

SOUTH AFRICA / JUDGMENT

Bizstorm 51 CC T/A Global Force Security Services v Witzenberg Municipality and Another

(13794/13) [2014] ZAWCHC 83 (30 May 2014)

[2014] ZAWCHC 83

COURT

Western Cape High Court, Cape Town

BEFORE

Schippers

CASE / FILE NUMBER

13794/13

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IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case no: 13794/13

DATE: 30 MAY 2014

In the application of:

BIZSTORM 51 CC t/a GLOBAL FORCE

SECURITY SERVICES.....Applicant

And

WITZENBERG MUNICIPALITY.....First Respondent

VENUS SECURITY SOLUTIONS (PTY) LTD.....Second Respondent

JUDGMENT:

FRIDAY 30 MAY 2014

Schippers J:

- [1] In July 2013 the first respondent, Witzenberg Municipality (“the Municipality”), awarded Bid No 08/2/10/117 to provide security services at various municipal sites for a period of two years with effect from 1 July 2013 to 30 June 2015 (“the tender”), to the second respondent. This is an application to review and set aside that decision.

- [2] In its original notice of motion the applicant sought an order that the tender be remitted to the Municipality for re-adjudication, with certain directions to ensure that all bidders were given an opportunity to resubmit or supplement their bids. However, in the supplementary notice of motion the applicant seeks an order that the decision awarding the tender to the second respondent be substituted with an award of the tender to the applicant; and an order directing the Municipality to enter into a contract with the applicant for the security services described in the tender.
- [3] The Municipality and the second respondent oppose the application.
- [4] The basic facts are these. The closing date of the tender was 18 June 2013. Twelve bids were submitted. These were opened on 24 June 2013. That day or shortly thereafter, the prices of the various bids submitted were made known. The Municipality's Bid Evaluation Committee (BEC) found that only two bids were responsive, namely that of the second respondent and an entity known as Royal Security CC.
- [5] On 22 July 2013 the Municipality informed the second respondent that the tender had been awarded to it. On the same day the applicant was informed that its bid was unsuccessful. The applicant noted an appeal against the award of the tender in terms of s 62 of the Local Government: Municipal Systems Act 32 of 2000 ("the Systems Act"), and requested copies of all internal memoranda and recommendations relating to the decision to award the tender.
- [6] On 26 July 2013 the applicant received a copy of the report by the Bid Adjudication Committee (BAC). However, it did not receive the report by the BEC, a scoring sheet setting out the prices of the various bids and other relevant documentation. These were provided on 1 August 2013.
- [7] On 12 August 2013 the applicant submitted a formal appeal under s 62 of the Systems Act. Its grounds of appeal were that the Municipality: failed to exercise its discretion in a manner that was fair and reasonable; did not conduct the tender process fairly; advantaged at least one bidder over others by giving it an opportunity to supplement its bid; and focused on form rather than substance.
- [8] By the time that this application was heard, the applicant's internal appeal had not been decided. The Municipality has taken the point that the applicant has not exhausted an internal remedy as contemplated in s 7(2) of the Promotion of Administrative Justice Act 3 of 2000 (PAJA), and that the application therefore should be dismissed. However, in view of the conclusion to which I have come, it is not necessary to decide the point.
- [9] The grounds of review contained in the founding papers, some of which tend to overlap, may be summarised as follows. The Municipality's decision to allow some bidders to supplement their bids without allowing others to do the same, is procedurally unfair in terms of s 6(2)(c) PAJA. The applicant's bid was declared non-responsive because it did not submit proof of public liability insurance in the sum of at least R5 million. However, the Municipality allowed other bidders to supplement their bids. The Municipality disregarded a

relevant consideration as contemplated in s 6(2)(e)(iii) of PAJA, namely that the applicant had met the requirement for public liability insurance in the sum of R5 million.

Alternatively, the Municipality acted arbitrarily and capriciously as contemplated in s 6(2)(e)(iv) of PAJA, by failing to exercise its discretion to ask for clarification or information concerning the applicant's public liability insurance. The Municipality performed its functions and exercised its powers in a way that no reasonable decision-maker could have done, and therefore its decision falls to be set aside in terms of s 6(2)(h) of PAJA. Finally, the Municipality acted contrary to a mandatory and material procedure or condition prescribed by an empowering provision.

