IN THE HIGH COURT OF SOUTH AFRICA,

FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	**YES/NO**
Of Interest to other Judges:	**YES/NO**
Circulate to Magistrates:	**YES/NO**

Case number: 4689/2023

In the matter between:

SILVER LAKE TRADING 305(PTY) LTD t/a OPULENTIA FINANCIAL SERVICES **Applicant**

and

BLOEMWATER (now VAAL CENTRAL WATER) **1st Respondent**

SANKOFA INSURANCE **2nd Respondent**

CORAM: NAIDOO, J et MOLITSOANE, J

HEARD ON: 20 NOVEMBER 2023

JUDGEMENT BY: MOLITSOANE, J

DELIVERED ON: 20 MARCH 2024

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[1] The applicant seeks an order to review and set aside a decision to award a short-term insurance tender to the second respondent, alternatively to have it declared unlawful and be set aside on that basis. As a just and equitable remedy in accordance with section 8 of the Promotion of Administrative Justice Act, 3 of 2000(PAJA), it seeks an order that the tender be awarded to it as well as the order directing the first respondent to conclude an agreement with it.

[2] The facts of this case are largely common cause or are not seriously in dispute. The first respondent invited tenders from short term insurance brokers for short

term insurance brokering services as well as supporting services such as claims management. The closing date for the tender was 12 May 2023. This closing date was later extended to 19 May 2023.

[3] On 11 May 2023 the Bill of Quantities was amended to make provision for the bidders to submit bids which covered the extended insurable interests of the first respondent. This amendment was necessitated by the incorporation of Sedibeng Water Boards into the first respondent. The applicant, the second respondent and five other entities submitted their offers. All the bids were evaluated at the first stage as being responsive except one of Mpumelelo Services. The second and third stages of the evaluation dealt with the technical functionality as well as price and preference.

[4] On 22 June 2023, Mr Lerato Moeketsi, in his capacity as a member of the Bid Evaluation Committee addressed emails, on the version of the first respondent, to bidders whose arithmetic calculations did not tally with the Bills of Quantities as per their schedule. According to the first respondent, Moeketsi sought confirmation from the bidders on their offer as per the price schedule.

[5] On 30 June 2023 the second respondent was appointed to provide short term insurance services as the successful bidder. Having learnt of the outcome of the bid, the applicant, on 7 August 2023 sought reasons and confirmation from the first respondent on whether the award of the tender was made and specifically whether the second respondent was the appointed bidder. The first Respondent responded the next day as follows:

Your organisation was indeed unsuccessful in the tender, and the reasons are as follows: (Italics in keeping with the rest of the quote)

1. *Vaal Central Water (Bloem Water) acknowledges that Silverlake Trading 305 (Pty) Ltd t/a Opulentia Financial Services submitted a valid bid for the aforementioned Bid.*
2. *Sankofa Insurance Brokers was appointed for an appointment amount R8 655 172,72 (Including VAT) and not R9 247 536,38 as stated in your letter.*
3. *The tender was three stage tender evaluation process and Silverlake Trading 305(Pty)Ltd t/a Opulentia Financial Services passed the first 2*

stages of the evaluation process, namely Administrative or Compliance Check (commonly referred to as Responsiveness) and Technical Evaluation

4. *Silverlake Trading 305 (Pty) Ltd t/a Opulentia Financial Services thus qualified for the final stage Pricing was however not the highest point scoring, when the evaluation committee performed the price and preference comparison with other bidders."*

[6] The applicant was not satisfied with the response given and addressed a further letter on 11 August 2023 in which it confirmed that the second respondent had submitted a bid for R9 247 53, but was awarded a bid which was less by R600 000.00. The applicant thus sought clarification as to why the second respondent, as the successful bidder was appointed for a lesser amount than that for which it submitted its bid. The first respondent responded as follows:

"Vaal Central Water (formerly Bloem Water) acknowledges that Sankofa Insurance Brokers price at the time of bid opening was R9 247 536,38.

The sequence of events to arrive at appointment amount of R8 655 172,72 (Including VAT) was as follows:

- *On the day of opening the price, it was announced that the price read out from the tender summary page are not final and subject to further assessment of the form of offer.*
    - During the evaluation process, the following discrepancies was uncovered.
        - There were inconsistencies in the prices of certain bidders.
        - The first clarity seeking questions was sent on Thursday, 22 June 2023.
        - The response deadline was Friday 26/06/2023 16h00.
    - *Upon conclusion of the price assessment and clarification price and preference calculations was applied and Sankofa Insurance Brokers was the highest scoring bidder.*

On page 1- "TENDER SUMMARY PAGE" of the tender document the following note is included: - "Note: This page is used for tender opening purposes only. Where there is a discrepancy between this page and the Form of Offer and Acceptance, the latter will be taken as the valid offer."

