

SOUTH AFRICA / JUDGMENT

Vukukhanye Personnel Services CC v Ethekwini Municipality and Others (8110/2010) [2010] ZAKZDHC 68 (1 December 2010)

[2010] ZAKZDHC 68

COURT

Kwazulu-Natal High Court, Durban

BEFORE

Swain

CASE / FILE NUMBER

8110/2010

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IN THE KWAZULU-NATAL HIGH COURT, DURBAN

REPUBLIC OF SOUTH AFRICA

CASE NO. 8110/2010

In the matter between:

VUKUKHANYE PERSONNEL SERVICES CCAPPLICANT

and

ETHEKWINI MUNICIPALITYFIRST RESPONDENT

BRIOMHAR CONSULTING CCSECOND RESPONDENT

DATA WORLD (PTY) LIMITEDTHIRD RESPONDENT

JUDGMENT Delivered on 01 December 2010

SWAIN J

- [1] The present dispute finds its genesis in a desire by the eThekwini Municipality (the first respondent) to obtain updated account holder information. In order to achieve this objective, the first respondent called for tenders from interested parties to carry out what was in effect a census of existing account holders and in doing so, obtain specified information which was needed to enable the first respondent to introduce a new billing system, known as the Revenue Management System.

- [2] The object of the exercise appears to be to ensure the accuracy of the bills generated by the first respondent.
- [3] Four responses were received to the invitation to tender by the first respondent, being the applicant, the second respondent, third respondent and Deloitte Consulting. The offer by Deloitte Consulting was deemed by the first respondent to be non-responsive, as they failed to stipulate prices as required. It was therefore excluded from further consideration.
- [4] In the light of the conclusion I have reached as to the validity of the decision taken by the first respondent, in awarding the contract jointly to the second and third respondents, to the exclusion of the applicant, it becomes unnecessary to consider the history of precisely how the first respondent went about reaching the conclusion that it did.
- [5] It would however be fair to say that the scope of the work defined in the tender, was of such a nature that it created uncertainty in the tenderers, as to how precisely they were to set about achieving the requisite goals of the first respondent. Of significance is that in the tender document, no estimation was furnished by the first respondent of the number of consumers, and yet the price that was required to be quoted was a “rate per consumer” and no differentiated rate was required for “structured” and “unstructured” addresses. Clearly, these issues were of vital importance to enable tenderers to submit quotes, which were rationally related to the tasks they were being asked to perform.
- [6] Be that as it may, the applicant avers that it learned of the rejection of its bid on 29 April 2010 by ordinary mail and as a consequence lodged an appeal and called for reasons for the decision on 07 May 2010. The third respondent however, avers that the notice was sent by registered mail on 08 April 2010 and uplifted by the applicant on 22 April 2010. In the latter event, the appeal noted by the appellant, according to the third respondent, would have been lodged one day late. Mr. Salmon S C, who appeared for the applicant objected to the admission of this evidence in the supplementary answering affidavit of the third respondent, which was delivered late, in terms of the order granted by this Court on 12 October 2010. He also objected on the basis that the applicant denied the averments made by the third respondent, as to the date upon which the applicant received notice of the rejection of its tender.
- [7] The significance of all of this lay in the fact that the third respondent alleged as a consequence, that the applicant did not timeously avail itself of the right of appeal, afforded by the first respondent. The applicant had therefore failed to demonstrate that it had exhausted the internal remedies available to it, before launching the present proceedings, as required by Section 7
- (2) of the Promotion of Administrative Justice Act No. 3 of 2000 (P A J A). Again, for reasons which will become apparent later in this Judgment, it becomes unnecessary for me to decide this issue.

