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IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 056285/2022

DATE: 2022-12-14

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE:	NO
(2) OF INTEREST TO OTHER JUDGES :	NO
(3) REVISED	
NIEUWENHUIZEN AJ	S VAN
	SIGNATURE
DATE: 4 APRIL 2023	

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In the matter between

AQUA TRANSPORT AND PLANT HIRE (PTY) LTD Applicant

and

JOHANNESBURG WATER SOC LIMITED AND First Respondent
CITY OF JOHANNESBURG MUNICIPALITY Second Respondent

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J U D G M E N T

VAN NIEUWENHUIZEN, AJ: Case number 056285/20222, the matter between Aqua Transport and Plant Hire (Pty) Ltd, the applicant and Johannesburg Water SOC Ltd, the first respondent, the City of Johannesburg Metropolitan Municipality second respondent. In this matter the applicant has brought an urgent application for what I perceive as fairly innocuous

and harmless relief. The first prayer is for an order in terms of Uniform Rule 6(12).

The second prayer is the following:

“That pending the final determination of the relief sought in part B in the notice of motion the first respondent is interdicted from implementing the tender process under RFQ number JW RFP 002/22 MS, including (i) evaluation of the documents, (ii) making any award/s for the process and/or iii
10 entering into any contract or otherwise implementing any such award/s pursuant to the RFQ.”

I emphasise, pursuant to the RFQ.. Part B, just so that one knows what part A is all about reads as follows:

“The applicant is directed to file proceedings to this honourable Court within 30 days of date of this order to have the first respondent’s tender process under RFQ number JW RFP 002/22 MS and the first respondent’s decision to publish the RFQ reviewed,
20 declared unlawfully and set aside.”

Then it forms part of part B that the respondents pay the costs of the application, including costs of two counsel The applicant sought this relief in the context of the following background.

I refer for purposes of convenience to the applicant as

Aqua. Aqua has been involved in an earlier, for lack of a better word "incident" where there followed an investigation and a report. The report contains *inter alia* the responses from Aqua as far as the allegations made in the report are concerned.

I refer thereto because this report casts a shadow over the application and has also given rise to some controversy in as much as the respondents seeks not to be involved with Aqua

10 Given the fact that Aqua is involved in bidding for contracts for local governments it is of course continuously involved in various bids. This Court will take judicial cognisance of that.

Competition is fierce amongst bidders and ever so often one finds that allegations are made, serious allegations on the face of it against a specific bidder Sometimes these assertions are not capable of being proved. They are often aimed at only one bidder and that then excludes that party from competing against other bidders..

20 The legislative background against the open and transparent bidding starts with Section 217 of the constitution. It is followed by national legislation, which is part of the legislation regulating the conduct of Treasury.

Treasury has got its own supply chain management policy. There are supply chain management regulations under

certain statutory provisions.

It is known to me and I take judicial cognisance of the fact there has been an active campaign since 2013/2014 by National Treasury to bring the supply management policy, which prevail in the various local governments in line with National Treasury's policies on a national level.

Historically most local governments had their own supply chain policy and supply chain provisions. It was often difficult for National Treasury to subject these provisions to proper scrutiny and interrogate the different systems on local government level . Hence the concerted effort made by National Treasury to bring all the statutory provisions and policies in line.

That effort is ongoing. By 2017 National Treasury achieved some success and its efforts culminated in a situation where most local governments became more or less compliant with National Treasury's demands. Arguments have been made to this effect before a panel of 3 judges of which I was one and proof of such material was placed before the court by way of evidence under oath.

National Treasury's ultimate aim was to bring all local authorities onto a level playing field as prevails nationally across the country. That was done so that there would be a uniform standard and format giving expression to Section 217 of the Constitution.

The respondents in this matter took issue with the application and relief sought by Aqua.

I have already referred to a fairly innocent urgent application and fairly innocent relief sought. I have already identified the tender and the reference numbers thereto.

I should interpose here that during the hearing of this matter there was an issue whether there was only a RFP (a request for pricing) or also a RFQ (a request for a quote). After Mr Wasserman showed his opponent why he included the issue
10 of a RFQ in the relief, counsel for the respondents accepted both a RFP and RFQ was requested by his clients. Both Counsel for Aqua and the respondents seem to have a good working relationship and I am grateful that they could resolve this issue given the hurly burly of an urgent court.

The real difficulty, however, is that Aqua has brought this urgent application against the backdrop of a report, which seems to cast a shadow over Aqua as a tenderer seen from a historical perspective notwithstanding the submissions it made.

20 I should immediately dispel the notion that that report is so weighty that it disqualifies Aqua at this stage from either bringing an urgent application seeking the present relief or in one or other way, should some further tender processes follow. The report as I understand it has not been taken further to the level of blacklisting Aqua and hence, it is just a report. It

contains Aqua's full explanation and submissions to the assertions made against it. The exigencies of the Urgent Court does not permit me to dwell further on the aforesaid save to say that I regard it as irrelevant to the present relief.

