

SOUTH AFRICA / JUDGMENT

Insitu Pipelines (Pty) Ltd and Another v City of Tshwane Metropolitan Municipality and Others (73050/2009) [2010] ZAGPPHC 595 (25 March 2010)

[2010] ZAGPPHC 595

COURT

North Gauteng High Court, Pretoria

BEFORE

Raulinga

CASE / FILE NUMBER

73050/2009

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IN

THE HIGH COURT OF SOUTH AFRICA
(NORTH
GAUTENG HIGH COURT)

Case number:

73050/2009

Date: 25 March

2010

In the matter

between:

INSITU PIPELINES

(PTY)

LTD.....1st

APPLICANT

(Registration

Number: 2006/ 037046/02)

WBHO CONSTRUCTION

(PTY)

LTD.....2ndAPPLICANT

(Registration

Number: 1983/0111953/07)

and

CITY OF TSHWANE

METROPOLITAN MUNICIPALITY.....1st

RESPONDENT

L & R CIVIL

(PTY)

LTD.....2ndRESPONDENT

PHAMBILI	
PIPELINES (PTY)	
LTD.....	3rd
RESPONDENT	
QUBEKELA PROJECTS	
CC.....	4th
RESPONDENT	
CYCAD	
PIPELINES.....	5th
RESPONDENT	
WK PIPELINES	
(PTY)	
LTD.....	6th
RESPONDENT	
KING ENGINEERING	
CONTRACTORS (PTY)	
LTD.....	7th
RESPONDENT	

JUDGMENT

RAULINGA, J

INTRODUCTION

This is an urgent application in which Applicants seek an order:

- [1] Dispensing with the rules of the court and hearing the matter as one of urgency in terms of Rule 6(12)
- [2] Reviewing and setting aside the decision of the first Respondent's Bid Adjudication Committee to:

2.1. disqualify Applicants from the tender process in respect of Tender Number: CB 195/2008 for the replacement of the Gezina Bulk Water Pipeline on or about 7th September 2009.

2.2. award tender Number : CB 195/2008 for the replacement of the Gezina Bulk Water Pipeline to the joint venture carried on by Second , Third and Fourth Respondents , on or about 5th October 2009 .

- [3] Awarding the contract in terms of Tender Number: CB 195/2008 to Applicants.
- [4] That the costs of this application be paid by the First Respondent, and in the event of any of the other Respondents opposing this application that the costs be paid by the First Respondent and such Respondents opposing this application jointly and severally , the one paying the other to be absolved.

- [5] Applicants have joined the remaining unsuccessful tenders as interested parties in this application as Fifth to Seventh Respondents herein. Only First Respondent has opposed the relief sought and filed opposing papers.

However, the parties are ad idem that the matter is urgent and further that the decision of the First Respondent stands to be reviewed and set aside.

- [6] Applicants seek the review and setting aside of the tender contract awarded to the joint venture, Second to Fourth Respondents, on the grounds that they were improperly disqualified from the tender process but for which disqualification they would have been awarded such tender. Applicants contend that the decision to disqualify them as well as the decision to award the tender to the joint venture are reviewable and seek further that the contract be awarded to them.

First Respondent's defence is that a tender was disqualified because prior to Applicant's disqualification, Cerimele (Pty) Ltd was erroneously overlooked by First Respondent at the time that Applicants were requested to withdraw their refusal to extend their tender offering in early May 2009. First Respondent contends that because Cerimele was not invited back into the tender process it is this decision which in fact falls to be reviewed on the basis that Applicants were erroneously given second opportunity unfairly and to the detriment of Cerimele. First Respondent avers that the decision to award the tender to Second, Third and Fourth Respondents was an attempt by the Bid Evaluation and the Bid Adjudication Committees to correct the error and that the matter should now be referred back to these Committees for consideration of the tender bids of only those tenderers who had accepted First Respondent's invitation to extend their offers when requested to do so on 23rd March 2009.

