

SOUTH AFRICA / JUDGMENT

## Sonasethu General Engineering Services CC v Ntinga O.R Tambo Development Agency Soc.Ltd (448/2019) [2019] ZAECMHC 46 (15 August 2019) [2019] ZAECMHC 46

COURT

Eastern Cape High Court, Mthatha

BEFORE

Jolwana

CASE / FILE NUMBER

448/2019

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IN

THE HIGH COURT OF SOUTH AFRICA

EASTERN

CAPE LOCAL DIVISION: MTHATHA

CASE NO. 448/2019

In

the matter between:

SONASETHU

GENERAL ENGINEERING SERVICES CC Applicant

And

NTINGA

O.R. TAMBO DEVELOPMENT AGENCY SOC. LTD

Respondent

### JUDGMENT

JOLWANA J

- [1] The applicant obtained, with the consent of the respondent, an order interdicting the respondent from giving effect to the cancellation of a contract awarded to the applicant for meat inspection and classification services. Further ancillary orders were also

granted effectively allowing the applicant to continue rendering meat inspection and classification services pending this application for the setting aside as unlawful the notice of cancellation of the contract issued by the respondent to the applicant.

- [2] The respondent runs the Umzikantu Red Meat Abattoir in Mthatha (the abattoir) which produces meat for human consumption. It is in respect of the said abattoir that the respondent issued a tender for meat inspection and classification services. After the tender processes were completed the respondent addressed a letter dated 31 July 2018 to the applicant informing it of having been appointed to provide meat inspection and classification services at the abattoir for a period of three years. In the letter of appointment a service level agreement was also envisaged presumably to regulate operational matters flowing from the award of the tender. However, when the respondent sent the notice of cancellation of the contract, the service level agreement had not yet been concluded.
- [3] The applicant later received a letter dated 29 October 2018 from the respondent in which the latter requested the applicant to furnish it with qualification certificates in respect of the applicant's primary and secondary meat inspection personnel. These were the certificates of the meat inspector or animal health technician who must be registered with the relevant statutory body and a secondary meat inspector which is a veterinarian who is registered with the veterinary council. Secondly proof was also required that the deployed meat inspector is competent on meat classification and grading.
- [4] The applicant was unable to respond to the aforementioned letter immediately due to unforeseen circumstances, and the applicant also felt that in any event the required documents had been submitted to the respondent together with the bid document. Due to this failure to respond to the letter dated 29 October 2018 the respondent addressed another email to the applicant dated 7 November 2018 in which the applicant was reminded that it had not responded to the said letter. It was further pointed out that if the applicant did not respond by close of business on the 7 November 2018 the applicant's appointment with the respondent would be cancelled. The applicant only responded to the email dated 7 November 2018 on the 16 November 2018 allegedly submitting all the documents requested on 29 October 2018.
- [5] In its papers the applicant also gives its history with the respondent pointing out that on 1 August 2015 it was awarded a first

contract and the second one was awarded on 1 September 2017 for the same services. Thereafter the applicant makes the following

averment:

*"Therefore the same services have been rendered to the respondent by the applicant without the need for the specifications as listed/requested in the email marked "VAN7".*

- [6] VAN7 is the respondent's letter dated 29 October 2018 in which the respondent requested the applicant to furnish it with the certificates of the personnel who would be providing meat inspection and classification services to the abattoir. For reasons that will become clear later in this judgment it is surprising that the applicant was previously awarded contracts "without the need for the specifications as listed/requested". Having said that, I am not sure what case is being made or what the relevance of the two previous contracts is. I understand the applicant's case to be that having been awarded the tender on 31 July 2018 it was never provided with a notice of breach of contract or an opportunity to remedy any alleged breach before the notice of cancellation was dispatched to it.
- [7] Following the award of the tender to the applicant, the respondent started a vetting process in preparation for the conclusion of the service level agreement with the applicant as indicated in the letter of award. It was during the vetting process that they realized that the applicant did not furnish the respondent with the certificates for all the personnel required for meat inspection and classification services when the bid was submitted.
- [8] In the answering affidavit the rationale for the vetting process and the need for the meat inspection and classification services

personnel and their functions are described as follows:

