



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 937/2012

Reportable

In the matter between:

DR JS MOROKA MUNICIPALITY

First Appellant

**THE CHAIRPERSON OF THE TENDER ADJUDICATION
COMMITTEE OF THE DR JS MOROKA MUNICIPALITY**

Second Appellant

**THE CHAIRPERSON OF THE TENDER ADJUDICATION
COMMITTEE OF THE DR JS MOROKA MUNICIPALITY**

Third Appellant

**THE ACTING MUNICIPAL MANAGER OF THE
DR JS MOROKA MUNICIPALITY**

Fourth Appellant

And

BERTRAM (PTY) LIMITED

First Respondent

Neutral citation: *Dr JS Moroka Municipality v The Chairperson of the Tender Evaluation Committee of the Dr JS Moroka Municipality* (937/2012) [2013] ZASCA 186 (29 November 2013)

Coram: Brand, Maya, Bosielo, Leach and Wallis JJA

Heard: 15 November 2013

Delivered: 29 November 2013

Summary: Tender — requirement that tenderers submit original tax clearance certificate or be disqualified — failure to provide original certificate — absence of power to condone non-compliance — not affected by regulations permitting council to address enquiries to SARS.

ORDER

On appeal from: North Gauteng High Court, Pretoria (Hiemstra AJ sitting as court of first instance):

- 1 The appeal succeeds with costs, including the costs of two counsel.
- 2 The order of the court a quo is set aside and is substituted with the following: 'The application is dismissed with costs, including the costs of two counsel where so employed.'

JUDGMENT

LEACH JA (BRAND, MAYA, BOSIELO AND WALLIS JJA CONCURRING)

[1] The cardinal issue arising in this appeal is whether a municipality was justifiably entitled to disqualify a tender supported by a copy of a tax clearance certificate when the invitation to tender had called for an original certificate to be provided. The court a quo held that the municipality had erred in disqualifying the tender for that reason alone and granted relief designed to ensure the disqualified tender was evaluated. With leave of the court a quo, this appeal lies against that order.

[2] A need for toilets gave rise to the tender at the heart of this dispute. In a written invitation published on 24 June 2012 the first appellant, the Dr J S Moroka Municipality of Siyabuswa, Mpumalanga (the municipality) called upon interested parties with the necessary experience and 'in good standing with the South African Revenue Services' (SARS) to tender for the supply and delivery of 6 000 VIP toilets.¹ In the invitation to tender (in a section headed 'Bid Instructions') it was stated that a failure to submit required documents would render a tender liable to rejection. In addition, it listed a number of documents as being 'minimum qualifying requirements' to be made available as 'the prerequisite for (tenderers) to qualify for evaluation'. One such requirement was 'a valid original Tax Clearance Certificate.'

[3] Pursuant to this invitation, and after a tender briefing and site inspection, 11 tenders were submitted, including tenders from both the first respondent, Betram (Pty) Ltd, and the second respondent, Eldocrete CC ('Eldocrete'). However the municipality's bid evaluation committee disqualified the first respondent's tender as not complying with the minimum qualifying requirement for tenders in that it included a copy of a SARS tax clearance certificate and not an original. A number of other tenders were disqualified for various deficiencies before those that did qualify were evaluated. The contract awarded to Eldocrete, although its bid had been almost R2 million higher than that of the first respondent.

[4] Learning of this when certain of its representatives visited the municipality on

¹ In this instance 'VIP' does not imply a product of superior quality — it is an acronym for Ventilated Improved Pit toilets.

2 August 2012, the first respondent proceeded to launch urgent review proceedings in the North Gauteng High Court, Pretoria. Citing as respondents the municipality itself, the chairpersons of its tender evaluation and adjudication committees and its acting municipal manager (the four appellants), it sought an order reviewing and setting aside the award of the contract to Eldocrete as invalid and unenforceable, as well as interim relief suspending the execution of the contract pending the outcome of the review.

[5] In seeking this relief, the first respondent alleged not only that it had in fact attached an original SARS tax clearance certificate to its bid, but that its representatives had seen the original certificate amongst the original tender documents when they visited the Municipality on 2 August 2012. This the Municipality denied. It persisted in its allegation that the first respondent's bid had included merely a copy of a SARS clearance certificate and that the tender had accordingly failed to comply with one of the minimum qualifying requirements for a tender as set out in the tender invitation.

