

**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

CASE NO: 18339/18

In the matter between:

TMT SERVICES AND SUPPLIES (PTY) LTD

Applicant

and

THE MEC: DEPARTMENT OF TRANSPORT, KZN

First Respondent

THE PREMIER OF KZN

Second Respondent

THE MEC: DEPARTMENT OF TREASURY, KZN

Third Respondent

THE HOD: DEPARTMENT OF TRANSPORT, KZN

Fourth Respondent

MTM KZN TRAFFIX (PTY) LTD

Fifth Respondent

Delivered: 06 March 2020

JUDGMENT

NDITA; J

INTRODUCTION

[1] This is an application to review and set aside the decision of the Fourth Respondent to award a tender for traffic contravention management to the Fifth Respondent. The Applicant was an unsuccessful bidder. More specifically, the relief sought by the Applicant in the Notice of Motion is couched in the following terms:

- '1. Reviewing and setting aside the decision by the Fourth Respondent ("the Department") to award tender **ZNB1366/17T: Supply of Integrated Traffic Contravention Management Systems to Road Traffic Inspectorate** ("the tender"), to the Fifth Respondent, as well as any contracts concluded pursuant to such award.
2. Remitting the tender for adjudication afresh on the same bid documents, with the following time table:
 - 2.1 the Fourth Respondent's Bid Evaluation Committees ("BEC"), along with any Bid Specification Committee ("BSC"), or any other relevant technical committee, to consider the bids and make recommendations to the Fourth Respondent's Bid Adjudication Committee ("BAC") on the appointment of a new bidder within 30 (thirty) days of the date of this order.
 - 2.2 The Fourth Respondent's BAC to consider the recommendations of the BEC referred to in paragraph 2.1 above and to take a final decision, along with whoever at the time is acting in their official capacity as the Fourth Respondent's Head of Department, regarding the appointment of a new bidder within (15) days of receipt of the BEC's recommendations.
3. In the alternative to paragraphs 1 and 2 above, that the award of the tender to the Fifth Respondent by the Fourth Respondent, and any contract concluded pursuant thereto, be reviewed and set aside, and that the Fourth Respondent call for bids afresh within 30 (thirty) days of the date of this order.'

In an amended Notice of Motion, the Applicant seeks that the award [the tender] to the Fifth Respondent, as well as any contracts concluded pursuant to such award be given to it.

THE PARTIES

[2] The Applicant is TMT Services and Supplies (PTY) LTD t/a Traffic Management Technologies ("TMT" or "the Applicant"), a company duly incorporated under the laws of the Republic of South Africa with registration number 2000/0222850/07 and with its registered office, as well its principal place of business at Ground Floor, Building D, Platteklouf, Cape Town, The pleadings reflect that the

Applicant is in the business of providing traffic management services to state entities such as municipalities and provincial governments. The business consists of four divisions, namely, Road Safety Enforcement Public Transport Management, and Tolling.

[3] The First Respondent is the MEC: Department of Transport, Province of KwaZulu-Natal ("the Department"), with its principal place of business being 172 Burger Street, Pietermaritzburg, KwaZulu-Natal Province. The Second Respondent is the Premier of the KwaZulu-Natal, in his official capacity and cited as Head of the Provincial Government of the Government of the Province of KwaZulu-Natal, with its principal place of business also at 172 Burger Street, Pietermaritzburg. The Third Respondent is the MEC: Department of Treasury, Province of Kwa-Zulu-Natal, with its head office at 14 Chief Albert Luthuli Street, Pietermaritzburg. The Fourth Respondent is the Head of the Department: Department of Transport, KwaZulu-Natal Province with his principal offices at 172 Burger Street, Pietermaritzburg.

[4] The Fifth Respondent is MTM KZN Traffix (PTY) LTD ("MTM"), a company duly incorporated under the laws of the Republic of South Africa, with registration number 2014/165478/07 t/a Mikros Traffic Monitoring with its registered office as well as principal place of business is at 116 Fascia Road, Silvertondale, Pretoria. For its Kwa-Zulu Natal operations, the physical address is Unit 14 – 17, Davlen Park, 11 Halsted Road, Mkondeni, Pietermaritzburg.

