

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE**

(1) REPORTABLE: ~~YES~~/NO

(2) OF INTEREST OF THE OTHER
JUDGES: YES/~~NO~~

(3) REVISED

DATE

18/3/2022.....SIGNATURE.....

CASE NO: 3007/2021

IN THE MATTER BETWEEN:-

BAATSHUMA (PTY) LTD

APPLICANT

AND

TUBATSE LOCAL MUNICIPALITY

FIRST RESPONDENT

REVENUE ENHANCEMENT AGENCY (PTY) LTD

SECOND RESPONDENT

MORKALIO AND HLAHLETETA TRADING

THIRD RESPONDENT

LEGOTO IT AND PROJECTS

FOURTH RESPONDENT

JUDGMENT

MANGENA AJ

- [1] Fetakgomo Tubatse Local Municipality (“the municipality”) is an organ of State as defined in Section 239 of the Constitution Act 108 of 1996. It is enjoined to comply with Section 217 of the Constitution in the procurement of goods and services and ensure that the process is fair, competitive and transparent.
- [2] On or about 28 August 2020, the municipality issued a tender inviting interested bidders to apply for appointment as service providers to implement revenue enhancement projects for a period of 36 (thirty-six) months. The closing date for the submission of the bid documents was 28 September 2020 at 12h00.
- [3] Bidders’ attention was drawn to a “very important notice on disqualification” which stated that “a bid not complying with the peremptory requirements stated hereunder will be regarded as not being an “Acceptable bid” and as such will be rejected!! The requirements listed were as follows:-
- *“Compliant tax status (the Municipality will verify tax compliance during evaluation and adjudication stage).*

- *Joint venture agreement, signed by both parties stipulating the percentage of shareholding agreement.*
- *The bidders must submit both manual and electronic tender document in the form of CD or USB for consideration.*
- *Submission of municipal rates and taxes or municipal service invoice issued to the bidder and all directors, by any other Municipality or municipal entity. The rates and taxes charges must not be in arrears for more than 3 (three) months for the company and directors. If you are renting, attach valid signed lease agreement.*
- *Fully signed and completed MBD forms.*
- *Certified ID copies of all directors/members/shareholders of the company/business (for all companies in case of a joint venture).*
- *All pages signed or initialled.*
- *Authority of signatory, signed by all the parties (a letter showing who is authorised to sign the documents).*
- *Price amendment without signature will amount to disqualification.*
- *Provide central supplier database (CSD) number”.*

[4] The municipality received bids from several companies and in due course evaluated them for compliance with the administrative requirements and functionality. Baatshuma (Pty) Ltd, was eliminated for non-compliance with peremptory requirements on the basis that not all pages were signed and initialed. The tender was awarded to the second respondent, Revenue Enhancement Agency (Pty) Ltd with Registration Number 2018/633/38/07 on 15 December 2020.

[5] Dissatisfied with the outcome of the evaluation and adjudication process, applicant instituted these review proceedings on 03 May 2021 for an order amongst others, declaring the award of the tender by the first respondent (municipality) to the second respondent invalid, declare the contracts concluded between the municipality and the second respondent pursuant to the award of the tender void *ab initio*; condonation for the late filing of the review and the extension of the 90 days period referred to in Section 5(1) of PAJA in so far as it may be necessary and costs of suits. The municipality was further required to file the record in terms of Rule 53 of the Uniform Rules of Court.

[6] The municipality has filed the record and is opposing the application, largely on the basis that the Applicant has misrepresented facts and allegedly committed fraud regarding its BEE certificate. It is contended that the Applicant is unsuited to institute these proceedings because “his hands are not clean”. On this basis, it was argued that it has no standing to approach this court and have the tender reviewed and set aside.

[7] The contention by the municipality is untenable. The right of a party to institute court proceedings has got nothing to do with BEE or tax compliant status more especially in public procurement matters. Tax and BEE status are relevant for adjudication purposes and allocation of points and remain

subject of dispute until determined by a court of law. Where a party is alleged to have submitted a fraudulent tax clearance or a fraudulent BEE certificate as in this case, such a party retains the constitutionally entrenched right to approach the court for a relief arising out of an exercise of a public power. The right to challenge the allegation on misrepresentation is antecedent to the right to approach the Court. It goes without saying that the mere fact that a party is alleged to have committed fraud cannot be a reason to deprive him or her of the legal standing to institute the proceedings. Baatshuma has an unquestionable standing as an affected party. It seeks to vindicate a constitutional right to a fair and just administrative action. Its standing is therefore to be determined in terms of Section 38 of the constitution. **See *Esorfranki Pipelines (Pty) Ltd and Another v Mopani District Municipality and others*, [2014] 2 ALLSA 493 (SCA) at Paragraph 16 and 17.**

[8] The municipality further sought to argue without force that the application was launched out of time and therefore unreasonably delayed. There is no merit in this contention as the application was brought within the 180 days prescribed by PAJA even if it were to be accepted that the Applicant became aware of the decision to award the tender to the second Respondent on 15 December 2020. The review application was lodged with the Registrar on 03 May 2021. There was no delay in the launching of the application.

