REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NO: 2096/2022

(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED: YES/NO

Date: 7/02/2022 .....

In the matter between :

DOWN TOUCH INVESTMENTS (PTY) LTD First Applicant

AXTON MATRIX (PTY) LTD Second Applicant

and

THE MEC : PROVINCIAL GOVERNMENT OF THE GAUTENG PROVINCE : DEPARTMENT OF ROADS AND TRANSPORT Respondent

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JUDGMENT

STRYDOM J :

[1] This is an urgent application for an interim interdict pending a review application in which the applicants, unsuccessful tenderers (hereinafter referred to as "the Consortium") brought an application against the MEC : Provincial Government of the Gauteng Province, Department of Roads and Transport ("the Department") seeking to interdict and restrain the Department from in any way further proceed with the procurement process relating to the construction of roads ("the works") and not to award any contract or to conclude any service level agreement with any tenderers for the execution of the works.

[2] The Department issued an invitation to tender ("the tender") on 15 June 2020.

[3] The Consortium put in a bid for the works but on 17 December 2021 at a meeting between the tenderers and the Department it was informed that its bid was disqualified.

[4] Before the two applicants put in their bid, they concluded an agreement to act as a consortium. It was a condition of the tender that bidders must award 30% of the works to a subcontractor. A list of subcontractors which could have been used for this purpose was provided by the Department and include an entity known as Muravha Building and Civil CC ("Muravha").

[5] The Consortium entered into an agreement with Muravha to do 30% of the works in terms of a subcontract.

[6] The Consortium then submitted a bid in line with the subcontracting conditions of the tender.

[7] Unbeknown to the Consortium, Muravha concluded a further subcontracting agreement with another tenderer and also submitted a bid as a main bidder under a joint venture with a further party.

[8] After the tenders were received, the Bid Evaluation Committee ("BEC") concluded their evaluation of the bids. On 26 November 2021 it brought out its report in which it indicated that the consortium was disqualified as a bidder for contravening section 4 of the Competition Act 89 of 1998. Nothing was stated pertaining to the alleged uncertified B-BBEE certificate. Thereafter an independent audit was conducted by way of a bid evaluation review by an entity known as Kopano Incorporated. In this audit report, dated 2 December 2021 it was indicated that the bid of the Consortium was disqualified as the B-BBEE certificate was not certified. It should be noted that this report was attached to the answering affidavit without a confirmatory affidavit by the author thereof.

[9] The Department held a public adjudication meeting on 17 December 2021 attended by the Consortium. There the Consortium was informed for the first time that its bid was disqualified as a result of collusion, in contravention of section 4 of the Competition Act between the Consortium and Muravha.

[10] This left the Consortium dissatisfied and it caused a letter to be written to the Department, dated 10 January 2022, wherein it stated that the Consortium complied with the mandatory requirements in entering into an

agreement with a subcontractor from the Department's own list. The Department was requested to reconsider the disqualification of the Consortium's bid and provide them with confirmation that same will be done by close of business on Wednesday 12 January 2022. It was stated that in the event that the Department persisted with the Consortium's disqualification, it required to be provided, in writing, with full and adequate reasons why the Consortium's tender was disqualified.

[11] On 17 January 2022, the Department responded to the Consortium's letter. With reference to the Consortium's letter it stated the reasons for disqualification to be as follows:

> *"K56 Joint Venture Sub-contracted a bidder who also has a main bidder in Magubane/Muravha JV is which is in contravention of Section of the Competition act. no 89 of 1998 and also captured in the SBD9 of the bidding document. This qualifies as collusion as defined under section 4 act and SBD 9."*(sic)

[12] The reason for the disqualification provided seems to be that the Consortium and Muravha acted in contravention of the Competition Act and that led to its disqualification as a bidder. The SBD 9 document which formed part of the tender is merely a declaration that the bidder did not act in collusion with anyone in contravention of the Competition Act. This declaration was made by the Consortium.

[13] Of importance to note is that nothing was said, nor was it stated as a reason for the disqualification, that the B-BBEE certificate was not certified. This reason for the disqualification of the Consortium's bid was

for the first time advanced in the answering affidavit filed on behalf of the Department. I will deal with this aspect later in this judgment.

[14] The initial ground of disqualification was further explained in the answering affidavit filed on behalf of the Department. In the founding affidavit the Consortium denied any form of collusion and stated that it was unaware of the fact that Muravha has put in its own bid and/or was a subcontractor in other bids.

