

IN THE NORTH GAUTENG HIGH COURT, PRETORIA

REPUBLIC OF SOUTH AFRICA

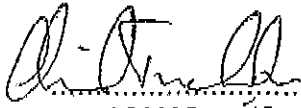
CASE NO: 5906/2012

In the matter between:

MACP CONSTRUCTION (PTY) LIMITED

Applicant

and

(1)	<u>REPORTABLE:</u>	<u>YES / NO</u>
(2)	<u>OF INTEREST TO OTHER JUDGES:</u>	<u>YES / NO</u>
	<u>11/04/12</u> DATE	 SIGNATURE

GREATER TZANEEN MUNICIPALITY

First Respondent

MAKGETSI CONSTRUCTION ENTERPRISES CC

Second Respondent

JUDGMENT

Tuchten J:

- 1 The applicant ("MacP") seeks urgently to review and set aside a decision by the Municipal Manager of the first respondent ("the Municipality") to award to the second respondent ("Makgetsi") a tender worth R33 223 649,84 to upgrade a road in the province of Limpopo ("the tender"). In terms of a written application brought during the hearing before me, MacP applied to amend its notice of motion to include in the relief sought an order setting aside the service level

agreement which was concluded between the Municipality and Makgetsi after it was awarded the tender. No prejudice has been caused by the amendment and it is granted.

- 2 The application is opposed by both respondents although only the Municipality delivered affidavits.
- 3 The tender was initiated by an advertisement published on 7 October 2011, to which 15 tenderers responded. Both MacP and Makgetsi tendered. The tender invitation restricted prospective tenderers to experienced service providers with a Construction Industry Development Board grading of 6CEPE or higher. The advertisement made it clear that the Municipality was not obliged to accept the lowest or any bid.
- 4 Pursuant to the relevant legislation, the tenders were first considered by a bid evaluation committee ("the BEC"). Because of previous difficulties encountered by the Municipality, it appointed to the BEC a consulting engineer in private practice, Mr Mojapelo, to evaluate the bids.

- 5 Mr Mojapelo proceeded to evaluate the bids and produced a report of his findings dated 6 December 2011. He proceeded to recommend the elimination of six tenderers on the grounds of various deficiencies in their tenders which he described as resulting in a lack of completeness or responsiveness to tender requirements. Neither MacP nor Makgetsi was so eliminated.
- 6 Using his own professional experience, Mr Mojapelo estimated the cost of construction, which he concluded was R33 956 379,06. He then did something which I consider rather curious. He added up the sums tendered by the fifteen tenderers (ie including in this sum the tenders of the six tenders already recommended for elimination) and divided the sum of the fifteen tenderers by fifteen, thereby arriving at an arithmetical average of R33 490 740,66. He then compared the tendered prices of the remaining nine tenderers with both his estimated price and the arithmetical average.
- 7 Using these data, Mr Mojapelo concluded that MacP deviated from the estimated price by 30% and from the average price by 29%. Makgetsi deviated by 2% from the estimated price and 1% from the average price.

- 8 Mr Mojapelo then conducted an exercise which he described as a sensitivity analysis of rates. By this he meant the rates within each of the tenders themselves. He concluded that the rates tendered by Makgetsi were acceptable. But he was critical of the rates tendered by MacP. Mr Mojapelo noted:

Most of their rates do not compare favourably with the average prices. On major items such as double seal, the rates are 55,34% less and borrow materials are 50,75% less. ... On items such as mass earthworks and drains are 50,75% and 54,74% less respectively. **With low rates on these major items, it clearly indicates that the tenderer is facing a risk of not being able to carry out the work.** Therefore the rates are not acceptable. [my emphasis]

- 9 Mr Mojapelo also noted that MacP had submitted a "deviation/qualification" in relation to its rates for certain items because it specified in its tender that its rates did not include a rate for a base slab and for unsuitable material. This was raised by the Municipal Manager in her answering affidavit on behalf of the Municipality "in passing" and does not seem to have featured with any prominence, if at all, in the decision making process.

