



**IN THE GAUTENG DIVISION HIGH COURT, PRETORIA  
(REPUBLIC OF SOUTH AFRICA)**

(1) REPORTABLE: YES / <u>NO</u>
(2) OF INTEREST TO OTHER JUDGES: YES / <u>NO</u>
(3) REVISED
<u>25/07/2014</u>
DATE
<u>[Signature]</u>
SIGNATURE

25/7/14

CASE NUMBER: 0924/2014

**DDP VALUERS (PTY)**

**APPLICANT**

V

**MAKHADO MUNICIPALITY**

**FIRST RESPONDENT**

**SIYABUSELELA TRADING ENTERPRISE 275 CC  
(T/A RISUNA PROPERTY CONSULTANTS)**

**SECOND RESPONDENT**

**KULANI DUMOND NKUNA**

**THIRD RESPONDENT**

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**JUDGMENT**

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**DOSIO AJ:**

**INTRODUCTION**

[1] This is an application to review and set aside a tender awarded by the First Respondent

to the Second Respondent. The Applicant seeks to have the tender awarded to itself, alternatively that the tender be referred back to the First Respondent for consideration afresh.

- [2] The First Respondent opposes the application. The Second and Third Respondents do not oppose the application.
  
- [3] The Applicant sought condonation to amend the original founding affidavit in terms of uniform Rule 53(4). Condonation was granted.
  
- [4] This court must decide whether to review and set aside the decision of the First Respondent, and if it does, whether to remit the matter back to the First Respondent to consider it afresh, or to grant the tender to the Applicant.

### THE LEGISLATIVE SCHEME

- [5] Before embarking upon an analysis of the grounds of review and the issues in this case, it is necessary to set out the legal framework pertaining to the adjudication of tenders.
  
- [6] It is common cause that the municipality is an organ of State and that any decision on its part to award or reject a tender constitutes administrative action in terms of the Constitution.
  
- [7] The Preferential Procurement Policy Framework Act 5 of 2000 ("Procurement Act") requires organs of State to establish a procurement policy.
  
- [8] Section 3 (2) (c) of the Promotion of Administrative Justice Act 3 of 2000 ("PAJA") requires the process to be lawful, procedurally fair and justifiable.
  
- [9] By virtue of the provisions of Section 2 (1) of the Local Government Municipal Property Rates Act, Act 6 of 2004 ("the Rates Act"), the First Respondent is empowered to levy a

rate on property. Section 30 (1) of the Rates Act provides that a municipality intending to levy a rate on property, must in accordance with the Rates Act, cause a general valuation and a general valuation roll to be made of all properties in the municipality. In terms of section 33 (1) of the Rates Act, a municipality must, before the date of the valuation, designate a person as a municipal valuer.

[10] Section 39 (1) of the Rates Act provides that a municipal valuer must be a person registered as a professional valuer or professional associated valuer in terms of the Property Valuers Profession Act, Act 47 of 2000 ("the Valuation Act").

[11] Section 1 of the Procurement Act defines an "*acceptable tender*" as a tender which complies with the specifications and conditions as set out in the tender document.

## THE FACTS

[12] The tender in question relates to the compilation of the Makhado Local Municipality Valuation Roll for the 2014/2015 to 2017/2018 Financial years ("Tender 1/2013"), including the supplementary valuation rolls. The First Respondent resolved to procure the services of a person in private practice as its municipal valuer.

[13] Five tenders were submitted to the First Respondent. The tenders were firstly evaluated by a bid evaluation committee ("BEC") who made its recommendations to the bid adjudication committee ("BAC"). The latter committee then submitted its report and recommendations to the First Respondent.

