

SOUTH AFRICA / JUDGMENT

Bophelong Construction (PTY) LTD v Roads Agency Limpopo (SOC) Limited (7765/2020) [2022] ZALMPPHC 71 (19 December 2022) [2022] ZALMPPHC 71

COURT

Limpopo High Court, Polokwane

BEFORE

Ledwaba

CASE / FILE NUMBER

7765/2020

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

(LIMPOPO

DIVISION, POLOKWANE)

CASE

No 7765/2020

Reportable:

No

Of

Interest to the Judges: No

Revised

19/12/2022

In

the matter between:

BOPHELONG

CONSTRUCTION (PTY) LTD

APPLICANT

And

ROADS

AGENCY LIMPOPO(SOC) LIMITED

FIRST RESPONDENT

LILITHALETHU

TRADING 41 CC

SECOND RESPONDENT

JUDGMENT

LEDWABA AJ

Introduction

[1] Bophelong Construction (PTY) LTD (the applicant) is an unsuccessful tenderer in the bid allocated reference number RAL / T652C/2021 for the upgrade from gravel to tar of Road P277/1 from Makuya to Masisi villages of the Vhembe District in the Limpopo Province (the bid or tender). It is aggrieved that the first respondent awarded the tender

to the second respondent.

[2] Apart from urgency prayer number 1 , the applicant prayed that:

- (2) the first respondent's decision to disqualify its tender be reviewed and set aside,
- (3) the first respondent's decision to award the bid to the second respondent together with any contract /agreement pursuant to the award of the bid be reviewed and set aside.
- (4) the tender be remitted back to the first respondent with direction that the applicant's bid be reconsidered de novo and
- (5) directing the first respondent to pay the costs of this application.

[3] On the 1st April 2021, the first respondent advertised the tender and set the 28th April 2021 as the closing date. Having submitted its tender on the closing date of the 28th April 2021, the applicant learned on the 22nd September 2021 from the tender bulletin dated the 17th September 2021 that the first applicant awarded the tender to the second respondent on the 11th August 2021. On the 7th October 2021 the applicant submitted the request in terms of the provisions of Promotion of Access to Information Act 2 of 2000 (PAIA) to obtain the reasons why its tender bid failed. By way of the letter dated the 12th October 2021(the rejection letter) , the first respondent replied to the PAIA request as follows:

Kindly be informed that Bophelong Construction (Pty) Ltd was unsuccessful in the above-mentioned bid for the reasons stated below:

1. The bid required bidders to demonstrate relevant experience by annexing to their bids CVs of the State Agent, as well as completion certificates of relevant projects that have been successfully completed previously by the bidders. For the functionality assessment on relevant experience, Bophelong was allocated a score of 5 (out of 6). The score so called allocated was for the experience of the company in the performance of similar projects. This is attributable to the fact that Bophelong only attached a typed summary of its experience but failed to attach completion certificates to this effect, which was expressly required on page T.17 of the bid document. We attach hereto extracts of the tender document of Bophelong, in this regard, marked as Annexure A (Curriculum Vitae of O. Mataboge) and

Annexure B (Letter of introduction and Recent Contracts). Furthermore, we attach hereto Annexure C, being an extract of the Bid Evaluation Report (demonstrating the points scored by Bophelong) and Annexure D (bid requirements).

2. Whereas the bid required that bidders submit proof that they possess the requisite plant and equipment, as listed in Annexure E, Bophelong only submitted proof the plant and equipment contained in Annexure F. it is upon this premise that Bophelong was awarded a score of 4 out of 15 for equipment functionality evaluation. In this regard, we

attach hereto an extract of the bid document of Bophelong marked as Annexure E (equipment required in terms of the bid document and scores allocated therefore), as well as Annexure F (plant owned and hire by Bophelong).

