

SOUTH AFRICA / JUDGMENT

Razzmatazz Civil (Pty) Ltd v Independent Development Trust and Others (4691/2017) [2018] ZAFSHC 50 (19 April 2018)

[2018] ZAFSHC 50**COURT**

Free State High Court, Bloemfontein

BEFORE

Naidoo, Mathebula

CASE / FILE NUMBER

4691/2017

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Source record**IN****THE HIGH COURT OF SOUTH AFRICA,****FREE****STATE DIVISION, BLOEMFONTEIN****Case****number: 4691/2017****In****the matter between:****RAZZMATAZZ****CIVIL (PTY)****LTD****Applicant****And****THE****INDEPENDENT DEVELOPMENT TRUST****1ST****Respondent****THE****MINISTER: GOVERNMENT OF THE REPUBLIC OF****SOUTH****AFRICA: DEPARTEMENT OF PUBLIC WORKS 2ND****Respondent****REDER****CONSTRUCTION CC****3RD****Respondent**

CORAM: NAIDOO
ADJP et MATHEBULA, J
HEARD

ON: 12 FEBRUARY 2018

JUDGMENT

BY: MATHEBULA, J

DELIVERED ON: 19 APRIL 2018

[1] The applicant, Razzmatazz Civil (Pty) Ltd, brought an application to review and set aside a decision of the 1st respondent, The Independent Development Trust, to award a tender to the third respondent. In addition the applicant is seeking an order that the Service Level Agreement concluded between the 1st and 3rd respondent be struck down as well as certain ancillary

orders.

[2] The background facts are briefly as follows. In June 2017, the first respondent invited tenderers to bid for the provision of major refurbishment of facilities and Civil Services at 44 Parachute Regiment, Tempe, Bloemfontein. The closing date was 3 July 2017 at 11h00. The applicant and 3rd respondent also submitted their bids.

[3] The bids were evaluated as indicated in the Minutes of the Bid Evaluation Committee held on 12 to 13 July 2017. The following

sequence was applied:-

A. Compliance with mandatory requirements (“Gate Keepers”)

B. Application of Functionality Criteria, with minimum threshold of 70% required to qualify for further evaluation.

C. Price and Preference (90/10)

[4] The applicant’s bid made it through the Gate Keepers stage but did not progress beyond the Functionality stage because it achieved a score less than the minimum of 70%. The score achieved by the applicant was recorded as follows:-

Relevant experience on similar construction projects completed in the past 5 years. The similarity refers to project of similar and complexity, size and value in terms of the CIDE categorization. 24 Performance on previous projects executed in terms of the respective completed “Client Reference Scorecards” (see returnable schedules) for the projects listed on the aforementioned projects. 10 Financial Ability 0 Qualification and Competence of key staff 18 Contractor approach and methodology 8 60.00

- [5] It appears that on 28 August 2017 the applicant obtained the confirmation of the awarding of the tender to the 3rd respondent on the website of the 2nd respondent. In consequence thereof the applicant's attorneys wrote a letter to the 1st respondent on 28 September 2017 requesting full and adequate reasons why the applicant's bid was unsuccessful. They also requested the evaluation report of the Consulting Engineers, minutes of the Bid Evaluation Committee meeting, Bid Adjudicating Committee as well as certain additional information.
- [6] The 1st respondent replied in a detailed letter dated 30 August 2017. The relevant part contained in paragraph 8 of the said letter read as follows:-

"Having achieved a functionality score of 60% as shown in Table A above, Razzmatazz thus failed to attain the minimum threshold of 70% on functionality required to progress to third and final stage of evaluation i.e. price and preference evaluation."

- [7] The applicant was dissatisfied with the response and wrote another letter dated 1 September 2017. On this occasion, the applicant substantially dealt with inaccuracies in the response of the 1st respondent and threatened to bring an urgent application in the event the 1st respondent proceeded with the implementation of its decision. On 5 September 2017 the 1st respondent replied with a letter and paragraph 10 conveyed the following message:-

"In terms of B2, financial ability, Razzmatazz failed to comply with the requirements of the returnable as per table 1, but however provided Financial Statements instead. Clause F2.18 of the standard conditions of tender does not deal with documents not submitted as part of the tender requirements but additional other material and on discretionary request by employer for purposes of fair risk assessment as captured in sentence number 4 of clause F2.18.1."