[9] Earlier on I alluded to the peremptory requirements which bidders had to comply with before their bids can be considered for evaluation and adjudication. These requirements fell under administrative compliance. Once a bidder has been found to be administratively compliant, his or her bid will

progress to the next stage for evaluation on functionality. The tender document clearly stated that: the bidder must obtain a minimum score of 70% of points allocated for quality (functionality). The bidder who scored the highest points on functionality will be recommended for appointment. The bidders will be ranked according to the points scored.

[10] Under Revenue enhancement and Credit Control the scoring was categorised into four areas each with its own weighting and the points to be allocated upon production of the requisite proof. A bidder was required to attach signed reference letters on credit control environment where four or more letters entitled him/her to 30 points; attach a proof of ownership or licence agreement in respect of a system to be utilized. This system had to be compatible with credit control management system and carried 30 points, the team leader and assistant team leader had to have an experience of 10 years in municipal credit control to earn 20 points and the final 20 points were for a presentation of the project implementation plan.

[11] The Applicant attacks the decision to award the tender to the second respondent on the basis that it does not have the requisite experience and did not meet the functionality requirements of the tender invitation. In support of this attack, Applicant contended that the second respondent ought not to have been awarded 30 points on the first criteria regarding signed reference letters as none whatsoever was submitted. The municipality conceded that there were no reference letters attached and the scoring of 30 points on this category was

a mistake. The municipality has however failed to give an explanation on how the mistake occurred, when was it discovered and how was it corrected. The explanation was crucial in view of the frontal attack which the Applicant made on the allocation of the points. When an allegation is made in motion proceedings, it is not enough to deny it without facts and rely on a scanty affidavit by another person who just state that I confirm the contents when the contents themselves provide no evidence to counter the allegations made in the founding affidavit. **See *Kalil N.O and Others v Mangaung Metropolitan Municipality Others, 2014 (5) SA 123 (SCA)***. Indeed, law reports are replete with authorities that in motion proceedings an affidavit serves an important purpose of adducing evidence for the parties involved in a legal dispute. A party who fails to deal with an averment made by an opponent and/or does so scantily in circumstances where he or she was required to respond with some degree of detail and certainty cannot expect the court to come to his or her rescue. See ***Wightman t/a JW Construction v Headfour (PTY) LTD, 2007 (2) SA 128 (CPD)*** at para 12 and 14.

- [12] It is indisputable that the Municipal Manager was not part of the evaluation and adjudication committee and therefore does not have first-hand knowledge of the circumstances under which the so-called mistake occurred. One would have expected him to establish this from Mr Makgopa and other members of the evaluation committee and provide in some detail as to how the mistake happened. The municipality failed to do so and instead dealt with this serious allegation in a perfunctory manner. The denial that the second respondent was allocated points in circumstance where he was not supposed to pales into

insignificance in the face of the record submitted by the municipality. The denial is bald, unsubstantiated and if anything conveys the determination and the extent to which the municipality was prepared to go to cover an irregularity in the award of the tender to the second respondent. The defence that there was a misallocation of points is clearly a fabrication unsupported by the record. It is disconcerting that a municipal manager employed to protect public funds and ensure clean administration can go to this great length to defend a process that is clearly tainted with irregularity, unfairness and I dare say corruption. One would have expected a responsible municipal manager to demand accountability from all the officials who were involved in the evaluation and adjudication of this tender. This failure by the municipal manager to call for accountability is a manifestation of the systemic rot prevalent in the award of tenders by those entrusted with the power to ensure that the objectives of the constitution are realized.

- [13] An attempt by the municipal Manager to re-allocate the points initially ascribed to signed reference letters to the proof of ownership or licence agreement category finds no favour with me for the simple reason that no adequate explanation occurred as to how the second respondent was incorrectly scored. The municipality is the custodian of the record and when it is called upon to produce the record, it cannot do so in drips and drabs. A record is produced for usage by the aggrieved party and once given it is taken that it is complete and accurate unless stated otherwise. In this case the municipality did confirm that the record is complete. The contents cannot be amended mid-stream at the whims of the municipality in answer to the supplementary

affidavit deposed to based on the record supplied. To allow the municipality to do so will negate the importance of the record and will be prejudicial to the applicant. In a nutshell, the municipality cannot tailor its case by amending the record on the flimsy reason that it was incomplete or inaccurate.

