IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES / NO.

(2) OF INTEREST TO OTHER JUDGES: YES / NO.

(3) REVISED.

10/2/16 DATE ..... SIGNATURE

10/2/2016

In the matter between:

SEKHUKHUNE DISTRICT MUNICIPALITY	APPLICANT
and	
BO-MAMOHLALA PROJECTS CC	RESPONDENTS
CASNAN CIVILS CC	
KINGKI ELECTRICAL & DGCV JV	
ETERNITY STAR INVESTMENTS 231 CC	
HTE CONSTRUCTION CC	
KGALEMO CONSTRUCTION CC	
KHULANI TRADING ENTERPRISES CC	CASE NO.60186/15
KSB PUMPS AND VALUES (PTY) (LTD)	
LEBAKA CONSTRUCTION (PTY) (LTD)	
MADIPADI CONSTRUCTION CC	
MASHAIPANE GENERAL CONSTRUCTIN JA	
KINGKI ELECTRICAL CONTRACTORS DGDC JV	CASE NO.60185/15

MOTHAKGE PHADIMA CONSTRUCTION AND SANITARY WORK & WHITE HAZY BUILDING CONSTRUCTION JV CASE NO.60180/15

Coram: HUGHES J

JUDGMENT

HUGHES J

[1] Initially, this application was launched on a semi-urgent basis and urgency was an issue for the respondents who opposed the application. The issue of urgency was later abandoned by the respondents. In this application the applicant seeks an order to review and set aside fifteen tenders awarded to the fifteen respondents during February 2015 as the awarded tenders are unlawful.

[2] The case made out by the applicant attacking the internal procedure followed by the applicant, in respect of all fifteen respondents, covers the same aspects and as such I propose to deal with this issue collectively. This means that there will only be one finding made in respect of the internal procedure adopted by the applicant in respect of all fifteen respondents. The second aspect which is the external process involving the submissions of the respondents' tenders who have opposed this application will be dealt with on an individual basis.

[3] I set out the back ground briefly. During 2014, the applicant received a conditional municipal grant for the development of water supply infrastructure in the Sekhukhune District. This grant enabled the applicant to launch an infrastructure development initiative which involved the delivery of water supply to the Sekhukhune District. An invitation to tender in respect of tender number SK8/3/1/16/2014/15 was made. The fifteen respondents were successful and were awarded the tender in February 2015.

[4] The applicant contends that it conducted an investigation and it came to light that the tender award to the respondent's was irregular and unlawful. The applicant now seeks to review and set aside the tenders granted; alternatively refer the bids

submitted by the respondent's back to the various procurement committees for reconsideration.

[5] The applicant places reliance on section 217 of the Constitution in order to have its own decision reviewed. The applicant argues that the tender evaluation and adjudication proceedings were riddled with irregularities and as such they are obliged, in the interest of justice, to seek an order declaring the process as invalid and unlawful. Section 217 of the Constitution obliges organs of the state to ensure that they contract for goods or services *"in accordance with a system which is fair, equitable, transparent, competitive and cost-effective"*.

[6] The applicant submits that its case is premised on the factual findings by Mr Mogashoa the General Manager: Regulatory & Compliance Services. After the investigation was conducted into the alleged improprieties in the awarding of the tenders, Mr Mogashoa, duly instructed by the Municipal Manager, was tasked to compile a report in terms of section 38 (1) (b) of the Local Government: Municipal Finance Act 56 of 2003 read with clause 50 (1) (b) of the Sekhukhune District Municipality: Supply Chain Management Policy. These factual findings are contained in this report.

[7] His findings are found at paragraph 6.1 of his report. In short he found the following: that every member of the Bid Evaluating Committee (BEC) did not evaluate each tender for responsiveness, functionality and price as is required; that the Bid Adjudication Committee (BAC) members adjudicated only some of the tenders recommended by the BEC's recommendations; he concluded that the BAC was not properly constituted; that there was inconsistent application of the evaluation criteria in the assessment of the bids; and that the members of both committees had not exercise due diligence.

