

SOUTH AFRICA / JUDGMENT

East London Boating Association v Transnet SOC Limited (EL1571/2022) [2024] ZAECELLC 19 (14 May 2024) [2024] ZAECELLC 19

COURT

Eastern Cape High Court, East London Local Court

BEFORE

Cengani-Mbakaza

CASE / FILE NUMBER

EL1571/2022

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IN

THE HIGH COURT OF SOUTH AFRICA

(EASTERN

CAPE DIVISION, EAST LONDON CIRCUIT COURT)

CASE

NO.: EL1571/2022

REPORTABLE:YES/NO

In

the matter between:

EAST
LONDON BOATING ASSOCIATION
Applicant
and
TRANSNET
SOC LIMITED
Respondent

JUDGMENT

CENGANI-MBAKAZA AJ

Introduction

[1] The East London Boating Association (the applicant), filed a notice of motion seeking a declaratory order. The notice of motion is paraphrased as follows:

It is declared that on 26 August 2022 after the respondent accepted the applicant's tender under reference no. ELS/HPM/05/08/2022/02

and the applicant successfully tendered in the respondent's public procurement process, a lease agreement was entered into

between the parties for the portion of Erven [...] and [...] for a term of ten years at a monthly rental of R7000.00 exclusive of value added tax, with annual increase at a rate of 6% based on the terms of the written lease as annexed in the founding affidavit.

[2] The applicant was established by the East London Rowing Club, a company founded in 1875. The Buffalo River serves as a venue in East London to provide facilities to advance the sport of rowing.

[3] The respondent is Transnet SOC Ltd, a State-owned company incorporated with the laws of the Republic of South Africa.

[4] The respondent objects to the declaratory order sought for the reasons which are presented in paragraph 23 of this judgment.

Factual

Background

[5] A synopsis of the background facts of this case contained in the parties' affidavits is largely common cause. In August 2022, the respondent published on its website a request for bids (RFB) inviting interested parties to submit lease applications for various properties situated at the Port of East London.

[6] Details on the conditions of the tender were fully outlined in the advert as follows: Evaluation of tenders would be done on an awarded basis in which twenty points would be rendered based on B-BBEE status and eighty points on price rental offered. The party with the highest score would be awarded the tender and offered a lease.

[7] Amongst the other conditions detailed in the lease application document, one in particular was outlined as follows:

“1.5 The lease Specification and Evaluation Committee of TNPA[1] will evaluate all lease applications and make a recommendation for the award of all lease applications to the preferred Applicant.

Negotiations, if necessary, will then be conducted with a preferred applicant, which will culminate in the signing of the TNPA standard lease agreement.”

[8] The applicant submitted its tender offering a monthly rental in the sum of R7000.00 which would then have an annual accumulation rate of 6%. The respondent’s impression was that the rental offer would be subject to negotiations at the discretion of the TNPA and would be informed by the market-related valuation escalation rates.

[9] On 25 August 2022, the applicant’s legal representative, Mr J Buchner was invited to a meeting with the evaluation committee regarding lease specifications and for purposes of negotiating a market-related rental value. During the meeting, however, the applicant was informed by the committee that the amount it offered was below the market value. The applicant’s representative committed to responding to the offer and further requested the respondent’s representatives to send the letters reflecting the offer the following Tuesday.

[10] On 26 August 2022, the applicant received a letter (‘the first letter’) from the respondent which was then signed by the property manager, Mr Makunga. The respondent informed the applicant of the successful lease through communication from the committee which reads:

“We thank you for taking part in the lease application process and we would like to invite you to take part in any future competitive lease application process as we strive to make things happen in the Port of East London.”

[11] On the same day, Mr Makunga further wrote to the applicant informing him that the lease application was evaluated and recommended for approval by the respondent’s statutory committee. Another letter (‘the second letter’) set out a monthly rental of R35 000 exclusive of value-added tax, with an annual increase rate of 8%. The letter further set out a requirement of a security deposit in the sum of R190 468.45, the applicant was then advised to accept the proposed terms in writing to enable the respondent’s office to seek approval from the statutory committee for the said proposal.

