

SOUTH AFRICA / JUDGMENT

Ikhona Techni (Pty) Ltd v Sundays River Valley Municipality (2880/2020) [2021] ZAECPEHC 23 (16 March 2021) [2021] ZAECPEHC 23

COURT

Eastern Cape High Court, Port Elizabeth

BEFORE

N.J. Mullins

CASE / FILE NUMBER

2880/2020

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IN THE HIGH COURT
OF SOUTH AFRICA
(EASTERN CAPE
LOCAL DIVISION, PORT ELIZABETH)

Case

No: 2880/2020

Date

Heard: 11 December

2020

Date

Delivered: 16 March

2021

In the matter

between:

IKHONA TECHNI
(PTY) LTD
Applicant
and
SUNDAYS RIVER
VALLEY MUNICIPALITY
First Respondent
SUNDAYS RIVER
VALLEY MUNICIPALITY
APPEAL
AUTHORITY
Second Respondent
IBHABHATHANE
TRADING CC

Third Respondent

JUDGMENT

MULLINS AJ

- [1] This is an application brought on an urgent basis in accordance with the Promotion of Administrative Justice Act, 2 of 2000 (“PAJA”), to review and set aside a decision of a municipality to award a tender to the Third Respondent instead of to the Applicant, which application is opposed by the First Respondent. The First Respondent has brought a counter-application based on a legality review to set aside its own decision to award the tender to the Third Respondent, which counter-application is opposed by the Applicant.
- [2] The Second Respondent has filed a notice to abide. The Third Respondent has taken no part in the proceedings.
- [3] The hearing was conducted in open court. The Applicant was represented by Mr Richards and the First Respondent by Mr Ford. I am indebted to counsel for their assistance.
- [4] The background facts to this matter, which are either common cause or not in dispute, may be summarized as follows:
- (a) At the beginning of 2020 the First Respondent invited tenders for a project described as the Upgrading of Roads and Stormwater in Enon and Bersheba – Phase 1 – Contract No. SRVLM 06/2017/EB (“the Tender”);
 - (b) The Applicant and the Third Respondent were two of the entities that submitted tenders, there being eight in total;
 - (c) In due course the tender was awarded to the Third Respondent, the Applicant having been declared non-responsive at an early stage by the Bid Evaluation Committee (for the reason dealt with below);
 - (d) Dissatisfied with the outcome, and of the view that it should have been awarded the tender, on 30 September 2020 the Applicant’s attorney sent a letter to the First Respondent, *inter alia*:
 - (i) requesting written reasons for the decision;
 - (ii) Noting an appeal in accordance with s62 of the Local Government: Municipal Systems Act, 32 of 2000 (“the Systems Act”);
 - (iii) Requesting certain additional documentation in order to supplement the grounds of appeal;
 - (e) When there was no response to the above and to follow-up requests, the Applicant instructed its attorneys to launch an urgent application. The founding affidavit states that an application was launched, but this is not the case: it was launched a few days later;

- (f) Before this could happen, on 22 October 2020 the First Respondent's attorneys responded, inter alia, stating that:

"5. We are instructed to provide you with reasons herein as follows:

5.1. As per the advert the following compulsory documents must be submitted with the tender:

5.1.1.1. ...

5.1.1.2. ...

5.1.1.3. Certified ID copies of company directors;

5.1.1.4 ...

5.1.1.5. ...

5.1.4.6 ...

6. ...

7. Your client was disqualified as not all of your directors ID documents were submitted." (My emphasis).

(g) The letter goes on to state that certified copies of the identity documents of only three of the Applicant's four directors were submitted. As far as the First Respondent's attorneys were concerned that was the end of the matter. As is dealt with below the First Respondent's attorney misquote the tender document, the highlighted words being added in;

(h) Thereafter the Applicant filed supplementary grounds of appeal which, although running to 31 pages, can be summarized thus:

(i) The reason given for disqualifying the Applicant's bid was unlawful;

(ii) The Third Respondent's bid should have been disqualified and the Tender awarded to the Applicant;

(i) In due course the Second Respondent dismissed the appeal on the same ground as the original Bid Evaluation Committee had done;

(j) Based on the outcome of the appeal, on 23 November 2020 the Applicant launched this application on an urgent basis.

