



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

REPORTABLE

Case No: 572/2013

In the matter between:

MOGALE CITY MUNICIPALITY

Appellant

and

FIDELITY SECURITY SERVICES (PTY) LTD First Respondent

MAFOKO SECURITY SERVICES (PTY) LTD Second Respondent

BOSASA SECURITY SERVICES (PTY) LTD Third Respondent

RED ANT SECURITY SERVICES (PTY) LTD Fourth Respondent

NATIONWIDE SECURITY CC Fifth Respondent

CHANGING TIDES 208 (PTY) LTD Sixth Respondent

Neutral citation: *Mogale City Municipality v Fidelity Security Services (Pty) Ltd* (572/2013)[2014] ZASCA 172 (19 November 2014)

Coram: NAVSA ADP, WALLIS, SALDULKER, MBHA and ZONDI JJA.

Heard: 7 November 2014

Delivered: 19 November 2014

Summary: Tender –review – irregular procedure – Uniform Rule 30 – discussion of effect of blacklisting by National Treasury – bids not

properly considered – tender process defective – just and equitable remedy – warning to errant officials.

ORDER

On appeal from: South Gauteng High Court (Meyer J sitting as court of first instance):

The following order is made:

1 Paragraph 3 of the order of the court below is amended to replace the period of four weeks with a period of two weeks.

2 An additional paragraph to be numbered 5 is added to the order of the court below reading as follows:

‘The order of invalidity in paragraph 2 hereof is suspended for a period of three weeks from the date of this order, whereafter it will take effect.’

3 The references in paragraphs 3 and 5 of the order of the court below to ‘the date of this order’ are to be construed as meaning the date on which this judgment is delivered.

4 The appeal is otherwise dismissed with costs, such costs to include those consequent upon the employment of two counsel.

JUDGMENT

Wallis JA (Navsa DP, Saldulker, Mbha and Zondi JJA concurring)

[1] On 4 July 2011 the appellant, the Mogale City Municipality (the Municipality) published a tender, SS(T&S) 01/2012, for the provision of security services to the Municipality for a period of three years. The first

respondent, Fidelity Security Services Proprietary Limited (Fidelity), which was already providing those services in terms of an existing contract with the Municipality, submitted a tender. Its tender, and that of the fourth respondent, Red Ant Security Services (Pty) Ltd (Red Ant), scored highest in the bid evaluation process, but for different reasons both were ultimately excluded from consideration by the Bid Adjudication Committee (BAC), acting on the recommendation of the Bid Evaluation Committee (BEC). Instead the contract was offered to and accepted by Mafoko Security Services (Pty) Ltd (Mafoko), which has been performing it since 2012. As has become virtually the norm in relation to high value tenders, that outcome was challenged, initially by Red Ant and finally by Fidelity. The latter's challenge was upheld by Meyer J in the South Gauteng High Court and an order was granted setting aside the award of the tender and ordering the Municipality to re-evaluate the bids within a period of four weeks. Meyer J then gave leave to appeal to this Court.

[2] At the commencement of the appeal we dealt with an application by Fidelity to lead further evidence on appeal. It was dismissed with costs, including the costs of two counsel. The proposed evidence was, in substance, already before the court, and in any event there were no circumstances warranting the admission of further evidence at this stage in accordance with the test that this Court applies in such cases.¹

[3] The Municipality advanced two arguments in its heads of argument. First, it contended that the proceedings were irregular and that on that ground alone the appeal should be upheld. If that argument was

¹ *De Aguiar v Real People Housing (Pty) Ltd* 2011 (1) SA 16 (SCA) para 12.

rejected, it argued secondly that the BAC was correct to exclude Fidelity's tender from consideration and that as a result Fidelity lacked the necessary *locus standi* to pursue any other objections to the tender process. The latter contentions on the merits were not persisted with in oral argument. In the result oral argument was confined to the procedural objection and the terms of the order granted by the court below. The procedural argument will be addressed first. That requires an outline of the course that the litigation took in the high court.

[4] When the outcome of the tender process became known, Red Ant challenged it in review proceedings before the South Gauteng High Court. Fidelity was cited as the fourth respondent in those proceedings. It delivered an affidavit supporting Red Ant's contention that the tender process was legally flawed and complained of the fact that its tender had not been considered. It opposed the request for an order that the Municipality be directed to award the tender to Red Ant. Instead, Fidelity argued that the tender process should be re-evaluated.

