

SOUTH AFRICA / JUDGMENT

Mantladi Technologies (Pty) Ltd v National Treasury and Others (033768/2022) [2024] ZAGPPHC 1168 (11 November 2024)

[2024] ZAGPPHC 1168

COURT

North Gauteng High Court, Pretoria

BEFORE

Mahosi

CASE / FILE NUMBER

033768/2022

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IN THE HIGH COURT OF

SOUTH AFRICA

GAUTENG DIVISION,

PRETORIA

Case Number: 033768/2022

(1)

REPORTABLE: NO.

(2)

OF INTEREST TO OTHER JUDGES: NO

(3)

REVISED: NO

DATE:

11 November 2024

SIGNATURE

In the matter between:

MANTLADI TECHNOLOGIES

(PTY) LTD

Applicant

and

THE NATIONAL

TREASURY

First Respondent

THE

DEPARTMENT OF

HEALTH

Second Respondent

THE

MINISTER OF

FINANCE

Third Respondent
THE
COMPETITION COMMISSION OF
SOUTH
AFRICA
Fourth Respondent
NUANGLE SOLUTIONS
(PTY) LTD
Fifth Respondent
MOTHUDI
SERVICES (PTY)
LTD
Sixth Respondent
LOGAN
MEDICAL & SURGICAL (PTY) LTD
Seventh Respondent
ENDOMED
MEDICAL & SURGICAL SUPPLIES CC
Eighth Respondent
MAISHA
MED (PTY)
LTD
Ninth Respondent

JUDGMENT

MAHOSI J

Introduction

- [1] This is an application for an order to review and set aside the first respondent's decision to award the tender RT42-2021 to the fifth to ninth respondents, respectively, for the supply and delivery of bandages and dressings to the State from 01 April 2022 to March 2025. The applicant sought an order to remit the impugned decision to the first respondent for reconsideration.

The Parties

- [2] The applicant is Mantladi Technologies (Pty) Ltd ("Mantladi"), a private company with limited liability duly registered and incorporated in terms of the laws of this country. The first respondent is the National Treasury, responsible for managing South Africa's National Government Finances. The Second Respondent is the Department of Health, cited as the department responsible for providing public healthcare to the population of the Country. The third respondent is the Minister of Finance cited as an official responsible for inter-governmental financial and fiscal relations. The fourth respondent is the Competition Commission of South Africa cited because of its mandate to investigate all competition concerns. The fifth to ninth respondents are all successful bidders and cited as they have an

interest in the matter. The first and third respondents opposed the application.

The background

- [3] On 27 July 2021, the National Treasury advertised the tender as a transversal term contract for three years to supply bandages and dressings. On the closing date, 26 August 2021, the National Treasury received ninety-three (93) bids, and the applicant was one unsuccessful bidder. The successful bidders were awarded the tender on 29 April 2022. Aggrieved by the National Treasury's decision not to grant it the tender, Mantladi brought the current application. The first and third respondents ("the Treasury respondents") opposed the application.

The submissions

For the applicant

- [4] Mantladi relied on four grounds of review. The first is that the pricing submitted by the sixth to eighth respondents indicated that the products submitted for the tender could not be absorbent capillary action products but must be passive wound care products. The second was that if the products supplied by the sixth to eighth respondent met the tender specifications, the sixth to eighth respondents fell below clause 5.2.2.3 of the Special Conditions of Contract ("SCC"). The third was that the submitted product was incorrectly classified as woven. The fourth was that the non-woven product submitted by the ninth respondent was incorrectly classified as a woven product.

- [5] It was based on the above that Mantladi contended, inter alia, that the National Treasury's decision to award the tender to the successful bidders was not rationally connected to the information provided to it and was based on irrelevant considerations. At the core of Mantladi's contention was that prior to this tender, from 1999 to 2017, when the second respondent, the Department of Health ("the Department"), issued a tender for the supply of advanced wound care products, the bid specifications requirements were listed in generic categories without a specific description of the product. However, since 2017, there has been a definite shift in how governmental departments

formulated their tenders, in that tenderers are now requested in categories with detailed specifications that are no longer generic.

