

IN THE COURT OF APPEAL OF LESOTHO

HELD AT MASERU

C OF A (CIV) 50/2020

In the matter between-

**SCIG-SMCG-TIM JOINT VENTURE
APPELLANT
MASERU CITY COUNCIL
APPELLANT**

1ST

2ND

AND

**UNIK CONSTRUCTION ENGINEERING (PTY) LTD
RESPONDENT**

CORAM: DR KE MOSITO P
PT DAMASEB AJA
DR J VAN DER WESTHUIZEN AJA

HEARD: 15 APRIL 2021

DEWLIVERED: 14 MAY 2021

SUMMARY

The failure to submit a duly signed power of attorney as part of a tender, as required, is fatal for the tender. The disqualification of the tender was thus justified. The failure to give notice to the tenderer within the prescribed time limit was unfortunate and less than duly diligent. It had no practical effect on the tender process under the circumstances of this case and does not render it irregular so as to be set aside.

JUDGMENT

DR VAN DER WESTHUIZEN AJA:

Introduction

[1] This is an appeal against a judgment by Sakoane J (as he then was) in the High Court, delivered on 25 November 2020. On application by Unik Construction (Pty) Ltd (Unik), the court reviewed and set aside the award of a tender by the Maseru City Council (the City), to SCIG-SMCG-Tim Joint Venture (Tim Joint).

Background

[2] In response to an invitation to tender, Tim Joint and Unik submitted tenders for the upgrade of the Mpilo Boulevard Intersection in Maseru.

[3] At a meeting on the City's premises regarding the opening of the tenders in June 2019, a concern was allegedly raised that Tim Joint's documents had not been translated from Chinese into English or Sesotho. According to Tim Joint's counsel, this was not

correct. The relevant parts were in English. No problem regarding Unik's tender documents was raised at the same meeting.

[4] The price tendered by Unik was substantially lower than that tendered by Tim Joint.

[5] According to Unik, it heard nothing about the tender for several months. The Record shows a letter by the City, dated 21 October 2019, to Unik, informing it that the tender had been awarded to Tim Joint. The letter envisaged a formal debriefing meeting. On 28 October 2019 Unik responded to the City's letter.

(6) On 29 November 2019 Unik was invited to a debriefing meeting scheduled for 3 December. On that day, it was informed that the meeting had been postponed. The debriefing session took place on 11 December. According to the City, Unik's tender was disqualified in terms of Regulation 28(3) of the Procurement Regulations of 2007, because the Power of Attorney (Power of Attorney) included in the documentation did not contain the signature of the manager, with the seal of a notary public, as required by the invitation to tender. At the June meeting regarding the opening of the tenders, the absence of the signature was not noticed, because the purpose of that event was to check if all required documents had been submitted. The Power of Attorney was indeed there. At a later stage the Evaluation Committee discovered the flaw in the Power of Attorney and eliminated Unik's tender.

[7] According to Regulation 28(4) Unik had to be notified within ten working days of the irregularity in their tender. This did not happen. According to the City, this was an oversight.

The High Court

[8] The High Court judgment deals with the issue of the lack of notice first. The decision to award the tender to Tim Joint was made on 31 July, but - according to the court - disclosed to Unik on 11 December only. Thus Unik "was disabled from taking timeous and legal action on an informed basis". It "could have challenged the determination or waived its rights". The judgment, quite strongly, states: "The prejudice suffered by the applicant which undoubtedly had invested a lot of resources in the tender process echoes through the corridors of this Court."

[9] The High Court stressed the importance of correct procedures and especially reasons in a tender process. In para [40] of its judgment it states that reasons are needed for the equal protection of the right all tenderers: "Its purpose is to ferret out all manner of corrupt conduct in public procurement Decisions taken along the chain of the tender process must be rational, fair and lawful. This is an imperative of the principle of legality." It concluded that the City's failure to furnish reasons for disqualifying Unik's tender was an irregularity justifying the setting aside of the award of the tender.

