

**FORM A**  
**FILING SHEET FOR EASTERN CAPE, PORT ELIZABETH**

**NOT REPORTABLE**

PARTIES:     **ROBCON CIVILS / SINAWAMANDLA 2 JOINT VENTURE**

Case Number:               **2106/09**

- High Court:           **PORT ELIZABETH**
- 
- DATE HEARD:               **25 FEBRUARY 2010**
- DATE DELIVERED:   **4 MARCH 2010**
- JUDGE(S):               **EKSTEEN J**

LEGAL REPRESENTATIVES -

*Appearances:*

- for the Plaintiff(s): **ADV ENGELA**
- for the Defendant(s): **ADV SCHUBART**
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*Instructing attorneys:*

- Plaintiff(s):           **MASIZ HARKER INC**
- Defendant(s):               **SCHOEMAN OOSTHUIZEN INC**

CASE INFORMATION -

- *Nature of proceedings:*
- *Key Words:*
- *Summary:*

IN THE HIGH COURT OF SOUTH AFRICA  
EASTERN CAPE, PORT ELIZABETH

NOT REPORTABLE

Case No.: 2106/09

Date delivered: 4 March 2010

In the matter between:

**ROBCON CIVILS / SINAWAMANDLA 2 JOINT VENTURE** Applicant

and

**KOUGA MUNICIPALITY** First Respondent

**AFRICAN BULK EARTHWORKS (PTY) LTD** Second Respondent

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**JUDGMENT**

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**EKSTEEN J:**

[1] This matter concerns costs incurred in respect of the launching of an application by the applicant in which it sought an order against the first respondent to provide it with certain documentation and information relating to the adjudication and award by the first respondent of a tender to the second respondent and an interim interdict against the first respondent restraining it from entering into a contract with the second respondent.

[2] During January 2009 the first respondent invited tenders for the construction of an access road in Oceanview, Jeffreys Bay. Aurecon South

Africa (Pty) Limited (Aurecon) were appointed by the first respondent to act as its consultants in the management and execution of the tender 26/2009. It is not in dispute that Aurecon acted at all times as the duly authorised agent of the first respondent in its interaction with tenderers.

[3] Tenders closed at noon on 6 March 2009 and the validity period of tenders was stipulated to be eight weeks from the closing date. The applicant duly complied with the tender conditions and submitted a tender which was timeously received.

[4] On 5 May 2009 the applicant received a letter from one Johan van der Mescht, acting on behalf of Aurecon wherein he stated that the tender validity period had expired on 24 April 2009 and that the first respondent had requested Aurecon to confirm whether the first respondent, and other tenderers, would agree to the validity period being extended by 30 days with the revised expiry date being 24 May 2009. The applicant agreed to this request. On 19 May 2009, however, the applicant received an email from the said van der Mescht, on behalf of Aurecon, in which he records as follows:

“We received an email from the client today informing us that we must go ahead and appoint African Bulk Earthworks as the contractor for the above project. Our tender report recommended your company as the preferred contractor, but, as far as I know the client has the final say in the matter.”

[5] In the light hereof the applicant immediately called upon its attorneys, Mills & Lombard, to address both Aurecon and the municipal manager of the first respondent requesting further details and information regarding the alleged award of the tender. Their letter, dated 21 May 2009, records as follows:

“We have been instructed by our client to appeal the decision to award the contract to Africon Bulk Earthworks. To enable us to formalise our appeal and reasons we urgently require the following information from you:

1. Names of the Panel that evaluated the different bids as received in respect of the tender advertised for the construction of the access road.
2. The score sheets of every member of the panel evaluating the different bids.
3. Exact details of the specific criteria used by the evaluating panel to determine what points should be allocated to each bid for experience, expertise and methodology.
4. Where in the tender document has the criteria that would be utilise to determine the points to be allocated in respect of the experience, expertise and methodology been set out. ...”

[6] This letter elicited no immediate response from the municipal manager, however, on 25 May the said van der Mescht, on behalf of Aurecon responded requesting an extension of the tender validity period to 6 July 2009. This request was promptly accepted by the applicant. The letter of 25 May, however, made no mention of the correspondence forwarded to Aurecon and the municipal manager on 21 May. The only logical conclusion to be drawn from the request to extend the tender validity period seems to be that

the first respondent was reconsidering the award of the tender and that no final decision had yet been made. In order to clarify this the applicant addressed a further letter to Mr van der Mescht in which it specifically referred to its earlier correspondence of 21 May 2009 and requested van der Mescht to acknowledge receipt thereof. The applicant therein recorded its understanding that the “*dies*” allowed for a disappointed tenderer to lodge an appeal in terms of section 62 of the Local Government: Municipal Systems Act, 32 of 2000, are similarly extended consequent to the request for an extension of the validity period. The said section affords a disappointed tenderer twenty one days from the date of notification of the tender award to lodge an appeal against such decision. It appears accordingly that what the applicant records is its understanding that the prior notification of the tender award no longer applied. This accords with its understanding that the award of the tender was to be reconsidered.