[6] This was a dispute of fact impossible to resolve on the papers. The first respondent elected not to have it determined by way of oral evidence but to argue the matter on the papers as they stood. Accordingly, under the well-known procedural rule applicable to opposed motions the matter was argued in both the high court and in this court on an acceptance of the appellants' allegation that the first respondent had enclosed a copy of a SARS tax clearance certificate in its tender and not an original.

[7] The high court held that despite the tender invitation having specified an original certificate as a requirement, the disqualification of the first respondent's tender had been administratively unfair. It therefore declared both the exclusion of the first respondent's tender and the consequent award of the contract to Eldocrete to be invalid. However it recognised that the contract had already been partially completed and, in order to avoid Eldocrete being unnecessarily prejudiced, it granted further relief similar to that issued by this court in *Millennium Waste*

*Management*² - essentially obliging the Municipality to evaluate the tender of the respondent, compare it to that of Eldocrete and then to accept whichever of the two was found to be preferable.

[8] The necessity to comply with the obligations imposed by s 217 of the Constitution relating to public procurement policies and procedures to be adopted by organs of state, including municipalities, has resulted in the enactment of numerous interrelated statutes, regulations and directives. This, in turn, has given rise to a convoluted set of rules and requirements that have proved to be fertile ground for litigation with the law reports becoming littered with cases dealing with public tenders. It is unnecessary, for present purposes, to embark upon a detailed analysis of all the statutory provisions relating to the process of municipal procurement of goods and services by way of tender. For present purposes it suffices to mention the following:

The Preferential Procurement Policy Framework Act 5 of 2000 (the 'Procurement Act') requires a municipality to implement a procurement policy by following a preference point system in respect of any 'acceptable tender', defined as being 'any

²Millennium Waste Management v Chairperson, Tender Board, Limpopo Province and others 2008 (2) SA 481 (SCA) para 35.

tender which, in all respects, complies with the specifications and conditions of tender as set out in the tender document'.³

(a) On 10 August 2001, the Preferential Procurement Regulations, 2001 were promulgated under the Procurement Act. Regulation 16 thereof provided:

'No contract may be awarded to a person who has failed to submit an original Tax Clearance Certificate from the South African Revenue Service ("SARS") certifying that the taxes of that person to be in order or that suitable arrangements have been made with SARS.'

(b) Those regulations were repealed with effect from 7 December 2011 by the Preferential Procurement Regulations, 2011.⁴ Regulation 14 of these latter regulations similarly prescribes that a municipal tender may not be awarded 'to any person whose tax matters have not been declared by the South African Revenue Service to be in order.'

(c) The Local Government: Municipal Systems Act 32 of 2000 ('the Systems Act'), requires a municipality to have a supply chain management policy that is 'fair, equitable, transparent, cost effective and competitive and as may be provided for in other national legislation'⁵ in order to procure municipal services.

(d) Section 112(1) of the Local Government: Municipal Finance and Management Act 56 of 2003 ('the Municipal Finance Act'), requires a municipal supply chain management policy to also comply with a regulatory framework that covers as a minimum a wide range of issues. These include, in particular, 'open and transparent pre-qualification processes for tenders and other bids',⁶ 'bid documentation, advertising of and invitations for contacts'⁷ and 'screening processes . . . for prospective contractors on tenders or other bids above a prescribed value'.⁸

(e) On 30 May 2005, the Municipal Supply Chain Regulations were promulgated under s 168 of the Municipal Finance Act.⁹ Regulation 43 thereof provides:

'(1) The supply chain management policy of a municipality or municipal entity must, irrespective of the procurement process followed, state that the municipality or municipal entity may not make any award above R15 000 to a person whose

³ Section 1 of the PPPF Act.

⁴ Published in GG No R 502 of 8 June 2011.

⁵ Section 83(3) of the Systems Act.

⁶ Section 112(1)(e).

⁷ Section 112(1)(g).

⁸ Section 112(1)(i).

⁹ In G/N 868 of 2005.

tax matters have not been declared by the South African Revenue Service to be in order.

(2) Before making an award to a person, a municipality or municipal entry must first check with SARS whether that person's tax matters are in order.

(3) If SARS does not respond within seven days such person's tax matters may for purposes of subregulation (1) be presumed to be in order.'