3. In terms of the evaluation of the financial standing of the bidders, points were allocated as follows:

Bank rating A: 20 points

Bank rating B: 16 points

Bank rating C: 12 points

Bank rating D: 8 points

Bank rating E: 4 POINTS; AND

Bank rating F-G: 0 points

Bophelong, in its bid document, as well as the letter from its bank, stated that it is rated as a B, for which it was correctly allocated a score of 16 points. In this regard, an extract of the bid document of Bophelong is attached hereto marked as Annexure G (the bank rating). The scores for the rating of the bank are detailed in page T.18 of the tender document, which is attached hereto marked as Annexure H.

- [4] In terms of the rejection letter, one of the tender invitation requirements was that the tenderers were required to demonstrate relevant experience by attaching Competence Certificates of the projects which have been successfully completed (the disputed documents). In terms of the rejection letter, instead of submitting the disputed documents, the applicant attached typed summary of its experience without attaching the completion certificate. In its answering affidavit, the first respondent contends that the Completion Certificates attached by the applicant and found in pages 78 to 110 of the record do not meet the requirements of the definition stated in the General Conditions of Contract for Construction Works (2010) published by the South African Institution of Civil Engineering (GCC 2010). This is because in the first respondent's view clauses 1.1.3 and 5.14.4 of the GCC 2010 define Completion Certificate as a certificate signed by the engineer to the employer and the contractor confirming the date on which the works were completed.[1] The applicant says what are missing are the portions of the completion certificates bearing the

signatures of the engineers.[2] The first respondent's position is that this resulted in the applicant being allocated the score of 5 of 6 points.

- [5] Irrespective of the documents attached by the applicant and considered as part of its bid documents, the common position appears to be that the disputed documents were not part of the applicant's bid documents considered by the first respondent's Bid Evaluation Committee (BEC). The question is whether the disputed documents were (as a matter of fact) attached by the applicant or not and whether they were removed from the applicant's bid documents by the first respondent's officials or not.

The applicant avers that they were included as part of the tender document and that the first respondent's officials removed them with the results that the first respondent unfairly and unlawfully disqualified/rejected its bid. The first respondent's version is that the applicant's tender was disqualified because it did not include the disputed documents.

The first respondent's submission is that since a dispute of fact, irresolvable on the papers, has arisen in this review application, which dispute was foreseeable by the applicant, this court should use its discretion referred to in Rule 6(5)(g) of the Uniform Rules to dismiss the applicant's application.

- [6] The first respondent served its supplementary affidavit and prays that its delivery be condoned in terms of rule 6(5) of the Uniform Rules. In this supplementary affidavit, the first respondent provides the update about the implementation of the tender.[3] It submits that in the event of the finding in favour of the applicant, just and equitable remedy should be crafted to allow for

the completion of the project. There is no opposing to the delivery of this supplementary affidavit. There is agreement between the parties that due to passage of time, the progress towards the completion of the project and the duration of the contract between

the first and the second respondents,[4] the execution of the tender has "reached a point of no return" that setting aside the awarding of the bid to the second respondent and cancelling the subsequent execution agreement between the first and second respondents would not be a just and equitable remedy envisaged in section 8 of the Promotion of Administrative Act 3 of 2000(PAJA) . The parties agree that substituting the second respondent will not serve the purpose of ensuring that the affected communities are provided with long awaited road. There is agreement between the parties that the other prayers, including that the matter should be remitted back for re-adjudication have been overtaken by events and would be academic to grant them. The result is that the only remaining issue as at the date of hearing of this application is prayer 2, namely the first respondent's decision to disqualify the applicant's bid on the basis that its tender documents did not include the disputed documents. This is apart from prayer five relating to the costs.

