

SOUTH AFRICA / JUDGMENT

Thaka Security Solutions CC v Amajuba District Municipality and Another (1623/2023P) [2025] ZAKZPHC 21 (26 February 2025)

[2025] ZAKZPHC 21

COURT

Kwazulu-Natal High Court, Pietermaritzburg

BEFORE

Mngadi

CASE / FILE NUMBER

1623/2023P

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IN

THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL

DIVISION, PIETERMARITZBURG

Case

No: 1623/2023P

In

the matter between:

THAKA
SECURITY SOLUTIONS CC
APPLICANT
AND
AMAJUBA
DISTRICT MUNICIPALITY,
FIRST RESPONDENT
IZINHLOLI
HOLDINGS (PTY) LTD
SECOND RESPONDENT
ORDER

1.

The application is dismissed. The applicant is ordered to pay costs of the application.

JUDGMENT

Delivered:

Mngadi J

- [1] Applicant seeks to review and set aside decision of 1st Respondent to award a tender to 2nd respondent for the rendering of security services, and that decision be substituted with an order awarding the tender to the applicant. The first respondent opposes the application. The second respondent has taken any part in the litigation
- [2] The applicant is Thaka Security Solutions CC a Close Corporation Incorporates and registered in terms of the law. The first respondent is Amajuba District Municipality a municipality established in terms of Section 12 of the Local Government: Municipal Structures Act of
1988. The Second respondent is Izinhloli Holdings (Pty) Ltd, a private security company incorporates and registered in terms of the Company Law of Republic of South Africa.
- [3] On 10 February 2022 the first respondent advertised a tender for the provisions of security services for a period of Three (3) years. The advert stated that the bid will be evaluated on price and functionality in terms of 80/20 preference point system as prescribed in the Preferential Procurement Policy Framework Act (Act No5 of R2000). In addition, it required bidders to submit original tax certificate/Tax compliance status in PIN or CSD number and a valid B- BBEE status level verification certification on certified copies and it states that failure to submit proof of B-BBEE certificate will result in forfeiting the points.
- [4] On 7 and 13 June 2022 the first respondents Bid Evaluation Committee (BEC) conducted tender evaluation. The BEC found two bids that of applicant and second respondent to be bids considered responsive. The applicant with a bid price of R19 871 089.20, price point 77.42, BBEE points 20.00 and a score of 195. The second respondent with a bid price of R19 251 006.00, price points 80/00 and a score 100. It recommended that the bid be awarded to the second respondent with a highest preference point of 100.00 at a functionality score of 100 points and a Bid price of R19 251 000.00.
- [5] On 29 June 2022 the Bid adjudication Committee (BAC) of the first respondent recommended that the bid be awarded to the applicant, with the highest preference points of 100.00 at functionality score of 100.00 points and a bid price of R19 871 000.00. It put a note which stated that the BEC critically recommended the second respondent, then the BAC through further evaluation discovered that the second respondent did not submit proof of Central Firearm Registration (CFR) but only submitted a list of firearms.
- [6] On 12 July 2022 the Acting Municipal Manager of the first respondent issued a memo with a decision that the recommendation of the BAC was invalid ad it was rejected. He then signed off an intention to award the tender to the second respondent and a notice to that effect was

published on the website. The notice advised that in terms of section 49 of the first respondents' supply chain management policy, persons aggrieved by the decision or actions must lodge within 14 days of the decision or action an objection or complaints, objections or complaints must reach the office of the Municipal Manager within, 14 days from the date of this notice. It stated below that the grievance period will expire by close of business on 29 July 2022.

