

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

NOT REPORTABLE

Case No.: 467/2012
Date Heard: 11 May 2012
Date Delivered: 22 May 2012

In the matter between:

**MACROVEST 102 (PTY) LTD t/a BUSINESS
INTELLIGENCE AND MAZIZI**

Applicant

and

**THE MUNICIPAL MANAGER OF THE NELSON
MANDELA BAY METROPOLITAN
MUNICIPALITY**

First Respondent

**THE BID ADJUDICATION COMMITTEE
OF THE NELSON MANDELA BAY
METROPOLITAN MUNICIPALITY**

Second Respondent

**THE NELSON MANDELA BAY
METROPOLITAN MUNICIPALITY**

Third Respondent

BUSINESS CONNEXION (PTY) LTD

Fourth Respondent

EPWEB ICT SOLUTIONS

Fifth Respondent

JUDGMENT

EKSTEEN J:

[1] On 23 February 2012 the applicant launched this application. In its notice of motion it sought a rule *nisi* coupled with a interim interdict preventing the first, second and third respondents from awarding a tender pending the finalisation of the review proceedings (Part A), an order granting it access to documentation relating to decisions taken in respect of the tender process (Part B), and, in due course, an order reviewing and setting aside any decision taken in respect of the award of the tender (Part C).

[2] The relief foreshadowed in the original notice of motion in Part C thereof was in the following terms:

- "1. An order reviewing and setting aside, alternatively declaring unlawful, any decision of the First, Second and/or Third Respondents to award the aforementioned Tender to either the Fourth or Fifth Respondents.
2. An order directing the First Respondent to award the aforesaid Tender to the Applicant, and a further order compelling the First Respondent to sign such documentation and such contracts as may be necessary to give effect to the award of the said Tender."

Section 8 of the Promotion of Administrative Justice Act, 3 of 2000, empowers the court, however, to grant any order in review proceedings which is just and equitable, including an order setting aside the administrative action and remitting the matter for reconsideration by the

administrator.

[3] On 15 February 2012 the first, second and third respondents served a notice of their intention to oppose the application in all its parts. The first, second and third respondents, however, failed to file any opposing papers and on the morning of the hearing of Part A and B of the notice of motion the first, second and third respondents withdrew their opposition to Parts A and B and filed a notice to abide the decision of this court in respect of these portions of the notice of motion. The fifth respondent, on the other hand, not only gave notice of its intention to oppose, but filed papers opposing the relief sought in Parts A and B of the notice of motion and, notwithstanding the first, second and third respondents' decision not to persist in their opposition, continued vehemently to oppose the granting of any relief. The fourth respondent did not enter an appearance to oppose.

[4] Although the first, second, third and fifth respondents were before court and the question of an interim interdict was fully argued at the first appearance, I nevertheless granted a rule *nisi* as the fourth respondent had not entered an appearance. On 8 March 2012 the following order was made:

"1(a) A rule nisi will issue returnable on 5 April 2012 at 10h00, or as soon thereafter as Counsel may be heard, calling upon the Respondents to show cause, if any, why a final order should not

be granted:

- (i) That the First, Second and Third Respondents be interdicted from awarding the September 2011 Financial Management Tool Tender (tender number SCM337/2011-2012)(the "tender") to the Fourth or Fifth Respondents and interdicting the First, Second and Third Respondents from concluding any agreements with the Fourth or Fifth Respondents to perform any work in terms of the tender until the final determination of the pending review application.
 - (ii) That the Third Respondent pay the costs occasioned by this application, alternatively, that the Third Respondent, jointly and severally with such further Respondents as may oppose the application, pay the costs of the application.
- (b) The order referred to in paragraph 1(a) above shall operate as an interim interdict with immediate effect pending the return day of the rule nisi.
- (c) The Third Respondent and the Fifth Respondents are ordered, jointly and severally, the one paying the other to be absolved, to pay the costs occasioned by the application for the interim interdict referred to in paragraph 1(b) above.
- 2(a) The First, Second and Third Respondents are ordered to provide to the Applicant, subject to paragraph 2(b) below, within three (3) weeks from the date of this order, all documentation relating to decisions taken in respect of the aforesaid tender, which documentation is to include the following:
 - (i) All minutes of the Bid Evaluation and Bid Adjudication Committees, including all reports, memoranda, score

sheets, tender responses and other documents forming a party of such minutes and reports;