- [7] On behalf of the first respondent it was indicated that in terms of rule 6(15) of the Uniform Rules, it is still pursuing its application to struck out from the applicant's supplementary affidavit what it regards as scandalous, vexatious and or irrelevant allegations by the applicant. The first respondent states that this relates to certain paragraphs in which the deponent stated that he can only conclude that the disputed documents were removed from the applicant's bid documents by the first respondent's employee whose task was to compile the documents required for consideration or the first respondent's employee could have intentionally tampered with the applicant's bid by removing the disputed documents so as to sabotage the applicant's opportunity to be awarded the tender. This could have occurred at stage after the disputed documents were deposited into the tender box, with the result that they never served before the BEC during the valuation process. Relying on *Hacker v Hartmann & Others*
- (2019) ZAECPHC (10 April 2019) the first respondent states that the matter sought to be struck out must indeed be scandalous, vexatious or irrelevant. Citing *Beinash v Wixley* 1997(3) SA 721 (SCA) pg 732 and *National Director of Public Prosecution v Zuma* 2009(2) SA 277(SCA) par 81, the first respondent said a court must be satisfied that the affected party would be prejudiced if the application is not granted. Relying on paragraphs 12-17 of the affidavit supporting the striking out application, the first respondent submits that short of granting the application it will be prejudiced.
- [8] The first respondent submits that since the applicant did not reserve for itself the right to supplement its founding affidavit upon the receipt of the record, it is irregular for the applicant to serve the supplementary affidavit after the receipt of the record. In terms of rule 53(2) of the Uniform Rules, the contents of the founding affidavit are the grounds, the facts and the circumstances upon which an applicant relies to have the decision set aside. Rule 53(4) allows an applicant to supplement the supporting affidavit. As a matter of right, rule 53 allows an applicant to amend the founding papers after the delivery of the rule 53 record.[5] No provisions of rule 53 requires an applicant to reserve the right to supplement a founding affidavit which supports the review application.
- [9] The applicant submits that the first respondent's actions were allegedly procedurally unfair, [6] that the first respondent failed to consider relevant consideration[7] and that the first respondent's action of disqualifying the applicant's tender was not rationally connected to the reasons provided.[8]

Discussion

[10] Once an administrative action is reviewed and set aside under section 6 of PAJA, section 8(1) provides a court with a wide discretion to grant any order that is just and equitable, including remittal and substitution. The remedies envisaged in section 8 of PAJA are in the main of a public law and not private law character.[9] For the purpose of deciding this matter and in terms of section 8(1)(

c) of PAJA, a court may grant any order that is just and equitable, including setting aside the administrative action and either remitting the matter back for reconsideration or , in exceptional

cases, substituting or varying the administrative action, correcting a defect or directing the administrator to pay compensation. Once an administrative action is reviewed and set aside, what normally follows is remittal or in exceptional cases, substitution.

Just like in the case of section 172(1)(b) of the Constitution in relation to constitutional matters, section 8 of PAJA confers on a court in proceedings for judicial review a generous jurisdiction to make orders that are just and equitable. [10]

[11] The applicant's remaining prayer is that the first respondent's decision to disqualify its tender be reviewed and set aside. In the light of the agreement between the parties that just and equitability dictates that the second respondent proceeds to finalise the project, the focus is no longer on reviewing and setting aside the first respondent's decision to award the tender to the second respondent and cancel the resultant agreement. The question is whether the first respondent's decision to disqualify the applicant's tender is just and equitable and related to that, the question is whether such a remedy settles the dispute between the applicant and the first respondent. This question arises in the context of the general principle that, a judgment or order is required to have three attributes: it must be final in effect and not susceptible to alteration by the court of first instance, it must be definitive of the rights of the parties and must have the effect of at least disposing of the relief claimed in the main proceedings.[11] It must have final effect[12] and effectively vindicate the violated right.[13]

[12] The applicant is not praying for the declaration of any right. Just reviewing and setting aside the first respondent's decision to disqualify the applicant where the second respondent still proceeds to complete the tender is not what the applicant intended. It is not the applicant's case that the second respondent is not qualified to be awarded the tender and execute the contract. The applicant provided no evidence as to what would have happened had the tender not been awarded to the second respondent. The applicant's own version is that its tender was the fourth lowest in terms of the tender pricing. Even if the applicant was to succeed in having the first respondent's decision to disqualify it set aside, there

is no evidence that this necessarily disqualify the second respondent from continuing with the execution of the tender to be substituted by the applicant. Even if the second respondent was to be disqualified from executing the tender, any of the second and third qualifying

bidder in terms of pricing could qualify to be awarded the tender. This means setting aside the first respondent's decision to disqualify the applicant's tender will not necessarily oblige the first respondent to re-evaluate the tender with a view of the applicant executing the tender, which was the applicant's ultimated goal.

