



SUPREME COURT OF APPEAL SOUTH AFRICA

MEDIA SUMMARY - JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

FROM The Registrar, Supreme Court of Appeal

DATE 29 March 2018

STATUS Immediate

Overstrand Municipality v Water and Sanitation Services South Africa (Pty) Ltd (143/2017) [2018] ZASCA 50 (29 March 2018)

Please note that the media summary is for the benefit of the media and does not form part of the judgment of the Supreme Court of Appeal.

Today, the Supreme Court of Appeal (SCA) dismissed an appeal brought by the appellant, Overstrand Municipality, against a judgment of the Western Cape Division of the High Court, Cape Town (the court below). The issue at the heart of this appeal was whether the award of a tender by the appellant is reviewable under s 6(2)(b) of the Promotion of Administrative Justice Act 3 of 2000 (PAJA). The question is whether a mandatory and material procedure or condition prescribed by an empowering provision was not complied with in the awarding of that tender.

In 2014 the Overstrand Municipality (the Municipality), which is located along the Atlantic coast between Cape Town and Cape Agulhas including, inter alia, the towns of Hermanus, Gansbaai and Kleinmond, determined to outsource the operation and maintenance of the Municipality's bulk water and sewerage infrastructure to the private sector. The Request for Proposal (RFP) issued in December 2014 contained provisions regarding the staffing requirements for operation of each of the water works located within the Municipality's jurisdiction. Bidders were required to bid on the basis that the existing municipal staff complement would transfer with the contract, but that any shortfall between the existing staff complement and regulatory requirements for the staffing of the water works must be provided for in the bid. A document provided to bidders during the tender process indicated that there were a number of positions for 'process controllers', required by Regulation 2834, at the various water works that were currently vacant.

The respondent, Water and Sanitation Services South Africa (Pty) Ltd (WSSA), Veolia Water Solutions and Technologies South Africa (Pty) Ltd (Veolia) and one other company submitted bids in early 2015. WSSA and Veolia were the two lowest bidders. WSSA offered a global price that was around 20% higher than that of Veolia. WSSA's bid included costing for a large number of additional

staff, partially in recognition of the shortfall in process controllers. Veolia stated that their aim would be to train staff so as to achieve regulatory compliance within three years.

The Municipality, advised by WorleyParsons RSA (Pty) Ltd, evaluated the bids and ultimately identified Veolia as the preferred bidder; WSSA as reserve second preference. The bidders were advised and negotiations were entered and a contract was concluded with Veolia.

WSSA instituted action against the Municipality for judicial review of the decision to award the tender. Multiple grounds of review under PAJA were raised. The court below held that the Municipality deviated from the regulatory framework that specified skills thresholds, so Veolia's bid did not comply with the RFP. The court concluded that the Municipality's actions were procedurally unfair because the bid did not qualify as 'acceptable tender' under the Preferential Procurement Policy Framework Act 5 of 2000 (the Procurement Act). In addition, the court found that Veolia was permitted to vary the terms of their bid by adding the additional 14 posts and absorbing the costs. Accordingly the decision was liable to be set aside.

The SCA held as follows. The award of a tender is administrative action; accordingly it is subject to the grounds of review in s 6 of PAJA. Section 6(2)(b) of PAJA provides that the court has the power to judicially review administrative action if 'a mandatory and material procedure or condition prescribed by an empowering provision was not complied with'. The definition of 'acceptable tender' contained in the Procurement Act, which is legislation pursuant to s 217 of the Constitution, is the relevant 'empowering provision'. Accordingly, the appeal turns on whether the bid by Veolia was an 'acceptable tender' in that it 'in all respects ... compli[ed] with the specifications and conditions of tender set out in the tender document.'

The RFP, read with Regulation 2834, specified the minimum staffing requirements, particularly as relates to process controllers, for the operation of various classes of water works. Communications with bidders clearly indicated that the Municipality's existing staff complement fell short of those minimum regulatory requirements, and that any shortfall must be met by bidders in order to achieve compliance. While the Municipality assured bidders that required staffing skills could be developed over a three-year period, on the proper construction of the document this could only have related to another anticipated 'Draft' Regulation and not the existing Regulation 2834. Accordingly, in order to comply with the specifications of the tender, bidders ought to have made provision for that shortfall. In failing to do so, Veolia's bid was not an 'acceptable tender'.

A question raised by the SCA was whether Regulation 2834 was actually in force when the RFP was issued. Submissions from the parties were invited and received. It was concluded that by following the legislative thread is apparent that despite the repeal of the legislation on which the Regulation was promulgated, the effect of the savings provision of the subsequent legislation is that the Regulation remained in force at the relevant time.

The SCA confirmed the setting aside of the decision. It considered that it is in the public interest for the decision be remitted to the Municipality for a full new tender process.

It made the following order:

1 The appeal is dismissed with costs, including the costs of two counsel. The order of the court below is, however, amended to the limited extent reflected below.

2 Paras 3, 4 and 5 of the order of the court below are set aside and substituted as follows

'3 The decision is remitted to the first respondent for a full new tender process commencing with an RFQ to be started and completed;

4 In consequence of the order in paragraph 1, the contract between the first and second respondents is set aside; save that the setting aside of the contract is suspended until the tender is re-awarded or on the lapse of a period of six months, whichever is earlier.

5 The first respondent is ordered to bear the applicant's costs including the costs of two counsel.'

3 The six month period of suspension referred to in the substituted order is to commence running from the date of this judgment.