IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE – PORT ELIZABETH)

Case No.: 1661/2012
Date heard: 15 November 2012
Date delivered: 15 January 2013

In the matter between:

NELSON MANDELA BAY METROPOLITAN MUNICIPALITY	Applicant
and	
MTN SERVICE PROVIDER (PTY) LTD	First Respondent
VODACOM SERVICE PROVIDER COMPANY (PTY) LTD	Second Respondent
CELL C SERVICE PROVIDER COMPANY (PTY) LTD	Third Respondent
CIGI CELL (PTY) LTD	Fourth Respondent
ALGOA OFFICE AUTOMATION (PTY) LTD t/a NASHUA EASTERN CAPE	Fifth Respondent
TELKOM SA LTD	Sixth Respondent
DIMENSION DATA (PTY) LTD t/a INTERNET SOLUTIONS	Seventh Respondent

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J U D G M E N T

DAMBUZA, J:

[1] The applicant has brought an application in which it seeks to set aside its own award of a contract to the first respondent. The application is opposed by the first respondent who contends, amongst others, that there is a dispute of fact on the papers regarding what took place during the process which forms the basis of the applicant's application. The applicant has now brought an application that the alleged dispute of fact be referred for oral evidence. The matter is therefore before me for determination of whether there is a dispute of fact as alleged by the first respondent and whether the issue has to be referred for oral evidence.

[2] The applicant is the Nelson Mandela Bay Metropolitan Municipality. The seven respondents are MTN Service Provider (Pty) Ltd, the respondent to whom the contract in question was awarded; the second respondent is Vodacom Service Provider Company (Pty) Ltd; the third respondent is Cell C Service Provider Company (Pty) Ltd; the fourth respondent is CIGI Cell (Pty) Ltd; the fifth respondent is Algoa Office Automation (Pty) Ltd a company which trades as Nashua Eastern Cape; the sixth respondent is Telkom South Africa Limited; and the seventh respondent is Dimension Data (Pty) Ltd a company which trades as Internet Solutions. All the respondents submitted tenders to the applicant for provision of the services to which the tender relates.

[3] For a proper perspective on the issue before me a summary of the background events leading to the application is necessary. During 2011 the applicant invited tenders for provision of "mobile voice" and "data" services for

a contract period of 36 months. The first to seventh respondents submitted tenders to the applicant in response to the invitation. At some stage thereafter the tenders submitted by the second to the sixth respondents were declared to be non-responsive for failure to comply with certain bid requirements. Only the first and the seventh respondents' tenders were regarded as responsive. The contract was thereafter awarded to the first respondent in a letter dated 10 February 2012 addressed by the applicant to the first respondent.

[4] In the main application the applicant seeks to have that award reviewed and set aside on the basis that the process followed in awarding the contract to the first respondent, was fundamentally *"flawed, unlawful and therefore invalid"*. In essence the applicant contends that the disqualification of the tenders submitted by the second to sixth respondents as non-responsive was irregular in that there is no provision in its Supply Chain Management Policy (SCMP) for the pre-evaluation process in terms of which those tenders were declared non-responsive. According to the applicant all tenders received by it in response to the invitation to tender had to be placed before the bid evaluation committee, irrespective of whether they were responsive or not. In this case, so contends the applicant, a pre-evaluation committee which is not provided for in the SCMP, set about the function of irregularly *"evaluating"* the tenders and declared non-responsive the tenders submitted by the second to sixth respondents as already stated.

[5] According to the applicant the SCMP only provides for a "*specification committee",* a *"bid evaluation committee"* and a *"bid adjudication committee"*. The correct procedure which should have been followed in processing the tender was, firstly, for the bid specification committee to compile specifications for procurement of the necessary services. This would be done prior to the invitation to tender being issued by the applicant. After publication of the tender and once the bids were received all competing bids would be evaluated by the bid evaluation committee which would then submit a report to the bid adjudication committee. The bid adjudication committee would consider the report received from the evaluation committee and would then make a final award or a recommendation to the accounting officer to make a final award.

[6] In opposing the application, the first respondent contends, firstly, that because the application is not brought in terms of Rule 53 of the Rules of practice in this Court, it is fatally defective. A further contention is that insofar as the application is brought in terms of the Promotion of Access to Justice Act, Act 3 of 2000 (PAJA) it was brought out of time. For this reason the application falls to be dismissed. Even further, the first respondent contends that because of an allegation by the applicant, in the founding affidavit, that it did not make the decision to award the contract to the first respondent there is no valid basis for bringing the application in terms of PAJA. The first respondent also contends that the application must fail as the applicant has not shown any prejudice resulting from the *"irregular process";* such prejudice

being a requirement for the applicant to successfully set aside its own decision.