- (ii) All reports, memoranda and other relevant documents submitted to the said committees by the municipal officials, directorates and departments concerning the aforesaid tender;
 - (iii) All written reports and recommendations of the Bid Evaluation and Bid Adjudication Committees concerning the aforesaid tender;
 - (iv) All written decisions and memoranda prepared by or on behalf of the Acting Municipal Manager of the Third Respondent in connection with the aforesaid tender;
 - (v) All reasons relating to any decision taken in connection with the aforesaid tender, whether by the First or Second Respondent; and
 - (vi) All minutes of the council of the Third Respondent and mayoral committees and sub-committees in connection with the aforesaid tender.
- (b) The First, Second and Third Respondents are directed to exclude from the aforesaid documentation, alternatively, to block out in the aforesaid documentation all information supplied by the Fourth Respondent and/or the Fifth Respondent in their bids which may put either of the said Respondents at a disadvantage in the bid process or prejudice them in commercial competition and in particular the First, Second and Third Respondents are ordered to omit or delete any information relating to the pricing structures of the Fourth Respondent and the Fifth Respondent's bid.

- (c) The costs occasioned by the application for access to information and reasons are reserved."

[5] The rule and the interim interdict were subsequently extended to 10 May 2012. This is then the extended return day of the rule.

[6] On 11 April 2012 the first, second and third respondents delivered the documentation referred to in paragraph 2 of the order of 8 March 2012 (the documents record). The evaluation criteria contained in the tender invitation provide that tenders are conditional on each bidder's "functionality pre-evaluation points, totalling 100 points, and only tenderers scoring a total of 60% (60 points) or higher will be evaluated further". Tenderers "price points" and "preference points" will accordingly not be evaluated and scored unless such tenderer has achieved 60% for its "functionality pre-evaluation points". The documents record revealed that four bids had been received in response to the third respondent's invitation to tender, being that of the applicant, the fourth respondent, the fifth respondent and a further bid from Mars Technology. The bid by Mars Technology had been rejected as non-responsive at a pre-evaluation meeting even before the bids were submitted to the third respondent's Bid Evaluation Committee. The applicant's bid had been eliminated at the first hurdle by the Bid Evaluation Committee as it was adjudged not to meet the minimum functionality requirement of 60% set in the evaluation criteria. It was accordingly not further evaluated with reference to its

price structures and the preference criteria set out in the evaluation criteria. The bids of the fourth and fifth respondents were further considered by the bid evaluation committee and by the second respondent and the second respondent ultimately recommended to the first respondent to award the tender to the fifth respondent.

[7] This is precisely what the applicant in its initial papers had contended had occurred and which it contended had wrongfully occurred.

[8] On 24 April 2012 after consideration of the documents record, the applicant filed and delivered its further affidavits for purposes of the review application, Part C of the notice of motion, as it was entitled to do in accordance with the provisions of Rule 53 of the Uniform Rules of Court.

