



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable

Case no: 846/2021

In the matter between:

**CITY OF EKURHULENI METROPOLITAN
MUNICIPALITY**

APPELLANT

and

TAKUBIZA TRADING & PROJECTS CC

FIRST RESPONDENT

ZUTARI (PTY) LTD

SECOND RESPONDENT

NTIYISO CONSULTING (PTY) LTD

THIRD RESPONDENT

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

Coram: PONNAN and MABINDLA-BOQWANA JJA and MEYER,
MATOJANE and PHATSHOANE AJJA

Heard: 26 May 2022

Delivered: 03 June 2022

Summary: Tender – award of after expiry of tender validity period – once tender validity period expired – tender process completed, albeit unsuccessfully.

ORDER

On appeal from: Gauteng Division of the High Court, Johannesburg (Victor J, sitting as court of first instance):

- (1) The appeal is dismissed with costs.
 - (2) The appellant's Johannesburg and Bloemfontein attorneys shall not be entitled to recover any of the costs associated with the preparation, perusal or copying of the record from the appellant.
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JUDGMENT

Ponnan JA (Mabindla-Boqwana JA and Meyer, Matojane and Phatshoane AJJA concurring)

[1] 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 total value of the tender amounted to some R117 million, being approximately R37 million in respect of area 1 and R79 million in respect of area 2.

[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, Ms Sanjuka Makhan, the ICT Acquisition Specialist: Supply Chain Management in the Finance Department of the Municipality, despatched the following email to all 24 bidders:

‘SUBJECT: REQUEST FOR EXTENSION OF VALIDITY: PS-F 07-2020
THE APPOINTMENT OF FINANCE METER MANAGEMENT CONSULTANTS TO
MANAGE THE CITY OF EKURHULENI’S WATER AND ELECTRICITY METER
READINGS AND CREDIT CONTROL PROCESSES, ON AN AS AND WHEN REQUIRED
BASIS FROM 01 JULY 2020 UNTIL 30 JUNE 2023.

Contract number **PS-F 07-2020** 120 day validity period will expire on 09 October 2020.

You are kindly requested to indicate whether you are accepting the extension of validity until **31 December 2020**.

Please confirm by completing the note below and return by e-mail to:

Sanjuka.Makhan@ekhuruleni.gov.za

Kindly note that the confirmation is required on or before 9 October 2020. . . .’

[3] According to the Municipality:

‘91 . . . The email was sent to [Aurecon South Africa Pty Ltd (Aurecon)] at the email address: benoni@aurecon.com. A short while later, Ms Makhan received a “no delivery notification” from Microsoft Outlook which included no delivery in respect of [Aurecon].

. . .

93 According to Ms Makhan, pursuant to receiving the notification from Microsoft Outlook, she discovered that some email addresses of bidders had been captured incorrectly on the system – it included [Aurecon’s] email address. She states that once the typographical errors were corrected she re-sent the email separately to affected bidders.

94 The letter was subsequently sent to [Aurecon] on 9 October 2020 at 15h32 to the correct email address: benoni@arecongroup.com. [Aurecon] emailed its confirmation on 12 October 2020 at 16h43 . . .

95 Ms Makhan states that there was not a deliberate delay to any specific bidder to jeopardize them in any way. The extension notices were sent to all the bidders by the close of business on 9 October before the validity period had ended. Ms Makhan concedes that it would have been preferable to have sent the letter to the bidders earlier.

96. According to Ms Makhan, all the bidders, bar one, agreed to the extension, with three other bidders also indicating their agreement after the deadline. Bidder 8 did not respond to the extension letter. None of the bidders were disqualified from being evaluated due to their late response to the letter, or in the case of bidder 8, due to its non-response. A bidder would only have been excluded if it had responded to the extension letter and explicitly rejected the extension of the validity period.¹

[4] On 19 November 2020, the Bid Evaluation Committee of the Municipality (the BEC) recommended to the Bid Adjudication Committee (the BAC) that the second respondent, Zutari (Pty) Ltd (previously known as Aurecon South Africa (Pty) Ltd (Aurecon)), and the third respondent, 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.