- [10] The grounds upon which the applicant seeks an order that the Municipality's decision be substituted by an award of the tender by this court, are these. If the applicant's bid had been considered, it would have been successful and there is no point in remitting the matter to the Municipality. The court is in as good a position as the Municipality to make a decision to award the tender, as it does not involve any policy-laden, budgetary, or polycentric issues.
- [11] Before dealing with the review grounds, it is necessary to outline the relevant statutory and regulatory provisions.

The statutory and regulatory provisions

- [12] Section 111 of the Local Government: Municipal Finance Management Act 56 of 2003 ("the MFMA"), requires a municipality to have and implement a supply chain management policy which gives effect to Part 1 of Chapter 11 of the MFMA dealing with inter alia, the procurement of goods and services. Section 112(1) provides that the supply chain management policy must be fair, equitable, transparent, competitive and cost-effective and comply with the prescribed regulatory framework, which must cover at least the following: open and transparent pre-qualification processes for bids;[1] competitive bidding processes in which only pre-qualified persons may participate;[2] bid documentation and invitations for contracts;[3] and procedures for opening, registering, evaluating and approving bids.[4]
- [13] The first respondent's Supply Chain Management Policy (SCMP) was implemented on 1 July 2012. Paragraph 26 of the SCMP makes it clear that bids must be submitted in accordance with the directives in the bid documents. The invitation to bid forms part of the bid documents.
- [14] Paragraph 27(4) of the SCMP provides that the Manager: Supply Chain Management may, in compliance with paragraph 63 of the policy, grant a reasonable opportunity to a bidder who made an innocent error or omission in a bid document to correct such error or omission, provided that such opportunity should not unduly prejudice any of the other bidders.
- [15] In terms of paragraph 63 of the SCMP, the accounting officer of the Municipality is empowered to condone non-compliance with peremptory requirements of bids in cases where condonation is not incompatible with the public interest, and promotes the values of fairness, competitiveness and cost-effectiveness listed in s 217 of the Constitution.

[16] Paragraph 3.1 of the terms of reference in the bid documents reads as follows:

“PRE-QUALIFICATION CRITERIA

3.1 Bidders must be registered with the Security Officers Board in terms of Art (sic) 10(1) and 10(2) of the Act on Security Officers 1987 (Act 92 of 1987) as amended and must comply with the minimum training standards in terms of Regulation 23 of the said Act with regards to handling of cash in transit, firearms and access control. Bidders are required to supply the following documentary proof:

- a) Proof of registration;
- b) Latest valid certificate of good standing;
- c) Fire arm licenses; and
- d) ICASA Licenses

3.2 Bidders must have Public Liability Insurance cover of at least R5 000 000.00 (five million rand). Proof thereof must be submitted with the bid.”

[17] The first page of the bid documents states that the proposal and all other documents of the submission must be attached to the bid (paragraph 3). This requirement is repeated in paragraph 11 of the invitation to bid, which states that failure to comply with the conditions of the invitation may result in the bid being disqualified. The criteria in determining whether a bid

is responsive are set out inter alia as follows:

“RESPONSIVENESS CRITERIA

No bid will be considered by Witzenberg Municipality unless it meets the following responsiveness criteria (for the bid to be considered the responsive, the bid must meet the following requirements):

...

- d) The official bid document must be completed in indelible ink. Where information requested does not apply to the bidder and the space is left blank, it will be deemed to be not applicable.
- e) All requested relevant and/or additional documentation such as Compliance Certificates, professional registration, artisan qualification, etc must be submitted with the bid document.”

[18] The pricing schedule contained in the bid documents reads inter alia as follows:

“BIDDERS MUST QUOTE ON ALL ITEMS IN THE PRICING SCHEDULE AS LISTED BELOW. IF NOT THE BID WILL BE CONSIDERED TO BE NON-RESPONSIVE.”