- [8] The reasons having been provided and the applicant still dissatisfied, these proceedings were launched as a matter of urgency. The object of the review proceedings in terms of Rule 53 is to grant a quick relief to an aggrieved party. I do not intent to repeat its historical background up to the proceedings before us.
- [9] Mr Grobler on behalf of the applicant put up a formidable argument that the decision to award the bid to the 3rd respondent be reviewed and set aside. He argued that the question of locus standi can only be dealt with once the facts have been examined and considered. The essence of his submission was that the issues

to be considered are whether the applicant submitted a compliant bid and that the 1st respondent scored the bids in a correct manner. Only in the event that the applicant was non-compliant then the question of locus standi can be considered.

- [10] He proceeded to deal with the scoring by the 1st respondent and argued that there was no objective criteria used to complete the exercise. It was his submission that the absence of objective determination vitiated the process. He referred to several incidents where points were not awarded or improperly awarded to the applicant. These inaccuracies contributed toward the applicant not making the necessary threshold.

- [11] In response, Mr Mokoena sharply differed with the submissions of the counsel for the applicant. He submitted that it was not the case of the applicant that the bid of the 3rd respondent was not responsive and had to be disqualified. The applicant was not alleging that the 1st respondent awarded the bid to the 3rd respondent in a situation where the latter did not qualify. Further that the applicant was not alleging any bias, fraud, corruption or arbitrary grounds for awarding the tender to the 3rd respondent. He added that the applicant was not relying on any specific ground and which provision of PAJA[1] has not been complied with.
- [12] He emphasised that the response of the 1st respondent through letters exchanged gave comprehensive reasons for the lawful decisions. These demonstrated a clear, objective and fair criteria were applied consistently in a lawful manner and that the bid of the applicant did not meet the threshold. In his view the applicant was a disgruntled bidder who would stop at nothing to award itself a bid. On the issue that not all documents were returned, he argued that there were no reasons that the applicant ought to have been treated differently. The calculation of scores was a fair and just administrative action. In the matter on hand there were no exceptional circumstances justifying a different approach by the court. He alluded to the importance of the work to be performed at a military base and that the application ought to be dismissed with costs.
- [13] Mr Snellenburg for the 3rd respondent submitted that an organ of state must comply with the prescripts of section 217 of the Constitution. He argued that Mr du Preez in his affidavit does not deny having knowledge of the value of the work to perform. On the issue of scoring he submitted that the applicant was scored incorrectly in any event under the heading relevant experience. The experience gained in road maintenance cannot be equated to building as they are not the same thing. According to him there was no one who positively scored that the Bank Rating Certificate was included in the documents submitted for the bid. He submitted that the 3rd respondent will suffer immense prejudice in the event the tender was reviewed and set aside. The costs spent in establishing itself on site and contracts entered into with sub-contractors, employees and other service providers was just too enormous.
- [14] The first issue to be considered is whether the applicant had the legal standing to seek the review of the award and ancillary relief. The applicant did not submit a bid that was excluded at the outset for being non-responsive. It was found to be compliant and excluded only because it did not attain the 70% threshold. There is an obvious dispute regarding submission of returnable documents and the methodology of calculating the score. The applicant as an unsuccessful party has an interest in the matter and in its litigation do so on its own facts. It is my considered opinion that it has the necessary locus standi in this matter.
- [15] The procurement of goods and services by state organs must comply with the provisions of the Constitution and relevant legislation.

Section 217 of the Constitution prescribes that the public sector procurement system must be fair, equitable, transparent, competitive

and cost effective. This section lays down the imperatives of fairness and transparency. There are a myriad of Statutes, Regulations and Policies flowing from these provisions which must also be complied with. In addition the Tender Data contain formulae for calculating the scores for relevant experience, financial ability, financial offer and price.