[14] The following tenders were received;

1. Siyabuselela Trading Enterprise (T/A Risuna Property Consultants Valuers)

a) R7 487 583.84    b) R2 087 226.00

2. Evaluation Enhanced Property

a) R 3 249 347.70    b) R8 862 833.10

3. Unico

a) R2 870 000.00    b) R11 900 000.00

4. Eli Stroh (Pty) Ltd and Silver Beleggings CC Joint Venture

a) R3 800 000.00    b) R18 000 000.00

5. DDP Valuers

a) R1 350 000.00    b) R9 500 000.00

- [15] The first value refers to option 1 and the second value to option 2 of tender 1/2013.
- [16] The BEC stated that Eli Stroh (Pty) Ltd and Silver Beleggings CC Joint Venture were not assessed due to the fact that one partner was unable to submit a valid SARS clearance certificate as required by the tender notice. Risuna Property Consultants Valuers (Second Respondent) was disqualified as their trading name was not a registered entity name, and it had only submitted one year's financial statements and not three as required.
- [17] In respect to option 1, the BEC recommended that it be awarded to the Applicant, and in respect to option 2 it recommended that it be awarded to Evaluations Enhanced Property.
- [18] The First Respondent awarded tender 1/2013 to the Second Respondent.
- [19] An application was initially set down by the Applicant on the 25th of February 2014 for an urgent interim order against the First and Second Respondent wherein in terms of Part A of the notice of motion, the Applicant sought an interdict against the First Respondent from executing or implementing tender 1 of 2013, pending the final determination of the review incorporated in Part B.
- [20] The matter was struck from the roll due to lack of urgency. The Applicant again placed the matter on the roll for interim relief.
- [21] After the matter was enrolled, a supplementary affidavit amending prayer 2 of part B of the notice of motion was filed, which reads;
- " 2. Tender 1/2013 is awarded to the Applicant; alternatively the awarding of Tender 1/ 2013 is referred back to First Respondent for consideration afresh."*
- [22] Counsel for the Applicant argued that although an application for interim relief was originally before the court, it had shown a clear right and was entitled to final relief.

#### THE PURPOSE OF THE APPLICATION

- [23] The Applicant submits that the decision of the First Respondent to award tender 1/2013

to the Second Respondent should be reviewed and set aside in terms of section 6 of PAJA.

[24] The Applicant relies on the following grounds for review;

First ground of review - The First Respondent took irrelevant considerations into account or failed to consider relevant considerations in that the designated municipal valuer did not have the work experience stated in the Affidavit, Declaration and Nomination of the Municipal Valuer ("municipal valuer affidavit").

[25] In terms of section 39 (1) of the Rates Act, the Applicant is of the view that the Third Respondent (who was the sole member of the Second Respondent), was not competent to be appointed as a municipal valuer.

[26] The Applicant submits that section 39 (1) (a) of the Rates Act requires that the designated valuer be registered as a professional valuer or professional associated valuer. The Second Respondent nominated the Third Respondent as municipal valuer even though the latter was not registered as a professional valuer or as a professional associated valuer.

[27] Notwithstanding that the Third Respondent does not qualify to submit a bid, the First Respondent awarded the tender to the Second Respondent. The Applicant submits this is either due to (i) the Third Respondent representing to the First Respondent that he was registered as a professional valuer or a professional associated valuer or (ii) that the First Respondent deliberately or by a careless omission ignored this fact.

[28] Applicant alleges that the Second Respondent got hold of a person who is a registered valuer, (namely, Mr Zulu), and it then forged the signature of that registered valuer and obtained the tender on that basis. The Applicant alleges that the person who is involved as the municipal valuer is the Third Respondent. Mr Zulu is a smoke screen.

[29] The Applicant's counsel referred the court to the "*Makhado Local Municipality-Specifications for the Procurement of Private Valuers*", where it is stated that neither the municipal valuer or assistant municipal valuer may cede or assign their appointment to

any other valuer unless such cession or assignment has been approved in writing by the municipality. In addition, should such person for any reason no longer be associated or employed by the tenderer, the municipality reserves the right to cancel this agreement.

[30] Applicant's counsel argued that the municipal valuer should be a person who is in an employment relationship with the tenderer or be associated to the tenderer. The relationship between Mr Zulu and the Second Respondent is unknown and accordingly the tender should not have been awarded to the Second Respondent.

[31] The Applicant challenged the fact that Mr Zulu possessed the work experience as stated in the municipal valuer affidavit. The Applicant submitted that Mr Zulu was not responsible for the compilation of the various valuation rolls alluded to on the municipal valuer affidavit.