Review grounds

- [19] The applicant contends that the Municipality firstly, acted procedurally unfairly when it decided that the applicant's bid was non-responsive, because it did not submit proof of public liability insurance in the sum of at least R5 million. The applicant says that it should have been given an opportunity to supplement its bid, as happened in the case *Waaksaam Sekuriteits Dienste t/a AC Security* ("Waaksaam"), which was allowed to supplement its bid by providing proof of public liability cover. Then it is said that it is common practice and reasonable for a security company tendering on a contract which requires insurance cover greater than that held by the company, to submit a letter stating that the company can obtain the necessary cover if it gets the tender. What usually happens, the applicant says, is that the bidder submits a letter by its insurer, as the applicant did in this case, stating that sufficient cover is available on request.
- [20] This challenge to the impugned decision is unsustainable. The tender was for the rendering of security services which includes the use of firearms and the exercise of access control, at some 14 municipal sites. Bidders were required to submit proof of public liability insurance cover of at least R5 million. The applicant did not comply with this requirement. The confirmation of security liability insurance attached to its bid states that the applicant has general public liability cover in the sum of R1 million and cover for security risks also for R1 million; and that the limit of indemnity may be increased to R5 million at the insured's request. Such a request would have to be made to the insurance company concerned and may or may not be approved. As stated in the answering affidavit filed on behalf of the Municipality, the insurance criteria were not based on what a bidder might be able to do in the future: it had to comply with the requirements of the bid documents at the date of the submission of its bid.
- [21] The circumstances under which Waaksaam was allowed to furnish proof of public liability insurance have been fully explained and do not detract from the fairness of the evaluation process, to the contrary. The Municipality's answering affidavit states that it previously adopted a policy in terms of which it demanded strict compliance with pre-qualification criteria of tenders. However, such a rigid approach had adverse effects and resulted in eminently qualified bidders being excluded from tenders in cases where a document was omitted from a bid due to an oversight. The Municipality therefore adopted a more flexible approach so as to ensure a more comprehensive and inclusive tender process. Waaksaam was in possession of public liability insurance but omitted to include the document evidencing this in its bid. It was given an opportunity to correct the omission.

The certificate of insurance which Waaksaam furnished showed that it did not have public liability insurance cover of R5 million.

Its cover was limited to R2 million. Its bid – like the applicant's - was found to be non-responsive. The bid submitted by Blue Spirit Trading 61 CC t/a Future Security Services was likewise found to be non-responsive because it did not have public liability insurance cover of at least R5 million.

[22] It is trite that the duty to act fairly is a flexible concept to be decided on the circumstances of each case. It may be fair to ask a bidder to explain an ambiguity in its bid, to correct an obvious mistake or in a complex tender, to ask for clarification in order to properly evaluate the tender. But whatever is done must not cause the process to lose the attributes of fairness,

transparency, competitiveness or cost-effectiveness.[5] In this case the unchallenged evidence is that every bidder who could not furnish proof of public liability insurance cover of at least R5 million, was found to be non-responsive. Not a single bidder who provided proof of public liability insurance cover of less than R5 million, was given an opportunity to increase that cover.

[23] Consequently, the applicant's challenge to the impugned decision on the grounds of procedural unfairness must fail. So too, its challenge on the grounds that the Municipality disregarded a relevant consideration; that it acted arbitrarily and capriciously; and that the decision is one which a reasonable decision-maker could not have reached.

[24] Apart from this, the applicant's tender was non-responsive in other material respects. This issue is considered next.

The applicant's tender was non-responsive in other respects

[25] The applicant did not quote on item H3 of the pricing schedule – to patrol premises on public holidays (24 hours) and when offices are closed at a storm water depot in Ceres. The pricing schedule in the bid documents makes it clear that bidders must quote on all items listed in the schedule ie for each and every service to be provided, failing which a bid will be considered to be non-responsive.

