

**IN THE HIGH COURT OF SOUTH AFRICA  
(EASTERN CAPE HIGH COURT, MTHATHA)      CASE NO:1666/2010**

HEARD ON            17<sup>th</sup> September 2010

DELIVERED ON    30<sup>th</sup> September 2010

In the matter between:

**SIZABONKE CIVILS CC**

**Trading as PLASCON PROJECTS**

**APPLICANT**

and

**OR TAMBO DISTRICT MUNICIPALITY**

**1<sup>ST</sup> RESPONDENT**

**THUSO DEVELOPMENT CONSULTANTS**

**2<sup>ND</sup> RESPONDENT**

**WSSA/ ZANA MANZI JOINT VENTURE**

**3<sup>RD</sup> RESPONDENT**

**KHAYELIHLE TRADING (PTY) LTD**

**4<sup>TH</sup> RESPONDENT**

**SANYATHI HOLDING LIMITED**

**5<sup>TH</sup> RESPONDENT**

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**JUDGMENT**

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**CRISP AJ**

INTRODUCTION

[1] This is a review application brought in terms of rule 53 of the Uniform Rules for the setting aside of the award of a tender by the first respondent (“the municipality”) to the third respondent in respect of phase 1 and to the fourth respondent in respect of phase 2, for the construction of an off-channel storage dam, raw

water pump station and water purification works, at Flagstaff in the OR Tambo District Municipality.

- [2] The application was initially brought on an urgent basis where the applicant sought to interdict the third and fourth respondents from commencing with any work in accordance with the tenders which had been awarded to them.
- [3] Only the first and the third respondents opposed the application. The third respondent reached an agreement with the applicant, to the effect that the former would not commence with any work in terms of the tender award. The first respondent assured the applicant that by agreement with the fourth respondent, no work would be done until the judgement in this matter has been handed down. In the circumstances the applicant abandoned the claim for interdictory relief.
- [4] Applicant further contends that this court will find that “exceptional circumstances” are apparent in the award of the tender to the third and the fourth respondents and that on that basis the award of phase 1 to the third respondent, and phase 2 to the fourth respondent, ought to be set aside without the remission thereof to the first respondent, and that the court ought to award both those phases to the applicant.

#### THE LEGISLATIVE FRAMEWORK

- [5] The award of municipal tenders is governed by Section 217 of the Constitution of the Republic of South Africa, Act 108 of 1996 (“the Constitution”), which provides that such awards must be made in accordance with a system that is “*fair, equitable, transparent,*

*competitive and cost-effective”.*

- [6] The Constitution further provides that national legislation must prescribe the framework for the implementation of a preferential policy. This has been attained by means of the PREFERENTIAL PROCUREMENT POLICY FRAMEWORK ACT, 5 OF 2000 (“the PPPFA”), which allows for a preferential procurement policy based on a points system.
- [7] The PPPFA provides that bidders for tenders are to be scored and that once this has been done in terms of the policy, the bidder who scores the highest points ought to be awarded the tender, unless objective criteria, other than those contemplated in the assignment of scores, justify the award of the tender to another bidder.
- [8] Section 112 (1) of the LOCAL GOVERNMENT: MUNICIPAL FINANCE MANAGEMENT ACT NO 56 OF 2003, further provides that:  
*“The supply chain management policy of a municipality or municipal entity must be fair, equitable, transparent, competitive and cost effective...”*
- [9] It is settled law that when a municipality awards a tender in terms of its procurement policy, it performs an administrative function. Such functions are to be administered in terms of the provisions of THE PROMOTION OF ADMINISTRATIVE JUSTICE ACT, 3 OF 2000 (“PAJA”). PAJA contemplates that an administrator is to make decisions which are lawful, reasonable and procedurally fair. Sections 6 (2) and the further sub-sections there-under, provide that the decision taken must not conflict with the

empowering provision relating to the decision. The Act defines empowering provision as meaning “...a law, a rule of common law, customary law, or an agreement, instrument or other document in terms of which an administrative action was purportedly taken;”. It is indisputable that in a procurement context, “the empowering provision” will be the tender documents generated by the first respondent which invite prospective bidders to tender for a procurement tender award.