The fact, that there are more assertions, more answers, and even more findings in the report, is not necessary for me to consider for purposes of the present limited relief. It would appear to me and I read it as quickly as I can in the short period available to me that a proper explanation has been
10 given by Aqua. At least in as much as it could in respect of the allegations made.

So, for the purposes of this matter, I am going to put the report about Aqua to one side. I hence approach it as a normal urgent application for interim relief and the backdrop of the above report is neither here nor there.

The respondents' counsel was far from satisfied when I raised this as an approach I considered following. In fact, they are seriously upset. On more than one occasion the submission has been made that Aqua should actually be
20 disqualified from even being able to launch these proceedings. It to some extent in my view becomes academic, because it appears from the ultimate conduct of the respondent that they have embarked on a different process, a so-called deviation, as they are entitled to do.

Having started off with what appeared to be a tender

process they have ultimately decided that they would rather proceed with a deviation.

That is a perfectly legitimate course of action and the case made before me is having made that decision and having embarked on that course, they are set on that course and whilst it may coincidentally have the consequence that Aqua will not be considered as a tenderer, it is a perfectly legal course.

- 10 Respondents may indeed decide how they move ahead with the process to award a tender – it is their decision. I have heard about serious shortages of potable water in certain areas. I have been made aware of this in argument and it has been all over the news. I am taking judicial cognisance of that fact. Hence, I would have expected the respondents to take all steps within their power to address the shortage of potable water, in the various affected areas (under its jurisdiction).

- I have also been referred to the dire consequences that may follow if toilets are not cleaned out timeously and should
20 any order I make impact on the exercise of these local government functions to be exercised by both respondents in their different capacities.

I am not persuaded that any relief sought by Aqua will infringe on the respondents' conduct in exercising their powers. The order is narrowly drafted. It is linked to a

specific document and a specific advertisement.

Nothing prevents the respondents, either to embark on the deviation they seek to protect or even re-embarking on a different process. If they want to they could still do so even if the interim relief is granted.

My granting the interim order sought in its narrow terms will not stop any of the above. The notion of any order as expressed as narrowly as the proposed draft order handed up to me during argument in any way interfering with the powers
10 of the respondent to resolve the above crisis (by way of a deviation) is misconceived.

I can understand the concern. I can understand, for lack of a better word, the passion with which the case has been conducted on behalf of the respondents and I can even understand the sensitivity, to what to me appears to be virtually a second by second interrogation of any body language or response I may have displayed.

I made it known to counsel for the respondents that if you have to sit as a Judge for a whole day in urgent
20 applications, two things happen. Your blood circulation is not what it should be and you ultimately end up either with a deep vein thrombosis and you become at risk of having a pulmonary embolism.

I have had both conditions. I have no intention of contracting either one of them again and I am on treatment for

same. But I have been warned that the same can re-occur at any time.

Hence, you will see me moving around on my chair on purpose, moving forward, looking as though I am seemingly reacting to some submission made by counsel. Counsel would be well advised to not read anything into me moving around maintaining proper blood circulation by doing so.

I understand the sensitivities of clients, of course, who perhaps are not always informed listeners. I am not familiar
10 with the public's sensitivities and sometimes they read more into whatever the Judge says (to counsel during argument) or the judge's body language. They should also be careful in coming to conclusions.

It does not mean that the Judge is not listening. More often, when I sit forward I am trying to hear better and I have no doubt that counsel for the respondents is fully aware of the fact that on many other occasions I have asked counsel to speak up.

I am no longer a spring chicken. I admit to being
20 slightly deaf. My hearing aids do not quite do the job. So, it is inevitable, as counsel argues and looks down to pick up his notes that his voice will drop, hence I at times struggle to hear. This applies to every legal representative who appears in front of me and obviously each one has his or her own voice.

Some express themselves softly and

others (express) themselves volubly. I sometimes cannot make out what counsel says. So, there is not much to be read into my response when I move around or suddenly sit forward.

Returning to the merits of the matter, the City Council, as far as I can see is perfectly entitled to embark upon a deviation.

That, however, does not preclude a third party like Aqua, who is involved in tenders on a regular basis who, because of the
10 advertisement(s) that appeared, got the impression that there is a tender about to be awarded and has certain fears, from immediately reacting.

There has been a debate pursuant to one of my questions whether the applicant was not a bit premature in responding, but in my experience over the last months I have discovered that tender processes may in a very short period turn into an illegality.

I have seen advertisements (for tender processes) transmogrified into either full on contracts overnight (and)
20 awards by way of a deviation, going to the bidder that scored the lowest in a tender process. In other cases I have seen it taking a long time.