*"15. By way of a brief illustration, the primary meat inspector is the person that receives an animal from a supplier and/or farmer. He or she is the first point of call for the certification of suitability. Should the primary meat inspector suspect any deformity and/or disease on the animal and/or carcass, the latter has a duty to inform the secondary meat inspector without undue delay.*

16. The secondary meat inspector, veterinary surgeon, is in terms of the Act, expected to conduct examination/s on the carcass and/or authorize further tests and investigations.
17. On the other hand, the meat examiner/classifier examines the quality of the carcass. Thus, it is imperative that all three personnel be employed by the assignee and/also be readily available at the abattoir.
18. Thus, as at the time the applicant submitted tender documents for Bid Serial Number 279/2018, and on the date of closure of the bids, which was on the 21 June 2018, the applicant did not comply with the required bid and minimum specifications to justify being awarded the tender or bid."
- [9] It also appears that the whole vetting process was also triggered by the manager of the abattoir, Mr Mapatwana who was apparently

concerned that the applicant did not have a secondary meat inspector and a meat classifier as required in terms of the Meat Safety Act 40 of 2000 (the Act). He reported his suspicions to the respondent which then sent the letter 29 October 2018 to the applicant. The said letter reads as follows:

*“Kindly send through the following documentation:*

1. Primary Meat Inspector or Animal Health Technician (Registered with the appropriate Statutory body).
2. Secondary Meat Inspection: Certification of the Veterinarian (Registered with the South African Veterinary Council). The Veterinarian must be available within 1-2 hours if there is any need to do secondary meat inspection or receive Red Cross Permit consignment at the Umzikantu Red Meat Abattoir

Lastly please provide us with proof that the deployed meat inspector is competent on meat classification and grading. (Certificate with SAMIC).

This information will allow the Agency to finalised the contract agreement between both parties.”

- [10] As indicated before, there was no response to the above mentioned letter resulting in the respondent sending another email to the applicant on 7 November 2018 which reads as follows:

*“The attached letter bears reference. I have not received any response on the letter attached. Failure to respond to this email by the end of business today will render your appointment with the Agency rescinded due to non-submission of the required documents. This withdrawal will be effective immediately.”*

- [11] The applicant responded to this email with its email dated 16 November 2018 as follows:

*“Kindly find the attached documents as requested. Ms Likhona Mkhumbini is a registered Meat Inspector performing Meat Inspection service at Umzikantu Red Meat Abattoir. She has recently registered with SAMMIC the Meat Classifiers Course. She is likely to furnish in March 2019.*

Should Meat Classification be required before this period, alternative personnel shall be used as means of a relief personnel.”

- [12] When the applicant launched these proceeding it did not attach to its founding affidavit the documents requested in the email dated 29 October 2018 which were the basis for the alleged cancellation. The bid document signed by the applicant was filed by the respondent. However, the said bid document also did not have the said documents attached to it. Schedule 14 of the bid document required the bidders to list the documents attached by a bidder to its bid document. A number of documents are listed therein as being attached by the applicant. However, the certificates requested in the respondent’s letter dated 29 October 2018 are not reflected despite applicant’s assertion that they had been submitted together with the bid document.
- [13] Denuded of all references to extraneous matters and attachments relating to the previous contracts entered into between the applicant and the respondent, the question is whether the documents required by the respondent in its letter dated 29 October 2018 were some of the requirements for bidders in respect of bid no.279/2018. As to applicant’s allegation that it

was never provided with a notification of breach or non-compliance with the bid and that it was never provided with an opportunity to remedy the alleged breach, it is difficult to understand how such a contention could be made in the face of the letter dated 29 October 2018, the respondent's own admitted failure to respond thereto and the respondent's email dated 6 November 2018 which triggered the applicant's email dated 16 November 2018.

