

SOUTH AFRICA / JUDGMENT

Phumelela Dlomo JV Kantera Trading v Walter Sisulu Local Municipality and Others, Iziqhamo Zethu JV Noble Money v Walter Sisulu Local Municipality and Others (3729/2018, 3730/2018) [2018] ZAECHGHC 138 (28 December 2018)

[2018] ZAECHGHC 138

COURT

Eastern Cape High Court, Grahamstown

BEFORE

M Roberson

CASE / FILE NUMBER

3729/2018, 3730/2018

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IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE DIVISION, GRAHAMSTOWN

CASE NO: 3729 /2018

Reasons available: 28/12/2018

PHUMELELA DLOMO JV KANTERA TRADING

APPLICANT

and

WALTER SISULU LOCAL MUNICIPALITY

1ST RESPONDENT

THE MUNICIPAL MANAGER: WALTER SISULU

2ND RESPONDENT

LOCAL MUNICIPALITY

THE ADMINISTRATOR, WALTER SISULU

3RD RESPONDENT

AMADWALA CONSTRUCTION TRADING 363 CC

4TH RESPONDENT

(Registration Number: 2005/022765/23)

CASE NO: 3730/2018

IZIQHAMO ZETHU JV NOBLE MONEY

APPLICANT

WALTER SISULU LOCAL MUNICIPALITY

1ST RESPONDENT

THE MUNICIPAL MANAGER: WALTER SISULU

2ND RESPONDENT

THE ADMINISTRATOR, WALTER SISULU

3RD RESPONDENT

AMADWALA CONSTRUCTION TRADING 363 CC

4TH RESPONDENT

REASONS FOR ORDERS

ROBERSON J:-

[1] On 21 December 2018 I made the following order in case number 3729/2018:

“1. a Rule Nisi is issued, calling upon the first, second and fourth respondents to provide reasons, if any, on the 5th day of February 2019 at 9:30 why the following order should not be finally made:

1.1 the first and fourth respondents are interdicted and restrained from performing any rights and obligations (including the works) arising from Tender Bid number 67/2018 pertaining to the tender known as “Upgrading of Steynsburg internal roads from gravel to paving” (“the Tender”) pending the outcome of an application to be brought by the applicant for the reviewing and setting aside of the award of the tender to fourth respondent.

1.2 directing the applicant to file its review application in respect of the award of the tender, within thirty (30) days of date of this order, failing which this order will automatically lapse.

1.3 that the first respondent be ordered to pay the costs of this application and in the event of it being opposed by any of the other respondents that the first respondent together with such respondents who oppose the application be ordered to pay the costs jointly and severally.

2. the order contained in paragraph 1.1 shall have immediate effect and operation, pending the final adjudication of this application.

3. the Sheriff is authorised to serve a photocopy of this order upon first, second and fourth respondents.

I made an identical order in case number 3730/2018, except that in paragraph 1.1 the name of the tender is “Upgrading of Dukathole internal streets from gravel to paving” and the number of the tender was 66/2018.

My reasons for the orders were to follow, which they now do.

- [2] The applications arose from the award of tenders by the first respondent (the Municipality) to the fourth respondent (Amadwala). The applicant in case number 3729/2018 (Kantera) was one of the bidders for the tender for the upgrading of Steynsburg internal gravel roads to paved roads. The applicant in case number 3730/2018 (Noble Money) was one of the bidders for the tender for the upgrading of Dukathole internal gravel roads to paved roads. I shall refer to Kantera and Noble Money collectively as the applicants.
- [3] The closing date for the submission of bids was 6 November 2018. The tender process was conducted in three stages: an evaluation by Nemorango Consulting Engineers (Nemorango); evaluation by the Bid

Evaluation Committee (the BEC); and the final decision of the Bid Adjudication Committee (the BAC).

- [4] In both matters Nemorango and the BEC recommended that the tender be awarded to the applicants respectively. In both matters Amadwala’s bid was found to be non-responsive by Nemorango and the BEC because of non-compliance with the requirement in the tender notice that:

“A current Tax Clearance Certificate (original) or Tax Compliance Status (TCS) Pin must be supplied with the tender or the tender will not be considered and in case of a JV a Tax Clearance Certificate (sic) (original) or Tax Compliance Status (TCS) Pins for both companies must be submitted.”

