

SOUTH AFRICA / JUDGMENT

Gijima Holdings (Pty) Ltd and Others v South African National Roads Agency SOC Limited and Others (57952/2020) [2021] ZAGPPHC 391 (17 June 2021)

[2021] ZAGPPHC 391

COURT

North Gauteng High Court, Pretoria

BEFORE

C J van der Westhuizen

CASE / FILE NUMBER

57952/2020

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

CASE

NO.: 57952/2020

REPORTABLE:NO

OF

INTEREST TO OTHER JUDGES:NO

REVISED

17/06/2021

In

the matter between:

GIJIMA HOLDINGS (PTY)
LTD
AFRICAN TECHNOLOGY
OPERATIONS AND MAINTENANCE (PTY) LTD
SICE SOUTH AFRICA
(PTY) LTD
First applicant
Second applicant
Third
applicant
and
SOUTH
AFRICAN NATIONAL ROADS AGENCY SOC LIMITED
TOLCON
GROUP (PTY) LTD
NETRONIX
(PTY) LTD
First
respondent
Second
respondent
Third
respondent

JUDGMENT

van der Westhuizen, J

- [1] The applicants were unsuccessful in respect of tender invitations called by the first respondent. The applicants participated in the tender proceedings as a Joint Venture. The applicants apply for the review and setting aside of the decision by the first respondent to exclude the applicants during the second envelope process from continuing to participate in the tender process and the award of the said tenders to the second respondent.
- [2] The second respondent submitted the only other responsive tender; other participants were considered to be non-responsive following on the first envelope consideration. The third respondent was the holder of the tender that would have come to an end during December 2019.
- [3] The continuation of the third respondent's duties flowing from a previous tender award in respect of same regions was initially extended until December 2020. In an application for the review and setting aside of the award of the tenders to the second, and by agreement, this court on 17 November 2020 granted a further extension.
- [4] The first respondent, the South African National Road Agency SOC Limited (SANRAL), called for the submission of tenders in respect of different regions. The relevant regions to this matter were:

- (a) The Western Cape – Tender No. [...]; and
- (b) Gauteng – Tender No. [...].
- [5] The combined value of the two mentioned tenders is approximately R1,2bn. Both the said tenders were awarded to the second respondent.
- [6] I do not intend to re-state the legal framework within which SANRAL is to operate. That has been traversed in many precedent setting judgments and is common cause. It will suffice to state that the first respondent is a creature of statute (the South African National Roads Agency Act, No. 7 of 1998) and is bound by various statutory requirements, prescriptions and guidelines, the least of which is the Public Finance Management Act, 1 of 1999 (the PMFA). SANRAL acts through its Board of Directors which has delegated some of its powers to various officials and committees of SANRAL. The Board is the accounting authority.^[1] Nevertheless, the Board retains the right to final consideration of bid documents lodged. It does not merely rubberstamp any recommendations by a delegated subcommittee in respect of any award of a tender. Furthermore, in terms of the provisions of section 51 of the PMFA, the Board is authorised to initiate internal and external audit reviews in respect of all tender invitations, as well as other risk assessments in the supply chain management environment. The role played by each of the delegated subcommittees in a tender process is common cause.
- [7] As recorded, the tender process was conducted in a two envelope process. The first envelope process centred on a so-called technical or functional responsive evaluation. The second envelope process focusses upon the price and B-BBEE status of the bidder. The first envelope evaluation process is a closed evaluation. The second envelope evaluation process is an open enquiry. At the commencement of the second envelope enquiry, the tender participants were made privy to the other tender participants' tenders. The evaluation in the second envelope enquiry is conducted, inter alia, in terms of the Preferential Procurement Policy Framework Act, No. 5 of 2000 (PPPFA).
- [8] The applicants bemoan the conduct on the part of the board of the first respondent relating to their tender submission that resulted in the exclusion of the applicants' tender submission from further consideration. The complaint being that the applicants' tender was considered to be non-compliant with tender specifications. The applicants' non-compliance was considered to be material. In the light of the alleged material non-compliance with the tender specifications, SANRAL, during the second envelope enquiry, considered the applicants' tender submission to be non-responsive, and thus to be excluded from further consideration.
- [9] The primary reason provided to the applicants for the exclusion of their bid was the non-compliance with the pre-qualification criteria in respect of the lack of proof of B-BBEE contributor status level due to the invalid sworn statement.