[26] The reason for considering such a bid non-responsive is not far to seek. The Municipality's answering affidavit states that all bids are opened simultaneously and the prices of the various bidders made known. If a bidder which did not quote a price on any service to be provided is allowed to do so after the closing date of a tender, it could adjust its tender price to below that of the lowest bidder. That is the very antithesis of a tender process. It would strip the process of the attributes of fairness, transparency and competitiveness contemplated in s 217(1) of the Constitution and 112(1) of the MFMA.[6] In fact, the applicant itself concedes that it is unacceptable to seek supplementary information from bidders, particularly if this would allow them to adjust their price or other crucial aspects of their tender. This, the applicant says, is antithetical to fairness as a bidder would be allowed to adjust its bid, knowing how its competitors had bid.

[27] Save for a bald denial, the applicant has no answer to its failure to comply with the pricing schedule.

- [28] There is a further reason why the applicant's bid is non-responsive - it failed to furnish a valid certificate of good standing issued by the Security Officer's Board, or more correctly, by its successor, the Private Security Industry Regulatory Authority (PSIRA), as required in terms of the bid documents. The PSIRA certificate attached to the applicant's bid was issued on 28 February 2013 and expired on 29 May 2013 - prior to the closing date of the tender. The applicant has likewise not answered these facts.
- [29] There can be no question that the failure to furnish a valid PSIRA certificate would render a bid fatally non-responsive. Section 20 of the Private Security Industry Regulation Act 56 of 2001 ("the Security Industry Regulation Act") provides that no person (which includes a close corporation) may in any manner render a security service for remuneration, reward, fee or benefit unless such a person is registered as a security service provider under the Act. In terms of s 38(3) of the Security Industry Regulation Act, any person who contravenes or fails to comply with s 20(1) is guilty of an offence and on a first conviction, may be sentenced to a fine or imprisonment for a period not exceeding five years or to both a fine and such imprisonment.
- [30] The applicant has not furnished any explanation for this fatal defect in its bid either. Instead, the replying affidavit states that the Municipality has provided additional reasons to those furnished when it declared the applicant's bid non-responsive. The applicant argues that its bid was declared non-responsive for one reason only - its failure to furnish proof of public liability

insurance of R5 million. Therefore, so the argument runs, this application must be decided on that reason alone and it is not open to the Municipality to introduce new reasons. For this argument the applicant relies on National Lotteries

- [7] and Jicama,[8] in which this court (per Cleaver J) cited with approval the following dictum in *R v Westminster City Council*: [9]

"... The cases emphasise that the purpose of reasons is to inform the parties why they have won or lost and enable them to assess whether they have any ground for challenging an adverse decision. To permit wholesale amendment or reversal of the stated reasons is inimical to this purpose. Moreover, not only does it encourage a sloppy approach by the decision-maker, but it gives rise to potential practical difficulties. In the present case it was not, but in many cases it might be, suggested that the alleged true reasons were in fact second thoughts designed to remedy an otherwise fatal error exposed by the judicial review proceedings. That would lead to applications to cross-examine and possibly for further discovery, both of which are, while permissible in judicial review proceedings, generally regarded as inappropriate. Hearings would be made longer and more expensive."

[31] But the applicant is mistaken. First, the Supreme Court of Appeal in *National Lotteries* expressly refrained from deciding the question whether the failure to give reasons for an administrative decision (which includes proper or adequate reasons) can be validated by different reasons given afterwards.[10] Second, the facts in *Jicama* are distinguishable. Third, a court is bound by the principle of legality: regardless of the reason given for finding the

applicant's bid non-responsive, this court cannot make an order contrary to the requirements of the tender, or which has the effect of permitting a contravention of the law.

[32] The applicant in *Jicama* was awarded a tender to collect arrear municipal service council levies and to attend to the registration of levy payers.

Subsequently the West Coast District Municipality decided to re-advertise the tender, allegedly because the requirement of functionality had not been stipulated therein. The court held that a binding agreement came into force upon acceptance of the tender; that the applicant came to court to deal with the stated reason for the cancellation of the tender; and that it was not open to the municipality to supplement the basis on which its decision was taken.[11] By contrast, the undisputed evidence in this case is that once the Municipality determines that a bid is non-responsive, a further audit of the bid is not done because that would serve no purpose. The Municipality's answering affidavit states that the applicant would in any event not have been awarded the tender because it did not complete the pricing schedule, and it failed to furnish a valid PSIRA certificate.