[10] The impugned tender was initiated by a tender invitation advertised in a newspaper, an extract of which publication is annexed to the first respondent answering affidavit and marked “E” at page 325 of volume 1 of the record. This application states in specific terms that bidders will be disqualified and that their applications would be invalid if they failed to submit-

*\* A certified copy of company founding statement*

*\*An original SARS Tax Clearance Certificate*

*\*In the case of a Joint Venture, a Memorandum of Agreement indicating the level of involvement and responsibilities of each Joint Venture partner*

*\*Certified copy of CIDB registration*

*\*Certified copy of ID’s of owners of the company.*

[11] The bundle of tender documents are marked A”, commencing at page 38 of volume 3 of the record. On the fifth page thereof at T1.1-4 (page 42 of volume3), bidders are similarly advised that the non-submission of the documents referred to in the previous paragraph, will lead to the disqualification of their tender bids.

## THE TENDER PROCESS

- [12] The second respondent THUSO DEVELOPMENT CONSULTANTS, being consulting engineers, was mandated by the first respondent, to evaluate all tenders submitted by bidders. Second respondent's mandate went no further than assessing the technical capacity of every bidder to perform the requisite work and to forward their findings to the first respondent.
- [13] Two committees who sat under the authority of the municipality were thereafter tasked with evaluating the tenders submitted by the bidders. Those committees had regard to the reports submitted by the second respondent in arriving upon their conclusions.
- [14] The first committee tasked to evaluate the tenders transmitted by the bidders is styled the BID EVALUATION COMMITTEE ("BEC"). This committee, after having made their evaluations, forwarded their conclusions to the second committee, styled the BID ADJUDICATION COMMITTEE ("BAC"). The latter committee had regard to the bid scores and the recommendations made by the BEC and transmitted their recommendations to the Municipal Manager of the municipality. The latter official is the final arbiter and is ultimately responsible for the selection of the bidder who is to execute the tender. In the circumstances, an award is made consequent upon the application of the collective minds of the BEC, BAC and the Municipal Manager to the tender applications of various bidders. Whilst the second respondent serves as the foot soldiers during this process, he is not entitled to the exercise of a discretion during any phase of this process. It is reasonable to presume that the Municipal Manager is constrained to abide by the

recommendations forwarded to him by the BAD, unless he is able to show that circumstances exist which disallow him from approving those recommendations. The Municipal Manager is not an automaton in this process. He has to apply his mind in the course of exercising his discretion.

- [15] In the circumstances of the instant matter, it is important to state that as at the time of the tender, the CIDA certificates, referred to in paragraph 10 above, were no longer issued by the Construction Industry Development Board. Under those circumstances, both the BEC and the BAC were constrained to ignore the necessity of the inclusion of a CIDB registration certificate, in a bidder's tender application when deciding whether or not a bidder's tender fell to be disqualified on the basis that documents which had been regarded as being essential documents as per the terms of the advertisement, were transmitted by the bidder. In view thereof that the lack of a CIDB registration certificate ought, reasonably construed, to have affected all the bidders equally, it must follow axiomatically, that the BEC and BAC would adopt this stance in respect of CIDB registration certificates. Quite reasonably, bidders were no longer as at the date of the evaluation of the tenders, required to have submitted CIDB registration certificates. In the language employed in the tender procurement process, a bidder's tender would not be styled "non-responsive" because he had failed to transmit a CIDB registration certificate.

#### ANALYSIS OF FACTS OF THE APPLICATION

[16] Applicant's contention is that, properly construed, he ought to have attained the highest score in phase 1 of the tender and the second highest score in phase 2 of the tender. Applicant's contention is that the fifth respondent ought to have been awarded the highest score in phase 2. Since the fifth respondent has not joined issue in these proceedings, it must be accepted that he no longer has an interest in the matter, in the applicant's view. Applicant accordingly contends that both phases of the tender ought, to have been awarded to him. It is precisely because the first respondent has not properly evaluated the tenders within the precincts of his own legal framework, that the administrative action falls to be reviewed and set aside, avers the applicant.

