

SOUTH AFRICA / JUDGMENT

Mavo & Josi Trading CC v Matoane and Others (32156/2012) [2013]

ZAGPPHC 423 (10 December 2013)

[2013] ZAGPPHC 423

COURT

North Gauteng High Court, Pretoria

BEFORE

R G Tolmay

CASE / FILE NUMBER

32156/2012

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IN

THE NORTH GAUTENG HIGH COURT, PRETORIA

(REPUBLIC
OF SOUTH AFRICA)

CASE

NO: 32156/2012

DATE:

10 DECEMBER 2013

IN

THE MATTER BETWEEN:

MAVO

& JOSI TRADING CC.....

APPLICANT

6TH

RESPONDENT IN THE

MAIN

APPLICATION

AND

T

MATOANE

ACTING

MUNICIPAL MANAGER

EMALAHENI

LOCAL MUNICIPALITY.....1ST

RESPONDENT

EMALAHLENI

LOCAL MUNICIPALITY.....

2ND

RESPONDENT

	MEMBER
OF EXECUTIVE COUNCIL:	CO-OPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS – MPUMALANGA PROVINCE.....3RD RESPONDENT THE HEAD OF DEPARTMENT (HOD) DEPARTMENT
OF FINANCE:	MPUMALANGA PROVINCIAL GOVERNMENT.....4TH RESPONDENT THE MINISTER: NATIONAL TREASURY.....5TH RESPONDENT KHUPUKANI JV IZINGWENYA SECUIRTY.....6TH RESPONDENT

JUDGMENT

TOLMAY, J:

NATURE OF THE APPLICATION

- [1] The applicants Mavo & Jozi Trading CC (Mavo & Jozi) lodged an application to rescind an application granted by this Court on 12 October 2012 in terms of rule 31 (2)(b) of the Uniform Rules of Court (the rules). The order which the applicant seeks to rescind is an order in terms of which an award purportedly granted by the second respondent (“the municipality”) has been set aside and granted to sixth respondent, Khupukani JV Izingwenya Security (“Khupukwani”).

BACKGROUND

- [2] The following facts are common cause:

- 2.1. During July 2011 the municipality issued a tender for the provision of security services which required 139 security guards to be employed at various sites under the control of the municipality;
- 2.2. Various security firms, including Mavo & Jozi and Khupukani applied for the tender;
- 2.3. The bid adjudicating committee nominated three finalists amongst the parties who applied for the tender, Khupukani and Mavo & Jozi were amongst the finalists;

2.4. Ms T M Matoane (the former acting municipal manager of the second respondent - now dismissed and the first respondent in the review application) (Matoane”) did not accept the aforementioned parties as final contenders, deviated from the nomination by the bid adjudicating committee, reduced the scope of the tender and requested the nominated parties to submit proposals for a reduced number of security guards, to wit 93. On 1 November 2011 Matoane awarded the tender to Mavo & Jozi. On 22 November 2011 Mavo & Jozi were formally informed that it had received the tender.

2.5. On 6 June 2012 Khupukani launched a review application to set aside the award of the tender to Mavo & Jozi. In terms of the return of service the review application was served on Majo & Jozi at its registered address on 12 June 2012.

- [3] On 12 October 2012 the award of the tender was set aside by the court and awarded to Khupukani. Mavo & Jozi did not oppose the aforementioned review application by Khupukani because, it did not know that Khupukani had brought such an application. During November 2012 Mavo & Jozi, filed a rescission application in terms of rule 31 (2)(b). Khupukani is presently rendering services to the municipality since December 2012 after it had accepted the award from the municipality.
- [4] Matoane was dismissed prior to the launching of this application and replaced by Mr Mthimuney who became the municipal manager. Mr Mthimuney in his capacity as municipal manager as well as Khupukani opposes the application for rescission.

REQUIREMENTS FOR A RESCISSION APPLICATION

- [5] Before I proceed to deal with the merits of the case I will first set out the legal principles pertaining to a rescission application.

- [6] This application is brought under rule 31 (2)(b) of the rules. It reads as follows:

“A defendant may within twenty days after he or she has knowledge of such judgment apply to a court upon notice to the plaintiff to set aside such judgment and the court may, upon good cause shown. set aside the default judgment on such terms as to it seems meet”.

- [7] In order to succeed with the rescission application, Mavo & Jozi must show:

- (i) That the applicant has a reasonable explanation for its default;
- (ii) That the application is bona fide and not made with the intention of merely delaying the plaintiff’s claim; and
- (iii) A bona fide defence against the case on which the default judgment is based.¹

[8] In *Silber v Ozen Wholesalers (Pty) Ltd*² it was held that good cause includes but is not limited to the existence of a substantial defence.

- [9] Where an applicant has provided a poor explanation for default, a good defence may compensate³.

- [10] The court has a wide discretion in evaluating “good cause” in order to ensure that justice is done.