[13] The question is whether the applicant's bid was lawfully disqualified or not. The narrow issue related to that is whether the disputed documents were attached and submitted as part of the applicant's bid documents or not. The first respondent avers that the applicant's bid was lawfully disqualified while the applicant denies this.

[14] The parties explain their respective general procedures in dealing with the tender documents and attach affidavits of respective people and or officials who deal with the tender documents.[14] Mr Popper and Oelofse explained that they personally inspected the applicant's tender bid and confirm that the disputed documents

were attached. Mrs Van Jaarsveld and Mr Morris stated that they reviewed and bound the tender bid to avoid any document being dislodged and fall out of the bundle. The applicant regards this as direct uncontradicted eyewitness evidence.

The applicant says the first respondent's response moves the goal posts from saying the disputed documents were not attached to saying they were not signed by engineers. [15]

[15] To support the submission that its processes are reliable to make a claim that the disputed documents were not attached to applicant's tender documents, the first respondent relies on the security environment in which the bid documents are handled. [16] To bolster its submission that it is impossible for its officials and or third parties to temper with the submitted bid's documents without detection, the first respondent showed the picture of the tender box slot used to deposit tender documents and state that once deposited in the slot, it is impossible for any person to retrieve the bid documents without this being noticed. It explains that the only way to access and retrieve the bid documents is from inside its building through the door which can only be opened by unlocking biometric key lock and a normal key lock. It explains that only two people in the entire organisation have access keys (both biometric and manual). These people are Mr M Dinala and Ms S Selolo both from supply chain management division. They deposed to the affidavits to the effect that until the handing over of the bid documents to the BEC, at no stage did they open the tender box to retrieve the bid documents. Their affidavits explain that the tender box was opened on the 28th April 2021 in the presence of Messrs M Dinala, Mabilu , Kgomeswana and Ms S Selolo, Ms Maribana and Ms Rangoato and they all signed the tender opening register, whereafter the documents were stored under lock and key until they were handed over to the BEC by Mr M Dinala and Ms S Selolo. They explained that it would have been impossible for anyone to remove the disputed documents from the applicant's bid documents without them noticing it. They deny that they removed the disputed documents and compiled them into a separate bundle as suggested by the applicant.

The first respondent's supplementary affidavit states that given the explained process, there is nowhere through the chain of handling the bid documents where they are exposed to an opportunity for any person to intentionally tampered with and or sabotage any bid as suggested by the applicant in its supplementary affidavit.

[16] To demonstrate that the applicant is unjustified in relying on its systems, the first respondent points to the previous occasion under case number 3382/2021 in this division when the applicant made the similar claim that in terms of its own internal processes, all mandatory tender documents were attached to its bid. Believing and relying on its system, the applicant brought the review application, only to later realised that it made a mistake and withdraw the review application.[17] The first respondent submits that the applicant's directors, like any other human being are fallible and not immune from making mistakes. It says the applicant's system is not without flaws. The first respondent submits that the reasonable inference to be drawn is that the applicant committed the similar error of not attaching the disputed mandatory documents.

The applicant's reply is to the effect that in the previous occasion when its review application was withdrawn, that was due to confusion that existed between two tender requirements, which resulted in a dispute with regard to the documents that were submitted and this has nothing to do the integrity of its system .[18] It says what happened in the previous withdrawn review application is irrelevant inadmissible evidence[19]

[17] Together with the documents supplied as part of the record in response to rule 53(1)(b) notice, the applicant expects the first respondent to submit the original tender documents as submitted, together with its original binding ,(something not raised in the pleadings but in the applicant's heads of argument). This ignores the fact that once received and when processed, the bid documents are not kept in their original form. Copies were made for various purposes, including for the purpose of Rule 53 itself. The applicant expects that in order for real dispute of facts to arise, the first respondent should provide direct eyewitness testimony by a witness such a member of the BEC.

