



**IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN**

REPORTABLE

CASE NO: 33/2023

In the matter between:

THE MUNICIPALITY OF MOSSEL BAY Applicant

and

JAN KASPER GERHARDUS STEENKAMP NO First Respondent

STEPHANUS JOHANNES STEENKAMP NO Second Respondent

Bench: P.A.L. Gamble, J

Heard: 17 & 18 August 2023

Delivered: 1 December 2023

This judgment was handed down electronically by circulation to the parties' representatives via email and release to SAFLII. The date and time for hand-down is deemed to be 12h30 on Friday 1 December 2023.

JUDGMENT

GAMBLE, J:INTRODUCTION

1. The applicant (the Municipality) seeks to review its own decision taken in February 2009 in which it allocated a tender for the building of 3 middle-income housing projects to its preferred bidder. The matter has a long history but the points for determination in this review are fairly crisp.
2. The review has its genesis in action proceedings which are pending in this court under case no 21583/2011 in which the successful tenderer (cited in those proceedings as the Stone Trade Trust) has sought specific performance from the Municipality to enforce the contract which was allocated to it, alternatively a claim for damages in excess of R64m for its alleged loss of profits.
3. On 21 December 2022, and as the parties were preparing to go trial on 13 February 2023, the Municipality put a spanner in the works as it sought to review the tender allocation which it had made some 13 years earlier. It goes without saying that, in addition to the merits of the application which is brought as a legality review, there is the question of unreasonable delay in filing the review.

BACKGROUND FACTS

4. The papers show that the Stone Trade Trust (Master's Reference IT 902/2002) was formed in 2002 as a family trust engaged in the construction industry, predominantly in the Eastern Cape: the Trust's principal place of business is in Jeffreys Bay. At all material times its trustees were the first and second respondents herein, Messrs. J.K.G and S.J.Steenkamp¹, and over the years it appears to have traded generally under the name "Stone Trade Trust Construction".
5. In October 2007 the Municipality issued a public document termed an "Expression of Interest" announcing its intention to develop municipal land for mid-

¹ The first respondent, Mr J.K.G Steenkamp, the father of Mr. S.J. Steenkamp, evidently died in 2020.

income housing on three designated sites in its area of jurisdiction. After considering the response thereto, the Municipality shortlisted 7 firms as potential parties to be considered for the project. Thereafter, and on 15 May 2008, the Municipality issued a so-called "Call for Proposal" document to the seven firms which had been shortlisted. Of the seven, two firms declined to tender. The five firms which subsequently submitted tenders included two entities described in the relevant documentation as "Stone Trade Trust" and "ASLA Devco (Pty) Ltd" (ASLA).

6. On 31 July 2008 a tender for the project was submitted on behalf of an entity described as "Stone Trade Trust Construction". Where relevant I shall refer to this entity by the acronym "STTC" (which the Trust's agents utilized from time to time) but otherwise I shall refer to the Stone Trade Trust simply as "the Trust". The tender was a voluminous document containing a plethora of information relating to, *inter alia*, the nature of the work for which it tendered and the costings in relation thereto. In its tender document STTC disclosed that, for the purposes of the project, it was a 50% shareholder in a joint venture (JV) with a company called Mbobs and Mbobs Building and Civil Construction (Pty) Ltd (Mbobs). Details of that JV were included in the tender document which reflected that it was intended to be housed in a separate entity known as Marblesharp 122 (Pty) Ltd (Marblesharp).

7. In October and November 2008 the Municipality's Pre-Evaluation Committee (PEC) met on several occasions to consider the various tenders. The PEC comprised municipal officials and representatives of the accounting firm PriceWaterhouseCoopers and the proposals before it were evaluated according to a points scoring system with the individual components comprising an aggregate of 100 points. The PEC evidently applied the Municipality's Supply Chain Policy utilizing the so-called 90/10 principle with 10% allocated to the "Preferential Procurement Element" and 90% to the content of the proposal.

8. At a meeting on 26 November 2008 the product of the PEC's work was discussed by the Municipality's Evaluation Committee (EC) and a recommendation was made to the Municipality's Bid Adjudication Committee (BAC) that the tender be awarded. This was based on the fact that the Trust was awarded 80.60 points and

ASLA 79.40 points. The other three tenderers were allocated significantly smaller aggregates. Consequently, the Trust was recommended as the preferred tenderer in the following terms.