[9] In its further affidavits, the applicant alludes to the third respondents tender invitation and the evaluation criteria set out therein. The functionality pre-evaluation was performed by the Bid Evaluation Committee and the documents record reveals that the Bid Evaluation Committee was comprised of five members being as follows:

Chairperson: Mr R Williams

Committee Member: Ms N Mzinzi

Committee Member: Mrs N C Ngxesha

Committee Member: Mr A F Hiscock and

Project Manager: Ms T Jonas

[10] Each of these members scored each of the tenderers on the strength of their bids. The score cards revealed that initially Ms Jonas scored the applicant at 75%, Mr Williams 45%, Ms Ngxesha 50%, Mr Hiscock 80% and Ms Mzinzi 50%. Notwithstanding the very considerable disparity which exists between the scoring of Ms Jonas and Mr Hiscock on the one hand, and that of Mr Williams, Ms Ngxesha and Ms Mzinzi on the other, the applicant would nevertheless have achieved 60%. The score cards however, reveal that the scores originally allocated by Mr Williams and Ms Mzinzi were further altered, in the case of Mr Williams, to reduce the applicant's functionality score from 45% to 35 % and in the case of Ms Mzinzi to reduce the score allocated from 50% to 45%. This the applicant suggests was irrational and was done to eliminate the applicant from the process.

[11] The applicant argues in its further affidavits, largely on the strength of the foregoing, that the Bid Evaluation Committee's assessment and scoring of the applicant's functionality requirement is clearly incorrect and its decision to eliminate the applicant from the tender process is unreasonable, irrational and arbitrary as the applicant had since August 2005 designed the third respondent's Financial Management Tool and has

furthermore since then successfully developed, supported and maintained the system on behalf of the third respondent. I pause to record that in argument before me it is further contended that in the event that the matter is referred back to the third respondent Mr Williams, Ms Mzinzi and Ms Ngxesha should be disqualified from further participation in the evaluation process. I shall revert to this issue below.

[12] Notwithstanding the formulation of the notice of motion to which I have referred earlier, the applicant declares the objective of its application in its further affidavit as follows:

'The Applicant simply seeks that its tender response, in particular its "**Functionality**" requirement, "**Price Points**" and "**Preference Points**", be referred back to the Bid Evaluation Committee, the Second Respondent and the First Respondent and be considered, evaluated and scored with other bidders' tender responses; and that the Tender be awarded fairly by the First Respondent to the bidder with the highest "**Price Points**" and "**Preference Points**" scores.'

[13] On 25 April 2012, after delivery of the further affidavits, the first respondent addressed a letter (the letter) to the applicant, fourth respondent and fifth respondent, and presumably also to Mars Technology in which he records as follows:

'On my perusal of the report of the Bid Evaluation Committee to the

Bid Adjudication Committee, I noted *inter alia* the following:

- that Mars Technology was found non-responsive at a “*pre-evaluation meeting*” held by officials other than the Bid Evaluation Committee. The Municipality’s Supply Chain Management Policy contains no provision for such a pre-evaluation process by officials other than the Evaluation Committee. Therefore the disqualification of Mars Technology by those officials offends the Supply Chain Management Policy;
- furthermore, the Evaluation Committee was tasked to evaluate tenderers on functionality and to allocate points based on previous experience in related industry, personnel component, project management capabilities and comprehensiveness of tender requirements. It was further stipulated in the tender conditions that only the tenderers who attained a score of 60% or higher, qualify for further evaluation. In my view, the fact that one of the tenderers, Mars Technology was marked “*non-responsive*” and disqualified by officials who had no power to do so, violated and contravened the Municipality’s Supply Chain Management Policy.

Consequently and based on the powers vested upon me, in terms of clause 29(6) of the Municipality’s Supply Chain Management Policy, I have decided to refer the Evaluation Committee’s recommendation back to the Bid Evaluation Committee for reconsideration.

The Bid Evaluation Committee is now constituted by new members and I have instructed the Evaluation Committee to reconsider whether all the tenderers who had submitted their tenders on or before the closing date (22 September 2011) in respect of the relevant tender were responsive or not, and further to evaluate all those tenderers who are found to be responsive in accordance with the tender specifications. The evaluation will also involve evaluation on functionality which requires a tenderer to attain a score of at least

60% on functionality in order for that tender to be evaluated further on pricing and HDI component.'