- 10 Mr Mojapelo made it clear in his report that when he referred to average prices in the context I have just quoted, he was referring to a table attached to his report as annexure A. Annexure A reflected a comparison with each of the tender items, beginning with "general requirements and preparations" and ending with "finishing the road and road reserve and treating old roads".
- 11 In respect of five of the nine remaining tenderers, amongst whose number MacP was included, Mr Mojapelo came to the conclusion that the tendered rates were unacceptable. The remaining four tenderers, including Makgetsi, were then considered for further evaluation.
- 12 Mr Mojapelo then evaluated the remaining four tenderers for functionality, which is industry shorthand for capacity to do the job. Within the criterion of functionality, there are four subcriteria, each of which is accorded points out of a total of 100, ie experience: 50; skills of key personnel: 25; and availability of equipment: 25. Only these remaining four tenderers were scored by Mr Mojapelo.
- 13 Makgetsi was awarded 77,5 points out a possible 100. For experience, Makgetsi received 27,5 points and for both the other two subcriteria the full 25 points.

- 14 The BEC considered Mr Mojapelo's report and recommendations at its meeting on 20 December 2011. The BEC recommended two tenderers for award. One of the two tenderers recommended was Makgetsi.
- 15 The next step in the process was the consideration of the BEC 's recommendations by the bid adjudication committee ("BAC") of the Municipality. The BAC had certain difficulties with the manner in which the BEC had reached its conclusions and at its meeting on 22 December 2011 referred the matter back to the BEC for rectification of its conclusions on point scoring.
- 16 On 27 December 2011, the BEC reconsidered the matter and concluded that its approach to point scoring had been correct. The BEC accordingly declined to alter its conclusions on point scoring and adhered to its recommendations.
- 17 On the same day, the BAC once again considered the matter. The BAC expressed concern about the exclusion of tenderers, especially on two grounds, one of which related to inexperience, but resolved to recommend the tender of Makgetsi for acceptance "as they scored the highest points."

- 18 The material which had served before the BEC and the BAC, including Mr Mojapelo's report was then put up to the Municipal Manager, the ultimate decision maker and therefore, for the purposes of the Promotion of Administrative Justice Act, 2000 ("PAJA"), the administrator in relation to the tender. The Municipal Manager awarded the tender to Makgetsi after she had satisfied herself of the process followed during the assessment of the tenders at all its relevant stages and came to the conclusion that the award was both procedurally fair and in the best interests of the Municipality and the community it served.
- 19 By letter dated 29 December 2011, the Municipal Manager notified Makgetsi that it had been awarded the tender. On 17 January 2012, the Municipality and Makgetsi concluded the service level agreement to which I referred earlier.
- 20 Makgetsi began to build the road in terms of the tender. But MacP was aggrieved by the award of the tender to Makgetsi. MacP launched various urgent applications in this court, including an urgent application to interdict progress on the works under the tender. On 24 February 2012 this court granted the interdict sought pending the determination of the review. At this stage, less than 1% of the work

has been carried out. The review application itself was instituted by notice of motion dated 18 February 2012.

- 21 The first question I must decide is whether there is an internal remedy available to MacP. This is because s 7(2)(a) of PAJA provides that no court may review an administrative action unless an internal remedy provided for has been exhausted. Section 7(2)(a) is subject to s 7(2)(c) which, if the court deems it in the interests of justice, provides for an exemption from the obligation to exhaust internal remedies on application, where there are exceptional circumstances..
- 22 The respondents contend that there is indeed an internal remedy available to MacP, as provided for in s 62 of the Municipal Systems Act, 2000 ("the Systems Act"). This measure confers a right of appeal upon a person whose rights are affected by a decision taken by a staff member of a municipality such as, in this case, the Municipal Manager. The right to appeal arises upon notification of the decision. It is difficult to fit the present case into that framework because MacP was never *notified* of the decision to award the tender to Makgetsi.

- 23 But I think that the provisions of s 62(3) of the Systems Act are decisive of the point. Section 62(3) provides that while the Appeal Authority constituted under s 62 must consider the appeal and confirm, vary or revoke the decision,

No such variation or revocation of a decision may detract from any rights that might have accrued as a result of the decision.