- [10] The applicants submitted that for the following, the first respondent's exclusion of the appellants' tender submission was unlawful and hence subject to a review and setting aside of that decision or determination.
- (a) The applicants are of the view that they duly complied with the tender specifications;
 - (b) Even if there was a non-compliance with the tender specifications, it was non-material;
 - (c) The first respondent had a discretion to condone any non-compliance with material requirements of the tender;
 - (d) In any event, the first respondent's disqualification of the applicants' tender submission was unlawful and procedurally unfair;
 - (e) The award of the two tenders to the second respondent was unlawful.
- [11] The bone of contention appears to be the approach taken by SANRAL in respect of an "affidavit" submitted on behalf of the second respondent to prove its B-BBEE status. SANRAL considered that document not to be in accordance with the requirements stipulated for a sworn statement to be "valid". The approach on the part of SANRAL in respect of this contested document inter alia formed the basis of the exclusion of the applicants' tender bid from the second envelope enquiry. SANRAL's aforesaid approach was hotly contested by the applicants.
- [12] In terms of its statutory obligations, SANRAL is obliged to procure services in accordance with a range of procurement prescripts, including section 217 of the Constitution. Also applicable are the B-BBEE codes issued in terms of the Broad-based Black Economic Empowerment Act, 53 of 2003 (the B-BBEE Act).[2] All procurement prescripts are binding upon SANRAL.[3]
- [13] The B-BBEE contributor status level may play different rolls in a tender process. It may either relate to pre-qualification criteria to determine eligibility to submit a tender, or may only be relevant in respect of a points allocation. Non-compliance with the stipulated requirements may have different effects in respect of which of the two scenarios are determined. In the present instance, that much is clear from a purposive reading of clauses 4 and 5 of the present Tender Data specifications of the Tender Invitation.[4]
- [14] Prior to the call for tenders that are the subject of this review, the first respondent issued an Advance Notification of Future Tenders. That Notification advised prospective bidders of, inter alia, the B-BBEE status requirements of the envisaged tenders. The requirements of the two tenders in this matter were largely similar,
- especially in respect of the B-BBEE status requirements.[5]
- [15] The tender specifications in both instances required at least a B-BBEE status level 4 contributor; the T1.1 Tender Notice and Invitation to Tender specified that only bidders of a contributor status of levels 1, 2, 3 and 4 were to be eligible to submit a bid. In this regard, the

second applicant contends that it in fact has a B-BBEE level 1 contributor status and thus clearly complied with the tender specification requirement. It is this status claim that is the contentious issue in this review application. Inter alia, a further pre-qualification was set that the prospective bidder was to be registered on the National Treasury Central Supplier

Database.[6]

[16] Where there is non-compliance with the B-BBEE requirements set in the tender specifications, in particular in respect of the pre-qualification requirement relating to eligibility to submit a tender bid, that bid is considered an unacceptable bid.[7] In contrast to the former consequence, regulations 6(4) and 7(4) under the Preferential Procurement Act stipulate that failure to submit proof of B-BBEE status level contribution, or where the bidder is a non-compliant contributor to B-BBEE, such bids may not be disqualified. It is to be noted that the provisions of regulations 6(4) and 7(4) only apply where the specified B-BBEE requirements are not in respect of the pre-qualification requirements, but merely a requirement in respect of a points allocation.

[17] In the present instance, the specified B-BBEE requirements were set in respect of the pre-qualification requirements relating to eligibility to submit a tender bid,[8] as required by the Preferential Procurement Act Regulations, and which requirements were repeated in clause 4.1.1(f) of the Tender

Procedures of both tenders. Consequently, non-compliance with the specified B-BBEE requirements would result in a bid being excluded

from further consideration.

