REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

(1) REPORTABLE: No
(2) OF INTEREST TO OTHER JUDGES: No
(3) REVISED.

1 JULY 2016
DATE SIGNATURE

Case No.: A5023/2015

In the matter between:

Kenako Consulting (Pty) Ltd **Appellant**

and

City of Johannesburg Property Company (SOC) Ltd **First Respondent**

City of Johannesburg Property Metropolitan Municipality **Second Respondent**

City Manager, City of Johannesburg **Third Respondent**

The Zoo Lake Bowling Club **Fourth Respondent**

Coram: VALLY J, MOSHIDI J, MUDAU J,

Heard: 11 MAY 2016

Delivered 1 JULY 2016

Summary: Administrative law- PAJA- Review-Appeal-Setting aside of a tender.

ORDER

The entire order of the court a quo is set aside and replaced with the following. The application is dismissed. There shall be no order as to costs.

JUDGMENT

Vally J (Moshidi J and Mudau J concurring):

Vally J

Introduction

[1] Aggrieved at a decision of a single bench of this court, Wright J presiding, the appellant, with the leave of that court, seeks the intervention of this court to overturn the said decision.

[2] The appeal was not opposed by any of the respondents. It is, nevertheless, necessary for this court to satisfy itself that there is merit in the appeal before it can grant the order sought by the appellant.

Background

[3] The first respondent, City of Johannesburg Property Company (SOC) Ltd, is a company established by the second respondent to manage and develop its properties. The second respondent, City of Johannesburg Property Metropolitan Municipality (the City) is established in terms of the *Local Government: Municipal Systems Act 32 of 2000*. It is an organ of state. It owns an immovable property which is located in the north of the City and which was bequeathed to it in 1904. This property is popularly known as Zoo Lake by City residents. It consists of a large public space that is open to, and well utilised by, residents and visitors to the City of Johannesburg. Situated on it are a number of bowling lawns

used by persons who play the sport of bowling. Those players belong to the fourth respondent, the Zoo Lake Bowling Club (the Club). Members of the Club have played bowls on this property since 1904. Also situated on the property is a clubhouse where members of the public are able to socialise. The clubhouse is adjacent to the bowling lawns. The clubhouse and the bowling lawns are fenced-off, thus forming a separate self-standing property within the larger property of the Zoo Lake. Henceforth in this judgment the self-standing property will be referred to as "the property".

[4] As from 1 August 2000 the Club leased the property from the City. The lease was for a period of nine years and eleven months. The Club paid a paltry sum of R499 per annum for the use of the property. The lease agreement contained a clause allowing for either party to terminate it by giving three months' notice. Neither party terminated the agreement prematurely. It terminated by effluxion of time on 30 June 2009. Even though the agreement had terminated the City and the Club did nothing. They continued as if nothing had changed until 11 November 2010, when the City issued the Club with a written notice to vacate the property within three months (the notice).

[5] The Club having received the notice took no action until 24 January 2011 when it wrote a letter to the City challenging the legality of the notice. It attempted to have the City accept that the notice constituted administrative action. The City did not agree with the Club. Nevertheless,

the Club succeeded in remaining on the property for a long time after the period referred to in the notice had expired. During that period of extended stay the Club continued to pay the paltry sum of R499 per annum for its occupation.

[6] One and a half years after the notice was issued, the first three respondents considered and embarked on a public tender process in order to acquire new leases in respect of five of the City's properties, which included the present property. To that end, a tender invitation was published in various major newspapers on 20 July 2012. The tender closed on 20 August 2012, and nine bids were received in respect of the property.

[7] The City established a Bid Specification Committee (BSC) to identify the minimum requirements that had to be met for the bid to be successful and to establish criteria for the assessment of bids. In terms of the criteria established all potential bidders were informed that in order for their bid to be successful they would have to show, *inter alia*, that the manner in which they would utilise the property would "*serve the community's social needs in terms of providing valuable recreation and sports opportunities to the communities.*"

[8] The bidding process was divided into two stages – during the first stage all bids were to be assessed for their functionality only. Only bidders who acquired eighty points or more were to be considered during the second

stage. All others were immediately rejected. During the second stage bids were to be assessed according to their price and their contribution to Black Economic Empowerment (BEE).

[9] Once the bids were received, they were filtered by a Bid Receipt Committee to check whether they complied with basic aspects such as providing all the documentation that was necessary in order to evaluate the respective bid. Thereafter, bids were submitted to a Bid Evaluation Committee (BEC) for evaluation. After evaluating the bids, the BEC was to make a recommendation to the City as to which bid best fit the City's requirements.