Mantladi asserted that this was a "nefarious tool" to exclude competitors from the market, creating a temporary monopoly

that resulted in unfair competition and did not meet the internationally accepted procurement method for advanced wound care products.

- [6] Mantladi claimed that the National Treasury refused to align itself with internationally accepted methods used by the Western Cape and Kwa-Zulu Natal provincial governments. It further directed a complaint to the Competition Commission investigation, which had yet to be finalised.
- [7] Mantladi outlined why the sixth to ninth respondents should have been disqualified in its founding and supplementary affidavits. It stated that although the sixth respondent, Mothudi Services, was awarded line items RT42-01-111, RT42-01-113, RT42-01-115 and RT42-01-127, its product supplier based in Portugal, Bastos Viegas did not indicate that the wound dressing was a hydrocapillary non-woven product which was in contravention of the SCC applicable to the tender.
- [8] Mantladi argued that the fact that the product supplied by Bastos Viegas was a non-adherent dressing did not mean that the dressing was a hydrocapillary non-woven product. Further, a search on the Bastos Viegas website for a hydrocapillary non-woven product returned no results, demonstrating that Mothudi Services should not have been awarded the line items listed above because the product specification did not comply with the advanced wound care requirements.
- [9] Mantladi submitted that the seventh respondent, Logan Medical & Surgical (Pty) Ltd, should have been disqualified from supplying line items RT42-01-111 and RT42-01-121 because a search of the website of its product supplier, All Pro Corporation, demonstrated that they produced no hydrocapillary non-woven product and did not present any results for a search of the word hydrocapillary. Additionally, although Logan Medical & Surgical had submitted sample products it intended to tender to the South Africa Bureau of Standards (SABS) for testing, it did not provide a product sample under the line items awarded for testing and classification. Further, the supporting documentation submitted and a search of the manufacturer's website showed that the product it submitted did not comply with the advanced wound care requirements.
- [10] The eighth respondent, Endomed Medical & Surgical Supplies CC ("Endomed"), was awarded line items RT42-01-113, RT42-01-115, RT42-01-117, RT42-01-119 and RT42-01-123, but they failed to provide a letter of authorisation from PharmaPlast as required by the SCC, item TCBD 1.2 and a search on the manufacturer's website for a hydro capillary dressing returns no result. Mantladi averred that the Exsorb Pad product used by Endomed to tender under the hydrocapillary non-woven category did not meet the tender specification for the hydrocapillary non-woven product. For this reason, Mantladi argued that Endomed should not have been awarded the line items because the product specification does not comply with advanced wound care requirements.
- [11] The ninth Respondent, Maisha Med (Pty) Ltd ("Maisha Med"), was awarded line items RT42-01-110, RT42-01-112, RT42-01-116, RT42-01-118,

RT42-01-120, RT42-01-124 and RT42-01-128, which fall under the woven category, however, it utilised the same product to tender under the woven and non-woven category. Mantladi claimed that the product catalogue of Maisha Med's supplier, Beier Drawtex, demonstrated that it only had one type of product manufactured following the 2006 patent that they held, which was non-woven. In addition, Drawtex certificates and test reports on the manufacturing of their dressings demonstrate that the products are non-woven, and Maisha did not demonstrate that the products they submitted were woven.