[18] It is common cause that the Tendering Procedures document (including the Tendering Procedures Supplement) are to be read with the Standard Conditions of Tender.[9]

[19] The relevant eligibility criteria set in the Tender Data portion of the Tender Procedures (T1.2) are recorded in clause 4.1.1 of thereof. In summary these relate to:

- (a) key personnel;
- (b) declaration: Environmental, Social, Health and Safety past performance;
- (c) financial capabilities;
- (d) National Treasury Central Supplier Database;
- (e) local content;
- (f) criteria for preferential procurement.

The following is specifically recorded under clause 4.1.1(f):

“Only tenders with a B-BBEE contributor status level of 1, 2, 3, or 4, are eligible to tender.

The tenderer shall submit a valid B-BBEE certificate in compliance with Tender Data 5.11.8 as proof of eligibility.

Failure to submit a B-BBEE certificate at the time of tender closing shall render the tender non-responsive and the tender shall not be considered.”

[20] It follows that non-compliance with the criteria in respect of a B-BBEE certificate as stipulated,[10] will result in the tender bid being excluded from further consideration.

[21] It is to be noted that beneath the tender criteria relating to eligibility,[11] the following appears in bold type:

“Failure to satisfy the eligibility criteria is a breach of the Conditions of Tender and as such, may result in a non-eligible tender.”

It is upon this passage that the applicants have pinned their colours to the mast.

[22] Albeit that the quoted passage in bold appears to provide a general discretion in respect of non-compliance with the eligibility criteria, clause 4.1.1(f) clearly requires that a valid B-BBEE contributor status level certificate, which is to be verified, has to be submitted prior to the closing date of the Tender. No discretion is provided, nor permitted, in respect of non-compliance of that requirement. The tender bid is rendered non-responsive and shall not be considered. That effect is supported by the initial eligibility requirement that only bidders with a B-BBEE contributor status level of at least 4 may submit a tender. Furthermore, the B-BBEE contributor status level has to be valid as at the tender closing date. If compliance with the submission of a valid B-BBEE contributor level status certificate could be made at a later stage during the second envelope enquiry, that would defeat the purpose of the initial eligibility requirement of a specific B-BBEE contributor status level. It would further render the requirement of pre-qualification eligibility senseless and of no consequence, i.e. irrelevant and superfluous.

[23] The requirement of submitting a valid B-BBEE contributor status level prior to the closing date of the Tender Invite serves a specific and necessary purpose; that is to comply with the statutory requirements to address and advance participation by previously disadvantaged persons or entities. That much is common cause, if not, it should be.

[24] In a second clause 4.1.1 bearing a heading “Functionality Criteria”, criteria are set relating to Functionality. That functionality criteria specifies a minimum 70% threshold to be achieved, failing which the tender will be considered non-responsive. The functional score is then recorded. That detail is not relevant for present purposes as it is common cause that both the applicants and the second respondent were found to be functionally responsive in their respective bids.

[25] From the provisions of clause 4.1.1(f) of the Tender Data specifications the following requirements in respect of proof of B-BBEE contributor level status are gleaned:

- (a) a B-BBEE contributor status level certificate, duly verified, is to be submitted;
 - (b) the certificate must be valid;
 - (c) the certificate must be submitted prior to the closing date of the Tender Invite;
 - (d) the certificate must be compliant with the provisions of Tender Data 5.11.8.
- [26] The aforesaid proof in respect of B-BBEE contributor level status to be submitted is to be read with clause 5.11.8 of the Tender Data specifications. That clause prescribes the format of the proof that is to be submitted. First and foremost, it is required that a B-BBEE Verification Certificate is to be submitted. That certificate shall:
- (a) be an original or an original certified copy of the original;
 - (b) have been issued by a verification agency accredited by the South African National Accreditation System (SANAS);
 - (c) be in the form of a sworn statement (accompanied by an audited financial statement or Management Account on the latest financial year) or a certificate issued by the Companies and Intellectual Property Commission in the case of an Exempted Micro Enterprise (EME) if issued in accordance with the amended Construction Sector Codes published in Notice 931 of Government Gazette No 1287 on 1 December 2017 by the Department of Trade and Industry; and
 - (d) be valid at the tender closing date; and
 - (e) have a date of issue less than 12 (twelve) months prior to the original advertised tender closing date (see Tender Data 4.15)
- [27] Further, and in particular, clause 5.11.8(f) of the Tender Data stipulates that bidders that submit their bids as a Joint Venture are to submit two B-BBEE certificates, one being a consolidated B-BBEE certificate in the name of the JV, one for each member of the JV. That clause provides as follows:
- “In the event of an un-incorporated joint venture (JV), a project-specific (SANRAL project number indicated) consolidated B-BBEE verification certificate in the name of the JV issued by a verification agency accredited by the South African National Accreditation System (SANAS) shall be submitted, as well as a valid B-BBEE verification certificate for each member of the JV; and ...)*
- [28] From the foregoing it is clear and unambiguous that compliance with all the aforementioned requirements in respect of the proof of the required B-BBEE contributor level status is to exist prior to the closing date of the Tender Invite. It follows that non-compliance with any stipulated requirement will result in a non-responsive bid that will not be considered further during the second envelope enquiry. To hold otherwise, will be to the prejudice of other valid bids submitted. A non-compliant bid will of necessity delay the process to enable it to be made compliant and valid.

- [29] Furthermore, the B-BBEE proof must be:
- (a) a certificate, with specific content;
 - (b) issued within a specified period;
 - (c) issued by a specified institution; or
 - (d) if not so issued in particular circumstances, it must be in a specified format, i.e. in the form of a sworn statement and accompanied by specified documentation (i.e. so-called self-verification); and
 - (e) be valid at the tender closing date.
- [30] It is common cause between the parties that the aforementioned requirements are to be read with the B-BBEE codes of which one is a Generic Code. In terms of the Generic Code, an Emerging Micro-Enterprise may supply so-called self-verification in the form of a sworn affidavit in respect of its status in order to comply with the aforesaid clause 4 of the Tender Data as qualified in clause 5.8 of the Tender Data.
- [31] Furthermore, it is clear that the proof of eligibility as required in clause 4.11(f) is the same as that specified in respect of preferential eligibility points as stipulated in clause 5.11.8. The requirements of clause 4.11(f), when read with clause 5.11.8 in respect of self-verification, must be in the form of a sworn affidavit that is accompanied by, either audited financial statements, or a Management Account and must be valid at the tender closing date.
- [32] The applicants participated as a Joint Venture, and were thus obliged to submit a consolidated verification certificate by an accredited Verification Agency in addition to submitting individual, duly issued verification certificates, in respect of each member of the JV, either issued by the accredited Verification Agency, or in the format of a self-verification certification as described earlier.
- [33] SANRAL found the JV to be non-compliant with the pre-qualification eligibility requirement in respect of the B-BBEE contributor status level and consequently found the JV's bid to be non-responsive and hence to be excluded from further consideration in the tender process.
- [34] In that regard, the applicants' specific complaint at being excluded from further consideration during the second envelope process, is directed at SANRAL's finding that the "affidavit" submitted by the second applicant relying on self-verification, in proof of its B-BBEE contributor status level, was not a valid "affidavit". The first respondent's attention was drawn to the invalidity of the affidavit submitted by the second applicant by the first respondent's Internal Audit committee and also by a report from the Department of Trade and Industry.
- [35] A scrutiny of the vexed "affidavit" reveals, inter alia, that it bears two dates. One on which the deponent is alleged to have deposed to and signed the document, and the other, a day later, on which the commissioner of oaths had ostensibly commissioned the affidavit. It is

the applicants' view that nothing turns on the apparent discrepancy with the dates of signature and commission. It is alleged on their behalf that it is "non-material". It is furthermore contended by the applicants that SANRAL was obliged to afford them the opportunity to explain the apparent discrepancy and possibly to "rectify" the said discrepancy.