- 24 The award of the tender and the conclusion of the service level agreement took place before the review was launched. So even if MacP qualifies as a *person whose rights are affected by* the decision and is not precluded from appealing under s 62 by the lack of *notification to MacP of the decision*, and even if its appeal were upheld, the success of the appeal would not detract from Makgetsi's accrued rights to perform, ie build the road, under the tender and the service level agreement. So s 62 does not in the present circumstances afford MacP an effective remedy.

- 25 I do not think that the *internal remedy* contemplated in s 7(2)(c) of PAJA includes an appeal that can afford an appellant no effective remedy. I therefore find that the provisions of s 62 of the Systems Act are no bar to a consideration by the court of the present application for review.

26 MacP advanced three grounds of review:

26.1 that MacP had irrationally been eliminated from consideration on the grounds that its tendered price was too low in relation to the arithmetical average price I mentioned earlier;

26.2 that the Municipality had departed from its own formula for evaluating experience within the criterion of functionality in relation to Makgetsi and that if the formula had applied correctly Makgetsi would, because of its lack of appropriate experience, have failed to achieve the threshold minimum points imposed by the Municipality in relation to functionality;

26.3 that the Municipality failed to evaluate the tenders on the basis determined by it, ie by allocating 90 points for functionality, 5 points for status as an historically disadvantaged person, 2 points for having a local presence, 2 points for female ownership and 1 point for disability. The contention is that the Municipality made the mistake of allocating only 80 points for price.

- 27 The attack on the ground that the *arithmetical average* had been used as a yardstick and was irrational was made forthrightly in the founding affidavit. The use of the arithmetical average was defended with equal forthrightness by the Municipal Manager in the Municipality's answering affidavit.
- 28 The Municipal Manager points out that the acceptance of tenders which are so low that the successful tenderer is unable to complete the work at the tendered price has in the past caused many problems for the Municipality. The Municipality had from such tenderers received substandard work. A further troublesome effect of accepting a tender that was, measured against a market related tender price, too low was that the Municipality would be confronted with the need to raise additional, unbudgeted, revenue to complete the work. To obviate these substantial difficulties, the Municipality had obtained the services of independent expert consultants, such as Mr Mojapelo, to assist the Municipality in evaluating the competing tenders and to measure the tendered prices against a market related yardstick.
- 29 These are legitimate concerns and, as was accepted by all the parties during argument, the Municipality cannot be faulted for appointing a consulting engineer to guide the BEC and the BAC and the Municipal Manager in their various functions in relation to the tender.

30 Specifically, in relation to the attack on the arithmetical average, the Municipal Manager said the following:

30.1 After specifically denying that Mr Mojapelo had used his own estimates to disqualify MacP, she said that the "consulting engineer used an average price amount ...".

30.2 She put up in support of the use of the arithmetical average, a National Treasury circular, which she interpreted to mean that the National Treasury supported the use of the arithmetical average. "The average price becomes the 'acceptable price'. In other words the acceptable price is taken to be the market related price. This average price was used as a base for the determination of a competitive cost effective market related price."

30.3 "[T]he consulting engineer has confirmed that this is the universally recognized method in the construction industry employed to arrive at an acceptable price. The applicant seeks to obfuscate the difference between the lowest acceptable price and the lowest price."

- 30.4 "This formula [arrived at by the consulting engineer] can ... be clarified by way of the following example: if one wants to determine the average price of a loaf of bread, one will request the prices of a loaf of bread from competing outlets, eg Pick 'n Pay R8,40, Checkers R8,00, Shoprite R9,00 and Spar R8,60. To determine the average price one must take the minimum price and compare it with the highest price and determine the average price. The average price will therefore become the acceptable price."
- 30.5 "[W]hat the consulting engineer did was to take the lowest price and compare it to the highest price tendered in order to determine the average price. Arithmetically, the sum of all the bids divided by the total number of bids will yield the average price which is in accord with the amount arrived at by the consulting engineer as recorded in his report."
- 31 Counsel for the Municipality confirmed during argument that Mr Mojapelo had used for this purpose all fifteen tenders submitted.
- 32 In my view the arithmetical average calculation is both unscientific and irrational. Firstly, it takes no account of the possibility that one or more of the tenderers might by legitimate methods have lower costs of

production relative to its competitors. Secondly, it takes no account of the possibility that some of the tenderers might, in the knowledge that the arithmetical average was to be employed as a yardstick, have deliberately tendered high in order to have their lower priced competitors eliminated. Thirdly, it raises to the level of objective reliability the tendered price of each of the tenderers and takes no account of the possibility that some of the tenderers might not be proven participants in the market in which the tenders were made.

