



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable

Case no: 1233/2023

In the matter between:

AVENTINO ECOTROOPERS JOINT VENTURE FIRST APPELLANT

ALL AFRIKA GROUP (PTY) LTD SECOND APPELLANT

ECOTROOPERS CONSTRUCTION (PTY) LTD THIRD APPELLANT

and

**THE MEC FOR THE DEPARTMENT OF ROADS
AND TRANSPORT, GAUTENG PROVINCE FIRST RESPONDENT**

**VEA ROAD MAINTENANCE AND
CIVILS (PTY) LTD SECOND RESPONDENT**

LUBOCON CIVILS CC THIRD RESPONDENT

Neutral citation: *Aventino Ecotroopers Joint Venture and Others v The MEC for
the Department of Roads and Transport, Gauteng Province and
Others* (1233/2023) [2025] ZASCA 32 (31 March 2025)

Coram: NICHOLLS, MBATHA and UNTERHALTER JJA and MUSI and
 MOLITSOANE AJJA

Heard: 25 February 2025

Delivered: 31 March 2025

Summary: Tender – tender validity period – extensions of the period – s 38 of the Public Finance Management Act 1 of 1999 – supply chain management policy – extensions of bids – lapse of the tender – misrepresentations in a prior tender – listing on the Treasury restricted list – exclusion of bids from consideration.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Makhoba J, sitting as a court of first instance):

The appeal is dismissed with costs, including the costs of two counsel, where so employed.

JUDGMENT

Unterhalter JA (Nicholls and Mbatha JJA and Musi and Molitsoane AJJA concurring):

Introduction

[1] The first appellant, Aventino Ecotroopers Joint Venture (Aventino), is an unincorporated joint venture. The second and third appellants (the partners) are partners in this joint venture. I refer to the joint venture as Aventino, and in other contexts, I refer to Aventino to denote the three appellants. In May 2021, the first respondent, in May 2021, as the Department of Roads and Transport (the Department), published DRT1 9/07/2019 (Tender 19) and RT21/07/2019 (Tender 21) for the management and execution of routine road maintenance on selected provincial roads (the tenders). Aventino submitted bids for the tenders. The Bid Evaluation Committee (BEC) awarded Aventino the highest score in its assessment of the rival bids for the tenders. In August 2022, the Head of the Department, Dr Barclay, disqualified the bids of Aventino. He did so because, at the time of its disqualification, Aventino was to be listed as a restricted supplier and serious allegations of fraud were made against it. Tender 19 was awarded to the third respondent, Lubocon Civils CC (Lubocon) and Tender 21 was awarded to the second respondent, Vea Road Maintenance and Civils (Pty) Ltd (Vea).

[2] In November 2022, Aventino and the partners brought proceedings in the Gauteng Division of the High Court, Pretoria (the high court) to review the award of the tenders. They sought the following relief: to review and set aside the awards to Lubocon and Vea; to set aside any service level agreements entered into with Lubocon and Vea; and to award the tenders to Aventino. Aventino relied, in essence, upon two grounds of review. First, it alleged that the extension of the validity period of the tenders had not lawfully taken place, and hence the tender validity period had expired. Second, the Department had unlawfully failed to award the tenders to Aventino and disqualified it on unfounded allegations, even though it was the highest scoring bidder.

[3] The review came before Makhoba J in the high court. He dismissed the review, with costs. He found that Aventino and the partners had failed to show that the tenders had lapsed. As to the disqualification of Aventino, he held that Aventino was required to review and set aside the administrative decisions upon which its disqualification rested. This Aventino had not done, and hence, these decisions stood, and so too did the disqualification of Aventino from bidding on the tenders. Aventino and the partners sought leave to appeal. This application was refused. But on petition, this Court granted leave to appeal.

[4] Three issues arise for determination in this appeal. First, did the tenders lapse? Second, if they did not, was Aventino unlawfully disqualified from bidding on the tenders? Third, if so, what remedy should issue? Although Vea and Lubocon challenged the standing of Aventino and the partners, they do not persist in this challenge before us.

Did the tenders lapse?

[5] It is common ground that the closing date for the tenders was 30 July 2021. The tender validity period was 120 days. The tenders would thus have expired on

29 November 2021, absent lawful extension. Five extensions were sought. In August 2022, Aventino was disqualified, and the tenders were awarded to Vea and Lubocon. If the tender validity period was not lawfully extended, then the tender lapsed, and, so Aventino contended, the award of the tenders could not have been validly made.