"The tender for the Development of Land for Mid-Income Housing on three sites be awarded to Stone Trade Trust [Marble Sharp 122 (Pty)] (sic) subject to the following conditions:

1. That a Joint Project Committee be established between the developer and municipal officials to oversee the financial management of this project.

2. That a Contract lawyer be appointed to frame the contract agreements between the Municipality and the developer."

9. The BAC considered the proposal from the EC at a meeting on 4 December 2008 and approved it. Confirmation of the award was contained in a letter of 5 February 2009 addressed to STTC under the hand of the Municipality's erstwhile Acting Municipal Manager, Mr. C. du Plessis. That letter stipulated that the acceptance of the tender was subject to the negotiation and signature of a so-called "Land Availability Agreement".

10. ASLA was unhappy with the outcome of the tender process and on 10 March 2009 it launched urgent review proceedings to set aside the award thereof. I shall refer to this as "the ASLA review". During the course of that litigation the court directed that the ASLA review should be dealt with by way of an internal appeal under the Municipality's Supply Chain Management Policy. Pursuant thereto the Trust, ASLA and the Municipality agreed to convert the internal appeal into arbitration proceedings and those proceedings were ultimately settled on the basis that the Trust and ASLA would share the award of the tender.

11. It is not entirely clear from the papers why the Trust did not immediately proceed to implement its development rights but it would appear that there were issues around the conclusion of the land availability agreement: there are allegations that the Municipality frustrated this process. Be that as it may, in October 2011 the Trust issued summons against the Municipality for an order for specific performance,

alternatively damages, as aforesaid. That action meandered its way through the corridors of the court until it was eventually set down for trial on 13 February 2023.

12. The Municipality says in this review that during the final phases of trial preparation its legal representatives advised it that they held the view that the tender had been irregularly awarded to the Trust and that a legality review was mandated under the Constitution, 1996, hence its decision to launch this application at a very advanced stage of proceedings. At the hearing of this matter, the Municipality was represented by Advs. R.S. van Riet SC and S.A. Jordaan SC while Adv. P. de B. Vivier SC appeared on behalf of the Trust. The Court is indebted to counsel for their comprehensive heads of argument which have facilitated the preparation of this judgment.

DELAY

13. The founding affidavit in this review was deposed to by the Municipality's Senior Manager, Legal Services, Mr. Pieter Daniel Prins (Prins), who says that he has been in the employ of the Municipality since 2007 and thus has personal knowledge of the facts pertaining to the matter.

14. In this affidavit there is not a whisper about delay. Indeed, Mr. van Riet readily accepted in argument that the delay in launching these proceedings was manifestly unreasonable and that there was nothing further to be said on that score. The Municipality is thus in the same position as its local authority counterpart in Buffalo City². That case holds that it is not the end of the matter: even though there is an admittedly unreasonable delay, the Court is still required to look at the legality of the contract awarded by the Municipality. As Theron J for the majority of the Constitutional Court, following Gijima³, observed in Buffalo City -

"[101] However, this is not the end of the enquiry. On the authority of Gijima, this court must, having established that the... contract was clearly unlawful on undisputed facts, declare it

² Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd 2019 (4) SA 331 (CC) at [100]

³ State Information Technology Agency SOC v Gijima Holdings (Pty) Ltd 2018 (2) SA 23 (CC)

invalid in terms of the provisions of s172(1)(a) [of the Constitution, 1996] and set it aside. The unlawfulness of the... contract cannot be ignored and this court is obliged, as it did in *Gijima*, to set aside a contract it knows to be unlawful. Even on a restrictive interpretation of the *Gijima* principle, bearing in mind the need to hold the state to the procedural requirements of review, as explained above, I can see no reason to depart from it in this matter."

15. In the circumstances, the focus of this judgment shifts to the question whether the award of the contract must be set aside because it is indisputably unlawful. In that regard, the Municipality contends that its own conduct was in breach of the procurement provisions of s217 of the Constitution which are to the following effect.

"217. Procurement

(1) When an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective.

(2) Subsection (1) does not prevent the organs of state or institutions referred to in that subsection from implementing a procurement policy providing for –

(a) categories of preference in the allocation of contract; and

(b) the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination.

(3) National legislation must prescribe a framework within which the policy referred to in subsection (2) must be implemented."

LEGALITY REVIEW

16. In accordance with the decision in Gijima, the provisions of PAJA⁴ do not apply in situations where a state entity seeks to review its own conduct on the basis that it is not in compliance with the law. The road to review in such circumstances is now exclusively located through the principle of legality. As the minority judgment of Cameron and Froneman JJ in Buffalo City makes plain, there has not been judicial or academic unanimity in the adoption of legality reviews as the appropriate mechanism for a self-review such as this, but it is nevertheless the mandated approach, and for good reason.