[9] In the light of these provisions, the reasoning of the high court in regard to the exclusion of the first respondent's tender appears to have been as follows: the critical requirement was the tenderer's tax affairs being in order; it was incumbent upon the municipality under reg 43 of the Municipal Supply Chain Regulations of 2005 to check with SARS whether that was the case; an original SARS tax clearance certificate is not a material requirement to do so (presumably on the basis that an original is not required to ascertain from SARS whether the tenderer's tax affairs are in order); and accordingly disqualification from the tender process of a tender supported by a copy of a SARS tax clearance certificate rather than an original was procedurally unfair as the requirement of an original was not 'critical'.

[10] Not only is precisely what was meant by this finding unclear but the underlying reasoning is doubtful, particularly given the fact that at the time the preservation of secrecy provisions contained in s 4 of the Income Tax Act 58 of 1962 would have made it very difficult for a municipality to investigate the tax affairs of any tenderer, save possibly if the tenderer had provided its consent to any information being made available under s 4(2B) of that Act.¹⁰ But I do not find it necessary to deal any further with that issue. Essentially it was for the municipality, and not the court, to decide what should be a prerequisite for a valid tender, and a failure to comply with prescribed conditions will result in a tender being disqualified as an 'acceptable tender' under by the Procurement Act unless those conditions are immaterial, unreasonable or unconstitutional.¹¹

¹⁰The position has since altered. Section 4 of the Income Tax Act 58 of 1962 was repealed by s 271 of the Tax Administration Act 28 of 2011, s 256 of which provides a procedure whereunder a person to whom a taxpayer has presented a tax clearance certificate may confirm a taxpayer's tax compliance status with SARS.

¹¹ See in this regard, albeit obiter, the comment of this court in *Millennium Waste Management* para 19.

[11] The requirement that tenders should only be awarded to persons whose tax affairs have been declared by SARS to be in order echoes loudly throughout the statutes and regulations mentioned above, and there is no hint on the papers of any contention that this is in any way unconstitutional, unreasonable, irrelevant or immaterial. Nor is it suggested that it was unreasonable, irrelevant or immaterial for the appellants to have required an original, rather than a copy, of a tax clearance certificate. Counsel for the first respondent therefore correctly accepted that the lawfulness of the municipality's condition set out in the tender invitation imposing an original SARS clearance certificate as a minimum qualifying requirement could not be challenged. He submitted, however, that the appellants should have been satisfied with the copy provided and that the failure to provide an original was something which the appellant could and should have condoned.

[12] The immediate difficulty I have with this argument relates to its underlying premise that there existed a discretion to condone a failure to comply with any of the minimum qualifying requirements set out in the tender invitation. The respondent was unable to point to such a discretion being afforded in any of the relevant legislation or regulations, and, as Brand JA said in *Pepper Bay*:¹²

'As a general principle an administrative authority has no inherent power to condone failure to comply with a peremptory requirement. It only has such power if it has been afforded the discretion to do so.'

[13] The decision in *Pepper Bay* is instructive. The court in that matter was called upon to decide whether a Chief Director, to whom the power to grant fishing licences under a general notice had been delegated, enjoyed the necessary authority to condone the failure of a person to comply with certain peremptory procedural requirements relating to applications for such licences as prescribed in the general notice. In regard to the Chief Director's powers, Brand JA said the following:¹³

'The Chief Director derives all his (delegated) powers and authority from the enactment constituted by the general notice. If the general notice therefore

¹²Minister of Environmental Affairs and Tourism v Pepper Bay Fishing (Pty) Ltd; Minister of Environmental Affairs v Smith 2004 (1) SA 308 (SCA) para 31.

¹³Para 31.

affords him no discretion, he has none. The question whether he had a discretion is therefore entirely dependent on a proper construction of the general notice.'

[14] The first respondent did not seek to dispute the correctness of this decision. It also accepted that a discretion to condone a failure to comply with the peremptory requirement of an original tax clearance certificate in the present case was entirely dependent upon a proper construction of the documents forming part of the tender invitation. Although unable to refer to any specific provision in the tender invitation or the various documents included therewith (which included the bid instructions and the standard terms and conditions of bid) where mention is made of a discretion afforded to a municipal official or committee to condone a failure to comply with any prescribed condition of tender, it argued that such a discretion is implicit in clause 3 of the standard terms and conditions of bid. It reads as follows:

'3.1 All bids validly submitted will be taken into consideration. Each tender/bid will be reviewed and evaluated for its ability to deliver the specific requirements of the bid in line with set criteria of paragraph 3.3.