[14] If what is recorded in the letter has indeed occurred then, the applicant contends that it has achieved precisely what it had set out to achieve, as declared in the further affidavit, namely, that its tender response be referred back to the Bid Evaluation Committee, the second respondent and the first respondent and be considered, evaluated and scored with other bidders' tender responses and that the tender be awarded fairly by the first respondent. In these circumstances the applicant contends that the first, second and third respondents have essentially conceded the main relief sought by it in review.

[15] In argument before me the applicant accordingly seeks an order that the first, second and third respondents remit the applicant's tender response to the third respondent's Bid Evaluation Committee for reconsideration and recommendation, and that the second respondent should evaluate the recommendation of the third respondent's Bid Evaluation Committee and submit its recommendation to the first respondent.

[16] The documents record shows that a final award of the tender has not been made. Mr **Gqamana** on behalf of the first, second and third respondent argues, reliant on the letter, that whatever the merit of

previous decisions may have been, the first respondent has now exercised the power which is vested in him in terms of clause 29(6) of the third respondent's Supply Chain Management Policy and he has remitted the matter back to the Bid Evaluation Committee to commence the process afresh. On this basis it is argued that the process is now before the Bid Evaluation Committee and the review has become moot. He contended accordingly that I should simply discharge the rule.

[17] The fifth respondent adopts a similar stance. Mr **Swanepoel**, who appeared on behalf of the fifth respondent, affirms that the fifth respondent does not oppose or object to the first respondent's remittal of the matter back to the newly constituted Bid Evaluation Committee and will abide the outcome thereof. He argues that the remittal by the Municipal Manager renders the review academic.

[18] The difficulty, I think, which the first, second and third respondents have, is that no affidavit has been filed by or on behalf of any of them. The content of the letter has not been confirmed on oath and the letter has no evidential value on its own. Mr **Gqamana** has, however, confirmed that his instructions accord with the content of the letter. He conceded accordingly, correctly in my view, that in the absence of an affidavit by the first respondent to confirm that the remittal has occurred it would be appropriate to make an order that the matter be referred back to the Bid Evaluation Committee for the process to commence afresh. No

purpose would be served in postponing the review application further in circumstances where the parties are in agreement in respect of the further conduct of the process.

[19] Initially Mr **Gqamana** resisted the order sought by the applicant to exclude Mr Williams, Ms Mzinzi and Ms Ngxesha from the process, however, after obtaining specific instructions in respect of the composition of the proposed newly constituted Bid Evaluation Committee, Mr **Gqamana** advised that the first, second and third respondents do not intend to include these persons on the new Bid Evaluation Committee and have no objection to the granting of such an order. He remained, however, firmly opposed to the form of the remainder of the order sought by the applicant.

[20] Mr **Swanepoel**, on behalf of fifth respondent, was similarly opposed to the order sought by the applicant at the hearing. Suffice it to say that I think that there is merit in much of the criticism raised by Mr **Gqamana** and Mr **Swanepoel**, however, by virtue of the concession made by Mr **Buchanan**, on behalf of the applicant, in reply I do not think that it is necessary to deal in any detail with these objections. It was submitted on behalf of the fifth respondent that in the event of an order being made the respondents should simply be directed to consider the competing tenders of all tenderers in accordance with the applicable laws, regulations and the procurement policy of the third respondent and in

accordance with the requirements of section 217 of the Constitution. I think that this would adequately protect the interests of all parties and Mr Buchanan did not contend otherwise.

[21] What remains for determination is the costs of the application, save those costs which have previously been adjudicated.

[22] On behalf of the applicant it is argued that the content of the letter by the first respondent is essentially a concession of the main relief sought in review. It is true that in the initial notice of motion the applicant sought an order that the tender be awarded to it. Notwithstanding this prayer, upon filing the further affidavits after the delivery of the documents record the applicant set out its objective, which I have recorded earlier.