[10] The Club participated in the bidding process, as did the appellant. Its bid like that of all the other competing bids, including the appellant's, was assessed by the BEC. The Club failed to acquire the minimum of eighty points during the first stage of the assessment. Its bid was accordingly rejected. The reasons for rejecting the Club's bid were that:

[10.1] its bid was based on a partnership with another company operating under the name and style of Ooba Poonage (Pty) Ltd) (Ooba). Ooba was a company that was essentially owned by the wife of the deponent to the founding affidavit. He is the secretary of the Club. Ooba entered into a contract with the Club allowing it to sell food and beverages at the Clubhouse. As a result of this Ooba was effectively running a business at the Clubhouse. It was a lucrative business. According to the evaluation of the BEC the Club's bid was essentially

focussed on continuing with this business and not one of "*serv(ing) the community's social needs in terms of providing valuable recreation and sports opportunities to the communities*"; and,

[10.2] it was only concerned with generating a profit for Ooba and not really concerned with developing any sports opportunities, including opportunities for members of the public to engage in the sport of bowls.

[11] The appellant's bid, on the other hand, was ultimately deemed to be the one that best fit the requirements and needs of the City, thus resulting in it being successful. It was found to have provided a sound basis for holding that once awarded the lease it would utilise the property in a manner that would advance the social and sporting needs of the community. Having decided to award the lease to the appellant the City concluded an agreement (the lease agreement) with it.

[12] The Club was aggrieved by decision of the City. It brought an application to have the decision reviewed and set aside (the review application). Apart from that relief it also sought from the court an order declaring the lease agreement to be *pro non scripto* and of no legal force. It asked further that the court declare it to be the successful bidder and order the City to conclude a lease agreement with it.

[13] The application was brought in August 2013. By launching the application the Club was able to ensure that the appellant and the City

were unable to take immediate advantage of the agreement they had concluded. The matter finally came before Wright J on 24 August 2014. In the meantime the Club continued to occupy the property and pay R499 per annum for that privilege. This continued until sometime just before 24 August 2014, when the court issued an order evicting it from the property. In essence, the Club had secured occupation of the property for a period of almost three years after it had received the notice to vacate. The Club did not appeal the eviction order granted against it, but persisted with the review application.

The grounds upon which the review application was brought

[14] The application for review was very wide in scope. The Club raised every conceivable point it could think of. It claimed that a public participation process was not undertaken prior to the decision being made and that this was required in terms of s 80(2) of the *Municipal Systems Act, 32 of 2000*, thus rendering the decision unlawful; that the decision was not rationally connected to the information before the BEC; that the decision was influenced by irrelevant considerations; that the BEC failed to apply its mind to the facts before it; and the BEC was biased against the Club; and finally, the Club claimed that because it was not provided with the reasons for the impugned decision within 90 days of its request, the decision must be deemed to have been taken without good reason, as envisaged in s 5(3) of the *Promotion of Administrative Justice Act, 3 of 2000* (PAJA).

The decision of the court *a quo*

[15] The court *a quo* found that the rejection of the Club's bid because it had failed to show that the primary function for which the property would be put to use was not really for the benefit of the community was wrong. It found that the bid by the Club was "*really one of partnership or joint venture between the Club and Ooba*"[1], and though the BEC did not see it as such, there is, nevertheless, no basis to find that the BEC's decision was either irrational or unreasonable for failing to do so. The court *a quo* observed:

> "In my view… the decision to exclude the Club cannot be said to be irrational when one considers (the City's) evidence and the Club's tender documentation in isolation from other reasoning behind the decision to exclude the Club."[2]

[16] But, that was not the end of the matter. The court *a quo* continued and held that because the BEC found there to be "*no social nature*" to the planned usage of the property by the Club, the BEC committed a reviewable irregularity. It reasoned as follows:

> "In my view the irrationality in the reasoning that "*social nature is not there*" skews the decision to the extent that the decision to exclude the Club is neither reasonable nor rational within the meaning of these words in administrative law. An irrational decision can hardly be said to be reasonable. Under Section 6(2)(f)(ii)(cc) of PAJA a court may review a decision where it is not rationally connected to the information before the administrator. In my view the decision to exclude the Club is reviewable." [3]

[17] The court *a quo* then went on to evaluate the BEC's decision to award the tender to the appellant and found this to be irrational. Its reasoning is articulated in the following paragraphs:

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[1] Judgment at [22]
[2] Judgment at [24]
[3] Judgment at [28]

"(The appellant), as part of its bid, stated that it would "*Create a community facility supported by the Psychological Society of South Africa for social enablement, cohesion and support.*" This vague statement has led to the award of the tender to (the appellant) for the purpose, amongst others, of establishing and running a drug rehabilitation centre on the property. In my view a drug rehabilitation centre falls outside the bid specifications which limit the proposed use of the property to "*valuable recreations and sports opportunities to the communities*".