[7] The initial tender specifications dated 4 May 2023 stated that the "*all risk material damage: fire, expulsion, lightening, special perils. Earthquake, malicious damage"* upon which assets the first respondent needed short term insurance was for an amount of R2 694 013 512.00.

[8] On 11 May 2023 this amount was increased by the first respondent when it informed the potential bidders that the all-risk sum insured was now R 5 816 973 212.00. It appears that the reason for the increase was as a result of the sudden insurable interest the first respondent obtained by other boards[1]. The record of the decision filed in terms of Rule 53, reveals that the second respondent's bid incorporated the first and the lower amount for its bid. In this regard. The sum assured was limited to R2 695 013 512. The applicant contends that this amount was too low as the second respondent had to provide a bid for almost double the amount referred to in the record of the decision. For this reason, the applicant contends that the second respondent had submitted a non-responsive bid.

[9] Section 217(1) of the Constitution lays down that when an organ of state contracts for goods and services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective. The starting point is the acceptance that the tender process constituted administrative action which entitles the tenderers to a lawful and procedurally fair process and outcome.[2]

[10] Section 217(2) of the Constitution allows organs of State to implement a preferential procurement policy. The Court in *Airports Company South Africa SOC Ltd v Imperial Group Ltd & others*[3] said the following;

> '[64] The general rule under s 217 of the Constitution is that all public procurement must be effected in accordance with a system that is fair, equitable, transparent, competitive, and cost-effective. The only exception to that general rule is that envisaged by s 217(2) and (3). Section 217(2) allows organs of the state to implement preferential procurement policies, that is, policies that provide for categories of preference in the allocation of contracts and the protection

[1]Sedibeng Water Vaal Gamagara; Sedibeng Namakwa and Sedibeng Water Free State.
[2] Logbro Properties CC v Bedderson NO and others (372/2001)[2002] 2ASCA 135; [2003] 1 All SA 424 (SCA) (18 October 2002).
[3] 2020(4) SA17(SCA).

and advancement of people disadvantaged by unfair discrimination. Express provision to permit this needed to be included in the Constitution in order for public procurement to be an instrument of transformation and to prevent that from being stultified by appeals to the guarantee of equality and non-discrimination in s 9 of Constitution. The freedom conferred on organs of state to implement preferential procurement policies is however circumscribed by s 217(3), which states that national legislation must prescribe a framework within which those preferential procurement policies must be implemented. The clear implication therefore is that preferential procurement policies may only be implemented within a framework prescribed by national legislation….'

[11] In my view, this application stands to be decided on two grounds of review. The first ground is that the tender data did not confer upon the first respondent the power to correct any arithmetical errors on the submitted bids. Allied to this ground is that the applicant submitted a cheaper bid and ought to have been awarded the tender. The second ground relied upon is that the second respondent submitted a non-responsive bid and thus should not have been granted the tender.

[12] As can be gleaned from the above, the facts of this application are largely common cause or are not seriously in dispute. The tender evaluation process was a three-stage process, namely, the first stage being for responsiveness and eligibility, the second being for technical functionality and lastly, for price and preference.

[13] According to the first respondent, during the bidding process, it was established that the arithmetical calculations of some of the bidders did not tally with those carried out by the BEC. The fist respondent avers that the second respondent was one of such bidders. The evidence reveals that the first respondent then recalculated the bid of the first respondent. The second respondent was then called upon to confirm the correctness of the calculations by the first respondent.

[14] The first respondent contends that it had reserved itself the right to seek all information that would enable it to effectively evaluate a tender. In this contention, it relies on clause 1.6 of the "invitation to tender" SBD 6.1) which provides as follows;

"The organ of state reserves the right to require of a tenderer, either before a tender is adjudicated or at any time subsequently, to sustainable any claim in regard to preferences, in any manner required by the organ of state"

[15] In this regard, on 22 June 2023 Lerato Moeketsi addressed an email[4] to the second respondent and informed it as follows:

"The following arithmetic calculations were made on the tender document (Price Schedule) as part of the due diligence process performed for the above-mentioned project.