- [5] In the reports of the BEC it was stated that Amadwala did not comply with tender requirements and was deemed non-responsive because:

“Tax Status could not be verified due to Company submitting contradicting Tax-related documents.

According to the CSD report dated 21 September 2018, the Tax affairs of the company are non-compliant.[1]

According to SARS report issued on the 4th June 2018 to 4th June 2019 the Tax affairs are compliant.”

- [6] A further requirement in the tender notice was:

“Potential service providers will have to achieve a minimum of 75 points out of 100 for their technical proposals before their financial proposals and B-BBEE status are evaluated.”

- [7] Noble Money, the only bidder deemed responsive in this tender, scored 70,5 points for functionality and 20 points for B-BBEE status. The BEC concluded its report by stating:

“We are of the opinion that the tenderer Messrs Iziqhamo Zethu JV Noble Money who scored the highest points, and with the tender amount of R10 779 171.38 (including contingencies and Vat) is at moderate risk and can handle project of this magnitude within a construction period of 6 months excluding contractor’s holidays.”

- [8] Kantera, one of two responsive bidders in its tender, scored the higher number of points for functionality, 77 points, and 20 points for B-BBEE status, in the BEC report, which concluded by stating:

“We are of the opinion that the tenderer Messrs Phumelela Dlomo JV Kantera Trading who scored the highest points, with the corrected tender amount of R4 738 664.70 (including contingencies and VAT) is a moderate risk and can handle projects of this magnitude within a construction period of 3 months excluding contractor’s holidays.”

- [9] The BAC made its recommendation that the tenders be awarded to Amadwala on 22 November

2018. In both matters the BAC found Amadwala’s bids to be responsive, stating:

“The tenderer comply (sic) with the tender requirements and deemed responsive.

The tenderer submitted a valid tax clearance certificate and the SARS Pin number to verify its tax matters and the results are tax compliance with SARS. A SARS verification was done on 21 November 2018 from the SARS website and the tax affairs were found to be in good order.”

- [10] In the Kantera matter the BAC included Amadwala and Kantera on their list of responsive bidders. They allocated 95.5 points to Amadwala and 70.5 points (down from 77) to Kantera for functionality. Only Amadwala was considered for further evaluation for price and B-BBEE status. It scored 20 points for B-BBEE status. It was awarded the tender because it scored the highest number of points and achieved 95.5 points for functionality.
- [11] In the Noble Money matter, according to the BAC report Amadawala was the only responsive bidder. Noble Money was included in the non-responsive list. The stated ground for being non-responsive was that Noble Money’s landlord’s municipal rates and services account had been in arrears for more than three months. This was the only ground stated for non-responsiveness.
- [12] The applicants were not formally notified by the Municipality of the awards to Amadwala and learned from a whistle blower of the awards. The applicants wrote to the then Administrator expressing their dissatisfaction. They were furnished with the various reports. Their attorney wrote to the second respondent requesting reasons for the decision and copies of the various reports. Included in the documents provided by the second respondent was a CSD registration report with the date and time of the generation of the report recorded as 22 November 2018 06:25 PM. The edit date was 12 November

