



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN**

CASE NO: 5056/2021

In the matter between:

VZ CONTRACTORS CC

APPLICANT

and

KING CETSHWAYO DISTRICT MUNICIPALITY

FIRST RESPONDENT

**THE MUNICIPAL MANAGER: KING
CETSHWAYO DISTRICT MUNICIPALITY**

SECOND RESPONDENT

**THE MUNICIPAL COUNCIL: KING
CETSHWAYO DISTRICT MUNICIPALITY**

THIRD RESPONDENT

ORDER

[1] In respect of the main application:

- (a) The respondents' decision taken on 12 November 2020 to accept the tender submitted by the applicant more fully described as KCDM/08/2020 be and is hereby reviewed and set aside.
- (b) It is declared that the respondent's acceptance of the tender submitted by the applicant as communicated to the applicant on 12 November 2020 is null and void and of no force and effect.
- (c) The respondents are directed to forthwith invite a new bidding process and to invite all interested parties to tender for the appointment of a panel of civil work contractors for the maintenance support in water and sanitation works within the King Cetshwayo District Municipality.
- (d) The respondents are directed to pay the costs of the applicant, jointly and severally, the one paying the other to be absolved.

[2] In respect of the counter-application launched by the respondents, such counter-application is dismissed with the respondents to pay the costs of the counter-application, jointly and severally, the one paying the other to be absolved.

JUDGMENT

SINGH AJ:

Introduction

[1] The applicant, V.Z. Contractors CC seeks the relief contained in terms of Part B of its notice of motion ("the main application"):-

- (a) the time periods referred to in S 9 of the Promotion of Administrative Justice Act No. 3 of 2000 ("PAJA") be extended insofar as may be necessary;

(b) the respondents' failure to furnish the record of its decision in tender number KCDM/08/2020 ("the tender") described as "Appointment of Panel of Civil Works Contractors for the Maintenance Support in Water and Sanitation Works for the period ending 30 June 2023 within King Cetshwayo District Municipality" to the applicant be reviewed;

(c) the decision by the respondents to award the tender to any service provider in the localities of Umfolozi, Nkandla, uMthonjaneni and uMlalazi, if any, be reviewed and set aside;

(d) that in consequence of the decision of the respondents to award the tender to any service provider in the localities of Umfolozi, Nkandla, uMthonjaneni and uMlalazi having been reviewed and set aside, the respondents be directed to re-award the tender to the applicant for the localities of Umfolozi, Nkandla, uMthonjaneni and uMlalazi;

(e) the respondents pay the costs of the application, in the event of any opposition.

[3] The main application was launched during June 2021 and on 9 June 2022, my brother Mdlala AJ granted an order which was taken by consent that the respondents were not to furnish letters of appointment to any other companies/entities to perform services in respect of the tender. The respondents were also ordered to deliver the record in respect of their decision to revoke the award of the tender to the applicant as well as various other documentation referred to in paragraphs 1.2 and 1.3 of Part A of the notice of motion.

[4] The respondents opposed the main application and delivered an answering affidavit during September 2021 with the applicant delivering a replying affidavit thereto, on 4 October 2021.

[5] After the papers in the main application were complete and during May 2022, the respondents launched a counter-application ("the counter-application") wherein the respondents sought the following relief:-

(a) that the delay by the first respondent to launch the counter-application be condoned;

(b) the fourth to ninth respondents be joined as parties to the counter-application;

(c) the decision of the first respondent to award the tender for the Appointment of a Panel of Civil Works Contractors for Maintenance Support in Water and Sanitation Works for the period ending 30 June 2023 within King Cetshwayo District Municipality is declared unlawful, reviewed and set aside;

(d) the costs of the counter-application, in the event of any party opposing the counter-application.

[6] The applicant opposed the counter-application and delivered an answering affidavit. No replying affidavit was delivered by the respondents.

[7] The applicant thereafter requested that preference be afforded for both applications to be heard on the opposed motion roll. On 20 January 2023, all parties were advised that the matter was afforded preference. It bears mentioning that the applicant had delivered its practice note and heads of argument during May 2022. The respondents ought to have delivered heads of argument at the very latest on or before 30 January 2023 in light of the preference being afforded to the matter. The practice note and heads of argument by the respondents were only delivered on 3 February 2023 without an application for condonation for the late filing of the practice note and heads of argument.

