




**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

Case Number: 21819/2020

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED.
 SIGNATURE	<u>09.06.2022</u> DATE

In the matter between:

COLVIC MARKETING & ENGINEERING (PTY) LTD

Applicant

and

MINISTER OF PUBLIC WORKS AND INFRASTRUCTURE

First Respondent

BSE DISTRIBUTORS WESTERN CAPE CC

Second Respondent

ECM TECHNOLOGIES (PTY) LTD

Third Respondent

BLUE APPLE TRADING CC

Fourth Respondent

MATAKANYE CONSTRUCTION CC

Fifth Respondent

BSE DISTRIBUTIONS CC (Reg no. 1988/032140/23)

Sixth Respondent

JUDGMENT

AC BASSON, J

Introduction

[1] This is an application for the review of a decision taken by the Department of Public Works (*“the Department”*) to award the tender for the supply of old generation type Bailey bridge components, materials and equipment for the construction of bridges to the sixth respondent (BSE Distributions CC - *“BSE”*). The application for review is brought in terms of the Promotion of Administrative Justice Act¹ (*“PAJA”*).

[2] The applicant (Colvic Marketing & Engineering (Pty) Ltd) seeks an order setting aside the decision of the Department and for an order substituting the decision with one awarding the tender to it. The applicant mainly seeks to review the tender on the basis that it was awarded to BSE on the strength of misrepresentations that BSE made in its bid as well as for serious failure on the part of the Department to properly evaluate its bid. This application is opposed by the Department and BSC only.

[3] The grounds of review are:

- 3.1 The Department unlawfully and irrationally rejected the applicant’s bid solely because it was not satisfied with the formal appearance of certified copies of artisanal trade qualifications that were submitted as part of the applicant’s bid. These copies were rejected because they bore a stamp from a previous certification, even though there was no basis in law or in fact for the Department to reject these certified copies.
- 3.2 The Department failed to reject BSE’s bid even though it clearly failed to meet the functionality criteria of the tender. In particular, BSE did not have the necessary manufacturing capacity or the necessary accreditation to meet the functionality criteria.
- 3.3 These decisions by the Department collectively were unfair and unlawful in that they did not reflect a fair, equitable, transparent, competitive or cost-effective procurement process as contemplated in section 217 of the Constitution of the Republic of South Africa, 1996.

¹ Act 3 of 2000.

[4] The applicant submitted that its bid ought to have been accepted as the only responsive bid and that the tender ought to have been awarded to it. Consequently, the applicant submitted that it is entitled to an order substituting the decision of the Department with a decision awarding the tender to it.

The invitation to bid

[5] On 19 July 2019, the Department published an invitation to bid under the tender reference number H19/001GS for the appointment of a service provider to supply old generation type Bailey bridge components, materials and equipment for the construction of bridges on a three-year term contract (*“the tender”*). The tender is to terminate by effluxion of time at the end of September 2022.

[6] A Bailey bridge is described by the applicant as a type of portable prefabricated truss bridge. It was originally developed by the British military for use during the second world war. Because it requires no special tools or heavy equipment to assemble and because the elements of the bridge are small and light enough to be carried in trucks and lifted into place without the use of a crane, they continue to be used in civil engineering to provide temporary crossings for pedestrian and vehicle traffic, particularly where permanent bridges have been destroyed by floods or other incidents. Bailey bridges may also be used to provide permanent solutions to areas where it is not feasible to bring in heavy machinery to construct any other kind of bridge.

[7] The purpose of the bid in the present matter is to improve accessibility in rural areas to the communities living there.

[8] The tender states that the refurbished Bailey bridge components of the Department of Defense have been depleted and that new components now had to be procured. The purpose of the tender is set out as follows:

“The Department of Public Works requires the appointment of an experienced service provider who has the relevant experience in providing bridge components, supplying construction materials and equipment for construction of bailey bridges.”

[9] The tender involves the following:

- 9.1 The fabrication of the components and the delivery of those components to the bridge construction sites across South Africa;
- 9.2 The supply and delivery of various other construction materials as stated in the bill of materials. Bulk construction materials were to be sourced within the local vicinity of construction sites to empower local suppliers;
- 9.3 The supply and delivery of tools and equipment as stated in the bill of materials;
- 9.4 Bidders were required to comply with local production and content.