[14] It is noteworthy that in the applicant's own email dated 16 November 2018 it is specifically indicated therein that Likhona

Mkhumbini was still at school doing the meat classifiers course and would hopefully complete it in March 2019. Furthermore, the applicant's failure to attach the required documents in the founding affidavit despite the fact that in its email dated 16 November 2018 it indicated that the required documents were attached, is on its own very troubling as is the failure to attach the said certificates in the bid document.

[15] I turn now to examine the bid requirements, in other words, whether the documents required by the respondent were required or necessary documents in the bid specifications for bid no.279/2018. In *Westinghouse v Eskom Holdings*[1] the law in this regard was stated as follows:

*"[39] Proper compliance with the procurement process is necessary for the process to be lawful. Strict rules of compliance have been laid down by the Constitutional court. In Allpay Consolidated Investment Holdings (Pty) Ltd & others v Chief Executive Officer, South African Social Security Agency & others [2013] ZACC 42; 2014 (1) SA 604 (CC) para 39 the court approved the dictum of this court in Premier, Free State & others v Firechem Free State (Pty) Ltd 2000 (4) SA 413; [2000] ZASCA 28 (SCA) para 30, where Schutz JA said:*

'One of the requirements ... is that the body adjudging tenders be presented with comparable offers in order that its members should be able to compare. Another is that a tender should speak for itself. Its real import may not be tucked away, apart from its terms. Yet another requirement is that competitors should be treated equally, in the sense that they should all be entitled to tender for the same thing. Competitiveness is not served by only one or some of the tenders knowing what is the true subject of the tender.... that would deprive the public of the

benefit of an open and competitive process.' (My emphasis.)

[40] The Constitutional Court said in *Allpay* (para 40):

'Compliance with the requirements for a valid tender process, issued in accordance with the constitutional and legislative procurement

framework, is thus legally required. These requirements are not merely internal prescripts that [the tender awarding body] may disregard at whim. To hold otherwise would undermine the demands of equal treatment, transparency and efficiency under the Constitution. Once a particular administrative process is prescribed by law, it is subject to the norms of procedural fairness codified by PAJA. Deviations from the procedure will be assessed in terms of those

norms of procedural fairness. That does not mean that administrators may never depart from the system put in place or that deviations will necessarily result in procedural unfairness. But it does mean that, where administrators depart from procedures, the basis for doing so will have to be reasonable and justifiable, and the process of change must be procedurally fair.' (Footnotes omitted.)"

[16] The bid document for bid no.279/2018 for meat inspection and classification services was completed and signed by the sole member

of the applicant Miss Vuyiseka Azania Ngudle. It contained undertakings that Sonasethu General Engineering Services, Registration number 2010/135226/23 represented by Vuyiseka Azania Ngudle:

*"HEREBY AGREES THAT by signing the Contract Form, the Bidder:*

1. confirms that it has examined the documents listed in the Index (including Schedules and Annexures) and has accepted all the Conditions of Bid;
2. confirms that it has satisfied itself as to the correctness and validity of the bid, that the price(s), and rate(s) quoted cover all the goods and/or services specified in the bid documents; that the price(s) and rate(s) cover all its obligations and accepts that any mistakes regarding price(s) and calculations will be at own risk;
3. offers to supply all/or any of the goods and/or render all/or any of the services described in the bid document to the Ntinga O.R.Tambo Development Agency in accordance with the:
  - terms and conditions stipulated in this bid document;
  - specifications stipulated in this bid document; and
  - at the price reflected in the space provided,
4. agrees that this bid document, including the following, shall form the Contract between the parties in the event that the Bidder is successful:
  - Price Schedule
  - Bid Specifications
  - All declarations
  - General conditions of contract; and
  - Special conditions of contract.
5. Accepts full responsibility for the proper execution and fulfilment of all obligations and conditions devolving on it in terms of this Contract."