FACTUAL BACKGROUND

[5] Before summarizing the facts relevant to the background of this application, I must mention that Counsel for the Applicant, Mr Ackerman, sought leave to file supplementary authority on 27 February 2020, the eve of the date on which I had undertaken to deliver the Order in this matter. The Respondent's expressed objected

but were of the opinion that this court may have recourse to the authority it was being referred to because it, in any event bore no relevance to the points raised *in limine*, which, in terms of an Order of this court were to be determined before the the determination of the merits of the review application. I have in this judgment considered the aforesaid authority. I now turn to outline the factual matrix.

[6] The Applicant submitted its tender for the provisioning of traffic management services comprising of five components, namely, an integrated camera network, a traffic contravention management system, common interface of the various systems, fines recovery and a skills transfer component. The contract was for a duration of five years. The closing date for the bid was 12 July 2017. There was a four-stage bid evaluation process, involving Pre-screening, (to ensure that bidders had submitted all relevant documents); Technical evaluation, Price evaluation; and a B-BBEE evaluation. The Bid Evaluation Criteria and Methodology were stipulated in the bid document's Special Conditions of Contract. Bidders had to achieve a score of 65% for the evaluation to proceed to price and preference evaluation.

[7] The bids were evaluated and in the course of this process, the Applicant was eliminated in the pre-screening phase on the basis that it had failed to provide two copies of its bid. On 03 August 2017, the BEC met and the Fifth Respondent obtained the highest score of 97,5% and was awarded the bid. On 13 October 2017, the Applicant lodged an appeal against the bid award to the Kwa-Zulu-Natal Appeals Tribunal. The appeal was not opposed by neither the Department, nor the Fifth Respondent. On 05 February the Bid Appeals Tribunal found that the bids should be re-evaluated. After the re-evaluation process the bid was awarded to the Fifth Respondent. Another bidder, Magna Medaco, who was also unsuccessful at the re-evaluation stage launched review proceedings challenging the bid award, but later

abandoned the process. The Applicant served the review papers on the Respondents during October 2018.

[8] The grounds of the review can be summarised as follows:

8.1 The Department acted *ultra vires* when awarding the tender to MTM because it re-evaluated MTM's bid prior to the recommendation of the Third Respondent that the bids be referred for re-evaluation.

8.2 The BEC and BAC did not apply their minds to the re-evaluation as the scoring and re-evaluation was done in a hasty manner; and

8.3 The scoring of MTM's bid was flawed as the scores were vague and incomprehensible.

GROUND OF OPPOSITION

[9] The First and Fourth Respondents, as well as Fifth Respondent oppose the relief sought by the Applicant on several grounds, and have raised four points *in limine*, some of which may be dispositive of the application. I deem it expedient to first deal with them.

9.1 Jurisdiction

The Respondents allege that this court does not have jurisdiction to adjudicate upon this matter as it has no connection whatsoever with the dispute because the cause of action arises in Kwa-Zulu, Natal, not the Western Cape, and none of the Respondents are resident or domiciled within its jurisdiction.

9.2 Non-joinder

The Respondents allege that the two bidders who were unsuccessful ought to have been joined in these proceedings seeing that a decision awarding the bid to the Applicant may be prejudicial to them.

9.3 Failure to exhaust internal remedies

According to the Respondents, the Applicant did not exhaust internal remedies and has not asked for condonation of the failure. The Respondents aver that the Applicant did have an internal remedy to BAT but it lodged a defective appeal in that it lodged outside the five-day period prescribed for an appeal to the BAT.

9.4 Failure to comply with the 180-day period

On this point it is alleged that the Applicant launched the present application more than 180 days since it was served on or about 18 October 2018 and has not applied for condonation.

[10] According to the Respondents, the application should be dismissed on one or more of the grounds raised *in limine*. It is clear to me that the point which must be considered first is that of jurisdiction since it is dispositive of the other points.

Jurisdiction

[11] The territorial jurisdiction of the divisions of the High Court of South Africa is governed by section 21 of the Superior Courts Act 10 of 2013 which provides that the high court has jurisdiction over all persons residing or being in, and in relation to all causes arising and all offences triable within, its area of jurisdiction and all other matters of which it may according to law take cognizance of. In the matter at hand, the Applicant relies on section 1 of PAJA to found jurisdiction. Section 1 of PAJA defines a 'court' as:

(a) ...

(b) (i) a High Court or another of similar status;

(ii) within whose area of jurisdiction the administrative action occurred or the administrator has his or her or its principal place of administration or the party whose

rights have been affected is domiciled or ordinarily resident or the adverse effect of the administrative action was, is or will be experienced; . . .'