[5] Having informally learnt on 11 January 2021 that it was unsuccessful, the first respondent, Takubiza Trading & Projects CC (Takubiza), caused an urgent review

¹ This being the explanation advanced in the answering affidavit filed on behalf the Municipality.

application to be issued out of the Gauteng Division of the High Court, Johannesburg (the high court). The application was heard by Victor J on 22-23 April 2021, who, in a judgment delivered on 14 of June 2021, 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.

[6] Takubiza's primary contention, which found favour with the high court, is that the award to each of Aurecon and Ntiyiso had been made after the tender validity period had already lapsed. In support of that contention, Takubiza called in aid a line of high court authority commencing with the judgment of Southwood J in *Telkom SA v Merid Training (Pty) Ltd and others; Bihati Solutions (Pty) Ltd v Telkom SA and others (Telkom SA)*.² In that matter, Telkom published a request for proposals in order to appoint service providers. The request stipulated a closing date and a tender validity period of 120 days from the closing date, during which offers made by bidders would remain open for acceptance. By the time the tender validity period had expired, no decision had been taken by Telkom, and the tender validity period had not been extended. Despite this, Telkom continued to evaluate and shortlist the bidders. It was only after the tender validity period had expired that Telkom sent e-mails to the 15 shortlisted bidders requesting them to agree to an extension of the tender validity period. Some, including the six successful bidders, agreed to do so. The decision to accept the bids of the six respondents was taken only after the expiry of this further period. Before any contract was concluded with the six bidders, Telkom decided, on legal advice, to apply for the setting aside of its own decision.

² *Telkom SA Limited v Merid Training (Pty) Ltd and Others; Bihati Solutions (Pty) Ltd v Telkom SA Limited and others* [2011] ZAGPPHC 1.

[7] Southwood J took the view that:

‘The question to be decided is whether the procedure followed by the applicant and the six respondents after 12 April 2008 (when the validity period of the proposal expired) was in compliance with section 217 of the Constitution. In my view it was not. As soon as the validity period of the proposals had expired without the applicant awarding a tender the tender process was complete — albeit unsuccessfully — and the applicant was no longer free to negotiate with the respondents as if they were simply attempting to enter into a contract. The process was no longer transparent, equitable or competitive. All the tenderers were entitled to expect the applicant to apply its own procedure and either award or not award a tender within the validity period of the proposals. If it failed to award a tender within the validity period of the proposals it received it had to offer all interested parties a further opportunity to tender. Negotiations with some tenderers to extend the period of validity lacked transparency and was not equitable or competitive. In my view the first and fifth respondents’ reliance only on rules of contract is misplaced.’³

[8] *Telkom SA* was followed by Plasket J in *Joubert Galpin Searle Inc & others v Road Accident Fund & others (Searle)*.⁴ The facts in *Searle* were these: On 13 July 2012, the respondent, the Road Accident Fund (RAF), advertised a ‘request for proposals’ with the description ‘Panel of Attorneys for [RAF] to provide specialist litigation services’. The RAF invited suitably qualified legal firms from all provinces to be listed on a panel of attorneys to provide specialist litigation services in various specified categories. The closing date for the submission of bids was 20 August 2012 and the tender validity period was ‘90 days from the closing date’. It would appear that the process was complex and time-consuming and did not always run smoothly. The Bid Evaluation Committee (the BEC) finalised the evaluation of all of the bids on 21 September 2012. An evaluation report was finalised by the BEC on 2

³ Ibid para 14.

⁴ *Joubert Galpin Searle Inc and Others v Road Accident Fund and Others* [2014] ZAECPHC 19; [2014] 2 All SA 604 (ECP); 2014 (4) SA 148 (ECP).

November 2012 and tabled before a meeting of the Procurement Control Committee (the PCC) on 5 December 2012. On 5 August 2013, the RAF wrote to bidders to inform them that it had taken a decision to proceed with its proposal concerning the extension of the tender validity period. It asked bidders to ‘amend and renew’ their bids in accordance with this decision by 13h00 on 14 August 2013.

[9] Plasket J, who took the view that the judgment in *Telkom SA* was ‘essentially on all fours with [*Searle*],⁵ observed:

‘[68] As with this case, what had to be decided, according to Southwood J, was “the legal consequence of a failure by a public body to accept, within the stipulated validity period for the (tender) proposals, any of the proposals received.” In deciding this issue, Southwood J’s starting point was four inter-related propositions. They are that: (a) the decision to award a tender is an administrative action and the PAJA therefore applies; (b) generally speaking, once a contract has been entered into following the award of a tender, the law of contract applies; (c) but a contract entered into contrary to prescribed tender processes is invalid; and (d) consequently, “even if no contract is entered into, all steps taken in accordance with a process which does not comply with the prescribed tender process are also invalid.”