The

legal framework

[12] In cases where a declaratory order is sought, the court must, by principle, be satisfied that the applicant has an interest in a future contingent right or obligation. If the court is so satisfied it must decide whether the order should be granted. In exercise of its discretion, the court may decline to deal with the matter where there is no actual dispute[2].

[13] The Constitution of the Republic of South Africa[3] ('the Constitution') and the Procurement Preferential Policy Framework Act[4] ('PPPFA') set out a legislative framework in terms of which decisions may be taken in the procurement process. Section

2(1)(f) of the PPPFA which is fundamental to the applicant's case provides that the contract must be awarded to the tenderer who scores the highest points unless objective criteria in addition to those contemplated in paragraphs (d) and (e) justify the award to another tenderer. By deductive reasoning, the objective criteria can only be applied in exceptional circumstances as Section 2(1)(f) explicitly states that a tender must be awarded to the tenderer who scores the highest points.

[14] The Preferential Procurement Regulations which were published in the government gazette No.40553 of 20 January 2017(PPR, 2017) were repealed and replaced by Preferential Procurement Regulations 2022 (PPR, 2022) which came into effect on 16 January 2023. This notwithstanding, any tender advertised before 16 January 2023 is examined in terms of the PPR, 2017.[5]

[15] The consensus is that the tender in question was advertised before the 16 January 2023. Thus, Regulation 6(9) of the PPR, 2017 which appears to be fundamental to the respondent's case provides that,

"(a) If the price offered by a tenderer scoring the highest points is not market related, the organ of the state may not award the contract to that tenderer.

(b) The organ of the state may:

(i) Negotiate a market-related price with the tenderer scoring the highest points or cancel the tender.

(ii) If the tenderer does not agree to a market-related price, negotiate a market-related price with the tenderer scoring the second highest points or cancel the tender.

(iii) If the tenderer scoring the second highest points does not agree to a market-related price, negotiate a market-related price with the tenderer scoring the third highest points or cancel the tender.

(c) If a market-related price is not agreed as envisaged in paragraph (b) (iii) the organ of the state must cancel the tender."

[16] The implementation guidelines[6] PPR, 2017 provide:

"19. NEGOTIATING A FAIR MARKET-RELATED PRICE

19.1 Institutions may include in their Supply Chain Management Policy (SCM) policies a process for negotiating with preferred bidders after a competitive bidding process or price quotations. The policy may include amongst others the following principles:

(a) Delegation and threshold values for negotiations by the accounting officer.

- (b) Negotiation may not allow any preferred tenderer a second or unfair opportunity.
- (c) Is not to the detriment of any other tenderer.
- (d) Does not lead to higher price than the bid as submitted.

19.2 Institutions must include in the tender documents a condition stating that the award of the tender may be subject to price negotiation with the preferred tenderers.”

- [17] On a proper reading of Regulation (6)(9) of the PPR 2017, an organ of the state, as in the present case, has the discretion not to award the tender after having taken into account the circumstances listed in paragraphs a-c of the PPR, 2017.

Issues

- [18] The applicant asserted that because its tender had the highest score, it was entitled to be awarded the tender on the terms specified in the lease agreement mentioned in the tender invitation. It further claimed that because the tenderer was awarded with the highest score, a lease agreement had already been concluded.

Discussion and analysis

- [19] The nub of the applicant's complaint is that the two letters dated 26 August 2022 are contradictory to each other which makes it impossible to reconcile the second letter with the tendering process which had been followed and accepted by the applicant. The first letter, so the applicant averred, constituted an acceptance of the applicant's offer with the terms that were already expressed and therefore binding between the two parties.
- [20] The applicant's senior counsel argued that, given the respondent's acknowledgement of the applicant's successful tender, the respondent was required by Section 2(1) (f) of the PPPFA to award the tender to the applicant in accordance with the terms of the written lease agreement mentioned in the invitation to tender.
- [21] Section 217 of the Constitution and the provisions of the PPPFA, so he argued, prohibit the respondent from imposing a condition in its RFB that the rental was subject to negotiations based on the market-related assessment. Since the applicant had the highest bid, the respondent was compelled to act in accordance with the PPPFA's provisions and is still obligated to lease to the applicant according to the terms specified in the agreement as read with the amount tendered. Therefore, the respondent is prohibited from demanding payment of a rental five times greater than the amount tendered with threats of not awarding the tender and cancelling it, so the argument continued.