[18] The applicant submits that it provided what it claims is direct uncontradicted eyewitness evidence by Mr Popper and Oelofse that they personally inspected the applicant's tender bid and confirm that the disputed documents were attached. It expects that in order for real dispute of facts to arise, the first respondent should provide direct eyewitness testimony by the witness, such as BEC member, who scrutinised and observed the tender documents that the disputed documents were not in the bundle. This misses the point that the basis of assessing the first respondent's version is whether it is so far-fetched or clearly untenable that the court is justified in rejecting it merely on the papers. The fact that the witnesses were not put into the witness box to test the authenticity of their evidence is the applicant's choice, even after receiving the record provided in terms of section 53(3)(b) of the Uniform Rules and this cannot be used to the disadvantage of the first respondent.

[19] The first respondent submits that a genuine dispute of fact relating to the disputed documents has arisen and that this court should use its discretion to dismiss the applicant's application in terms of rule 6(5)(g) of the Uniform Rules. The first respondent's case is that given the Plascon-Evans[20] and other cases[21], the final interdict in the case of dispute of facts can only be granted if the facts alleged by an applicant which have been admitted by a respondent, together with the facts alleged by a respondent, justify such order. It submits that the handling of the disputed documents should be assessed on the basis of Plascon-Evens principle and that its version is not so far-fetched that it should be rejected merely on papers. This is because an applicant who seeks final relief using motion proceedings must, in the event of a dispute of fact, accept the version set up by a respondent unless the latter's allegations are, in the opinion of the court, not such as to raise a real, genuine or bona fide dispute of fact or are so far-fetched or clearly untenable that a court is justified in rejecting them merely on the papers. The recent decision of Mamadi [22] dealt with the relation between rules 6(5)(g) and 53 of the Uniform Rules. The court said a litigant who brings a review in terms of rule 53, and thus on motion, where disputes of fact are reasonably foreseeable, does not act in an impermissible way. In order to properly give effect to their section 34 Constitutional rights, litigants are constitutionally entitled to make use of rule 53 in review proceedings. It therefore cannot be that a litigant can be penalised through the use of rule 6(5)(g) of the Uniform Rules merely because rule 53 was utilised. A court does not have a discretion under rule 6(5)(g) of the Uniform Rules to dismiss an application brought in terms of rule 53 of the Uniform Rules on the basis that reasonably anticipated disputes of fact has arisen on the papers. This will penalise a litigant for making use of the procedural advantage of rule 53 of the Uniform Rules. [23] The court further said once a rule 53 applicant has enjoyed the benefit of rule 53 by receiving the record and in the face of disputes of fact, such applicant should timeously apply for a referral to oral evidence or trial. This is because where timeous

application is not made, courts are, in general, entitled to proceed on the basis that the applicant has accepted that factual disputes will be resolved in line with the Plascon-Evans rule.[24] Having received the record, the applicant has not applied for referral to oral evidence or trial and has accepted that in case of the finding that there are disputes of fact, they will be resolved in line with the Plascon- Evans rule. Given the evidence from both sides, the dispute whether as a matter-of-fact valid disputed documents were attached to the applicant's bid cannot be resolved on papers. The first respondent's version is not so far-fetched that it should be rejected merely on papers. The applicant is seeking the final relief on motion proceedings and must accept the version set up by the first respondent, unless the latter's allegations are so far-fetched or clearly untenable to be rejected merely on the papers. This is not the applicant's submission in respect of the first respondent's version.

[20] The applicant provided no motive (such as bad faith, dishonesty and or ulterior purpose) for the first respondent's staff or officials to sabotage its opportunity to be awarded the tender.

- [21] Accepting that alternative words could have been used, there is no indication that by using the words such as sabotage on its own displays any ill or bad intention on the part of the applicant's employees. The applicant says it only drew inferences to assist the court.[25] I could not find any prejudice on the part of the first respondent, even on the basis that its reputation has been damaged by the applicant's allegations.
- [22] The applicant's heads of argument make mention of the costs of the irregular proceedings and the costs of the 5th September 2022 which were reserved to be determined by the court hearing this application. I could not find these costs to enable me to make an order. I suggest that should the parties wish to pursue these costs; they should make the necessary arrangements.