[5] After the record of the deliberations of the BEC and the BAC had been delivered and all parties had also delivered their affidavits, the litigation took an unexpected turn when, on 6 December 2012, Red Ant's attorneys delivered a notice of withdrawal of the proceedings. Apparently this was because Red Ant and Mafoko had negotiated a compromise in terms of which they would share the benefits of the contract. There is some indication that this had the tacit approval of the Municipality. This prompted Fidelity to launch what it described as a counter-application, seeking an order reviewing and setting aside the decision of the Municipality to award the tender to Mafoko and ordering that the tender process be re-evaluated. In the 'founding' affidavit delivered in support

of the counter-application Fidelity contended that its disqualification from the tender process was unlawful and invalidated the entire process. It also contended that the process was invalid on certain other grounds. The Municipality filed further answering and replying affidavits in response to the counter-application and the matter was then argued before Meyer J.

[6] Although Meyer J held that this procedure was irregular, he said that the issues in dispute between the parties had been fully canvassed without objection by the Municipality and accordingly refused to dismiss the application on this ground. In my view that was plainly correct. There are three approaches any of which justify that conclusion. The first is that the review application commenced by Red Ant was still in existence, if only because the notice of withdrawal had not contained a tender to pay the costs of the other parties. It was therefore still open to the other parties, including Fidelity, to set the matter down for argument on costs or take other steps, such as delivering the counter-application. The second is that Fidelity was in any event a party to the existing *lis* with a distinct interest in its outcome. It was already engaged in seeking to set aside the tender and was entitled to continue to do so as against the Municipality, notwithstanding Red Ant's withdrawal. The third is to accept that the original proceedings had terminated and to treat the 'counter application' as a procedurally defective application for review, which is what Meyer J did in the court below. Accepting that all of these may possibly have involved a procedural irregularity, if the Municipality wished to object to it they should have done so by way of an application in terms of rule 30 of the Uniform Rules of Court. They did not do so when the irregular step was taken and thereafter took a further step in the proceedings, with knowledge of the irregularity. In terms of the rule that disqualified them from pursuing any objection. This is clear and the only surprising feature

is that neither the court below nor the parties referred to the provisions of rule 30.

[7] Even if an application had been brought in terms of the rule, the court would have had a discretion in terms of sub-rule 3 whether or not to set the counter-application aside. It is plain that Meyer J would have exercised his discretion against the Municipality, not least because the objection was not initially raised but was made at a late stage of the proceedings. As Schreiner JA put the matter in *Trans-African Insurance Co Ltd v Maluleka*:²

‘... technical objections to less than perfect procedural steps should not be permitted, in the absence of prejudice, to interfere with the expeditious and, if possible, inexpensive decision of cases on their real merits.’

[8] Appellant’s counsel sought to argue that this was not in reality a point about irregular procedure, but a point about jurisdiction. He contended that if Fidelity had instituted fresh review proceedings they could have been met by an objection that the review had been instituted outside the period of 180 days provided in s 7 of PAJA.³ But that is a procedural objection, not a question of jurisdiction, and, if the point had been raised in the court below it had a discretion to condone the late application. Bearing in mind the circumstances in which the issue arose and the manner in which the court below dealt with the procedural objection once it was raised, it seems inevitable that it would have condoned the delay. But it is unnecessary to speculate, as the point was not raised in the court below and it is not open to the Municipality to raise it at this late stage. Fidelity has not had an opportunity to respond to it by

² *Trans-African Insurance Co Ltd v Maluleka* 1956 (2) SA 273 (A) at 278F-G. This approach has been accepted on many other occasions.

³ The Promotion of Administrative Justice Act 3 of 2000.

evidence or to seek condonation for the delay. The procedural objection is therefore rejected.

[9] Turning to the merits, Fidelity's tender was rejected by the BAC in the following circumstances. All tenderers were required to complete a document headed 'Declaration of Bidder's Past Supply Chain Management Practices'. Clause 3 of that document reads as follows:

'The bid of any bidder may be rejected if that bidder, or any of its directors have:

- a abused the municipality's/municipal entity's supply chain management system or committed any improper conduct in relation to such system;
- b been convicted for fraud or corruption during the past five years;
- c wilfully neglected, reneged on or failed to comply with any government, municipal or other public sector contract during the past five years; or
- d been listed in the Register for Tender Defaulters in terms of section 29 of the Prevention and Combatting of Corrupt Activities Act (No 12 of 2004).'

