

SOUTH AFRICA / JUDGMENT

Topfix (PTY) LTD v Eskom Holdings SOC LTD and Others (5765/2022) [2023] ZAGPPHC 33 (17 January 2023) [2023] ZAGPPHC 33

COURT

North Gauteng High Court, Pretoria

BEFORE

M Munzhelele

CASE / FILE NUMBER

5765/2022

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION,

PRETORIA

CASE

NO: 5765/2022

REPORTABLE: NO
OF
INTEREST TO OTHER JUDGES: NO
NO
REVISED: NO
17
January 2023
In
the
matter

between: TOPFIX
(PTY)
LTD
Applicant
And
ESKOM
HOLDINGS SOC
LTD
First Respondent
KAEFER
THERMAL CONTRACTING SERVICES (PTY) LTD
Second
Respondent
ELECTRO
HEAT ENERGY (PTY)
LTD
Third
Respondent
ORAM
INDUSTRIALS (PTY)
LTD
Fourth
Respondent
RSC
INDUSTRIAL SERVICES (PTY)
LTD
Fifth Respondent
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gesture, it
will be sent to the parties/their
legal representatives by email.

JUDGMENT

M MUNZHELELE J

Introduction

- [1] The applicant requests this court to review and set aside Eskom's decision to award tender no CORP5171 to the second, third, fourth and fifth respondents on the basis that such a decision was invalid. Alternatively, to interdict the first to fifth respondents from effecting the implementation and continuation with Eskom's decision to award the tender. Secondly, the first to fifth respondents are interdicted and restrained from concluding or giving effect

to any service level agreement or contract that must still be concluded between them. Thirdly, the respondents are interdicted from executing any obligations flowing from the award of the above tender.

- [2] The applicant is TOPFIX (Pty) Ltd, a private company for a profit with limited liability and with their registered address at the topaz avenue, Littleton Manor Centurion. The first respondent is Eskom Holdings SOC Ltd, ("Eskom"), a public company incorporated and registered under company laws of the republic of South Africa with the registered address at Mega Watt Park, 2 Maxwell drive, Sandton, Johannesburg. The second respondent, Kaefer Thermal Contracting Services (Pty) Ltd, is a private company incorporated and registered according to the company laws of the Republic of South Africa. The address is 7 Neighbourhood street, Alberton, Johannesburg. The third respondent is Electro Heat Energy (Pty) Ltd, a private company incorporated and registered according to the company laws of the Republic of South Africa with its registered address at 111 Smokey Mountain Route n4 business park Emalahleni Mpumalanga. The fourth respondent is Oram Industrials (Pty) Ltd, a private company incorporated and registered according to the company laws of the Republic of South Africa with a registered address at Alugang road, Richards bay, Kwa-Zulu Natal. The fifth respondent is RSC Industrial Services (Pty) Ltd, a private company incorporated and registered according to the company laws of the Republic of South Africa with a registered address at 4 Windsor road Lancaster east Krugersdorp, Gauteng.
- [3] This application is opposed by Eskom only. None of the parties cited as the second, third , fourth and fifth respondents have opposed the application. On its opposing papers, Eskom alleges that the applicant's challenge on the mandatory criteria set out on the invitation to tender has no merits and is out of time. Further that the court should accept Eskom's version of disputed facts on the rule outlined in Plascon - Evans paints (TVL) Ltd v Van Riebeeck paints limiteci[1].

Background

facts

- [4] An invitation to tender was open to the open market on 26 October 2020 for the supply, transportation, erection and dismantling of scaffolding and insulation material for fifteen (15) fossil-fired power stations, including Eskom rotek industries and group capital. The applicant was one of the tenderers. The procurement strategy included, among others, a list of commercial tender returnables as follows:

"basic compliance: the tenderer must submit the tender as a complete original tender plus one hard copy of the original tender.

Central supplier database number (MAA number).

Pre-qualification criteria: valid BBBEE certificate: level 1-4. sub-contracting to designated groups, subcontracting agreements must be submitted, valid BBBEE certificate, valid affidavits of the subcontractors.

Commercial annexure A; acknowledgement form. Additional documents required in the event of JV."

Eskom intended to make this procurement strategy peremptory, and if a tenderer did not fully comply with it, the tenderer will be met with disqualification.

[5] Eskom's procurement strategy process had five (5) different stages. Stage 1

- comprised basic compliance, which entails that the tenderer will have to meet the eligibility criteria, submit one hard copy of the original tender to Eskom and also submit the mandatory tender returnable at the stipulated time as well as the central supplier database number; Stage 2 -:dealing with the applicable mandatory and pre-qualification criteria.

[6] For this application, I will concentrate on stage 2 because the applicant was disqualified. Eskom alleges that the applicant did not submit a CSD registration number. According to Eskom, the applicant submitted a document with the number R0036685111, which is not the MAA number required under the invitation to tender. The applicant disagreed and said in paragraph 23 of the founding affidavit that they submitted the document, which clearly shows that the applicant was registered with the CSD. On paragraph 24 of their founding affidavit, the applicant agreed that the unavailable information was MAA0481276. In fact, this number is only provided by the applicant during this application and is out of time. I agreed with the first respondent when they argued that the applicant is providing this court with information which they should have provided during the lodging of the tender documents.

[7] The applicant submits, therefore, on the basis that they have supplied the document which shows that they were registered on the central supplier database for the government, even though they did not provide a CSD number as required, still contend that the tender process was unreasonable, unfair, irrational, and contrary to Eskom's own obligation of the tender processes and its rules. The applicant requests the court to declare such tender process invalid and, as such, should be reviewed and set aside.