[10] Thereafter the High Court considered the absence of the signature on the Power of Attorney in Unik's tender: "The reason

for disqualifying the applicant's tender was that the Power of Attorney it submitted was not signed by its manager. Nothing more nothing less." This was, according to the court, not serious. A Power of Attorney was indeed submitted, as required. It was just not signed; and could be signed later in the process!

[11] The High Court judgment contains extensive quotations from case law, like *Millennium Waste Management (Pty) Ltd v Chairperson Tenderboard; Limpopo Province and Others* 2008(5) BCLR 508 (SCA) and *AllPay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of SA Social Security Agency and Others* 2014(1) SA 604 CC (28 - 30). It concludes that administrators "must adopt a broader, flexible approach on the legal consequences of non-compliance with formal requirements ...". It mentions the "opportunity to rectify innocent mistakes". Thus, according to the High Court, the absence of the required signature on the Power of Attorney was innocent - not fatal.

[12] The language issue and lower price tendered by Unik as compared to the tender of Tim Joint are mentioned in the High Court judgment. However, these factors are not stated as reasons for the decision to set aside the award. The court regarded the price issue as unnecessary to investigate, given its finding on the other points.

[13] In relevant part, the High Court ordered that (2) the decision of City "declaring the tender of the Applicant as non-responsive

and disqualifying it, as well as the consequent decision accepting the tender of the 2nd Respondent are declared to invalid (sic) and reviewed and set aside". It furthermore ordered (3) the City "to reconsider the award of tenders based on those already accepted by then as compliant, and to include the tender of the Applicant". The City was ordered (4) to pay the costs of the application.

Submissions before this Court

[13] Counsel for Joint Venture argued that the High Court was not entitled to decide on the basis of the failure by the City to furnish reasons, because it had not been pleaded. With reference to the record, counsel for Unik submitted that it was pleaded.

[14] On behalf of Joint Venture it was further submitted that, should the failure to provide reasons be relevant, it could not vitiate the entire tender process. Counsel for Unik emphasized, inter alia, that adherence to the requirement to furnish reasons was a rule of law issue. Unik did not know that they had been disqualified and could thus do nothing about it.

[15] Thirdly, counsel for Joint Venture argued that the requirement that the manager has to sign the Power of Attorney in front of a notary was not a mere formality. It is essential, because it speaks to the authority of the officials to represent the tenderer. The requirement must be strictly adhered to. The tender by Unik was correctly disqualified because of the failure to submit a duly signed Power of Attorney. The response to this from the

side of Unik was that scrutiny of the regulations as a whole shows that the signature requirement was not essential.

[16] Counsel for both sides presented detailed arguments on the difference between “mandatory” and “peremptory” requirements; and extensively analysed the different steps in the tender process with reference to the Regulations.

Discussion

[17] The two central issues are (a) whether the absence of the signature of the manager of Unik on the Power of Attorney accompanying their tender was fatal; and (b) what the effect of the City’s failure to give notice within ten days was on the tender process. Unlike the High Court, I start with (a).

Power of Attorney

[18] It is common cause that the tender had to include a Power of Attorney, duly signed by the manager of the tenderer, in front of a notary.

[19] This requirement is not a mere formality. Its purpose is clear. Before a tender is evaluated, it must be certain that those who submitted it were duly authorized to do so. The omission of the signature on the Power of Attorney may be “innocent”, in the sense that it was accidental rather than in bad faith, but how do those who evaluate the tender know this?

[20] The High Court reasoned that the mistake could be rectified later. This is dangerous. Imagine the consternation and upheaval

if a tender without the required signature by the relevant authority is accepted because the price is lower than all other tenders; but at a crucial later stage, for example when the contract following on the award of the tender has to be signed, the manager of the party who won the tender sees the quoted price for the first time; disagrees with it; and refuses to sign!

[21] The omission of a signature is not the same as a grammatical mistake, not affecting the meaning of a paragraph or document. In our society a signature indicates identity, familiarity with the contents of a document, authority and approval. In legal procedures and dealings it is hard to deny the contents of a document that one signed. Conversely, it is easy to do so regarding an unsigned document.

[22] The High Court's view that a Power of Attorney was indeed submitted, as required, but just not signed, is flawed. A Power of Attorney without the required signature is not a proper Power of Attorney.