- [36] As recorded earlier, a JV member may under certain circumstances self-certify its B-BBEE contributor status level. The stipulated manner being the submission of: a sworn affidavit; that is accompanied by either audited financial statements, or a Management Account both of which are to bear a date within a particular time period; and which is further to be valid at the closing date of the tender.
- [37] It is trite that an affidavit is to comply with certain prescribed requirements, namely, the provisions of the regulations promulgated under the Justices of the Peace and Commissioners of Oaths Act, 16 of
1963. Regulation 1 thereof prescribes the manner of administering of the oath or affirmation. Regulation 2 prescribes what the commissioner of oaths is required to ask a deponent before administering the oath or affirmation. These are: whether the deponent knows and understands the content of the declaration (statement); whether the deponent has any objection to taking the prescribed oath; and whether the deponent considers the prescribed oath to be binding on the deponent's conscience. Once the deponent has answered the foregoing questions in the affirmative, the commissioner of oaths shall administer the oath as prescribed. Regulation 3 provides for the instance where the deponent acknowledges and understands the content of the declaration, but where the deponent objects to taking the oath and does not consider the oath to be binding on the deponent's conscience, the commissioner shall administer the prescribed affirmation. Regulation 3 further requires that the deponent shall sign the declaration in the presence of the commissioner of oaths, whether by signature or mark. Regulation 4 prescribes that the commissioner of oaths shall certify below the deponent's signature or mark that the deponent has acknowledged that the deponent knows and understands the content of the declaration and the commissioner shall further state the manner, place and date of taking the declaration. Furthermore, the commissioner of oaths shall sign the declaration and print his full name and business address below his signature and state his designation and the area for which the commissioner holds the appointment or the office held by the commissioner if the appointment is *ex officio*.
- [38] It is clear from the provisions of regulation 3 of the regulations promulgated under the Justices of the Peace and Commissioners of Oaths Act, that it is peremptory that the intended deponent is to sign the statement in the presence of the commissioner who is obliged to follow a stipulated process when commissioning the statement. This is supported by the specific proviso relating to where the intended deponent cannot write and is obliged to make a mark, and where the commissioner doubts that inability to write, the commissioner shall require some other trustworthy person to certify that apparent inability

to write. To hold otherwise, would defeat the purpose of the said regulation.

- [39] From the foregoing, it is clear that the stipulated requirements for a sworn statement are obligatory and not discretionary. The content and context of the provisions of regulation 3, purposively read, is peremptory. Non-compliance of any of the prescribed requirements will of necessity affect the validity of the declaration.
- [40] On behalf of the applicants it was submitted that the aforesaid requirements in respect of a sworn statement is not mandatory, nor peremptory. In that regard, the applicants rely on a number of cases where on the face of those judgments it was held to be not peremptory that the deponent is to sign the document in the presence of the commissioner. Those judgments are distinguishable from the present instance. In those instances, the issue was whether the court could accept the document purporting to be an affidavit into evidence. The probative value of such evidence is to be considered later. In the

present instance, the issue is not one of admissibility, but whether a document, purporting to comply with pre-qualifying criteria, in the form of a certificate (as self-verification), was submitted, on time and was valid.

- [41] It is undisputable that on the face of the alleged “affidavit” the dates captured thereon in respect of the signing of the statement by the “deponent” and the commissioner differ. It follows that the statement was not signed by the deponent in the presence of the commissioner. The form of the statement incorporates in its body

that which is to be determined by the commissioner and which is to appear immediately below the deponent’s signature and before the commissioner’s signature. In the present instance that does not appear on the “affidavit”, but above the signature of the deponent. That being so, there is no certification by the commissioner as required by regulation 4(1). Furthermore, there is no compliance with the requirements of regulation 4(2) which, inter alia, requires the designation and area for which the commissioner holds the appointment.

