

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

CASE NO: 28395/2022

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED.

DATE: 15 MAY 2023

SIGNATURE:

In the matter between:

AVENTINO ECOTROOPERS JOINT VENTURE

First Applicant

ALL AFRIKA GROUP (PTY) LTD (Registration No. 2[...])

Second Applicant

ECOTROOPERS CONSTRUCTION (PTY) LTD  
(Registration No. 2[...])

Third Applicant

and

THE MEC FOR THE DEPARTMENT OF ROADS AND  
TRANSPORT, GAUTENG PROVINCE

First Respondent

VEA ROAD MAINTENANCE AND CIVILS (PTY) LTD  
(Registration No. 2[...])

Second Respondent

LUBOCON CIVILS CC  
(Registration No. 2[...])

Third Respondent

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## JUDGMENT

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### **MAKHOB A J**

- [1] The first respondent published the following two tenders namely tender number D[...] 1[...] for the management and execution of routine road maintenance contracts on selected RISFSA classes and two provincial roads in the Bronkhorstspuit region of Gauteng province.
- [2] The second tender is D[...]2[...] for the management and execution of routine contracts on selected RIFSA classes 1 and 2 provincial roads in the Vereeniging region of Gauteng Province. The closing date for the two tenders was the 30 July 2021.
- [3] The tenders were considered simultaneously by the first respondent. The applicants were the highest scoring tenderer in respect of both tenders.
- [4] On the 18th of August 2022 the Bid Adjudication Committee (hereinafter referred to as “BAC”) decided that, notwithstanding a recommendation in favour of the applicants by the Bid Evaluation Committee (hereinafter referred to as “BEC”), the applicants are disqualified from the tenders. The tenders were eventually awarded to the second and third respondents respectively.
- [5] The applicants launched the present application to review the decision of the first respondent to award the tenders to the second and the third respondents.
- [6] The applicants are of the view that the tenders have lapsed. Should the court find that the tenders did not lapse, the applicants seek substitution relief. Even if the tenders did not lapse, the awards were made in direct conflict with the peremptory provisions of section 2 (1) (f) of the Preferential Procurement Policy Framework Act 5 of 2000 (hereinafter referred to as PPPFA)
- [7] The applicants as part of their tender documents declared its involvement with the “Emergency accommodation project with the housing development agency of

the department of public works". Subsequently the applicants were referred to the National Home Builders Registration Council for disciplinary action to be taken against the applicant.

[8] The matter was also reported to the special investigation unit (hereinafter referred to as SIU). On the 10<sup>th</sup> December 2021, the SIU presented its report to the president. In its report, the SIU makes allegations of fraud against the applicants in relation to the construction of the emergency accommodation in the Limpopo area during the COVID-19 pandemic. Hence the applicants were disqualified.

[9] The matter was referred to the National Prosecuting Authority. On the 17<sup>th</sup> of December 2021 the sole director of the applicant was arrested. The BAC concluded that the applicant should not be recommended for appointment in respect of the two tenders.

[10] The first applicant is an unincorporated joint venture consisting of the second applicant and the third applicant.

[11] The first respondent is Phalama Mamabolo in his capacity as the MEC for the department of Roads and Transport Gauteng Province 45 Commissioner St. Johannesburg.

[12] The second respondent is Vea Road Maintenance and Civils (PTY) LTD a company duly registered and incorporated in terms of the company laws of South Africa.

[13] The third respondent is Lubocon Civils CC a close cooperation duly registered and incorporated in terms of the close cooperation act 69 of 1984 with registered address at 1[...] P[...] Rd. Glen Austin, Midrand, Gauteng.

[14] On behalf of the applicant, it is submitted by counsel that the tenders submitted have lapsed for the following reasons:

(14.1) The tender validity Period was 120 days and both tenders lapsed prior to the awards to the second and third respondent

(14.2) the effect of all the extensions would amount to a validity period of more than 365 days and that in itself constitute an irregularity.

[15] It is further submitted that the awards were made in direct conflict with the peremptory provisions of Section 2(1) (f) of the PPPFA.

[16] In their submissions that the tenders have lapsed, counsel for the applicants referred to the decision in *Watt Power solutions cc and another v Transnet soc ltd and another*<sup>1</sup> where the court said “it is clear from the case authorities say that a tender can be extended if firstly the tender data or invitation made provision for an extension, and secondly it is extended prior to the date on which it was due to lapse” see also *SA v Merid Training (Pty) Ltd and others; Bihiti Solutions(Pty) Ltd v Telkom SA and others*.<sup>2</sup> It is submitted on behalf of the applicants that the first respondent extended the bid without consent.

[17] In addition, the applicants are of the view that in terms of Section 2(1) (f)<sup>3</sup> the tender should have been awarded to the applicants. Moreover, counsel for the applicants argued that there was no misjoinder the argument about *locus standi* is bad in law.

