not permit the re-advertising thereof;

(ii) that the decision was invalid for non-compliance with regulation 8(4) of the regulations; and

(iii) that the decision was irrational.

[13] The eighth respondent obtained leave to join the application as an applicant. Although it initially prayed for different (and unsustainable) relief, the eighth respondent made common cause with the first to seventh respondents at the hearing of the application. At the hearing the fourth respondent also abandoned its claim for relief, on the basis that it too did not submit a qualifying bid.

[14] The court a quo found for the respondents on all three grounds. It reviewed and set aside the decision. It also made the following orders:

'2. The respondent is ordered to consider and adjudicate applicants 1 to 3 and 5 to 8's bids in terms of the evaluation methodology prescribed in paragraph 9 of the bid document, within 15 (fifteen) days of the granting of this order.

3. The respondent is ordered to provide the applicants with a written report within 20 (twenty) days of the granting of this order, on the outcome of the evaluation process, with specific reference to:

(a) the valuation criteria used for measuring functionality of the applicants' respective bids;

(b) the weight which was attached to each criterion;

(c) the applicable values that were utilised when scoring each criterion;

(d) the score for functionality obtained by each individual applicant;

(e) the points scored by those applicants, who scored the minimum threshold of 70% for functionality, in respect of price and equity ownership.'

Kubushi J granted the appellant leave to appeal to this court.

[15] I am unable to agree with the court a quo's interpretation of the order of Janse van Nieuwenhuizen J. In her judgment Janse van Nieuwenhuizen J dealt with the grounds of review of the award of the tender that led to the remittal of the tender to the appellant. The judgment rightly did not deal with the manner in which the reconsideration should take place. In the context of the judgment the order did no more than to place an obligation on the appellant to reconsider the tender with due regard to the judgment. The judgment and order did not purport to exclude any legitimate options available to the appellant upon reconsideration. Nor could they, having regard to the principle of separation of powers. If the reconsideration indicated, for instance, that no acceptable bids were received, the appellant would surely not be obliged to nevertheless award the tender. I therefore conclude that the order of 26 May 2014 did not oblige the appellant to award the tender.

[16] It is, however, a requirement of a fair, equitable and transparent procurement system in terms of s 217 of the Constitution that a tender properly issued, may not be cancelled without good reason. In this regard regulation 8(4) of the regulations provides:

'An organ of state may, prior to the award of a tender, cancel a tender if-

(a) due to changed circumstances, there is no longer a need for the services, works or goods requested; or

(b) funds are no longer available to cover the total envisaged expenditure; or

(c) no acceptable tenders are received.'

The tender could only be cancelled if one of the grounds stipulated in regulation 8(4) existed. See *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd & another* 2015 (5) SA 245 (CC); [2015] ZACC 22 paras 68-69.

[17] There is no doubt that the decision constituted a cancellation of the tender. This was expressly recognised by the appellant. The appellant did not state that due to changed circumstances there was no longer a need for the services envisaged by the tender nor that funds were no longer available to cover that expenditure. The resolution to re-advertise the tender in itself demonstrated that these grounds for cancellation did not exist. There were 522 acceptable bids. The only justification for the cancellation proffered by the appellant was the fear of possible litigation, and the costs thereof, that could follow on a fresh award of the tender. That is not a ground for cancellation stipulated in regulation 8(4). Regulation 8(4)(b) clearly refers to the total expenditure envisaged in respect of the implementation of the tender itself. Thus, the appellant was not empowered to cancel (and re-advertise) the tender.

[18] I agree that the decision was in any event irrational within the meaning of s 6(2)*(f)*(ii) of the Promotion of Administrative Justice Act 3 of 2000. According to the BEC, there were possible irregularities in respect of some thirty odd bids out of approximately 1100 bids. Some of these bids were in any event disqualified. On the face of it, the possible irregularities may be attributable to minor administrative failings. Only the first to seventh respondents came forward to challenge the award of the tender. The seventeen successful tenderers did not oppose that challenge and thus accepted that the award of the tender should be reconsidered. There is no evidence of any threat of litigation should a fresh award of the tender be made. Such a threat would in any event be premature.

[19] The implementation of the tender was intended to serve the desperate needs of poor children. The 522 qualifying bids could clearly be evaluated properly and expeditiously. The fear of possible litigation following on an award of the tender after proper evaluation of the qualifying bids, appears to me to be illusory and wholly unjustified. In my view the decision to cancel the tender for fear of possible litigation, was not rationally connected to the purpose of the powers of the appellant or the information before the appellant. What made matters worse, was that in terms of the decision, the tender was

awarded for the interim period on a month to month basis to, inter alia, four bidders that had been disqualified by the BEC.

[20] It follows that the court a quo correctly set aside the decision and that the appeal must be dismissed. In my view, however, paras 2 and 3 of the order of the court a quo cannot stand. In terms of para 2 the appellant was ordered to consider and adjudicate only the bids of the first to third and fifth to eighth respondents. Clearly all qualifying bids should be considered for the award of the tender. Paragraph 2 should also be adjusted in respect of the time within which it should be complied with. There is no legal basis for a report to the respondents in terms of para 3 of the order, as counsel for the respondents fairly conceded, and it should be deleted.

[21] For these reasons the following order is issued:

1 The appeal is dismissed with costs, including the costs of two counsel.

2 Paragraphs 2 and 3 of the order of the court a quo are deleted and substituted with the following:

‘The respondent is ordered to consider and adjudicate all qualifying bids in terms of the evaluation methodology prescribed in paragraph 9 of the bid document, within 30 (thirty) days of the granting of this order.’

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C H G van der Merwe
Judge of Appeal

Appearances

For the Appellant:	G Shakoane SC (with him K M Mokotedi) Instructed by: Adendorff Attorneys, Nelspruit Lovius Block Attorneys, Bloemfontein
For the First to Seventh Respondent:	A Vorster (with him R C de Alcantara) Instructed by: Hugo & Ngwenya Incorporated, Pretoria Phatshoane Henney Attorneys, Bloemfontein
For the Eighth Respondent:	P L Uys (with him S G Webster and C J Mkhavelo) Instructed by: C J Mkhavele Inc, Pretoria Honey Attorneys, Bloemfontein