- [42] The submitted “affidavit” clearly does not comply with the peremptory requirements of the regulations promulgated under the Justices of the Peace and Commissioners of Oaths Act. Consequently, the applicants have not complied with the stipulated provisions of clause 4.1.1(f) of the Tender Data. It follows that the applicants’ tender bid was factually non-responsive and stood not to be considered further, i.e. to be excluded. It was non-compliant with the pre-qualifying criteria of the stipulated B-BBEE contributor status level.
- [43] The applicants further contend that the issue of B-BBEE contributor status level is one of non-materiality. Non-material in the sense that it could be rectified later. There is no merit in that contention for what follows.
- [44] The applicants rely upon the provisions of clause 5.7 of the Tender Data. That clause provides:

“Prior to disqualification, the Employer shall inform the tenderer and give the tenderer an opportunity to make representations within 14 days as to why the tender submitted should not be disqualified and as to why the tenderer should not be restricted by the National Treasury from conducting any business with an organ of state for a period not exceeding 10 years.

In the event of disqualification, the Employer may, at its discretion, claim damages from the tenderer and impose a specified period during which tender offers will not be accepted from the offending tenderer and, the Employer shall inform the National Treasury and the CIDB in writing.”

[45] As recorded earlier, non-compliance with the requirements of clause 4.1.1(f) of the Tender Data specifications results in a non-responsive bid, that is to be excluded from further consideration. It is not a “disqualification” in the context of clause 5.7 of the Tender Data specifications.

[46] The applicants do not explain why a non-responsive bid in terms of clause 4.1.1(f) of the Tender Data specifications, and hence an excluded bid, would result in the tenderer being restricted by the National Treasury from conducting business with an organ of state for a particular period. Such an interpretation would be irrational, illogic and senseless. This is more so where clause 5.7 provides for a claim of damages that could be instituted against the tenderer and where tender offers from the “offending” tenderer will not be accepted for a specified period in future.

[47] It is common cause between the parties that the Standard Conditions form part of the requirements of the tender. That being so, Clause 5.7 of the Tender Data specifications is to be read with clause 5.7 of the Standard Conditions which clause provides for the “grounds for rejection and disqualification” and provides:

“Determine whether there has been any effort by a tenderer to influence the processing of tender offers and instantly disqualify a tenderer (and said tenderer’s offer) if it is established that the tender engaged in corrupt or fraudulent practices.”

[48] When reading clause 5.7 of the Tender Data specifications with clause 5.7 of the Standard Conditions in a purposive manner, the provisions of the former becomes rational, logic and sensible. So purposively read, clause 5.7 of the Tender Data specifications clearly relate to circumstances where fraud and corruption exist, or are found to exist. It follows that in the said circumstances an opportunity is awarded to the “offending” tenderer to make representations prior to a disqualification. Non constat that clause 5.7 of the Tender Data specifications apply to where there is non-compliance with the requirements of clause 4.1.1(f) of the Tender Data specifications. The applicants’ aforesaid non-compliance does not lean to fraud or corruption in the context of clause 5.7 of the Tender Data specifications.