[32] The First Respondent denied the allegations and submitted there was nothing in section 39 (1) (A) of the Rates Act that indicated that the person appointed as municipal valuer must be employed by the bidder.

The second ground of review - The tender was obtained by fraudulent means perpetrated by the Second Respondent on the First Respondent, in that the municipal valuer affidavit purportedly deposed to by the designated municipal valuer (Mr Zulu), is a forgery.

[33] The Applicant alleges the signature made by Mr Zulu on the municipal valuer affidavit and the confirmatory affidavit are not the same. This is confirmed in a corroboratory affidavit compiled by Lieutenant Colonel. G M Cloete, who is a member of the South African Association of Forensic Document Examiners.

[34] The Applicant's counsel stated that Mr Zulu was in Zambia on the 29th of January 2013 and would not have been able to sign the municipal valuer affidavit in Giyani.

The third ground of review - The First Respondent awarded the tender to the Second Respondent contrary to the recommendations of the First Respondent's BEC.

[35] It is clear from the minutes of the BEC that the Second Respondent was disqualified.

[36] Schedule 14 of the tender documents states that a tenderer must attach audited financial statements for the last three (3) years, and secondly it must attach suitable

evidence of experience in delivering certified valuation rolls to municipalities which covers a period of at least five (5) years.

- [37] The Second Respondent was registered on the 4<sup>th</sup> of April 2011 and did not have the requisite (five) 5 years' experience in delivering certified valuation rolls to municipalities. Neither did it submit financial statements for (three) 3 years. The requirement as referred to in Schedule 14 to the tender documents is obligatory. The Applicant contends that the BEC was correct in disqualifying the Second Respondent.
- [38] The Municipal Supply Chain Management Regulations ("MSCM regulations") provide that if a BAC decides to award a bid other than the one recommended by the BEC, it must notify the accounting officer. The accounting officer may ratify or reject the decision of the BAC. If it is rejected it must refer the decision of the BAC back to the BEC for reconsideration.
- [39] Section 114 of the Municipal Finance Management Act, 2003 ("MFM Act") states that if a tender other than the one recommended is approved, the accounting officer of the municipality must give reasons for deviating from such recommendation.
- [40] No reasons were provided why the First Respondent deviated from the recommendation of the BEC. Section 114 of the MFM Act is mandatory. The Applicant contends that failure to comply with this provision renders the actions of the First Respondent *ultra vires* the enabling legislation.
- [41] Applicant's council referred this court to Section 5 (3) of PAJA where it is stated; that "*If an administrator fails to furnish adequate reasons for an administrative action it must, ...be presumed in any proceedings for judicial review that the administrative action was taken without good reason*".
- [42] The Applicant contends that the First Respondent awarded option 1 to the Second Respondent at a hugely inflated price (R7,487,583-84 as compared to the Applicant's R1,350,000-00), and that this is the reason why the First Respondent did not want to give any reasons.
- [43] The First Respondent denied that it had failed to comply with mandatory provisions

- [44] The First Respondent submitted its accounting officer did comply with section 114 of the MFM Act. There was no documentary proof to this effect. Counsel for the First Respondent submitted that such proof may be in the archives of the First Respondent and that it would be better to remit this matter back to obtain clarity whether there was compliance with section 114 or not.
- [45] The Applicant's counsel also stated that the Second Respondent only nominated the Third Respondent as an assistant municipal valuer and failed to nominate a substitute municipal valuer. This is contrary to the specifications in Schedule 2 of the tender documents.

#### AMENDMENT OF THE RELIEF CONTAINED IN PART B OF THE NOTICE OF MOTION

- [46] The Applicant submitted that the record has made it clear that the tender should have been awarded to the Applicant and that it would serve no purpose to refer the awarding of the tender back to the First Respondent to consider it afresh. Hence the amendment of the relief contained in Part B of the notice of motion.
- [47] The Applicant argued that by virtue of the provisions of section 8 (1) (c) (ii) of PAJA this court is entitled to award tender 1/2013 to the Applicant.
- [48] The First Respondent denied this and stated that the Applicant was recommended by the BEC only in respect to option 1 and not option 2.