The permutations are manifold. I do not think it would be unfair to say that there are local authorities in this country and in the jurisdiction of this court which do not always adhere

to the Constitution and sometimes by mistake or sheer incompetence commit illegalities and then find themselves on the receiving end of this kind of urgent application.

It would appear to me that the respondents in this matter are not in that category. They include Johannesburg Water, a company owned by the City of Johannesburg. It has been around for many years.

I have disclosed that I was party to another matter in the past where I was on brief for the City. That is the distant
10 past I might add and if anything I would have expected the applicant to complain about that and not the respondent.

On more than one occasion the respondent's representative referred to me as seemingly having made a decision, having made up my mind. He could not be more wrong. I do not make up my mind during an argument. I listen to the argument.

I have said I observe counsel when arguing and if there are no merits forthcoming I bear that in mind. Even then I do not form a conclusion. I listen to both sides.

20 In matters such as these I carefully weigh all the facts that were placed before me. Especially where a lot have papers have been thrown at me on short notice I am always careful to look out in case I have overlooked some or other aspect. I have no reason to believe that any aspect has been overlooked. Competent counsel have appeared in front of me

and drawn my attention to all relevant aspects.

Counsel for Aqua addressed me on the negative report. I regard this report as irrelevant. Even if all the assertions against Aqua are true it does not mean that they are always going to conduct themselves like that. In any event the assertions are denied and countered by the submissions made by Aqua as set out in the report.

They have not yet been prosecuted. For all I know they may never be prosecuted. There are no facts in front of me to
10 take the issues in the report any further.

As far as the respondents' arguments are concerned, I suspect they are overly dramatic. There is no risk of having no water tomorrow should the order sought be granted. There is no risk of some impending disaster or other dramatic event taking place.

I accept that counsel acting on behalf of the respondents presented the case for the respondents as seen by them and if at times it came across as overly dramatic it was meant to make the point and I draw no negative inference
20 from any over dramatisation.

On a total conspectus of all the facts in front of me I ultimately have to bear in mind that this is an application for an interim order. Hence, all the applicant has to make out is a *prima facie* case.

It does not have to meet the test for final relief. There

are issues regarding balance of convenience that I should take into account such as the harm that may ensue should I grant the relief.

I cannot see why a tenderer in the position of Aqua should sit back and wait until a local government has committed several administrative illegalities or even acted in breach of the Constitution and then only respond.

It is clear enough that the respondents are on the wrong course or possibly on the wrong course or even probably on
10 the wrong course. If Aqua has made out a prima facie case (I emphasise that it is a very light test) and only for purposes of interim relief, it must succeed.

I can see no reason why they cannot apply to the court urgently in the way they have done. I have considered what the position would be if I grant no relief whatsoever. The difficulty with the latter is that the lingering suspicions will remain. There has been an advertisement which pointed to a certain direction and course of action. The fact that a different ostensible innocent course of action is now followed does not
20 mean that it is going to stay that way.

I can understand why a tenderer or a potential tenderer immediately runs to court and protect his possible position down the line. If it turns out to be a case where as here when the matter is heard there is no bid process ongoing it is not the end of the inquiry. More may happen down the line.

I know that the respondents are committed to a deviation, a legitimate process utilised in an emergency situation. Should that course change, there may be consequences. As I have said a potential bidder has no reason to sit back when they see an advert. That is the first overt act detectable by a tenderer and from experience in this court I know bidders act pre-emptively to prevent another bidder being wrongfully preferred by way of deviation.

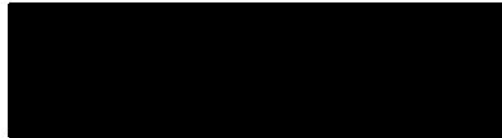
They are vigilant and they pounce in case another
10 bidder is wrongfully preferred. The bidding process is fierce. If you sit back and you do not respond, you may be taken by complete surprise and eventually find yourself completely out of the bidding.

The fact that there is a potential bid that may ultimately be academic. I have reckoned with, but at the same time in the interim an order will have a salutary effect. It will keep the respondents, should anything go wrong, on the straight and narrow. If they are truly committed to a deviation as they say they are then this interim order will not in any way burden the
20 deviation process and they will be able to fulfil their statutory functions to the fullest extent and on an emergency basis.

On the final balancing of all the facts in front of me and I have taken into account Section 217 of the constitution and the fact that I should look at various different balances, I am satisfied that the applicant has made out a *prima facie* case

and I am therefore going to make the order as formulated in the draft order handed up to me. I am not going to read it out again. I have done so at the beginning. I am making no amendments to the order save for the amendment in paragraph 3. It was given to me in that fashion. I merely have to change the word "it" to "is", so that it makes grammatical sense in English. So, I in the circumstances I grant the order as reformulated. The order is handed down and marked X.

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VAN NIEUWENHUIZEN, AJ

JUDGE OF THE HIGH COURT

DATE: 4/4/2023