



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

Case No. **293/2021**

- (1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: 11/9/2023

Julian Yende

SIGNATURE

13 September 2023

DATE

In the matter between:

**CANAAN ELECTRICAL CONTRACTORS
REG [..]**

APPLICANT

And

**CITY OF TSHWANE METROPOLITAN
MUNICIPALITY**

1ST RESPONDENT

**MUNICIPAL MANAGER OF THE
CITY OF TSHWANE**

2ND RESPONDENT

HEAD: GROUP FINANCE DEPARTMENT

3RD RESPONDENT

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Delivered :This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail and uploaded on caselines electronic platform. The date for hand-down is deemed to be 13 September 2023.

JUDGMENT

YENDE AJ

Nature of the Proceedings

[1] This is a review application brought in terms of the Promotion of Administrative Justice Act 3 of 2000 (“PAJA”) in terms whereof the applicant seeks the review of administrative actions by the first respondent and the substitution of these decisions in terms of the provisions of section 8(1)(c)(ii) of PAJA.

[2] The applicant by way of the present review application, seeks the following relief:

“1. An order reviewing and setting aside decision take by the respondents with regard to *tender number USD EE 15-2018/19 (“The First Tender”)* and;

2. *Tender number USD EE 06- 2019/20 & USD EE 07-2019/20 (“The Second Tenders”)*;

3. *An order approving the applicant as a valid tenderer;*

4. *Ordering the applicant as the successful bidder for the First Tender;*

5. *Ordering the applicant as a successful bidder for the Second Tenders; alternatively;*

6. *An order that the First and Second Tenders should have been allocated to the applicant as successful bidder when the tenders were allocated;*”

[3] The respondents have raised points in *limine* pertaining to:

“1. *the applicant’s locus standi in respect of US EE 15-2018/19;*

2. *the failure to exhaust internal remedies;*

3. *the delay in launching this application”.*

[4] Issues requiring determination

“1. Whether the applicant has made out a case for reviewing and setting aside of the decision of the respondents on the First and Second Tenders.

2. *Whether the applicant is entitled to the relief sought.*

3. Whether the respondents set out a case for dismissal of the applicant’s review application with regard to the First or Second tenders or both”.

[5] In opposing this application, the respondents raises points *in limine* and contends that the application should be dismissed on one, more or all of the three points raised on the following basis;

“1. The applicant has no locus standi to apply for the relief sought insofar as it relates to the joint venture;

2. The applicant has not exhausted all internal remedies before approaching the court, as required in terms of section 7(2)(a) of PAJA and, in the absence of an application for exemption from this requirement, the court is precluded from hearing the review; and

3 There has been an unreasonable delay on the part of the applicant in launching the review application and, in the absence of application for the extension of the prescribed time-period, as contemplated in section 9(1) of PAJA, the court has no power to entertain the review”.

[6] The respondents contends further that the applicant has fallen far short of making out a case for review of the decisions on any of the grounds upon which it relies and has made out no case for the substitution of these decisions, as contemplated in section 8(1)(c)(ii) of PAJA and that the application stands to be dismissed with costs.

[7] At the commencement of the hearing of this application it was contended by the respondent’s counsel and agreed to by the applicant’s counsel that the points *in limine* raised should first be argued and adjudicated by the court prior to the consideration of the merits in the main application .

EPHEMERAL FACTUAL MATRIX

[8] The respondents had issued two tenders namely ;

[8.1] USD EE 15-2018/19 - TO APPOINT VARIOUS CONTRACTORS TO PROVIDE CONSTRUCTION WORKS ON LOW VOLTAGE (LV) AND MEDIUM VOLTAGE (MV) ELECTRICAL NETWORK INFRASTRUCTURE AND CONSUMER CONNECTIONS ON

AS AND WHEN REQUIRED BASIS FOR A THREE-YEAR PERIOD, hereafter “the first tender”.

[8.2] USD EE 06-2019/20 AND USD EE 07-2019/20- TENDERS TO APPOINT VARIOUS CONTRACTORS TO PROVIDE MAINTENANCE WORKS ON PUBLIC LIGHTING ELECTRIC NETWORK INFRASTRUCTURE ON AS AND WHEN REQUIRED BASES, FOR A THREE-YEAR PERIOD hereafter “the second and third tenders”.