#### THE LEGAL PRINCIPLES

- [49] The matter of ***Oudekraal Estates v City of Cape Town 2004 (6) SALR 222, SCA*** states that an administrative decision stands until set aside.
- [50] In ***Steenkamp NO v Provincial Tender Board, Eastern Cape 2007 (3) SA 121 (CC)*** at paragraph [33] Moseneke DCJ stated;
- "Section 217 of the Constitution is the source of the powers and functions of a government tender board..., the tendering system it devises must be fair, equitable, transparent, competitive and cost-effective."*
- [51] In the case of ***Allpay Consolidated v Chief Executive Officer, SASSA 2014 (1) SA 604***



CC, the learned Froneman J stated at paragraph [43];

*"...The facts of each case will determine what ... may lead to: procedural unfairness, irrationality, unreasonableness or any other review ground under PAJA".*

[52] Once a valid ground of review under PAJA has been established, section 172 (1) (a) of the Constitution requires the decision to be declared unlawful. The grounds for judicial review under PAJA are contained in section 6.

[53] Section 6 states;

***"Judicial review of administrative action –***

- (1) Any person may institute proceedings in a court or a tribunal for the judicial review of an administrative action*
- (2) A court or tribunal has the power to judicially review an administrative action if –*
  - (a) the administrator who took it –*
    - (i) was not authorised to do so by the empowering provision;*
    - (ii) acted under a delegation of power which was not authorised by the empowering provision; or*
    - (iii) was biased or reasonably suspected of bias;*
  - (b) a mandatory and material procedure or condition prescribed by an empowering provision was not complied with;*
  - (c) the action was procedurally unfair;*
  - (d) the action was materially influenced by an error of law;*
  - (e) the action was taken –*
    - (i) for a reason not authorised by the empowering provision;*
    - (ii) for an ulterior purpose or motive;*
    - (iii) because irrelevant considerations were taken into account or relevant considerations were not considered;*
    - (iv) because of the unauthorised or unwarranted dictates of another person or body;*
    - (v) in bad faith; or*
    - (vi) arbitrarily or capriciously;"*
  - (f) the action itself –*
    - (i) contravenes a law or is not authorised by the empowering provision; or*
    - (ii) is not rationally connected to –*

- (aa) the purpose for which it was taken;
- (bb) the purpose of the empowering provision;
- (cc) the information before the administrator; or
- (dd) the reasons given for it by the administrator;"

[54] In the case of ***Trinity Broadcasting (Ciskei) v Independent Communications Authority of South Africa 2004 (3) SA 346 (SCA)***, the test of rationality for the purposes of section 6(2)(f)(ii) of PAJA was stated at paragraph [21] as follows;

*"...the reviewing Court will ask: Is there a rational objective basis justifying the connection made by the administrative decision-maker between the material made available and the conclusion arrived at?"*

[55] As stated in the case of ***Allpay supra*** at paragraph [25];

*"... insistence on compliance with process formalities has a threefold purpose: (a) it ensures fairness to participants in the bid process; (b) it enhances the likelihood of efficiency and optimality in the outcome; and (c) it serves as a guardian against the process skewed by corrupt influences."*

[56] The learned Mogoeng J (as he then was) in the case of ***Viking Pony Africa Pumps (Pty) Ltd t/a Tricom Africa v Hidro-Tech Systems (Pty) Ltd and Another 2011 (1) SA 327 CC***, at paragraph [34] stated that;

*"Whenever an enterprise was plausibly accused of having furnished false information in its tender documents, the organ of State responsible for the tender is, upon becoming aware of the alleged misrepresentation, under an obligation to investigate the matter."*

[57] In situations where a tenderer has inserted a fraudulent signature, the learned Conradie JA in the case of ***Metro Projects CC v Klerksdorp Local Municipality 2004 (1) SA 16 SCA***; stated at paragraph [12]

*"The deception stripped the tender process of an essential element of fairness: the equal evaluation of tenders."*

[58] In respect to the onus of proof, the learned author JR de Ville in *Judicial Review of*

*Administrative Action in South Africa*, LexisNexis, Butterworths, 2003, page 314 stated that;

*“The onus of proof...is not necessarily on only one of the parties to the dispute... each of the parties may bear a burden of proof in relation to a specific issue. The standard of proof in review proceedings is that of a balance of probabilities or preponderance of probabilities”.*

and further at page 315;

