


IN THE HIGH COURT OF SOUTH AFRICA  
LIMPOPO DIVISION, POLOKWANE

CASE No: 8965/2022

(1)	REPORTABLE: <input checked="" type="radio"/> YES
(2)	OF INTEREST TO OTHER JUDGES: <input checked="" type="radio"/> NO <input type="radio"/> YES
(3)	REVISED: 

11/4/2023

In the matter between:

MAXIMUM PROFIT RECOVERY (PTY) LTD

APPLICANT

and

BELA-BELA LOCAL MUNICIPALITY

FIRST RESPONDENT

MTC TAX CONSULTING (PTY) LTD

SECOND RESPONDENT

PROTEA CONSULTING INC

THIRD RESPONDENT

CIS BELT (PTY) LTD

FOURTH RESPONDENT

MTC PROTEA & CIS BELT JOINT

VENTURE

FIFTH RESPONDENT

J P SELAPYANE

SIXTH RESPONDENT

<b>JUDGMENT</b>
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DIAMOND AJ:

- [1] The Applicant renders services to organs of the state, and in particular municipalities, and at the recovering value added tax (VAT), in terms of the relevant legislation (the "VAT Review Services").
- [2] The Applicant rendered such services to the First Respondent previously in the past.
- [3] The First Respondent published an invitation to interested persons to tender, to provide VAT Review Services, on 26 January 2022. This was an invitation for the same services that the Applicant rendered to the First Respondent up until that stage.
- [4] The closing date of the tender was 4 March 2022.

- [5] The Applicant submitted a tender timeously.
- [6] On 4 May 2022, the Applicant directed an email to the First Respondent to enquire whether or not an award had been made at that stage. The letter reads as follows:

*"The above-mentioned bid refers.*

*Would you please be so kind as to advise whether the bid has been awarded yet.*

*We checked your website, however, it seems that no information has been publicised regarding the specific but as yet.*

*Your assistance is highly appreciated."*

- [7] The First Respondent did not reply to this letter.
- [8] The First Respondent awarded the tender on 12 May 2022, to the Fifth Respondent. This letter of award states explicitly that the Fifth Respondent shall sign a service level agreement with the Applicant, prior to the commencement of the contract.
- [9] The Fifth Respondent accepted the tender award on 16 May 2022.
- [10] The Fifth Respondent is a joint venture consisting out of the Second, Third and Fourth Respondents.

[11] The Applicant once again wrote a letter on 8 June 2022 requesting a copy of the opening register of the tenders.

[12] The Applicant wrote a further letter, on 9 June 2022 once again requesting the First Respondent to advise whether a bid has been awarded yet and once again stating that no information had been published on the website of the Applicant at that stage.

[13] The First Respondent replied to the request that the opening register shall be provided to the Applicant, and it did so in a letter dated 13 June 2022. The letter states as follows:

*"Kindly receive attached as requested, apologies for responding very late."*

[14] The Applicant wrote a letter on 23 June 2022, once again requesting confirmation as to whether a tender had been awarded yet.

[15] Not having received any response from the First Respondent, the Applicant apparently made a telephone call on 28 June 2022, and later confirmed the telephone call, on the same date at 12: 26 pm. The written confirmation reads as follows:

*" BELA BELA LOCAL MUNICIPALITY*

*Dear Ms. Daphney Tjabadi.*

*The above-mentioned bid refers.*

*This email serves to confirm our telephonic discussion that to date the above references bid has not been awarded yet.*

*Your response hereto is greatly appreciated.*

*Regards"*

- [16] This time around, the telephone call and the confirmation letter did succeed in prompting the First Respondents into a response. On the very same date of the very last enquiry, that is the 28<sup>th</sup> June 2022, the First Respondent responded by way of an email, at 16:14 that afternoon, stating the following:

*"Good afternoon,*

*kindly note the bit mentioned above has been awarded and we are currently busy with the contractual matters. The service provider will commence the work in the new financial year staring(sic) 1<sup>st</sup> of July 2022.*

*I would like to apologies (sic) for not responding sooner as we wanted to communicate the appointment after the contract has been signed by all parties.*

*Do not hesitate to contact me for any information you may require.*

*Kind regards*

*Tinyiko Mohale"*

[17] The Applicant responded in a letter dated 30 June 2022. In this letter the Applicant indicated that it would bring a review application and indicated that the way in which the First Respondent dealt with the correspondences, highlighted above, illustrated the First Respondent acted in bad faith, and flagrantly disregard due process and displayed a lack of transparency.