Order

- [1] The application is dismissed.
- [2] The first respondent's delivery of its supplementary affidavit is condoned.
- [3] The first respondent's application to struck out from the applicant's supplementary affidavit what the first respondent regards as scandalous, vexatious and or irrelevant allegations in terms of rule 6(15) of the Uniform Rules is dismissed.
- [4] The applicant is ordered to pay the costs of this application on party and party scale, including the cost relating to the employment of two counsels.

LEDWABA LGP

ACTING JUDGE OF THE HIGH COURT

LIMPOPO DIVISION : POLOKWANE

APPEARANCES

For the applicant :

Adv GJ Diamond

Instructed by:

Cox Yeats Attorneys

C/O AH Burger Attorney Inc

Polokwane

For the first respondent :

Adv JA Motepe SC

Adv Lekgetho N

Instructed by:

Legodi Attorneys

Heard on:

17th October 2022

Judgement delivered on:

19 December 2022

[1] Paragraph 60 and 61 of the answering affidavit.

[2] Paragraph 8.2.5 of the replying affidavit.

[3] It says 40.31% of the project was implemented as at the 7th October 2022 and that by the 22nd December 2022 the project will reach practical completion to be eligible for usage at the end of February 2023.

[4] The contract duration was intended to be nine months and this was extended by the first and second respondents. It is common

cause that the contract having ran for more than four months, it has reached a point of no return to it be cancelled.

[5] Mamadi & Another v Premier of Limpopo Province & Others (2022) ZACC 26(6/07/22) (Mamadi) – par 27 and 39

[6] Paragraph 44.1 of the founding affidavit.

[7] Paragraph 46.1 of the founding affidavit

[8] Paragraph 46.2 of the founding affidavit.

[9] Jurgens Johannes Steenkamp N.O. v Provincial Tender Board of the Eastern Cape (2006) ZACC 16; 2007(3) SA 121(CC); 2007(3) BCLR 300(CC) (Steenkamp) – par 30

[10] Corruption Watch NPC & Others v President of Republic of the Republic of South Africa & Others; Nxasana v Corruption

Watch NPC & Others (2018) ZACC 23; 2018 (2) SACR 442(CC); 2018(10)BCLR 1179(CC); Steenkamp – par 30.

[11] Arcus v Arcus (2022) ZASCA 9; (2022)All SA 626(SCA) 2022(3) SA 149(SCA)(21/01/22)-par 15 : Zweni v Minister of Law and Order (1993) 1 All SA 365(A); 1993(1)SA 523(A) at 5321-533

[12] International Trade Administration Commission v SCAW South Africa (Pty) Ltd (2010) ZACC 6 ; 2012(4) SA 618(CC) ; 2010(5) BCLR 457(CC) -par 49

[13] Steenkamp - par 29

[14] Paragraphs 27- 35 of the applicant's founding affidavit.

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- [15] Paragraph 3.5.11 of the applicant's heads of arguments.
- [16] Paragraph 83-88 pages 353-54 of the answering affidavit and paragraph 10 of the supplementary affidavit.
- [17] Paragraph 42-51 of the answering affidavit.
- [18] Paragraph 10.3 and 4 of the applicant's reply.
- [19] Replying affidavit- para 10.3-10.6- pages 720-21
- [20] Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd (1984) ZASCA 51; 1984(3) SA 623(A) at 634H-1(Plascon-Evans case)
- [21] Tsambo v Sengadi(2020) ZASCA 46- par 46 ; Wrightman t/a W Construction v Headfour (Pty) Ltd & Another (2008) ZASCA 6;
- (2008) 2 All SA 512(SCA); 2008(3) SA 371 - par 12
- [22] Mamadi & Another v Premier of Limpopo & Others (2022) ZACC 26(Mamadi).
- [23] Mamadi- par 43
- [24] Mamadi- par 44.
- [25] Paragraph 10.2 of the replying affidavit.
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