WILFUL DEFAULT

- [11] In terms of rule 31(2)(b) Mavo & Jozi should have brought the application within 20 days from the date that it became aware of it. This was not done.
- [12] No explanation for the default was tendered in the founding affidavit only in the replying affidavit did Mavo & Jozi explain that although service of the application was properly effected on its registered address, it moved out of its registered address in December 2011. The registered address was only changed after service of the review application. Applicant lodged the application during or about May or June 2012. The relevant CK2 and CK2A documents attached however indicate that the documents were only received by the Registrar of Companies on 16 August 2013.
- [13] The fact that the details were only changed some 9 months after the applicant moved leads to the conclusion that applicant was clearly grossly negligent and must take full responsibility for the fact that they did not get notice of the application.
- [14] The negligence together with the fact that Mavo & Jozi should have dealt with this aspect in their founding affidavit, lead me to the conclusion that the explanation for its default is not reasonable. However, if a good bona fide defence is shown a court may still exercise its discretion and grant the application.

BONA FIDE DEFENCE

- [15] Khupukani’s case in the review application was based on certain alleged irregularities committed by Matoane, in awarding the tender on 1 November 2011 to Mavo & Jozi. In order to determine whether the applicant has a bona fide defence, one should consider the basis on which Matoane awarded the tender to Mavo & Jozi. To determine whether the tender was correctly awarded one needs to consider the applicable legal framework within which a tender ought to be considered and awarded.
- [16] Section 217 of the Constitution deals with procurements by organs of state and states that such procurement must be in accordance with a system which is fair, equitable, transparent, competitive and cost effective. Section 195(1) of the Constitution provides that public administration must be governed by the democratic values and principles enshrined in the Constitution. An award of a tender must also comply with sec 33 of the Constitution which guarantees the right to administrative justice, and this must in turn be read with the Promotion of Administrative Justice Act (“PAJA”).
- [17] The system envisaged by sec 217 has been provided by the enactment of the Preferential Procurement Policy Framework Act, no 5 of 2000, the Preferential Procurement Regulations, 2001, the Formal Implementation Guide on the Preferential Procurement Regulations and the Municipal Finance Act (“MFA”), Act no 56 of 2003

[18] In *Total Computer Services v Municipal Manager Potchefstroom Local Municipality & Others*⁴ the court sets out the process that should be followed by a municipality when considering and awarding a tender:

“In terms of sec 168 of the Local Government Municipal Finance management Act 56 of 2003, the Minister of Finance, acting with the concurrence of the Minister for Provincial and Local Government, has made the regulations, referred to as the Municipal Chain management

Regulations, published under GC868 in GG 27636 of 30 May 2005. Regulation 2 provides that each municipality must implement a supply

chain management policy that gives effect to sec 217 of the Constitution which is fair; equitable, transparent, competitive and cost effective. Regulation 2(3) provides that no municipality may act otherwise than in accordance with its supply chain management policy when procuring goods or services. Regulation 26 provides that a supply chain management policy must provide for a committee system for competitive bids consisting of a bid specification committee, a bid evaluation committee and a bid adjudication committee. The bid specification committee has responsibility for compiling the specifications for each procurement of goods and services. The bid evaluation committee must evaluate bids in accordance with the specifications for a specific procurement and the points system as may be set out in the supply chain management policy of the municipality as prescribed in the specifications and in terms of the Preferential Procurement Policy Framework Act. It is also required to evaluate each tender to execute the contract. Thereafter the evaluation committee must submit their report to the adjudication committee including its recommendations regarding the award of the bid. The bid adjudication committee then

must consider the report and recommendations of the bid evaluation committee and either make a final award or a recommendation to the accounting officer (in this case the municipal manager) to make the final award”.

[19] Section 111 of the MFMA provides that each municipality must have and implement a Supply Chain Management Policy (“SCMP”) which

must be fair and transparent.⁵

[20] Paragraph 11.1.11 of the formal Implementation Guide on the Preferential Procurement Regulations. Paragraph 11.1.11 reads as

follows:

“Bids must be evaluated in terms of the criteria embodied in the bid documents. The amendment of evaluation criteria weights, applicable

values and/or the minimum qualifying score for the functionality after the closure of bids is not allowed as this may jeopardize the fairness of the process”⁶

[21] As a general rule, an organ of state cannot be allowed to make changes to tender specifications after a call for tenders had been advertised. The author Bolton⁷ states as follows:

"Tenderers prepare their tenders based on the specifications laid down in a call for tenders. As a general rule, therefore, an organ of state should not be allowed to make changes to tender specifications after a call for tenders has been advertised. It is in the interest of fairness and transparency (and also competitiveness) for organs of state to abide by the tender specifications initially provided".

[22] Material facts incorporated into tender documents by means of a letter, after tenders have been opened, has been held by the courts would undermine the constitutional basis and efficacy of the tender system⁸

[23] It seems from the case law that our courts would allow a tenderer to correct obvious mistakes in a tender, but a change to specifications which causes the tender process to lose the attribute of fairness and transparency will not be allowed⁹

[24] Consequently Matoane's decision not to accept the recommendation of the bid adjudication committee and her invitation

to the three top service providers for revised quotations were unlawful. Matoane's conduct amounted to a change of the specification of the tender after the call for tenders had been closed and such conduct is not allowed in terms of the applicable legislation and the authorities. The deviation from the tender requirements by Matoane was accordingly irregular and unlawful.

