



**IN THE SPECIAL TRIBUNAL ESTABLISHED IN TERMS OF SECTION 2 (1) OF  
THE SPECIAL INVESTIGATIONS UNIT AND  
SPECIAL TRIBUNALS ACT 74 OF 1996**

**(REPUBLIC OF SOUTH AFRICA)**

**CASE NUMBER: EC06/2020**

In the matter between:

**THE SPECIAL INVESTIGATING UNIT**

Applicant

and

**PHATHILIZWI TRAINING INSTITUTE**

First Respondent

*(Registration NO: 2017/096970/07)*

**O.R. TAMBO DISTRICT MUNICIPALITY**

Second Respondent

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**JUDGMENT**

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*Summary* – Review of the extension of a tender - whether the extension of the tender was irregular and unlawful - whether services were rendered under the extended tender - whether it is just and equitable for the respondent to be permitted to retain all the funds it earned from the extended tender.

**MODIBA J:**

**INTRODUCTION**

- [1] The Special Investigating Unit (**SIU**) seeks an order declaring the contract the O.R. Tambo District Municipality (**Municipality**) awarded to Phathilizwi Training Institute (**Phathilizwi**) under Tender No: ORTD SCUM 05-08/19 (**tender or original tender**) unlawful and void *ab initio*. It also seeks other ancillary relief.
- [2] Phathilizwi is opposing the application. The Municipality is not participating in these proceedings.
- [3] The background facts are largely common cause. On 10 October 2018, the Municipality advertised the tender in the Daily Dispatch newspaper, inviting bidders to submit proposals for the appointment of a service provider to conduct community education workshops within the Municipality for a period of 12 months from the date of appointment of the successful bidder. The closing date for the submission of proposals was 31 October 2018.
- [4] On 31 January 2019, the Municipality issued a letter awarding the tender to Phathilizwi. The tender is subject to the government's General Conditions of Contract (**GCC**). The SIU has no issue with the awarding of this tender.
- [5] On 24 February 2020, the Municipality extended the tender (**the extended tender**) by a period of six (6) months.
- [6] While conducting an investigation into Covid 19 related procurement as authorized by President Cyril Ramaphosa in terms of Proclamation 23 of 2020,

the SIU alleges that it found irregularities in the extension of the tender. Hence, it has instituted proceedings for the order described above.

### **GROUNDINGS OF REVIEW**

[7] The SIU relies on the following grounds of review:

7.1 non-compliance with the applicable regulatory prescripts when the tender was extended;

7.2 no services were rendered in terms of the extended tender;

[8] Phathilizwi relies on the following grounds of opposition:

8.1 the tender was duly extended in terms of clause 21.2 of the GCC;

8.2 Annexure FA6 constitutes a deviation that authorized the Municipality not to follow an open bidding process when extending the tender;

8.3 in the event that the Tribunal finds that the tender was irregularly extended as contended by the SIU, it is not just and equitable for Phathilizwi to be outstripped of the profits it earned from the extended tender as it has duly performed the required services in terms of the extended tender.

[9] Phathilizwi has also raised the following points *in limine*:

9.1 the SIU ought to have sought the review in terms of the Promotion of Just Administrative Act (PAJA);<sup>1</sup>

9.2 paragraphs 30 and 31 of the founding affidavit ought to be struck out as they contain inadmissible hearsay evidence.

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<sup>1</sup> Act 3 of 2000.

[10] The first point *in limine* is dispositive of the review application, while the second is not. In the event that the first point *in limine* is not upheld, the followings issues stand to be determined in respect of the merits.

10.1 whether the extension of the tender was irregular and unlawful;

10.2 whether the services were rendered under the extended tender;

10.3 whether Phathilizwi should be permitted to retain all the funds it earned from the extended tender.

## **POINTS IN LIMINE**

### ***Whether the SIU should have brought the Review in terms of PAJA***

[11] On the authority in *Gijima*<sup>2</sup> as applied in *MEC for Department of Treasury Free State Province*,<sup>3</sup> this review is akin to a self-review. Therefore, PAJA is incompetent under the present circumstances. The SIU correctly relies on the principle of legality.