- [49] Furthermore, if the applicants' contention that SANRAL is granted a discretion as contemplated in clause 5.7 of the Standard Conditions, then the stipulated result of non-compliance in clause 4.1.1(f) of the Tender Data specifications is irrelevant, and of no consequence. It would follow that the said result was to be considered non pro scripto. The contention, and its logical effect flies in the face of the trite principles of construction and interpretation. Contextually it would make no sense.
- [50] The applicants further contend that SANRAL could in any event and easily "verify" the B-BBEE contributor status level of the second applicant by merely consulting, or perusing, the National Treasury Central Supplier Data base. There is no merit in that contention. The applicants bear the onus of proving the certificate relating to the required B-BBEE contributor status level. It is not for SANRAL to investigate from other possible sources what the correct position is. SANRAL bears no onus, it merely considers the documentation submitted by a potential bidder to determine whether it complies with the prescribed requirements.
- [51] It follows that the applicants' contention, that because they were not granted an opportunity to make representations in respect of the defective "affidavit", SANRAL did not act fairly, and SANRAL's consequent determination was therefore unlawful.[12]
- [52] Cameron, JA., as he then was, qualified in the Metro Projects CC case that fairness must be decided on the circumstances of each case. From the foregoing, in my view, the particular circumstances of the present instance do not provide for an opportunity for the applicants to insist upon a reliance on the audi alteram partem principle. Clause 4.1.1(f) of the Tender Data specifications does not provide for a discretion to be exercised.
- [53] Furthermore, it is submitted on behalf of SANRAL that the applicants' contentions in respect of clause 5.7 of the Tender Data specifications are contrary to the PPPFA regulations, which require that a non-responsive tender must be rejected. The applicants' contentions in respect of that clause are clearly misplaced for what is recorded earlier.
- [54] The content of the vexed affidavit is further non-compliant with the stipulated requirements of clause 4.1.1(f) of the Tender Data specifications, read with clause 5.11.8(f) thereof. In that regard, it was not accompanied by an audited financial statement or Management Account on the latest financial year, or a certificate issued by the Companies and Intellectual Property Commission in the case of an Exempted Micro Enterprise (EME) if issued in accordance with the amended Construction Sector Codes published in Notice 931 of Government Gazette No 1287 on 1 December 2017 by the Department of Trade and Industry. This is common cause.
- [55] If the applicants' contentions as discussed earlier are to be accepted, the purpose of setting pre-qualification criteria would be defeated. It would make a mockery thereof and mere lip service would then be paid to statutory prescripts. A potential bidder could slovenly prepare tender documentation and demand indulgence to the prejudice of competing bidders.

[56] It follows that the applicants' contentions that the non-compliant "affidavit" is non-material is flawed for what is recorded above. There is likewise not merit in the applicants' contentions that SANRAL's finding that the bid of the applicants was non-responsive and to be excluded from further consideration was irrational, unfair and unlawful. The applicants themselves are to blame for their apparent dilemma. SANRAL was entitled to hold the applicants' bid to be non-responsive and to be excluded from further consideration. The applicants simply did not pre-qualify as a bidder.

[57] There is no merit in the application for review and setting aside of SANRAL's decision to exclude the applicants' bid from further consideration. The application stands to be refused.

I grant the following order:

The application for review is dismissed with costs, such costs to include the costs consequent upon the employment of two counsel.

C J VAN DER WESTHUIZEN

JUDGE OF THE HIGH COURT

Date of Hearing: 21 & 22 April 2021

On behalf of Applicant: P Snyckers SC

A Friedman

Instructed by:

Nicqui Galaktiou Inc.

On behalf of Respondent: NGD Maritz SC

S Tshikila

Instructed by:

Gildenhuys Malatji Attorneys

Judgment

handed down: 17 June 2021

[1] Section 49 of the PFMA; Section 12 of the SANRAL Act

[2] Section 9 of the B-BBEE Act

[3] Allpay Consolidated Investment Holdings (Pty) Ltd et al v Chief Executive Officer, South African Social Security Agency et al 2014(1) SA 604 (CC) [40]

[4] In particular clause 4.1.1(f) and clause 5.11.8 of the Tender Data

-
- [5] See in this regard regulations 4(1) and 4(2) issued under the Preferential Procurement Act, 5 of 2000
- [6] T1.1 Tender Notice and Invitation
- [7] Regulation 4(2) of the Regulations under the Preferential Procurement Act.
- [8] T1.1 Tender Notice and Invitation
- [9] T1.2 of the Tendering Procedures: Tender Data
- [10] Clause 4.1.1 Tender Data
- [11] Clause 4.1.1(f) Tender Data
- [12] Metro Projects CC v Klerksdorp Local Municipality 2004(1) SA 186 (SCA) [13]
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