[6] There was some disagreement before us as to precisely what Aventino had pleaded so as to make out its challenge that the tenders had lapsed. In its heads of argument, Aventino relied upon two grounds that, it contended, gave rise to the lapsing of the tender. First, if a bidder failed to respond to an invitation to extend the validity period of the tender, the Department could not disqualify that bidder and then proceed to consider the bids of those who agreed to the extension. I shall refer to this as the disqualification challenge. Second, in order validly to extend the tender validity period, all bidders must be invited to extend the period. This did not occur, and hence the tenders lapsed. I shall refer to this as the invitation challenge.

[7] Aventino's challenge evolved in the course of the exchange of affidavits between the parties. In its supplementary founding affidavit, as I have observed, Aventino's case was that the Department sought and received extensions from what it described as the 'top 10 bidders'. This meant that the tender validity period was not extended, and expired on 29 November 2021. The Department met this case as follows: it averred that the offers were extended and referenced a supplementary record that it had produced which, it claimed, evidenced the extension. In its replying affidavit Aventino had this to say of the supplementary record, '[it] illustrates that [the Department] did not receive timeous responses from all the tenderers'. This passage is offered in support of the averment in the replying affidavit that summarises the case of Aventino and states the following: 'I made it clear in the founding affidavit that the first respondent would be required to demonstrate in the record that each and every participating tenderer timeously consented to the various requests for extension. In the supplementary affidavit it

was demonstrated that the first respondent failed to receive timeous responses from all the tenderers'. This is clearly a case based on the disqualification challenge.

[8] Aventino contended in its oral argument that the position taken in the replying affidavit must be understood with passages in the supplementary founding affidavit that reference the extensions sought by the Department as reflected in the record that '... effectively negates the award of the tenders ... requests for the extension of a validity period in a tender must be correctly and timeously transmitted to all bidders'. Aventino did make mention in its supplementary founding affidavit of the extensions that were sought that were included in the record. However, that averment was offered in support of its case, as it then stood, based upon what was claimed to be the seeking and obtaining of consent from 'only the top ten'. It was also based on the record as it then stood at the time the supplementary founding affidavit was filed.

[9] However, the Department, as we have observed, provided a supplementary record, and claimed that this record evidenced the valid extension of the bid validity period. Aventino's case in its replying affidavit, with the benefit of the supplementary record, was to complain that the record did not show that the Department had received timeous responses to extend the tender validity period from all the tenderers. This then was the case upon which Aventino made its challenge. Ordinarily, such a case cannot be made in a replying affidavit. But given the piecemeal disclosure of the record, it is understandable that this is where its case is to be found. But that case goes no further than the disqualification challenge, and does not include the invitation challenge.

[10] What then of the merits of the disqualification challenge? On 17 November 2020, the Department adopted the revised policy on procurement, entitled, the supply chain management policy: procurement of goods and services (the SCM policy). The SCM policy is a lengthy document. It was produced as part of the

record. It explains that it was adopted in terms of s 38 of the Public Finance Management Act 1 of 1999 (PFMA). Section 38(a)(iii) requires that the Department, amongst other things, has and maintains an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost-effective. This is a statutory recognition of the constitutional obligations set out in s 217 of the Constitution.

[11] Paragraph 4.14 of the SCM policy traverses validity periods of bids. It provides that a Bid Evaluation Committee (BEC) shall, when the evaluation or adjudication of a bid is envisaged to go beyond the validity date in the bid documentation, request bidders to extend the validity of their bids. The following is then stated: '[b]idders may either accept or reject the extended validity period and those who do not wish to extend the validity period would be regarded as non-responsive and would be excluded from further assessment'. I shall refer to this provision as the exclusionary stipulation. The invitation to tender recorded that the Department adheres to all relevant Acts, including the PFMA. The PFMA was of application to the tenders. The invitation to tender also stated that the bid validity period is 120 days. It went on to provide: 'However, the Department reserves the right to request all bidders to extend such validity period should the need arise'. The need did arise. And the basis for extension is to be found in the provisions of paragraph 4.14 of the SCM policy.

[12] In letters from the Department to Aventino the following is recorded, 'We wish to inform you that we will be extending your bid by 60 days. Should these (sic) be unacceptable, you leave us with no alternative but to cancel your bid'. Provision is then made for a bidder to accept or decline. While cast in somewhat peremptory language, these letters are consistent with the exclusionary stipulation.