- [22] Referring to *Afribusiness NPC v Minister of Finance*[7], the senior counsel contended that the respondent's reference to PPR, 2017 is inaccurate on the basis that PPR, 2017 were declared unconstitutional and repealed. Furthermore, the replacement regulations published on 16 January 2023 contain no provision similar to regulation (6) (9) of PPR, 2017 nor do they provide for the cancellation of an invitation to tender.
- [23] The respondent's counsel, on the other hand, submitted that the respondent is legally permissible to consider whether the prices submitted by the successful bidder may be subject to adjustment. The market relatedness of the bid is a mandatory and materially relevant consideration in any public tender, so she argued. Referring to *South African Container Stevedores (Pty) Ltd v Transnet Port Elizabeth Terminals and Others*[8], counsel argued that negotiations with preferred bidders are lawful for as long as provision therefor was made in the tender invitation.
- [24] I think it is apposite to first deal with the constitutionality of PPR, 2017. In *Afribusiness NPC's* case, the issue was about the lawfulness of regulations 3(b)[9], 4[10] and 9[11] of the PPR, 2017. Counsel for the Minister submitted that if the court finds against the Minister on the merits, it should consider setting aside regulation 4 only and not the regulations in its entirety. The court held, that option, due to the interconnectedness of the regulations, may not be an appropriate one. Zondi JA (with Dambuza, Ponnan JJA, Eksteen and Goosen AJJA concurring) analysed the provisions of section 217 of the Constitution and held:

"[40] It follows therefore that the Minister's promulgation of regulations 3(b), 4 and 9 was unlawful. He acted outside his powers under Section 5 of the Framework Act. In exercising the powers to make the 2017 Regulations, the Minister had to comply with the Constitution and the Framework Act, which the national legislation that was enacted to give effect to Section 217 of the Constitution. The framework providing for the evaluation of tenders provide firstly for the determination of the highest points scorer and thereafter for the consideration of objective criteria which may justify the award of a tender at a lowest score. The framework does not allow the preliminary disqualification of tenderers, without any consideration of any tender as such. The Minister cannot through the medium of the impugned regulations create a framework which contradicts the mandated Framework Act."

- [25] Therefore, the court held that PPR, 2017 was inconsistent with section 217 of the Constitution and section 2 of the Framework Act. Furthermore, the court suspended the order of invalidity for a period of 12 months to remedy the defects. Considering the passages above, it is clear that regulation 6(9) of PPR, 2017 was not associated with the issues raised in *Afribusiness NPC's* case, however, due to the fact that the regulations were intertwined, the court allowed the state a period of 12 months from the date of the judgment (08 September 2020) to remedy the defects. In his address, the applicant's senior counsel did not fully argue that the Constitutional Court, in its judgment on 30 May 2022 stated that the order of the SCA was suspended under the provisions

Section 18 (1) of the Superior Court's Act due to an appeal that was lodged with the court.^[12] As a result of the Constitutional Court judgment of 30 May 2022, the countdown of the 12-month period of suspension resumed on 16 February 2022 and the PPR, 2017 in its entirety remained valid until 26 January 2023.

[26] In terms of the transitional arrangements, if a tender was advertised or invited in terms of the evaluation criteria prescribed in the PPR 2017, prior to the coming effect of the PPR, 2022, as in the present case, but will only be evaluated and awarded after the date of coming into effect of the PPR, 2022, the tender must be evaluated and awarded in terms of the evaluation criteria prescribed in the PPR, 2017, and in terms of the conditions contained in the bid document.

[27] Fortified by the suspension of the constitutional invalidity of PPR, 2017 for a period of two years and the applicability of the transitional requirements, one concludes that the regulations that are applicable in this case are PPR, 2017. This notwithstanding, I agree with the applicant's senior counsel that Regulation 6(9) of PPR, 2017 must be viewed through the lens of the Constitution and PPPFA.