[8] Adv. Cilliers SC, representing two of the respondents' raised three points in *limine*. The first dealt with the reliance of the applicant on hearsay evidence which was cured by the applicant as it filed the necessary confirmatory affidavits by those concerned and thus, I will not deal with this aspect.

[9] The second point *in limine*, relates to the evidence of Mr Mogashoa amounting to opinion evidence. This evidence counsel argued was relevant if it was of assistance to the court and irrelevant if it was not. In these circumstances this evidence should be held to be irrelevant and struck off, as reference was had of documents and interviews of individuals whose identity was not disclosed. Further, that the discussions with those interviewed in the investigation were not revealed.

[10] The failure to place all the evidence, relied upon by Mr Mogashoa in compiling his report, before the court makes it impossible for the court to evaluate the veracity of the facts relied upon by Mr Mogashoa, so Adv. Cilliers argument goes.

[11] The evidence upon which the applicant's case is based on, that is the findings of M Mogashoa, is inadmissible and thus the *Hollington-Hewthorne* rule would be applicable was the last point raised by Adv. Cilliers.

[12] During the course of the argument, and correctly conceded by Adv. Cilliers, it became apparent that the hearsay and *Hollington- Hewthorne* points *in limine* were moot. As these points are moot I do not propose to deal with them.

[13] Adv. Swart SC, for the applicant, pointed out that the point raised, as regards the opinion evidence, could not be sustained as the applicant did not place reliance on the opinion of Mr Mogashoa, but rather reliance was place on the factual findings emanating from the report.

[14] Counsel further argued that these factual findings are corroborated by supporting evidence of the affidavits, score sheets and extracts from the bids submitted by the respondent's. It was further argued, that in any event, the substance of the evidence adduced by applicant had not been denied by the respondent's.

[15] I will deal with the outstanding points *in limine* simultaneously with the main defences raised by the defendant's. The respondent's contends that the grounds upon which the review is sought do not make out a *prima facie* case.

[16] These internal procedural grounds of review relied upon by the applicant which are applicable to all respondents are:

(a) A joint evaluation was not conducted by the BEC and BAC;

(b) The BAC was not properly constituted;

(c) Some respondents ought to have, by law, submitted audited financials. However, as the wrong criteria was applied, some of the bidders were disqualified and in doing so the committee acted arbitrarily; and

(d) Lastly, the Municipal Manager failed to apply her mind when the recommendations were made to her.

[17] The applicant submitted that a joint evaluation did not take place and this is corroborated by direct evidence of the members of the BEC whom submitted affidavit's to this effect. Each BEC member was to examine each tender that was submitted for responsiveness. Once this was achieved, they then examine the bidder for functionality. If, successful on both counts then the bidder was referred to the BAC, who verified the recommendations made by the BEC.

[18] In this instance the members of the BEC confirmed in their reports, to Mr Mogashoa, that they did not evaluated each bidder for functionality. This situation was perpetuated with the BAC not examining all those recommended by the BEC. All the members of the BAC adjudicated on every BEC recommendation.

[19] The applicant made reference to the case of *Schierhout v Union Government 1919 AD 30 at para [44] and Minister of Health v New Clicks SA (Pty) Ltd and Others 2006 (2) SA 311 (CC) at para [171]:*

"[171] The *Schierhout* line of cases was concerned with adjudication. Whilst it is ordinarily necessary for bodies appointed to deal with such matters to be properly constituted at all times throughout the adjudication process,[142] the same does not necessarily apply to a committee such as the Pricing Committee whose work would involve research, the gathering of information and the making of enquiries before making its recommendations. In this regard I agree with the following comment of Corbett JA in *S v Naudé*:[143]

"[I]t must be conceded that a commission is, in general, the master of its own procedures. Within the bare framework provided by the Act and such modifications and regulations as may have been made by the State President in terms of sec 1(1) of the Act, it is free to determine how it shall function. There is no doubt that a commission, particularly where it consists of a substantial number of persons,

may operate without every member participating personally in every activity. Were it otherwise, a commission would be hamstrung from the start." [144]

In each case what will be required will depend on the interpretation of the empowering legislation and relevant regulations, prescribing how a commission should function."

