

REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Reportable: No Of interest to other judges: No 21 Sept 2022 Vally J
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Case No.: 30343/2020

In the matter between:

Airports Company South Africa SOC Ltd**Applicant**

and

Royal HaskoningDHV (Pty) Ltd**First Respondent****Netherlands Airport Consultant
A Company of Royal HaskoningDHV****Second Respondent**

Judgment

Vally JIntroduction

[1] The applicant, Airports Company South Africa SOC Ltd (ACSA), is an organ of state as envisaged in s 239 of the Constitution of the Republic of South Africa Act 108 of 1996 (the Constitution). As such it assumes certain duties and responsibilities as to how it should conduct its affairs.

[2] On 11 January 2019, it issued an open tender (RFP COR5796/2018) (RFP)¹. On 13 September 2019 ACSA concluded a Service Level Agreement (the agreement) with the first respondent. Subsequently, ACSA came to realise that it had not complied with its own precepts and conditions of the tender when awarding it to the first respondent. Hence, on 12 October 2020 – one year and one month after concluding the agreement - it launched the present application, wherein it seeks to review its own decision to award a contract in terms of the tender to either or both of the respondents (as to why it chose to cite both respondents will become clearer later). The review is sought under the principle of legality. Its primary contention is that awarding the contract is contrary to the dictates of s 217 of the Constitution.

Overview

[3] ACSA received seven bids. However, during the pre-qualification phase of the evaluation process three of the bidders were disqualified; after the functionality phase one other bidder was disqualified, and after presentations from three bidders were entertained, one other bidder was disqualified. This was at the first stage of the evaluation. During this stage the sub-contracting agreements of the bidders with local partners were scrutinised. A document showing the subcontracting arrangement of the first respondent with a local partner was looked at and found to be acceptable. One other bidder, ATL South Africa (ATL), too passed this stage of the evaluation. Hence, after the first stage of the evaluation only two bidders were left, the first respondent and ATL.

¹ The tender was 'for the acquisition of an aviation security consultancy for the provision of a design layout and advisory services for the detection screening equipment and automated smart lanes at the Applicant's regional and international airports for a period of 5 (five) years.'

[4] The words 'NACO a company of Royal HaskoningDHV' appear on each page of the first respondent's bid document.

[5] The next stage of the evaluation involved a scrutiny of the Broad-Based Black Economic Empowerment (B-BBEE) status of the two bidders and their respective pricing. On 28 June 2019, after evaluating the two bids, the Bid Adjudication Committee resolved to award the tender to the first respondent. A letter was sent on 15 July 2019 by the Supply Chain Management Performance Monitoring and Governance Committee (SCM) informing the first respondent that it was the successful bidder. In that letter the name of the tenderer was identified as 'NACO a Company of Royal HaskoningDHV'.

[6] On 22 August 2019 ATL applied for access to information in terms of s 18(1) of the Promotion of Access to Information Act 2 of 2000 (PAIA). The information sought focused on, amongst others, the name and details of the successful bidder.

[7] On 13 September 2019 the agreement was signed. ATL's request for information in terms of PAIA went unanswered. On 11 November 2019 it reiterated its request. This prompted ACSA to look into the awarding of the contract to the first respondent.

[8] After examining the information that was sought by ATL, an employee of ACSA, on 21 November 2019, flagged the possibility that ACSA may have incorrectly awarded the contract to the second respondent. This concern was expressed in the following terms: (i) the tender was awarded to NACO a Company of Royal

HaskoningDVH and not the actual bidder Royal Haskoning DHV (Pty) Ltd; (ii) the company introduction refers to NACO as 'a company of Royal HaskoningDHV, founded in 1949, whereas Royal Haskoning DHV (Pty) Ltd was only incorporated in 1996'; (iii) the two aforesaid entities appear to have been evaluated as one entity, whereas they are separate legal entities; and (iv) the aforesaid discrepancy may have resulted in an incorrect allocation of points.

[9] Acting on the concerns of the employee, on 2 December 2019, ACSA addressed a letter to the first respondent advising it of the PAIA request and asked it to clarify if the first and second respondents were engaged in a joint venture. If so, it was required to furnish information concerning the percentage of each company in the Joint Venture and their respective responsibility; a copy of the B-BBEE Certificate of 'the successful bidder'; a copy of the tax clearance certificate of 'the successful bidder'; CV's of 'the successful bidder's' key personnel; the list of consultancy experience on Aviation Security Projects submitted by 'the successful bidder'; the registered name and registration number of the company that will be the designated an Exempted Micro Enterprise (EME); and the allocated percentage for EME in this contract.

[10] On 6 December 2019, the first respondent in response to the letter asserted that its commercial and technical information as well as its trade secrets should not be disclosed to ATL.