[12] Therefore, this point *in limine* falls to be dismissed.

### ***Hearsay evidence***

[13] Phathilizwi seeks the evidence of the Municipality's Municipal Manager, Mr Hlazo as set out in paragraphs 30 and 31 of the founding affidavit, struck out as hearsay evidence because the SIU did not file a confirmatory affidavit by Mr Hlazo.

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<sup>2</sup> *State Information Technology Agency SOC Ltd v Gijima Holdings (Pty) Ltd* 2018 (2) SA 23 (CC)

<sup>3</sup> *Special Investigating Unit v MEC for Department of Treasury Free State Province*. An unreported judgment of the Special Tribunal delivered on 31 January 2022 under case number: FS01/ 2020.

- [14] On the authority in *Swissborough Diamond Mines*,<sup>4</sup> hearsay evidence is subject to striking out because it constitutes irrelevant evidence. For the reasons that follow, I find that the evidence Phathilizwi contends should be struck out does not constitute hearsay evidence. As a result, it is not subject to striking out.
- [15] At paragraph 32 of its answering affidavit, Phathilizwi states that Mr Hlazo refused to settle its invoices and demanded that the invoices be accompanied by a portfolio of evidence that work had been done. This is what the SIU stated in the paragraphs Phathilizwi seeks struck out. Phathilizwi submitted the portfolio on 15 June 2021.
- [16] It is unclear why Phathilizwi has turned about, seeking to suppress this common cause evidence.
- [17] Therefore, this point *in limine* stands to be dismissed.

## THE MERITS

### ***Whether the tender was duly extended in terms of the GCC***

- [18] Clause 21.2 of the GCC provides that:

*“If at any time during performance of the contract, the supplier or its sub-contractors should encounter conditions impeding timely delivery of the goods and performance of services, the supplier shall promptly notify the purchaser in writing of the fact of the delay, its likely duration and cause. As soon as practicable after the receipt of the suppliers notice, the purchaser shall evaluate the situation and may at his discretion extend suppliers time for performance with or without the imposition of penalties in which case the extension shall be ratified by the parties by amendment of contract.”*  
(sic)

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<sup>4</sup> 1999 (2) SA 279 (T) Page 335 - 338.

[19] Properly interpreted having regard to the text, context and purpose of the GCC<sup>5</sup>, clause 21.2 permits the extension of a tender under the following circumstances:

- 19.1 a supplier or service provider encounters circumstances that impede timeous performance;
- 19.2 the supplier or service provider has promptly notified the purchaser in writing of the fact of the delay, its likely duration and cause;
- 19.3 on receipt of the request to extend the contract, the purchaser has evaluated the circumstances and has exercised a discretion to extend the time for performance with or without the imposition of penalties;
- 19.4 the parties have concluded an amendment to the contract to give effect to the extension.

[20] Phathilizwi conflates the purpose of clause 21.2 with a deviation authorized in terms of Treasury Regulation 16A6.4. The purpose of clause 21.2 is to authorize and give effect to the extension of a contract when a supplier or service provider encounters circumstances that impede timeous performance in terms of the original tender.

[21] It is not Phathilizwi's case that it encountered circumstances that impede timeous performance under the original tender. On Phathilizwi's own version as set out in paragraph 38 of its answering affidavit, it did not request the extension of the original tender. The extension was instigated by the Municipality because it could not follow a competitive bidding process for an entirely different service. Therefore, Phathilizwi's reliance on clause 21.2 is misplaced.

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<sup>5</sup> *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA) para 18.