(The deponent to the appellant's answering affidavit) denied that (the appellant) had tendered on the basis that it would run an in-house medical facility to house individuals afflicted by drug abuse on a 24-hour basis. He did not deny Kenako's (the appellant) proposed "*community facility*" is a drug rehabilitation centre." [4]

Do the court *a quo*'s findings constitute a misdirection?

[18] The court *a quo*'s finding that the BEC erred in not recognising that the Club's bid was social in nature is not supported by the facts. There can be no doubt that the Club's bid focussed almost exclusively on the intention of the Club to continue to sell food and other beverages to members of the public. Such a use of the property is no different from the multitude of private businesses which sell food and drink. That this activity falls within the broad understanding of the word "socialising" does not mean that the Club was intending to use the property in the manner set out in the bid specification document by the BSC. There was sufficient evidence before the BEC to find that the Club, through Ooba, was driven purely by commercial considerations, with the core of its business being the sale of food and alcoholic beverages, and that when necessary the provision of entertainment services to attract patrons. The Club was merely intending to use the property to run a private business. The BSC intended it to be used by people who came to

[4] Judgment at [30] – [31]

socialise and play sport but who may not want to consume any food or drink. The Club was merely interested in securing a lease on favourable terms so that it could advance its commercial interests. Judged by the contents of its bid it had not demonstrated any interest in "*serv(ing) the community's social needs*" whether "*in terms of providing valuable recreation and sports opportunities to the communities*" or otherwise. The finding by the BEC to this effect was correct. In any event, it could under no circumstances be said that the finding was not based on the evidence before the BEC, for it certainly was. Further, it could not be said that the finding was either irrational[5] or one that "*no reasonable decision-maker could reach.*"[6] For these reasons, I find that the finding of the court *a quo* that the BEC committed a reviewable irregularity was wrong.

[19] The same applies to the second finding of the court *a quo*. In this case the finding is more problematic. Here the court *a quo* decided to make a finding rejecting the *ipse dixit* of the deponent to the appellant's answering affidavit without any basis for so doing. The deponent to the appellant's answering affidavit averred that the appellant's bid contained no claim that the appellant intended to use the property for a drug rehabilitation centre. The court *a quo* acknowledged this averment but then went on to say that the deponent "*did not deny tha*t *Kenako's* (the appellant) *proposed community facility is a drug rehabilitation centre*"

[5] See: *Potgieter & Another v Howie & Others NNO* 2014 (3) SA 336 (GP) at [20]; Pharmaceutical *Manufacturers Association of SA & Another: In re: Ex parte President of the Republic of South Africa & Others* 2000 (2) SA 647 (CC) at [85] - [86].
[6] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 (4) SA 490 (CC) at [44].

and on this reasoning found that the appellant's bid indicated that it was intent on hosting a drug rehabilitation centre on the property. Such a finding is in clear contradiction to the unambiguous *ipse dixit* of the deponent to the appellant's answering affidavit. There is just no basis for such a finding. There is no evidential support for it. The deponent denied that the appellant intended to host a drug rehabilitation centre on the property. There is no need for him to further deny that the community facility is a drug rehabilitation centre. On any reading of his averment the community facility will not be a drug rehabilitation centre. And even if it was, there is no evidence that this is contrary to the bid specification that the lessee should use the property to "*serve the community's social needs in terms of providing valuable recreation and sports opportunities to the communities.*" The appellant's bid was multi-faceted. It is for that reason that the BEC found it to best fit the bid specifications of the BSC. It was not based on the expectation that the appellant was to provide a drug rehabilitation facility on the property. The appellant had no such intention. Hence there could not have been any expectation on the part of the BEC to that effect. The decision to award the tender was based on other factors, and its decision, in my view, was certainly one that a person acting rationally or even reasonably would arrive at.

[20] As both these errors by the court *a quo* resulted in it making an order that otherwise would not be made, they constitute a misdirection-one that can only be remedied by this court. It resulted in the granting of

relief, when none should have been granted. The granting of the order has prejudiced the appellant who is now entitled to have it overturned.

[21] Finally, it bears mentioning that as the Club chose not to oppose the appeal there is no need to discuss the other grounds for review it raised in the court *a quo.*

Order

[22] The following order is made:

1 The appeal succeeds.

2 The entire order of the court *a quo* is set aside and replaced with the following:

2.1 The application is dismissed.

2.2 There shall be no order as to costs.

For the appellant: Adv. M Smit

Instructed by: Siva Chetty

No appearances for any of the Respondents.