*“PAJA does not contain any explicit provision indicating where the onus of proof in challenging the validity of administrative action on the grounds set out in section 6(2)... the onus is generally on the person who challenges the validity of administrative action, to prove facts constituting an illegality...Once that has been done, the burden of rebuttal will shift to the party alleging the contrary”*

and further at page 315;

*“...where a public authority fails to furnish adequate reasons for a decision in circumstances that it is required to do so, the onus will be on the public authority to show that the decision was taken with ‘good reason’.”*

#### The discretionary power a court has to remit the matter

[59] Section 8 (1) of PAJA states that the court or tribunal, in proceedings for judicial review in terms of section 6 (1), may remit the matter for reconsideration by the administrator, with or without directions, or in exceptional cases substitute or vary the administrative action.

[60] In the decision of ***Gauteng Gambling Board v Silverstar Development Ltd and Others*** **2005 (4) SA 67 (SCA)** it was stated that remittal is almost always the prudent and proper course as the administrative functionary is best equipped to make the right decision due to the access to relevant information at its disposal and its experience. As stated by the learned Heher J at paragraph [28] the above scenario is usually the situation unless;

*“...a court is persuaded that a decision to exercise a power should not be left to the designated functionary”*

[61] In the case of ***Johannesburg City Council v Administrator, Transvaal, and Another*** 1969 (2) SA 72 (T), the learned Hiemstra J at page 76 stated;

*“... 2. The Court will depart from the ordinary course in these circumstances:*

- (i) Where the end result is in any event a foregone conclusion and it would merely be a waste of time to order the tribunal or functionary to reconsider the matter...*
- (ii) Where the tribunal or functionary has exhibited bias or incompetence to such a degree that it would be unfair to require the applicant to submit to the same jurisdiction.”*

### EVALUATION

[62] Although the Applicant originally sought an interim interdict against the First Respondent, there is now no longer a need for this, as this matter is finally being decided upon by means of the review procedure. As a result, the interlocutory order originally sought by the Applicant in the urgent application is no longer of relevance.

[63] In the light of the various allegations raised by the Applicant, it is necessary for this court to determine whether the materiality of the irregularities justify the legal conclusion that they are grounds for review under PAJA.

[64] The advertisement of the tender clearly stated that bids that did not comply with the tender specifications would not be evaluated and would be disqualified.

[65] The Applicant's council has submitted, in my view correctly, that there are irregularities in this tender process.

[66] The first such irregularity is the fraudulent signature on the municipal valuer affidavit.

[67] The First Respondent has merely stated it has no knowledge of this. The First Respondent should have obtained its own expert to examine the handwriting of Mr Zulu, but it elected not to do so. The inference this court must draw is that the First Respondent has accepted the correctness of Lieutenant Colonel. Cloete's report and that is why they have allowed the allegation to stand uncontested.

- [68] Although the Second and Third Respondents filed a confirmatory affidavit, they also failed to respond to this serious allegation. Mr Zulu also did not depose to an affidavit setting out his side of the story. Mr Zulu's election to remain silent convinces this court that probably it is not his signature on the municipal valuer affidavit.
- [69] It is clear that the misrepresentation of Mr Zulu's signature should have prompted the First Respondent to call upon the Second Respondent to verify or submit satisfactory documentary proof that Mr Zulu was in fact the person they had appointed as the municipal valuer. Failure to do this rendered the tender process as unfair and in terms of section 6 (2) (c) of PAJA it is a ground of review.
- [70] The second irregularity or non-compliance with a material condition is that the Second Respondent nominated a person who clearly does not have the requisite experience as a municipal valuer. This goes against the provisions of section 33(1) of the Rates Act. The Applicant's allegations that false information pertaining to the work experience of Mr Zulu was inserted in the municipal valuer affidavit remains uncontested. Accordingly, a mandatory condition prescribed by an empowering provision was not complied with and in terms of section 6 (2) (b) of PAJA it is a ground of review.
- [71] Thirdly, the Second Respondent did not appoint a substitute municipal valuer. The tender documents clearly stated this must be done. In addition, the tender documents also stated that a minimum of two assistant municipal valuers must be appointed. The Second Respondent only appointed the Third Respondent. The Second Respondent did not nominate an assistant municipal valuer. Accordingly the Second Respondent did not comply with an obligatory condition in the tender documents.
- [72] Fourthly, the failure of giving reasons as required in terms of section 114 of the MFM Act, leads this court to believe that the First Respondent acted *ultra vires* the enabling legislation.
- [73] These irregularities have stripped the tender process of an essential element of fairness, namely, the equal evaluation of tenders.
- [74] These are consequential flaws. This is not an acceptable tender as defined in the Procurement Act.