[10] The functionality criteria that the bidders were required to meet in terms of the tender, included the following:

- 10.1 Company experience in marketing steel bridges, which was given a weighting factor of 30% (*“the experience criterion”*). Here the bid document requires that the company must *“provide indicating list and type of projects completed (completed bridges projects similar to the scope off this tender only will be considered)”*.
- 10.2 The manufacturing workshop, its location and its capacity to handle the amount of workload in maximum steel tonnage that could be handled per month, which was given a weighting factor of 30% (*“the manufacturing criterion”*);
- 10.3 A minimum of two qualified artisans to be used in the fabrication of components for Bailey bridges with a minimum of two years each post trade certification experience, which was given a weighting factor of 20% (*“the artisan criterion”*); and
- 10.4 The accreditation and certification of the company and the workshop, which was given a weighting factor of 20% (*“the accreditation criterion”*).

[11] The applicant and BSE responded to this tender. The Department awarded the applicant the full score under the *manufacturing criterion* and the *accreditation criterion* but awarded it zero points under the *artisan criterion* and the *experience criterion*. It is

the latter two decisions to award zero points to BSE and to select BSE instead of the applicant as the successful bidder, that constitute the premise of this review application.

[12] BSE was awarded the tender by the Department in September 2019. BSE immediately commenced with manufacturing the bridge components for the Department. By the time the answering affidavit was prepared in May 2021, BSE had already manufactured and supplied 14 bridges to the Department under the tender, within the required time frames.

The sixth respondent (“BSE”)

[13] BSE opposes this application on the following grounds:

- 13.1 The applicant has unreasonably delayed in launching this application and therefore condonation should be refused;
- 13.2 The first respondent’s award of the tender to BSE is not susceptible to review;
- 13.3 BSE’s bid complied with the terms of the tender;
- 13.4 To the extent that the award of the tender is found to have been unlawful, it would not be just and equitable to substitute the decision of the first respondent and to set aside the contract due to the significant period that has elapsed since the award of the contract and in light of the work that has already been done by BSE under the tender; and
- 13.5 The relief sought by the applicant may be rendered moot by the time the application is heard and determined.

[14] BSE submitted that, with its experience in manufacturing and supplying Bailey bridges, its bid for the tender satisfied all the competencies for the works required and submitted that the tender was lawfully awarded to it. BSE referred to the fact that it has been supplying, manufacturing and refurbishing Bailey bridge components for the Department since 2009 and that it has since supplied and refurbished Bailey bridge components for the government for over 11 years. BSE further elaborated that, during this period, it has supplied components for approximately 20 bridges and submitted that it has a wealth of knowledge of, and experience with, Bailey bridges, supplying both the public and private sectors.

The applicant's delay in launching the review

The delay

[15] Section 7(1) of PAJA provides that any proceedings for judicial review in terms of section 6(1) must be instituted without unreasonable delay and not later than 180 days after the date on which the person concerned was informed of the administrative action, became aware of the action and the reasons for it, or might reasonably have been expected to have become aware of the action and the reasons.

[16] In terms of section 9 of PAJA the period of 180 days may be extended for a fixed period by agreement between the parties or, failing such agreement, by a court on application by the party concerned. Such an application may be granted where the interests of justice so require.

[17] On its own version, the applicant became aware that it was an unsuccessful tenderer on *27 September 2019*. The applicant was required in terms of section 7 of PAJA, to launch the main application within a period of 180 days from 27 September 2020. This 180-day period lapsed on 25 March 2020.

[18] The applicant claims that it only became aware of the reasons for its unsuccessful bid on *17 October 2019*. Calculated from this date, the 180-day period lapsed (at the latest) on 14 April 2020.

[19] The main application was only launched on *7 May 2020*. This is 43 days after the period prescribed by section 7 of PAJA had lapsed, if reckoned from 27 September 2019, and 23 days after the later period, if claims from 17 October 2019.

[20] The review application is out of time on both constructions. The applicant also did not launch a condonation application simultaneously with the review application. It was only filed much later. And, although the initial delay in launching the review application is not that excessive, this delay was significantly worsened by a further unreasonable delay in filing the replying affidavit,

[21] In November 2020, BSE notified the applicant that its review application was launched outside of the 180-day period and that it ought to apply for an extension of time in terms of section 9 of PAJA. At that stage the applicant ought to have launched the condonation application but only did so on 8 April 2021. Taking into account the fact that the tender was awarded as far back as 27 September 2019, a period of one and a half years of a three year contract had, by that time, already lapsed.