Relevant statutory provisions and discussion

[8] As stated in the case of *Overstand Municipality v Water & Sanitation Services*[2] at para. 36 where it was said that:

'procurement of goods and services by organs of State must be carried out in terms of the principles set out in Section 217(1) of the Constitution which reads:

- (1) 'When an organ of State in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective

Section 217(3) of the constitution reads;

- (2) 'National legislation must prescribe a framework within which the policy referred to in subsection(2) must be implemented'.

The procurement Act is a legislation pursuant to section 217(3). It sets out a framework for the implementation of a procurement policy. Section 1 thereof defines "acceptable tender" as follows:

'acceptable tender means any tender which in all respects, complies with the specifications and conditions of tender set out in the tender document. '

- [9] The principles contained in the above section 217 of the Constitution apply to Eskom as an organ of state when exercising its discretion while performing any function and also when taking any administrative decision. Observance of the rules of procedural fairness ensures that an administrative functionary has an open mind and a complete picture of the facts and circumstances within which the administrative action is to be taken. See also Allpay Consolidated Investment Holdings Pty Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others[3], Janse van Rensburg NO and Another v Minister of Trade and Industry NO and Another[4] at para 24. The applicant had to prove that their tender was acceptable and complied with the specifications and conditions set out in the tender document in all respects.

- [10] I agreed with the applicant when they relied on the case of Steenkamp NO v Provincial Tender Board Eastern Cape[5], which held that:

'the remedy must be fair.....it must be just and equitable in the light of the facts.the implicated constitutional principles,if any, and the controlling law '

- [11] The applicant acknowledges that the central supplier database number was not submitted. And that was given as a reason for disqualification. The applicant contends that they were registered on the central suppliers' database with treasury; and as such, it is unacceptable that they have been disqualified because they did not supply the correct MAA number. On the other hand, Eskom contends that the invitation to tender made it clear that submission of a tender by a bidder in response to the invitation to tender would be deemed as the bidder's acceptance of Eskom's standard conditions of the tender. Further, the applicable evaluation criteria of the procurement process were set out by Eskom in the invitation to tender; they were divided into different stages and governed by different clauses in the invitation to tender, which were based on the standard conditions of the tender. The invitation to tender contained the following: 'submit the mandatory tender returnables at a stipulated deadline and submit the central supplier database number.· Eskom relied on the case of Allpay Consolidated Investment Holdings Pty Ltd and Others v Chief Executive

Officer of the South African Social Security Agency and Others 2014 (4) SA 183 (CC) at para 40, which held that:

'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 SASSA 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 norm of procedural fairness codified in 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 into place or that deviations will necessarily result in the procedural unfairness. But it does not 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.'

- [12] Based on the above case, it is clear that the applicant should have complied with the internal prescript, which made it mandatory to provide an MAA number. A tenderer registered with the central supplier's database would have provided an MAA number before the deadline. All the other companies were subjected to the same scrutiny and passed. The applicant cannot expect to be treated differently because of their reckless disregard for mandatory principles. To hold otherwise would undermine the demand for equal treatment required by the Constitution, as stated in the case of Allpay above. An acceptable tender would mean that the applicant's tender complies in all respects with the specifications and conditions of the tender set out in the tender document. In the absence of the MAA number therefore, there was no proper compliance with the mandatory requirements, which resulted in disqualification. I do not find any unfairness in the procedure that was followed by Eskom tender procurement process when disqualifying the applicant for non-compliance with a mandatory requirement.
- [13] When arguing their case, the applicant was misleading the picture, making it as if the tender invitation requirement was that there should be proof that the tenderer is registered with the CSD. The question should not be whether the proof of registration on the central supplier database serves the same purpose as the central supplier database number(MAA) or whether the requirement of the CSD registration number as opposed to proof of registration on the CSD database is peremptory or directory or whether proof of being on the database was substantial compliance with the requirements. The main issue is whether the applicant complied with the mandatory requirement of the tender document, which states that a CSD number was required. And the applicant provided a document which does not have the MAA number.

- [14] I agreed with the first respondent when they indicated that it is not for the applicant to choose which document they wish to submit in compliance with the mandatory requirements (ad paragraph 23 bullet 182 on the answering affidavit). All the requirements in question were binding on the applicant and all other tenderers. The applicant could not ignore any of those mandatory requirements and then regarded the process as unfair when disqualified. It follows that the relief claimed on the notice of motion cannot be granted.
- [15] I find that the Eskom Tender process CORP 5171 determination was reasonable, fair and lawfully done. The applicant should have had regard to mandatory requirements- to furnish the CSD MAA number as required.

Costs

- [16] Eskom has been substantially successful in the litigation and is entitled to its costs, including those of two counsels.

Order

- [17] In the result, the following order is made:

1. The applicant's application is dismissed with costs, including the costs of the two counsels.

M Munzhelele

Judge of the High Court

Heard On: 08 September 2022

Electronically Delivered: 17 January 2023

Appearances:

For the Applicant: Adv. R du Plessis SC

Adv. V Mabasa

Instructed by: Hattingh & Ndzabandzaba Attorneys

For the First Respondent: Adv. N Maenetje SC

Adv. H Rajah

Instructed by: Mchunu Attorneys

[1]

[1984] ZASCA 51; 1984

(3) SA 623 (A)

[2] [2018] 2 All SA 644 (SCA)

[3] 2014

(4) SA 183 (CC)

[4] 2001(1) SA 29 (CC)

[5] 2007

(3) SA121 (CC)

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