[15] Why the non-certification reason of the B-BBEE certificate was not mentioned in the BEC report was not explained in the papers before this court.

[16] The Department accepted that the only reason advanced to the Consortium was that it had colluded with another entity in submitting a price for the works it was to perform.

[17] In the Department's answering affidavit it was stated that the BEC came to the conclusion that there existed a possible collusion between the bidders. It referred to section 4 of the Competition Act.[1]

[18] There is no doubt that if the Department could have shown that there was evidence of collusive trading the bid could have been disqualified. A mere

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[1] See section 4(1)(b)(iii) which provides that:

"4. Restrictive horizontal practices prohibited –

(1) An agreement between, or concerted practice by, firms or a decision by an association of firms, is prohibited if it is between parties in a horizontal relationship and if –

(b) it involves any of the following restrictive horizontal practices:

(iii) collusive trading."

suspicion, however, would not suffice. Moreover, Regulation 14 of the Provincial Procurement Regulations of 2017 provides as follows:

> *"... upon detecting that a tenderer has submitted false information regarding its BEE status level of contributor, local production and content, or any other matter required in terms of these Regulations which will affect or has affected the evaluation of a tender, or where a tenderer has failed to declare any subcontract arrangements, the organ of state must –*
>
> *(a) inform the tenderer accordingly;*
>
> *(b) give the tenderer an opportunity to make representations within 14 days as to why the tender submitted should not be disqualified ..."*

[19] Thus, even if the BEC had valid grounds for suspecting the Consortium had made itself guilty of bid rigging, the Regulations obligated it to afford the Consortium an opportunity to make representations within 14 days as to why the bid should not be disqualified. It is common cause that the Consortium was not afforded such opportunity.

[20] Accordingly, the disqualification on this ground standing on its own, was unlawful as there was no evidence indicating a collusion, as opposed to a suspicion, and the Consortium was not afforded to reply to such allegations.

[21] Realising that the Department could not have disqualified the Consortium on the reason advanced by it, the Department raised the further reason for disqualification, to wit, the non-certification of the Consortium's B-BBEE certificate in its answering affidavit for the first time. It should be noted that the certificates were attached to the answering affidavit and on

perusal thereof it appears that the B-BBEE certificates of the two applicants in the joint venture were in fact certified as a true copy. It is the Joint Venture Verification Certificate which on the face of it was not certified as such. The applicant in this matter stated that this document was in fact certified but that it was not in possession of the original certificate as it formed part of the tender documents which were submitted. Whether this certificate was certified on its flip side or at all the court will not know but it was stated that it was indeed certified. Accordingly, a factual dispute has arisen as far as this is concerned.

[22] The legal question this court is faced with is to decide whether the Department would at this stage be entitled to rely on a further reason why the Consortium's bid should and could have been disqualified. On behalf of the Consortium, it was argued that a further reason or reasons could not be advanced at this stage. The Consortium brought it application on the basis of the reasons provided to it for the disqualification of its bid. It was argued that the court should only concern itself with the reasons provided by the Department. It was argued that whether a further reason can be advanced is an issue which should be dealt with by the court hearing the review application.

[23] As to the possibility of an administrator relying on new or additional reasons in a review application, the Supreme Court of Appeal considered this issue in *National Lotteries Board v South African Education and*

Environment Project.[2] In paragraphs 27 and 28 of this decision the court found as follows:

> *"[27] The duty to give reasons for an administrative decision is a central element of the constitutional duty to act fairly. And the failure to give reasons, which includes proper or adequate reasons, should ordinarily render the disputed decision reviewable. In England the courts have said that such a decision would ordinarily be void and cannot be validated by different reasons given afterwards – even if they show that the original decision may have been justified. For in truth the later reasons are not the true reasons for the decision, but rather an ex post facto rationalization of a bad decision. Whether or not our law also demands the same approach as the English courts do is not a matter I need strictly decide.*
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> *[28] In the present matter the refusal of a funding application involves the exercise of a discretion. This means that the board could have exercised its discretion by waiving the requirement for signed statements in the guideline, or simply condoning the failure to comply strictly with it. It failed to exercise its discretion properly by applying the guideline dogmatically. The fact that it may have had other reasons for having come to that conclusion does not change the fact that the board exercised its discretion unlawfully when it made the decision. In fact, it exercised no discretion at all. This cannot be remedied by giving different reasons after the fact. The high court, in my respectful view, got it right."*

[24] On behalf of the Department, it was argued that a court should consider the matter holistically and bear in mind that the Consortium's bid did not meet the peremptory requirements that its B-BBEE certificate was not certified to be a true copy.[3]

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[2] 2012 (4) SA 504 (SCA).