[7] More relevant to the issue before me is the first respondent's contention, in its answering papers, that pre-evaluation of tenders is a mechanical process of essentially *"ticking the boxes"* in accordance with whether aspects of the tender specifications, such as furnishing of specified documents and completion of documents or sections thereof, have been completed. According to the first respondent this process does not entail substantive decision making or exercise of powers of judgment. It is therefore not an evaluation of the bids received. To this extent, the committees which are enjoined to consider the tenders were advised of both the responsive and non responsive tenders, so contends the first respondent. As I have stated the first respondent's case is that the dispute of fact arises because the relevant parties are not in agreement as to what took place during the pre-evaluation stage, and what the effect of the tender is.

[8] The first respondent contends that a further issue which requires determination by oral evidence is whether paragraph 2.5 of the Court Order granted by Grogan AJ in 2010 was complied with. In this regard Grogan AJ considered a challenge to a previous award of a tender for the same services, by the applicant to the first respondent. The second respondent in these proceedings and Mfuleni Investments CC (who had also submitted a bid in the previous tender) challenged the previous award. Grogan AJ granted an order setting aside the award and remitting the tender to the applicant for

reconsideration, subject to certain conditions, which included re-advertising thereof, appointment by the accounting officer and *"a neutral and independent observer agreed to by the bidders to attend all committee meetings concerned with (the) tender".* The award which is the subject of these proceedings, was a culmination of reconsideration of the previous tender as per order of Grogan AJ.

[9] I may add that although the second respondent is not opposing the application it has filed an affidavit, deposed to by its *"employee"* Wanda Matandela. In that affidavit Matandela makes representations which he, according to her, might assist the Court in *"arriving at a correct decision on the matter".* The affidavit contains submissions on whether the provisions of PAJA are applicable to the application and whether the application complies with the provisions of Rule 53. The second respondent also supports the applicant's case that its (second respondent's) tender was disqualified at the pre-evaluation stages. It also supports the contention by the applicant that the grounds on which its tender was in fact disqualified were wrong and takes issue with the criteria used in allocating points to the tenders. According to the second respondent the applicant allocated points using incorrect criteria.

[10] *Mr Nyameko Gqamana,* an advocate and member of the Eastern Cape Society of Advocates, Port Elizabeth, was appointed as an independent obsever in compliance with the order of Grogan AJ. Although the second respondent is not opposing the application, it raises the issue that its agreement was not sought prior to *Mr Gqamana's* appointment. It also points out that, contrary to the order granted by Grogan AJ, it is apparent from *Mr*

Gqamana's report that he did not attend all meetings concerned with this tender. In the relevant portion of *Mr Gqamana's* report the following is stated:

> "In a Bid Adjudication Committee meeting, the BEC (Bid Evaluation Committee) report was presented and it was left to the Bid Adjudication Committee to debate and consider same. I was not present when the discussion on this contract was debated by the BAC. Furthermore, I am not privy of their recommendation and accordingly cannot comment on it."(emphasis added).

[11] The second respondent's affidavit was filed out of time. However, it appears from the papers that both the applicant and the respondent have no objection to its admission. The first respondent refers to the issue of *Mr Gqamana's* absence at the adjudication meeting, as raised in the second respondent's affidavit and contends that as a result of the absence of *Mr Gqamana* from that meeting there is no independent report on whether the bid adjudication committee considered the non-responsive bids. Although no application has been specifically brought for condonation of the late filing of this affidavit, a detailed explanation is made therein of the facts which led to the late filing thereof and I am satisfied therefrom that the affidavit should be admitted.

[12] Sub-rule 6(5)(g) of the Rules of Practice in this court empowers the court, where an application cannot be decided on affidavit, to make such an order as to it seems meet in order to ensure a just and expeditious decision. However, the dispute of fact must be material to the determination of the

issue(s) between the parties. The following appears in Erasmus, Superior Courts Practice:[1]

> "The Supreme Court of Appeal has cautioned that a court should be astute to prevent an abuse of its process in such a situation by an unscrupulous litigant intent only on delay or a litigant intent on a fishing expedition to ascertain whether there might be a defence without there being any credible reason to believe that there is one.
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> In general terms it can be said that oral evidence in terms of the subrule should be allowed if there are reasonable grounds for doubting the correctness of the allegations made by the applicant. In reaching a conclusion in this regard, facts peculiarly within the knowledge of the applicant which cannot for that reason be directly contradicted or refuted by the other party are to be carefully scrutinised

[13] In this matter, my view is that the more relevant inquiry is whether a court can determine, from the papers, what the results of the pre-evaluation process meant in relation the subsequent processing of the bids; ie what the relevance of the declaration of the bids as either responsive and non-responsive meant to the processing of the tender.