...

[70] I am in agreement with Southwood J for the reasons given by him. As a result, it is my view that, in this case, once the tender validity period had expired on or about 20 November 2012, the tender process had been completed, albeit unsuccessfully.’

[10] *Telkom SA* and *Searle* have been cited with approval in several subsequent judgments.⁶ However, the argument advanced on behalf of the Municipality is that

⁵ Ibid para 66.

⁶ See, inter alia, *SAAB Grintek Defence (Pty) Ltd v South African Police Services and Others* [2015] ZAGPPHC 1; 2015 JDR 0080 (GP); *Tactical Security Services CC v Ethekwini Municipality* 2017 JDR 1558 (KZD); *Secureco (Pty) Ltd v Ethekwini Municipality and Others* [2016] ZAKZDHC 14 and *Ethekwini Municipality v Mantengu Investments CC and Others* [2020] ZAKZDHC 11.

this weighty body of authority is distinguishable because, so the argument goes, here, unlike in those matters, the Municipality took steps (in the form of the notification from Ms Makan) before the expiration of the validity period. As I shall endeavour to show, there are several reasons why any distinction, as may exist between those matters and the present, is a distinction without a difference.

[11] First, the Municipality has quite inexplicably advanced no explanation as to why the notification was despatched on the very last day of the tender validity period. That aside, second, a real difficulty for the Municipality is that the notification from Ms Makan, required ‘confirmation’, for good reason, from all of the bidders ‘on or before 9 October 2020’, which, did not happen. Conceptually, there can be no difference between the situation encountered here, where the confirmation sought is not received by the organ of state within the stipulated period, and that dealt with in *Telkom SA* and *Searle* (and the cases that followed them), where the notification is only despatched by the organ of state after the period has expired. Surely, both stand on the same footing: and in both, so it seems to me, the same consequence must inexorably follow. It is difficult to appreciate why an organ of state would be better placed, merely because it has despatched a request to which it has not received a favourable response before the expiration of the validity period, compared to one that only takes such a step after the expiry of that period. Here, the despatch of the notification plainly did not serve to achieve its intended purpose and, in truth, was so late as to be more illusory than real.

[12] Third, to borrow once again from Plasket J (*Searle* para 74):

‘. . . By the time the tender validity period has expired, there is nothing to extend because, as Southwood J said in *Telkom*, the tender process has been concluded, albeit unsuccessfully. The

result, in this case, is that the RAF had no power to award the tender once the bid validity period had expired and it had no power to extend the period as it purported to do. In the language of s 6(2)(a)(i) of the PAJA, the decision-maker – the board, in this instance – “was not authorised” to take the decision. Put in slightly different terms, there were no valid bids to accept, so the RAF had no power to accept the expired bids.’

In *Tactical Security Services CC v Ethekekwini Municipality and Others*,⁷ which considered the question whether the validity of bids can be extended by agreement after they had expired, Ploos van Amstel J pointed out that a tender is defined in the Preferential Procurement Regulations as ‘a written offer in the prescribed or stipulated form in response to an invitation by an organ of state for the provision of services, works or goods, through price quotations, advertised competitive tendering processes or proposals’.⁸ He accordingly held that without an extension, the tender, like any other offer, falls away, if it is not accepted in time. Accordingly, that come the 10th of October, there was no longer a valid tender from Aurecon for the Municipality to accept.

[13] Fourth, as was held by the high court, the validity period is 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 is required. Unless there is a timeous request and favourable response from all the tenderers prior to the expiry of the tender, the tender comes to an end. The view taken by the high court in this matter accords with the judgment of the full court (Daffue JP and Mhlambi J) in *Defensor Electronic Security (Pty) Ltd v Centlec SOC Ltd*, where the following was said:

⁷ *Tactical Security Services CC v Ethekekwini Municipality* 2017 JDR 1558 (KZD).

⁸ *Ibid* para 10.