- [8] The applicant launched the present proceedings on 14 July 2010, after ascertaining that the contract was being implemented notwithstanding the appeal that it had lodged, as well as a request for reasons from the first respondent, as to the decision it had made. The applicant initially sought an interdict restraining the first respondent from engaging the second and third respondents to perform the work in question, pending the furnishing of reasons by the first respondent, the final determination of the applicant's appeal and any review proceedings the applicant may bring.
- [9] At the hearing on 22 July 2010, the second and third respondents handed up what was termed a "preliminary answering affidavit", the matter was adjourned sine die and the first respondent undertook to furnish the applicant and the second and third respondents, on or before the 19 August 2010 with the following:
- [9.1] Written reasons for the rejection of the applicant's tender.
- [9.2] The report of the Bid Evaluation Committee to the Bid Adjudication Committee (B A C).
- [9.3] The minutes of the meeting of the Bid Adjudication Committee, at which a decision was taken to award the tender.
- [9.4] The outcome of the applicant's appeal (in writing).
- [9.5] The minutes of the appeal authority.
- [9.6] Copies of the second and third respondents' tender submissions.
- [9.7] A copy of any Service Level Agreement concluded between the first respondent and the second and third respondents, alternatively, written notice of the date on which such agreement was concluded and the date on which such agreement became effective.
- [10] The agreement also reserved to the applicant the right to supplement its affidavits and file an amended notice of motion.
- [11] The applicant then filed a supplementary affidavit and an amended notice of motion in which a review of the decision of the Bid Adjudication Committee of the first respondent, on 20 January 2010, was sought as a second order prayed. A further order was sought directing the said Committee to reconsider the tenders of the applicant and the second and third respondents.
- [12] At the time of filing of the applicant's supplementary affidavit on 10 September 2010, it was pointed out that the first respondent, in breach of its undertakings had failed
- [12.1] To furnish any reasons for the rejection of the applicant's tender.
- [12.2] To furnish the applicant with the outcome of its appeal.
- [12.3] To furnish the applicant with the relevant minutes of the appeal authority.

[12.4] To furnish the applicant with a copy of any service level agreement concluded between it and the second and third respondents.

[12.5] To furnish the applicant with the other documents referred to in the agreement, the first respondent having partially complied with its undertaking by furnishing an incomplete bundle of documents on 19 August 2010 and a further bundle on 25 August 2010.

[13] When the matter came before Court on 12 October 2010, an answering affidavit was handed up on behalf of the first respondent, in which the first respondent stated that it had elected not to oppose the matter and to abide the decision of the Court.

[14] The relevant aspects of the first respondent's affidavit are as follows:

[14.1] The deponent, who is described as a legal advisor to the first respondent, states that there was never an appeal because one Sbu Shezi, who deals with the appeal process, formed the view that the appeal was out of time. No appeal was heard and there was therefore no outcome to an appeal.

[14.2] No service level agreement was concluded between the first respondent and the second and third respondents.

[14.3] Most of the available documents relied upon by the Bid Evaluation Committee and the Bid Adjudication Committee had been provided to the applicant.

[14.4] After the tenders were opened the treasury unit prepared a report which was considered by the Bid Evaluation Committee on 07 June 2009.

[14.5] The report stated that of the four responses received to the tender, only those of the applicant, second respondent and third respondent, stipulated the prices as required.

[14.6] These three tenders were compliant in terms of prices, but contained exclusions, that rendered it difficult to compare them on an equitable basis.

[14.7] It was recommended that these tenders not be accepted but that authority be given to the Head: Revenue to negotiate with these three parties to supply the services.

[15] In the result, on 24 June 2009, the Bid Adjudication Committee approved a recommendation by the Bid Evaluation Committee, that the Department address a letter to all the companies, requesting them to exclude their exclusions.

[16] This was done, all of these companies responded and interviews were then held with all of them to ensure they understood the task, and to enable their ability to undertake the task to be assessed by the first respondent.

[17] The Treasury Department then prepared raw scores in which the applicant and the second and third respondents were scored. The deponent states

"It was on the strength of the raw scores that the Treasury Department recommended the awarding of the tender in the form it was awarded".