A court or tribunal has, in terms of section 6(2) of PAJA the power to review an administrative action on a number of grounds as set out in section 6.

[12] The Applicant relies on section 1 read with section 6 of PAJA to found jurisdiction on the basis it is resident in Cape Town. The Respondents contend that section 6 of PAJA must be interpreted in the light of section 21 of the Superior Courts Act 10 of 2013, as well as the doctrine of effectiveness and/or convenience. According to the Respondents, this court has no jurisdiction to determine the merits of the review application on the following basis:

12.1 All the Respondents are based in Kwa-Zulu Natal;

12.2 The bid was a bid process issued in Kwa-Zulu Natal for goods and services in KwaZulu- Natal;

12.3 Item 12 of the Special Conditions of Contract require the service provider's project team to be located in Pietermaritzburg;

12.4 The bid concerned road traffic functions of KwaZulu-Natal Provincial Administration within the exclusive jurisdiction of the Provincial Government

12.5 The bid was undertaken in terms of the KwaZulu-Natal Supply Chain Management Policy and KwaZulu-Natal Treasury practice Notes;

12.6 The bid was adjudicated in KwaZulu-Natal, and the final administrative decision was taken in KwaZulu –Natal. The bid award was subject to an appeal before the KwaZulu-Natal Bid Appeals Tribunal;

12.7 The bidder had to be a KwaZulu-Natal small medium or micro enterprise (SMME) or allocate at least 30% of the bid price to such an entity.

[13] For all these reasons, so argued the Respondents, it cannot be convenient that the matter be heard in the Western Cape, and it is desirable for sound public administration and for the principle of convenience that the matter be heard in KwaZulu-Natal. As can be discerned from the foregoing, none of the Respondents are resident or domiciled in the Western Cape. Moreover, this Court has no connection whatsoever to the dispute, save that the applicant happens to be resident here.

[14] Counsel for the Applicant contended that there is no discretion or weighing of interests once a PAJA ground of jurisdiction applies. Stated differently, considerations of effectiveness, or common sense, or convenience do not apply once jurisdiction has been established in terms of PAJA. According to the argument, the fact is TMT resides in Cape Town, and the bottom line is that this Western Cape High Court has jurisdiction. The Applicant relies in the main, as authority for this contention on an unreported judgment of Mayosi AJ in the matter of *B.O. Mahony N.O. Trustee for the Time Being of Rainbow Nation Property Trust Number 3 & Others v The Member of the Executive Council for Health and Social Development Eastern Cape Provincial Government & Others*, Case number 1444/15, an of this division as authority for this contention

[15] It must be stated from the outset that the reliance on *Mahony* is misplaced as firstly, the facts are clearly distinguishable from the facts *in casu*, and secondly, in coming to its conclusion, the court applied the considerations of convenience. In *Mahony*, the applicants were attempting to compel the Eastern Cape Provincial Government to make a decision regarding the application by a consortium (of which the applicants were members) for a licence to operate a 60 bed and 3 theatre hospital in Jeffrey's Bay. Since the Provincial Government had, according to them,

either failed or refused to make a decision, they sought a mandamus to compel same. The respondents had their principal places of residence/offices in the Eastern Cape, the decision sought to be compelled related to medical facilities in the Eastern Cape and the administrative action (the decision making) would take place in the Eastern Cape. The sole connection with the Western Cape, was – as in the instant case – the applicants' domicile. Since the applicability of PAJA was not disputed, and – crucially – the respondents conceded that the Cape High Court had jurisdiction, the matter turned on considerations of convenience, and it was this factor that swayed the Court to keep the matter in the Western Cape. It is, however, on this same point that the argument falls apart for the current applicants. In the *Mahony* matter, the 1st and 2nd applicants, who were integral to the successful prosecution of the review, had severe medical conditions that would have been exacerbated by continuously flying to and fro the Eastern Cape. Since the same did not apply to the respondents, convenience clearly favoured proceedings in the Western Cape.