[8.3] The applicant submitted its bid in respect of the “first tender” in a joint venture with Phumelela Dlomo Construction (Pty) Ltd, relating to the provision of certain construction works on low voltage and medium voltage electrical network infrastructure and consumer connections. With regards to the “second and third tender” the applicant submitted its solo bid relating to the provision of maintenance works on certain electrical network infrastructure. All three tenders are on an ‘as and when required’ basis for a three year period.

[9] On 4th March 2020 a letter was addressed to applicant and JV Phumelela Dlomo Construction (Pty) Ltd that the joint venture, as regards bid USD EE15-2018/2019 and the applicant, as regards bid USD EE 06-2019/2020 and bid USD EE 07-2020, were disqualified in the tender evaluation process as follows;

“1 The joint venture (bid USD EE 15-2018/2019 in phase one because it did not complete the local content declaration”;

“ 2 The applicant (bid USD EE 06-2019/2020 and bid USD EE 07-2020), also in phase one as it was found at the time the decision was taken, that the applicant had a state employee in its employ”.

[10] On 7 March 2020 successful tenderers were appointed in respect of all three tenders and have been rendering the required services since the tender was awarded. Accordingly, the applicant have been aware of this fact since at least 7 March 2020.

APPLICANT'S CASE.

- [11] The relevant applicant's pleaded facts are herein under restated. In respect of tender under reference USD EE 15-2018/19 (the first tender). The applicant averred that the reasons for disqualification by official letter of the respondent dated 4 March 2020 and directed to the applicant was that "the bidder did not complete **Annexure C Local Content Declaration**" (see par 18.1 to 18.1.3 of the Founding Affidavit as read with the letter dated 4 March 2020 marked as Annexure "SC5" (see page 002-49 to 002-51 on Caselines). The applicant maintains that it actually completed the relevant section by marking it "N/A" (Not Applicable) on the relevant sections (see Annexure "SC5" specifically pages 002-52 to 002-54 on Caselines).
- [12] The applicant argues that this was not necessary as the tender specifications specifically provided that "the appointee contractor will only be required to provide labour. Materials for the works shall be provided by the "CoT"." According to the applicant a tender for both labour and supply of materials would specifically provide a list of the materials to be supplied and for each tenderer to provide a quote of their prices in each line item. No such list was provided. Consequently, argues the applicant that the grounds for disqualification are reviewable and should be set aside as they are in contravention of the Constitution and the PAJA Act in all aspects as cited in clause 2.1 and its subparagraphs.
- [13] In respect of tender under reference USD EE 06-2019/20 and USD EE 07-2019/20 (the second tenders). The applicant contends that the reasons for disqualification by official letter of the respondent dated 4 March 2020 and directed to the applicant was that "the applicant had a director in its employ who was a state employee in contravention of the relevant act." According to the applicant this was incorrect as the relevant director had resigned way before the tenders. The applicant avers further that this point was conceded by the respondent who advised the applicant that its bids would be send to their bids evaluation committee

to be re-evaluated and that the applicants would be informed of the outcome of the further evaluation process once that has been concluded¹.

Ground of review

[14] The applicant contends that this application is based on the grounds for review provided for in the following sub-sections of section 6(2) of the ('PAJA') cited herein, mainly:

“1 section 6(2)(c) - procedural unfairness;

2 section 6(2)(e)(iii) - irrelevant considerations taken into account or relevant considerations not considered;

3 section 6(2)(e)(vi) – arbitrary or capricious actions;

4 section 6(2)(f)(ii) – actions not rationally connected;

5 section 6(2)(g) read with section 6(3)– failure to take a decision and unreasonable delay in making a decision;

6 section 6(2)(h) – unreasonable actions”.

RESPONDENTS CASE.

[15] The respondents contends that the application is legally flawed, unmeritorious and should be dismissed on one, more or all of the three points *in limine* herein below mentioned.

¹ See Annexure “SC5” specifically Caselines paginated pgs.002-69 .

[16] That the applicant has no *locus standi* to apply for the relief sought insofar as it relates to the joint venture. The respondents avers that the issue of *locus standi* is core divorced from the substance of the case and must indeed be determined before the merits of the main application are considered.²

[16.1] The bidder in respect of tender USD EE 15-2018/19 (the first tender) was a joint venture consisting of the applicant and one Phumelela Dlomo Construction(Pty) Ltd. The joint venture is not a party to this application, nor is Phumelela Dlomo Construction (Pty) Ltd, the other partner to the joint venture. The applicant has not pleaded the conclusion and the terms of cession, whether it was verbal or in writing, nor has it annexed a copy of the duly concluded agreement of cession.