The tenderers were then required to answer certain questions. The first of these was whether the bidder or any of its directors were listed on the National Treasury's data base as a company or person prohibited from doing business with the public sector. Fidelity answered this in the negative.

[10] Unbeknown to Fidelity, when the tender was submitted Mr Godfrey Jack, one of its directors, had been so listed on the National Treasury's data base. It was not disputed that the data base was not accessible either to companies or to individuals, but only to public bodies on application to National Treasury, and therefore the erroneous answer to the question posed in the declaration was inadvertent and unavoidable. There is a note in the declaration suggesting that companies or people who are placed on the data base will be informed of that by National Treasury, but neither Fidelity nor Mr Jack had been so informed. Fidelity

became aware of Mr Jack's listing on the data base on 4 September 2011, which was after the submission of its tender. It acted speedily and Mr Jack resigned as a director on 6 September 2011.

[11] The Municipality only became aware that Mr Jack's name had appeared on the National Treasury's data base, when it received a letter from the auditor general on 8 November 2011. That letter related to the existing contract between the Municipality and Fidelity for the provision of security services, and not the tender. It appears to have generated some panic among the officials of the Municipality. On the same day Ms Liebenberg, the Manager: Supply Chain Management, had a telephonic discussion with Fidelity's Tenders Administrator, Ms Madondo. She raised the matter of Mr Jack's status with Ms Madondo, who informed her that Mr Jack had resigned as a director on 6 September 2011. Later that morning Ms Madondo sent an e-mail to Ms Liebenberg informing her that Fidelity had become aware of Mr Jack's position on 4 September 2011 and that he had resigned on 6 September 2011. She attached all the relevant CIPC documents in substantiation of that.

[12] Ms Liebenberg referred this e-mail to various other officials, including the Municipality's legal advisor. She was concerned whether the existing contract with Fidelity should be terminated and whether the expenditure on it should be treated as irregular. She also wrote to Mr Fourie, the General Manager: National Tenders of Fidelity on 8 November 2011. The heading to that letter referred to the existing contract between the Municipality and Fidelity for the provision of security services. The body of the letter read as follows:

‘The award of the abovementioned contract has reference.

It has come to our attention that one of your directors, Mr Godfrey Jack, has been prohibited by National Treasury to do business with any organ of state, due to misrepresentation, for the period 20/11/2003 until 19/11/2013.

After a telephonic [conversation] between our Ms Renell Liebenberg and your Ms Priscilla Madondo on the 07 November 2011, your office has forwarded copies of the Cipro documentation with regard to the change of director. We also want to enquire from yourselves as to why your company withheld this important information to ourselves which the Municipality believes that you had a legal obligation to do so.

It will however be appreciated if you can officially respond to the statement by the Auditor-General as the expenditure that Mogale City has incurred to date in respect of this contract, is now regarded as irregular expenditure.’

[13] On 18 November 2011 Ms Madondo wrote to the municipal manager of the Municipality attaching a number of documents, most of which were those previously furnished to Ms Liebenberg, but they also showed that a Mr Mahlangu had been appointed a director in place of Mr Jack. One document did not, however, deal with Mr Jack’s position. It was a letter that Ms Liebenberg had addressed to Fidelity on 14 November 2011 asking it to agree to extend the validity of its tender for the contract SS(T&S) 01/2012 to 31 December 2011. That was the tender in dispute in this case. Fidelity was asked if it was willing to hold its tender valid for the further period. The answer, given by Fidelity on 18 November 2011, was in the affirmative. Ms Madondo’s letter to the municipal manager bore the tender reference as its heading. Accordingly, while clarity was being sought and given in regard to Mr Jack’s position, Fidelity was asked by the very official responsible for supply chain management to extend the validity of its tender and it agreed to do so.