[28] In *Airports Company South Africa SOC Ltd v Imperial Group Ltd and Other*,^[13] Ponnann JA with (Cachalia and Wallis JA concurring held:

"[64] The general rule under s 217 of the Constitution is that all public procurement must be effected in accordance with a system that is fair, equitable, transparent, competitive and cost-effective" (my underlining)

Molemela JA (Tshiqi JA concurring):

"[45] The PP Act, like any other legislation, must be interpreted purposively. The long title of that Act states that its enactment was intended to give effect to s 217 (3) of the Constitution by providing a framework for the implementation of the procurement policy contemplated in s 217(2) of the Constitution. A purposive interpretation dictates that the PP Act be read in the context of s 217 of the Constitution. The constitutional imperatives of a cost-effective procurement must therefore be considered. It is clear that a transaction of the kind contemplated in the RFB seeks to elicit bids for leases at the highest possible rental. This

interpretation is consistent with various provisions of the PFMA, which enjoins the accounting authorities of organs of state to

exercise sound management of revenue and expenditure; to efficiently manage, safeguard and maintain their assets and liabilities; and generally, to ensure that the organs of state receive value for money."

[29] Applying the above principles to the facts of this case, first, there is no dispute that the applicant scored the highest points and was a preferred tenderer. The fact that it was a successful tenderer must not be interpreted to mean that the bid was concluded. Second, the first and the second letters that were written by Mr Makunga on behalf of the applicant

are interconnected and cannot be interpreted separately. In support of this proposition, there was an understanding between parties that, if necessary, negotiations would then be conducted with a preferred applicant, which would culminate in the signing of the TNPA standard lease agreement. In my opinion, the applicant knew in advance or ought to have known that the lease agreement was subject to negotiations.

[30] Third, the fact that the applicant is a club and not a commercial entity is irrelevant. Most importantly, the accounting authorities of the organ of the state are legally permissible to exercise sound management of revenue and expenditure; to efficiently manage, safeguard and maintain their assets and liabilities; and generally, to ensure that the organs of the state receive value for money[14]. These accord with the constitutional imperatives which guarantee a system that is fair, equitable, transparent, competitive, and

cost-effective. Therefore, the argument positing that the respondent is under compulsion to conclude the tender based on the stipulated

amount of a monthly rental of R7000 00 excluding VAT, with an annual increase at a rate of 6% has no merit.

[31] A point was raised that an amount of the monthly rental of R35 000 with an annual increase of 8% is five times higher than the offer that was made by the applicant in his RFB and therefore exorbitant. The following is extracted from the minutes of the meeting dated 25 August 2022:

“4.1 LEASE AGREEMENT NEGOTIATIONS

Mr V Makunga: This is a negotiation in terms of the rentals offered by the East London Boating Association. The offer by the East London Association is lower than the than the market value.

Mr. V. Makunga: Does ELBA have an NPO certificate?

M J. Buchner: Mr Buchner asked what the rental for ELBA is.

Mr V Makunga stated that the valuations for ELBA came at R35 000 and the escalation rate came at 8%. The rental discount will not be backdated, and ELBA will be charged this amount until they produce a valid NPO certificate.

Mr J Buchner:Mr Buchner further mentioned that the main income of ELBA comes from sponsorship and the income of the club is membership-based.

Mr V. Makunga: in terms of the current mandate in Transnet, the discount percentage that may be granted in Spotting Bodies is a 50% rental discount.

Mr V. Makunga urged the ELBA to please submit the necessary documentation and further clarified that the valuation are based on

the land and improvements.”

[32] It is observed from the minutes of the meeting that the applicant was given a fair opportunity to negotiate the monthly rental. It is further noted that Mr Buchner, the applicant's representative undertook to revert on a Wednesday following the day of the negotiations. The negotiations for a monthly rental were still underway and this judgment is not meant to end the parties' already-started negotiations.

[33] Considering the fact that the issues raised in casu are clearly defined in the statute and the Constitution, the application for a declaratory order cannot succeed.