[16.2] The respondents argues that the allegation that Ms. Lethatha is a director of Phumelela Dlomo Construction (Pty) Ltd, is the only nexus between her and the company. Furthermore, she has failed to annexe a resolution by Phumelela Dlomo Construction (Pty) Ltd, confirming her authority to act on behalf of by Phumelela Dlomo Construction (Pty) Ltd herein. In addition to the above, no confirmation of her alleged directorship in Phumelela Dlomo Construction (Pty) Ltd from the Companies and Intellectual Property Commission (“ CIPC”) has been provided and / or attached to the founding affidavit.

[16.3] The respondents had disputed the applicant’s *locus standi* in their answering affidavit and despite having every opportunity to do so, the applicants has still failed to produce the necessary proof in support of its locus standi in its replying affidavit .

[17] The second point *in limine* raised by the respondents is that the applicant has failed to exhaust internal remedies. The respondents contends that a review under the Promotion of Administrative Justice Act,3 of 2000 (“ PAJA”) may only be instituted once all internal remedies have been exhausted and the applicant has failed to demonstrate to the court either by way of the pleaded facts that it has either

² See Giant Concerts CC v Rinaldo Investments (Pty) Ltd and others 2013 (3) BCLR 251 CC at para 32.

exhausted all internal remedies, nor has it applied for exemption from this requirement.

[17.1] The respondents avers that in law the applicant ought to have availed itself of the internal appeal process before approaching the court to review the alleged impugned decision and *in casu*, it has failed do so. Accordingly, the first respondent's evidence is that no appeal was lodged that complies with section 62 of the Local Government :Municipal Systems Act, 32 of 2000 ("the MSA"). The only document that purports to be the "appeal" is not directed to the first respondent's municipal manager, as provided for in section 62 of the "MSA" and it is therefore invalid.

[17.2] The respondents further contend that the even if the court were to accept that the applicants appeal was validly lodged, there had been no decision taken and/or made in respect of that appeal thus, the internal remedy has not yet been exhausted.

[18] The respondents further raised the point *in limine* with regards to unreasonable delay in launching the current application.

[18.1] The respondents contend that it is fundamental principle in review proceedings that such proceedings must be instituted as soon as possible, as administrative decisions stand and are given effect to until set aside. The administrative actions that the applicant claims must be reviewed and set aside, were taken during December to February 2020. The applicant was, at the very latest, informed of the decisions and the reasons therefore on 4 March 2020, when the first respondent communicated same to the applicant by way of its letter dated the 4 March 2020. This communication has been accepted by the applicant and annexed as annexure "SC5" to the applicants founding affidavit.

[18.2] The respondents argued that this application for review was only launched in January 2021, about 300 days after the applicant became aware of the decision

and the reasons thereof and therefore far beyond the 180 day period prescribed by statute.

[18.3] The respondents contend further that the applicant has not sought an extension of the 180- day period, as provided for in section 9 (1) of PAJA, that in the absence of an application for the extension of the time-period, the Court has no power to entertain the review³.

Legal framework .

[19] A preliminary procedural question that has to be considered in the judicial process is whether the parties to the litigation have the necessary *locus standi in iudicio* or the legal capacity to litigate.⁴

[20] It must appear *ex facie* the founding papers that the parties have the necessary legal standing (*locus standi in iudicio*)⁵. This is closely connected to the question of whether practical effect can be given to the order made.

[21] It is trite that a party relying on a cession must allege and prove the contract of cession⁶. In *Gaint Concerts CC and Rinaldo Investments & others*, the court explained that a successful challenge to a public decision can be brought only *if "the right remedy is sought by the right person in the right proceedings"*⁷.

³ See *Mostert NO v Registrar of Pension Funds* 2018 (2) SA 53 (SCA) at 61I-J; *Commissioner, South African Revenue Services v Sasol Chevron Holdings Limited* (unreported, SCA case no 1044/2020 dated 22 April 2022 at para [18]-[23]

⁴ See *Malan v Van Rooyen* 1929 POD 25; *Watt v Sea Plant Products Bpk* [1998] 4 ALL SA 109 (C) 113-114.

