

THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Summary: Review of tender award – whether compliance with the conditions of the request for bid and s 14 of the Local Government: Municipal Finance Management Act 56 of 2003.

ORDER

On appeal from: Northern Cape Division of the High Court, Kimberley (Lever AJ and Phatsoane ADJP, sitting as court of first instance):

- 1 Leave to appeal is granted.
- 2 The appeal succeeds with costs.
- 3 The order of the court a quo is set aside and replaced by the following:
'(a) The resolution of the first respondent to sell the property known as Erf 15747, Olivier Park, Upington, Northern Cape Province, measuring 9 023 square metres, is reviewed and set aside.
(b) The award of the tender adjudication committee dated 8 April 2016 in respect of tender TN054/2015 is reviewed and set aside.
(c) Any contract entered into as a result of the decisions of the tender adjudication committee of the first respondent to award the tender to the second respondent is declared invalid and of no force and effect.
(d) The first respondent is ordered to pay the costs of the application.'

JUDGMENT

Mbatha JA (Ponnan and Mocumie JJA and Koen and Gorven AJJA concurring)

Introduction

[1] This is an application for leave to appeal and, if granted, the determination of the appeal itself. The two judges who considered the application referred it for oral argument in terms of the provisions of s 17(2)(d) of the Superior Courts Act 10 of 2013.

Background facts

[2] On the northern banks of the Orange River lies the subject of the present dispute, an immovable property described as Erf 15747, Olivier Park, Upington, Northern Cape (the property). The applicant, Oranje Watersport CC, has leased the property from the first respondent, the Dawid Kruiper Local Municipality (the

Municipality), for the past 17 years. The latest lease commenced on 26 July 2013 and would have run its course by the end of June 2018. The applicant conducted a recreational barge cruise facility known as 'Sakkie se Arkie' on the Orange River from the property.

[3] On 3 December 2015 the Municipality adopted a resolution to the following effect: to alienate the property at a market-related price as it was no longer required for basic municipal service delivery; the alienation would occur by public tender that would need to be accompanied by a development proposal for the property; the conditions of sale relating to the alienation thereof would be determined by the Municipality's supply chain management committee and the fair market-related price of the property was to be determined by a valuer.

[4] In due course, the market value of the property was determined to be the amount of R2 080 000. Pursuant to the invitation to tender, the applicant and the second respondent, Upington Hotel (Pty) Ltd (Upington Hotel), submitted bids for the property in the amounts of R2 080 000 and R2 400 000 respectively. The Municipality's Bid Evaluation Committee (BEC) accepted Upington Hotel's bid on the basis that it had offered a higher purchase price and satisfied the other requirements of the bid. On the 8 April 2016 the Municipality resolved to award the bid to Upington Hotel.

[5] The applicant's bid was not considered for evaluation. The Municipality's bid award committee found it to be non-responsive on the basis that it did not comply with one of the special conditions of the bid, which required a guarantee from a registered financial institution that the bidder qualified for financing to purchase and develop the property. Such a guarantee did not accompany the applicant's bid. The bid by Upington Hotel was found to be responsive on the strength of a letter from its bank, Nedbank.

[6] The award of the bid to Upington Hotel caused the applicant to bring an application seeking: (a) to interdict the Municipality and the Registrar of Deeds, the third respondent, from transferring the property to Upington Hotel; and (b) an order reviewing and setting aside the decision of the Municipality to award the tender to

Uppington Hotel. On 4 November 2016, the Northern Cape Division of High Court Division, Kimberley granted the applicant the interdict sought, pending finalisation of the review application.

[7] The review application failed. On 6 July 2018 judgment was delivered by Lever AJ (Phatsoane ADJP concurring) dismissing it with costs. On 15 February 2018 the applicant's application for leave to appeal met the same fate. The applicant lodged an application for leave to appeal to this Court. The application for condonation and leave to appeal were referred for oral argument in terms of s 17(2)(d) of the Superior Courts Act 10 of 2013. The parties were directed to be prepared, if called upon to do so, to address this Court on the merits of the appeal.