[18] The Applicant further opined in this letter, that functional criterium 4 of the tender, which states that one director of the tendering company must be a qualified chartered accountant (SA), is irrational, and constitutionally invalid. The Applicant referred, in this letter to two earlier judgements<sup>1</sup>, ("Inxuba" and "Greater Letaba"), attached a copy of one of the judgements, and demanded an undertaking that the First Respondent would not proceed with the implementation of the award made pursuant to the tender and that the First Respondent would cancel the award and proceed to re-advertise the tender with functionality criteria which are constitutionally sound.

[19] The Applicant did not receive a reply to this letter.

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<sup>1</sup> Maximum Profit Recovery (Pty)Ltd v Inxuba Yethemba Local Municipality and others Case number 1712/2020, Eastern Cape Division of the High Court and Maximum Profit Recovery (Pty) Ltd v Greater Letaba Municipality case number 2663/202, Limpopo Provincial Division.

[20] It seems to be common cause that the Fifth Respondent started to render services to the Applicant on 1 July 2022. There is no allegation, not even in the answering affidavit, where one would expect such an allegation, that the service level agreement was signed between the First Respondent and the Fifth Respondent, as is alluded to in the award letter of the 12<sup>th</sup> of May 2022.

[21] The Applicant applies that the decision to award the tender to the Fifth Respondent shall be declared constitutionally invalid, and set aside, and that the contract concluded between the First Respondent the Fifth Respondent be set aside, as well as an order for costs on an attorney and client scale.

[22] In its opposition the First Respondent relied on two defences *in limine*, the first being that the application was not urgent<sup>2</sup> and, secondly that the Applicant failed to exhaust internal remedies at its disposal as is required by Section 7 of the Promotion of Administrative Justice Act, 2000 (Act 3 of 2000) ("PAJA").

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<sup>2</sup> This application was initially brought on an urgent basis but was removed from the urgent roll and a special date for the hearing was allocated by the judge President and I am consequently not going to deal with urgency any further in this judgement.

- [23] I will deal, firstly, with the *in limine* defences.
- [24] The First Respondent states that there are several internal remedies available to an aggrieved tenderer, which are contained in several statutes.
- [25] The First Respondent then refers, in this regard to regulation 49 of the regulations promulgated in terms of the Municipal Finance Management Act (the "Supply Chain Regulations"), in which it is stated that a Municipality's Supply Chain Management policy shall allow persons aggrieved by decisions or actions by the Municipality to lodge, within 14 days of the decision or action a written objection or complaint to the municipality against the decision or action.
- [26] The First Respondent relies, secondly, on regulation 50 of the same regulations which requires that an aggrieved person should refer any dispute relating to decisions made in the process of procurement to the Municipality.
- [27] Thirdly, the First Respondent relies on Section 62 of the Local Government: Municipal Systems Act, 32 of 2000 (the "Systems Act"), and submits that this section provides an internal remedy for a tenderer.



[28] I will firstly deal with the submission that procedures available in terms of the Supply Chain Regulations, provided internal remedies which the Applicant should have exhausted.

[29] Regulation 49 clearly refers to the resolution of objections and complaints. For an internal remedy, there should be an independent and impartial third party who has remedial powers. This is not what Regulation 49 envisages.<sup>3</sup> Regulation 49, requires the person receiving the objection, to rule on the objection - it does not have any remedial powers.

[30] The position regarding Regulation 50 as a possible internal remedy is equally clear. It was ruled in DDP Valuers (Pty) Ltd v Madibeng Local Municipality<sup>4</sup> ("DDP Valuers"), since there is no obligation on a disgruntled tenderer to utilise its provisions<sup>5</sup>, that these procedures do not constitute an internal remedy as is contemplated in Section 7 of PAJA.

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<sup>3</sup> For a discussion, see Bolton, P. (2010). Municipal tender awards and internal appeals by unsuccessful bidders. *Potchefstroom Electronic Law Journal/Potchefstroomse Elektroniese Regsblad*, 13(3) Page 73/508.

<sup>4</sup> 2015 JDR 2093 (SCA) pars 22 and 23.

<sup>5</sup> Regulation 50(7), states explicitly that the regulation must not be read as affecting a person's right to approach a court at any time.