1. *The total bid amount of R9 247 536,38 does not correspond with the bill of quantities(BOQ) total of R8 655 172,72 as calculated by the employer (Bloem Water). The bill of Quantities is R592 363,66 lower than the form of offer amount.*

As checked and verified by the Employer, advise if the changes must be effected by the employer…."

[16] The undisputed fact is that both the first page of the tender as well as the price schedule indicated that the second respondent had tendered for a yearly premium of R9 247 536.38. There was no inconsistency or arithmetical error on the first page of the bid of the first respondent and its offer and acceptance. In my view, having recalculated the bid of the second respondent and affording the second respondent to accept the tender so recalculated, impermissibly allowed the second respondent to vary its bid. The contention that clause 1.6 of the SBD1 entitled the first respondent to seek 'clarity' in respect of the price is misplaced. There was no need to seek any clarity. There simply was no arithmetical error.

[17] The first respondent further submits in the Heads of Argument that "the reference to "preferences" refers to the categories that the bids would be allocated preferential points, i.e., "price and specific goals". I am unable to

[4]ROD page 120.

agree with the contention by the first respondent. The contention that 'preference' points in this regard also includes 'price' is incorrect. The words 'preference' and 'price' are used disjunctively at the third stage of the evaluation process. I agree with the contention by the applicant that SBD6.1 could not have intended that a bidder be afforded an opportunity to *ex post facto* correct the price it submitted.

[18] In my view, the first respondent did not reserve for itself the right to correct errors in the bids. Its recalculation of the tender of the second respondent in the absence of a discrepancy between the first page of the tender document and the offer and acceptance and affording the first respondent an opportunity to accept the recalculation without the necessary authority reserved in the tender data amounted to impermissibly exercising the power it had not reserved for itself. There is further no evidence of further evaluation of the tenders in light of the so-called correction of the purported arithmetical error. The recalculation or 'correction' by the first respondent and the failure to subject the process to a further evaluation process trumped the fairness concept inherent in the process of bidding. This in my view constitutes a good ground of review as provided for in s6(2)(a)(i) of PAJA. It is unnecessary in my view to deal with the other ground of review as the first ground is dispositive of this application.

[19] The applicant urges us, relying on s8(1)(c)(ii)(a) of PAJA), to substitute the decision of the first respondent with one in terms of which it is declared the successful bidder. It is contended that, it is apparent that only the applicant and the first respondent submitted responsive bids. Thus, so it is submitted, once the second respondent leaves the stage, the applicant becomes the 'last man standing.'

[20] On the other hand, the first respondent has contended that the applicant does not present any exceptional circumstances and further the order it seeks is not just and equitable. In amplification of its submission, it has raised a number of reasons why it holds that the order sought is not just and equitable. According to the first respondent, the only remedy that is just and equitable would be to suspend the declaration of invalidity made, for a period of six months to permit the first respondent to remedy any defects in the procurement process while

during the said period, the first respondent will continue to receive the services it sought.

[21] With regard to the proper approach in seeking a just and equitable remedy, the following was stated in *Steenkamp NO v Provincial Tender Board, Eastern Cape*[5]*:*

> "It goes without saying that every improper performance of an administrative function would implicate the Constitution and entitle the aggrieved party to appropriate relief. In each case the remedy must fit the injury. The remedy must be fair to those affected by it and yet vindicate effectively the right violated. It must be just and equitable in the light of the facts, implicated constitutional principles, if any, and the controlling law. It is nonetheless appropriate to note that ordinarily a breach of administrative justice attracts public-law remedies and not private-law remedies. The purpose of public-law remedy is to pre-empt or correct or reverse improper administrative function…Ultimately the purpose of a public remedy is to afford the prejudiced party administrative justice, to advance efficient and effective public administration compelled by constitutional precepts and at a broader level, to entrench the rule of law."

[22] The Constitutional Court in *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer, South African Social Security Agency and others*[6] said the following with reference to *Steenkamp* case quoted above:

> "[29] ….
>
> The emphasis on correction and reversal of invalid administrative action is clearly grounded in section 172(1)(b) of the Constitution, where it is stated that an order of suspension of a declaration of invalidity may be made "to allow the competent authority to correct the defect." Remedial correction is also a logical consequence flowing from invalid and rescinded contracts and enrichment law generally.
>
> [30] Logic, general principle, the Constitution and the binding authority of this Court all point to a default position that requires the consequences of invalidity to be corrected or reversed where they can no longer be prevented. It is an approach that accords with the rule of law and principle of legality". (footnotes omitted)

[23] PAJA is the constitutionally mandated legislation that seeks to give effect to the Constitutional right to 'just administrative action'. Section 8(1) (c) (ii)(aa) of PAJA empowers the courts in review matters to make just and equitable orders. To this end, the court may substitute or vary administrative actions or correct a

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[5] 2007(3) SA 121(CC) at para 29.