[14] It is against that background that the BEC met on 13 January 2012 to consider the different tenders. It had before it a report, from the

Manager: Traffic, Security and VIP Protection, recommending that the contract be split between the two highest scoring tenderers, namely, Red Ant and Fidelity (itself an unexplained irregularity in the tender proceedings as there was nothing in the tender documents permitting such a split). It also had all the documents provided by Fidelity in relation to Mr Jack's position and his resignation as a director. During the course of the meeting, the BEC sought and obtained the advice of the acting manager of legal services in the Municipality about the validity of Fidelity's tender. His advice was that it fell to be rejected on the grounds that at the time that the tender was submitted Mr Jack's name appeared on the National Treasury data base.

[15] That advice was embodied in the BEC's recommendation to the BAC, which read as follows:

'Fidelity Security Services is rejected based on the fact that the information as provided in their tender submission is based on the details of the company shareholding with Mr Godfrey Jack still listed as a shareholder – blacklisted shareholder. The advice from the Legal Section was that information obtained during the quotation process, cannot be used for a different procurement process. The tender has to be evaluated based on the information as provided in the tender submission.'

At its meeting on 12 March 2012 the BAC adopted this advice. In the result Fidelity's bid was not considered. The advice was, however, patently wrong, as counsel for the municipality accepted. A bar on awarding a tender does not mean that a possible obstacle to the award of the tender cannot be removed before the decision on the tender is made. The exclusion of Fidelity was accordingly wrong and a reviewable error in terms of PAJA.

[16] It is largely unnecessary to canvass the other complaints by Fidelity about the tender process. I should, however, highlight two of

them. The first is that in scoring the tenders for functionality that of the ultimately successful tenderer, Mafoko, received such a poor mark that it should have been disqualified at that stage. In circumstances that remain obscure its score was revised so as to afford it a qualifying score and kept it under consideration. That was itself an irregularity warranting the setting aside of the award of the tender. The second is that the BEC recommended that the contract be awarded in arbitrarily determined proportions to Red Ant and Fidelity. That was inconsistent with the advertised basis of the tender and was also irregular and warranted the setting aside of the award of the tender.

[17] The adjudication of the tender was therefore in breach of Fidelity's right to fair administrative action. The award of the tender accordingly fell to be set aside. The high court made the following order:

‘1 The decision(s) of the first respondent of 19 March 2012 and/or thereafter to award tender No SS (T&S) 01/2012 to the second respondent is reviewed and set aside.

2 The contract between the first respondent and the second respondent pursuant to tender No SS (T&S) 01/2012 is set aside and declared void *ab initio*.

3 The first respondent is to re-evaluate the bids submitted for tender No SS (T&S) 01/2012 and re-award the contract within 4 weeks of the date of this order.

4 The first respondent is ordered to pay the fourth respondent's costs of the counter-application, including the costs of two counsel.’

[18] There is no objection to the first paragraph of this order and there clearly could not be in the light of the Constitutional Court's judgment in *Allpay*.⁴ Nor was it disputed that the result of the award of the tender being set aside, had to be the invalidation of the contract concluded pursuant thereto and the re-evaluation of the bids. The only concern with

⁴ *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer, South African Social Security Agency and Others* 2014 (1) SA 604 (CC) paras 25 and 56.

the second and third paragraphs of the court below's order was that an immediate invalidation of the contract awarded to Mafoko would leave the Municipality without a service provider in respect of security services in its area of jurisdiction.

[19] In order to address this concern counsel for the Municipality submitted that we should craft an order that was conditional on the outcome of the re-evaluation of the bids, along the lines of the order in *Millennium Waste*,⁵ in which an order of invalidity in respect of the existing contract would issue only if, after the re-evaluation process, the contract was to be awarded to a bidder other than the existing contractor. Fidelity, on the other hand, argued that it would be more appropriate to make an order of invalidity in respect of the contract, but to suspend the operation of that order for a period sufficient to enable the re-evaluation of the bids to take place and, thereafter, to provide enough time for an orderly hand-over (assuming that to be the outcome of the re-evaluation) from Mafoko to the successful bidder. It pointed to the relief eventually granted in *Allpay* in support of this submission.⁶ In my view that is the more appropriate course to follow, especially as it may be that Mafoko's bid is disqualified from consideration in the re-evaluation process. That serves to distinguish this case from *Millennium Waste*, where the original successful tenderer might still have been awarded the contract after a re-evaluation of the bidding process.