FACTUAL

BACKGROUND

- [7] When tender Number 195/2008 for replacement of Gezina Bulk Water Pipeline was advertised during October 2008, the Applicants and other tenderers completed the tender documents and submitted same to First Respondents. The work was to be carried out for First Respondent's Public Works and Infrastructure Development Department and its Water and Sanitation Division. The closing date for the tender was 10H00 on Monday 24 November 2008. Applicants easily met First Respondent's preference points system for price and equity ownership by historically disadvantaged persons in its enterprise.
- [8] On or about 19th March 2009 Applicants received a letter from First Respondent's Financial Services Department, Supply Chain Management in which they were requested to hold their tender offer open and valid in all respects for a further period of 120 days until 31st July 2009. Applicants turned down this offer in view of other commitments in large contracts in Limpopo Province and the Western Cape. On the 20th March 2009 Applicants replied in the negative indicating that they were not prepared to extend the validity of their tender. In

early May 2009 Applicants received a telephone call from a representative of First Respondent who enquired whether Applicants were prepared to reconsider their stance with respect to the extension of the tender validity period. Applicants replied back in the positive since at that time it was feasible for them to extend the tender validity period. As a result Applicants withdrew their

notice of 23 March 2009 refusing an extension of tender validity and confirmed that their tender validity date was extended until 31 July

2009. First Respondent indicated that the withdrawal was accepted and that the tender validity period was extended until 31 July 2009.

On 6 May 2009 First Respondent endorsed the extension by requesting urgent clarification of certain aspects of Applicants' tender. This is a clarification that takes place during the evaluation by First Respondent at all tender offers.

On the 20 July 2009 an email was sent to Nyeleti which was later received by Applicants, in which the First Respondent indicated that the tender validity was extended to November 2009. On 23 July 2009 Applicants replied to the email indicating that Insitu Pipeline agreed to extend validity of the tender until end November 2009.

During the first week of October 2009, Applicant learned that the tender had been awarded to the Joint Venture comprising Second, Third and Fourth Respondents. The tender was accepted at a contract

price of R56 718 094

- 02 some R6.2 million more than what the Applicants had offered, which is R 50 456 974 - 85.

[9] It later became an open secret that on the 28 August 2009, First Respondent's Technical Department recommended to its Bid Evaluation Committee that Applicants be awarded that contract in terms of its tender. On the same day the Bid Evaluation Committee agreed and recommended to the Bid Adjudication Committee that Applicants be awarded the contract.

On 7 September 2009

- The Bid Adjudication Committee met and referred the matter back to the Technical Department to address the issue of "Administrative Compliance" and to address the Bid Adjudication Committee accordingly. On or about 1 October 2009 - Bid Adjudication Committee prepared a "Further Report" stating that Applicants' original tender proposal "lapsed" and that Applicants "... must be administratively disqualified as they had no valid tender". On 5 October 2009 - The Bid Adjudication Committee passed resolution recommending to First Respondents' City Manager that the Joint Venture be awarded the contract instead of Applicants. The approval was signed on the 7th October 2009.

EVALUATION

- [10] As already indicated above, the parties are ad idem that the decision of the First Respondent's Bid Adjudication Committee to award tender Number :CB 195/2008 for the replacement of the Gezina Bulk Water Pipeline to the joint venture carried on by Second , Third and Fourth Respondents , be reviewed and set aside , albeit for different reasons.
- [11] The First Respondent contends that the Applicants declined to extend the validity of their offer because of other commitments and Cerimele (Pty) Ltd agreed to extend their offer on condition of an increase in contract price. Cerimele therefore submitted what is tantamount to a qualified or unconditional tender offer which is in breach of the tender conditions. See Annexure "MPW4" clause 2.17 - "No change in the total of the prices or substance of the tender offer is sought, offered, or permitted. The total of the prices stated by the tender shall be binding upon the tender". See also Section 1 of the Preferential Procurement Policy Framework Act 5 of 2000 - "acceptable tender" means any tender which , in all respects , complies with the specifications and conditions of tender as set out in the tender document". The argument of the First Respondent thereto does not turn on this issue. There is thus no "decision" of First Respondent that constitutes administrative action capable of being reviewed. The rejection of Cerimele was based on contractual rights and not First Respondent's power of public authority which derives from statute -Cape Metropolitan Council v Metro Inspection Services (Western Cape) CC and Others 2001 (3) SA 1013 (SCA).
- [12] On the issue of non-joinder, a party had to be joined of necessity if he had a direct and substantial interest in any order the court might make, or if such an order could not be sustained or carried into effect without prejudicing that party, unless the court was satisfied that he had waived his right to be joined- Pick 'n Pay stores Ltd and others v Teazers Comedy and Revenue CC and Others 2000 (3) SA 645 (W). In casu Applicants furnished Cerimele with the founding and answering affidavits, and it appears Cerimele had no interest in the matter.
- [13] It is now common cause that the Applicants' tender offer was not accepted by the First Respondent's Adjudication Committee. The First Respondent contends that the invitation to the applicant back into the bidding process was a breach of the Supply Chain Management Policy adopted by the First Respondent which prohibits negotiation with a preferred bidder if such a negotiation follows that bidder to a second opportunity, and it is detrimental to other bidders. Further that, when the applicants' offer lapsed it was deemed non-responsive. In inviting the applicants' back and accepting the withdrawal of the applicants' initial refusal to extend, the first respondent allowed a non-responsive offer to be subsequently made responsive by a withdrawal of the non-conforming deviation or reservation. To this extent the First Respondent referred the court to "MPN 5" paragraph 2 which is a tender description dated 19.03.2009- "Extended date to which tender will be valid:" should you not be willing to hold upon tender for the further period, it will of course lapse on expiry of the current validity period and will therefore be ignored if the tender are not adjudicated within this period". One would assume that by "this period" First Respondent was referring up to the end of March 2009.