[17] The bid specifications list the following as the duties of the meat inspector:

*“1. Perform Primary and Secondary Meat Inspection as described in the Meat Safety Act 2000 for Bovine, Ovine and Porcine;*

2. Perform Classification of Bovine, Ovine and Porcine species;
3. Supervise all abattoir processes starting from receiving to dispatch;
4. Monitor general abattoir Hygiene;
5. Assist Management during compliance Audits.”

[18] It is common cause that the applicant is an assignee as provided for in section 12 of the Act. In terms of its assignment by the Minister of Agriculture, Forestry and Fisheries, as it was then called, dated 19 December 2017 the applicant is assigned to provide meat inspection services in order to enhance meat safety practices at abattoirs throughout the Republic. I will return to the applicant’s assignee status later in this judgment.

[19] In order to get a full understanding of the legal environment in which the tenders were invited and the award thereof was made, it is imperative to consider some of the provisions of the Act. Section 4 of the Act contains inter alia, the following provisions:

*“4(1) The Minister may assign the application of this Act or certain provisions thereof throughout the Republic or in a particular area, to any person with an interest in or particular knowledge of meat and meat safety.*

4(2) ...

4(3) ...

4(4) The chief executive officer, chairperson or any other person in charge of any assignee which is not a natural person –

- (a) must act on behalf of that assignee in the exercise of the powers and the performance of the duties in question; and
- (b) may in writing delegate or transfer to an employee of that assignee any power which the assignee may exercise or any duty which the assignee must perform in terms of this Act, or may in writing authorise or direct any such employee to exercise such power or perform such duty.”

[20] The applicant has not, either in the founding affidavit or the supplementary affidavit sought to establish compliance with the Act regarding the section 4(4)(b) requirement for the assignee powers to be delegated in writing. In fact it is the respondent that brought a veterinarian, Dr Nkubungu into the picture alleging that it was informed by the applicant that it had employed Dr Nkubungu. How the respondent was informed about Dr Nkubungu is not altogether clear from the papers. The Act clearly requires that a person such as Dr Nkubungu be given written delegation of the assignee powers which are to be exercised on applicant’s behalf. There is nothing in the papers that such delegation to Dr Nkubungu was

made nor are the qualifications of Dr Nkubungu attached or proof of his registration with the veterinary council. Whilst the respondent does not dispute that Dr Nkubungu is or was a veterinarian in the employ of the applicant there is neither written delegation as required by the Act nor any confirmation of Dr Nkubungu's appointment or qualifications.

[21] If at the time that the bid document was completed Dr Nkubungu had applicant's delegation of assignee status such delegation

should have been attached to the founding affidavit. The letter dated 29 October 2018 required certificates of the personnel who were to be involved in the meat inspection and classification process. However, the certificates of Dr Nkubungu or his proof of registration with the veterinary council is not attached. In fact the applicant is discomfortingly silent or vague at best about its personnel when in fact the certificates, qualifications and registration of its personnel with the relevant authorities were the main if not the only reason for the cancellation of the contract.

[22] Section 11(1) of the Act contains inter alia the following provision:

“11(1) (a) ...

- (b) the owner of an abattoir must procure a meat inspection service for that abattoir;
- (c) meat inspection services may only be performed by the national executive officer, a provincial executive officer, an authorised person or assignee, who must perform that function independently from the abattoir;
- (d) a person contemplated in paragraph (c) must be a veterinarian, meat inspector, meat examiner, animal health technician or such other duly qualified person as may be prescribed;”

[23] The meat inspection service provided for in section 11(1) is defined in the Red Meat Regulations[2] as follows:

“*“meat inspection service” means the performance of ante-mortem, primary and secondary meat inspections by a registered inspector who may be employed by an assignee and may include hygiene management and regulatory control as agreed on with the provincial executive officer of each abattoir and includes reporting of non-conformances to the provincial executive officer;*