[22] It is convenient at this point to quote the purported deviation as set out in Annexure FA6:

*'The Department of Legislative Services in its 2019/2020 SDBIP is responsible for conducting community education workshops and facilitating Speaker's outreaches to the communities in an endeavour to encourage community members to participate in municipal programmes with full understanding of Local Government processes. (sic)*

*In order to successfully implement the above mandate, the department appointed Phathilizwi Training Institute on a term contract for a period of One (1) year, as per the attached appointment letter. The above contract has come to an end. Even though procurement process has begun, there are some delays that can negatively affect the implementation of the departmental DBIP. (sic)*

*In light of the above, your approval for extension of Phathilizwi Training Institute's Contract for a period of Six (6) Months, is recommended'.*

[23] The recommendation was approved as reflected from the annotation that appears in Annexure FA6.

[24] The original tender was in respect of a community outreach program aimed to encourage community members to participate in municipal programmes with full understanding of local government processes. The extended tender is for a completely different activity, namely a Covid-19 door-to-door campaign. It clearly appears from the wording in Annexure FA6 that it constitutes an approval of the extension of the original tender. It does not authorize the expansion of the scope of the original tender to include the Covid-19 door-to-door campaign. Neither does it authorize a deviation from the normal bidding process in the event that the Municipality requires new services. Therefore, annexure FA6 does not

constitute an approved deviation as foreshadowed in Treasury Regulation 16A6.4.

[25] The fact that Phathilizwi would provide the additional services at the same price is of no moment. The original tender did not set a fixed price for the services Phathilizwi was originally contracted to provide. For these services, Phathilizwi charged R660 per person per day. To the extent that when performing the door-to-door campaign in terms of the extended tender, Phathilizwi would levy additional charges for each person it provided Covid 19 information or training to, the extension resulted in an increase in the cost of the tender. But for the extension, the Municipality would not have incurred the additional cost of R4,856,600 in respect of the invoices Phathilizwi rendered on 21 and 25 May 2020 for the Covid 19 door-to-door campaign. Consistently with Phathilizwi's version as set out in paragraph 21 of this judgment, these circumstances suggest that the extended tender is, for all intents and purposes, a new tender. The prescribed procurement process had to be followed when awarding it.

[26] When extending the tender, the Municipality failed to comply with the emergency procurement process as set out in Treasury Regulation 16A6.4 as required by the National Treasury Practice Note 6 of 2007/2008 (NTP 6). This regulation was promulgated to give effect to the values of fairness, equity, transparency, competitiveness and cost effectiveness in public procurement as mandated by section 217(1) of the Constitution. The procurement process followed to extend the tender undermines these values. This renders the extension of the tender unlawful.



[27] The emergency presented by the Covid 19 pandemic does not justify the utilization of an unlawful procurement process to extend the tender. Circumventing the prescribed competitive bidding process under these circumstances is clearly prohibited by NTP 6. Further, no evidence that, within 10 days of authorizing the purported deviation, the Municipality's accounting officer reported the extension of the tender to the relevant treasury and the Auditor General as required by NTP 6.<sup>6</sup>

[28] For these reasons, the review application falls to succeed.

### ***Whether the services were rendered***

[29] Phathilizwi disputes the Municipality's version that it did not render services in terms of the extended tender. To support its version, Phathilizwi has put up a report entitled 'Report, Public Participation Door-to-Door Programme on Covid 19', dated 15 June 2020 (**training report**). For the reasons below, I am unable to reasonably rely on Phathilizwi's version that it conducted a Covid 19 door-to-door campaign in the O.R. Tambo Municipal area to the extent of 4112 people as reported in the training report:

29.1 in the training report, Phathilizwi reports that it utilized 12 field agents and 1 supervisor to render the service. Yet, at paragraph 31 of its answering affidavit, it avers that it only incurred salaries for 8 employees. It makes no reference to the 13 persons who conducted the training as reported in the training report. Neither does it explain on what basis were the 5 employees

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<sup>6</sup> See paragraph 3.1 of the National Treasury Practice Note 6 of 2007/2008.

that appear not to have been remunerated performed the services. At best, these versions are contradictory;

29.2 the training report does not constitute the portfolio of evidence - that Phathilizwi reached 4112 people during the door-to-door campaign - which the Municipality called for after Phathilizwi presented its invoices to the Municipality for payment. As contended by the SIU, attendance registers or other objective proof that Phathilizwi reached 4112 people is not reflected in the report. The pictures set out in the report only depict a handful of community members allegedly reached. This is a serious omission since Phathilizwi's remuneration is premised on the number of people trained.