[14] The conduct of the municipal manager and that of Mr Makgopa sought to obstruct and hinder the Applicant from continuing with this litigation. They together hatched a plan to cover their tracks with the assistance of Mr Sekgololo to obfuscate issues and create side shows away from the real issue for consideration. This conduct should be deprecated

[15] In this regard, I align myself with the views of the Supreme Court of Appeal in ***Kalil N.O and Others v Mangaung Metropolitan Municipality and others, 2014 (5) SA 123 (SCA)*** where it was said:

“ [30] This is public interest litigation in that it examines the lawfulness of the exercise by public officials of the obligations imposed upon them by the constitution and national legislation. The functions of public servants and government officials at national, provincial, municipal levels is to serve the public and the community at large has the right to insist upon them acting lawfully and within bounds of their authority. Thus where, as here, the legality of their

*actions is at stake, it is crucial for public servants to neither be coy nor to play fast and loose with the truth. On the contrary, it is their duty to take the court into their confidence and fully explain the facts so that an informed decision can be taken in the interest of the public and good governance. As this court stressed in Gauteng **Gambling Board and Another v MEC for Economic Development, Gauteng, 2013 (5) SA 24**, our present Constitutional order imposes a duty upon state officials not to frustrate the enforcement by courts of constitutional rights”.*

- [16] On the basis of the findings that the second respondent was not entitled to be awarded 30 points on the signed reference letters category and that it was correctly scored zero (0) on no proof of ownership or license agreement of a system, the application succeeds with costs including costs of two counsel where employed.
- [17] Having found that the tender was awarded irregularly and liable to be set-aside due to invalidity, the question which begs for an answer is- should the second respondent be allowed to keep the proceeds of an invalid contract? The answer to this question is found in the case of **SABC SOC Ltd and Another v Mott Macdonalds SA (pty) Ltd [2020] ZAGPHC 5 (08 December 2020)** where Keightley J gave a useful summary of the principles to be taken into account. The overriding consideration is the public interest and the duty of

the court to protect the constitution as a bulwark against the plundering of the public resources. Stamping out unlawful procurement practices is imperative for good governance, which is critical to the success of our democracy. This is why the constitution itself requires state entities to follow proper procurement procedure.

- [18] It will be inimical to the values underpinning the Constitution to allow any person to retain the benefits of an irregularly awarded tender. The second respondent colluded with the municipality to perpetuate tender fraud and should not be allowed to benefit out of this conduct. In this regard, it is apposite to recall what Sutherland J (as he then was) said in ***Mining Qualifications Authority v IFU Training Institute (pty) Ltd [2018] ZAGPJHC 455 (26 June 2018)***.

“it is unnecessary that a clear case of complicity (against the contracting party) is proven; it is enough that the award was tainted by an irregularity. Were it otherwise, the plea of an innocent tenderer would as a matter of course outweigh the public interest. The pendulum should usually swing the other way. What one has not obtained through a fair and transparent process ought not to vest any moral claim to retain the spoils”.

- [19] Guided by the above authorities I have no difficulty in finding that the first respondent should be ordered to take steps to recover the public funds. I am empowered by the constitution to give an effective remedy sufficient to vindicate the principles of legality and Rule of law under the rubric of just and equitable remedy.

[20] The Applicant also prayed for an order that the first respondent be ordered to replace the second respondent with the applicant as a successful bidder. This may not be done as I am not in a position to assess the functionality component of the applicant's bid. There is also a further difficulty that the bid document has been found to be non-compliant and that finding has not been challenged.

[21] Consequently, the following order is made:

1. The decision by the first respondent to award Tender no: FTM/T05/20/21 to the second respondent on the 15 December 2020 is declared invalid, reviewed and set aside.
2. The contract concluded between the first respondent and the second respondent pursuant to the award of Tender no FTM/T05/20/2021 is *void ab initio*.
3. The first respondent is ordered to terminate the contract forthwith and institute proceedings to recover all monies unlawfully paid to the second respondent.
4. The first respondent is ordered to pay costs on attorney and client scale inclusive of costs of two counsel.

M.I MANGENA

ACTING JUDGE OF HIGH COURT OF
SOUTH AFRICA, LIMPOPO DIVISION

Appearances

For the Applicant: Adv M.E Manala

Instructed by: Rams Attorneys

For the First Respondent: Adv AC Diamond

Instructed by: Machaba Attorneys INC