[31] That leaves the procedure provided for in Section 62 of the Systems Act. This section stipulates as follows:

**“62. Appeals**

- (1) *A person whose rights are affected by a decision taken by a political structure, political office bearer, councillor or staff member of a municipality in terms of a power or duty delegated or sub-delegated by a delegating authority to the political structure, political office bearer, councillor or staff member, may appeal against that decision by giving written notice of the appeal and reasons to the municipal manager within 21 days of the date of the notification of the decision.*
- (2) *The municipal manager must promptly submit the appeal to the appropriate appeal authority mentioned in subsection (4).*
- (3) *The appeal authority must consider the appeal, and confirm, vary, or revoke the decision, but no such variation or revocation of a decision may detract from any rights that may have accrued as a result of the decision.*
- (4) *When the appeal is against a decision taken by—*
  - (a) *a staff member other than the municipal manager, the municipal manager is the appeal authority;*
  - (b) *the municipal manager, the executive committee or executive mayor is the appeal authority, or, if the municipality does not have an executive committee or executive mayor, the council of the municipality is the appeal authority; or*
  - (c) *a political structure or political office bearer, or a councillor—*
    - (i) *the municipal council is the appeal authority where the council comprises less than 15 councillors; or*
    - (ii) *a committee of councillors who were not involved in the decision and appointed by the municipal council for this purpose is the appeal authority where the council comprises more than 14 councillors.*
- (5) *An appeal authority must commence with an appeal within six weeks and decide the appeal within a reasonable period.*

(6) *The provisions of this section do not detract from any appropriate appeal procedure provided for in any other applicable law.*<sup>6</sup>

[32] Both Mr Els, who appeared for the Applicant, and Mr Mathaphuna, who appeared for the Respondents, made submissions with regard to the question whether this section affords an internal remedy as is contemplated by Section 7 of PAJA.

[33] Mr Els submitted, on the basis of Regulation 29(1)(a) of the Supply Chain Regulations, that the Municipal Manager, in his capacity as the accounting officer, makes the final award after considering the recommendation of the bid adjudication committee. Acting in such a capacity, the power of the Municipal Manager to make the award is an original power, and not a delegated power as is clearly envisaged in Section 62(1) of the Systems Act. For that reason, Section 62 is not available to the Applicant.

[34] Mr. Mathaphuna, relied on the judgement of *CC Groenewald v M5 Developments*<sup>7</sup> ("Groenewald") and argued that Section 62 of the

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<sup>6</sup> Emphasis added.

<sup>7</sup> (283/09) [2010] ZASCA 47 31 March 2010.

Structures Act was available to the Applicant as an internal remedy contemplated in Section 7 of PAJA.

[35] Considering the judgement of Groenewald, it is conceivable that in certain circumstances Section 62 may provide an internal remedy as is contemplated in section 7 of PAJA, the right and the usefulness of this appeal process is, as is stated by Bolton<sup>8</sup>, particularly constrained.

[36] One such a constraint is, if rights had already accrued to the preferred bidder and such rights will be disturbed on appeal. This much is the explicit ruling in the judgement of in DDP Valuers<sup>9</sup>.

[37] It is beyond doubt that "rights have already accrued", to the Fifth Respondent. Consequently, section was not available to the Applicant.

[38] The defence *in limine*, viz that the Applicant failed to exhaust its own internal remedies as is provided for in section 7 of PAJA, must consequently fail.

[39] The Applicant raises four grounds on the basis of which the tender award should be reviewed and set aside: 1) The tenders were not

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<sup>8</sup> Supra, P. 77/508

<sup>9</sup> Paragraph 23

opened in public, 2) Irrational and irregular functionality criteria, 3) The Fifth Respondent is not tax compliant and 4) The Fifth Respondent failed to comply with the mandatory requirements.

[40] First ground - The tenders were not opened in public: the Applicant states that the Supply Chain Regulations as well as the First Respondent's own Supply Chain Policy, states that tenders "may be opened only in public". The Respondents admit this stipulation but argues that the word "may", instead of must, endows the First Respondent with a discretion whether to open it in public or not. The Respondents argue that the First Respondent exercised its discretion not to open it in public, due to the constraints on public meetings as a result of the Covid 19 state of emergency. In my view these defences by the Respondents are disingenuous. The word "may", can only denote a meaning corresponding to "is only allowed to", given the context within which it is used. That is nothing less than a peremptory provision. This requirement is to ensure transparency.

[41] The defendants that the first respondent could not adhere to this requirement in the Supply Chain Regulations, because of the stipulations of the Covid 19 state of disaster management, is downright dishonest. It is a matter of public record that the state of emergency

ended on 5 April 2022, and at the stage that the tenders were opened (presumably towards the end of May 2022), very few of the state of emergency measures still remained in place. It is inconceivable that the public opening of the tenders would have presented any difficulties whatsoever.