[22] Despite the fact that the reasons for the rejection of the bid were known as far back as 17 October 2019, the applicant only approached counsel for advice on 8 March 2020. The explanation for this delay is that the papers are voluminous and technical in nature and that it took time to prepare which it could not reasonably do before the end of March 2020. The applicant also alleges that it had been waiting for some information from the Department which was not forthcoming. The Department, in opposing the application for condonation, reiterates that it did provide the applicant with written reasons on 17 October 2019. The applicant was furnished with the functionality criteria scored by the applicant and other bidders; the price and preference criteria of the applicant and other bidders; the Bid Evaluation Committee meeting minutes and related notes; the Adjudication Committee notes and recommendations; the applicant's original bid submission documents and a review of the applicant's bid submission documents with an authorised individual of the Department. The applicant responded that it intended relying on the provisions of PAJA to obtain further documents, *inter alia*, relating to other bidders that participated in the tender process. The Department responded to this request on the same day and advised that this request for additional documents was to be treated separately in terms of PAJA from the reasons for the applicant's successful bid. According to the Department, the applicant had all the necessary information in order to consider whether to launch a review application and that the applicant did not require the PAJA documents as it was aware of the reasons for its unsuccessful bid. However, notwithstanding the fact that the applicant had all the documents pertaining to the refusal of its bid, it still waited until a week before the first period prescribed to approach counsel for advice.

[23] I am in agreement with the Department. The applicant had sufficient information at its disposal to launch the review application: There was not need for information regarding the other bidders in order to launch the review. Also, the applicant's

explanation as to why it waited until the end of March 2020 to only then seek legal advice is tenuous particularly in circumstances where the 180- day time limit was looming large.

[24] The Department filed its answering affidavit in October 2020. The replying affidavit was, however, only filed almost 193 court days late.

Should the delay be condoned?

[25] The Supreme Court of Appeals in *The Camps Bay Ratepayers' and Residents' Association v Harrison*² sets out what should be taken into consideration in deciding an application for condonation in the context of section 9(2) of PAJA:

“...Section 9(2) however allows the extension of these time frames where 'the interests of justice so require'. And the question whether the interests of justice require the grant of such extension depends on the facts and circumstances of each case: the party seeking it must furnish a full and reasonable explanation for the delay which covers the entire duration thereof and relevant factors include the nature of the relief sought, the extent and cause of the delay, its effect on the administration of justice and other litigants, the importance of the issue to be raised in the intended proceedings and the prospects of success.”

[26] Also in the specific context of PAJA, the Supreme Court of Appeals in *Opposition to Urban Tolling Alliance and Others v The South African National Roads Agency Ltd & Others*³ (“OUTA”) held that the legislature determined a delay exceeding 180 days as “*per se unreasonable*”. In other words, after the 180-day period has lapsed, the issue of unreasonableness is pre-determined by the legislature; it is unreasonable *per se*. The court is only empowered to entertain the review application if the *interests of justice* dictate an extension in terms of section 9 of PAJA. The Supreme Court of Appeals in *Asla Construction (Pty) Ltd v Buffalo City Metropolitan Municipality*⁴ (Asla) explains:

“The respondent therefore required an extension of the period fixed by PAJA within which to bring the application for review. Section 9 contemplates a

² 2010 JDR 0099 (SCA); [2010] 2 All SA 519 (SCA) (17 February 2010) at para 54.

³ [2013] 4 All SA 639 (SCA).

⁴ 2017 (6) SA 360 (SCA) at para 8.

substantive application to the relevant court or tribunal, by the person or administrator concerned. That application ought to have been made by the respondent when it first approached the court for relief. It did not do so. Once the appellant had raised the issue of compliance with PAJA, the respondent was obliged to launch an application in terms of this section for an extension of the fixed period. This application could thereafter have been consolidated with the review application. The correct procedure would have ensured that the relevant facts were placed before the court a quo, to enable it to exercise its discretion properly.”

[27] The applicant launched the main application for review outside of the 180-day period prescribed by PAJA which delay is regarded as “*per se unreasonable*”. A court may, however, still condone such delay. The overriding question is whether it is in the interest of justice to grant condonation with reference to all the factors listed by the court in *Camps Bay Ratepayers*.⁵ Starting with the explanation for the delay. I am not persuaded that the applicant has furnished a full and reasonable explanation for the delay. I have already referred to the various delays and the absence of a proper explanation therefore.