- [7] On a letter dated 2 August 2022 a firm of attorney wrote to the first respondent advising of the intention to appeal the decision to award the tender to the second respondent. In the letter written reasons were requested why the decision was made to award the tender to the second respondent and not too the applicant and a full record of the decision: An undertaking was requested that the first respondent would not proceed with the award of the tender whilst considering the appeal.
- [8] In a letter dated 12 August 2022 the first respondent advised the second respondent that it was in terms of the tender being appointed for the provisions of security services for a period of three (3) years. The contract duration is three (3) years effective from 18 August 2022 to 17 August 2025.
- [9] The applicant as grounds for review states the following: (1) The second respondents' tender was not responsive and should have been disqualified because the 2nd respondent failed to attach the Central Firearm Registration, and (2) The first respondent failed to afford the aggrieved service provider an opportunity to file objection to the intention to award the tender.
- [10] In explaining the grounds the applicant states that the Bid Specification Committee expressly approved as a tender requirement that bidders must submit proof of Central Firearms Registration. The BAC minutes shows that the second respondent did not attach proof of the Central Firearm Registration. In explaining the second ground the applicant states a notice of the signing of the intention to award was on 12 July 2022, but it was not published, the failure to publish the notice of intention to award infringed upon the rights of the other bidders to challenge the award.
- [11] The applicant in a supplementary affidavit stated that points were not allocated properly for previous experience as evident from, letters of previous appointments. Secondly, the Municipal Manager of the first respondent contravened clause 29 of the supply chain policy which requires the BAC if it arrives at a decision different to that of the BEC which requires him after due consideration of the reasons for the deviation, ratify or reject the decision of the BAC and if the decision of the BAC is rejected, refer the decision of the BAC back to that committee for reconsideration.

- [12] The first respondent in the answering affidavit raised the following points in limine. Firstly, the applicant failed to follow the provisions of the Supply Chain Management Policy which provides that appeal against procurement decisions must be referred to the Municipal Bid Appeals Tribunal. The appeal within fourteen
- (14) days of the decision to be lodged in writing with the Municipal Bid Appeals Tribunal. Secondly, the first respondent intends that the applicant delayed in taking the matter on review. The decision was taken on 12 August 2022, and the review was lodged on 3 February 2023, which is 175 days later.
- [13] The first respondent states that the BAC was incorrect in stating that the second respondent did not submit proof of registration with Central Firearm Registration because the so-called list of firearms is in fact an extract from the South African Police database and stamped by the South African Police.
- [14] The first respondent states that the notice of intention to award the tender is dated 29 July 2022 and the decision to appoint the second respondent is taken on 12 August 2022, therefore, fourteen days (both dates inclusive) resulted in fourteen (14) days. It takes that in any case, the applicant responded to the notice and its response was considered.
- [15] The first respondent disputes the applicants' approach on the allocation of points for experience. It explains the process of evaluation and the allocation of points based on experience. The first respondent denies any wrongdoings or failure to comply with its Supply Chain Management Policy.
- [16] The first respondent in the heads of arguments argued that the applicant delayed materially in bringing the matter on review. Service it was not done within a period of 180 days from the date of the decision. The first respondent also argued that there was no proper service of the review application on the second respondent which is a fatal irregularity. The applicant admits that initially the second respondent was not served with papers in terms of the Rules. The papers were served by email but subsequently that was corrected when the second respondent as ordered by the court was served with a full set of papers. In my view, the second respondent has not raised the issue of an irregular service. It accepted the irregular service, and it did not raise any objection as well as the subsequent service. The first respondent has not shown any prejudice caused to it by the irregular service. I am of the view that there is not merit in the contention.
- [17] On 12 August 2022 the first respondent published the decision of the Acting Municipal Manager to award the tender to the second respondent. There was some correspondence between the parties in the interim. On 3 February 2023 the applicant issued the review application. The delay in issuing the review application is in region of six months. Section 7(1) (b) of PAJA provides that any proceedings for judicial review in terms of section 6(1) must be instituted without unreasonable delay and not later than 180 days after the date the person concerned became aware of the decision and the reasons for the decision. In the letter dated 2 August 2022 the applicant requested to be given reasons for the decision to

intend to award the tender to the second respondent and not to it. The first respondent did not respond to the request. The notice dated 12 August 2022 advised the bidders of the award of the tender to the second respondent without giving reasons. As a result, the period in calculating whether there was a delay and if so whether it was unreasonable or not must start to run from the date the applicant was officially advised by the first respondent of the reasons for the decision to award the tender to the second respondent. It follows that the first respondent's calculation of the supposed delay is incorrect and the point needs no further consideration.