[5] Paragraph 2 of the original notice of motion prayed for the following relief:

"2. That the decision of the Second Respondent (the "Impugned Decision") to dismiss the Applicants appeal in terms of section 62 of the Local Government: Municipal Systems Act (the "Appeal") against decisions of the First Respondent to declare its bid for the tender "Upgrading of roads and

stormwater in Enon and Bersheba – Phase 1 – Contract No. SRVLM 06/2017/EB” (the “Tender”) non-responsive and to award the Tender to the Third Respondent, be reviewed and set aside in terms of Section 8(1)(c) of the Promotion of Administrative Justice Act (“PAJA”) and be substituted with the decision of this Honourable Court that the Tender be awarded to the Applicant in terms of section 8(1)(c)(ii)(aa) of PAJA.”

[6] At the commencement of the hearing the Applicant applied for an amendment of paragraph 2 of the notice of motion to read as follows:

“2. That the decisions of the First Respondent (the “impugned decisions on appeal”) to declare the bid of the Applicant for the tender “Upgrading of roads and stormwater in Enon and Bersheba – Phase 1 – Contract No. SRVLM 06/2017/EB” (the “Tender”) non-responsive and to award the Tender to the Third Respondent and the decision of the Second Respondent (the “impugned decision”) to dismiss the Applicants appeal in terms of section 62 of the Local Government: Municipal Systems Act (the “Appeal”) against the impugned decisions on appeal, be reviewed and set aside in terms of Section 8(1)(c) of the Promotion of Administrative Justice Act (“PAJA”) and be substituted with the decision of this Honourable Court that the Tender be awarded to the Applicant in terms of section 8(1)(c)(ii)(aa) of PAJA, alternatively the Appeal is remitted back to the Second Respondent to either award the Tender to the Applicant or cancel the Tender process.”

[7] The First Respondent did not oppose the amendment and it was accordingly granted.

[8] It is apparent that the relief the Applicant now seeks is substantially different. The original relief targeted the Second Respondent’s decision (the appeal) only. The amended relief targets both the original decision and the appeal. It also includes an alternative prayer.

[9] In the counter-application the First Respondent prays for the following relief:

“1. That the decision of the First Respondent to award the Tender for the “Upgrading of roads and storm water in Enon and Bersheba – Phase 1 – Contract No. SRVLM06/27/EB” to the Third Respondent is reviewed and set aside;

2. That the acceptable and responsive tenders submitted in the aforesaid tender process be referred back to the First Respondent for evaluation by its Bid Evaluation Committee and Bid Adjudication Committee in order for a successful tender to be identified and an appropriate appointment made by the First Respondent;”

[10] On page T1.3 of the Tender Notice the following is stated as a requirement for a responsive tender:

“The following compulsory documents must be submitted with the tender:

1. ...;
2. ...;
3. Certified copies of Company Directors;

4. ...

5. ...” (My emphasis).

[11] It is common cause that when it submitted its bid the Applicant included certified copies of the identity documents of three of its four directors. It was on the basis of the absence of the fourth director’s identity document that its bid was declared non-responsive. The Applicant’s case in this regard is dealt with below.

[12] The First Respondent opposed the application on the merits and on a number of procedural and technical grounds, which are considered below.

[13] In the first place the First Respondent disputes urgency. After the unsuccessful outcome of the appeal the Applicant’s attorneys requested an undertaking not to implement the tender pending a review application. That was on 20 November 2020. The First Respondent’s attorney stated that it was awaiting instructions and would revert by 23 November

2020. When there was no response the Applicant launched the application – on the same day, the papers being served on the First Respondent’s attorneys at 15h50.

[14] At first blush this appears to have been an over-hasty reaction. However, there was nothing preventing the First Respondent from giving the undertaking and the matter could then have been dealt with in the normal course, or on agreed time limits. Furthermore, it is evident from the First Respondent’s attorney’s letter and the opposing papers that no undertaking would have been forthcoming even if it had been afforded more time.

[15] Had the Applicant waited any longer the First Respondent would no doubt have argued that urgency had been lost. There is also merit in the Applicant’s argument that it is often not possible to “unscramble the egg”, meaning that once the successful tenderer commences with the project it is too late to challenge it, and any delay would result in the application becoming academic. In the circumstances I am satisfied that the Applicant was justified in bringing the application on an urgent basis.