[28] What cannot be ignored is the fact that, even though the extent of the initial delay might not be extensive, more than 2 years have elapsed since BSE was appointed as service provider and that more than 2/3 of the contract, had already elapsed as of May 2021 and that 14 bridges had already been manufactured. Adding to the applicant’s woes is the fact that its replying affidavit is also unreasonably late. The Department served its answering affidavit on 19 October 2020 and in terms of the Rules of Court, the applicant was obliged to file its replying affidavit within 10 court days, on 2 November 2020. The applicant’s replying affidavit was served on the Department’s legal representative on 27 July 2021. This is approximately 193 court days late (approximately six months out of time). The applicant merely states that the delay was caused by the fact that it had to acquire certain evidence from the South African Institute of Steel Construction. No proper explanation is, however, forthcoming about what had transpired in the period between October 2020 and 5 July 2021. The applicant vaguely refers to

⁵ *Supra*.

the fact that it had to make various telephone calls and send some emails. The applicant does not, however, attach any of these emails or letters directed at the South African Institute of Steel Construction and has also not set out who made the telephone calls and to whom.

[29] By the time this review application served before court on 22 April 2022, at best for the applicant, 5 months are left until the contract comes at an end by effluxion of time.

Prejudice

[30] The applicant states in its papers that the respondents face no substantive prejudiced as a result of the late filing of the replying affidavit.

[31] The prejudice that BSE and the Department will suffer in general as a result of all of these delays (the late filing of the review application and the substantial delay in filing a replying affidavit) is certainly not negligible, especially if regard is had to the time period that is left on the contract before it expires. Also, it is evident from the facts that approximately 14 bridges have already been manufactured. But, apart from this, there is a need for finality in administrative acts.⁶ More importantly, it is not only the Department and BSE that will suffer prejudice because of these delays, but also the prejudice that will be caused to the communities for whom the bridges are destined if the tender is declared invalid.

Prospects of success

[32] Considering the prospects of success in the context of a condonation application does not entail a determination of the merits. The Supreme Court of Appeals in *Asla*⁷ held as follows:

⁶ *Beweging vir Christelike-Volkseie Onderwys v The Minister Education* 2012 JDR 0505 (SCA): “[23] Underlying that latter aspect of the rationale is the inherent potential for prejudice, both to the efficient functioning of the public body and to those who rely upon its decisions, if the validity of its decisions remains uncertain. It is for that reason in particular that proof of actual prejudice to the respondent is not a precondition for refusing to entertain review proceedings by reason of undue delay, although the extent to which prejudice has been shown is a relevant consideration that might even be decisive where the delay has been relatively slight (*Wolgroeiërs Afslaers*, above, at 42C).”

⁷ *Supra* fn. 5 at para 12-13.

*“Although a consideration of the prospects of success of the application for review requires an examination of its merits, this does not encompass their determination. In *Beweging vir Christelik-Volkseie Onderwys v Minister of Education* [2012] 2 All SA 462 (SCA) ([2012] ZASCA 45) paras 42–44 the proposition that a court is required to decide the merits before considering whether the application for review was brought out of time or after undue delay and, if so, whether or not to condone the defect, was rejected. Thereafter, in *Opposition to Urban Tolling Alliance and Others v South African National Roads Agency Ltd and Others* [2013] 4 All SA 639 (SCA) ([2013] ZASCA 148) paras 22, 26 and 43 it was decided that a court was compelled to deal with the delay rule before examining the merits of the review application, because in the absence of an extension the court had no authority to entertain the review application. The court there concluded that because an extension of the 180-day period was not justified, it followed that it was not authorised to enter into the merits of the review application. However, in *South African National Roads Agency Ltd v Cape Town City* 2017 (1) SA 468 (SCA) ([2016] 4 All SA 332; [2016] ZASCA 122) para 81 a submission based upon this decision, namely that the question of delay had to be dealt with before the merits of the review could be entertained, was answered as follows:*

'It is true that . . . this court considered it important to settle the court's jurisdiction to entertain the merits of the matter by first having regard to the question of delay. However, it cannot be read to signal a clinical excision of the merits of the impugned decision, which must be a critical factor when a court embarks on a consideration of all the circumstances of a case in order to determine whether the interests of justice dictate that the delay should be condoned. It would have to include a consideration of whether the non-compliance with statutory prescripts was egregious.'

*A full and proper determination of the merits of the review application was accordingly dependent upon a finding that the respondent's failure had to be condoned. As stated in *Opposition to Urban Tolling Alliance* supra para 26:*

'Absent such extension the court has no authority to entertain the review application at all. Whether or not the decision was unlawful no longer matters. The decision has been validated by the delay'

[33] It is not necessary to consider the prospects of success in light of the unreasonableness of the delay. I will nonetheless make a view brief observations on why I am of the view that the prospects are in any event slim. I have already referred to the fact that on two criteria (the manufacturing and the accreditation criteria) the applicant received a full score. On the experience and artisan criteria, the applicant was awarded zero points.