⁵ *Mars Inc v Candy World (Pty) Ltd* 1991 (1) SA 567 (A) p. 575 See also *Kommissaris van Binnelandse Inkomste v Van der Heer* 1999(3) SA 1051

⁶ See *Lief NO v Dettman* 1964 (2) SA 252 (A) ; *Johnson v Inc General Insurance Ltd* 1983(1) SA 318 (A).

⁷ CCT 25/12(2012) ZACC 28

[22] A review under the Promotion of Administrative Justice Act, 3 of 2000 may only be instituted once all the internal remedies have been exhausted. Section 7(2)(a) of Act No 3 of 2003 (“PAJA”) provides as follows:

“ Subject to paragraph (c), no court or tribunal shall review an administrative action in terms of this Act unless any internal remedy provided for in any other law has first been exhausted⁸.”

[23] Paragraph (c) provides that:

“ A court or tribunal may, in exceptional circumstances and on application by the person concerned, exempt such a person from the obligation to exhaust any internal remedy if the court or tribunal deems it in the interest of justice”.

[24] The legislative framework mentioned *supra* provides for an internal remedy, as contemplated in section 7(2)(a) of Act No 3 of 2000. In the same vein section 62 of the Local Government: Municipal Systems Act, 32 of 2000 mentioned *supra* in this judgment provides as follows:

“A person whose rights are effected by a decision taken by a political structure, political office bearer, councillor or staff member of a municipality, in terms of a power or duty delegated or sub-delegated by a delegating authority to the political structure, political office bearer, councillor or staff member, ***may appeal against that decision*** by giving written notice of the appeal and reasons to the municipal manager within 21 days of the date of the notification of the decision”.

[25] The Supreme court of Appeal held in *Nichol and Another v Registrar of Pension Funds and Others*⁹ that PAJA made it compulsory for an aggrieved party always to

⁸ See *Koyabe and Others v Minister for Home Affairs and Others* (Lawyers for Human Rights as Amicus Curiae [2009] ZACC 23 : 2010 (4) SA 327 (CC); 2009 (12) BCLR 1192 (CC) at paragraph(s) 43-39, as well as 46-48.

⁹ 2008 (1) SA 383 (SCA). Also See *Reader v Ikin* 2008 (2) SA 582 (C) at 586 B-F; and see *City of Cape Town v Helderberg Park Development (Pty) Ltd* 2008 (6) SA 12 (SCA) at 16A-G; *City of Cape Town v Reader* 2009 (1) SA 555 (SCA) at 565 F-G; *Sumbana v Head of Department of Public Works, Limpopo Province* 2009 (3) SA 64 (HVC) at 70F-G and 72B-C; *Koyabe and Others v Minister of Home Affairs*

exhaust internal remedies unless exempted therefrom by way of a successful application under section 7(2)(c).

[26] Section 7(2)(a) of PAJA provides, in peremptory terms, subject to paragraph (c), that no court or tribunal shall review an administrative action in terms of this Act unless any internal remedy provided for in any other law has first been exhausted.

[27] Section 7(1) of PAJA provides, in peremptory terms, that proceedings for a judicial review must be instituted without unreasonable delay and not later than 180 days after the date on which internal remedies were concluded or, where no such remedies exist, when the person was informed or might reasonably be expected to have become aware of the decision¹⁰.

Application of the law.

[28] As adumbrated *supra* it is apposite to mention that the bidder in respect of tender USD EE 15-2018/19 (the first tender) was a joint venture consisting of the applicant and one Phumelela Dlomo Construction(Pty) Ltd. The joint venture is not a party to this application, nor is Phumelela Dlomo Construction (Pty) Ltd, the other partner to the joint venture. As far as the joint venture is concerned, the Court cannot make an order that the applicant, who was not the bidder in relation to bid USD EE 15-2018/19, can be approved as successful bidder. The applicant has no *locus standi* to bring this review application on behalf of the Joint venture by virtue of this Point *in limine* alone the applicant's sought relief that this court must *review and set aside the decision take by the respondents with regard to tender number USD EE 15-2018/19 ("The First Tender") and; order approving the*

(Lawyers for Human Rights as Amicus Curiae) 2010 (4) SA 327 (CC) ; Basson v Hugo 2018 (3) SA 46 (SCA) at 51B-55G; Woodlands Dairy (Pty) Ltd v Minister of Agriculture, Forestry and Fisheries in the Government of the Republic of South Africa [2021] 3 All SA 619 (GP) at paragraphs [85]- [88].