[20] The approach to be followed in this exercise has recently been formulated by the Constitutional Court as follows in *All Pay Consolidated v Chief Executive Officer, SASSA 2014 (1) SA 604 para 24 & 38 to 40:*

"The proper approach is to establish, factually, whether an irregularity occurred. Then the irregularity must be legally evaluated to determine whether it amounts to a ground of review under PAJA. This legal evaluation must, where appropriate, take into account the materiality of any deviance from legal requirements, by linking the question of compliance to the purpose of the provision, before concluding that a review ground has been established. ... Once that is done, the potential practical difficulties that may flow from declaring the administrative action constitutionally invalid must be dealt with under the just and equitable remedies provided for by the Constitution and PAJA."

[21] In this instance I was referred to the Supply Chain Management Policy for Sekhukhune District Municipality 2013/2014 (the Policy), clause 30, by the applicant. This clause sets out the relevant committee's to be established to consider competitive bids. These committees are, BEC, BAC and Quotation adjudication committee.

[22] The Policy at clause 33(1) (a)-(e) sets out how the BEC is to evaluate the bids. Clause 33(1) (b) of the Policy states that the committee must *'evaluate each bidder's ability to execute the contract'*. The applicant's contention is that this did not take place at all and confirmation of this was supplied by the BEC members in their reports to the Municipal Manager. The applicant argued that this corroborated their stance that the prescribed procedure in terms of the Policy was not followed.

[23] In my view, this is where the requirements of each member examining each bid for responsiveness and functionality come into play. On the evidence before me, at least one of the BEC committee members, Luthando Mashiya, states as follows: *'neither myself, nor any of the other members of BEC, considered each and every*

bid prior to taking of decisions...our modus operandi was for each member to evaluate a bid and finalise it. This resulted in awards having been made where some committee members, in each instance, never had regard to the bid that received the award, and also resulted in the disqualification of bidders where some members, in each instance, never had eyes on the bids that disqualified.' This was corroborated by the other members in reports to the Municipal Manager.

[24] This on its own is contrary to the prescript of the Policy which dictates the process of evaluating *each* the bidder's ability. It is evident to me that the process adopted by the BEC did not comply with the Policy and thus did not comply section 217 of the Constitution which obliges organs of state to contract for goods or services 'in accordance with a system which is fair, equitable, transparent, competitive and cost-effective.

[25] The quorum composition, a majority of the bid committee, is regulated by clause 32 of the Policy. A majority is made up of those members physically present to make up the quorum and the decision taken by the majority and the meeting where is a quorum, that results in a valid and binding act of the committee.

[26] According to members of the BEC they individually attending to a bid and they did not individually attend to each and every bid. This does not conform to that required in clause 33(1) (b) of the Policy. In addition, the decision taken by the BEC members individually as regards the bids they individually accessed will not constitute a quorum and as such the act of the BEC will not result in one that is valid and binding. Thus the decision of one member does not constitute a majority of the committee to form a quorum. Yet another contravention of section 217 and this goes even further, in my view, as it clearly resulted in some bidders being excluded over others.

[27] There is also the issue of the BAC having not been properly constituted as is required by clause 34(2) of the Policy. This clause states that the BAC *must* be made up of at *least* four senior managers. At least, one of which is a *'senior supply chain management practitioner who is an official of the municipality'*.

[28] The applicant argued that it is undisputed that Mr Malilula, a Procurement Officer, who sat on the BAC, was not a senior supply chain management practitioner as is required by clause 34(2) of the Policy. To this end the BAC was not properly constituted. From the use of the word '*must*' in this clause it can be said that the composition of the BAC is peremptory.