- [42] Over and above the above consideration, the entire sequence of the correspondence, undertaken by the Applicant towards the First Respondent, creates the impression that the First Respondent intended to finalise the awarding of the tender as well as the conclusion of the contract with the Fifth Respondent, before communicating the outcome of the tender process to the other tenderers. In fact, it is explicitly admitted in paragraph 175 of the answering affidavit.<sup>10</sup> The Respondents do not clarify this issue at all in the answering affidavit, and the only impression that one is left with after considering the allegations in the founding affidavit, in this regard, is that the First Respondent intended to be less than transparent with the award of this tender.

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<sup>10</sup> P. 149.

[43] Second ground - irrational functional criteria: functional criterium 4 of the tender requirements requires that at least one company director must be a qualified chartered accountant (SA) registered with the South African Institute of Chartered Accountants. As indicated above, two courts have already ruled, in Inxuba and Greater Letaba that the requirement was irrational and I can see no reason to deviate from the above judgements since there is, once again, no clarity on the papers as to why such a requirement was inserted in the tender requirements.

[44] The Applicant opines that what would be needed is that the relevant person must be a duly registered tax practitioner, as is contemplated in the Tax Administration Act, 28 of 2011. He argues that this is all that is needed to perform the services tendered for. The Respondents do not provide any clarity in this regard. All that they do in paragraphs 198 202<sup>11</sup> of the answering affidavit, is to state in bald manner, without explaining, that the criterium, is rational.

[45] In my view, the requirement that the Applicant company must have a registered chartered accountant on its board, is indeed irrational,

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<sup>11</sup> P. 157 Paginated papers.

especially given the absence of any reasonable explanation for the requirement.

[46] The third ground - the Fifth Respondent is not tax compliant: - the Respondents explain in their answering affidavit<sup>12</sup> that, in the event of a joint venture having tendered, all the members of the joint venture shall have to comply with all the formalities. They explain further that such members need to be tax compliant on the date that the tender is awarded to the successful tenderer.

[47] The Respondents attach three certificates<sup>13</sup>, viz Annexures "**BBL-13B**" all", **BBL -13C**", and "**BBL- 13D**"<sup>14</sup> being three certificates purporting to show that the 3 members of the joint venture,<sup>15</sup> were tax compliant.

[48] When the annexures are analysed, the certificates also certify that the members of the joint venture (the Fifth Respondent), are tax compliant. However, the date of this verification was 11 October 2022. There is no evidence that the members were tax compliant on the date of the award of the tender, that is 12 May 2022.

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<sup>12</sup> In par 99 and Par 105 of the answering affidavit, P.127 and 129, paginated papers.

<sup>13</sup> Called CSD certificates.

<sup>14</sup> P. 289 – P. 295 of the paginated papers.

<sup>15</sup> Consisting of the Second, Third and Fourth Respondents.



[49] The papers of this review application were issued on the 18<sup>th</sup> of August 2022. It is therefore clear that this tax status verification was done after the review application was issued and served.<sup>16</sup>

[50] It is in my view clear that there is no evidence that the members of the Fifth Respondent were tax compliant, on the date that the tender was awarded.

[51] The fourth ground - the Fifth Respondent failed to comply with mandatory requirements. These allegations are made in the supplementary affidavit of the Applicant. The allegations of the Applicants relate to the mandatory lease agreement as well as utility agreements of all prospective tenderers, that should be submitted with the tender.

[52] The Respondents explain in paragraphs 232 - 236<sup>17</sup> that they only considered the compliance of the Fifth Respondent with these requirements and that they were satisfied that the fifth respondents complied. I do not deem it necessary, in view of the conclusions below, to come to any definitive conclusions as far as this aspect is concerned.

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<sup>16</sup> The notice to oppose was already served on 26 August 2022.

<sup>17</sup> P. 165 – P 166.

[53] Mr. Mathaphuna argued that, in spite of any possible non-compliance by the successful tenderer, of any of the tender requirements, the Applicant was not prejudiced in any way since the Applicant was not excluded from final the adjudication process, and the bid of the applicant was considered, in the final process, with all other compliant tenderers at that stage.

[54] The reason why the Applicant was not awarded the tender, so the First Respondent argued, was purely on the basis of price, and for that reason the review application should not be successful. In other words, if I understand him correctly, he submits that, had all the tenderers complied with all the requirements, that the Applicant would still not have been successful with its tender.