[7] In response to this communication Mr van der Mescht did indeed respond acknowledging receipt of the applicant’s letter dated 21 May 2009.

Mr van den Mescht records as follows:

“Our subsequent request for an extension of the tender validity period on behalf of our client, the Kouga Municipality, was to allow specific time for the matter to be resolved.”

[8] No explanation is given in respect of what matter needed to be resolved. In my view the applicant would have been entitled to assume, as it

appears to have done, that the award of the tender was to be reconsidered. The applicant caused a further email to be sent to Mr van der Mescht at Aurecon on 4 June 2009 requesting information in regard to further developments. Van der Mescht responded on the following day recording as follows:

“There is nothing from our side. Bear in mind that we can do nothing without our client’s consent. To date we have not received any further instructions with respect to proceeding with the project.”

This appears to fortify the view held by the applicant. Indeed on 6 July 2009 van der Mescht requested a further extension of the tender validity period to 17 August 2009. The applicant promptly agreed thereto.

[10] On 8 July 2009 the municipal manager of the first respondent reacted, at last, to the applicant’s letter dated 21 May 2009 to which reference has been made above. He formulated a response as follows:

“You are hereby advised to follow the procedures prescribed in the Promotion of Access to Information Act, Act 2 of 2000, in order to obtain the requested information.”

[11] This response, the first respondent contends, was sent by ordinary mail. It does not disclose the date upon which it was mailed and no mention is made of this letter in the applicant’s founding papers which were attested to

on 31 July 2009. On the papers before me I cannot determine whether this letter had or ought to have been received by the applicant's prior to launching the application.

[12] On 15 July 2009 the "Daily Tenders Consultant" published on their website a notice stating that the tender had been awarded to the second respondent. Upon learning of this event the applicant telephonically contacted the said van der Mescht on 16 July 2009. Van der Mescht confirmed the award of the tender to the second respondent.

[13] Pursuant to this notification and on 21 July 2009 the applicant again caused a letter to be dispatched by fax transmission from its attorneys, addressed both to Aurecon and to the municipal manager of the first respondent in which it sought an unequivocal undertaking that the first respondent would not implement or act in any way on the decision to award the contract in respect of which the applicant intended to appeal until the appeal had been finalised. It sought further an unequivocal undertaking that the first respondent would not conclude a contract with the second respondent or hand over the site to the second respondent until such time as the applicant's appeal had been finally adjudicated on. In this letter it also renewed its request for documentation and declared that unless the documents were received before 24 July 2009 it would approach the High Court as a matter of urgency. This letter elicited no response whatsoever and

accordingly the application was launched as a matter of urgency on 31 July 2009.

[14] The matter was set down for 4 August 2009. The first respondent required time to deal with the affidavits and the matter had to be postponed. The costs of the postponement on 4 August 2009 were reserved for later adjudication.

[15] When the first respondent ultimately came to reply it emerged that the second respondent had been informed on 6 May 2009 that the contract had been awarded to it. This so called "initial award" had never been retracted and in fact the contract had been finally concluded on 21 July 2009, the very day upon which an undertaking had been sought from the first respondent not to enter into such contract prior to the appeal having being heard. The site was handed over on the same day.

[16] Section 62(3) of the Local Government: Municipal Systems Act 32 of 2000 provides, in respect of an appeal against the decision to award a contract, that-

"the appeal authority must consider the appeal, and confirm, vary or revoke the decision but no such variation or revocation of a decision may detract from any rights that may have accrued as a result of the decision."

[17] It follows that once the contract had been concluded the relief sought by the applicant had been rendered largely nugatory and the applicant accordingly resolved not to proceed with the application. Hence the enrolment of the application in respect of the issue of costs which remains in dispute.

[18] The entire procurement process of an organ of state, which the first respondent is, is required to comply with the provisions of section 217 of the Constitution of the Republic of South Africa, Act No. 108 of 1996. Section 217 requires of the first respondent to act in accordance with the system which is "fair, equitable, transparent, competitive and cost effective". In terms of section 62(1) of the Local Government: Municipal Systems Act, 32 of 2000 a disappointed tenderer is required to lodge any appeal against the decision to award a contract within twenty one days of the date of notification of the decision. That notification was received on 19 May 2009. Immediately, within two days of the receipt of the notification the documentation which forms the subject matter of the current application was requested through the attorneys of the applicant. The immediate response to this communication received from Aurecon was to request an extension of the tender validity period of all tenders. I have already stated that in my opinion the only reasonable inference to be drawn from this was that the original allocation of the tender had been withdrawn and fell to be reconsidered. Subsequent correspondence and repeated requests for the extension of the tender validity

period appears to confirm this conclusion. The first respondent itself, did not respond to this request until 8 July 2009 and then such response was dispatched by surface mail.

