



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

From: The Registrar, Supreme Court of Appeal

Date: 03 June 2022

Status: Immediate

The following summary is for the benefit of the media in the reporting of this case and does not form part of the judgments of the Supreme Court of Appeal

City of Ekurhuleni Metropolitan Municipality v Takubiza Trading & Projects CC and Others (Case no 846/2021) [2022] ZASCA 82 (03 June 2022)

Today the Supreme Court of Appeal (SCA) handed down judgment dismissing, with costs, an appeal against a decision of the Gauteng Division of the High Court of South Africa, Johannesburg (the high court).

In March 2020, the appellant, the City of Ekurhuleni Metropolitan Municipality (the Municipality), published an invitation to tender under reference PS-F07-2020 (the tender) for the appointment of finance meter management consultants to manage the Municipality's electricity and water meter readings and credit control processes on an 'as and when' required basis for a 36-month period. Appointments were sought to be made in respect of two separate areas, namely the North East (area 1) and South West (area 2). The initial closing date for the tender was 24 April 2020. However, due to the COVID-19 pandemic and resultant national lockdown, the closing date had to be extended to 11 June 2020. The bid validity period was 120 days from the closing date, being 9 October 2020. On that date at 11h47 the Municipality sent an email notification to all of the bidders enquiring whether they would accept an extension of validity until 31 December 2020. The Municipality required confirmation 'on or before 9 October 2020'. However, the notification was not delivered to one of the bidders, who was ultimately successful, namely, Aurecon South Africa (Pty) Ltd (Aurecon). It was subsequently re-sent at 15h32 that day to the correct email address. Aurecon only responded, some three days after the bid validity period had expired, on 12 October 2020.

On 19 November 2020, the Bid Evaluation Committee of the Municipality (the BEC) recommended to the Bid Adjudication Committee (the BAC) that Aurecon and Ntiyiso Consulting (Pty) Ltd (Ntiyiso), be awarded the tender for area 1 and area 2, respectively. On 23 November 2020, the BAC accepted the recommendation of the BEC. The City Manager and the Chairperson of the BAC approved the award to each of Aurecon and Ntiyiso on 24 November 2020 and, by letter dated 17 December 2020, they were informed of their appointment. Having informally learnt on 11 January 2021 that it was unsuccessful, Takubiza Trading & Projects CC (Takubiza), caused an urgent review application to be issued out of the high court. The application was heard on 22 - 23 April 2021, and on 14 June 2021 the court set aside the award to both Aurecon and Ntiyiso, but suspended the declaration of invalidity for a period of 150 days to enable the Municipality to commence with a new tender process.

Takubiza's primary contention, which found favour with the high court, was that the award to each of Aurecon and Ntiyiso had been made after the tender validity period had already lapsed. The SCA reasoned that: firstly, there was no explanation from the Municipality as to why the notification was despatched on the very last day of the tender validity period. Secondly, a real difficulty for the Municipality was that their notification, for good reason, required confirmation from all of the bidders on or before 9 October 2020, which, did not happen. The Court further held that an organ of state cannot be better placed merely because it had despatched a request to which it was yet to receive a response before the expiration of the validity period. In truth, the despatch of the notification was so late as to be

more illusory than real. Thirdly, by the time the tender validity period had expired, there was nothing to extend because, the tender process had been concluded, albeit unsuccessfully. Come the 10th of October, there was no longer a valid tender from Aurecon for the Municipality to accept. Fourthly, the SCA agreed with the high court that the validity period was indeed one of the fundamental rules of the game, being the period within which the process should be finalised. To extend the tender validity period the consent of all the participants to the tender process was required. Unless there was a timeous request and favourable response from all the tenderers prior to the expiry of the tender, the tender came to an end. Lastly, the SCA held that the signification of confirmation by Aurecon on the 12th could not somehow have had the effect of turning back the clock to the 9th and breathing life back into the process with retrospective effect to that date. A tender process cannot be open-ended. Certainty has to be the touchstone. The SCA accordingly concluded that the appeal must fail.

The SCA expressed its displeasure at the lamentable state of the appeal record, which was replete with all manner of irrelevant material. Much of the record was barely legible, with inadequate line numbering and no proper cross-referencing to speak of. Bulk was added by pasting photostatic copies over other pages in the record, resulting often enough in pages sticking together that had to be prised apart. No heed was paid to the requirement that volumes should be so bound that upon being opened they will remain open or that, in use the binding would not fail. The SCA took the view that given the unnecessary volume and the state of the record as a whole some sanction must follow. The Court had previously expressed its displeasure at records that include unnecessary documents of the kind encountered here and had, where appropriate, ordered costs to be paid by attorneys *de bonis propriis* or disallowed the costs of perusing the record. The SCA concluded that it would not be right for the residents of the Municipality to be burdened with costs that should not have been incurred in the preparation, perusal and copying of the record. In the result, the SCA held that the appellant's Johannesburg and Bloemfontein attorneys should not be entitled to recover any of the costs associated with the preparation, perusal or copying of the record from the appellant.

~~~~ends~~~~