"[114] Common law judicial review - the predecessor and part-ancestor of constitutional legality review - did not provide for self-review by state organs. The constitutional era claims that capacity for state organs. This is because its commitment to open, responsive and accountable government not only permits state self-review but places a duty on state officials to rectify unlawful decisions.

[115] Constitutional legality review also finds rich grounding in ss1(c), 41(1)(b),195 and, as far as public procurement is concerned, s 217 of the Constitution. In its objective, state, self-review should therefore promote open, responsive and accountable government. In this, its underlying concern is consonant with that of the fundamental right to lawful, reasonable and procedurally fair administrative action that the Constitution affords to everyone. What legality review does, in sketching out a distinctive path, is to recognize the distinctive roles of those entitled to exact constitutional rights and the organs of government whose duty it is to obey and fulfill those rights. It is far from the only reasonable and logical conclusion that PAJA, which seeks to give legislative content to the right to just administrative action, must necessarily afford the exclusive or indeed the most appropriate partway for state self-review" (Internal references omitted)

THE MUNICIPALITY'S ALLEGED NON-COMPLIANCE WITH S217

17. Mr. van Riet conceded in argument that the Municipality bore the onus of establishing a clear case for the breach of s 217. Counsel accepted that if it failed

⁴ Promotion of Administrative Justice Act, 3 of 2000

to do so the Municipality was not entitled to have the tender set aside. The core submission advanced on behalf of the Municipality is that it unknowingly ended up contracting with the wrong entity, or so it surmises. It claims now that, while the letter of the Acting Municipal Manager of 5 February 2009 confirming allocation of the tender was addressed to "Messrs. Stone Trade Trust Construction", it surmises that the JV was the main contractor for the purposes of performing the contract and that it did not in actual fact purport to contract with that entity. On the face of it this is a strange allegation for a contracting party to make, particularly one which is an organ of local government which enjoys the protection of an array of legislative and regulatory instruments when it does business, and which has lawyers available to it – both in-house and external – for legal advice when it embarks on that course.

18. So then, how did the Municipality get it so wrong? Importantly, it does not allege that it was misled by the Trust, nor are there allegations of misrepresentation or "fronting". Rather, the narrative proceeds something like this. On a proper construction of the tender documents submitted to it, the Municipality says that it realizes now that it was uncertain at the time whether the tenderer in actual fact was –

- (i) the Trust; or
- (ii) ST Trade Construction (Pty) Ltd (ST Trade); or
- (iii) Marblesharp.

The Municipality alleges that its confusion arises from the various corporate descriptions utilised by the Trust in the tender documentation and it is fearful that it might be classified as a constitutional delinquent under s217 for wrongly awarding the tender to the Trust. It thus asks this Court to come to its rescue because it now considers that the tender was *de facto* granted to Marblesharp. And so, in the midst of a trial where the lawfulness of the tender proceedings has not been directly challenged, it is attempting to reverse its way out of a cul-de-sac, relying on, *inter alia*, s237 of the Constitution which requires that –

"All constitutional obligations must be performed diligently and without delay".

THE FOUNDING AFFIDAVIT

19. After referring to the provisions of s217 and the import thereof, Prins contends in the founding affidavit that the following facts are relevant to the determination of this matter.

"16.1 The tender was, ostensibly, submitted in the name of the Stone Trade Trust (the Respondent), who, in pending Supreme Court (sic) proceedings against the Municipality claims to have been the duly appointed tenderer and only bidder;

16.2 The acceptance of the Tender, however, was communicated to 'Messrs. Stone Trade Trust Construction', which name could possibly also be a reference to ST Trade Construction Pty Ltd, an associated (yet legally separate) company and member of the Joint Venture referred hereunder (sic), to whom extensive reference was made in the Tender;

16.3 In the tender documentation the abbreviation STTC was interchangeably used to refer to the Trust and to ST Trade Construction (Pty) Limited. Sometimes it cannot be said to whom it referred to (sic);

16.4 In fact the application for the tender was however, made on the basis that it would be, not the trust, but a joint venture entity known as Marblesharp 122 Pty Ltd who would perform and execute the tender and receive the proceeds generated thereby;

16.5 Marblesharp was a company of which the two (equal) shareholders where the said ST Trade Construction Pty Ltd and Mobbs & Mobbs (sic) Building and Civil Construction Pty Ltd;

16.6 The tender was motivated and worded on the basis that it would be executed by the joint venture and qualification points were awarded on that basis both in relation to preferential procurement and competency of the developer (a total of 12 points.(sic) The Tenderer "won" the Tender by 1.2 points only;

16.7 The Trust (Respondent) was at the relevant time, essentially dormant, insolvent and incapacitated to execute the tender itself. ST Trade Construction (Pty) Ltd had just been registered."

