

SOUTH AFRICA / JUDGMENT

AfriRent (Pty) Ltd v Rand West City Local Municipality and Another (2023-052811)

[2023] ZAGPJHC 1430 (11 December 2023)

[2023] ZAGPJHC 1430

COURT

South Gauteng High Court, Johannesburg

BEFORE

S D J Wilson

CASE / FILE NUMBER

2023-052811

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IN THE HIGH COURT OF
SOUTH AFRICA
(GAUTENG DIVISION,
JOHANNESBURG)

Case

No. 2023-052811

NOT REPORTABLE

NOT OF INTEREST TO OTHER

JUDGES

REVISED

11/12/23

In the matter between:

AFRIRENT
(PTY) LTD
Applicant
And
RAND
WEST CITY LOCAL MUNICIPALITY
First
Respondent
FLEET
HORIZON SOLUTIONS (PTY) LTD
Second
Respondent

JUDGMENT**WILSON J:**

1 The applicant, Afrirent, seeks leave to appeal my judgment, dated 23 October 2023, in which I refused its application to review and set aside the award of a tender to the second respondent, Fleet Horizon. The tender was advertised and awarded by the first respondent, Rand West.

2 The review application turned on three issues. The first was whether Rand West conducted itself irrationally in refusing to award

the tender to Afrirent because Afrirent had failed to hand over a copy of a statement of its liability to the South African Revenue

Service. The second was whether Fleet Horizon ought to have been disqualified for its failure to hand over three years' worth of audited financial statements. The third was whether a post-award condition that there be a negotiation aimed at reducing Fleet

Horizon's tender price had been fulfilled.

3 For the most part, Mr. Els, who appeared for Afrirent, trod a familiar path in arguing the application for leave to appeal. He was

unable to convince me that there was any prospect that a court of appeal would interfere with my conclusion on the first issue. Rand West had a rational basis on which to ask Afrirent for a statement of its tax liability. When that statement was not provided, despite two requests for it, Rand West plainly had a rational basis to refuse to award the tender to Afrirent solely because of that non-disclosure.

4 On the second issue, Mr. Els sought to persuade me that I had overlooked the effect of the decision of the Supreme Court of Appeal

in *WDR Earthmoving Enterprises v Joe Gqabi District Municipality* 2018 JDR 1295 (SCA) ("WDR"). In that case, an unsuccessful bidder had stated in its bid that it was required by law to have its financial statements audited. It followed from that representation that three years' worth of audited financial statements had to be supplied with the bid. However, the audited statements were not submitted with the bid. On review, the unsuccessful bidder asserted that it was not, after all, legally required to have its financial statements audited, that the requirement to submit audited statements did not apply to it, and that it ought not to have been excluded from consideration for the award of a tender merely because audited statements were not submitted.

5 The Supreme Court of Appeal rejected that submission. The court found that the municipality was entitled to decline the bid on the basis that the bidder had represented that it was required to supply the audited statements, and then failed to submit them, even

if it later turned out that the representation was erroneous. The court went on to hold that the successful bidder, too, ought to have been disqualified, because it had also failed to submit audited financial statements notwithstanding its representation that it was required by law to have its financial statements audited. There was no suggestion that the successful bidder was not in fact legally required to have its statements audited.

6 In this case, like the successful bidder in WDR, Fleet Horizon originally told Rand West that it was required to provide audited financial statements, but Rand West nonetheless accepted Fleet Horizon's bid without them. However, unlike the successful bidder in WDR, Fleet Horizon was not in fact legally

required to have its financial statements audited. As a result, it was not legally required to submit audited financial statements.

7 The question before me was whether Rand West had acted unlawfully in accepting Fleet Horizon's bid without the audited statements. I held that Rand West could not have acted unlawfully because it turned out that the requirement did not apply to Fleet Horizon after all, whatever Fleet Horizon had originally said in its bid documents.

8 Mr. Els accepted that Fleet Horizon was not legally required to have its financial statements audited (or at least that there was

no basis on the papers for him to argue otherwise). He nonetheless contended that Rand West ought to have rejected Fleet Horizon's

bid on the basis that the requirement did apply, because Fleet Horizon had said so in its bid, even though everyone later accepted

that the requirement did not in fact apply.

9 That proposition need only be stated to be rejected. I accept that the approach in tender matters has generally been to require strict compliance with statutory requirements and the bid conditions that give effect to them. However, I am unable to accept that strict compliance means that organs of state must be prevented from appointing service providers who do not conform to requirements that turn out not to apply to them, especially where the tender process was otherwise fair and lawful.

10 Mr. Els' submission boils down to the proposition that this case should have been determined on the basis of a fact that everyone now accepts is untrue: that Fleet Horizon is required by law to have its financial statements audited. I fail to see how, as Mr.

Els submitted, such an approach would promote either rational, lawful and fair administrative procedure (see section 33 of the

Constitution, 1996), or fair, equitable, transparent, competitive and cost-effective procurement (see section 217 of the Constitution,

1996). I see no basis on which an appeal court would disagree.

11 On the third issue, Mr. Els argued that the post-award condition was not merely that there be a negotiation, but that Fleet Horizon's price actually be reduced. However, the condition set out in the award letter speaks for itself. It calls for a "negotiation of decreasing" the price. Despite the inelegant turn of phrase, this can only mean one thing: that the parties negotiate. It is incapable of also meaning that they must reach a particular resolution.

12 Mr. Els further argued that, even if that was the meaning to be ascribed to the condition, there was no evidence before me that there had actually been a negotiation. But counsel for Rand West and for Fleet Horizon both pointed out undisputed passages of their

clients' affidavits which clearly state that there was such a negotiation. On the well-known rules applicable to the evaluation of factual averments in applications for final relief, those allegations must be accepted

13 The application for leave to appeal is dismissed with costs, including the costs of two counsel.

S D J WILSON

Judge of the High Court

This judgment is handed down electronically by circulation to the parties or their legal representatives by email, by uploading to Caselines, and by publication to the South African Legal Information Institute. The date for hand-down is deemed to be 11 December 2023.

HEARD ON: 5 December 2023

DECIDED ON: 11 December 2023

For the Applicant:

AJP Els

Instructed by Albert Hibbert Attorneys

For the First Respondent:

V Maleka SC

M Salukazana

Instructed by Straus Daly

For the Second Respondent:

AC Botha SC

C Cremen

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