[3] In the tender invitation document the requirement was stated as follows:

[25] On behalf of the Consortium it was argued that even if this further reason could be advanced, which it denied, that if this requirement is interpreted it draws a difference between "bidders" on the one hand and "trusts, consortia and joint ventures" on the other. The certified copy requirement only relates to "bidders" and not to the joint venture between the applicants.

[26] It is not for this court to decide this issue as the applicants only had to indicate that they have a *prima facie* case, even open to some doubt, that its disqualification was unlawful.

[27] On behalf of the Department it was argued that a court should not only consider the *prima facie* right in isolation. An interim interdict restraining the exercise of statutory powers is not an ordinary interdict, and courts grant it only in exceptional cases and when a strong case for that relief has been made out. It was further argued that this application did not meet the requirements for an interim interdict on the basis of the refined test in *OUTA*[4] where the Constitutional Court held as follows:

[28] In paragraphs 44, 45 and 50 of the *OUTA* decision it was decided as follows:

"Broad-Based Black Economic Empowerment (B-BBEE requires that bidders submit original and valid SANAS accredited B-BBEE status level verification certificates or certified copies thereof to substantiate their B-BBEE rating claims. All trusts, consortia and joint ventures must obtain and submit a consolidated B-BBEE status level verification certificate. Failure to do so will result in the bidder being disqualified. Public entities and tertiary institutions must also submit B-BBEE status level verification certificates together with their bids."

[4] National Treasury and others v Opposition to Urban Tolling Alliance and others 2012 (6) SA 223 (CC).

"[44]The common law annotation to the Setlogelo test is that courts grant temporary restraining orders against the exercise of statutory power only in exceptional cases and when a strong case for that relief has been made out. Beyond the common law, separation of powers is an even more vital tenet of our constitutional democracy. This means that the Constitution requires courts to ensure that all branches of Government act within the law. However, courts in turn must refrain from entering the exclusive terrain of the Executive and the Legislative branches of Government unless the intrusion is mandated by the Constitution itself.

[45] It seems to me that it is unnecessary to fashion a new test for the grant of an interim interdict. The Setlogelo test, as adapted by case law, continues to be a handy and ready guide to the bench and practitioners alike in the grant of interdicts in busy Magistrates' Courts and High Courts. However, now the test must be applied cognisant of the normative scheme and democratic principles that underpin our Constitution. This means that when a court considers whether to grant an interim interdict it must do so in a way that promotes the objects, spirit and purport of the Constitution." and further:

[50] Under the Setlogelo test, the prima facie right a claimant must establish is not merely the right to approach a court in order to review an administrative decision. It is a right to which, if not protected by an interdict, irreparable harm would ensue. An interdict is meant to prevent future conduct and not decisions already made. Quite apart from the right to review and to set aside impugned decisions, the applicants should have demonstrated a prima facie right that is threatened by an impending or imminent irreparable harm. The right to review the impugned decisions did not require any preservation pendente lite."[5]

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5 *OUTA* at paragraphs 44, 45 and 50.

[29] In my view the *OUTA* decision is to be distinguished from the current matter. The issue in *OUTA* was to consider when a court would be entitled to interfere with the national executive from fulfilling its statutory and budgetary responsibilities. It was found that a court considering an interim interdict must take into consideration the doctrine of separation of powers, which barred the judiciary from meddling in executive or legislative matters unless the intrusion was constitutionally mandated. The court had to into account the interest of the government and the extent to which the requested interdict would intrude on executive terrain, particularly if it interfered with the allocation of public resources, which was a policy issue at the core of the executive domain. Such interference was unwarranted, except where there was proof of unlawfulness, fraud or corruption.

[30] In this matter the court is dealing with an administrative decision by the respondent. The Consortium's right to just administrative action is sourced by the Constitution itself. That is what section 217 determines.[6] The true shift, brought about by *OUTA* is the consideration of the balance of convenience enquiry. That deals with the extent of the restraining order sought. The only introduction *OUTA* brought about was that courts are to consider whether the granting of the interdict would offend the doctrine of separation of powers.