[16] The First Respondent also argued that the Applicant had failed to follow Rule 53. That rule provides, inter alia, for the production by a respondent of the record (or records in this case) of the decision(s) taken. Mr Ford argued that the application was irregular in that not all the relevant facts were before the Court. I was referred me to the unreported judgment of Goosen J in *The Windfarm Concerned Group and Sixteen Others v Minister of Water Affairs and Others*; Case No. 2809/2012; Eastern Cape Local Division, Port Elizabeth. I do not understand this judgment to say that the failure to proceed by way of Rule 53 is fatal to an application. On the contrary, at para [19] Goosen J states as follows:

“[19] In this instance the applicants did not utilise Rule 53. They are of course not obliged to do so. However, in the light of the fact that Rule 53 was not utilized no record of the proceedings or material considered by the first respondent was made available by the first respondent in accordance with the provisions of Rule 53.”

- [17] Mr Richards argued in reply that the lack of a record could only be to the Applicant's prejudice, not the First Respondent. I am not convinced that this is correct and it certainly does not appear to have been the case in the Windfarm matter. Be that as it may, the Windfarm matter is distinguishable in two respects: firstly, certain of the respondents filed an application in accordance with Rule 30 alleging the failure to apply Rule 53 was an irregular step; and, secondly, there was an allegation of prejudice to those respondents, which the Court in fact found. In the present matter there is no such application, nor could Mr Ford point to any prejudice to the First Respondent. In the circumstances I am not prepared to non-suit the Applicant for failing to apply Rule 53.
- [18] The First Respondent also argued that the correct approach would have been to bring an urgent application for an interim interdict pending an application for review in due course. While this may be the appropriate course to adopt in certain circumstances I see no reason why it should be the invariable approach. Ironically, on the one hand the First Respondent challenges urgency, whereas on the other hand it argues that the Applicant should have first brought an application for an interim interdict on an urgent basis. Mr Ford also did not establish any prejudice to the First Respondent as a result of the procedure adopted by the Applicant. I am therefore also not prepared to non-suit the Applicant on this basis.
- [19] The next technical / procedural point involved the nature of the relief sought by the Applicant in paragraph 2 of the original notice of motion – prior to the amendment thereof. It was argued that the Applicant was obliged to review and set aside both the original decisions and the decision on appeal. As support for this contention Mr Ford relied on *Wings Park Port Elizabeth (Pty) Ltd v MEC, Environmental Affairs, Eastern Cape and Others* 2019 (2) SA 606 (ECG). In a thorough analysis of the legal position, Plasket J (as he then was) concluded that it all depended on the nature of the internal appeal. Referring to *Tickly v Johannes NO & Others* 1963
- (2) SA 588 (T), three types of internal appeals were identified, namely:
- (a) An appeal in the wide sense, i.e., a complete re-hearing;
 - (b) An appeal in the narrow sense, i.e., a re-hearing limited to evidence / information placed before the hearing of first instance;
 - (c) A review, i.e., a limited re-hearing with or without additional evidence / information to determine, not whether the decision was correct, but whether the hearing of first instance was properly conducted.
- [20] Section 62(3) of the Systems Act reads as follows:
- “62(3) The appeal authority must consider the appeal, and confirm, vary or revoke the decision, but no such variation or revocation of a decision may detract from any rights that may have accrued as a result of the decision.”*