Order

[34] The following order shall issue:

1. The application for a declaratory order is dismissed.
2. No order as to costs.

N CENGANI-MBAKAZA

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

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Date Heard

: 08 February 2024

Date Delivered

: 14 May 2024

[1] TNPA stands for Transnet National Ports Authority.

[2] Cordiant Trading CC V Daimler CHRYSLER Financial Services (Pty)Ltd 2005 (6) SA 205 (SCA) at 213 E-G; In terms of the provisions of Section 2(1)(1) (c), the court may grant a declaratory order without a consequential relief sought. The subsection provides, ‘(2)

(1) A Division has jurisdiction over all persons resident or being in, and in relation to all causes arising and all offences triable within, its area of jurisdiction and all other matters at which it may according to law take cognisance, and has power-(c) in its discretion, and at the instance of any interested person, to enquire

into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon determination.

[3] Section 217 of the Constitution, Act 108 of 1996 provides, “217(1) When an organ of the 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 fair, equitable, transparent, competitive, and cost-effective. (2) Subsection (1) does not prevent the organs of the state or institutions referred to in that subsection from implementing a

procurement policy providing for- (a) categories of preference in the allocation of contracts; and (b) The protection or advancement

of persons or categories of persons, disadvantaged by unfair discrimination. (3) National legislation must prescribe a framework within which the policy referred to in subsection (2) must be implemented.

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procurement policy providing for- (a) categories of preference in the allocation of contracts; and
(b) The protection or advancement

of persons or categories of persons, disadvantaged by unfair discrimination.

[3] National legislation must prescribe a framework within which the policy referred to in subsection (2) must be implemented.

[4] The Preferential Procurement Policy Framework Act, 5 of 2000 is a national legislation as contemplated in terms of section 217(3) of the Constitution.”

[5] Regulation (10)(2) of the Preferential Procurement Regulations, 2022 provides: ‘Any tender advertised before the date referred to in regulation 11 must be dealt with in terms of the Preferential Procurement Regulations, 2017. Regulation 11 provides,’ there Regulations are called Preferential Procurement Regulations, 2017 and take effect on 16 January 2023’.

[5] Regulation (10)(2) of the Preferential Procurement Regulations, 2022 provides:

‘Any tender advertised before the date referred to in regulation 11 must be dealt with in terms of the Preferential Procurement Regulations, 2017.

Regulation 11 provides,’ there Regulations are called Preferential Procurement Regulations, 2017 and take effect on 16 January 2023’.

[6] Implementation Guide: Preferential Procurement Regulations, 2017 issued by the National Treasurer in March 2020.

[7] Afribusiness NPC V Minister of Finance [2021] 1 ALL SA 1 (SCA)

[8] South African Container Stevedores (Pty) Ltd v Transnet Port Elizabeth Terminals and Others[8] 2011 JDR 0357 (KZD) at para 27.

[9] Regulation 3(b) of PPR, 2017 provides, ‘and organ of the state must determine whether pre-qualification criteria are applicable to the tender as envisaged in regulation 4.

[10] Regulation 4 of the PPR, 2017 provides, (1) If an organ of the state decides to apply pre-qualifying criteria to advance certain

designated groups, that organ of the state must advertise the tender with a specific tendering condition that only one or more of the following tenders may respond-(a) a tenderer having a stipulated minimum B-BEE status level of contributor;(b) an EME or QSE;(c) a tenderer subcontracting a minimum of 30% to-.....

[11] Regulation 9 of PPR, 2017 deals with subcontracting as a condition of the tender. Regulation (9) (1) provides that if feasible to subcontract for a contract above R30 million, an organ of the state must apply subcontracting to advance designated groups.

[12] The Superior Court’s Act 10 of 2013; Minister of Finance v. Sakeliga (Previously known as Afribusiness NPC) and others [2022] ZACC 17 at Paragraphs 15-17.

[13] Airports Company South Africa SOC Ltd v Imperial Group Ltd and Others [2020] ZASCA 2, 2020 (4) SA 17 SCA, also reported at [2020] 2 All SA 1 (SCA) - Ed at para [64].

[14] Airport's case *supra* n 13.

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