[55] The approach taken by Mr. Mathaphuna, was the approach taken by the Supreme Court of Appeal, which was overturned by the Constitutional Court in *AllPay Consolidated Investment Holdings (Pty) Ltd and others v Chief Executive Officer of the South African Social Security Agency and others (Corruption Watch and another as amici curiae)*<sup>18</sup>. In the constitutional court Froneman J stated as follows:

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<sup>18</sup> 2014 (1) BCLR 1 (CC).

*"On the approach of the Supreme Court of Appeal, procedural requirements are not considered on their own merits, but instead through the lens of the final outcome. This conflates the different and separate questions of unlawfulness and remedy. If the process leading to the bid's success was compromised, it cannot be known with certainty what course the process might have taken had procedural requirements been properly observed".<sup>19</sup>*

and

*"Once a ground of review under PAJA has been established there is no room for shying away from it. Section 172(1)(a) of the Constitution requires the decision to be declared unlawful. The consequences of the declaration of unlawfulness must then be dealt with in a just and equitable order under section 172(1)(b). Section 8 of PAJA gives detailed legislative content to the Constitution's "just and equitable" remedy."<sup>20</sup>*

[56] This ruling flies squarely into the face of the submission of Mr Mthaphuna. Once a ground of review under PAJA has been established, there is, in the words of Froneman J *".....no room for shying away from it. Section 172(2) requires the decision to be declared unlawful."*

[57] In my view, grounds 1, 2 and 3 relied upon by the Applicant, are all grounds to review the award of the tender.

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<sup>19</sup> Par 24.

<sup>20</sup> Par 25.

- [58] Firstly, section 6(2)(b) of PAJA states that an administrative decision may be set aside because a material mandatory condition prescribed by the empowering provision was not complied with. Such was undoubtedly the failure to open the tenders in public. This fact coupled with the way in which the First Respondent for all practical purposes ignored the correspondences of the Applicant, can only lead to the conclusion that the award of this tender was not done transparently as is required by Section 217 of the Constitution.
- [59] Secondly, the requirement that a company must have a registered Chartered Accountant as one of its board of directors, was a requirement that was irrelevant to the purpose of the requirement and thus falls foul of Section 6(2)(f)(ii).
- [60] The non-compliant tax status of the members of the Fifth Respondent, were surely highly relevant considerations in terms of the tender requirements, yet this fact was not taken into consideration in violation of Section 6(2)(e)(iii). It was certainly very unfair (once again in violation of section 217 of the Constitution), to accept the tender of the Fifth Respondent, despite them not having complied with compulsory tender requirements, while requiring of all other tenderers to comply with the provision.

[61] I consequently conclude that, the award of the tender was unlawful.

[62] This court is consequently called upon to craft a remedy that is a just and equitable remedy, as is required by Section 8 of PAJA.

[63] Froneman J continued, with regard to the question of a just and equitable remedy. He states as follows:

*"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. Indeed, it may often be inequitable to require the rerunning of the flawed tender process if it can be confidently predicted that the result will be the same."*

[64] The question therefore is, *in casu* whether it would be just and equitable to set the contract between the First and the Fifth Respondents aside, given the practical difficulties that may occur.

[65] The Respondents explain in the answering affidavit, that the services that the Fifth Respondent has to render, in terms of the contract, are not rendered on a continuous basis but on an *ad hoc* basis, should the need arise for such services:

[66] Given this fact, I am unable to conceive of substantial practical difficulties that may arise should the agreement between the First and the Fifth Respondents be set aside. In any event, the first respondent does not deal with this aspect in any substantial detail in the answering affidavit.

[67] I consequently order as follows:

- a) The decision of the First Respondent to award Tender 9/3/1/334 to the Fifth Respondent, is declared unlawful, unconstitutional and is reviewed and set aside.
- b) The agreement concluded between the First Respondent and the Fifth Respondent pursuant to the tender, is set aside.
- c) The First Respondent is to pay the costs of the Applicant.



G. J. DIAMOND

ACTING JUDGE OF

THE HIGH COURT

11/04/2023

**APPEARANCES**

HEARD ON : 22<sup>nd</sup> November 2022

JUDGMENT DELIVERED ON : This judgment was handed down electronically by circulation to the parties' representatives by email. The date and time for hand-down of the judgment is deemed to be 11<sup>th</sup> April 2023 at 13:00

For the Applicant : Adv. A.P.J. Els

Instructed by : Pratt Luyt & De Lange

For the 1<sup>st</sup> - 6<sup>th</sup> Respondent : Adv. M. Mathaphuna

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