[11] After conducting an investigation into the bidding process and the outcome the SCM came to the conclusion that the first respondent was the entity that submitted

the bid, and it was the entity that was evaluated at the pre-qualification stage. It met all the requirements set at that stage, which only considered subcontracting arrangements it would engage in should it succeed in the bid. Other documents considered only at a later stage of the evaluation process - the proof of experience, organizational structure, methodology, its approach to the work, and the company experience, footprint and capability - were, according to the SCM, those of the second and not the first respondent. On this understanding of the facts it concluded that the evaluation committee incorrectly assessed the first respondent's bid as it had assessed the first respondent's bid on the strength of the second respondent's attributes. Noting the SCM's conclusions, on 13 January 2020 ACSA posed three questions to the first respondent. These were:

- a. 'is NACO a separate legal entity registered in the Netherlands, if not;
- b. is NACO the trading name of the bidding entity, being Royal HaskoningDHV (Pty) Ltd? and if not';
- c. what is the trading name of Royal HaskoningDHV (Pty) Ltd?

[12] The first respondent responded in writing, on 20 January 2020, stating:

2. Royal HaskoningDHV is an independent international engineering and project management consultancy leading the way in sustainable development and innovation. Our head office is in the Netherlands, with other principal offices in the United Kingdom and Indonesia. We also have established offices in Thailand, India and the Americas; and we have a long-standing presence in Africa and the Middle East.
3. In South Africa, Royal HaskoningDHV (Pty) Ltd was formerly known as Stewart Scott (Pty) Ltd and trading as Stewart Scott International ("SSI"). Following a merger between DHV and Royal Haskoning in 2012, the company changed its name to Royal HaskoningDHV (Pty) Ltd to reflect the international branding of the enlarged group.

4. In response to the aforementioned correspondence, we kindly confirm the following:
 - 4.1 NACO is not a separate legal entity but is a brand of the Royal Haskoning DHV Group, of which Royal HaskoningDHV (Pty) Ltd forms part.
 - 4.2 NACO is not a registered trade name of Royal HaskoningDHV (Pty) Ltd but is a brand of the Royal Haskoning Group. Furthermore, NACO is identified as a specialist global engineering consulting services in the aviation industry.
 - 4.3 The trading name of the bidding entity is Royal Haskoning DHV (Pty) Ltd.'

[13] Royal HaskoningDHV Group is a company established and incorporated in terms of the laws of the Netherlands. Importantly, the Royal HaskoningDHV Group has a 76.95% shareholding in Stewart Scott Holding (Pty) Ltd, which in turn has a 100% shareholding in the first respondent.

[14] On receipt of the response ACSA decided that the awarding of the tender to the first respondent was unlawful. It explained its reasoning in a letter to the first respondent, the relevant parts of which read:

- '2. On or about 12 March 2020 and subsequent to a request for information, Airports Company South Africa SOC Limited ("ACSA") received a letter from one of the bidders in the abovementioned tender which advised that the tender had been awarded to an entity which did not meet the qualifying criteria, namely NACO a Company of Royal HaskoningDHV ("NACO") and that such award must be withdrawn failing which, they would bring an application to review and set aside the award. The letter necessitated that ACSA conduct an internal review of the tender and the following has been established: -
 - 2.1 The company which submitted a tender under RFP COR 5796/2018 is Royal HaskoningDHV (Pty) Ltd, a South African registered company;

- 2.2 NACO is a company registered in the Netherlands and is wholly owned by Royal Haskoning DHV, a company registered in the Netherlands;
 - 2.3 Royal HaskoningDHV (Pty) Ltd and NACO a Company of Royal Haskoning DHV, although related, are two separate legal entities;
 - 2.4 The company that should have been evaluated at all stages of the tender is Royal HaskoningDHV (Pty) Ltd;
 - 2.5 Royal HaskoningDHV (Pty) Ltd did not meet the requirements for the functionality/technical criteria. The documents provided for the functionality/ technical criteria predominantly relate to NACO.
3. In the circumstances the award to Royal HaskoningDHV (Pty) Ltd is unlawful and due to the fact that this is an administrative process where an award has already been made, ACSA is required to approach the court to review and set aside the award of the tender. We will therefore be approaching the court on this basis.'

The law and the merits of ACSA's case

[15] ACSA being an organ of state is bound by the provisions of s 217 of the Constitution. It prescribes that when an organ of state 'contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective'. Compliance with its terms is peremptory. Thus, the method and system by which the tender is awarded has to achieve five objectives: 'fairness, equity, transparency, competitiveness and cost effectiveness.'²

[16] This is a self-review brought by an organ of state. The Promotion of Administrative Justice Act 3 of 2000 (PAJA) is therefore not applicable.³ It can only be reviewed under the principle of legality.⁴ The application should be brought within

² *Municipal Manager, Qaukeni Local Municipality and Another v FV General Trading CC* 2010 (1) SA 356 (SCA) at [11] and [13]; *Metro Projects CC v Klerksdorp Local Municipality* 2004 (1) SA 16 (SCA) at [11]

³ *State Information Technology v Gijima Holdings (Pty) Ltd* 2018 (2) SA 1 (CC) at [37] and [41]

⁴ *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd* 2019 (4) SA 331 (CC) at [45]

a reasonable time which, in terms of the common law, should be within six months of the applicant learning of the unlawfulness of its own decision.