3.2 Dr JS Moroka Local Municipality is under no obligation to accept any tender/bid, or to accept the lowest tender/bid.

3.3 All tenders/bids will be reviewed and evaluated in accordance with the following criteria:

- General Information supplied by the bidder
- Compliance with bid requirements
- Technical
- Operational
- Preferential Procurement.'

[15] This argument cannot be accepted. The clause relates to bids 'validly submitted' and, as is indeed stated in clause 2.5.5 of the standard terms and conditions of bid, only tenders submitted 'in the prescribed manner may be accepted as valid bids'. That clause merely states the obvious. A bid that does not satisfy the necessary prescribed minimum qualifying requirements simply cannot be viewed as

a bid 'validly submitted'. Moreover, the tender process consists of various stages: first, examination of all bids received, at which stage those which do not comply with the prescribed minimum standards are liable to be rejected as invalid; second, the evaluation of all bids 'validly submitted' as prescribed in clause 3; and third, a decision on which of the validly submitted bids should be accepted. The fact that all bids validly submitted are to be taken into consideration as set out in clause 3.1 affords no discretion to condone and take into account bids not validly submitted but disqualified.

[16] In these circumstances it is clear that there was no discretion to condone a failure to comply with the prescribed minimum prerequisite of a valid and original tax clearance certificate. That being so, the tender submitted by the first respondent was not an 'acceptable tender' as envisaged by the Procurement Act and did not pass the so-called 'threshold requirement' to allow it to be considered and evaluated. Indeed, its acceptance would have been invalid and liable to be set aside - as was held by this court in *Sapela Electronics*.¹⁴ On this basis the appellants were perfectly entitled to disqualify the first respondent's tender as they did.

[17] As a last line of defence, so to speak, the first respondent argued in the alternative that for reasons of public policy its tender ought not to have been disqualified but should have been evaluated. This argument was founded essentially on the fact that it was lower than that of Eldocrete and the statement in *Millennium Waste Management* that:

'(O)ur law permits condonation of non-compliance with peremptory requirements in cases where condonation is not incompatible with public interest and if such condonation is granted by the body in whose favour the provision was enacted (*SA Eagle Insurance Co Ltd v Bavuma*)'.¹⁵

[18] The first respondent's argument on this issue faces a fundamental difficulty. The decision in *SA Eagle Insurance Co Ltd v Bavuma*,¹⁶ referred to as authority for

¹⁴ *Chairperson, Standing Tender Committee v JFE Sapela Electronics (Pty) Ltd* 2008 (2) SA 638 (SCA) para 11.

¹⁵ Para 17.

¹⁶1985 (3) SA 42 (A).

the proposition in the dictum in *Millennium Waste Management* quoted above that condonation can be granted where it is not inconsistent with public policy, related to a statutory provision enacted for the specific benefit of an individual or body. It was held that such a benefit may be waived by that individual or body provided that no public interests were affected thereby and that it was not open to another person, whom the statute was not intended to benefit, to insist that the provision be observed. In my view, that does not support the proposition that, if it is not inconsistent with public policy, non-compliance with a peremptory requirement of a tender can be condoned so that a tender which is 'unacceptable' as envisaged by the Procurement Act may be accepted. Not only is such a proposition inconsistent with the decision of this court in *Pepper Bay* - a decision regularly followed and approved, including in *Millennium Waste Management* - but it also offends the principle of legality, as emphasised by this court in *Sapela Electronics*. Accordingly, in my respectful view, insofar as the judgment in *Millennium Waste Management* may be construed as accepting that a failure to comply with the peremptory requirement of a tender may be condoned by a municipal functionary who is of the view that it would be in the public interest for such tender to be accepted, it should be regarded as incorrect.

[19] In these circumstances the high court erred in granting the order that it did, and the first respondent's application ought to have been dismissed.

[20] The following order will issue:

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

2 The order of the court a quo is set aside and is substituted with the following:

'The application is dismissed with costs, including the costs of two counsel where so employed.'

APPEARANCES:

For 1st to 4th Appellant: N J Graves SC (with him
D N Lundström)

Instructed by:
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