[17] First respondent, on the other hand, contends that the applicant's bid was found to be non-compliant in the entire process; that the applicant's bid was non-responsive; and that first respondent was obliged to disqualify the applicant from competing for the tender because applicant had failed to fulfil his obligations in respect of an essential term of the tender process, to wit-

17.1 no certified copies of company founding statements; and

17.2 no certified identity documents of the owners of the company had been included in the applicant's bid, as set out in paragraphs 10 and 11 above.

[18] Applicant's response to first respondent's grounds of exclusion is that first respondent ought not to have adopted an inflexible, mechanistic approach by disqualifying a tender on the basis of an omission.

[19] Applicant opines that first respondent ought to have had regard to clause 2.18.1 of the Specific Terms of Tender which allows first respondent to request-

*“Any other material that has a bearing on a tender offer, the tenderer’s commercial position (including notarised joint venture agreements) preferencing arrangements, or samples of materials considered necessary by the First Respondent for the purpose of full and fair risk assessment”* (Vide: clause 2.18.1)\_

[20] First respondent explains that he requires the documents in the form set out in the newspaper advertisement and in the tender document precisely because his experience has been that where company documents are not certified, “*front*” Companies arise with fictitious persons being put up to secure a tender in contravention of clause 44 of the Supply Chain Management Policy. First respondent further contends that in the present climate, it is unable to rely on the CIPRO database in order to seek confirmation of the details contained in uncertified Company documents. The aforesaid Supply Chain Management Policy obliges the first respondent to, at the very least, presume that the commissioner who certified the company documents is a person of integrity who has had sight of the original documents, prior to certifying same. The same reasoning is applied to the identity documents of the members of the company concerned. In the absence of such certification the members of the BEC, the BAC and the Municipal Manager are constrained to presume that the documents have not been certified precisely because the bidder is intent on hiding something of a fraudulent nature.

[21] This court takes judicial notice of the first respondent’s averments in respect of the nugatory effect of employing the CIPRO



database in order to establish the authenticity of a company's founding statements.

[22] First respondent further contends that it would be improper for him to make contact with a bidder in order to advise him to furnish documents which the bidder had not furnished, so as to advantage the bidder by making a non-responsive bid responsive. This submits the first respondent is more particularly the case where the tender bid invitation pertinently informs bidders that the non-submission of the documents, in the requisite format, would render the bid invalid. First respondent accordingly avers that he would have tainted the tendering process by contacting the applicant and requesting him to furnish certified copies of the company founding statements and certified copies of the identity documents of the members of the company.

[23] The proper approach to be adopted under these circumstances has been considered by our courts.

[24] In the GVK SIYAZAMA BUILDING CONTRACTORS (PTY) LTD V MINISTER OF PUBLIC WORKS & OTHERS [2007] JOL 20439(D), Mr Justice Morley AJ confirmed the well established legal principle that the material terms and conditions of a public tender, objectively considered, should be such as to enable a prospective tenderer to know with reasonable certainty what is required in order to submit a valid and acceptable tender. In the GVK matter, the department had not stipulated any formal requirements in its tender invitation. The court accordingly held that the first respondent could not reject the applicant's tender out of hand on the grounds of non-responsiveness, because applicant had not complied with a necessary criteria for the

tendering process. The court did not deal with the *ex post facto* submissions concerning the merits of the tender applications but restricted itself to the consideration of whether or not the exclusion of the applicant on the grounds of administrative non-responsiveness was procedurally fair in the light of sections (6) (2) (c) and (d) of PAJA. The review application succeeded on the grounds that it was incumbent upon a potential employer of tendering services to make contact with a tenderer and to advise him that additional information is required, where the requisite information had not been highlighted in the tender invitation. It follows axiomatically that such contact would be superfluous where the requisite information is set out in the tender invitation.