- 33 In fact, the Treasury circular relied upon by the Municipal Manager not only does not bear out her contention, but says the opposite:

Deviation by more than a predetermined range from the costs estimates of the project or commodity is not a justifiable reason for the rejection of a bid and has, therefore, not been approved as an evaluation norm or criteria [sic].

- 34 I can see no legitimate objection against the employment of a duly qualified and impartial expert in order to advise the Municipality or the employment by such an expert in the evaluation process of his or her own expert estimate of a reasonable price for the work or commodity concerned. I accept too, the dangers for the Municipality if it accepts a tender that is too low. The Municipality must bear those dangers in mind when it evaluates the tenders and by appropriate means

eliminate or reduce the risks of such dangers. I accept as well that in principle there is no obligation on the Municipality at any level of the evaluation process to conduct interviews with the tenderers.

35 But in the present case, the evaluation method employed by Mr Mojapelo and adopted by the ultimate decision maker, the Municipal Manager, was such that unless appropriate steps were taken to establish whether the tenders that were rejected for being too low were in fact, evaluated against objective, market related criteria, too low, the Municipality could not fulfil the constitutional mandate imposed upon it in s 217 of the Constitution to contract for goods or services in accordance with a system which is, *inter alia*, fair, cost-effective and competitive.

36 Counsel for MacP submitted that the Municipality should have fulfilled this obligation by arranging an interview between Mr Mojapelo and officials from MacP. This is no doubt one of the ways in which the Municipality might have been able to determine whether the price tendered by MacP was market related. But it is not for this court to prescribe how the Municipality should implement its constitutional mandate. I would however say this: in my view, the Municipality is entitled to eliminate from consideration any tenderer whose tender has been determined by objective, market related criteria to be so low

that if its tender were accepted, the Municipality would run the risks of substandard work or a demand for additional funds, as discussed above.

- 37 It will be clear from the passages that I have quoted from the Municipal Manager's affidavit that the arithmetical average formed the basis for the elimination of MacP and others from the number of those tenderers whose tenders were evaluated in the final stage of the process, the only stage at which scoring took place. The arithmetical average was not something mentioned in passing or used as a basis for comparison with an evaluation on legitimate criteria. The use of the arithmetical average was fundamental to the evaluation of the tenders.
- 38 I therefore find that the decision of the Municipal Manager under attack was not rationally connected to the purpose for which it was taken, was based on an irrelevant consideration (the arithmetical average), was so unreasonable that no reasonable person could have made that decision on the grounds relied upon and was unconstitutional because it was not made in accordance with a system which is fair, cost-effective and competitive. MacP has therefore established grounds for review under ss 6(2)(e)(iii), 6(2)(f)(ii)(aa), 6(2)(h) and 6(2)(i) of PAJA.

39 This does not mean that the decision may not have been the right one. This court is not qualified to determine which of the tenderers, if any, ought to have been awarded the tender. I have arrived at my conclusion because the *process* was, in my view, flawed, not because I think that the ultimate *decision* was right or wrong. This conclusion renders it unnecessary for me to consider the other two grounds of review relied upon.

40 I must refer to an argument by counsel for the Municipality: that MacP would not have under any circumstances been awarded the tender because the Municipality had had previous experience of poor work by MacP in the execution of tenders awarded to it by the Municipality. The submission is however not born out by the Municipal Manager's affidavit. She does not say that the Municipality has such a poor impression of MacP's work that it will never grant it another tender. In fact she merely refers to two instances in which she says defective services were rendered after "under quoting by tenderers".

41 One of these tenders is alleged to have been executed in 2002 by MacP. It is alleged by the Municipality that the road washed away 18 months after it was completed because MacP executed the tender with substandard materials and poor workmanship and that the cost of rebuilding the road caused the Municipality to incur extra expense

of R20 million to reconstruct the road. MacP denies that it executed any projects for the Municipality in 2002.