‘ . . . It is the applicant’s case that the first respondent awarded the tender to the second respondent after expiry of the tender validity period and without a prior request for extension and approval of all relevant bidders. The tender validity period expired on 2 March 2021. Although the first respondent relied on letters addressed to applicant and second respondent dated 1 March 2021, the day before expiry of the tender, there is no proof that the request for extension was communicated to the bidders prior to the expiry and the bidders consented to the extension of the period prior to expiry thereof. In fact, applicant has proved that the request for extension was sent by e-mail to it as late as 23 March 2021. It is the applicant’s case that once the tender validity period has expired, it was not possible to resuscitate it. A new bid process had to be initiated in order to ensure that all interested parties were provided a further opportunity to tender. I am in respectful agreement with the judgment of Southwood J in *Telkom SA Ltd v Merid Training (Pty) Ltd and others; Bihiti Solutions (Pty) Ltd v Telkom SA and others* relied upon by Mr Cilliers. I therefore also agree with the applicant’s counsel that in the absence of the required proof that there was after the expiry date no longer any valid tender process. The tender award has to be set aside for this reason alone.’⁹

[14] Fifth, the signification of confirmation by Aurecon on the 12th could not somehow have had the effect of turning the clock back to the 9th and breathing life into the process with retrospective effect to that date. What the argument advanced on behalf of the Municipality boils down to is that whereas, as a fact, there was confirmation only on the 12th, it fell to be treated as if, to all intents and purposes, that had occurred on the 9th. What then of the period that intervened between the 9th and 12th (namely the 10th and 11th); what would the status of the tender process have been in that period? If not completed, then what? If completed, albeit unsuccessfully, then how could it possibly be resuscitated? What if, instead of the 12th, the confirmation from Aurecon had only come much later, say after several more days,

⁹ *Defensor Electronic Security (Pty) Ltd v Centlec SOC Ltd and another* [2021] ZAFSHC 315 para 8.

weeks or months? What would the status of the tender have been in that extended period between the 9th and confirmation?

[15] It goes without saying that a tender process cannot be open-ended. Certainty has to be the touchstone.¹⁰ I can thus conceive of no reason why the principle so firmly established in *Telkom SA* and *Searle* does not find application here. It follows that the appeal must fail.

[16] It remains to comment on the lamentable state of the record. It consists of 12 main volumes consisting of 2244 pages and one supplementary volume of 111 pages. It is replete with all manner of irrelevant material. Much of it is barely legible, with inadequate line numbering and no proper cross-referencing to speak of. Bulk was added by pasting photostatic copies over other pages, resulting often enough in pages sticking together and having 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 will not fail.

[17] Such was the state of the record, that the registrar would have been entitled to have rejected it. An order striking the matter from the roll may also not have been unwarranted. However, prior to the hearing of the appeal, the appellant was invited to file supplementary heads of argument to address the failure to properly comply with the rules and what consequence, if any, should follow. In those heads, it was stated somewhat euphemistically that ‘there were shortcomings in the preparation of

¹⁰ *Tahilram v Trustees, Lukamber Trust and Another* [2021] ZASCA 173; 2022 (2) SA 436 (SCA) para 24.

the record'. The heads then proceed to identify some of the shortcomings, but not all of them.

[18] Given the unnecessary volume and the state of the record as a whole some sanction must follow. This Court has previously expressed its displeasure at records that include unnecessary documents of the kind encountered here and has, where appropriate, ordered costs to be paid by attorneys *de bonis propriis* or disallowed the costs of perusing the record.¹¹

[19] Despite having filed a record in excess of 2300 pages, we were told in the practice note filed by Counsel for the Municipality that only some 350 pages were relevant. From the bar, Counsel accepted that even that was an over-estimation. Indeed, from what is set out earlier in this judgment, it is patent that the facts fall within a very narrow compass. On the point held to be decisive of the appeal, the record ought not to have exceeded one volume. 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.

[20] In the result:

- (1) The appeal is dismissed with costs.
- (2) The appellant's Johannesburg and Bloemfontein attorneys shall not be entitled to recover any of the costs associated with the preparation, perusal or copying of the record from the appellant.

¹¹ *Municipal Manager: Qaukeni and Others v F V General Trading CC* [2009] ZASCA 66; 2010 (1) SA 356 (SCA); [2009] 4 All SA 231 (SCA) para 31 and the cases there referred to.

V M Ponnai
Judge of Appeal

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