- [16] In this matter it would appear that the applicant did not enclose the confirmation letter of “bank rating” from the bank thus failing the financial ability test. Instead the applicant submitted the financial statements. The necessary points were not awarded. The argument of the applicant is that the 1st respondent should have condoned this and even went an extra mile to request the applicant to file this document.
- [17] I find the argument misplaced. There is no evidence that any bidder was treated differently to the applicant in that documents were requested or corrected at the request of the 1st respondent. It fell squarely within the discretion of the applicant to do that or not. Failure to do so cannot be a

ground upon which the decision of the 1st respondent in evaluating the bid can be marred with irregularity to the point of vitiating it.

- [18] The decision to award or not award a bid is that of a relevant organ of state which must be in accordance with the principles of law. This being an administrative action means that the provisions of Promotion of Administrative Justice Act 3 of 2000 are applicable. In *Metro CC v Klerksdorp Municipality*[2] Conradie JA had the following to say about fairness in the context of public procurement.

“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.”

- [19] In this matter I am satisfied that the applicant was dealt with in a fair manner. The tender evaluation methods were clearly defined, certain and known in advance in tender documents. This document was important for the 1st respondent to evaluate the financial muscle of the bidders given the large amount of money involved and its importance to the client.

It was clearly stated in the tender document which returnable documents must accompany the bid. The applicant did not comply

with all of them.

- [20] It is trite that the method of tender evaluation is a fundamental part of the tender process. The relevant principles were summed up in *Allpay v Chief Executive, Sassa*.^[3] The proper approach as laid down is to establish factually whether an irregularity has occurred then be legally evaluated whether it amounts to a ground for review under PAJA. In this matter all bids were considered and after using a criterion which was objective and known beforehand to the bidders was the decision made. The applicant was provided with reasons which culminated in a decision to award the tender to the applicant. These reasons are rational as they are based on the prescripts of the tender document.
- [21] The applicant is also seeking the order that this court substitute the decision of the 1st respondent by allocating the tender to it. I do not find merit in this argument. As stated earlier the 1st respondent is ordained the discretion to award or not award a bid. The Constitutional Court repeatedly held that courts should be wary of abrogating to itself the powers that are endowed upon other agencies. Although it is difficult to formulate in clear terms what such deference must embrace, each matter will depend on its facts and circumstances.^[4] In this matter there are no exceptional circumstances warranting this court to interfere with the decision of the respondent. The applicant had not made a case for awarding the bid to it. It is not for the court to engage in the exercise of calculating the score(s) which is primarily the function of the 1st respondent. In the event such a task is to be undertaken, it would require that the bid of each and every bidder be examined and evaluated. This will not only be a mammoth task but also an encroachment on the competencies of other organs of state. I do not find any irregularity on that aspect.
- [22] I have alluded to the aspect that the scope of work had to be performed at a military base. Although the country is not at war, the safety and security of citizens is important. It cannot be put at risk. It is absolutely important that the decision of the 1st respondent is carried out and the 3rd respondent proceed to conclude the work.
- [23] Given the conclusion I have reached in this matter, there is no reason to depart from the ordinary rule regarding the costs.
- [24] Accordingly, I make the following order:-
- 24.1 . The application is dismissed.
- 24.2. The applicant is ordered to pay the costs of the 1st respondent inclusive of two counsel as well as costs of the 3rd respondent.

MATHEBULA, J

I concur

NAIDOO, J

On behalf of Applicant:

Adv. S Grobler

Instructed by:

Peyper Attorneys

Bloemfontein

On behalf of 1st Respondent:

Adv P Mokoena SC assisted by

Adv. M Skhosa

Instructed by:

Maphosa Mokoena Inc.

c/o Matsepes

On behalf of 3rd Respondent: Adv. N Snellenburg SC

Instructed by:

Honey Attorneys

/roosthuizen

[1] Promotion of Administration Justice Act 3 of 2000

[2] 2004 (1) SA 16 (SCA) para 13.

[3] 2014 (1) SA 404 (CC) paras 22-30

[4] National Coalition of Gay and Lesbian Equality v Minister of Home Affairs 2000 (2) SA 1 (CC);
Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others [2004] ZACC 15;
2004 (4) SA 490 (CC).

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