It will be immediately noted that the Municipality's stance regarding the party with whom it contracted was speculative and based on assumption rather than clear and equivocal.

20. Prins goes on to aver that, based on these facts, the provisions of s217 were breached in the following respects.

"17.1 On a proper construction of the tender in question it is uncertain whether the bidder was the Trust, ST Trade Construction Pty Ltd or Marblesharp 122 (Pty) Ltd;

17.2 It is uncertain whether the tender was awarded to the Trust or ST Trade Construction (Pty) Ltd;

17.3 The Trust could and should not have "earned "the 12 points referred to above;

17.4 ST Trade Construction (Pty) Ltd could and should not have earned the preferential procurement points or the title of the other 10 points;

17.5 Neither of the two entities should or legally could accordingly, have been awarded the tender;

17.6 Neither of these two entities was earmarked to execute the tender. It was Marblesharp 122 Pty Ltd;

17.7 Neither of these two entities were financially or otherwise competent to duly perform the obligations arising from the tender;

17.8 Neither of these two entities were properly authorized by resolution, to tender, as required by the tender documentation. (In this regard: (a) - the Resolution relating to the Trust (Respondent) was: not legally valid and - in any event did not authorize the submission of the

tender; (b) - No resolution at all authorized a tender on the half of ST Trade Construction in respect of the proposed development."

THE TRUST'S OPPOSITION

21. In the answering affidavit the Trust claims that the stance adopted by the Municipality is cynical and singularly lacking in good faith. It suggests that the real purpose of the review is to stall the trial action, given that the Municipality has known since at least the days of the ASLA review what the Trust's case is, and in particular how the relationship between the Trust and the JV was established and how it was intended to function.

22. The second respondent (Steenkamp Jnr) says in the answering affidavit that the Trust began operating a family construction business in 2002 and that its business grew rapidly on account of its good reputation in the market place. As the business grew, and as it became involved in larger projects, Steenkamp Jnr says the Trust received advice from, *inter alia*, its bankers that the Trust's construction business should be transferred into a corporate structure. This evidently took place in 2008 when ST Trade was incorporated.

23. But before this restructuring could be implemented, says Steenkamp Jnr, the Trust took the first step in the tender process when it submitted its Expression of Interest document to the Municipality. That was in November 2007 when the business was still conducted through the vehicle of the Trust which used the trading name Stone Trade Trust Construction and, as I have said, was sometimes abbreviated with the acronym STTC.

24. Steenkamp Jnr goes on to say that the Trust expressed interest in the project with the intention of participating with a Black empowerment (BEE) partner. The Municipality was told in section 9 of the Expression of Interest document dated 1 November 2007 that the Trust had previously entered into Black empowerment partnerships in other construction projects and intended doing likewise in Mossel Bay.

25. When the Trust submitted its tender document on 31 July 2008 it included, as Annexure GH thereto, a signed copy of the JV agreement which had been concluded with Mbobs on 9 July 2008. That document declares that the parties to the JV were ST Trade (having been incorporated on 7 January 2008 under registration number 2008/000142/07) and which is described in the JV as "Contractor 1", and Mbobs as "Contractor 2". The JV states in unequivocal terms that it is to be housed in Marblesharp, which was incorporated on 23 April 2008. Also annexed to the tender was a tax clearance from the South African Revenue Service reflecting the good standing of the Stone Trade Trust whose trading name was reflected therein as Stone Trade Trust Construction

26. What is clear from all of the relevant tender documentation filed with the Municipality is that the Trust was the entity which tendered for the contract. In so doing it told the Municipality that the contract would be performed by a JV in which ST Trade Ltd held an equal shareholding with a fully BEE compliant company – Mbobs – and which would be housed in Marblesharp.