[18] Furthermore the decision to disqualify the applicants was wrong and that decision was never shown to them, and it is not reviewable. The unlawful disqualification of the applicants occurred after the lapsing of the tenders and can

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<sup>1</sup> (D6346/2019) [2021] ZAKZDHC 46 Para 31.

<sup>2</sup> [2011] ZAGPPHC1 at Para 41; Joubert Gulpin Searle Inc..and others v Road Accident Fund 2014(4) SA (ECP) AT

Para 74; City of Ekurhuleni Metropolitan Municipality v Takubiza Trading and Projects CC and others 2022-

JDR 1544 (SCA) and Aptitude Trading Enterprise (Pty) Ltd and others v The City of Tshwane Metropolitan City

and Others (33009/2022) [2022] ZAGPPHC 94 (28 November 2022 Para 26.

<sup>3</sup> Section 2 (1) (f) of the PPPFA reads as follows “the tender must be awarded to the tenderer who score the

highest points, unless objective criteria in addition to those contemplated in paragraphs (d) and (e) justify the award to another tenderer”.

therefore not be considered as a basis for the applicants alleged lack of standing under PAJA.

[19] Counsel for the applicants assert further that there is no reason as to why the head of the department should have been joined, if that same person has already submitted his affidavit in these proceedings in his delegated capacity as the head of the department.

[20] It is argued further on behalf of the applicants that the subcontractors were not joined since the tenders were never granted to the subcontractors, and neither were they parties to the bidding process.

[21] It is also alleged that the alleged misrepresentation was made by the agent of the applicants and not by the applicants themselves. The charges were withdrawn against the director by the Prosecution. The applicants were reinstated to the list of suppliers by national treasury. Relying on the decision *Allpay Consolidated Investment Holdings (Pty) Ltd and others v Chief Executive Officer South African Social Security Agency and Others*<sup>4</sup> the applicants argue that the decision to disqualify the applicants was part and partial of the process that the first respondent followed in ultimately awarding the tenders to the second and third respondents.

[22] In regard to the validity of the tender, the applicants further contended, that should any of the bidders not respond to the department's request for extension, the department will not be able to validly extend the bid validity period. The applicants referred to the decision in *Joubert Gulpin Searle INC and others*<sup>5</sup>; *Bihiti solutions*.<sup>6</sup>

[23] Counsel for the applicants referred the court to the decision in *City of Ekurhuleni Metropolitan Municipality v Takubiza Trading and Projects cc and Others*<sup>7</sup> and submitted that the first respondent is obliged to notify all of the tenderers and not

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<sup>4</sup> 2014 (4) SA 179 (CC) Para 60.

<sup>5</sup> (3191/2013) [2014] ZAECPHC 19 [2014] 2 All SA 604 (ECP); 2014 (4) SA 148 (ECP) 25 March 2014 at paragraph

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<sup>6</sup> [2011] ZAGPPHC 1 at Para 14.

<sup>7</sup> 2022 JDR 1544 (SCA) AT Para 13.

only certain of the tenders. Failure to request extension from all the bidders automatically resulted there in that the tenders lapsed as at 30 November 2021.

[24] Counsel for the first respondent contends that the department cannot afford contracting with the applicants because they have committed fraud. The department was justified in disqualifying the applicants and has not committed any irregularity or reviewable irregularity.

[25] On the lapsed tenders the second respondent referred the court to a document titled “Departments Supply Chain Management Bid Evaluation Committee Charter”<sup>8</sup> This document consists of the following, the supply chain management Policy,<sup>9</sup> procurement of goods and services.<sup>10</sup>

[26] Counsel for the second respondent submitted further that properly interpreted Paragraph 8.1 of the charter means an extension notice need not be given to all bidders.

[27] Moreover counsel for the second respondent argued that there is no duty on the first respondent to give notice of extension to all bidders. The right to extend the period was expressly reserved in the tender documents.

[28] On the disqualification counsel referred the court to the two decisions namely *Allpay*<sup>11</sup> and *Oudekraal Estate*.<sup>12</sup> Counsel argued that the two decisions are distinguishable from the applicant’s case in that in this matter the disqualification was based on questionable conduct in a criminal sense, and this was the reason for excluding the applicants from the tender process. No such disqualification was present in the *Allpay* decision.

[29] Counsel for the second respondent hold the view that the subcontractors should have been joined because the subcontractors are closer to the employer namely the

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<sup>8</sup> CaseLines 06 1-25.

<sup>9</sup> CaseLines 06 1-97.

<sup>10</sup> CaseLines 06 1 – 25.

<sup>11</sup> *Allpay consolidated Investment Holdings*.