[16] The Court in *Mahony* referred to the matter of *Estate Agency Board v Lek* 1979 (3) SA 1948 (A). In *Lek*, the aggrieved party (an estate agent) had sought to bring the Estate Agency Board, centred in Johannesburg, to book in Cape Town, where the estate agent has resident, and where he had his own practice. The agent, who by that time had been in practice as an estate agent for many years, had been denied a "fidelity fund certificate". As a result of being denied such a certificate, and due to a recent legislative change, he could no longer legally practice as estate agent. The Board had sought to non-suit the agent, on the basis that their place of business was in Johannesburg. The Court held that not only was the agent resident in Cape Town, but the effect of the Board's decision would be felt in Cape Town, as

the agent would no longer be able to practice. Also, since the Board represented all estate agents in South Africa, they could reasonably be expected to attend Court throughout the Republic, as circumstances required.

The Court in *Lek* also pointed out though that:

“...as set out earlier in this judgment, convenience and common sense, are *inter alia*, valid considerations in determining whether a particular Division has jurisdiction to hear and determine the particular cause”

[17] An examination of court decisions firmly establishes that even where jurisdiction is founded on PAJA, considerations of convenience and common sense, as well as effectiveness are applicable. In *National Arts Council and Another v Minister of Arts and Culture and Another* 2006 (1) SA 216 (C) the Minister had taken a decision to terminate the functions of the Council. The principal place of business of the Council itself is, however, in Johannesburg. The Council attempted to bring the matter before the Cape Town High Court, on the basis that two of the Council's members were resident in the Cape Town. The argument was that the effect of the decision was felt in Cape Town, by the members resident there. The Court held that the members of the Council were not full time staff, but were employed only on a part time basis, for a fixed period, and that any allowances they received were in respect of services rendered from time to time.

[18] In the instant matter, the Applicant is also not a member of staff, or entitled to any remuneration until successfully awarded a tender, with rights only vesting once a tender is awarded and contracts signed.

[19] The applicants in *National Arts Council* had argued further that since a meeting regarding the proposed decision had been held in Cape Town that would

constitute a further ground for establishing jurisdiction. The Court held, however, that:

"It is quite clear on basis of the record that no decision that adversely affects the rights of anyone of the applicants having a direct, external legal effect was taken in Cape Town. Even if the first respondent proposed or contemplated making a decision at the time of the meeting held in Cape Town, the decision was finally made in Pretoria. It is thus clear, in my view, that the decision by the first respondent was taken in Pretoria and thus outside the jurisdiction of this Court. I am not persuaded by the proposition that because the decision taken by the first respondent commenced or flows from a meeting held in Cape Town constitutes a sufficient connecting factor to establish jurisdiction."

It is noteworthy that in the present application no decision adversely affecting the Applicant's rights, and having a direct, external legal effect, was taken in Cape Town.

[20] The Applicant also relies on the matter of *Johnson & Others v Minister of Home Affairs & Others: In Re: Delorie & Others v Minister of Home Affairs & Another*, Case number 10310/2014; 10452/2014 [2014] ZAWHC 101(30 June 2014). Likewise, such reliance is, misplaced. In *Johnson*, the issue arose as a result of a legislative amendment, to the effect that Executive has a principal place of business both in Tshwane and Cape Town. In respect of one of the complainant parties, the administrative action also took place in Cape Town (when the complainant was declared an "*undesirable person*" upon proceeding through passport control at Cape Town International Airport), while in the case of the other complainant party this happened in Johannesburg (at O.R. Tambo Airport). Since all the complainant parties were domiciled in the Western Cape, and in view of the facts mentioned above, it would indeed have been more convenient to proceed in the Cape High Court. Again, considerations of convenience came to the fore.

[21] In *Traffic Management Technologies (Pty) Ltd v Tlokwe Municipality and Another* 6628/2015 [2015] ZAWHCHC (28 April 2015), the applicant had attempted to prevent any contracts from being signed as a consequence of a tender being awarded between the 1st and 2nd respondents. The applicant had, in terms of a service level agreement with the Tlokwe Municipality, rendered traffic management services to said municipality. The service level argument had been a temporary measure, for a fixed period, in order to permit the correct procurement processes to take place. At the end of that process, the applicant had been informed that its bid had not been successful. The applicant did not expressly claim to be domiciled in the Western Cape, a point of contradistinction with the present matter. The Court however, held as follows:

"Its failure to reply to the averments, as contained, in second respondent's answering affidavit, is for the reasons which is outlined hereunder, fatal to its application:

(1) The SLA upon which the applicant relief for the relief it seeks provides inter alia:

1.1 for services to be rendered by the applicant to the local authority which is defined in the SLA as the Tlokwe Municipality.