[8] As pointed out in *Body Corporate of Marine Sands v Extra Dimensions 121 (Pty) Ltd* [2019] ZASCA 161; 2020 (2) SA 61 (SCA) para 1:

'Different considerations come into play when considering an application for leave to appeal as compared to adjudicating the appeal itself. As to the former, it is for the applicant to convince the court that it has a reasonable prospect of success on appeal. Success in an application for leave to appeal does not necessarily lead to success in the appeal. Because the success of the application for leave to appeal depends, *inter alia*, on the prospects of eventual success of the appeal itself, the argument on the application would, to a large extent, have to address the merits of the appeal.'

[9] Despite the various grounds of review on which the applicant's claim for the relief was based in the court a quo, only two will be considered on appeal, namely: (a) whether Uppington Hotel's bid was responsive in the sense that it complied with the special conditions of the tender and (b) whether the Municipality complied with s 14 of the Local Government: Municipal Finance Management Act 56 of 2003 (the MFMA).

Was Uppington Hotel's bid responsive?

[10] The Municipality's request for bid contained the following special condition.

'1. A guarantee from a registered financial institution, that the bidder does qualify for financing to purchase the land and the development thereof, must accompany the bid. A deposit to the amount of 10% of the valued price of the tender payable by means of transfer into Council['s Bank Account or cash must be paid to the Council within 14 days after the

tender was awarded. The deposit will be kept as partial payment of the purchase price. The said deposit will be forfeited if the purchase price is not concluded within the period mentioned in para 3.1 above. If no payment of the deposit is made within the said period the tender will be cancelled and the plot(s) will be resold.

3. The remainder of the purchase price must be paid:

3.1 in cash on a date of signing of the Deed of Sale; or

3.2 by means of a bank Guarantee payable on date of deed registration and at an annual interest rate of 8%, calculated on a daily basis from date of signing of the Deed of Sale until one day after the date of deed registration.'

[11] Upington Hotel's bid was found by the Municipality to be compliant on the basis of a letter dated 8 January 2016 that was issued by Nedbank, which read:

'We refer to the request to issue a bank code to [THE MUNICIPALITY] in respect of the conduct of the bank account of UPINGTON HOTEL (PTY) LIMITED. . . .

. . .

Bank codes are issued to other banks in accordance with normal banking practice. Had the bank code been requested by another bank, we would have issued code "B" on R2 525 000.00 (Two million five hundred and twenty five thousand Rand only).

The information supplied herein is confirmed only at the date of issue hereof and this letter is issued without prejudice to the rights of Nedbank.'

[12] In my view there are two fundamental difficulties with the Municipality's acceptance of the letter from Nedbank as a guarantee. First, the letter from Nedbank did not constitute a guarantee. Concerning the meaning of the term 'guarantee' R D Claassen in *Claassen's Dictionary of Legal Words and Phrases* (June 2019, online) states:

'The word is capable of a number of meanings, but the ordinary meaning is to assure a person of the receipt of possession of something" (per Greenberg, J in *Walker's Fruit Farms Ltd v Sumner* 1930 TPD 398). This word held used in the sense of a promise to pay in a certain event rather than in the usual and more proper sense. . . '

The definition proceeds to refer to the decision in *Mayfair South Townships (Pty) Ltd v Jhina* 1980 (1) SA 869 (T), in which the term 'guarantee', as it appeared in

s 58(11)(a)¹ of the Transvaal Town-planning and Townships Ordinance 25 of 1965, was interpreted. In *Mayfair* at 257 the court expressed itself as follows:

‘In my view, the word is used in a simple, non-technical sense in s 58(11) and means no more than an assurance of payment. The Afrikaans text which refers to “die waarborg tot voldoening” is, if anything, more clearly indicative of the wide sense in which a guarantee is to be interpreted. (*Cf Hermes Ship Chandlers (Pty) Ltd v Caltex Oil (SA) Ltd* 1973 (3) SA 263 (D) at 266 – 7).’