[23] The case law referred to by the High Court points out the difference between material and inconsequential formalities. Even in criminal procedure some irregularities are less serious than others as far as rendering a trial unfair. But these authorities do not support a conclusion that the failure to submit a duly signed affidavit in a case like the present is immaterial. In *Millennium Waste Management* (above) Jafta JA stated that "(t)he definition of a tenderer... certainly cannot mean that a tender must comply

that conditions which are immaterial, unreasonable or unconstitutional". The case dealt with the "failure to sign a duly completed form". To the extent that Jafta JA is correct, the requirement in this matter - that a duly signed Power of Attorney must be submitted - is not "immaterial, unreasonable or unconstitutional". In *AllPay* "linking the question of compliance to the purpose of the provision" is mentioned. As explained above, the purpose of the requirement in this case is clear.

[24] The City correctly disqualified Unik's tender on the basis that the Power of Attorney was not signed, in terms of Regulation 28(3), as well on the basis of common logic. The High Court's conclusion on this point was incorrect.

[25] Even if the High Court correctly concluded that the City's failure to give notice and provide reasons within ten days constituted an irregularity and that the award of the tender to Joint Venture should be set aside, its order (in paragraph [13] above) that the City must reconsider the tenders already accepted as compliant and must include Unik's tender, is unjustified. The basis of High Court's apparent assumption in the formulation of its order that the acceptance of Joint Venture's tender resulted directly from Unik's disqualification seems unclear as well.

Failure to give notice

[26] Where does this leave one with the City's oversight not to comply with Regulation 28(4)? It did provide the reason for the

disqualification of Unik's tender, but did not give notice to tenderers within ten days.

[27] Because of the considerations mentioned by the High Court, as well as others, the furnishing of proper reasons for an administrative decision by the decision maker is extremely important. It allows for transparency, as well as for those affected by a decision to consider action, such as to challenge the decision. The Regulations in this case allow for complaints.

[28] The City's oversight in this case is highly unfortunate. Sloppiness of this kind should be discouraged by courts.

[29] However, what would the practical effect have been in this particular case if Unik were notified in time that their tender had been disqualified because of the fatally flawed Power of Attorney? Unik would neither have been able to challenge the decision to disqualify successfully, nor to have the document signed after it had been submitted. On the facts before us, the outcome of the tender process would have been the same. The fact that Unik's price was lower than Joint Venture's was not only but one factor to be considered, but could have no effect on the purported Power of Attorney. Unik's own negligence might have denied the people of Maseru an upgraded Mpilo Boulevard for much less of their money.

[30] Thus it would seem that although the requirement to give timeous notice and provide reasons is important, it is immaterial in this case. The reason for the disqualification was provided. The

problem is the failure to notify Unik of the City's decision within the ten days stipulated in Regulation 28(4). If Unik suffered loss as a result of the delay on the part of the City, it could arguably consider legal action based on the City's negligence. The tender process and award is, however, not rendered irregular and invalid because of the oversight.

Conclusion

[31] The failure by Unik to submit a duly signed Power of Attorney as part of its tender is fatal. The disqualification of Unik's tender was not irregular. Procedural requirements are important in a tender process. The fact that the City did not give notice and furnish reasons for its decisions within the time limit is lamentable, but without practical significance within the factual context of this case. It does not result in the irregularity and invalidity of the tender process. Costs must follow the result.

Order

[32] In view of the above -

- (a) The appeal is upheld;
- (b) Paragraphs (2) to (4) of the order of the High Court is set aside; and replaced by the following:

The application is dismissed, with costs.

- (c) The Respondent must pay the costs of the appeal.



**J VAN DER WESTHUIZEN
ACTING JUSTICE OF APPEAL**

I agree



**K E MOSITO
PRESIDENT OF THE COURT OF APPEAL**

I agree



**PT DAMASEB
ACTING JUSTICE OF APPEAL**

FOR 1ST APPELLANT: MR LETSIKA
FOR 2ND APPELLANT: ADV S PHAFANE KC
FOR RESPONDENT: ADV. ME TEELE KC