“*primary meat inspection” means the inspection, by a registered inspector, of a carcass and organs directly after flaying and evisceration in terms of Part VIB;*

“*registered inspector” means a person contemplated in section 11(1)(c) of the Act who is registered by the provincial executive officer under regulation 111 to do a meat inspection service in a particular abattoir;*

“*secondary meat inspection” means the inspection, by a registered veterinarian of a carcass and organs detained during primary meat inspection in terms of Part VI C;*”

[24] Both the Act and the regulations prescribe a number of legal requirements whose main purpose is to ensure that abattoirs such as Umzikantu Red Meat Abattoir, through meat inspection and classification services, produce and sell to the unsuspecting members

of the public meat that is safe for human consumption[3]. The personnel that must perform the meat inspection and classification services are required to be appropriately qualified.

For this reason, it is quite audacious for the applicant to make the submission that the same personnel that is now being used is the same personnel that has been used in previous contracts. If over the years the applicant had successfully failed to comply with the regulatory framework by failing to provide proof that it had in its employ the qualified personnel, that cannot be the basis for the non-compliance to be allowed to continue and impose serious health risks to members of the public.

[25] This is not a matter of an agreement or understanding between the applicant and the respondent. The Act requires meat inspection service to be performed by appropriately qualified personnel who must be registered as provided for in the Act and regulations. The assignee status of the applicant, without the appropriately qualified personnel is irrelevant. That status was and is designed to enable the respondent to procure the services of qualified meat inspectors. It cannot be a sufficient basis for a valid contract to be concluded without more.

[26] It is clear from the papers that as at the date of the close of the bid on 21 June 2018 the applicant did not have all the appropriately qualified personnel to whom meat inspection service could be delegated. The applicant was asked to provide the certificates of qualifications of its personnel and it failed to do so. Even in the founding affidavit, the replying affidavit and the supplementary affidavit there are no certificates of any of its personnel attached including that of Dr Nkubungu and Dr Bawuti, the veterinarians. Both Dr Nkubungu and Dr Bawuti are not only required by the Act to be veterinarians which appears to be common cause that they are, the Act requires them to be registered with the veterinary council. That said even if both of them were in fact delegated by the applicant as meat inspectors of which there is no proof of written delegation, they had to be appropriately qualified and registered and had also to be registered with the provincial executive officer of the Department of Agriculture.

[27] In his confirmation letter dated 13 November 2018 attached to the respondent's answering affidavit, Dr Bawuti says that he will be assisting Miss Vuyiseka Ngudle, a meat inspector. Miss Ngudle is a sole member of the applicant but is neither a meat inspector or an assignee. Secondly Dr Bawuti indicates in his letter that he will be doing secondary meat inspection service. This begs the question, in light of the fact that Likhona Mkhumbini, the only other employee of the applicant is not a qualified meat classifier who should do meat classification if Dr Bawuti is only prepared to do secondary meat inspection. These issues, important as they are, are simply not dealt with by the applicant who seems to claim entitlement to the contract on the basis of the contracts that were awarded to it in the past.

[28] Even the assignee status of the applicant is highly questionable. The letter of assignment issued by Minister Senzeni Zokwana, as he then was, dated 19 December 2017 was issued to Sethu Consulting. The applicant is not Sethu Consulting but Sonasethu General Engineering Service CC. Whoever and whatever Sethu Consulting is, it is not clear that it is the applicant. Therefore even the assignee status of the applicant cannot be accepted at face value. I am therefore not satisfied that the applicant was even an assignee or that it is the assignee referred to in the letter issued by the Minister.

[29] Therefore and for all the above mentioned reasons the basis on which the applicant has been operating and conducting meat inspection

service, in the absence of anything to the contrary, appears to be unlawful for want of compliance with the Act and its regulations.