<sup>12</sup> *Oudekraal Estate (Pty) Ltd v City of Cape Town and others* 2004 (6) SA 222 (SCA).

first respondent. The subcontractors have a direct and substantive interest in the relief sought by the applicants.

[30] Counsel for the third respondent by and large in his submissions align himself with the submissions made by the first and second respondent's counsel. He argued that the applicants were properly disqualified and further that the tenders did not lapse.

[31] The test for joinder or non-joinder was set out in *Gordon v Department of Health, KwaZulu-Natal*<sup>13</sup> as follows "*The issue in our matter, as it is in any non-joinder dispute, is whether the party sought to be joined has a direct and substantial interest in the matter. The test is whether a party that is alleged to be a necessary party has a legal interest in the subject matter, which may be affected prejudicially by the judgment of the court in the proceedings concerned.*"

[32] I agree with the view expressed in *Peermont Global (KZN) Pty Ltd v Afrisun KZN Pty Ltd t/a Sibaya and Entertainment Kingdom and Others*<sup>14</sup> where the court said the following "*a direct and substantial interest under the common law involves a legal interest in the litigation which may be prejudicially affected by the judgment of the court, and not merely a financial interest*".

[33] It is my view that the subcontractors did not have a direct legal interest but only a financial interest. The second respondent submissions that there has been non-joinder of subcontractors is with respect not correct.

[34] Paragraph 8.1 of the department's Supply Chain Management Bid Evaluation Committee Charter reads as follows "*If an extension of a bid validity is considered necessary all those who passed through the last stage evaluation before expiration of the validity period successfully shall be asked to extend the validity period of their bids.*"<sup>15</sup>

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<sup>13</sup> 2008 (6) SA 522 (SCA) at Para 9.

<sup>14</sup> [2020] 4 All SA 226 (KZP).

<sup>15</sup> The Charter par 8.1 therefore CaseLines 06 at 1-25.

[35] In my view the literal interpretation of paragraph 8.1 of the charter is that the extension notice need not be given to all bidders but only those bidders who passed through the last stage of evaluation. The applicant's submissions in this regard are therefore incorrect

[36] Furthermore, the simple literal interpretation of paragraph 8.1 of the charter gives the first respondent a discretion to extend the validity period of the tenders.

[37] It is incumbent upon the applicants to show that indeed the tenders have lapsed.<sup>16</sup>

In my view the applicants failed to prove that the tenders have lapsed.

[38] In deciding whether the applicants were properly disqualified I was referred by all the parties to the two decisions I have referred to above namely *Allpay* and *Oudekraal*.<sup>17</sup> These decisions are very important in this matter before me.

[39] In *Oudekraal* the court said the following “[31] *Thus the proper enquiry in each case-at least at first-is not whether the initial act was valid but rather whether its substantive validity was a necessary precondition for the validity of consequent acts. If the validity of consequent acts is dependent on no more than the factual existence of the initial act, then the consequent act will have legal effect for so long as the initial act is not set aside by a competent court*”.

[40] In *Allpay* unlike in the matter before me the facts are not similar or the same, in *Allpay* the bidder fell out of the tender race because it failed to comply with the mandatory requirements as stipulated in the bid documents.

[41] The principle enunciated in the *Oudekraal* decision if applied in this case it means that, the applicants should have first dealt with the disqualification and have it set aside by the court. In my view that is what the applicants should have done.

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<sup>16</sup> *Makhuva – Mathebula Community v Regional Land Claims Commissioner Limpopo and another* (1106/2018)

[2019] ZASCA 157 (28 November 2019) at Para 34.

<sup>17</sup> *Allpay consolidated and Oudekraal Estate*.



[42] Consequently, the court finds that the applicants failed to establish that the tenders have lapsed, and the applicants remain disqualified.

[43] I make the following order.

[43.1] The application is dismissed.

[43.2] The applicants to pay the first, second and third respondents costs consequent upon the employment of two counsels.

[43.3] Applicants to pay the wasted cost for the 29, 30 November 2022 including the 1st of December 2022.

**MAKHOB A J**  
**JUDGE OF THE HIGH COURT**  
**GAUTENG DIVISION, PRETORIA**

**HEARD AND RESERVED ON: 26 APRIL 2023**

**DELIVERED ON 15 MAY 2023**

**APPEARANCES:**

For the Applicant: Adv S Maritz with Adv AA Bason (instructed by) Thomas & Swanepoel Inc.

For the 1<sup>st</sup> Respondent: Adv J Motepe SC with Adv K Mvumbu (instructed by) Malatji & Co Attorneys.

For the Second Respondent: Adv A Liversage SC With L Kotze (Instructed by) A Prinsloo Attorneys.

For the 3<sup>rd</sup> Respondent: R Bhima (instructed by) Pagel & Schulenburg Attorneys.