¹⁰ See Bengwenyama (Pty) LTD and Others v Genorah Resources (Pty) LTD and Others CCT 39/10 [2010] ZACC 26 at paragraph 24.

applicant as a valid tender. Ordering the applicant as the successful bidder for the First Tender is impractical and legally flawed. The ineluctable conclusion is that the applicant has no locus standi whatsoever to initiate these proceedings in connection with the relief sought relating to the joint venture. A successful challenge to a public decision can be brought only if “the right remedy is sought by the right person in the right proceedings”¹¹.

[29] The applicant alleges¹² that “...the joint venture partner has ceded all rights and permission to litigate against the City of Tshwane Metropolitan Municipality, as regards the dispute on this tender, as annexed hereto annexure ‘SC4’”. The applicant by these pleaded facts seeks to enforce the rights of the joint venture by acting as cessionary of the joint venture but fails to plead the conclusion and terms of the cession. The applicant has failed to plead a contract of cession with the joint venture nor produce *prima facie* proof thereof, since the contract of cession is the contract in terms of which the joint venture’s rights would have been transferred to the applicant. The production in evidence of an apparently regular and valid cession provides *prima facie* proof of cession¹³

[30] The reliance by the applicant on the confirmatory affidavit deposed to by one Sibongile Portia Lethatha¹⁴ is of no assistance to this Court moreover, the allegations made by Sibongile Portia Lethatha is hearsay evidence, which is inadmissible, and it therefore falls to be struck out. I found no evidence of annexed resolution by Phumelela Dlomo Construction(Pty) Ltd, confirming her authority to act on its behalf from the documents filed of records. In addition to the above, no confirmation of her alleged directorship in Phumelela Dlomo Construction(Pty) Ltd from the Companies and Intellectual Property Commission (“CIPC”) had been annexed to the applicants founding affidavit.

¹¹ Giant Concerts CC and Rinaldo Investments & Others CCT25/12 (2012) ZACC 28

¹² At par 6 of the Founding affidavit (caselines paginated pgs. 002-7)

¹³ See Hippo Quarries (Tvl) (Pty) Ltd v Eardley 1992 (1) SA 876 (A) at page 873.

¹⁴ See Caselines paginated pgs., 002-45-002-48

[31] As regards the (“PAJA”) legislative framework adumbrated *supra*, the applicant ought to have availed itself of the internal appeal process before approaching this court for the review of the allegedly impugned decision, but it failed to do so. A perfunctory read of the applicant’s founding affidavit is evident that no appeal was lodged that complies with section 62 of the Local Government :Municipal Systems Act, 32 of 2000 (“the MSA”). In fact, the document purportedly constituting the “appeal” was not directed to the first respondent’s municipal manager, as provided for in section 62 of the Municipal Systems Act and, on this basis, it is therefore invalid. Even if the Court were to accept the contention of the applicant that the “appeal” was validly lodge, but in the main there is no decision in respect of such an appeal that has been pleaded nor annexed to the applicant’s founding affidavit. It follows from the above that the applicant has not exhausted the internal remedies provided in terms of section 62 as mentioned above.

[32] The applicant has also failed to comply with the peremptory provisions of section 7(2)(c) of PAJA which make it compulsory for an aggrieved party to always exhaust internal remedies unless exempted therefrom by way of a successful application under section 7(2)(c). The applicant has further not sought exemption from its obligation to exhaust all internal remedies in terms of the provisions of section 7(2)(c) of PAJA.

[33] As adumbrated *supra*, section 7(2)(a) of PAJA provides, in peremptory terms, subject to paragraph (c), that no court or tribunal shall review an administrative action in terms of this Act unless any internal remedy provided for in any other law has first been exhausted.

[34] Given the fact that the applicant has neither establish that it has exhausted all internal remedies, nor has it applied for exemption from this requirement, this court is precluded, by virtue of the peremptory provisions of section 7(2)(a) of PAJA to review the administrative action in terms of PAJA.

[35] Consequently, I make the following order ;

- 1.The three Points *in limine* raised by the respondents are upheld.
2. The applicant has failed to make out a case for the all the relief sought.
4. The applicant is directed to exhaust its internal remedies.
- 3.The applicant's application for review is dismissed with costs.

JULIAN YENDE

J YENDE

ACTING JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

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Heard: 31 May 2023

Judgment: 13 September 2023