[19] At all times after 21 May 2009 up to the launching of the application the first respondent knew of the applicant's intention to appeal the decision to award the contract to the second respondent. Not only did it lull the first respondent into a false sense of security through the repeated requests for an extension of the tender validity period and ambiguous correspondence from Aurecon but, in the face thereof, proceeded to conclude a final contract with the second respondent on the very day that it had been requested to give an undertaking that it would not so do. In my view the conduct of the first respondent in this procurement process was not fair, not equitable and not transparent.

[20] I turn to the first respondent's response to the request for information. This response has previously been considered in the Supreme Court of Appeal. In ***Tetra Mobile Radio (Pty) Limited v MEC Department of Works and Others*** 2008 (1) SA 438 at 444C the Supreme Court of Appeal held as follows:

“[13] The argument advanced by the institutional respondents that the appellant should have followed the procedure set out in the Promotion of Access to Information Act 2 of 2000 (PAIA) cannot be upheld. One has only to look at the disparity between the time

frames prescribed for the request for information under the Procurement Act (s 20) and those laid down for access to information under PAIA (ss 74 - 77) to conclude that the latter Act is irrelevant to the appellant's claim."

[21] Admittedly that matter dealt with a demand for information in terms of the KwaZulu Natal Procurement Act 3 of 2001. I consider, however, that by parity of reasoning the same applies when one has regard to the time frames set out in the Local Government: Municipal Systems Act as compared to those set out in the Promotions of Access to Information Act. The response of the first respondent, which was only forthcoming a mere two weeks before it concluded a binding agreement with the second respondent, was accordingly not justified and served only to frustrate any attempt on the part of the applicant to lodge an appeal, as it was entitled to do.

[22] In consequence of the aforesaid conduct of the first respondent the application, when it was ultimately launched, had already been overtaken by events and little purpose could be served by the continuation of the application. The first applicant contends, nevertheless, that I should not only award the costs of the application to the first applicant but, as a token of the Court's disapproval of the conduct of the first respondent in breach of its Constitutional duty, I should award costs on a scale as between attorney and client against the first respondent.

[23] On behalf of the first respondent it is submitted that the applicant knew of the award of the tender on 19 May 2009 and that it was incumbent upon the applicant to take steps to protect its interests thereafter. In these circumstances the first respondent contends that the applicant has created its own urgency and that it was not justified in bringing the application in the manner in which it did and that I should accordingly order the applicant to pay the costs of the application, alternatively that the applicant should at least pay the costs occasioned by the appearance on 4 August 2009.

[24] I do not agree that it was incumbent upon the applicant to start taking steps in May 2009. I have referred above to the misleading correspondence including the repeated requests for the tender validity period to be extended. These requests could serve no logical purpose once a decision had been taken to award the contract and I consider that applicant's understanding of these events was reasonable. The applicant requested material to which it was entitled during May 2005. It did not enjoy the courtesy of a response from the municipal manager for at least six weeks after the request was made and was lulled into a false sense of security by the correspondence received from Aurecon. I consider that the first respondent acted in breach of its constitutional obligations imposed in section 217 of the Constitution. The following remarks of Van Coller J in ***Oosthuizen v LUR Plaaslike Regering en Behuising en 'n ander*** 2004 (1) SA 492 (A) are apposite to the present matter:

"Dit wil voorkom dat daar eintlik geen rede bestaan waarom die inligting nie behoorlik verstrekkend is nie. Indien dit wel behoorlik verstrekkend is, sou daar bes moontlik geen aansoek gewees het nie. Die volgende opmerkings van Colman R aangaande die optrede van die respondent in die saak van *Howie NO v Essey* 1963 (3) SA 402 (T) op 404A - B is na my mening ook hier van toepassing.

'In my judgment the respondent's behaviour was unreasonable, unco-operative, and discourteous. If she had behaved properly, and I am speaking now not about compliance with legal obligations but merely with normal and reasonable courtesy in a matter of business, the application would probably not have had to be made. In these circumstances I am not disposed to disallow any part of the applicant's costs.'

In die lig van al die omstandighede is ek van mening dat dit billik sal wees indien geen kostebevel in hierdie aansoek gemaak word nie."

[25] In the present matter, it is of course not merely reasonable courtesy which is in issue but indeed the first respondent's flagrant disregard for its constitutional obligations. Whilst it may be so that the first applicant afforded the respondents merely one court day to respond when it launched the application I consider that the conduct of the first applicant which gave rise to the application in the first place far outweighs this consideration. In the circumstances it would be appropriate to order the first respondent to pay the costs of the application, including the costs which were reserved on 4 August 2009, on a scale as between attorney and client.

[26] It is accordingly ordered that the first respondent pay the costs of the application, including the costs reserved on 4 August 2009, on a scale as between attorney and client.

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**J W EKSTEEN**

**JUDGE OF THE HIGH COURT**