[8] A day prior to the hearing of this matter, I requested that a statement of joint issues be delivered by the parties. The applicant responded explaining that there was no co-operation by the respondents in this regard. The respondents did not have the courtesy of replying to my request for a statement of joint issues or contact the applicant in this regard. I expressed my displeasure to the respondents' counsel *Ms Ntuli* and indicated that I was allowing the matter to proceed because the matter had been allocated preference and that I was not going to allow the matter to be delayed because the respondents chose to litigate in a tardy manner.

Facts that are common cause in respect of the main application and counter-application

[9] The following facts are common cause in respect of the main application and the counter-application:-

(a) the applicant carries on business as a civil and structural engineering service in the construction industry;

(b) during July 2020, the respondents published the tender inviting bids for the appointment of a Panel of Civil Works Contractors for Maintenance Support in the Water and Civil Sanitation Works for the period ending June 2023 within the King Cetshwayo District Municipality;

(c) the closing date for the submission of tenders was 3 August 2020 at 12h00;

(d) on 12 November 2020, the applicant received a letter of intention to award it the tender from the second respondent. The applicant was further advised that a letter of award would be forwarded after the result of the bid was published on the first respondent's website for any objections to the intended award;

(e) on 6 April 2021, the respondents forwarded a letter to the applicant advising that the first respondent had discovered that the information on the applicant's tender document was not corresponding with the applicant's information on the Central Supplier Database ("CSD"). Accordingly the decision by the respondents to award the tender was rescinded and was to be of no force and effect;

(f) in various correspondence to the respondents, the applicant denied that there was any misrepresentation on its part and alleged that the details on the CSD which the respondents referred to had been allocated in respect of another tender which the applicant had with an entity known as Epic Engineering (Pty) Limited ("Epic"). The joint venture between the applicant and Epic had been executed and completed and that the said joint venture had run its natural course. The applicant further advised that the said joint venture which had been concluded with Epic did not give rise to a general partnership between the applicant and Epic and which would have limited the rights of either the applicant or Epic to carry on separate business for their sole benefit.

[10] The respondents persisted with their allegation that the applicant had misrepresented its interests in completing the tender documents and further communication with the respondents was fruitless. On 30 April 2021, the applicant's attorney wrote to the respondents requesting the first respondent's Supply Chain Management Regulations relating to lodging objections. This information was not furnished by the respondents resulting in the main application being launched.

Late filing of the respondents' answering affidavit

[11] The respondents opposed the application and delivered an answering affidavit on 22 September 2021, a day before the matter was initially set down. The respondents were out of time with the delivery of their answering affidavit.

[12] In support of condonation for the late delivery of their answering affidavit, the respondents alleged that they had intended to settle the application with the applicant until they received an audit report which made specific findings and recommendations regarding the award of the tender. Prior to the audit report coming to hand, there had been no need to file answering affidavit.

[13] The respondents alleged that there was no prejudice to the applicant which could not be cured with an order for costs.

[14] It bears mentioning, that on 23 September 2021 when the matter was set down, the respondents were ordered to pay the wasted costs occasioned by the adjournment of the matter. I am therefore satisfied that the respondents have established "good cause" for the late filing of their answering affidavit and had same been delivered after 23 September 2021 then that would have been a different situation all together and the applicant would have been prejudiced by the late delivery of the answering affidavit. To that extent, I condone the late delivery of the respondents' answering affidavit.

The respondents' opposition to the main application

[15] In essence the respondents' opposition to the main application was as follows:-

- (a) The applicant had "failed to make certain mandatory disclosures in its bid";
- (b) The tender validity period was ninety days;
- (c) That on 12 August 2021, they had received an internal audit report which advised that the tender was awarded outside the ninety day tender validity period;

- (d) The tender validity period lapsed on 1 November 2020 and was only purportedly extended on the ninety second day being, 3 November 2020;
- (e) The award of the tender to the applicant was therefore unlawful and the tender process should have started *de novo*;
- (f) That a counter-application would be launched to have the award of the tender declared unlawful and set aside.

[16] Before dealing with the main application, I deem it prudent to deal with the counter-application.

The respondents' counter-application

[17] Despite having alleged in their answering affidavit, which was deposed to on 22 September 2021 that a counter-application would be launched to set aside the award of the tender, the respondents only launched the counter-application towards the end of May 2022. The reason for me stating "towards the end of May 2022" is twofold. Firstly, the notice of counter-application was undated and secondly, the founding affidavit in support of the counter-application was also undated. I can only assume that the counter-application was launched shortly before 27 May 2022 as that was the date on which the respondents served the counter-application on the applicant's attorney.

[18] The notice of counter-application further stated that the respondents would use the affidavit of the acting municipal manager, one Arthur Thamsanqa Ntuli in support of the counter-application whereas as the founding affidavit was in fact deposed to by one Philemon Philani Sibiyi who also stated that he is the acting municipal manager. *Ms Ntuli* who appeared for the respondents, was unable to make any submissions as to the reasons for this discrepancy. For that matter, she was unable to explain why the founding affidavit was neither dated nor was the place where the affidavit was signed stated. The respondents did not file a replying affidavit to explain themselves despite the applicant taking issue with the aforesaid defects in the notice of motion and founding affidavit.

[19] This takes me to my earlier comment that the respondents have handled their opposition to the main application, the counter-application and the late delivery of their practice note and heads of argument *sans* a condonation application in a tardy and haphazard manner.

[20] The respondents sought the relief which I have already referred to in paragraph 5 *supra* in their counter-application.

Delay in launching counter-application

[21] In support of the condonation sought for the delay in bringing the counter-application, the respondents stated that the counter-application was prompted by the findings set out in the audit report and “the insistence by the applicant in the main application to enforce the unlawful award of the tender which was apparent in its replying affidavit in the main application”.

[22] The reasons for why the respondent contended the tender must be set aside was largely the same as the reasons advance in opposition to the main application, namely that the award was made outside the ninety day tender validity period.

[23] Insofar as the respondents sought the joinder of the fourth to tenth respondents, the respondents alleged that they were also successful bidders and therefore had a direct and substantial interest in the proceedings. There were returns of non-service in respect of the fourth and seventh respondents. None of the other respondents, namely the fifth, sixth, eighth, ninth and tenth respondents who were served with these papers opposed the counter-application. It was only the applicant who opposed the counter-application.

[24] There was no further elaboration by the respondents as to why the counter-application was not delivered simultaneously with the answering affidavit which was delivered in September 2021 nor was there an explanation as to why the counter-application was brought some nine months after the answering affidavit had been delivered.

[25] It is trite that an organ of state such as the respondent may not review its own decision in terms of the provisions of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) and that the principle of legality is therefore the route for an organ of state to review its own decision¹.

[26] It has been recognized for some time that a legality review must be initiated with undue delay and whilst the court has a discretion to grant condonation where there has been a delay in instituting review proceedings, a court must be mindful of the provisions of section 237 of the Constitution Act, 1996 which provides that “all constitutional obligations must be performed diligently and without delay”. Time is therefore of the essence and an organ of state such as the first respondent, can hardly be likened to an ordinary lay litigant whose access to legal representation and in some instances funds for litigation may be limited and as a result of which there may be a delay in initiating proceedings².

[27] In *Gwetha v Transkei Development Corporation Limited and Others*³, it was held that in assessing undue delay, the following had to be examined:-

- (a) Whether the delay is unreasonable or undue (a factual enquiry upon which a value judgment is made in light of all “all the relevant circumstances”) and if so,
- (b) whether the court’s decision should be exercised to overlook the delay and nevertheless entertain the application.

[28] In casu the respondents were aware from about 12 August 2021 as that is the date of the internal audit report albeit, that it is a draft report, that the tender validity period may have lapsed and that the tender validity period had not been extended during the ninety day period. They were further aware of same on their own version when the answering affidavit to the main application was deposed to on 22

¹ State Information Technology Agency SOC Limited v Gijima Holdings (Pty) Limited 2018 (2) SA 23

(CC) at paragraphs 27, 37, 38 and 40

² MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Limited trading as Eye and

Laser Institute 2014 (3) SA 481 (CC) at page 505 C to D

³ 2006 (2) SA 603 (SCA)

September 2021. On the respondent's version, the applicant was also persisting with the main application by delivering its replying affidavit on 4 October 2021. The respondents knowing that the applicant was pursuing the main application by filing the replying affidavit, ought to have launched the counter-application if not simultaneously with the answering affidavit, then at the very least once the applicant had filed its replying affidavit in the main application and the applicant's pursuit of the main application had become evident.

[29] Condonation is not for the mere asking and a party seeking condonation must give a full explanation for any delays which covers the entire period of the delay. The entire manner in which this counter-application was launched by the respondents (see paragraphs 17, 18 and 19 supra) leads me to the view that the respondents have failed to make out any case entitling them to condonation for the late filing of the counter-application and accordingly the counter-application must fail. The costs must also follow the result and the counter-application by the respondents is therefore dismissed with costs.

Analysis of the submissions contained in respect of the main application

[30] Much of the facts pertaining to the publication of the tender, the closing date for the submission of tender applications and the applicant having received a letter of intention to award the tender dated 12 November 2020 from the second respondent is common cause as I have set out in paragraphs 9(b) to 9(f) supra.

[31] It is also common cause that the respondents forwarded a letter on 6 April 2020 to the applicant advising the applicant that they had rescinded the award of the tender on the basis that the information furnished by the applicant in its tender documents did not correspond with the information on the CSD. After queries by the applicant as to the precise details of the alleged misinformation in the tender documents by way of further letters to the respondents, the respondents advised the applicant that the sole member of the applicant did not disclose that he had a seventy percent interest in a joint venture with Epic and that this amounted to a misrepresentation on the part of the applicant.

[32] The applicant denied that there was any misrepresentation on its part and furnished an explanation. It was against this background that the applicant launched the main application.

[33] I have already dealt with the thrust of the respondents' opposition to the main application in paragraph 15 supra.

[34] Before dealing with the alleged misrepresentation, I turn to consider the argument of the respondents that the tender was awarded outside the tender validity period because whatever finding I make in this regard will determine the ultimate fate of the main application and whether the applicant ought to be granted the relief sought in Part B of the notice of motion.

[35] A tender like any other offer in the law of contract, falls away if it is not accepted within the time agreed to by the parties. A tender process will therefore be deemed to be completed, albeit it unsuccessfully on the expiration of the period⁴ as the tender process cannot be open ended⁵. Where a tender has not been awarded within the validity period, the tender period may be validly extended by agreement provided it is done within the initial period^{6, 7}.

[36] Where the award is not made within the tender validity period, the tender process would therefore have to start afresh^{8, 9} to ensure that all interested parties

⁴ Joubert Galpin Searle Inc. and Others v The Road Accident Fund 2014 (4) SA 148 (ECP) at 167

⁵ City of Ekurhuleni Metropolitan Municipality v Takubiza Trading and Projects CC & Others [2022] JOL53757 (SCA) at paragraph 15

⁶ Telkom SA Limited v Merid Trading (Pty) Limited and Others; Behati Solutions (Pty) Limited v SA Limited and others [2011] ZAGPPHC1

⁷ SAAB Grintek Defence (Pty) Limited v South African Police Services and Others [2015] JDR 0080

(GP)

⁸ Tactical Security Services CC v Ethekewini Municipality 2017 JDR 1558 (KZD)

⁹ Defensor Electronic Security (Pty) Limited v Centlec SOC Ltd and Another [2021] ZAFSHC 315 at

paragraph 8.1

are able to tender afresh. The respondents made the concession in their answering affidavit that the process would have to start “de novo”.

[37] The respondents alleged that the “tender of a validity period is ninety days” in terms of clause F.2.17 of the tender data and that if requested by it, a bidder would have to agree the extension of the validity period. The respondents further annex to their founding affidavit in the counter-application, copies of two (2) letters dated 3 November 2020 sent to the applicant and one other bidder requesting an extension of the tender validity period. Though only the two letters were annexed to the founding affidavit in the counter-application, the respondents alleged that all bidders had been dispatched with letters of extension. The respondents allege that the said letters were dispatched ninety two days after the submission for tenders had closed.

[38] The calculation of days were an act has to be done is defined in S 4 of the Interpretation Act 33 of 1957 (the Interpretation Act) which reads as follows:

“When any particular number of days is prescribed for the doing of any act, or for any other purpose, the same shall be reckoned exclusively of the first and inclusively of the last day, unless the last day happens to fall on a Sunday or any public holiday in which case the time shall be reckoned exclusively on the first day and exclusively also of every such Sunday or public holiday.”

[39] The relevant section is clear that Sundays and public holidays are excluded in determining the last day on which an act must be done. This definition also distinguishes calendar days which would include Sundays and public holidays. Based on calendar days, the tender validity period in *casu* would have lapsed on 1 November 2020, which date fell on a Sunday. The relevant clause of the tender data did not stipulate that the days were to be calendar days. (See the decision of Tactical Security Services CC at paragraph 2 referred to in footnote 8 wherein the tender validity period was stipulated as eighty five calendar days) but instead simply referred to days.

[40] Taking into account the provisions of S 4 of the Interpretation Act, ninety days in the present matter would have therefore fallen on 2 November 2020 which would have been a Monday. Had the respondents wanted to rely on calendar days, they ought to have stipulated same in the relevant clause of the tender.

[41] The letters of extension for the validity period were dispatched on the respondents' version on 3 November 2020.

[42] This was one day after the lapse of the tender validity period. Taking into account the cases I have referred to in paragraph 35 supra to which I align myself, the tender validity period expired on 2 November 2020 and the tender process was therefore completed albeit unsuccessfully.

[43] The acceptance of the tender by the respondents of which the applicant was advised on 12 November 2020 therefore fell out of the tender validity period and was therefore invalid and falls to be set aside.

[44] In view of the aforesaid finding, it is therefore unnecessary for me to pronounce on whether the respondents were justified in forwarding the letter of 6 April 2021 advising the applicant that the award of the tender was withdrawn on the basis of any alleged misrepresentations made by the applicant at the time the tender was submitted by the applicant. There was no tender validity period in existence at the time the tender was awarded and an award could therefore not be validly made to the applicant.

Costs

[45] I have already dealt with the issue of costs in respect of the counter-application, namely that the respondents are directed to pay the costs of the counter-application, jointly and severally, the one paying the other to be absolved.

[46] In relation to the main application, it is common cause that the main application was precipitated by the letter of withdrawal of the award of the tender by the

respondent on 6 April 2021. Despite a denial by the applicants that there were no misrepresentations on its part in submitting its tender and that the respondents' withdrawal of its decision to award the tender was ill-conceived, the respondents were unclear in correspondence to the applicant as to why they persisted with the allegations of misrepresentation and non-disclosure by the applicant. Despite a request by the applicant as to whether the respondents had an internal appeals process, the respondents did not furnish any details of such process and in fact only furnished the rules for the first respondents' bid appeals tribunal as an annexure to their answering affidavit which was filed on 21 September 2022.

[47] This in my view alone necessitated the applicant approaching this court in respect of the main application.

[48] Until the draft audit report became available to the respondents, it did not occur to the respondents that they had improperly awarded the tender to the applicant. One only has to visit the first respondent's website to see that invitations to the public to tender for goods and services is a frequent practice by the first respondent. One would therefore expect the respondents to be completely *au fait* with the legal prescripts relating to tenders and even if a tender was inadvertently awarded to a bidder, such as the applicant, the respondents ought to be expected to take steps immediately to remedy the situation.

[49] The respondents in *casu* took no such steps and were until receipt of the draft audit report, content with settling the main application. This was on the respondents' own version in their answering affidavit. No proper explanation was furnished for why the respondents had not realized sooner that they had strayed from the procurement prescripts until publication of the internal audit report. A full and proper record in terms of the order of court granted by my brother Mdladla AJ on 9 June 2021 was also not furnished by the respondents in compliance with such order.

[50] Inasmuch as the order that I make will not grant the applicant the relief it seeks, namely that the respondents re-award the tender to the applicant for the municipal

localities of Umfolozi, Nkandla, uMthonjaneni and uMlalazi, the applicant was entitled to approach this court based on the conduct of the respondents. The applicant has therefore succeeded in ensuring that the tender is not awarded to any of the other bidders who were successful. These bidders would be the fourth to tenth respondents in the counter-application. I am therefore of the view that the applicant is entitled to the costs of the main application.

[51] In the result I make the following orders:

- (1) In respect of the main application:
 - (a) The respondents' decision taken on 12 November 2020 to accept the tender submitted by the applicant more fully described as KCDM/08/2020 be and is hereby reviewed and set aside.
 - (b) It is declared that the respondents' acceptance of the tender submitted by the applicant under KCDM/08/2020 is null and void and of no force and effect.
 - (c) The respondents are directed to forthwith invite a new bidding process and to invite all interested parties to tender for the appointment of a panel of civil work contractors for the maintenance support in water and sanitation works within the King Cetshwayo District Municipality.
 - (d) The respondents are directed to pay the costs of the applicant, jointly and severally, the one paying the other to be absolved.
- (2) In respect of the counter-application launched by the respondents, such counter-application is dismissed with costs, with the respondents to pay the costs of the counter-application, jointly and severally, the one paying the other to be absolved.

SINGH AJ

APPEARANCES

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DATE OF HEARING: 9 February 2023

DATE OF JUDGMENT: 9 March 2023