Second, the letter from Nedbank said nothing about the costs of the development to be undertaken on the property.

[13] On this basis, the Municipality should have treated Upington Hotel's bid as non-responsive. The requirement of a bank guarantee was to give the Municipality certainty as to the financial ability of the tenderer not only to purchase the property but also to complete its proposed development. It assures the Municipality that the tenderer will not abandon the project due to lack of funds.

Was there compliance with s 14 of the MFMA?

[14] Section 14 of the MFMA provides:

‘14. Disposal of capital assets –

(1) A municipality may not transfer ownership as a result of a sale or other transaction or otherwise permanently dispose of a capital asset needed to provide a minimum level of basic municipal services.

(2) A municipality may transfer ownership or otherwise dispose of a capital asset other than one contemplated in subsection (1), but only after the municipal council, in a meeting open to the public –

(a) has decided on reasonable grounds that the asset is not needed to provide the minimum level of basic municipal services; and

(b) has considered the fair market value of the asset and the economic and community value to be received in exchange for the asset.

¹ Section 58 of the Transvaal Town-planning and Townships Ordinance 25 of 1965 set out the procedure to be followed regarding the establishment of a township. The owner of the land was required to make an application to the Director to the Administrator in the prescribed form which application was accompanied by the relevant supporting documentation. At the time *Mayfair* was instituted s 58(11)(a) of the read as follows:

‘. . . the applicant shall. . . furnish. . . a *guarantee to the satisfaction of the local authority concerned for the fulfilment of his obligations as previously agreed to by himself* and such local authority in respect of the supply of the services referred to in that sub-section, and such local authority shall inform the Director as soon as a satisfactory guarantee has been furnished’.

...

(5) Any transfer of ownership of a capital asset in terms of subsection (2) or (4) must be fair equitable, transparent, competitive and consistent with the supply chain management policy which the municipality must have and maintain in terms of section 111.'

[15] I have difficulties with the argument raised by the Municipality that it complied in particular with the requirements of s 14(2)(b) of the MFMA, being the consideration of the fair market value of the assets and the economic and community value to be received in exchange for the asset. The provisions of s 14(2)(b) require that once the market value of the property has been ascertained that it be weighed against the economic and community value to be received in exchange for the asset. There is no evidence that this was done by the council of the Municipality. Much less, in a meeting open to the public.

[16] This process could not be delegated by the council of the Municipality to any of its officers, as contended by the Municipality, because s 14(4) is limited to movable assets and does not extend to immovable property. S 14(4) specifically provides that:

'A municipal council may delegate to the accounting officer of the municipality its power to make determinations referred to in subsection 2(a) and (b) in respect of movable capital assets below a value determined by the council.'

[17] The effect of non-compliance with the provisions of s 14(2)(b) of MFMA, that is the failure by the Municipality to take a resolution determining the economic and community value of the property to be disposed, did not meet the jurisdictional facts for the disposal of a capital asset as required in terms of the MFMA. Counsel for the Municipality accepted that if this conclusion was to be reached, the Municipality would have to commence the entire process *de novo*.

[18] In the result the application for leave to appeal must succeed. The following order is made:

- 1 Leave to appeal is granted.
- 2 The appeal succeeds with costs.
- 3 The order of the court a quo is set aside and replaced by the following:

'(a) The resolution of the first respondent to sell the property known as Erf 15747, Olivier Park, Upington, Northern Cape Province, measuring 9 023 square metres, is reviewed and set aside.

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(d) The first respondent is ordered to pay the costs of the application.'

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JUDGE OF APPEAL

APPEARANCES

For applicant:	M Snyman SC
Instructed by:	CJ Willemse Muller & Babinszky Attorneys, Upington Symington de Kok Attorneys, Bloemfontein
For first respondent:	J S Rautenbach
Instructed by:	Becker, Bergh & More Incorporated, Upington Lovius Block Attorneys, Bloemfontein