[25] It is also alleged by Khupukani and the municipality that Matoane, deviated from the recommendation by the municipality's bid adjudication committee without complying with the provisions of section 114(1) of the Municipal Financial Management Act, No 56 of 2003 ("the MFMA"), and by not informing the officials contemplated in sec 114(1) of the MFMA, to wit the Auditor- General, the applicable Provincial Treasury and the National Treasury of such deviation.

[26] Sec 114 of the MFMA reads as follows:

"If a tender other than the one recommended in the normal course of implementing the supply chain management policy of a municipality or municipal entity is approved, the accounting officer of the municipality or municipal entity must, in writing, notify the Auditor-General, the relevant provincial treasury and the National Treasury and, in the case of a municipal entity, also the parent municipality, of the reasons for deviating from such recommendation"

[27] A letter from Matoane dated 21 November 2011 informed the Provincial Treasury about her deviation from the recommendation and her reasons for it.

[28] The reasons why Matoane said she deviated from the aforesaid recommendation are the following:

28.1 Mavo & Jozi's bid was the cheapest;

28.2 Mavo & Jozi's bid accordingly scored the highest points; and

28.3 Certain aspects regarding locality favours Mavo & Jozi over Khupukani;

[29] Matoane's insistence that she did comply with the requirements of sec 114 and that the municipality is in possession of such proof is not accepted. If the notice was given as envisaged by the aforesaid section, surely the letter of 21 November 2011 to the Provincial Treasury would have been addressed to the other role players too. The municipality also denies that there was compliance. There is only proof of notice to the Provincial Treasury of the deviation and reasons thereof.

[30] In response to the letter of 21 November 2011 the Provincial Treasury raised their concern about her actions. The letter states as follows:

'We note with concern the fact that the municipality is completely deviating from the original specification and this may cause challenges for the municipality. The fact that quotations are done after the evaluation and adjudication has taken place including considering locality, local job creation, physical presence of the company, all these constitute a complete deviation from the original specification. This compromises the integrity of the municipality's supply chain management integrity and creates an unfair advantage for High Five and Mavo & Jozi at the expenses of Khupukani Security JA/ tsingwenya (the applicant) who has won the bid in relation to the municipality's specification and needs.'

[31] Matoane ignored the directive. It was argued that Matoane had an independent discretion to award the tender, this submission flies in the face of the constitutional requirements, for tenders and the legislation already referred to.

[32] Matoane acted unlawfully when she deviated from the initial tender specifications and failed to comply with the requirements pertaining to notice to the parties mentioned in sec 114.

CONCLUSION\

[33] Matoane's descion to deviate from the recommendation bid adjudication committee was accordingly irregular and the court

correctly reviewed and set aside her decision to appoint Mavo & Jozi. In the light of the aforesaid the applicant did not give a reasonable explanation for its defaults nor did it reveal a bona fide defence. Consequently the application cannot succeed.

[34]I make the following order:

The application is dismissed with costs

R G TOLMAY

JUDGE OF THE HIGH COURT

1 Erasmus Superior Court Practice, Farlam and Others p 201 and cases referred to in footnote 10
21954(2) SA 345 (A) 352

3 Carolus v Saambou Bank Ltd; Smith v Saambou Bank Ltd 2002(6) SA 346 (SE) at 349 B-C; Creative
Car Sound v Automobile Radio Dealers Association 1989 (Pty) Ltd 2007(4) SA 546 (D) at 555 C-P

4 19 October 2007, Case No 294/07, par [19] - [33]; See also Indiza Airport Management (Pty) Ltd v
Msanduzi Municipality, Kwazulu Natal, 16 November 2012, Case No 274/12

4 19 October 2007, Case No 294/07, par [19] - [33]; See also Indiza Airport Management (Pty) Ltd v
Msanduzi

Municipality, Kwazulu Natal, 16 November 2012, Case No 274/12

5 Bolton, The Law of Government Procurement in south Africa, on c/t, pp 189-190

6 Bolton, on cit, p 219

7 Bolton, on cit, Chapter 7, par 24, p 182; par 3.1.1.1. pp 213-217

8 Bolton, on cit, p 217, see also Claude Neon Ltd v Germiston City Council and Another 1995(3) SA
710 (W)

9 Bolton, on cit, p 216; Metro Projects CC a.o. v Klerksdorp Local Municipality and Others 2004(1)
SA 16 (SAC); see also Biovac SA (Pty) Ltd v Chairman of the State Tender Board and Others [2004] 3
All SA 715 © at 730 E- G

9 Bolton, on cit, p 216; Metro Projects CC a.o. v Klerksdorp Local Municipality and Others 2004(1)
SA 16 (SAC);

see also Biovac SA (Pty) Ltd v Chairman of the State Tender Board and Others [2004] 3 All SA 715
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