For the Treasury respondents

- [12] The Treasury respondents submitted that there was no basis in fact and law for any of the complaints raised by the applicant, and the latter needs to demonstrate how the National Treasury's decision falls to be reviewed and set aside. They explained that the National Treasury centrally facilitated transversal term contracts on behalf of the State, typically when there is more than one State Department that requires the supply of certain goods or services.
- [13] In the tender in question, the Provincial Departments of Health, the Department of Correctional Services and the Department of Defense required the supply of the advanced wound care products. The National Treasury facilitated the tender process, and the Bid Specifications Committee ("BSC"), comprising individuals from the relevant departments and the National Treasury, compiled the specifications for the tender. The National Treasury averred that before its issuance, it ensured that the bid document was as generic as possible to accommodate all the relevant qualifying bidders or role players in the specific market for the tender. In essence, it ensured that it was in line with, inter alia, the requirements of section 217 of the Constitution and promoted the procurement process that is fair, equitable, transparent, competitive and cost-effective.
- [14] The treasury respondents submitted that, in issuing the bid, the National Treasury recognised that the South African bandage dressings market was moderately competitive. As the competition and the need for innovation increased, the industry was open to innovative offerings and alternative solutions to long-lasting challenges and consumer demands. The tender consisted of 479 items, which included, inter alia, different categories of wound dressings, foam dressings, bandages and skin closure strips. These products are used to assist in managing non-healing wounds as well as chronic wounds associated with, among other things, diabetes and the management of wounds that have placed a severe burden on healthcare resources.
- [15] The Bid Evaluation Committee held two meetings between 08 November 2021 and 10 February 2022 to evaluate the bids, and the process was conducted in five phases. The first was made up of pre-qualifying criteria. The second was compliance with mandatory and other standard bidding documents. The third was local content, which was applicable only to locally manufactured products. The fourth was technical evaluation, and the fifth involved price and B-BBEE.

[16] All bidders who submitted their bids were evaluated following all the five phases. Those who did not meet the requirements of a specific phase were disqualified from progressing to the next phase, and only bidders who were successful in all five phases were recommended for appointment. Of the 479 line items, Mantladi allegedly made offers on nine items. On 04 March 2022, the BEC recommended 46 bidders for appointment, and Mantladi was not one of them because it was unsuccessful in the technical evaluation phase. The treasury respondents submitted that Mantladi was unsuccessful because it provided woven items instead of non-woven ones and failed to provide samples for some of the line items it bid on. For the above reasons, the treasury respondents contended that Mantladi's grounds of review were untenable.

The legal framework

[17] Mantladi based its application on section 6(2)(e)(iii) and section 2(f)(ii)(cc) and (dd) PAJA[1]. Section 6 provides for the judicial review of the administrative action, and it reads:

“(1) Any person may institute proceedings in a court or a tribunal for the judicial review of an administrative action.

- (2) A court or tribunal has the power to judicially review an administrative action if-
- (a) the administrator who took it-
 - (i) was not authorised to do so by the empowering provision;
 - (ii) acted under a delegation of power which was not authorised by the empowering provision; or
 - (iii) was biased or reasonably suspected of bias;
 - (b) a mandatory and material procedure or condition prescribed by an empowering provision was not complied with;
 - (c) the action was procedurally unfair;
 - (d) the action was materially influenced by an error of law;
 - (e) the action was taken -
 - (i) for a reason not authorised by the empowering provision;
 - (ii) for an ulterior purpose or motive;
 - (iii) because irrelevant considerations were taken into account or relevant considerations were not considered
 - (iv) because of the authorised or unwarranted dictates of another person or body;
 - (v) in bad faith; or
 - (vi) arbitrarily or capriciously;

- (f) the action itself-
- (i) contravenes a law or is not authorised by the empowering provision; or
- (ii) is not rationally connected to-
 - (aa) the purpose for which it was taken;
 - (bb) the purpose of the empowering provision; (cc) the information before the administrator; or
 - (dd) the reasons given for it by the administrator;
- (g) the action concerned consists of a failure to take a decision;
- (h) the exercise of the power or the performance of the function authorised by the empowering provision, in pursuance of which the administrative action was purportedly taken, is so unreasonable that no reasonable person could have so exercised the power or performed the function; or
- (i) the action is otherwise unconstitutional or unlawful.

[18] Section 8 deals with the remedies in proceedings for judicial review, and subsection (1)(c)(ii) reads:

“(1) The Court or tribunal, in proceedings for judicial review in terms of section 6 (1), may grant any order that is just and equitable, including orders-

...