- [75] In the presence of irregularities the inescapable conclusion must be that either the First Respondent failed to consider material information, because it was not all before it, or if in the unlikely event that it was before it, that it wrongly disregarded it.
- [76] Although the First Respondent believes it followed all procedures properly, this court cannot come to that conclusion.
- [77] The First Respondent committed a procedural irregularity of significant material consequence which renders the granting of the tender to the Second Respondent as procedurally unfair and reviewable in terms of section 6 (2) (c) of PAJA. There was no rational connection between the outcome of the decision of the First Respondent and the facts upon which the decision was based.
- [78] The granting of option 1 to the Second Respondent for an inflated amount suggests to this court that this must have been granted either owing to an ulterior purpose or motive, or because irrelevant considerations were taken into account.
- [79] In terms of section 5 (3) of PAJA, the failure to give reasons by the First Respondent allows this court to conclude that the decision of the First Respondent was taken without good reason.
- [80] The tender 1/2013 is reviewed and set aside.
- [81] At the end of the application the First Respondent handed in a settlement agreement signed by the First Respondent and the Second Respondent whereby the Second Respondent voluntarily withdrew from tender 1 of 2013. The settlement agreement also stated that all contracts signed between the First Respondent and the Second Respondent would be terminated and cancelled.
- [82] Section 8 of PAJA permits this court in exceptional cases, to substitute or vary the administrative action.
- [83] The Applicant's council argued that this is a matter where substitution would be appropriate on the grounds that the result would be a foregone conclusion, and because this court is sufficiently informed to award the tender to the Applicant.

- [84] This court does not find that the circumstances placed before this court are exceptional.
- [85] Had the First Respondent continued to show lack of insight into its conduct, then it would be clear that referring this matter back to the First respondent would be fruitless. However, that is not the case. The settlement agreement indicates to this court that the First Respondent has understood that it did not act in an appropriate manner.
- [86] Accordingly, this court cannot come to the conclusion that the First Respondent has exhibited bias to such a degree that it would be unfair to require the Applicant to submit to the same jurisdiction.
- [87] Even if the court is wrong in this respect, the minutes of the BAC are not before this court, and neither are the reasons in terms of section 114. This makes it difficult for this court to award option 1 and 2 of tender 1/2013 to the Applicant.
- [88] The BEC only recommended that option 1 of tender 1/2013 be awarded to the Applicant. It did not recommend the Applicant for option 2.
- [89] By setting aside the tender the forgone conclusion would not be that the Applicant would also be granted the tender in respect to option 2.
- [90] In as much as this court sympathises with the treatment the Applicant was exposed to, this court cannot act arbitrarily and award option 1 and 2 of tender 1/2013 to the Applicant.

### ORDER

[91] In the premises the following order is made:

- i. The award of tender 1/2013 made by the First Respondent to the Second Respondent is hereby reviewed and set aside.
- ii. The award of such tender is declared to have been unlawful and unfair.
- iii. The First Respondent is directed to reconsider the competing tender of the Applicant in accordance with all applicable laws, regulations and the procurement policy of the First Respondent in accordance with the requirements of section 217 of the Constitution.

- iv. Due to the urgency of this matter, the First Respondent is ordered to evaluate the tenders submitted and to decide not later than one month from the date of this order, which tender ought properly to have been accepted.
- v. The First Respondent is ordered to pay the costs of this application.



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**D DOSIO**  
**ACTING JUDGE OF THE HIGH COURT**

Appearances:

On behalf of the Applicant:  
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