[30] Therefore, I am unable, on the basis of the training report, to rely on Phathilizwi's version that it trained 4112 people as alleged.

[31] It has become trite that rendering services under an irregular tender does not give a tenderer the right to retain profits accrued from the tender.<sup>7</sup> The Constitutional Court has permitted a tenderer to retain profits derived from an unlawful tender only under exceptional circumstances.<sup>8</sup> Even if I were to find that Phathilizwi did render the services as alleged, it has not established exceptional circumstances that justify the exercise of the Tribunal's discretion to allow it to derive full payment for the services.

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<sup>7</sup> See *AllPay Consolidated Investment Holdings (Pty) Ltd and Others v CEO of the South African Social Security Agency and Others* 2014 (1) SA 604 (CC), *AllPay Consolidated Investment Holdings (Pty) Ltd and Others v CEO of the South African Social Security Agency and Others* 2014 (4) SA 179 (CC)

<sup>8</sup> See *State Information Technology SOC Ltd v Gijima Holdings (Pty) Ltd* 2018 (2) SA (CC).

[32] At best for Phathilizwi, in accordance with the no profit, no loss principle enunciated in *All Pay*<sup>9</sup>, it is entitled only to costs incurred when rendering services under the extended tender. On the evidence before the Tribunal, Phathilizwi contradicts itself regarding the number of employees it used to conduct the Covid 19 door-to-door campaign. Even more seriously, it has not presented evidence of the costs incurred when allegedly rendering services under the extended tender.

[33] In the premises, the order below is made.

[34] It is appropriate that I explain the delay in handing down this judgment. It was occasioned by failure by the parties to file legible documents on which they rely, which made it extremely difficult to decipher their respective cases. It took them almost three months to comply with the Tribunal's directive issued after judgment was reserved, to file legible copies of annexures to their affidavits. When ultimately pressed to agree on the content of Annexure FA6, the SIU contended that it stood by the content of this annexure as quoted in its heads of argument. Astoundingly, only then was a legible copy of Annexure FA6 filed.

## ORDER

1. The extension of Tender No: ORTD SCUM 05-18/19 (**the tender**) awarded to Phathilizwi Training Institute Registration Number: 2017/096970/07 (**Phathilizwi**) to conduct a Covid-19 campaign for the O.R. Tambo Municipality (**Municipality**) is declared unlawful and set aside.

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<sup>9</sup> Foot note 6.

2. The Municipality is not liable to Phathilizwi for the tax invoices Phathilizwi issued under reference numbers: 452056876 and 4520156896 in the amount of R3 036 000.00 and R1 821 600.00 respectively.
3. Phathilizwi is liable for the Special Investigating Unit's legal costs as follows:
  - 3.1 the costs of the review application;
  - 3.2 the costs of 03 March 2021 when the matter was removed from the roll at Phathilizwi's request;
  - 3.3 the costs of 20 April 2021 when default judgment was granted in favour of the SIU;
  - 3.4 the costs of the application for rescission of the default judgment.

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**JUDGE L.T. MODIBA**  
**PRESIDENT OF THE SPECIAL TRIBUNAL**

## **APPEARANCES**

Counsel for the Applicants:	Adv T.C Kwinda
Attorney for the Applicants: the State Attorney, Pretoria	Ms. S. Zondi, Office of
Counsel for the 1 <sup>st</sup> respondent:	Adv Matotie, assisted by Adv L Rusi

Attorney the 1<sup>st</sup> respondent:

Mr. M. Dalasile,  
Mnikelo Dalasile &  
Associates

Date of hearing:

10 February 2022

Date of Judgment:

18 May 2022

***MODE OF DELIVERY***

*This judgment was handed down electronically by email to the parties' legal representatives, loading on Caselines, publishing on the Department of Justice and Constitutional Development's website and releasing to Saflii. The time of delivery is deemed to be 10am.*