[33] It can hardly be suggested that the Municipality's stance is an afterthought or that it constitutes an amendment or reversal of the Municipality's reason for not awarding the tender to the applicant. The facts point the other way. The bid submitted by Paarl AC Rottweiler Security (Pty) Ltd was found to be non-responsive because it did not quote on all the items in the pricing schedule. Similarly, the bids of EM Scholtz Enterprises t/a Ceres Alarms and Guarding, Shaloti General Trading t/a Shaloti Security Services, Dee Dee Safety & Security Services and Diamond Force Security CC, were all declared non-responsive because these bidders did not furnish certificates of registration with the PSIRA.

[34] The Constitutional Court has held that it is a fundamental principle of the rule of law that the exercise of public power is only legitimate where lawful. To the extent that the rule of law expresses this principle of legality, it is generally understood to be a fundamental principle of constitutional law. The Legislature and Executive are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law. [12] The rule of law admits of no exception in relation to the judicial authority of the State. The exercise of judicial authority otherwise than according to law is invalid.[13]

- [35] In its supplemented notice of motion the applicant asks for an order substituting the Municipality's decision with the award of the tender to the applicant; and an order directing the Municipality to conclude a contract with the applicant for the rendering of the relevant security services. In this regard the applicant submits that the result is a foregone conclusion: the tender would have been awarded to the applicant but for its inadequate public liability insurance cover; and any further delay would cause it unjustifiable prejudice.
- [36] These submissions have no foundation. The tender cannot be awarded to the applicant simply because it does not comply with the requirements set out in the bid documents. It does not have the requisite public liability insurance cover; it has not completed the pricing schedule; and it has not furnished a valid certificate of registration issued by the PSIRA, as contemplated in the Security Industry Regulation Act. An award of the tender to the applicant in these circumstances would not be in accordance with law and thus violate the principle of legality. Secondly, an award of the tender to the applicant could never be just and equitable as contemplated in s 8(1) of PAJA. Thirdly, a reviewing court may substitute its decision for that of a designated functionary only in an exceptional case as envisaged in s 8(1)(c)(ii) of PAJA: when upon a proper consideration of all the relevant facts, the court is persuaded that a decision to exercise a power should not be left to the functionary.[14] In my view, this is not such a case.
- [37] Finally, the facts show that the bid submitted by the second respondent was properly completed, contained all the relevant information and met the criteria set out in the bid documents. The Municipality's decision to award the tender to the second respondent is thus reasonable and not reviewable.[15]
- [38] I make the following order:
- (1) The application to review and set aside the first respondent's decision to award the tender to the second respondent is dismissed.
 - (2) The applicant is directed to pay the costs of the first and second respondents.

SCHIPPERS J

- [1] Section 112(1)(e).
- [2] Section 112(1)(f).
- [3] Section 112(1)(g).
- [4] Section 112(1)(h).
- [5] *Metro Projects and Another CC v Klerksdorp Municipality and Others* 2004 (1) SA 16 (SCA) para 13.

[6] Section 217 of the Constitution reads: "Procurement – (1) When an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective."

[6] Section 217 of the Constitution reads:

"Procurement – (1) When an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective."

[7] National Lotteries Board and Others v South African Education and Environment Project 2012 (4) SA 504 (SCA)

[8] Jicama 17 (Pty) Ltd v West Coast District Municipality 2006 (1) SA 116 (C).

[9] R v Westminster City Council, Ex Parte Ermakov

[1996] 2 All ER 302 (CA) at 316c-d.

[10] National Lotteries n 7 para 27.

[11] Jicama n 8 at 121B-F.

[12] Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others

[1998] ZACC 17; 1999 (1) SA 374 (CC) para 58.

[13] S v Mabena and Another 2007 (1) SACR 482 (SCA) para 2.

[14] Gauteng Gambling Board v Silverstar Development Ltd and Others 2005 (4) SA 67 (A) para 28.

[15] Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others

[2004] ZACC 15; 2004 (4) SA 490 (CC) para 44.

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