2018. The report reflected that Amadwala's income tax and VAT status was verified and overall tax status was tax compliant.
- [13] The applicants had a similar complaint, namely that the final bid adjudication process was manipulated so that the tender was awarded to a non-responsive tenderer while their responsive tenders were excluded without any lawful basis. Both maintained that there had been non-compliance with Constitutional imperatives that the procurement be in accordance with a system which is fair, equitable, transparent, competitive and cost-effective (s 217 of the Constitution).
- [14] Specifically the applicants were of the view that if Amadwala's tax affairs were non-compliant at the time the tenders were submitted, Amadwala should have been disqualified automatically and should not have had the opportunity to remedy its tax affairs and submit further documents because such conduct would impair the bidding process and render it non-transparent and subversive. They both pointed out that the CSD report of 22 November 2018, was generated at 06:25 PM, a time which was later than the business day of municipal officials. Further the edit date was 12 November 2018 which was after the closing date for submission of tenders, 6 November 2018. Noble Money also pointed out that the arrear municipal account was not its account, but that of its landlord.
- [15] According to both applicants, the site handover was to take place on 23 November 2018. A request by their attorneys to the Municipality to stay the implementation of the tender was refused. The reason given for the refusal was the community's service delivery demands.
- [16] The application was opposed by the first and second respondents. Amadwala was served with the applications but I was informed from the bar that it was not opposing the application at that stage. The Municipality is no longer under administration, hence the exclusion of the third respondent in the order.
- [17] The answering affidavit of the first and second respondents was deposed to by the acting CFO of the Municipality, Mr Nceba Bomvane. He was the chairperson of the BAC. He said that the funds utilised for the two tenders come from a national municipal infrastructure grant which is allocated to municipalities by the National Department of Cooperative Governance and Traditional Affairs. In terms of the Division of Revenue Act 1 of 2018 it is a requirement that municipalities must spend a minimum of 40% of these funds before 31 December of each year. The financial year runs from July to June the next year.
- [18] Bomvane said that the BAC considered the BEC's assessments in their totality. In Kantera's case the BAC found the BEC's assessment that its bid was responsive to be incorrect for two

reasons:

Kantera had scored 70.5 points for functionality which was less than the minimum threshold of 75 points; and the municipal account of Kantera's landlord was in arrears for more than 90 days. Bomvane named the landlord as J Mageduka of 370 Masakhane

Street, Jamestown.

[19] With regard to Noble Money's bid, the BAC found the BEC's assessment that it was responsive was incorrect for two reasons; it had scored less than 75 points for functionality, which was a peremptory requirement contained in the tender notice; and its landlord's municipal account was in arrears for more than three months. Bomvane again named the landlord as J Mageduka of 370 Masakhane Street, Jamestown. The BAC therefore found Noble Money's bid to be non-responsive.

[20] On the other hand, the BAC found Amadwala's bids to be responsive. Bomvane referred to the CSD report of 21 September 2018 which recorded Amadwala's tax status as non-compliant and said that a contradiction regularly occurs between CSD reports and SARS' reports, because the CSD delays in updating the information which it obtains from various sources, including SARS. The BAC's verification of Amadwala's tax status meant that it satisfied all the requirements for its bid to be deemed responsive. Bomvane annexed the CSD report of 22 November 2018 to his affidavit as well as a copy of a tax clearance certificate which he said had been verified through the pin verification process. This tax clearance certificate was for the period 4 June 2018 to 4 June 2019. Further documents annexed were: one dated 4 June 2018 from SARS in which it issued a TCS pin to Amadwala; and one seemingly generated by using the TCS pin in which

it was indicated that on 21 November 2018 at 12:50:51 Amadwala was currently compliant in respect of filing and payment responsibilities. The document recorded:

"The response represents the taxpayer's compliance status at the date and time of this response. It is important to note that the overall compliance status is not static and will change as the compliance status changes."

[21] Bomvane said that in the execution of its responsibilities, the BAC corrected the anomalies of the BEC reports concerning the non-responsiveness of Amadwala and prepared a report accordingly.

[22] I was satisfied that both matters were urgent. The applicants only learned of the award on 30 November 2018. Site handover had taken place and should the applicants have conformed with the normal time frames, the work to be done by Amadwala may have reached such a stage that even if the awards were invalid, because of the effluxion of time the awards could be allowed to stand (Chairperson: Standing Tender Committee and Others v JFE Sapela Electronics (Pty) Ltd and Others [2005] 4 All SA 487 (SCA) at paragraph [29]. Moreover, the Municipality refused to stay the implementation of the awards.

[23] The requirements for the granting of an interim interdict are well known. They are:

[1] A prima facie right even though open to some doubt.

[2] An apprehension of irreparable harm if the interdict is not granted.

[3] A balance of convenience in favour of interim relief.

[4] The absence of any other satisfactory remedy.