- [221] On behalf of the Applicant Mr Richards argued with some vigour that the present application was distinguishable from the Wings Park matter in that the appeal process in that matter (s43 of the National Environmental Management Act, 107 of 1998) differed. In *Groenewald NO & Others v M5 Developments (Cape) (Pty) Ltd* 2010 (5) SA 82 (SCA) at paras [23] and [25] it was held that an appeal in terms of s62 of the Systems Act is a wide appeal. Fortunately for the Applicant the amended notice of motion, which amendment was not opposed by the First Respondent, solved this problem for the Applicant. See also: *Sewperath v Minister of Finance & Another* [2019] 4 All SA 668 (SCA). In the result this point in limine must also fail.
- [222] The First Respondent also contended that the other unsuccessful tenderers should have been joined as they have an interest in the outcome, particularly as the Applicant's main prayer is for it to be substituted as the successful tenderer.
- [223] The Applicant, relying on *Groenewald*, submitted that the Second Respondent could not award the tender to a party that had not appealed against the decision. Although Mr Ford argued that *Groenewald* is distinguishable, I fail to see how. That matter also concerned s62 of the Systems Act and, while the facts are distinguishable, the principle, in my view, holds good in the present matter (see paras [23] – [25]). This point must also fail.
- [224] Finally, it was argued that the failure to cite the municipal manager, being the decision-maker, was fatal to the application. The Applicant side-steps this by arguing that the decision that is being attacked is that of the Second Respondent, as the appeal authority. Of course, the amendment changed the situation. Whatever the rationale, I am not persuaded that failing to cite the municipal manager is material and a ground for dismissing the application. It is relevant that the answering affidavit was attested to by the First Respondent's municipal manager, so it can hardly be argued that the official had no knowledge of the matter.
- [225] I turn now to the merits.
- [226] The Applicant was declared non-responsive at the Bid Evaluation Committee stage, its finding being recorded as follows:
- “Out of the 8 bid documents that were received, the following bidders were disqualified:*
- Alex Maintenance and Electrical – Billing clearance expired
 - Ikhona Techni (Pty) Ltd – not all directorates (sic) submitted IDs
 - Mogoba Mapluti – ID copies not certified”. (My emphasis).

- [27] It is not clear from the tender documents what type of entities the eight tenderers were. Some were companies and at least one (the Third Respondent) was a close corporation. Others appear to be joint ventures. Whatever the position, apart from the Applicant and one other (because the identity documents were not certified) all the other tenderers were regarded as responsive in this regard. In other words, certified identity documents of all the relevant individuals were supplied.
- [28] It is the Applicant's case that the reference to "ID" or "identity document" cannot simply be read into the sentence in question, or assumed. The Applicant submits that the requirement is not only vague, but patently non-specific to the point that it makes no sense at all. Thus, it submits, its disqualification was in contravention of s6(2)(a)(i), (c), (d), (e)(iv) and (i) of PAJA.
- [29] The Applicant also submits that the requirement that the directors' identity documents be attached makes no sense in that its bid in any event contains all the necessary information which appears on an identity document, which documents would thus be superfluous.
- [30] The Applicant also submits that requiring company directors to submit their identity documents is unfair in that the same is not required from sole proprietorships, partners, members of a close corporation and trustees of a trust.
- [31] As to why, when it submitted its bid, the identity documents of three of the four directors formed part of the documentation the Applicant's case is that it is involved in several tender bids every month and these identity documents just happened to form part of the "standard bundle", or "pack", as it was referred to in the papers, and not because it was a requirement of the tender it submitted.
- [32] In response to the above the First Respondent ridicules the Applicant's explanation. It admits the wording of the offending sentence contained a patent and obvious error which was "patently meaningless", but that this must have been clear to all concerned, including the Applicant who, on its own admission, is an experienced tenderer, as to what was required. It is quite clear that the reference to "Certified copies of Company Directors" can only have meant certified copies of their identity (ID) documents. It was argued that the fact that all the other tenderers included identity documents in their bids (albeit one not being certified) is support for this contention.
- [33] The First Respondent also points out that the Applicant attended the site clarification meeting and the meaning and effect of the offending sentence was not raised, which is again surprising given the Applicant's experience in the tendering business. It is relevant that at the meeting there was a question and answer session and this issue was not raised.
- [34] That certified copies of the director's identification documents was an immaterial requirement is also shot down by the First Respondent. The documents in question are a material requirement in order to identify who the directors are. In support of this submission, during argument Mr Ford latched on to the fact that the deponent to the Applicant's founding and replying affidavits was one Phil Naude, who describes himself as a

director of the Applicant. This individual is not listed as a director in the tender documents submitted by the Applicant. While opportunistic, the point is well made.

- [35] In conclusion the First Respondent submits that the Applicant's case is "fanciful and disingenuous" and that it only has itself to blame for having omitted a certified copy of one of its directors' identity document.
- [36] I have to agree with the First Respondent's submissions in this regard. On the face of it the requirement in question makes no sense, but it must be read in conjunction with the introductory sentence which refers to the compulsory documents which must be submitted with the tender. What else can be required but certified copies of directors' identity documents.