[13] It is common ground that Aventino did not challenge the exclusionary provision. Nor has it contended that the exclusionary provision is not of application

to the tender. The exclusionary provision is not free of all ambiguity. In particular, what does it provide in circumstances where a bidder does not respond to a request from the Department to extend the validity period? On a proper construction of the exclusionary provision, it is clear enough that those bidders that are non-responsive may be excluded. This is so for an obvious reason. Bidders may have good commercial reasons not to permit their bids to remain in place. Costs may have risen, or other relevant circumstances may render it no longer feasible for a bidder to wish to extend their bid for a further period. The bidder may then either respond to the Department's invitation to extend and decline to extend its bid, or a bidder may simply not respond to the invitation at all. In either event, the bidder has indicated that it no longer wishes its bid to be considered. Sensibly interpreted, what the exclusionary provision means is that if a bidder, invited to extend its bid, either declines to do so or simply fails to respond to the invitation, the Department may exclude that bid from the adjudication process, and may proceed on the basis of the bids of bidders that have accepted the extension. The language references exclusion from 'further assessment' which implies that the assessment will carry on, but only to consider the bids where the bidders have acceded to the extension and thereby extended their bids for the purpose of tender.

[14] The disqualification challenge cannot prevail because the exclusionary stipulation creates a regime that permitted the Department to exclude bids from further consideration in the event that a bidder either declined to extend its bid or failed to respond to the Department's invitation to extend. Aventino made no challenge to the legality of that regime. However, Aventino relied upon a number of cases that, it contended, supported the disqualification challenge. In *Joubert*,¹ following *Telkom SA*,² Plasket J (as he then was), affirmed two propositions. First, once a bid validity period has expired, there is nothing to extend. Second, the

¹ *Joubert Gulpin Searle Inc & Others v Road Accident Fund & Others* [2014] ZAECPEHC 19; [2014] 2 All SA 604 (ECP); 2014 (4) SA 148 (ECP) paras 73 and 74.

² *Telkom SA Limited v Merid Trading (Pty) Ltd and Others* [2011] ZAGPPHC 1; [2011] JOL 26617 (GNP).

constitutional and legislative procurement framework determines the powers of public bodies to procure goods and services. The power to extend a bid, within the bid validity period, is disciplined by this framework. The decision of this Court in *Takubiza*³ is to like effect.

[15] These authorities do not support the disqualification challenge. The position of the Department in its answering affidavit is that it sought serial extensions before the expiry of each bid validity period, and then proceeded to extend each period and consider the bids of those bidders who responded to the invitation to extend their bids. The disqualification challenge contends that this did not suffice to extend the bid validity period, on each successive occasion, because all bidders invited to extend had to agree to do so. But this is not what the exclusionary provision, forming part of the legislative framework of application to the tenders, stipulates. Rather, as I have explained, the exclusionary provision, permits the Department to extend the bid validity period to consider the bids of those who have agreed to extend their bids and may exclude those bids from further consideration where a bidder either declines to extend its bid or fails to respond to the Department's invitation to do so.

[16] For these reasons, the disqualification challenge must fail and I find that the bid validity period was lawfully extended.

Was Aventino unlawfully excluded?

[17] I consider next whether Aventino's bids for the tenders were unlawfully excluded from consideration by the Department. The Department's Bid Adjudication Committee (BAC) recognised that the BEC had ranked Aventino in first position. However, the BEC flagged for the consideration of the BAC that Aventino Group CC (Aventino CC) was investigated by the Special Investigating Unit (SIU) in respect of a project in Limpopo. The SIU is an independent statutory

³ *City of Ekurhuleni Metropolitan Municipality v Takubiza Trading & Projects CC and Others* [2022] ZASCA 82; 2023 (1) SA 44 (SCA) para 13.

body that investigates serious allegations of corruption in terms of the Special Investigating Units and Special Tribunals Act 74 of 1996 (the SIU Act). The SIU found that there were irregularities in the awarding of the contract to Aventino CC and recommended that Aventino CC be listed on the Treasury database for restricted suppliers. It does not appear to be in issue in this appeal that Aventino CC is not distinguishable from Aventino, the JV that bid for the tenders. The findings of the SIU included misrepresentations made by Aventino to procure the contract. In Tribunal proceedings taken against Aventino in terms of the SIU Act, Aventino agreed to a settlement, and the Tribunal made an order setting aside the contract on the basis that it was unlawful and void as a result of the misrepresentations made by Aventino. Aventino also agreed to repay the monies earned by it under the contract. The BAC considered these matters. Aventino was also given an opportunity to make representations to the Department concerning the SIU findings and the settlement before the Tribunal. The BAC took account of these representations. Ultimately, the BAC decided that it should not recommend Aventino.