The respondent and its personnel acted unlawfully in awarding the tender to the applicant without ensuring that the applicant had in its employ the appropriately qualified personnel on the date of the closing of the tender or at the very least, before the tender was awarded to the applicant. The assumption that Sethu Consulting and the applicant are or were one and the same company is without basis. Therefore anything done on the strength of that assumption was similarly unlawful.

[30] Being an assignee was, in any event, certainly not sufficient for the applicant to be awarded a tender for meat inspection service as defined in the regulations. The applicant also needed to show that it had the qualified personnel in its employ or had proper arrangements for meat inspection and classification services to be performed as provided for in the Act and the regulations. It seems that the applicant was awarded a tender only on the basis of it being an assignee. That was clearly contrary to the respondent's own bid specifications and therefore unlawful.

[31] Finally the meat inspection regulations also contain this requirement in respect of which no case has been made by the applicant

whatsoever:

*"111. Persons contemplated in section 11(1) c of the Act wishing to provide meat inspection services must register with the provincial executive officer in order to perform these services at a specified abattoir."*

[32] In fact the applicant makes very little to no attempt at showing that as at the time of the award of the tender it had complied

substantially with the regulatory framework. Furthermore even now on its papers no case is made that even belatedly and after the correspondence was exchanged between the parties the applicant has since complied with the applicable regulatory framework.

[33] The applicant has also fallen foul of the Preferential Procurement Policy Framework Act 5 of 2000 (PPPFA), a contention which the respondent makes. Section 2(1)(g) of the PPPFA reads thus:

*“any contract awarded on account of false information furnished by the tenderer in order to secure preference in terms of this Act, may be cancelled at the sole discretion of the organ of state without prejudice to any other remedies the organ of state may have.”*

[34] An acceptable tender is defined in the PPFA as “any tender which, in all respects, complies with the specifications and conditions of the tender as set out in the tender document.” The applicant’s tender did not comply with the specifications set out in the tender document. Furthermore, the applicant needed to have complied with the Act and the applicable regulations for a valid award of the tender. It seems to me that the tender was awarded in complete disregard of the regulatory environment at best and grossly negligently.

[35] The non-compliance with the Act, and the regulations, especially as it relates to meat inspection service imposed a serious health risk to the people who get their meat at Umzikantu Red Meat Abattoir. That must surely mean that the respondent not only had a right but also a duty to investigate its suspicions and establish the facts. The onus was on the applicant to prove that it did comply with the regulatory framework when the tender was closed on 21 June 2018 or at the very least when the required documents were requested. This it failed to do nor has it done so even now. The initial decision to award the tender to the applicant had no legal basis and/or was materially influenced by an error of law on the part of the respondent.

[36] It follows that any contract entered into in respect of bid no.279/2018 for meat inspection and classification services is

invalid. In the result the application must fail. [37] The following order will issue:

1. The application is dismissed.
2. The applicant is ordered to pay costs of this application including costs of the hearing of the matter on 14 February 2019 and 21 February 2019.

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M.S. JOLWANA

JUDGE OF THE HIGH COURT

Appearances

Counsel for the Applicant: L.R. BRAUNS

Instructed by: MALUSI & CO ATTORNEYS

C/O JOLWANA MGIDLANA INC

Mthatha

Counsel for the Respondent: L.L. SAMBUDLA

Instructed by: WT MQANDI & ASSOCIATES

Heard on: 13 June 2019

Delivered on: 15 August 2019

- [1] Westinghouse Electric Belgium Societe Anonyme v Eskom Holdings (Soc) Ltd and Another 2016 (3) SA 1 (SCA)
- [2] Regulations published in government gazette no.26779 on 17 September 2004 by the Minister of Agriculture in terms of section 22 of the Meat Safety Act 40 of 2000
- [3] The preamble to the Act reads thus: “To provide for measures to promote meat safety and the safety of animal products; to establish and maintain essential national standards in respect of abattoirs; to regulate the importation and exportation of meat; to establish meat safety schemes; and to provide for matters connected therewith.”

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