- [25] This approach was adopted in HAW AND INGLIS CIVIL ENGINEERING (PTY) LTD /THE MEMBER OF THE EXECUTIVE COUNCIL: POLICE ROADS AND TRANSPORT, FREE STATE PROVINCIAL GOVERNMENT AND 11 OTHERS, CASE NO: 5972/2009. In this matter, Mr Justice MOLEMLALA, stated in paragraph 24 of his judgement, that it was open to the tendering department to seek clarification from a bidder whose bid application fell short of the mark in circumstances where its tender invitation failed to clearly specify the type of documentary proof required. In this matter the department had failed to indicate to prospective bidders the manner in which they were to provide proof of ownership of/or access to critical equipment required in the performance of work desired in the tender process. In such a case, contended Mr Justice Molemlala, it would not taint the tender, were the tendering department to contact a bidder and advise him that further and better proof of ownership of and/or access to the essential equipment is required.

[26] In my view, the instant matter is poles apart from the Haw and Inglis and GVK SIYAZAMA matters. The municipality had clearly indicated to prospective bidders, up-front and in bold letters in the newspaper advertisement that the bid would be-

**INVALID OR NON-SUBMISSION OF THE FOLLOWING DOCUMENTS WILL RENDER THE BIDDER DISQUALIFIED**

[27] The instant matter is also clearly distinguished from MILLENIUM WASTE MANAGEMENT (PTY) LTD/ CHAIPERSON, TENDER BOARD: LIMPOPO PROVINCE AND OTHERS 2008, (2) SA 481 (SCA). In this matter the prospective bidder had inadvertently forgotten to sign a document.

[28] This court agrees with the first respondent. The tender invitation was lucid. Failure to provide certified company statements and identity documents would result in the disqualification of the bid. It was in the circumstances not required of the first respondent to enquire, form bidders why they had not submitted certified documentation. To do so would not merely have been the condonation of an inadvertent omission. On the contrary, it is well stated by the first respondent that making contact with such a bidder has in the past resulted in the review of his administrative action. This court agrees. Indeed, contacting a bidder under such circumstances could potentially have been construed as an act not too far removed from fraudulent conduct. First respondent, in my view quite wisely, did not employ the provisions of the variation of standard conditions as per T1-2-6 or T2.18 alluded to above, as the applicant suggests it ought to have done.

[29] This court accordingly finds that the first respondent correctly

disqualified the applicant, declared its bid to be non-responsive and excluded it from further participation in the tender award process, on the basis that the applicant had failed to comply with an essential, simple and a sufficiently well-highlighted provision of its conditions of tender, obliging prospective bidders to provide certified copies of company statements and the identity documents of the members of the company. I have already mentioned that a different consideration applied in relation to the CIDB registration certificates.

## REVIEWS

[30] As set out above, PAJA requires a court to review and set aside an administrative action which has been shown to be procedurally unfair; where the action has been influenced by an error in law; and where the administrator has evinced an attitude of bias which has adversely affected the constitutional rights of a party, precisely because the administrator has not been fair, equitable and transparent in the performance of his administrative actions. This type of conduct has not been apparent in this matter. All the bidders were subjected to a uniform standard. Indeed the applicant has not once contended that the first respondent's conduct, was biased in favour of any of the bidders, nor indeed that his conduct was directed at causing advantage to a particular bidder. This court accordingly finds no good reason why the administrative action falls to be reviewed.

[31] I take the same stance in this matter as did the GVK Siyazama Building Contractors court and hold that having found that the applicant had been properly excluded from the tender process it would serve no purpose to deal with the *ex post facto*

submissions of the tender procedures, precisely because I have found no evidence of bias, malice, or unfair conduct on the part of the first respondent. Moreover, there is no evidence before me that the Municipal Manager failed to apply his mind to the recommendations made to him by the BEC and BAC and that he simply robotically accepted what in the final analysis were merely recommendations, rather than exercising his discretion in the appointment of the bidders who are awarded the tenders. The application for the review of the tender process is accordingly dismissed.

[32] In the circumstances, the application is dismissed and the applicant is ordered to pay the first and the third respondents' costs.

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**O H CRISP**  
**ACTING JUDGE OF THE HIGH COURT**

Counsel for the Applicant : Adv. P.J. Wallis

Attorneys for the Applicant : C/O SPF Attorneys  
34 Stanford Terrace  
Mthatha

Counsel for the Respondent : Adv. Cole

Attorneys for the Respondent : C/O SZ JOJO Attorneys

74 Madeira Street  
Mthatha