Prima facie right

[24] The applicants are entitled as bidders to a procurement process which is in accordance with the requirements of s 217 of the Constitution.

[25] In her introduction to her paper “Disqualification for non-compliance with public tender conditions” PER / PELJ 2014 (17) 6, P Bolton states (footnotes omitted):

“In public procurement regulation it is a general rule that procuring entities should consider only conforming, compliant or responsive tenders. Tenders should comply with all aspects of the invitation to tender and meet any other requirements laid down by the procuring entity in its tender documents. Bidders should, in other words, comply with tender conditions; a failure to do so would defeat the underlying purpose of supplying information to bidders for the preparation of tenders and amount to unfairness if some bidders were allowed to circumvent tender conditions. It is important for bidders to compete on an equal footing. Moreover, they have a legitimate expectation that the procuring entity will comply with its own tender conditions. Requiring bidders to submit responsive, conforming or compliant tenders also promotes objectivity and encourages wide competition in that all bidders are required to tender on the same work and to the same terms and conditions.”

[26] I was of the view, firstly, that the BEC properly found Amadwala’s bid to be non-responsive because of the contradictory tax documents, especially because it was the later document of 21 September 2018 which recorded that its tax affairs were not in order.

[27] In *Minister of Social Development v Phoenix Cash and Carry – Pmb CC* [2007] 3 All SA 115 (SCA) the following was said at para [2]:

“Without attempting a comprehensive survey of the circumstances which will offend against s 217(1) certain general observations are demonstrated as true by the facts of the present case-

- (1) a tender process which depends on uncertain criteria lends itself to exclusion of meritorious tenderers and is opposed to fairness among tenderers, and between tenderers and the public body which supposedly promotes the public weal;
- (2) a process which lays undue emphasis on form at the expense of substance facilitates corrupt practice by providing an excuse for avoiding the consideration of substance; it is inimical to fairness, competitiveness and cost-effectiveness. By purporting to distinguish between tenderers on grounds of compliance or non-compliance with formality, transparency in adjudication becomes an artificial criterion. In saying this I do not suggest that the tender board is not entitled to prescribe formalities which, if not complied with, will render the bid invalid, provided both the prescripts and the consequences are made clear. What I am concerned to stress is the need to appreciate the difference between formal shortcomings which go to the heart of the process and the elevation of matters of subsidiary importance to a level which determines the fate of the tender.

It follows that a public tender process should be so interpreted and applied as to avoid both uncertainty and undue reliance on form, bearing in mind that the public interest is, after giving due weight to preferential points, best served by the selection of the tenderer who is best qualified by price. This is particularly relevant to the activities of a ‘technical evaluation committee’ which examines the tenders for formal compliance but does not evaluate the merits of the bids. In the present case the bids which survived the technical scrutiny were passed on to the bid committee for evaluation. By then the die was cast against the respondent (‘Phoenix’) and the bid committee was deprived of the opportunity of considering the merits of its tender.”

[28] I do not think that the BEC was elevating form over substance. In her paper (*supra*) at paragraph 3.4.1 Bolton referred to various legislative provisions dealing with the importance of tax compliance when evaluating tenders. This was not a matter of an outdated tax certificate (*Imvusa Trading 134CC and Another v Dr Ruth S Mompoti District Municipality and Others* [2008] ZANWHC 46 (20 November 2008), or a copy of the second page of a municipal billing clearance certificate instead of the original (*VDZ Construction (Pty) Ltd v Makana Municipality and Others*

[2011] ZAECGHC 64 (03 November 2011). There was a document which, according to the BEC report, stated that Amadwala’s tax affairs were non-compliant.