1.2 The offices of Tlokwe Municipality has its domicile and domicile citandi et executandi at corner of Saul 10 Plaaitjies Avenue and Wolmarans Street, Potchefstroom,

1.3 The services to be rendered is within the area of the Tlokwe Municipality.

(2) The tender process for Tender 29/13, occurred under 15 auspices and the instance and request of the Tlokwe Municipality.

(3) The performance of the applicant's contractual obligations in terms of the SLA are territorially bound by the municipal area of the Tlokwe Municipality. In addition, the receipt of tenders and the adjudication of tenders as well as the allocation of the tender, which the applicant attempts to challenge occurred in the Tlokwe Municipality.

- (4) The service which applicant is presently obliged to render is not only to be rendered within the Tlokwe Municipality and the payments which it received pursuant to the SLA, are also made by the Tlokwe Municipality.
- (5) The applicants staff and infra structure are employed at the offices of the Tlokwe Municipality from where it renders the service.
- (6) The alleged adverse effects which applicant complains about relates to the fact that it would be precluded from rendering service in the Tlokwe municipal area and to the Tlokwe Municipality beyond 30/04/2015, being the date when the SLA comes to an end.
- (7) The applicant's review proceedings i.e. the merits and competency of which is disputed by second respondent, is confined to the Tlokwe Municipality and municipality area.
- (8) The applicant's reliance on an internal appeal similarly relates to a tender process and adjudication which occurred in the Tlokwe Municipal area.
- (9) Second respondent has its head office and principal place of business in Centurion, Pretoria, which falls within the area of jurisdiction of the Gauteng Provincial Division, Pretoria.

It is therefore clear that since the respondents have not waived their rights to raise jurisdiction as a defence and the fact that respondents have not submitted to the jurisdiction of this Court, I cannot find that this Court has jurisdiction to hear the application for urgent relief or for the judicial review of the decisions by the first respondent. See *National Arts Council v Minister of Arts and Culture* (supra). Accordingly, and in my view, the applicant has in addition, not succeeded in surmounting the jurisdictional hurdle."

[22] It is clear from the foregoing decisions that even where jurisdiction is based on PAJA, considerations of convenience, effectiveness and common sense are still relevant. The question is whether in the instant matter, convenience and common sense favour hearing this matter in the Western Cape, when, as above, the issue is territorially connected to KZN, the impugned decision was taken in KZN, and the current respondents (and potential further respondents who may be joined) have

their principal places of business in KZN, and as such would be put to great cost to litigate in Cape Town. The following facts, as alluded to by the Respondents militate against this court having jurisdiction to hear and determine the review application:

22.1 All the Respondents are based in Kwa-Zulu Natal;

22.2 The bid was a bid process issued in Kwa-Zulu Natal for goods and services in KwaZulu- Natal;

22.3 Item 12 of the Special Conditions of Contract require the service provider's project team to be located in Pietermaritzburg;

22.4 The bid concerned road traffic functions of KwaZulu-Natal Provincial Administration within the exclusive jurisdiction of the Provincial Government

22.5 The bid was undertaken in terms of the KwaZulu-Natal Supply Chain Management Policy and KwaZulu-Natal Treasury practice Notes;

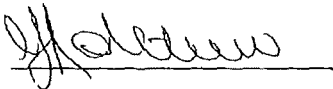
22.6 The bid was adjudicated in KwaZulu-Natal, and the final administrative decision was taken in KwaZulu –Natal. The bid award was subject to an appeal before the KwaZulu-Natal Bid Appeals Tribunal;

22.7 The bidder had to be a KwaZulu-Natal small medium or micro enterprise (SMME) or allocate at least 30% of the bid price to such an entity.

22.8 The service which the Applicant will render is to render is within Kwa-Zulu-Natal and the payments it will receive from the Fourth Respondent, the Department of Transport, Kwa-Zulu Natal. Haylie's

[23] It therefore is my judgment that the Applicant failed to establish that this court has jurisdiction to hear and determine the review application. In the result, the following order will issue:

The Application is dismissed with costs, which shall include in the case of the First and Fourth Respondents, costs consequent upon the employment of two counsel.

A handwritten signature in cursive script, appearing to read "J. NDITA", is written over a horizontal line.

NDITA; J