Artisan criteria

[34] The Department rejected the trade certificates of two of the applicant's artisans on the basis that the certificates were certified copies of a copy and not a certified copy of the original. In respect of this criteria, the applicant does have prospects of success: Nothing prevents a Commissioner of Oaths to certify a copy of an original that already bores the stamp of a previous Commissioner of Oaths in circumstances where the Commissioner of Oaths (that certified the documents in question) confirmed that at the time she certified the documents after she was presented with and examined the original qualification certificates in question.

The experience criteria

[35] The applicant scored zero on this criterion. The minutes of the bid evaluation committee of the Department reflect that the applicant, as a bidding entity, does not possess the required minimum experience in the manufacturing of steel bridges.

[36] The applicant was required to indicate by providing a company profile, a list and type of projects completed (namely completed bridge projects similar to the scope of the tender), the year in which it was completed and the value of the projects.

[37] From the applicant's company profile and bid document, it does not appear that the applicant (as a bidding entity) has manufactured steel bridges in its more than 20 years' of existence. The Department pertinently raises this lack of experience of the applicant as a bidding entity in its answering affidavit. The applicant, in its replying affidavit pays scant attention to this claim and merely states that the fact that the applicant's main business relates to the construction of fuel structures, does not mean that the applicant is not able to construct steel structures. The remainder of the replying affidavit deals with the condonation application for

the late filing of the replying affidavit and with attacking the experience of BSE.

[38] The applicant describes itself as a supplier of turnkey product and service solutions for the safe management and storage of fuel at filling stations, commercial sites and depots. If regard is had to what is stated in the founding papers, it is not claimed that the applicant (as an entity) has in fact manufactured bridges in the past. What it does say is that it has the capacity to do so through the expertise of a certain Mr. Forbes. Mr. Forbes is an independent contractor and does not form part of the company structure of the applicant. Considering the Department's submission that what was required was that the company had to show experience in manufacturing steel bridges by providing a company profile setting out the relevant experience. On the papers as they stand, the applicant, as *the bidding entity* and a juristic person with a separate legal *persona*, does not have any experience in the manufacturing of steel bridges. The applicant also did not provide any proof that any of its employees have the requisite experience in the construction of bridges. It was therefore submitted on behalf of the Department that the point allocation of zero is justified and that this was a rational score. Compared to the fact that BSE has extensive experience in the supply of Bailey Bridges and suspension bridge materials, the applicant's prospects of success in succeeding to overturn the award of the bid is slim.

Administrative action rendered unassailable

[39] One last point. In *OUTA*⁸ the court unequivocally endorsed the principle that unlawful administrative action may be rendered unassailable due to a delay:

"The fourth basis invoked by the appellants as to why the 180 day time bar should be extended was that it is the requirement of the rule of law that the exercise of all public power should be lawful and that SANRAL and the government has failed to act legally. As I see it, however, the argument is misconceived. While it is true that the principle of legality is constitutionally entrenched, the constitutional enjoiner to fair administrative action, as it has been expressed through PAJA,

⁸ *Supra*, see fn. 4 at para 36.

expressly recognizes that even unlawful administrative action may be rendered unassailable by delay”.

[40] In my view, the present matter is one of those cases where the administrative action is, in any event, rendered unassailable due to the delays. With only a few months left in the contract and in circumstances where BSE has already manufactured 14 bridges, coupled with the prejudice that would be caused to the respondents and public interest element in the finality of administrative decisions and the exercise of administrative functions, the administrative action (even if it is held to be unlawful which for the reasons set out hereinbelow is not determined in this judgment), renders the decision unassailable.

Order

[41] In the event the following order is made:

1. The application for condonation for the late filing of the review application is dismissed.
2. The applicant is ordered to pay the costs of the first and sixth respondents such costs to include the costs of two counsel where so employed.



A.C. BASSON
JUDGE OF THE HIGH COURT
GAUTENG DIVISION OF THE HIGH COURT, PRETORIA

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 9 June 2022.

Date of hearing

22 April 2022

AppearancesFor the applicant

Adv O Ben-Zeev

Instructed by Girard Hayward Inc

For the 1st respondent

Adv HC Janse van Rensburg

Instructed by State Attorney Pretoria

For the 6th respondent

Adv N Cassim SC

Adv K Naidoo

Instructed by C De Villiers Attorneys