Further, First Respondent argues that this is a breach of the Preferential Procurement Act and Section 217 of the Constitution (Act 108 1996) which reads: "when an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost effective. First Respondent reiterates that when it invited Applicants back into the fold of the tender process it made a bona fide mistake which should be accepted by the court. In *Chairperson STL vs JFE Sapela Electronics* 2008(2) SA 638 (SCA) at 645 F-H, the court held: "The definition of acceptable tender" in the Preferential Act must be construed against the background of the system envisaged by Section 217(1)(d) of the Constitution, namely one which is "fair, equitable, transparent, competitive and effective". In other words, whether the tender in all respects complies with the specifications and conditions of tender as set out in the contract documents must be judged against these values.....A tenderer who is permitted to do this has an unfair advantage over competing tenderers who base their tenders on this premise, inherent in the tender documents, that all the work itemised in the schedule of quantities is to be performed.....such a tender offends each of the core values which Section 217 (1) of the Constitution seeks to uphold. It would not be a tender which is "acceptable" within the meaning of the Preferential Act"

[14] The applicants contend that when the first applicant invited them after the 23rd March 2009, to extend the tender validity period, and after they withdrew their refusal that re-instated them as valid tenderer.

Moreover their validity period was further extended from the 31st August 2009 to the 30th November 2009. By reaching a conclusion that the original tender proposal lapsed and that applicants must be administratively disqualified as they had no valid tender, the First Respondent made an administrative decision which is biased and must be reviewed and set aside. This they aver is based on the fact that the Bid Evaluation Committee had recommended them to the Bid Adjudication Committee that the tender be awarded to them.

[15] In terms of the Regulations to the Preferential Procurement Act,

[1] only the tender with the highest number of points scored may be selected and

[2] a contract may, on reasonable and justifiable grounds, be awarded to a tenderer that did not score the highest number of points.

[16] They are of the view that the First Respondent has not demonstrated reasonable and justifiable grounds for disqualifying Applicants and for awarding the contract to the tender contract to the Joint Venture.

It was argued by the Applicants that they did not fail to comply with any statutory precepts. However it can be indicated that when Applicants withdrew from the tender, they disqualified themselves automatically from further participation in the tender- MPWS paragraph 2 and Section 1 of the Preferential Procurement Act - (Definition of "acceptable tender")

[17] In *Municipal Manager: Qaukeni Local Municipality and Another v FV General Trading CC* 2010 (1) SA 356 (SCA) - the appeal concerned the validity of a services procurement contract concluded by the second appellant, the Qaukeni Municipality without due compliance with various statutory prescribed procedures relating to municipal procurements.

The respondent raised an objection in limine, based on the contention that it was an innocent party who had done nothing wrong, but had merely accepted the appellants' offer whereas the appellant had failed to follow the municipal procedures that bound them.

The court held that this argument cannot be upheld. Further that the Supreme Court of Appeal has on several occasions stated that

depending on the legislation involved and the nature and functions of the body concerned, a public body may not only be entitled but also duty bound to approach a court to set aside its own irregular administrative act- *Pepcor Retirement Fund and Another v Financial Services Board and Another* 2003 (6) SA38 (SCA). In *Rajah 8i Rajah (Pty) Ltd and others v Ventersdorp Municipality and Others* 1961 (4) SA 402 (A) at 407 D-E it was held that the interest a municipality had to act for the public entitled it to approach a court to have its own act in granting a certificate to obtain a trading licence declared a nullity.

