

SOUTH AFRICA / JUDGMENT

VDZ Construction (Pty) Ltd v Makana Municipality and Others (1834/ 2011) [2011] ZAECGHC 64 (3 November 2011)

[2011] ZAECGHC 64**COURT**

Eastern Cape High Court, Grahamstown

BEFORE

DZ Dukada

CASE / FILE NUMBER

1834/ 2011

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Source record**IN THE HIGH COURT OF SOUTH AFRICA****(EASTERN CAPE, GRAHAMSTOWN)****CASE NO: 1834/ 2011****In the matter between:**

VDZ CONSTRUCTION (PTY) LTD

.....Applicant

and

MAKANA MUNICIPALITY

.....First

Respondent

THE MUNICIPAL MANAGER,

MAKANA MUNICIPALITY, NO

.....Second

Respondent

MASTERPAVE CC T/A M.G. MOPP

CONSTRUCTION

.....Third

Respondent

JUDGMENT

DUKADA , DZ AJ:

- [1] This is an application to review and set aside the decision of the second respondent awarding a tender contract to third respondent.

Factual Background:

- [2] The facts in this matter are largely common cause.

An invitation to tender for the construction of a multi-purpose centre in Node 2 at Rhini Township, Grahamstown was issued by the first respondent. The deadline for submission of tenders was 21 January 2011. First respondent stipulated some terms, conditions and requirements which applied to the tender which were contained in a document. The said document had two volumes, i.e Volume 1 containing tendering procedures, while Volume 2 contained a draft contract and annexures. The portion of this document which contains tendering procedures is referred to as "Tender Data".

The relevant clauses for the purposes of this matter are the following:-

Clause F.2.13.3. of the C.D.B. Standard Conditions of Tender which provides as follows:

"Submit the parts of the offer communicated on paper as an original plus the number of copies stated in the tender data....."

Clause F2.13.5 which provides as follows:

"seal the original and each copy of the tender offer as separate packages marking the packages as ' ORIGINAL' and 'COPY.'"

In the list of documents required for tender evaluation purposes clause T.2.6. stipulates the requirement relevant hereto as follows: "an original valid Municipal Billing Clearance Certificate. If the tenderer is based outside the Makana municipal boundaries, submit a clearance certificate from, the municipality where you are based."

- [3] The tenders were then evaluated by professional consultants appointed by first respondent and their report reflects, inter alia, that:

- (i) some tenders were considered to be non- responsive and were consequently not considered.
- (ii) the tender of the applicant and third respondent were considered and after calculation of the required formula relating to preference points and the tender price applicant obtained a number of points totaling 93.48 and third respondent obtained a number of points totaling 91.17.

[4] The said report was then considered by the bid evaluation committee of the first respondent which declared the tender of the applicant as non- responsive for failure to submit a municipal clearance certificate and recommended to the bid adjudication committee of the first respondent to award the tender to the third respondent .In other words applicant's tender was as such

disqualified. On 8 March 2011 the bid adjudication committee adopted the said recommendation and approved the award of the tender to the third respondent on 10 March 2011.

[5] The tender of the applicant was declared non-responsive because the Municipal Billing Clearance Certificate it furnished had only page 1 in original form but its page 2 was not original.

[6] The document inviting tenders required, among other things, that the tenderer furnishes an original Municipal Billing Clearance Certificate.

[7] The applicant challenges the decision of the first respondent declaring non responsive or disqualifying its tender on the ground that relevant considerations were not considered, alternatively, the said decision was not rationally connected to the information before second and/or first respondent, and as such the decision was wrongly taken.

[8] The first and second respondents resist the application mainly on the ground that the decision was correctly taken because of the failure of the applicant to furnish, as part of its bid, an Original Municipal Billing Clearance Certificate as required by the invitation to tender.

Legal Principles Applicable

[9] The first respondent, being an organ of the State in the local government sphere, is primarily governed by Section 217 of the Constitution of the Republic of South Africa Act 108 of 1996 (The Constitution). This section reads:

"(1) when an organ of state in the national, provincial or local 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.

Subsection (1) does not prevent the organs of state or institutions referred to in that subsection from implementing a government policy providing for-

categories of preference in the allocation of contracts; and

the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination.