- [18] The invitation for bids referred above stated that the invitation for bids was invited from companies registered on the Central Suppliers Database for the provision of security services. It did not specifically call upon of proof of registration with the Central firearm Registration, but a document titled "Draft Terms of Reference of Amajuba District Municipality Security Services Three
- (3) years new contract as security service provider requirements' states Bidders must submit proof of Central Firearm Registration (CFR). The first respondent states that what the BAC observed to be a list of firearms was in fact an extract from Central Firearm Registration. It provides proof of registration of each firearm in the Central Firearm Register. The applicant has not furnished any evidence from the Registrar of Central Firearm Register whether the list in question serves as proof of registration with Central Firearm Registration or not. It is not specified anywhere in the bid documents that the proof of the Central Firearm Registration had to be furnished in a particular format. It follows that the BAC was incorrect to exclude proof in the format submitted by the applicant.
- [19] Clause 49 of the First respondents' Supply Chain Management Policy states: '49 Persons aggrieved by decision or actions taken in the implementation of this supply chain management system may lodge within fourteen (14) days of the decision or action-
- (a) If the objection or complaints against the procurement process, submit a written objection against the decision or action to the Accounting Officer of the Municipality who shall in turn within 24 hours refer the written objection or complaint to the independent and impartial person referred to in paragraph for resolution or
- (b) If such complaint or objection is against the award of a bid, lodge a written appeal with Municipal Bid Appeals Tribunal in accordance the provisions of paragraph 50A. Section 50A of the Policy provides: '50A Municipal Bid Appeals Tribunal
- (1) The Council shall establish a municipal Bid Appeals Tribunal for its area of jurisdiction to hear and determine an appeal against the award of a bid.
- (2) The accounting officer of the municipality, in consultation with Provincial Treasury, shall appoint the Chairperson, Deputy Chairperson and member of the Municipal appeals Tribunal.

- (3) The powers, duties and functions of the Municipal Bid Appeals Tribunal and matters incidental thereto are set out in the Rules which appended to the Supply Chain Management Policy and matters appendix A.
- (4) The administrative and secretarial work involved in the performance of the duties and functions of the Municipal Appeals Tribunal shall be performed by officers of the Provincial Treasury as set out in the Rules referred to in paragraph 50 A.
- (5) There shall be no further appeals against a decision of the, Municipal Appeals Board.'
- [20] The Supply Chain Management Policy does not provide for a different method of the calculation of days. The first day is calculated as the first day and the last day is excluded. The calculation includes weekends and public holidays. Therefore, the first day is 29 July 2022 and the last day is 11 August 2022 which is 14 days. It follows that the first respondent was entitled to take a decision to award the tender on 12 August 2022 because it had not received any appeal. In any case, the first respondent was entitled to take the applicant's attorneys letter of 12 August 2022 as an indication that the applicant intended to appeal the award of the tender which necessitated no action on its part with a view that once a tender is awarded the applicant shall note the appeal. The applicant is apparently aggrieved by what appeared on the notice of intention to award the tender that those aggrieved may lodge complaint on 29 July
2022. It appears confusing on the first blush, but if the person was aggrieved by the award of the tender and intended to appeal that decision the recourse was clearly set out in the s49 and s50A of the Supply Chain Management Policy.
- [21] The letter by the then applicants' attorneys to the first respondent is not addresses to the Municipal Appeals Tribunal nor was it delivered to the Municipal Appeals Tribunal. It appeared to give a notice to the first respondent of its apparent dissatisfaction and that pending the outcome of the investigation an appeal against the award of the tender might be lodged. There was in fact no appeal lodged with the Municipal Bid Appeals Tribunal.
- [22] The applicant challenged the decision of the Acting Municipal Manager to reject the recommendation of the BAC and to go with the recommendation of the BEC. The acting Municipal Manager had the full record of what happened before those committees and the grounds of their recommendations. The recommendations were directed to him and the recommendations was good as the reasons for the reconsideration. The Supply Chain Management Policy gives power to the Municipal Manager after due consideration of the reasons for elevation to ratify or reject the decision of the BAC and if the decision of the BAC is rejected, refer the decision of the BAC back to that committee for reconsideration.
- [23] It is common cause that before the Acting Municipal Manager there were reports both by the BEC and BAC. The report indicated that there were two bidders who went through the process of evaluation, the applicant and the second respondent. It indicated how each of them scored before the BEC and that the only reason the BAC came to a different conclusion

to that of the BEC was their attitude to the proof of registration with the Central Firearms Registration of the second respondent. Otherwise even before the BAC the second respondent would have been a preferred bidder.