[18] The Department followed this recommendation, and did not award the tenders to Aventino. It did so, not on the merits of Aventino's bids, but because it was implicated in wrongdoing in the Limpopo housing tender. Aventino is thus correct to submit that it was, in this sense, excluded from consideration, without regard to the merits of its bids.

[19] Of the reasons that led the Department to exclude Aventino, Aventino contends the following. First, although Aventino was listed on the Treasury list of restricted suppliers on 20 September 2022, at the time that the BAC made its recommendation on 15 and 16 September 2022, the listing had not yet occurred. Furthermore, the second appellant, All Afrika Group (Pty) Ltd, brought an urgent review to have the listing removed. Treasury agreed to do so, as its letter makes plain, for procedural reasons. I shall refer to this as the listings argument. Second, Aventino explained in its supplementary founding affidavit that it had entered into

a settlement agreement with the SIU in the proceedings before the Tribunal, but did so without any acknowledgement that it had made fraudulent or wilful misrepresentations. Therefore, Aventino advanced a number of grounds of review, in essence, claiming that its exclusion was based upon irrelevant considerations and the Department was obliged to award the tenders to Aventino as the first ranked bidder.

[20] These contentions cannot prevail. The SIU placed evidence before the Tribunal of serious misrepresentations that Aventino had made to secure the Limpopo tender. In essence, Aventino had claimed in its tender to have assembled a professional team to carry out the works, when in truth, the members of that team had no knowledge that this was so. Aventino advanced various explanations for its conduct in an affidavit that served before the Tribunal. The ultimate settlement of the case before the Tribunal, on the basis that the contract was set aside and full restitution was ordered, does not however vindicate Aventino.

[21] The evidence against Aventino of misrepresentations to secure a tender is serious, and troubling. The terms of the order made by the Tribunal reflect that Aventino made misrepresentations that rendered the contract unlawful. That the Tribunal, by reason of Aventino's willingness to have an adverse order made against it, did not further determine Aventino's culpability does not mean that the Department could not decide that the evidence marshalled by the SIU sufficed to exclude Aventino. The misrepresentations made by Aventino to secure the Limpopo tender are clear. They are founded on evidence placed before the BAC, not least the terms of the order made by the Tribunal, acknowledged by Aventino, that make plain Aventino's unlawful actions to secure a tender. The BAC was entitled to give consideration to that evidence and conclude from it that Aventino's past conduct rendered it ineligible to bid for the tenders. Aventino advanced this aspect of its review on the premise that without a finding of guilt by the Tribunal, Aventino cannot be excluded from consideration. But that is not so. Once the evidence

implicated Aventino in making material misrepresentations to secure a tender, absent clear exculpatory evidence to the contrary, or vindication by way of an authoritative court decision, the BAC's recommendation was entirely reasonable.

[22] Aventino can fare no better in its reliance upon the listings argument. The BAC did not rely upon Aventino's listing by the Treasury, but rather that there were well-founded efforts to secure that listing. These arose from the serious malfeasance that implicated Aventino in the Limpopo tender. And, as it turned out, the Treasury did list Aventino. That the Treasury then removed Aventino from the list was not based on any acknowledgement that the listing was not substantively warranted, but rather that the process had been procedurally flawed. In sum, the BAC was justified to consider the prospective listing of Aventino as a relevant matter to consider and one that conduced to its exclusion.

[23] For these reasons Aventino's bids were lawfully excluded from consideration by the Department.

Conclusion

[24] It follows that, since the disqualification challenge must fail and there is no basis to review the decision of the Department to exclude Aventino's bids from consideration, the appeal fails. The costs must, in the usual way, follow this outcome.

[25] In the result:

The appeal is dismissed with costs, including the costs of two counsel, where so employed.

D N UNTERHALTER
JUDGE OF APPEAL

Appearances

For the appellant: A P J Els SC with A A Basson

Instructed by: Thomas Swanepoel Inc., Tzaneen
Symington De Kok Inc., Bloemfontein

For the first respondent: J A Motepe SC with T A Modisenyane

Instructed by: Malatji & Co Attorneys, Johannesburg
Webbers Attorneys, Bloemfontein

For the second respondent: J J Buys

Instructed by: York Attorneys, Bloemfontein

For the third respondent: R Bhima

Instructed by: Pagel Schulenburg Inc., Johannesburg
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