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[6] Sec 217 reads: *" Where an organ of state in the national, provincial or local government , or any other institution identified in national legislation , contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent competitive and cost-effective."*

[31] In *Allpay*[7] the Constitutional Court described the right to challenge a tender award as including the vindication of a fair process as a value itself. If the court, having weighed qualitatively and quantitatively the irregularities identified, finds that an irregularity occurred, it is bound by the Constitution to set it aside the irregular process. A court will concern itself whether an irregularity was shown and not whether there existed another reason why a tender should not have been awarded. The court rejected the notion that even if proven irregularities exist, the inevitability of a certain outcome is a factor that should be considered in determining the validity of administrative action.

[32] In my view, the existence of another reason why the Consortium's tender could have been disqualified is for purposes of considering whether an interim interdict should be granted irrelevant.

[33] In the matter of *Senyathi*[8] it was found as follows:

> *"[Procurement law was described as] prescriptive precisely because the award of public tenders is notoriously primed to influence and manipulation. In addition, the prescriptive nature of procurement law also serves the goal of ensuring that the selection process is fair, equitable, transparent, cost effective and competitive."*

[34] In the procurement realm, rife with nepotism, corruption, malfunctioning and general incompetence, courts readily and enthusiastically intervene. This is because unlawful action is not allowed to stand, when it involves procurement for goods and services. This is because it involves public

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[7] See: *Allpay Consolidated Investment Holdings (Pty) Limited and Others V The chief Executive Officer, South African Social Security Agency and Others, 2014 (1) SA 604 (CC) at para [23]*

[8] See *Sanyathi Civil Engineering and Construction (Pty) Ltd Civil v Ethekwini Municipality : Group Five Construction (Pty) Ltd v Ethekwini Municipality,* 2012 (1) All SA (KZP) at 34 – 36.

money, generally expended irregularly. The public interest lies in the fair award of tenders and not in the speedy performance of the works despite an unlawful procurement process. If the latter was the paramount criteria then unlawfulness in the procurement of services by organs of state would ran supreme.

[35] The mere fact that the department was aware of the non-certification ground for disqualification but did not rely on this reason when requested to provide reasons for the disqualification but rather elected to rely on the alleged collusion reason raises a concern. The first reason could only disqualify the Consortium. The further reason disqualified three bidders.

[36] On behalf of the Department it was argued that the building of the road should not be further delayed and there is a possibility that funding may be withdrawn. Against this must be weighed the applicants' right to the constitutionally ordained right to a fair administrative approach. In my view the latter right outweighs the concerns of the Department.

[37] The only effective remedy that the applicants have at this stage is to review the decision in terms of which it was disqualified.

[38] The balance of convenience in my view favours the granting of the temporary interdict

[39] In my view the applicants have made out a case for a temporary interdict.

[40] On behalf of the Department it was contested that the matter was sufficiently urgent for this court to consider. It became common cause between the parties that unless an order was made, the tender could have

been awarded to the successful tenderer at any moment. Under such circumstances I am of the view that the matter was sufficiently urgent for this court to deal with. Once the tender was awarded it would have been more difficult for the applicants to have the award set aside.

[41] The following order is made:

(1) The applicants' failure to adhere to this court's rules relating to time periods and service is condoned, and the application is heard as an urgent application in terms of Rule 6(12).

(2) The respondent is interdicted and restrained from in any way further proceeding with the procurement process relating to contact No. DRT32/09/2019: Construction of Road K56 between K46 (William Nicol Road) and P71-1 (Main Road) and the extension of Erling Road between Dorothy Road and K56, such process to include the taking of a decision to award the contract and to conclude any service level agreement with any of the tenderers for execution of the works.

(3) The order in prayer 2 is to operate as an interim interdict pending the finalisation of the review the applicants simultaneously herewith instituted in Part B, seeking the setting aside and/or declaring as unlawful the decision of the respondent to disqualify the applicants' bid for the aforementioned contract.

(4) The respondent is ordered to pay the costs of Part A of this application.

REAN STRYDOM J
JUDGE OF THE HIGH COURT
GAUTENG DIVISION
JOHANNESBURG HIGH COURT

Date of hearing:	3 February 2022
Date of judgment:	7 February 2022

APPEARANCES

On behalf of the applicants:	Adv. S. Grobler SC
	Adv. W Steyn
Instructed by:	Peyper attorneys
On behalf of the respondent:	Adv. T Raikane
Instructed by:	The State Attorney
	Mr K. Thaver