[6] [2014] ZACC 12;2014(4) SA 179(CC);2014(6) BCLR 641(Allpay 2) paras 29 and 30.

defect which results from the administrative defect which results from the administrative action in exceptional circumstances.

[24] The Constitutional Court in *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd*[7] observed that "in administrative review in the context of s8(1) of the PAJA and the wording under subs (1) (c)(ii) (aa) make it perspicuous that substitution remains an extraordinary remedy. Remittal is still almost always the prudent and proper course."

[25] *Trencon* formulated the test for exceptional circumstances as follows:

> "…The first is whether a court is in as good a position as the administrator to make the decision. The second is whether the decision of an administrator is a foregone conclusion. These two factors must be considered cumulatively. Thereafter, a court should still consider other relevant factors. These may include delay, bias or the incompetence of the administrator. The ultimate consideration is whether a substitution order is just and equitable. This will involve a consideration of fairness to all implicated parties..."

[26] I am unable to agree with the applicant that a proper case has been made out for a substitution order. While due weight must be accorded to the two factors enumerated in paragraph 23 above, it has to be borne in mind that the concept of fairness must permeate the tender process implicating the parties. The applicant relies heavily on the fact that a case has been made out to satisfy the two requirements of *Trencon* as well as the delay in remitting the matter back to the first respondent. This submission loses sight of the fact that in this case, it is the first respondent which on its own accord, decided to recalculate and thus in a way amended the tender of the second respondent and called upon it (the second respondent) to accept it.

[27] The second respondent was aware of the tender amount of the applicant. I would be surprised if the second respondent did not jump at the opportunity when called upon to accept the reduced amount of the tender offered in view of its knowledge of the tender amount of the applicant. Had it not been for the first respondent reducing the tendered amount of the second respondent, the second respondent would in all likelihood not have been granted this tender. It

[7] 2015(5) SA 245(CC) at para 42.

is the conduct of the first respondent which enticed the second respondent to accept the recalculation and thus "submission" of the amount it had not tendered for. The second respondent tendered for R9 247 536.38 and not for R8 655 172.72 as recalculated by the first respondent. In my view, fairness would dictate that since the invitation to accept the lowered bid did not emanate from it but from the employer, the just and equitable order would be one requiring remittal to the employer as opposed to substitution. Playing fields must be levelled for all and sundry to compete on equal grounds. Remittal of this matter to the first respondent will be just and equitable under these circumstances.

[28] The first respondent indicated, and it is not in dispute, that both the applicant and the second respondent passed the first two stages of the three-stage tender evaluation process, and that but for the amended tender amount, the second respondent may not have been awarded to tender. Therefore, the stage at which the applicant was disqualified was the third stage. It would be just and equitable and in the interests of all parties concerned for the third stage to be re-valuated on the original figures submitted by the applicant and second respondent.

[29] The second respondent did not oppose the application and consequently there can be no justification for a cost order against it. With regard to the first respondent, there is no reason why costs should not follow the cause. I accordingly make this order:

ORDER

1. The applicant's non-compliance with this court's rules related to time periods and service is condoned and the application is heard as an urgent review application in accordance with the relevant provisions of rule 6(12), read with Uniform Rule 53;
2. The first respondent's decision to declare as acceptable the second respondent's bid related to Contract: BW241/HO/STI/23: Request for proposal:

Provision of short-term insurance for a period of 36 months, is reviewed and set aside;

3. The first respondent's decision to award the tender to the second respondent is reviewed and set aside;
4. The service level agreement concluded between the first and second respondent is struck down, subject to the date of such striking down and cancellation of the said agreement being suspended for a period of Forty-Five (45) days as envisaged in paragraph 5 below;
5. The matter is remitted to the first respondent for the latter to reconsider stage three of tender process for securing of short-term insurance for its assets as envisaged in **Contract BW241/HO/STI/23**, namely, the Price and Preference stage. Such process shall be completed within Forty-Five (45) days of the granting of this order;
6. The First Respondent shall be liable for the costs of this application.

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P. E. MOLITSOANE, J

I agree

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S NAIDOO, J

For the applicant:	Adv. S. Globler SC
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