[23] The delivery of the further affidavits was followed the very next day by a letter which records that the first respondent has done precisely that which the applicant declared that it seeks. I think that the applicant is justified in concluding that the letter constitutes a concession of the main relief sought in the review application. At the hearing before me, all were agreed that no purpose could be served in the further pursuit of the review application. I am of the view that the applicant has achieved substantial success. It follows that I think that the applicant is entitled to an order for its costs, including the costs of two counsel.

[24] Mr **Buchanan** contends that the third respondent should be liable for these costs. The fifth respondent, for its part, contends not only that fifth respondent should not be liable for the applicant's costs, but indeed that the third respondent should be liable for its costs too.

[25] Mr **Swanepoel** argues that adjudication of a tender process by a local authority places upon officers in its employ constitutional obligations which are further fleshed out in various statutes and in the third respondent's Supply Chain Management Policy. At the time that the application was launched the fifth respondent had no knowledge of the process which was internal to the third respondent's structures. The first, second and third respondents, so it is argued, consistently indicated their intention to persist in opposing the review application. Reliant on all these features it is contended that the fifth respondent was entitled to assume that the integrity of the process was intact and that no irregularity had been committed. The fifth respondent was accordingly entitled to actively oppose the relief sought to protect its interests.

[26] The letter, which only emerged on 25 April 201, records a breach of the Supply Chain Management Policy which had occurred some seven months prior to the date of the letter and which had not previously been revealed. Mr **Swanepoel** argues that the failure on the part of the first and third respondents to state the correct position timeously,

transparently and accurately, contravenes its constitutional obligations and is worthy of censure. This shortcoming extends to the litigation itself, so the argument goes, in that the first, second and third respondents failed to disclose the correct position to the parties and to the court and in particular, failed to instruct their counsel and attorney as to what the correct factual position was at the time when the matter was heard on an urgent basis on 29 February 2012, with the fifth respondent especially in the dark at the time. This is compounded by the failure of the first respondent now to explain under oath what the true position was and in particular, to explain the delay in not doing anything to rectify the position from the inception of the matter to the date of the letter being 25 April 2012.

[27] The matter does not end there. Reliance is placed also on the events which occurred subsequent to the order made on 8 March 2012. I ordered the delivery of the documents record within a specified time frame and made a particular order that certain information confidential to the fifth respondent should not be disclosed. The fifth respondent contends that the complete record was only produced on 23 April 2012 and, contrary to the order made, the confidential information expressly referred to in the order was delivered to the applicant.

[28] I am in full agreement with Mr **Swanepoel** that these matters are indeed cause for concern. In ***Abdi and Another v Minister of Home***

Affairs and Others 2011 (3) SA 37 (SCA) Bertelsmann AJA stated at p. 54:

“[36] Our courts have on several occasions expressed their disquiet at the failure of government officials, including the Department's officials, to respect the rights of individuals they deal with and to act in accordance with their duties imposed by the Constitution: *Eveleth v Minister of Home Affairs and Another* 2004 (11) BCLR 1223 (T) paras 45 to 48; *Nyathi v MEC for Department of Health, Gauteng and Another* [2008 \(5\) SA 94 \(CC\)](#) (2008 (9) BCLR 865); *Total Computer Services (Pty) Ltd v Municipal Manager, Potchefstroom Local Municipality, and Others* [2008 \(4\) SA 346 \(T\)](#) para 21; *Van Straaten v President of the Republic of South Africa and Others* [2009 \(3\) SA 457 \(CC\)](#). In the present instance the respondents' officials failed to understand the very object and purpose of the Act it was their duty to apply, causing unnecessary litigation and wasted costs. ...”

[29] I am in agreement with the sentiments expressed therein and I think that these comments are apposite to the present matter. In this case the disquiet is compounded by the third respondent's disregard for the order of court not to reveal the information confidential to fifth respondent.