27. These documents passed through a host of hands and were scrutinized by several officials evaluating the various tenders on behalf of the Municipality. These would have been officials very alive to the spectre of "fronting" which is anathema to the provisions of s217⁵. Included in those officials was Prins, the Municipality's legal head. And yet, none of them had any difficulty in understanding the proposed structure of the tender, the execution of the works or with which entities they were dealing. The claim now by the very same Prins that there was uncertainty as to whom the tender was awarded is both astonishing and absurd. The tender was awarded to the Trust and everybody knew that – both at the time of the award of the tender and later during the ASLA review.

28. Counsel for the Municipality queried why the tender document was lodged by the Trust while ST Trade was described in the JV as "Contractor 1". That of

⁵ Esorfranki Pipelines (Pty) Ltd and another v Mopani District Municipality and others [2014] 2 All SA 493 (SCA) at [26]

course is a question which might have been asked by the Municipality at the evaluation stage, if it was confused or concerned about what the relationship was between the Trust and the JV. But it did not do so – obviously it did not require clarity on the point.

29. In that regard, it is important to note that in the bid document the Trust expressly informed the Municipality that it would be “roping in” a BEE partner and that the construction work would be performed by the JV through the vehicle of Marblesharp. Further, the customary scoring of BEE points in the tender process was based on Mbobs’ shareholding in Marblesharp. Everything appears to have been above board and none of the Municipality’s sub-committees found fault with the bid.

30. As demonstrated in para 8 above, the decision of the Municipality’s Council in awarding the tender was that it should go to “*Stone Trade Trust [Marblesharp 122 (Pty)]*”. The incomplete reference to Marblesharp in parentheses indicates unequivocally that the Municipality recognized that entity’s association with the Trust in relation to the tender but that the party to whom the tender was granted was the Trust.

31. Clearly, it did not bother the municipal officials how the Trust structured its affairs through the use of an eponymous company as “Contractor 1” in establishing the JV with Mbobs. In argument, the Court asked Mr. van Riet whether there was any authority on the interpretation of s217 which established that, in a situation where an entity had been awarded a contract by an organ of state, it was precluded by that section of the Constitution from rearranging its corporate affairs or structure for purposes of its own business efficiency in such a way that, for example, a wholly owned subsidiary was established to perform part (or all) of its obligations under the contract. Counsel was not aware of any such authority at the time and has not drawn anything to the Court’s attention subsequent to the hearing notwithstanding an invitation to do so.

CONCLUSION

32. On the evidence presented in the affidavits in this matter, I am unable to find that the Municipality has established conclusively that the contract in question falls foul of the provisions of s217 and that it must thus be set aside. It was fair, Transparent, equitable, competitive and evidently cost-effective. It follows that the review must fail.

33. As regards costs, Mr. Vivier urged the Court to grant the Trust a punitive costs order in light of the cynical and mala fide way in which it has approached the court to save its bacon in the damages claim. In my view, there is certainly merit in what counsel submitted but I consider that there is a more appropriate way to grant such a costs order. In the oft quoted decision of Alluvial Creek⁶ almost a century ago in this Division Gardiner JP held as follows.

“An order is asked for that he pay the costs as between attorney and client. Now sometimes such an order is given because of something in the conduct of a party which the Court considers should be punished, malice, misleading the Court and things like that, but I think the order may also be granted without any reflection upon the party where the proceedings are vexatious, and by vexatious I mean where they have the effect of being vexatious, although the intent may not have been that they should be vexatious. There are people who enter into litigation with the most upright purpose and the most firm belief in the justice of their cause, and yet whose proceedings may be regarded as vexatious when they put the other side to unnecessary trouble and expense which the other side ought not to bear. That I think is the position in the present case.”

ORDER OF COURT

Accordingly it is ordered that:

A. The application for review is dismissed.

⁶ In re Alluvial Creek Ltd 1929 CPD 532 at 535, followed in, *inter alia*, Camps Bay Ratepayers' and Residents' Association and another v Harrison and another 2011 (4) SA 42 (CC) at 76 and Boost Sports Africa (Pty) Ltd v South African Breweries (Pty) Ltd 2015 (5) SA 38 (SCA) at [27]

B. The applicant is to pay the costs of the first and second respondent, in their representative capacity as trustees of the Stone Trade Trust, on the scale as between attorney and client.

GAMBLE, J

APPEARANCES

For the Applicant: Mr. RS Van Riet SC
Mr. SA Jordaan SC
Instructed by Herbie Oosthuizen & Associates.
Mossel Bay
c/o Bossr Inc
Cape Town

For the Respondents: Mr. PB De Vivier SC
Instructed by Rossouw Attorneys
Jeffreys Bay.