- (c) setting aside the administrative action and-
 - (i) remitting the matter for reconsideration by the administrator, with or without directions; or
 - (ii) in exceptional cases –
 - (aa) substituting or varying administrative action the administrative action or correcting a defect resulting from the administrative action; or
 - (bb) directing the administrator or any other party to the proceedings to pay compensation.”

Assessment

[19] As aforesaid, Mantladi sought an order to review and set aside the treasury respondents' decision based on four grounds. However, in its heads of arguments, it sought a new relief in which this Court must grant an order to vary the administrative decision made by the treasury respondents by including it in the tender.

[20] In support of its new relief, Mantladi submitted that it would not be appropriate to refer the matter back to the treasury respondents for reconsideration as the tender period would prescribe on 31 March 2025, and the treasury respondents do not have the requisite expertise to adjudicate the tender for the provision of advanced wound care products, specifically those line items that form the subject matter of this application.

[21] The treasury respondents filed their heads of arguments and stated:

“6. Mantladi now seeks what is effectively entirely new relief. It seeks an order to vary or substitute the impugned decision so that it can be included in the tender. Mantladi seeks this substitution relief in terms of section 8(1)(c)(ii)(aa) of the Promotion of Administrative Justice Act 3 of 2000 (“PAJA”). Alternatively, Mantladi seeks that it be compensated for its alleged loss in profit from being disqualified from the tender. Mantladi relies on section 8(1)(c)(ii)(bb) of PAJA for this compensatory relief.

7. Mantladi seeks this new relief in circumstances where it has not pleaded this relief anywhere in its papers and in circumstances where it has not amended its notice of motion seeking this new relief. The Treasury respondents submit that under the circumstances, the relief sought cannot be granted and this ought to be dispositive of this entire application.”

[22] It was on the basis of the above that the treasury respondents argued that Mantladi’s new strategy of seeking a new relief, which has not been advanced or dealt with at all in its founding papers at the eleventh hour of its heads of argument, cannot be countenanced as no case had been made for it. The Treasury respondents asserted that Mantladi’s attempt to seek a new relief should be dispositive of the entire application, and there was no need for this Court to decide on the various grounds of review Mantladi raised.

[23] The above prompted Mantladi, two court days before the hearing of this application, to file the notice of intention to amend its notice of motion in terms of Rule 28(10) of the Uniform Rules in terms of which it no longer seeks an order to set aside the tender award, but to declare the treasury respondents’ decision not to include it in the tender unlawful. It seeks the following prayers:

“1. The decision of the first and third respondents’ (“the treasury respondents”) failure to award tender RT42-2021 for the supply and delivery of bandages and dressing (Hydrocapillary non-woven category) to the State (“the tender”) to the applicant (“the decision”) is unlawful.

2. The applicant is to be included in the tender from the date of this order until 31 March 2025 or to such further date to which the tender is extended

3. The applicant is entitled to just and equitable compensation in accordance with section 8(1)(c)(ii)(bb) of the Promotion of Administrative Justice Act 3 of 2000 (PAJA)

4. The following issues are referred to viva voce evidence (“the hearing”)

4.1 The quantum of the applicant’s loss of profits that it would have made had the applicant been awarded the tender from 01 April 2022 to date of this order; and

4.2 The amount of compensation that is just and equitable on the facts of this matter.

In the alternative to prayers 2 and 4 (including the sub-paragraphs thereto) above:

5. The applicant is entitled to just and equitable compensation in accordance with section 8(1)(c)(ii)(bb) of the Promotion of Administrative Justice Act 3 of 2000 (PAJA)

6. The following issues are referred to viva voce evidence (“the hearing):

6.1 The quantum of the applicant’s loss of profits that it would have made had the applicant been awarded the tender from 01 April 2022 to date of this order; and

6.2 The amount of compensation that is just and equitable on the facts of this matter

7. Should any of the party wish to lead evidence of any person who has not deposed to an affidavit in these proceedings, that person shall submit an affidavit containing a summary of such person’s evidence, together with any document upon which they rely and do so at least 15 days prior to the hearing.