It was also stated that the raw scores were provided to Supply Chain Management, to convert them into the appropriate score sheet but that

“There are some discrepancies on the conversion of the raw scores to the prescribed score sheet and those responsible are unfortunately unable to explain the reason for this”.

[18] The deponent then goes on to state the following:

“16

The Treasury Department made the recommendation that the award be in the form it did as it was perceived to be the most cost effective to the first respondent. The tender prices (after all parties had confirmed that their tender prices would include the exclusions and each of the parties had been interviewed) were taken into consideration when the raw scores were ascertained by the Treasury Department. The raw scores were then given to Supply Chain Management to formalise.

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It appears that the incorrect schedule was attached to the signed report that was placed before the Bid Adjudication Committee, but it has been impossible to obtain clarification from the persons responsible as to the reason why this happened. It has also been impossible to ascertain the methodology applied to ascertain the scores reflected on the score sheet that ought to have been attached to the signed report dated 22 October 2009 (B19]. The score sheets that ought to have been attached to the signed report are attached to the unsigned report of even date [B29].

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The recommendation of the Treasury Department to award the tender in the form that it was awarded to the second and third respondent was supported by the Bid Evaluation Committee and eventually approved by the Bid Adjudication Committee”.

[19] The unsigned report to the Bid Adjudication Committee dated 22 October 2009 with the schedule containing the scores appears at pages 261 – 268 of the papers. The signed report with the schedule containing the scores appears at pages 269 – 277 of the papers.

[20] What can be extracted from this maze of confusion is the following:

[20.1] The Treasury Department recommended the award of the tender on the basis of raw scores which it prepared. None of these raw scores have been produced, as these raw scores were converted into the “appropriate score sheet” by Supply Chain Management. There are discrepancies in the conversion of the raw scores to “the prescribed score sheet” but nobody is able to explain the reason for this. It appears that the prescribed score sheets are the documents which are annexed to the signed and unsigned reports to the Bid Adjudication Committee.

[20.2] The scores reflected on the prescribed score sheets annexed to the signed and unsigned reports to the Bid Adjudication Committee differ dramatically. A few examples will suffice. In the first prescribed score sheet annexed to the unsigned report the “grand total” of scores awarded respectively to the parties out of a possible 100 points are as follows:

Applicant	Second Respondent	Third Respondent
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(49.09)	80	5.67
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The comparable scores awarded to the parties on the prescribed score sheet annexed to the signed report are as follows:

Applicant	Second Respondent	Third Respondent
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89.75	-	-
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[20.3] According to the deponent to the first respondent’s affidavit, the scores that should have been placed before the Bid Adjudication Committee were the scores annexed to the unsigned report. This reflected the applicant as receiving a score of (49.09) which presumably indicates a negative score, with the second respondent receiving a score of 80 and the third respondent a score of 5.67. However, on the score sheets which were in fact placed before the Bid Adjudication Committee (albeit erroneously according to the first respondent) the applicant achieved a grand total score of 89.75 and the second and third respondents received no scores at all.

[20.4] The confusion is deepened by the fact that two additional “prescribed score sheets” are annexed to the unsigned report which contain differing scores.

[21] Regard being had to all of the foregoing the inference is irresistible that the Bid Adjudication Committee, which is the Body within the first respondent vested with the power to decide upon the award of the contract;

[21.1] Failed to apply its mind properly to the matter before it, because the recommendation to award the contract to the second and third respondents, based as it was upon how “they were rated in terms of the attached criteria and scored accordingly” was not borne out by the scores which were in fact placed before the Bid Adjudication Committee.

[21.2] The decision of the Bid Adjudication Committee was caused by the “unwarranted dictates of another person or Body” because the recommendation must have been accepted without any reference to the scores which were placed before it

Promotion of Administrative Justice Act

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Prepared on 14 October 2026 · Esheria