Furthermore, if the Applicant was unsure what the requirement meant it should – and could – have asked. It had an opportunity to do so and as an experienced tenderer one would have expected the Applicant to query a vague, non-specific requirement to the point that it makes no sense at all (the Applicant's description). It was not simply entitled to ignore it. In addition, certified copies of three of the directors' identity documents were included in the Applicant's tender. The date of the certification is "30/03/2020", which ties in with the date of the tender. Other documents, such as the COR39 form issued by the CIPC, are also certified on the same date. Thus, the three identification documents were specifically certified for the purposes of this tender and not simply because they formed part of the usual "bundle" or "pack".

- [37] Its explanation, in my view, is lame and smacks of an afterthought. The overwhelming probability is that the Applicant understood what the requirement meant, hence the inclusion of three of the directors' identity documents, duly certified, but that due to an oversight the fourth director's identity document was omitted. (How Phil Naude fits into the picture need not be explored at this stage).
- [38] In the circumstances I find that the failure to include a copy of the fourth director's certified identity document amounted to non-compliance with the First Respondent's tender requirements.
- [39] That brings me to the next issue, or, as put by Mr Richards, the second leg of his argument: was the omission material? Put another way: did it justify disqualification?
- [40] The Applicant submits that the requirement is immaterial and lacks a lawful purpose. Mr Richards relied on *Allpay Consolidated Investment Holdings (Pty) Ltd & Others v Chief Executive Officer, South African Social Security Agency & Others* 2014 (1) SA 604 (CC) at paras [28] – [30], in which Froneman J (writing for the Court) held:

“[28] Under the Constitution there is no reason to conflate procedure and merit. The proper approach is to establish, factually, whether an irregularity occurred. Then the irregularity must be legally evaluated to determine whether it amounts to a ground of review under PAJA. This legal evaluation must, where appropriate, take into account the materiality of any deviance from legal requirements, by linking the question of compliance to the purpose of the provision, before concluding that a review ground under PAJA has been established.

- [29] Once that is done, the potential practical difficulties that may flow from declaring the administrative action constitutionally invalid must be dealt with under the just and equitable remedies provided for by the Constitution and PAJA. Indeed, it may often be inequitable to require the rerunning of the flawed tender process if it can be confidently predicted that the result will be the same.
- [30] Assessing the materiality of compliance with legal requirements in our administrative law is, fortunately, an exercise unencumbered by excessive formality. It was not always so. Formal distinctions were drawn between ‘mandatory’ or ‘peremptory’ provisions on the one hand and ‘directory’ ones on the other, the former needing strict compliance on pain of non-validity, and the latter only substantial compliance or even non-compliance. That strict mechanical approach has been discarded. Although a number of factors need to be considered in this kind of enquiry, the central element is to link the question of compliance to the purpose of the provision. In this court O’Regan J succinctly put the question in *ACDP v Electoral Commission* as being ‘whether what the applicant did constituted compliance with the statutory provisions viewed in the light of their purpose’. This is not the same as asking whether compliance with the provisions will lead to a different result.”
- [41] On the other hand Mr Ford relied upon the decision of Dr JS Moroka Municipality and *Others v The Chairperson of the Tender Evaluation Committee of the JS Moroka Municipality & Others*
- [2014] 1 All SA 545 (SCA) where Leach JA (in a unanimous judgment) stated at para [10]:
- “[10] ... Essentially it was for the municipality, and not the court, to decide what should be a prerequisite for a valid tender, and a failure to comply with prescribed conditions will result in a tender being disqualified as an ‘acceptable tender’ under the Procurement Act unless those conditions are immaterial, unreasonable or unconstitutional.”*
- [42] The distinction between *Allpay* and *Dr JS Moroka* is that the first matter dealt with a failure to comply with legislative requirements and whether, on the basis of a just and equitable remedy the failure could be overlooked, whereas the second dealt with a municipality’s compulsory tender requirement,
- which is the case in the present matter. In my view *Allpay* does not apply.
- [43] So, is the condition that certified copies of directors’ identity documents, however badly worded, “immaterial, unreasonable or unconstitutional”? I do not believe so. The production of ones’ ID book is standard practise and part and parcel of every South African’s

daily life. It is frequently the starting point for a business transaction. The argument that the requisite information appears elsewhere in the tender document does not suffice: the purpose of requiring a certified copy is no doubt to ensure independent verification of the truth and accuracy of the information. For this reason another tenderer, who attached uncertified copies of the directors' identification documents was excluded.