Condonation for the late filing of the application

[17] ACSA brought the application on 13 October 2020, which is more than six months from 20 January 2020 when it claims to have learnt of the unlawfulness of its decision to award the tender to the first respondent.

[18] The law regarding condonation of delays in bringing a matter to court is trite. No purpose would be served in citing the many authorities that lay down the basic approach to be adopted and the principles to be applied to an application for condonation. Essentially, it is this: (i) the defaulting party, ACSA in this case, has to furnish a detailed explanation for its delay; (ii) it must show that the delay was not caused by a willful disregard by itself of the prescribed time periods; and, (iii) its case on the merits must be strong. With regard to the first question, the length of the delay has to be taken into account. The explanation must be comprehensive and not vague: it must be as detailed as is possible in the circumstances. However, a poor explanation for the delay could, in the interests of justice, be overlooked if the case is so strong that refusing condonation would result in a failure of justice.

[19] ACSA seeks condonation for bringing the application after the six-month time limit. It claims that the onset of the lockdowns experienced in the country in response to the outbreak of the Covid-19 pandemic resulted in it being short-staffed from March 2020, and therefore it was unable to attend to the matter until October 2020. The respondents submit that this explanation for taking more than six months is

woefully inadequate, and accordingly the application for condonation should be dismissed for this reason only. The application is a mere two months out of the time period identified by the common law as reasonable; the explanation given is lacking in detail but not completely unconvincing. It is true that the operations of most people and corporates were prejudicially affected by the radical shift that took place on account of the decision of the government to impose lockdowns as from March 2020. The prejudice took different forms for different people and for different corporates. ACSA's claim that in its case it resulted in short staffing, which in turn caused it to take longer than normal to attend to its business is understandable. It certainly is not a far-fetched explanation. Ordinarily, I would have condoned the filing of the application more than six months after acquiring knowledge of the cause of action. However, ACSA's case on the merits, as I show below, fails. For this reason, the application for condonation should be refused.

Was the legality principle breached by ACSA?

[20] In this case there is no question that the bid process was fair, equitable and transparent. No party that wished to place a bid was advantaged or disadvantaged by the process adopted. There is also no question that the first respondent's bid was lower than that of its competitor, ATL, by a significant amount. The only question in this case is: did the evaluation committee incorrectly take into account details and attributes of the second respondent when assessing the bid, which was of the first respondent? To pronounce on the question, it is necessary to ask a prior one: are the two respondents separate entities? If they are found to be two different entities then *caedit questio*, the application must succeed. If not then, too, *caedit questio*, the application should fail.

[21] It is common cause that the first respondent placed the bid. It is also common cause that the second respondent does not have a registration number. There is nothing further that shows that the second respondent is a legal entity. Reference to it can be found on each page of the bid document. But there is nothing there that identifies it as an independent legal entity. The reference was fully explained by the first respondent in its letter to ACSA⁵: NACO is a brand name of the Royal HaskoningDHV Group; It has a global footprint as ‘a specialist global engineering consulting service in the aviation industry.’ The first respondent is part of the Royal HaskoningDHV Group. However, it is an independent legal entity. It was entitled to place the bid. That it can draw on the expertise and knowledge of others in the Group is an advantage it was entitled to rely on when placing its bid. It did not conceal that it was part of the Group, nor did it unfairly or dishonestly draw on the strengths and knowledge acquired by the Group over time.

[22] In conclusion, on the facts before me there is no question that ‘NACO, a company of the Royal HaskoningDHV’ is not an independent legal entity. Accordingly, ACSA’s concern that it may have incorrectly awarded the tender to the first respondent is based on a misunderstanding of the facts. The application should, therefore, fail.

Application by the first respondent to file a further affidavit after pleadings had closed

[23] Before closing it is necessary to record that the first respondent had brought an application to file a supplementary answering affidavit after the replying affidavit was already filed. The application was opposed by the applicant. The new evidence

⁵ See [12] above

the first respondent wishes to introduce concerns the prior relationship between itself and the applicant as well as the status of the first respondent within the Royal HaskoningDHV Group. Given the conclusion that the tender was correctly awarded to the first respondent there is no need to make a determination on the issue as to whether the new evidence should be allowed or not.

Costs

[24] On this issue the parties were *ad idem*. Costs, they say, should follow the result. I agree.

[25] The following order is made:

- 1 Condonation for the late filing of the application is refused.
- 2 The applicant is to pay the costs.

Vally J

Dates of hearing: 21 July 2022

Date of Judgment: 21 Sept 2022

Representation

For the applicant: W Mokhare SC with A M Mtembu

Instructed by: Cowan-Harper-Madikizela Attorneys

For the respondent: A Govender

Instructed by: Mortimer Govender Attorneys