Although in the present case, the First Respondent is only reacting to a challenge by the Applicants, the same principle applies *Mutatis Mutandis*. The first Respondent has a duty to object to the relief sought by the Applicants. The contention that the First Respondent ought to have launched a counterapplication cannot be sustained.

[18] In *Municipal Manager Qaukeni Local Municipality and Others supra* the court also held that "while I accept that the award of municipal service amounts to administrative action that may be reviewed by an interested third party under PAJA, it may not be necessary to proceed by review when a municipality seeks to avoid a contract it has concluded in respect of which no other party has an interest. But it is unnecessary to reach any final conclusion in that regard. If the second appellant's procurement of municipal services through its contract with the respondent was unlawful, it is invalid, and this is a case in which the appellants were duty-bound not to submit to an unlawful contract, but to oppose the respondent's attempt to enforce it. This it did by way of its opposition to the main application and by seeking a declaration of unlawfulness in the counter-application. In doing so it raised the question of the legality of the contract fairly and squarely just as it would have done in a formal review. In the circumstances, substance must triumph over form.

And while my observation should not be construed as a finding that a review of the award of the contract to the respondent could not have been brought by an interested party, the appellant's failure to bring formal review proceedings under PAJA is no reason to deny them relief"

[19] This serves to confirm that the failure by the First Respondent to bring a formal counter-application cannot be used to deny them the relief they sought. It is more so because they motivate their opposition to the relief sought by the Applicants on papers. There is no doubt that their opposition is valid.

[20] It has been held in a number of decisions that contracts concluded without complying with prescribed competitive processes are invalid. In *Premier, Free State and others v Firechem free State (Pty) Ltd* 2000 (4) SA 413 (SCA) the court set aside a contract concluded in secret in breach of provincial procurement procedures, holding that such a contract was "entirely subversive of credible tender procedure and that it would "deprive the public of the benefit of an open competitive process"

[21] I am of a similar view that a procurement contract for municipal services concluded in breach of the provisions of the Preferential

Procurement Act, the Constitution and the tender documents is invalid and will not be enforced- See *Municipal Manager; Qaukeni Local*

Municipality and Another-supra.

One should be mindful of the fact that the joint venture complied with the Preferential Procurement Act, the Constitution and the Tender Document, in that they did not alter any clause of their contract nor did they make any attempts to increase the price of their offer. The fact that their contract price was R6.2 million more than what the Applicants had offered is immaterial and has no persuasive effect.

The Adjudication Committee is enjoined by the Preferential Act to refer matters back to the Technical Department and Evaluation Committee if it deems it fit. At the time the matter was referred back to the Technical Department and the Evaluation Committee no administrative action had been taken. All those attempts were mere recommendations. The administrative action only ensued when the City Manager signed the approval on the 7th October 2009.

CONCLUSION AND ORDER

[22] Although the 1st Respondent is entitled to a relief, one should be weary of the fact that it failed to bring formal counter review proceedings under PAJA. The proposal that its administrative action be reviewed would only be academic.

It is my respectful view that the First Respondent erroneously invited the Applicants back into the tender by mistake and that this amounts to a bona fide mistake. I am also of the opinion that although the decision taken by the First Respondent amounts to an administrative action, no irregularity ensued.

My conclusion is that by withdrawing their tender offer the Applicants breached the tender Procurement precepts. It therefore follows that their application should fail.

The first Respondent has demonstrated reasonable and justifiable grounds for disqualifying the Applicants and for awarding the tender contract to the Joint Venture. There is therefore no need to review and set aside the First Respondent's administrative action.

[23] In the premise I make the following order:

[1] The application is dismissed with costs.

T J RAULINGA

JUDGE OF THE HIGH COURT

NORTH GAUTENG HIGH COURT, PRETORIA

DATE OF HEARING: 12 February 2010

DATE OF JUDGMENT: 25 March 2010

PLAINTIFF'S ATTORNEYS: M J Hood and Associates

PLAINTIFF'S ADVOCATE : Adv P R Rossouw & Adv W B

Bank

DEFENDANT'S ATTORNEYS: Maduka More Attorneys

DEFENDANT'S ADVOCATE : Adv P Nonyane

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