8. Within 20 days of the making of this order, each of the parties shall make a discovery on oath, of all the documents relating to the issues referred to above, which documents are, or have at any time been, in possession or under control of such party.

9. Such discovery shall be in accordance with Rule 35 of the Uniform Rules of Court and the provisions of that Rule regarding the inspection and production of documents discovered shall be operative.

10. Either party may subpoena any person to give evidence at the hearing, whether such person has consented to furnish a statement or not.

11. The fact that a person has served a statement or has subpoenaed a witness, shall not oblige such party such party to call the witness concerned.

12. The Treasury respondent is to pay the applicant's costs, which included the costs of two counsel at schedule B and C of the Rules 67A(3) and 69(7).”

[24] On the same day, the treasury respondents indicated their intention to oppose the amendment Mantladi sought. Rule 28(10) provides that:

“(10) The court may, notwithstanding anything to the contrary in this rule, at any stage before

judgment

grant leave to amend any pleading or document on such other terms as to costs or other matters as it deems fit.”

- [25] Although rule 28(10) permits any party to a dispute to seek leave from a court at any stage before judgment for an order to amend any pleading or document and provides a court with the widest discretion, it is trite the discretion must be exercised judicially taking into consideration all the facts and circumstances before a Court.
- [26] In the current matter, Mantladi effectively seeks to be included amongst the successful tenderers to mitigate its damages and to refer to oral evidence, the quantification of its damages from the inception of the tender (as if it had been included from inception) to the date of this order. The basis for Mantladi's application was that the tender had almost run its course and referring the tender back to the tender Bid Adjudication Committee for reconsideration as initially prayed would be impractical to implement. Mantladi accepted no fault for this status as it unsuccessfully commenced with urgent review proceedings after the tender was awarded to the successful tenderers.
- [27] At the application hearing, Mantladi sought to further amend its amended notice of motion in the form of a draft order by extending the relief sought in 4.3 of the amended notice of motion to cater for the referral to evidence the issue of damages.
- [28] To buttress the bases of its amendment, Mantladi relies on the judgments in *Trencon Construction (Pty) Limited v Industrial Development Corporation of South Africa Limited and Another* [2] ("*Trencon*") and *Mngomezulu and Mistry Incorporated v MEC for Health: NW Province and another* [3] ("*Mngomezulu*"). However, in both these cases, the facts are distinguishable from the current matter, and the relief sought in terms of section 8 of PAJA was granted because the Courts found that the applicants ought to have been rightfully awarded the tenders and exceptional circumstances existed for the relief sought.
- [29] In *Trencon*, the Constitutional Court considered the test to be applied by Courts in establishing whether exceptional circumstances justify a substitution order under section 8(1)(c)(ii)(aa) of PAJA. It stated that:
- "[34] Pursuant to administrative review under section 6 of PAJA and once administrative action is set aside, section 8(1) affords courts a wide discretion to grant "any order that is just and equitable". In exceptional circumstances, section 8(1)(c)(ii)(aa) affords a court the discretion to make a substitution order.*
- [35] Section 8(1)(c)(ii)(aa) must be read in the context of section 8(1). Simply put, an exceptional circumstances enquiry must take place in the context of what is just and equitable in the circumstances. In effect, even where there are exceptional circumstances, a court must be satisfied that it would be just and equitable to grant an order of substitution."
- [30] In the current matter, Mantladi only submitted a bid and made offers on nine (9) line items out of the 479 line items that formed the subject of the bid. Mantladi was deemed non-compliant on all the line items it bid and made offers on because it was found to have provided woven items, whereas the bid specification required non-woven items. In addition, Mantladi was also disqualified because, in terms of the bid specification, bidders were

required to provide samples with their bids to enable the BEC to ascertain if they met the relevant technical requirements. For some of the nine line items that Mantladi bid on, it failed to provide the samples for the BEC to assess. The requirements for the tender were precise, and Mantladi was non-compliant. As a result, its bid failed.