⁵ *Millennium Waste Management (Pty) Ltd v Chairperson, Tender Board: Limpopo Province and Others* 2008 (2) SA 481 (SCA) para 35.

⁶ *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer, South African Social Security Agency and Others* 2014 (4) SA 179 (CC) para 78.

[20] The parties agreed that two weeks was adequate to enable the Municipality to re-evaluate the bids. We were informed from the bar, on instructions obtained in the course of the hearing, that the Municipality will not seek to take the matter on further appeal to the Constitutional Court. In those circumstances there should not be any delay in undertaking the re-evaluation or awarding a contract for the balance of the tender period.⁷ The suspension of the order of invalidity for a period of three weeks from the date upon which this judgment is delivered should therefore ensure that the Municipality does not find itself deprived of security services. However, it is not always feasible for a court, on the basis of limited and frequently imperfect information, to cater for every possible eventuality. It is accordingly appropriate to record that if any dispute arises in the process of re-evaluation or as to the award of a contract pursuant to that process it must be dealt with in fresh proceedings before the high court having jurisdiction. In other words we do not retain jurisdiction to oversee the bid re-evaluation process and its outcome.

[21] One final comment is required. The tender process in this case was so defective and involved so many flaws that it seems extraordinary to think that a public authority could engage in such a farcical endeavour. To recapitulate, the successful tenderer should have been disqualified in the initial evaluation of tenders. The two tenders that were evaluated as the best, namely those of Red Ant and Fidelity, were clearly so much better than those of the other bidders that the decision should have been to award it to one of them. Instead the recommendation was that the

⁷ Unlike in *Allpay* we were not asked to order that any fresh contract be awarded for a period extending beyond the period of the existing contract.

contract should be split between them in arbitrarily determined proportions contrary to the terms of the tender and without any apparent investigation as to whether that was an appropriate or feasible basis for security services to be provided to the Municipality. Red Ant was allowed to continue as a bidder (and at one time the preferred bidder) at a time when it was sponsoring a major function for the Municipality, which both elected and employed officials attended and where they were the recipients of gifts. Then, when the review proceedings were underway, and with the apparent agreement of the Municipality, Red Ant and Mafoko entered into an agreement under which they would share the contract between them. This litany of errors is such that it is appropriate to remind the Municipality that it runs the risk, if there is a recurrence of such conduct, either at the re-evaluation stage or when dealing with other tenders, that a court may be minded to take the decision out of its hands and, rather than referring it back, to order that the tender be awarded to the bidder to whom, in the court's view, it should have been awarded had a proper process been followed.⁸ That may also result in identifiable officials responsible for that situation being ordered to pay the costs personally, because:

'It is time for courts to seriously consider holding officials who behave in the high-handed manner described above, personally liable for costs incurred. This might have a sobering effect on truant public office bearers.'⁹

[22] In the result the following order is made:

- 1 Paragraph 3 of the order of the court below is amended to replace the period of four weeks with a period of two weeks.

⁸ *Gauteng Gambling Board v Silverstar Development Ltd and Others* 2005 (4) SA 67 (SCA) paras 28-29 and 38-40.

⁹ *Gauteng Gambling Board and Another v MEC for Economic Development, Gauteng* 2013 (50 SA 24 (SCA) para 54.

- 2 An additional paragraph to be numbered 5 is added to the order of the court below reading as follows:
‘The order of invalidity in paragraph 2 hereof is suspended for a period of three weeks from the date of this order, whereafter it will take effect.’
- 3 The references in paragraphs 3 and 5 of the order of the court below to ‘the date of this order’ are to be construed as meaning the date on which this judgment is delivered.
- 4 The appeal is otherwise dismissed with costs, such costs to include those consequent upon the employment of two counsel.

M J D WALLIS
JUDGE OF APPEAL

Appearances

For appellant: I W Maleka SC (with him N Mayet)(the heads of argument having been prepared by I W Maleka SC and S Yacoob)

Instructed by: TGR Attorneys, Sandhurst, Johannesburg
Webbers Attorneys, Bloemfontein

For respondent: Carol Steinberg (with her Nick Ferreira)

Instructed by: Blake Bester Inc, Roodepoort
Phatshoane Henney Inc, Bloemfontein.