- [24] The difficulty is that the Municipal Manager is bound by the provisions of the Supply Chain Management Policy. The Policy gives power to the Municipal Manager to take a decision deviating from the decision of BAC only after reconsideration by BAC. It serves no purpose to speculate whether on reconsideration BAC would have changed its earlier recommendation or not. The Municipal Manager at the stage he did he had no power in terms of the Supply Chain Policy take a decision that deviated from the recommendation of BAC. It follows that that decision cannot stand it is invalid.
- [25] The applicant challenges the allocation of points during the bid evaluation process. It is not a matter on which the court to make a decision for purposes of review. On review the central focus is not whether decision is correct but whether the process or decision is reviewable on the grounds set out in PAJA. In *All Pay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency and Others* 2014 (1) BCLR 1 (CC) at par 40 the court stated: 'Compliance with the requirement for valid tender process, issued in accordance with constitutional and legislative procurement framework, is thus legally required. These requirements are not merely internal prescripts that may be disregarded at whim. To hold otherwise would undermine the demands of equal treatment, transparency and efficiency under the

constitution.

- [26] The applicant contends that because by the letter dated 2 August 2022 it raised an objection to the intention to award the tender to the second respondent it was excused from lodging an appeal against the award of the tender. There is no provision in the Supply Chain Policy that if an objection is raised there is no need to lodge an appeal. The Supply Chain Policy established an Appeals Tribunal independent from the municipality to hear appeals against award of tenders. It prescribed how, to whom and within what period appeals are required to be lodged. It is part of the municipality procurement process. The applicant has prematurely sought to review the decision to award the tender to the second respondent. It requires the court to take a decision for the Appeals Tribunal without that body being called upon to take the decision in terms of the powers given to it. The Supply

Chain Policy binds the bidders as well as the municipality. It cannot be deviated from at whim.

- [27] The applicant seeks an order declaring that the applicant is awarded the tender to provide security services substituting the award of the tender to the second respondent. It is not known what would have been the decision of the BAC when the matter remitted to them for reconsideration. It is not known if on reconsideration, BAC changed its recommendation what would have been the decision of the Municipal Manager. It is also not known what would have been the decision of the Appeals Tribunal if it had an opportunity to consider an appeal. The second respondent in all these stages had a right to take part. It follows that the

applicant has not proved the basis for a relief in the form of a substituting order, in particular, that such a relief would be a just and equitable relief.

[28] It must be considered whether the relief has not become moot. In *Minister of Tourism v AfriForum NPC and Another* [2023] ZACC 7 (cc) para 23 the court held: 'A case is moot when there is no longer a live dispute or controversy between the parties which would be practically affected in one way or another by the court's decision. A case is also moot when a court's decision would be of academic interest only'. It has been necessary in this case to traverse the issues not only to be able to form a considered view on liability for costs but also to arrive at a conclusion that the relief that can be granted has indeed become moot. The only relief, in my view, that could be granted is to review and set aside the decision of the first respondent to award the tender to the second respondent and to refer the matter back to the first respondent to act in terms of the Supply Chain Management Policy. Such a course will serve no purpose since it has been overtaken by the events. The contract between the first respondent and the second respondent is left with about four months. The documents on which the matter can be reconsidered are out of date. It is not known whether the service is still required or not. The relief in my view has become moot.

[29] The failure of the applicant to lodge the internal appeal, in my view, is fatal to the application.

[30] The following order is made

1. The application is dismissed.
2. The applicant is ordered to pay costs of the application.

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