[30] Mr **Gqamana**, on behalf of the first to third respondents, resists the granting of a costs order against the first, second and third respondents in favour of the fifth respondent. He was constrained to concede the seriousness of the shortcomings, however, he submits that these

shortcomings should not operate to benefit of the fifth respondent in the manner contended.

[31] I think that there is merit in Mr **Gqamana's** submission. There is no lis between the first, second and third respondents on the one hand and the fifth respondent on the other. The fifth respondent took a conscious decision that it intended to oppose the application launched by the applicant. The applicant alleged expressly that the first, second and third respondents had breached their constitutional obligations. The very foundation of the fifth respondent's argument in this regard is that it had absolutely no knowledge as to the correctness or otherwise of these allegations. I do not think that in those circumstances that the fifth respondent can be justified in entering into litigation on the assumption that the applicant's averments would prove in due course to be unsound. It entered into the litigation with the full knowledge that the applicant sought a costs order against the third respondent jointly and severally with such further respondents who choose to oppose the application.

[32] In all the circumstances I would, but for what is set out below, have been inclined to order that the third respondent and the fifth respondent pay the costs occasioned by the application jointly and severally, the one paying the other to be absolved. That, however, would not take account of the third respondent's breach of the order issued on 8 March 2008 to which I have alluded above. I am in agreement with Mr **Swanepoel** that

this conduct is worthy of censure. For the reasons set out above I do not, however, consider that it justifies a costs order in favour of the fifth respondent. In all the circumstances I consider it appropriate that an order be made that the third respondent on its own pays the applicant's costs occasioned by the application, save such costs which have previously been determined.

[33] In respect of the costs order which I had made against the fifth respondent on 8 March 2012, Mr **Swanepoel** has referred me to ***Safcor Forwarding (Pty) Ltd v NTC***, 1982 (3) SA 654 (A) particularly at p. 676. Mr **Swanepoel** argues on the strength hereof that I should revisit the costs order previously made. Suffice it to say that I do not consider this authority to entitle me to revisit a final costs order previously made. In any event, even if I was entitled to do so and I was called upon at this stage of the proceedings to reconsider the costs occasioned by the interim interdict, I would again make the same costs order which I had previously made. I have recorded above that I consider that the concession contained in the letter dated 25 April 2012 by the first respondent constitutes a concession of the main relief sought in the review proceedings. I have accordingly found, in effect, that the applicant has indeed achieved substantially what it sought to achieve by the institution of the application. In those circumstances it seems to me that the institution of the application and the interim interdict protecting the *status quo* up until the concession made on 25 April 2012 were justified.

The fifth respondent actively opposed this relief and, at that time, also the review.

[34] In the result I make the following order:

1. The rule *nisi* is discharged.
2. It is ordered that the first and third respondents remit the applicant's tender response, together with all other tender responses received, to the third respondent's Bid Evaluation Committee to commence the Bid Evaluation procedure afresh.
3. The first, second and third respondents are directed to reconsider competing tenders of the applicant, the fourth respondent, the fifth respondent and Mars Technology in accordance with all applicable laws, regulations and the procurement policy of the third respondent and in accordance with the requirements of section 217 of the Constitution.
4. It is ordered that Mr R Williams, Ms N Mzinzi and Ms N C Ngxesha are to be excluded from the Bid Evaluation process.
5. The third respondent is ordered to pay the applicant's costs of the application including the costs of two counsel.

J W EKSTEEN

JUDGE OF THE HIGH COURT

Appearances:

For Applicant: Adv R Buchanan SC, instructed by van Wyk
Attorneys, Port Elizabeth

For 1st, 2nd & 3rd

Respondents : Adv Gqamana, instructed by Ketse Nonkwelo
Incorporated, Port Elizabeth

For 4th Respondent: No appearance

For 5th Respondent: Adv M Swanepoel SC, instructed by Schoeman
Oosthuizen Incorporated, Port Elizabeth