[31] Mantladi contended that it was impossible for a bidder to submit the products at the prices tendered by the successful bidders and relied on the confirmatory affidavit of Jacobus Mouton (“Mr Mouton”) and the report from Defcon Protect (Pty) Ltd (“the Defcon report”) to allege that the wound care products tendered and supplied by the ninth respondent (“Maisha”), which are in turn manufactured by Beier Drawtex Health Care (Pty) Ltd (“Drawtex”), do not meet the requirement of the tender in that the Drawtex products are not woven products as required by the tender. However, the Treasury respondents submitted that on 28 February 2023, Mr Mouton wrote a letter to Drawtex to confirm if Drawtex manufactured wound care dressings using the woven process in line with the tender requirements. Drawtex confirmed, on 01 March 2023, that its products adhere to the specifications and requirements of the tender.

[32] The treasury respondents correctly asserted that, at its core, the purpose of any tender is to elicit the best products or services

through a process that is, inter alia, cost-effective and competitive. They relied on section 217 of the Constitution [4] to submit that the system of awarding contracts to the State must be cost-effective. To the extent that Mantladi conceded that the successful bidders' pricing was significantly lower, it is apparent that the treasury respondents acted in the public interest. There is, therefore, no merit to this ground of review.

[33] Mantladi contended that the sixth to eighth respondents contravened clause 5.2.2.3 of the SCC because their bids were under-quoted. Clause 5.2.2.3 of the SCC states that:

“Due diligence on all market related pricing reasonability will be conducted. The State reserves the right to disqualify bid offers in which there is no reasonable doubt that the bid offered is under-quoted. In this case the bidder will be required to submit supporting documentations.”

[34] The above clause empowers the National Treasury to determine whether there is no reasonable doubt that the bid offered was under-quoted. It is, therefore, not for Mantladi to assert that because the successful bidder's prices were lower than its pricing amounted to under-quoting. Besides, as aforesaid, Drawtex confirmed that its products complied with the tender specifications. Thus, Mantladi's contention that the products supplied by Maisha did not comply with the tender requirements had no basis. In light of the above, Mantladi's third and last grounds of review are meritless. Besides, to the extent that Mantladi did not submit a bid for items awarded to Maisha, I agree with the treasury respondents that the former had no entitlement to review the award of these items as it had no direct external legal effect on its rights.

Conclusion

[35] Considering the facts and circumstances of this matter, Mantladi has failed to establish that the treasury respondents took irrelevant considerations into account or failed to consider relevant considerations. Mantladi should have shown that the decision was not rationally connected to the information before the National Treasury or its reasons. It follows that there are no grounds on which this Court may review and set aside the treasury respondent's decision to award the tender to the successful bidders in terms of section 6 of PAJA.

[36] Additionally, Mantladi has failed to demonstrate exceptional circumstances to warrant the new relief sought. Accordingly, there is no basis for this Court to allow Mantladi's application for amendment in terms of rule

28(10). Thus, its application stands to fail

[37] Accordingly, the following order is made:

1. The application is dismissed.
2. The applicant must pay the first and third respondents' costs, including the costs of counsel on scale B.

D Mahosi

Acting Judge of the High Court

Delivered: This judgment was handed down electronically by circulation to the parties' representatives through email. The date for hand-down is deemed to be 11 November 2024.

Appearances

For the Applicant: Advocate JP van den Berg SC and DH Hinsrichsen Instructed by: Cavanagh & Richards Attorneys For the first and third respondents: Advocate M Musandiwa Instructed by: State Attorney, Pretoria

[1] Act 3 of 2000, as amended.

[2] 2015] ZACC 22

[3] [2019] 3 All SA 796 (NWM)

[4] Section 217 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."

[4] Section 217 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.”

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