National legislation must prescribe a framework within which the policy

referred to in subsection

(2) must be implemented."

[10] As obliged by the above-quoted Section 217 (3) of Constitution, Parliament enacted the Preferential Procurement Policy Framework Act 5 of 2000. Section 2 of this Act requires an organ of State to establish a procurement policy and implement it in a framework embodying a "preference point system." In terms of Section 2

(1) (f) thereof the contract must be awarded to the tenderer with highest points unless certain specified criteria justify the award to

another tenderer.

[11] A further relevant aspect in this matter is the fact that the decision of the first and second respondents to declare non-responsive or disqualify the tender of the applicant and award the tender to the third respondent, is an administrative action in terms of Section 3 of the Promotion of Administrative Justice Act 3 of 2000 (PAJA). (See Logbro Properties Properties CC v Bedderson NO and Others 2003 (2) SA 460 (SCA) and the cases cited therein.) In the Logbro Properties CC case, supra, Cameron JA remarked as follows about an administrative action:

"This entitled the appellant.....to a lawful and procedurally fair process and an outcome, where its rights were affected or threatened, justifiable in relation to the reasons given for it."

[12] Turning now to the present case, it falls to be determined whether the tender by the applicant was an "acceptable tender" as defined in the Preferential Procurement Policy Framework Act 5 of 2000. This Act defines an "acceptable tender" as the one that "in all respects complies with the specifications and conditions of tender as set out in the tender document."

In Chairperson: Standing Tender Committee and Others v JFE Sapela Electronics (Pty) Ltd and Others¹, Scott JA said:

"the definition of 'acceptable tender' in the Preferential Act must be construed against the background of the system envisaged by Section 217 (1) of the Constitution, namely one, which is 'fair, equitable, transparent, competitive and cost-effective.' In other words whether the 'tender in all respects complies with the specifications and conditions' set out in the contract documents must be judged against these values."

[13] In casu the defect in the tender documents of the applicant on which decision to disqualify applicant's tender is based is the failure to furnish an original Municipal Billing Clearance Certificate as the one furnished has its page 2 in copy form.

[14] In determining whether applicant's said non-compliance rendered its tender to be not "an acceptable tender", in my view, regard must also be had to the purpose of the Municipal Billing Clearance Certificate. The reason given on behalf of the first respondent is that they do not want to conclude contracts with entities who previously may have breached their

contractual and/or statutory obligations to a municipality and who are already indebted to such municipalities in respect of services such as rates, sewerage, refuse and electricity/ water

[2005] 4 SA 487 (SCA) para [14]

charges, licenses and sundry debts. The reason given to require that the

Municipal Billing Clearance Certificate be original is to avoid any potential fraud,

malpractice or duplicity by tenderers seeking to obtain an unfair and unlawful advantage over other tenderers seeking to be awarded a contract from the public purse.

[15] In paragraph 8.6 of the opposing affidavit filed on behalf of the first respondent, Moses Bodlani, a legal advisor to the first respondent, says:

"The only possible inference which may be drawn, in the circumstances, is that the Applicant obtained a date stamp from the Buffalo City Municipality on copies of the original(and, perhaps even the original itself) but then, because of an error in collating its documents, only submitted a copy of- but not the original- second page of the Municipal Billing Clearance Certificate."

It is clear from the above statements that there is no suggestion of any fraud , malpractice or duplicity on the part of the applicant in submitting a copy of page 2 of the Municipal Billing Clearance Certificate nor does such suggestion appear anywhere in the papers as a whole in this matter. In fact the deponent says what can be inferred is that an error occurred in collating the documents.

There is also a statement by an official of the Buffalo City Municipality who was issuing the certificate to the effect that it is she who made the mistake of attaching a copy of page 2 to the original of page 1 of the Municipal Billing

Clearance Certificate.

It is clear to me that the submission by the applicant of page 2 of the Municipal Billing Clearance Certificate in a copy form was inadvertent.

[16] The question that remains now is whether such an inadvertent act justifies the decision in question here of the first respondent.

In *Metro Projects CC v Klerksdorp Municipality*² Conradie JA, (after quoting

Cameron JA's reference, in the *LOGPRO PROPERTIES* case *supra* , to the

"ever- flexible duty to act fairly" that rested on a provincial tender committee) said at para 13:

"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 valuation. 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."