- 42 The Municipality does not identify the tender concerned and gives no details of the allegedly substandard materials and workmanship or how the alleged reconstruction cost of R20 million is arrived at. I do not think that these rather bald allegations can justify a refusal by the Municipality to do business with MacP under any circumstances.
- 43 The second such tender relates to a 12 km tarred road from Tickeyline to Julesburg which the Municipal Manager says was completed toward the end of November 2011 and "some three months later was already showing signs of the use of substandard materials and bad workmanship". Strangely, it is not alleged that this road was constructed by MacP.
- 44 In its replying affidavit, however, MacP admits that it was awarded the tender for the Tickeyline road but asserts that the road is still under construction under the auspices of the Limpopo Roads Agency and puts up a letter from the consulting engineer dated 13 February 2012 which supports MacP's assertion.

45 The Municipal Manager did not even identify MacP as the successful tenderer for the Tickeyline road. The Municipality gives no particularity or documentary material in support of the allegations of substandard materials and poor workmanship. The evidence presented by MacP in contradiction of the allegation is substantial. I accordingly do not think that the Municipality has made a *prima facie* case to justify a refusal to award any tender to MacP because of its experience in relation to the Tickeyline road.

46 In addition, as counsel for MacP pointed out, the alleged poor performance in 2002 apparently did not cause the Municipality to decline to award the Tickeyline tender to MacP which suggests that the Municipality's allegations of poor performance may in general be somewhat overstated and even inaccurate.

47 It follows that MacP has made out a case for the setting aside of the tender and the service level agreement. I turn to the question of remedy.

48 Section 8(1) of PAJA empowers the court in review proceedings to grant any order that is just and equitable. It seems to me that the flaw in the process arose at the stage at which Mr Mojapelo excluded MacP and another four tenderers from further consideration because

of the conclusion he reached in regard to the disparity between the tender prices of these five tenderers and the arithmetical average of the sum of the fifteen tenders. I do not think that it would be just and equitable to require the Municipality to repeat those aspects of the process which took place before the arithmetical average was used. So the advertisement for tenders and the fifteen tenders stand, as does the exclusion of the six tenderers for want of incompleteness or responsiveness as described in paragraph 5 above.

- 49 It was submitted by the Municipality and by Makgetsi that it would not be just and equitable to stop the execution of the tender in its tracks because the provision of the road to the community would be delayed and the works had already been initiated. Weighty as they are, I do not think that these considerations can prevail. Only a very small proportion of the works has been executed. The potential overspend by the Municipality is some R10 million if MacP's contention that its tender price is legitimately market related is ultimately upheld. The court should wherever possible enforce compliance with constitutional norms, in this case that a tender system which is fair, cost-effective and competitive must be employed. Litigants who successfully seek constitutional relief should wherever possible be awarded effective

relief.¹ The work required for a reconsideration of the tenders is limited and can be completed in a relatively short period.

Order of court

50 I make the following order:

- 1 The decision of the Municipal Manager of the first respondent to award tender SCMU 23/2011 ("the tender") to the second respondent and the service level agreement concluded between the first and second respondents on 17 January 2012 are hereby set aside.
- 2 The matter is remitted to the first respondent for a reconsideration of the tender, in the light of this judgment, from the stage immediately prior to the exclusion of the tenders of the applicant and four other tenderers from further consideration on the ground that their tendered prices deviated inappropriately from the arithmetical average arrived at by dividing the sum of the tender prices in the tenders received by the first respondent by the number of tenderers.
- 3 For avoidance of doubt, it is declared that nothing in this order shall render invalid:

¹ *Fose v Minister of Safety and Security* 1997 (3) SA 786 CC para 69

- 3.1 the advertisement of the tender;
 - 3.2 subject to what follows, the tenders received pursuant to such advertisement;
 - 3.3 the elimination from further consideration of six such tenders on the ground of incompleteness or non-responsiveness as set out in paragraph 10 of the report of the consulting engineer dated 6 December 2001, annexure MCM34 to the founding affidavit.
- 4 The first and second respondents, jointly and severally, must pay the applicant's costs.



NB Tuchtén
Judge of the High Court
11 April 2012