[29] The requirement of the audited annual financial statement is regulated by clause 25(d) (i) of the Policy. If the value of the bid transaction is expected to exceed R5 million, if by law a bidder is obliged to prepare annual financial statements, then the Policy requires that that bidder submit it annual financial statements for the past three years or if established during the past three years.

[30] According to the applicant the BEC in these circumstances was obliged to establish if each bidder was required by law to submit the audited annual financials. This failure to consider this requirement in line with clause 25(d) (i) also results in a contravention of section 217. To this end the failure to submit these audited annual financial statements resulted in some bidders being disqualified when they were not required in law to submit these financials. This in my view amounts to arbitrary decision making and as such resulted in bidders being disqualified unlawfully.

[31] Applicant's counsel relied on what he terms as unlawful decisions having been taken by the various committees and as such the applicant's obligation to comply with section 217 of the Constitution necessitates declaring these irregularities as unlawful. This declaration necessitated this application to secure judicial oversight that had occurred in the evaluation and the adjudication of the bids submitted.

[32] It is clear from the discussion above that the irregularities are such that they the deviation there from is not justifiable, reasonable and resulted in the process being procedurally unfair to all the bidders who submitted bids and not only the respondents. In the circumstance of this case I find that the best cause would be that the entire process commences *de novo*.

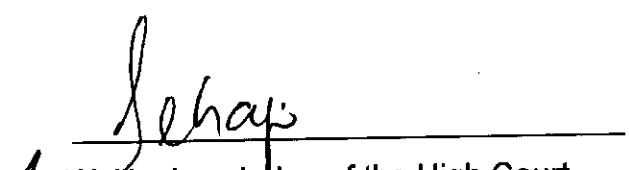
[33] As I stated above, if the applicant was too be successful in proving that the internal process that it followed falls to be review, this finding would not necessitate that I examine the individual external process of the respondents.

[34] The costs are to follow the result. The respondents, Khulani Trading Enterprise CC, Mothakge Phadima Construction and Sanitary Works and White Hazy Building Construction, and Kinki Electrical Contractor and DGDC JV, who opposed this application, are to pay the costs of this application on a party and party scale such to include the employment of senior counsel, jointly and severally the one paying the other to be absolved.

[35] Consequently the following order is made:

[35.1] The tender process pertaining to tender number SK8/3/1/16/2014/15 is duly declared unlawful and set aside. The fifteen awards in respect of such tender (SK8/3/1/16/2014/15), to all the respondents, are hereby set aside and it is ordered that the tender be re-advertised and recommence the procurement process with immediate effect.

[35.2] The respondents, Khulani Trading Enterprise CC, Mothakge Phadima Construction and Sanitary Works and White Hazy Building Construction, and Kinki Electrical Contractor and DGDC JV, who opposed this application, are to pay the costs of this application on a party and party scale such to include the employment of senior counsel, jointly and severally the one paying the other to be absolved.



W. Hughes Judge of the High Court

Counsel for Applicant: B H SWART SC and S G GOUW
Instructed by: VERVEEN ATTORNEYS (Ref: A L Maree / V98)
Telephone no. 012 3460049

Counsel for Respondents: P G CILLIERS SC and J H ROELOFSE
MOTHAKGE PHADIMA CONSTRUCTION AND SANITARY WORKS AND WHITE HAZY BUILDING CONSTRUCTIONS Case no. 60180/15 and KHULANI TRADING ENTERPRISES CC Case no. 60186/15
Instructed by: K T MOKOENA ATTORNEYS (Ref: MR T MOKOENA)
Telephone no. 086 1111 898

Counsel for Respondent: M HUGO
KINGKI ELECTRICAL CONTRACTORS AND DGDC JV Case no. 60185/15
Instructed by:
Telephone no. 082 6377325 / 012 1110413