- [44] In the circumstances I find that the Applicant has not made out a case for the review of the First and Second Respondents' decisions to declare the Applicant non-responsive and to disqualify its bid. Given this finding it is not necessary to consider the relief the Applicant sought.
- [45] Which brings me to the counter-application.
- [46] The First Respondent concedes *ex post facto* that the award of the tender to the Third Respondent stands to be reviewed and set aside. It submits that the matter should be remitted back in order for all qualifying bids to be reconsidered, re-evaluated and scored and an appropriate tender awarded.
- [47] It is evident from the above that the First Respondent is of the view that the Applicant's bid, having been legitimately disqualified, does not qualify for reconsideration and re-evaluation.
- [48] The Applicant's opposition to the counter-application is based on the following grounds:
- (a) This issue is *lis pendens*;
 - (b) No proper case is made out;
 - (c) Referral back is not competent.
- [49] I do not follow the reasoning behind the first ground. The fact that the award of the tender to the Third Respondent is one of the issues raised in the main application does not preclude the First Respondent from bringing an application to challenge its own decision. The decision stands until set aside by a court. It is also brought on the basis of a legality review, not in accordance with PAJA.
- [50] I am also not persuaded that the First Respondent has not set out sufficient reason for the review of its own decision. It says that, on advice, the Third Respondent's CIBD grading was incorrect, and it failed to submit the required financial statements together with form MBD5. If this is so, and I do not understand the Applicant to challenge the allegations, sufficient grounds are established for the First Respondent to challenge its own decision. The Applicant challenges the award to the Third Respondent on very much the same grounds.
- [51] The First Respondent says it erred and provides its reasons, albeit cryptically. In the absence of a denial by the Applicant supported by facts to the contrary, the First Respondent's version must be accepted.

[52] Insofar as the third ground of opposition is concerned, the Applicant again relies on Groenewald. At para [27] the following is stated:

“[27] It was suggested during argument that if Groenewald had not been empowered to award the contract to ASLA, the court a quo should have referred the matter back to the adjudication committee to enable it to reconsider the award, and that this court should therefore make such an order. There seems to me to be no merit in this suggestion. Groenewald’s power under section 62(3) was to “consider the appeal, and confirm, vary or revoke the decision”. He had no power to refer the matter back to the adjudication committee for reconsideration. That being so, the court a quo could not have made an order on review that Groenewald could not have made, and neither can this court.”

[53] The Groenewald matter is distinguishable in that a disgruntled tenderer brought an application to review the decision of the municipality. The municipality stuck to its guns and, when it lost in the court a quo, took the matter on appeal. Unlike in the present matter, the municipality concerned did not bring a legality review of its own decision. Thus, the third ground of opposition is also without merit. Ironically, in the amended notice of motion the Applicant prays in the alternative that the matter be remitted back, but in response to the counter-application argues that this is not competent.

[54] In the circumstances, the counter-application must succeed.

[55] I see no reason why the cost of the main application should not follow the result. Insofar as the counter-application is concerned, the First Respondent was obliged to bring it and would have been saddled with the costs irrespective of any opposition. I accordingly intend to order each party to pay its own costs.

[56] I make the following order:

1. The Applicant’s application is dismissed with costs.
2. The First Respondent’s counter-application succeeds and the following order shall issue:
 - 2.1. That the decision of the First Respondent to award the Tender for the “Upgrading of roads and storm water in Enon and Bersheba – Phase 1 – Contract No. SRVLM06/27/EB” to the Third Respondent is reviewed and set aside.
 - 2.2. That the acceptable and responsive tenders submitted in the aforesaid tender process be referred back to the First Respondent for evaluation by its Bid Evaluation Committee and Bid Adjudication Committee in order for a successful tender to be identified and an appropriate appointment made by the First Respondent.
3. The Applicant and the First Respondent shall each pay their own costs of the counter-application.

N.J. MULLINS

ACTING JUDGE OF THE HIGH COURT

Obo the Applicant:

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