Mr Paterson SC, Counsel for applicant, contended that a quick telephone call by the officials of the first respondent to Buffalo City Municipality would have

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

revealed the truth.

Mr Rorke SC, Counsel for the first and second respondents, in opposition,

argued that to enquire from Buffalo City Municipality would have created an unfair and uncompetitive situation in relation to other tenderers.

It seems to me that the error in question is in form rather than in substance. I fully agree with Mr Paterson SC, that a quick direct telephone call by first respondent to a sister municipality, Buffalo City Municipality, could have revealed the truth. It would also have been fair, in my view, to have allowed the Applicant to correct an obvious mistake of filing a copy instead of the original of page 2 of the Municipal Billing Clearance Certificate.

This view is re-inforced by the following remark by the Supreme Court of Appeal in Minister of Social Development V Phoenix Cash & Carry³, analysing Section 217 (1) of the Constitution:

"a process which lays undue emphasis on form at the expense of substance facilitates corrupt practice by providing an excuse for avoiding the effectiveness. By purporting to distinguish between tenderers on grounds of compliance or non-compliance with formality, transparency in adjudication becomes an artificial criterion. In saying this I do not suggest that the tender board is not entitled to prescribe formal shortcomings which, if not complied with, will render the bid invalid, provided both the prescripts and the consequences are made clear.

3 2007 (3) SA 115 (SCA)

What I am concerned to stress is the need to appreciate the difference between formal shortcomings which go to the heart of the process and the elevation of matters of subsidiary importance to a level which determines the fate of the

tender. It follows that a public tender process should be so interpreted and applied as to avoid both uncertainty and undue reliance on form, bearing in mind that the public interest is, after giving due weight to preferential points, best served by the selection of the tenderer who is best qualified by price."

(See also Inyameko Trading 189 CC t/a Masiyakhe Industries v Minister of Education & Others [2008] JOL 21327 (C) para 30 and Eagle Security v The Honourable Minister of the Department of Public Works and Another ECD, PE Case No. 1643/2010 paras 35 and 36, unreported.)

- [17] From the papers it appears that applicant obtained higher points than the third respondent. Further the applicant had tendered to construct the building in question for R26 828 762-00. In my view, condonation of the applicant's failure to furnish a full original Municipal Billing Certificate would have served the public interest as it would have facilitated competition among the tenderers. It also would have promoted the values of fairness, competitiveness and cost-effectiveness which are listed in Section 217 of the Constitution.
- [18] I am of the opinion that the second respondent failed to consider whether the failure by the applicant to furnish a Municipal Billing Clearance Certificate with both pages in original, was failure in form or substance and whether such formal shortcoming goes to the heart of the process or not, and further whether it could be condoned or not without thereby flouting the principles of fairness, transparency, competitiveness and cost-effectiveness.

In my view those aspects were relevant for consideration so as to arrive at a proper, fair and just decision in adjudicating the tender process. Consequently the decision to declare as non-responsive or disqualify the tender of the applicant and award it to the third respondent is reviewable in terms of Section 6 (2) (e) (ii) of PAJA.

- [19] I, therefore, find that the tender process followed by the first and second respondent was inconsistent with the afore-mentioned section of PAJA.

- [20] Regarding costs there is no reason justifying departure from the general rule that costs follow the result.

- [21] In the circumstances, the application succeeds and the following order is made:

The decision of the second respondent and/or first respondent in respect of a tender for the construction of a multi-purpose centre in Node 2 at Rhini Township , Grahamstown declaring non-responsive or disqualifying the tender of the applicant

and the consequent decision accepting the tender of third respondent, are declared to have been invalid and are set aside.

The first and second respondents are ordered to reconsider the award of tenders, based on those already accepted by them as compliant, and to include the tender of the applicant.

The first respondent is ordered to pay the costs of this application.

D Z DUKADA

ACTING JUDGE OF THE HIGH COURT

For Applicant: Adv T.M. Paterson SC

Instructed by: Abdo and Abdo Attorneys

For First, Second & Third Respondents: Adv S.C. Rorke SC

Instructed by: Gray Moodliar Attorneys

c/o N,N, Dullabh & Co

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