[29] It followed, in my view, that Amadwala was effectively allowed to supplement its bid in a material respect, after the closing date. Its bid documents were not disclosed by the respondents, but, as was submitted on behalf of the applicants, it can be inferred from the contents of the BEC report that its TCS pin was not included in its documents. I was of the view that this amounted to inequality, unfairness and a lack of transparency in the process. As was said in *Metro Projects CC and Another v Klerksdorp Local Municipality and Others* 2004 (1) SA 16 (SCA) at paragraph [13]:

“In the Logbro Properties case supra paras

[8] and [9] at 466H-467C Cameron JA referred to the ‘ever-flexible duty to act fairly’ that rested on a provincial tender committee. Fairness must be decided on the circumstances of each case. It may in given circumstances be fair to ask a tenderer to explain an ambiguity in its tender; it may be fair to allow a tenderer to correct an obvious mistake; it may, particularly in a complex tender, be fair to ask for clarification or details required for its proper evaluation. Whatever is done may not cause the process to lose the attribute of fairness or, in the local government sphere, the attributes of transparency, competitiveness and cost-effectiveness.”

[30] In any event, as was further submitted on behalf of the applicants, the documents relied upon by the BAC did not necessarily show that as at the closing date Amadwala was tax compliant. It was not known, so it was submitted, if the pin was provided by Amadwala and its tax status verified at the time its bid documents were submitted.

- [31] In my view, the decision of the BAC to find that Amadwala's bid was responsive, and the resultant exclusion of the applicants, was a result of an unfair process.
- [32] In addition, it appeared to me that the BAC did not provide a rational explanation for its polarised deviation from the BEC's recommendations. It decided that Noble Money's bid was non-responsive because its landlord's municipal account was in arrears. Regulation 38 (1) (d) (i) of the Regulations of the Local Government: Municipal Finance Management Act 56 of 2003, on which the BAC relied, provides that a supply chain management policy must enable the accounting officer to reject any bid from a bidder if any municipal rates and taxes or municipal service charges owed by that bidder or any of its directors to the municipality or municipality entity, or to any other municipality or municipal entity, are in arrears for more than three months.
- [33] Although in the BAC report Kantera was on the list of responsive bidders, in the answering affidavit it was said that the BEC was wrong to find Kantera's bid responsive for two reasons, the first being its score below 75 and the second its landlord's municipal account being in arrears for more than three months. No explanation was provided for reducing Kantera's initial points of 77 to 70.5, and clearly the Bomvane was mistaken when he referred to the state of Kantera's landlord's municipal account. This only applied to Noble Money.
- [34] For the above reasons I was satisfied that the applicants established a prima facie right, namely the right to a procurement process in accordance with s 217 of the Constitution and related legislation, which prima facie has been infringed. I was of the view that little doubt was cast on this right by the answering affidavit.

Apprehension of irreparable harm

- [35] I have to some extent dealt with this requirement when dealing with urgency. As was submitted on behalf of the applicants, if they do not succeed in suspending the implementation of the awards to Amadwala, a court might eventually refuse relief because of the extent of the work already completed by Amadwala.

Absence of any other satisfactory remedy

- [36] It was submitted on behalf of the respondents that the applicants had the remedy of claiming damages, presumably in the event of them establishing that the awards to Amadwala were invalid. In my view this was not a viable alternative remedy. In *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2006 (3) SA 151 (SCA) the following was said at paragraph [46]:

"Weighing up these policy considerations I am satisfied that the existence of an action by tenderers, successful or unsuccessful, for delictual damages that are purely economic in nature and suffered because of a bona fide and negligent failure to comply with the requirements of administrative justice cannot be inferred from the statute in question. Likewise, the same considerations stand in the way of the recognition of a common-law legal duty in these circumstances."

It may well be difficult for the applicants to prove dishonesty on the part of the BAC.

Balance of convenience

[37] It was submitted on behalf of the respondents that loss would be suffered by the Municipality because 40% of the grant needed to be spent before 31 December 2018. However, as pointed out by Counsel for the applicants, there was no allegation in the answering affidavit that the Municipality intended to spend anything on these two contracts before 31 December 2018. As far as the community's service delivery demands are concerned, the interdict was sought for a fairly limited period. On the other hand, given what I considered to be good prospects of success in the review application to be brought, the balance of convenience favoured the applicants, in that it would be prejudiced should the interdict not be granted. The work would be completed or substantially completed and even if the awards to Amadwala were found to be invalid, they might well be allowed to stand.

[38] These were my reasons.

J M ROBERSON

JUDGE OF THE HIGH COURT

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