IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

Case number 16/23755

(1) REPORTABLE:

(2) OF INTEREST TO OTHERS JUDGES:

(3) REVISED

16/02/18

DATE

SIGNATURE

In the matter between:

CITY OF JOHANNESBURG	**Applicant**
And	
FAITHFULNESS BUSINESS ENTERPRISE CC	**1ST Respondent**
BONAMINI ENTERPRISE (PTY) LTD	**2ND Respondent**
RADS INVESTMENT (PTY) LTD	**3RD Respondent**
LINK REFLECTIVE & PROTECTIVE DESIGNS CC	**4TH Respondent**
SUNDAY KIT UNIFORM SUPPLIES CC	**5TH Respondent**

JUDGMENT

Molahlehi J

Introduction

[1] The applicant has withdrawn its application to review and set aside the Service Level Agreements (SLAs) which it had concluded with the respondents during September 2014. The SLAs concerned the supply and delivery of various items of footwear for use by members of the Johannesburg Metro Police Department (JMPD). The applicant also pleaded to have processes which led to the SLAs declared invalid and set aside.

[2] The application was opposed by the first respondent.

[3] The applicant withdrew the application on the day of the hearing of the matter because the dispute had become academic, as the period of the SALs was to expire in September 2017.

[4] The issue that then remained for determination concerned costs which the applicant had not tendered in its withdrawal. The respondents contended that they are entitled to costs as the withdrawal amounted to a successful defence.

Background facts

[5] As stated above the parties concluded the SALs during September 2014 for the supply of various foot wear for use by members of the JMPD following the tender process which was advertised by the applicant during January 2014 in various newspapers.

[6] All the twelve applications for the tender which were received on time were considered by the Bid Evaluation Committee [BEC] at the meeting held on 4 April 2014.

[7] After an assessment seven of the bidders were disqualified and the remaining five moved to the next stage in the bidding process. And the ultimate decision of the BEC was that all the five bidders qualified and were recommended to the Central Adjudication Committee (CAFC) and subsequently the Executive Adjudication Community (EAC) that the five should benefit from the tender.

[8] It then transpired upon evaluation by the Screening Committee of CAC that the number of items to be purchased over a three year period would exceed R10 million thresholds. This fell outside the jurisdiction of the CAC. It was for this reason that the matter was referred back to the BEC.

[9] The BEC then prepared an amendment to its recommendations. The recommended amendment which was subsequently referred to the EAC estimated the value of the tender at R70 million. The amendment also altered the scoring of the appellants. Bonani Enterprise and Faithfulness were respectively scored as number one and two.

[10] The EAC accepted the recommendation of the BEC in particular that the tenders be split between the applicants. And after that, the tender was awarded, and subsequently, the parties signed the SLAs.

<u>The reasons for seeking the cancellation</u>

[11] The applicant sought the cancellation of the SALs mainly because of the query raised by the Auditor General (AG) concerning the increase in the value of the tender since the advertisement. Following the AG's query, the city manager was approached to grant a post-approval for the deviation concerning the

advertisement in terms of regulation 36(1) (b) of the SCM Regulations. The city manager did not grant the condonation for deviation.

[12] The procurement was way above the budget of R4,5 million. In other words, the value of the items to be procured fell outside the approved budget. The variation between R4.5 million and R 70 million was not a minor breach which could be condoned in terms of regulation 36 (1) (b) of the SCM Regulations.

[13] The tender awarded did not comply with the Preferential Procurements Framework Act number 5 of 2000 (PPFA) for reasons set out in the founding affidavit which need not be repeated in this judgment.

[14] In opposing the application, the respondent has raised one point *in limine*, contending that the deponent to the founding affidavit. Mr. Clark has no personal knowledge of the issues at hand. It contended further that the confirming affidavit by Mr. Msimang who signed the SLAs on behalf of the respondent and the city manager, Mr. Fowler was not attached to the applicant's papers.

[15] As for the comments made by Mr. De Klerk, the deponent to the founding affidavit of the respondent contended that the comments made at paragraph 24, 25, 26 and 27 of the founding affidavit are hearsay because it refers to Mr. Fowler who has not attested to any confirmatory affidavit.

<u>Withdrawal of proceedings –costs implication</u>

[16] In terms of rule 41 (1) of the Rules, proceedings may be withdrawn before the matter is set down for hearing. A withdrawal after the set down can either be by consent of the parties or leave of the court.

[17] A party that withdraws from the proceedings once the matter has been set down has to do so, on notice which may embody consent to payment of the

costs. If consent to payment of the costs is not made in the notice of withdrawal, the other party is entitled to apply for costs.

[18] It is generally accepted that a litigant who withdraws proceedings is in the same position as an unsuccessful litigant.[1]

[19] In the present matter, the applicant's matter was set down on 22 November 2017. On that day the applicant withdrew its application on the basis that the SLAs expired in September 2017. In other words, the application had become moot. It did not offer any costs consequent to the withdrawal.

[20] It is common cause that the applicant had delayed in instituting the review application. It was for this reason that it filed a supplementary founding affidavit seeking condonation for that delay in instituting the review application. The first difficulty which the applicant faced had the matter proceeded concerned the issue of the admission of that affidavit.

[21] The period of the delay and the reason for not applying for condonation at the time of filing the founding affidavit is stated in the supplementary founding affidavit in the following terms:

> "16. A period of approximately thirteen (13) months had lapsed between the awarding of the tender and that institution of the of the review application. I confirm that the delay in the institution of the proceedings was not deliberate. I submit that the Applicant did all it could within the circumstances to establish the correct legal procedure and to ultimately correct its own decision, which it accepted."

---

[1] Germihuys v Douglas 1973 (3) SA 299 (NC) Sentraboer Korporasie Bpk v Maphaka 1981 (2) SA 814 (at 818.

[22] In my view, the prospects of the applicant succeeding with the condonation for the delay in instituting these proceedings are very poor, and thus the likelihood of succeeding had this matter proceeded remains questionable.

[23] The explanation for not withdrawing the matter earlier is also unsatisfactory. The applicant was legally represented and has a legal department that assists it with legal matters. The date of the expiry of the SLAs is a matter which the applicant could have noticed much earlier.

[24] For the above reasons, I find that the withdrawal of the application amounts to failure of the application and therefore I see no reason why the general rule on costs should not find the application. I am however not persuaded that punitive costs would be appropriate.

Order

[25] The applicant is to pay the costs of the First Respondent for this application.

E Molahlehi

Judge of the High Court;

Johannesburg

Representations:

Counsel for the Applicant: Adv E Enaboi

Instructed by: Mkhabela Huntley Adekeye Inc

Counsel for the Respondent: Adv C Boden

Instructed by: JJS Manton Attorneys

Heard on: 22 November 2017

Delivered on: 16 February 2018