[14] In challenging its own award, the applicant relies on a report which sets out how the evaluation committee regarded the results of the pre-evaluation meeting. It also points out that the constitution (members) of the pre-evaluation meeting was different from that of the duly appointed members of the bid evaluation committee and that the members who constituted the pre-evaluation committee were not appointed by an accounting officer as required by section 262 (2) of the SCMP. The response by the first respondent is that it is not clear from the papers how the evaluation committee dealt with the

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bids subsequent to pre-evaluation thereof. It also contends that the people who constituted the pre-evaluation "meeting" had no power to "judge" the tenders and that the difference in the constitution of the pre-evaluation meeting and the evaluation committee is immaterial as two of the members of the evaluation committee knew what had happened at the pre-evaluation stage.

[15] In my view this is an issue which is easily determinable on the papers. The following is recorded in the report of the bid evaluation committee:

> "**7.1 RESPONSIVE TENDERS**
> Internet Solution was responsive only to Data services and MTN Business Solutions was responsive for both Data and Mobile, both were invited for technical evaluation."

> **7.2 NON RESPONSIVE TENDERS**
> Tenders were pre-evaluated as per specification, Cell C, Cigicell (PTY) LTD, Nashua, Telkom SA LTD (Data), Telkom SA LTD (Voice services) and Vodacom were non-responsive in the following key areas of the specification and therefore were not subjected to further evaluation. Furthermore Nashua placed functionality documents in a pricing envelope, the pre-evaluation team agreed in the meeting to open the pricing envelope to double check if the functionality envelope is not there and we found the document inside the wrong envelope.

	Voice and Data	**COMMENTS**
1.	Cell C	NMBM Billing in areas – 90 days
2.	Cigicell (PTY) LTD	No ICASA registration
3.	Nashua	No ICASA registration Annexure "F" – Tippex was used Annexure "B" – Not commissioned

		Pricing not separate as per Tender requirements.
4.	Telkom SA LTD (Data)	Annexure “B” – Not commissioned Declaration – Not commissioned
5.	Telkom SA LTD (Voice Services)	Annexure “B” – Not commissioned Declaration – Not commissioned No ICASA Registration
6.	Vodacom	Not registered on NMBM database No partnership agreement (Data) Copy of Tax Clearance Certificate submitted (Data)”

[16] The applicant makes the following further points:

1. That the bids of the first and second respondents were each considered and assessed by a different group of members of the pre-evaluation committee, an approach which, according to the applicant, is inherently inconsistent as the different groups *“may reach different conclusions on the same issues relevant to procurement specifications”*.

2. That the basis on which the second respondent’s bid was declared to be non-responsive, i.e. failure to file proof of registration on the applicant’s database, certificates of Incorporation and SARS clearance certificate, was incorrect and that discrepancies referred to by the pre-evaluation committee did not constitute material deviation from tender specification. It further contends that whilst the second respondent’s failure to file an original tax clearance certificate in respect of the Data services tender could be a proper

reason for disqualification, there was no reason why its tender for mobile voice services tender was declared non-responsive as the required original tax clearance certificate had been filed in that tender.

[17] Both *Mr Bassillian* and *Mr Solomon* who appeared on behalf of the second respondent referred to the report of *Mr Gqamana* in which is recorded that the pre-evaluation meeting had declared responsive the second respondent's bid for mobile voice data, however the report of the evaluation committee records that both tenders filed by the second respondent were found to be unresponsive. The submission was that one can only conclude from this that something must have happened subsequent to the pre-evaluation process to change the status of the second respondent's bid for mobile voice services as declared during the pre-evaluation process. The submission on behalf of the first respondent was that this could mean that the bids were evaluated by the evaluation committee and whether that is so can only be ascertain through oral evidence.

[18] I accept that what is recorded in the schedules completed during the evaluation process supports the allegation made in *Mr Gqamana's* report and is in conflict with what is recorded in the report of the evaluation committee. However, in my view the dispute referred to is not material to the resolution of the issues between the applicant and the first respondent. Even if I were to refer this discrepancy for resolution through oral evidence that would lead to resolution of the issues between the applicant and the first respondent. There

is no evidence that a similar discrepancy exists in the records that relate to the first respondent.

[19] The issue between the applicant and the first respondent is whether the pre-evaluation process was an irregular and unlawful step that rendered invalid the award made in favour of the first respondent. I am satisfied that allegations and counter-allegations made in the affidavits filed of record, together with the supporting documents are of such clarity that this issue can be determined on the papers and that there is no reason to refer the issue of what took place during that process for oral evidence.

[20] I also can find no reason why the costs of this application should not follow the result.

[21] Consequently the order I grant is that:

> The application that dispute of fact(s) regarding the proceedings of the pre-evaluation meeting, the evaluation committee meeting and the adjudication committee meeting be referred for oral evidence is dismissed with costs.

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N. DAMBUZA
JUDGE OF THE HIGH COURT

Appearances:

For the applicant:

Instructed by
Le Roux Attorneys, Port Elizabeth

For the respondents:

For first respondent: Adv M Basslian (SC)
Instructed by
Greyvensteins Attorneys, Port Elizabeth

For second respondent: