

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH)**

Case No: 3191/2013
Date heard: 12/12/13
Date delivered: 31/12/13
Not reportable

In the matter between:-

JOUBERT GALPIN SEARLE

1ST APPLICANT

REHANA KHAN PARKER & ASSOCIATES

2ND APPLICANT

Z ABDURAHMAN ATTORNEYS

3RD APPLICANT

and

THE ROAD ACCIDENT FUND

1ST RESPONDENT

BATE CHUBB & DICKSON

2ND RESPONDENT

FRIEDMAN SCHECKTER

3RD RESPONDENT

POTELWA & COMPANY

4TH RESPONDENT

MNQANDI INC.

5TH RESPONDENT

KETSE NONKWELO INC.

6TH RESPONDENT

RAHMAN INC.

7TH RESPONDENT

TAU PHALANE INC.

8TH RESPONDENT

TOMLISON MNGUNI JAMES

9TH RESPONDENT

T M CHAUKE INCORPORATED

10TH RESPONDENT

DWARIKA NAIDOO & COMPANY

11TH RESPONDENT

MATTHYSEN & VAN VUUREN

12TH RESPONDENT

EDWARD NATHAN SONNENBERGS

13TH RESPONDENT

MAYAT NURICK

14TH RESPONDENT

LINDSAY KELLER

15TH RESPONDENT

SISHI INCORPORATED

16TH RESPONDENT

FOURIE FISMER INC.

17TH RESPONDENT

MOHLALA ATTORNEYS	18TH RESPONDENT
LINDA MAZIBUKO & ASSOCIATES	19TH RESPONDENT
MAYATS ATTORNEYS	20TH RESPONDENT
SHEREEN MEERSINGH & ASSOCIATES	21ST RESPONDENT
DIALE MOGOSHOA	22ND RESPONDENT
NOSUKO NXUSANI	23RD RESPONDENT
MNQANDI INC.	24TH RESPONDENT
MARIBANA MAKGOKA	25TH RESPONDENT
GOVINDASAMY NDZINGI GOVENDER INC.	26TH RESPONDENT
KESI MOODLEY	27TH RESPONDENT
TSEBANE MOLABA INC.	28TH RESPONDENT
HAJRA PATEL INC.	29TH RESPONDENT
DUDUZILE HLEBELA INC.	30TH RESPONDENT
ROBERT CHARLES	31ST RESPONDENT
MATHOBO RAMBAU SIGOGO	32ND RESPONDENT
NONGOGO NUKU INC.	33RD RESPONDENT
BOKWA ATTORNEYS	34TH RESPONDENT

Award of tenders – application for interim interdict pending review of award of tenders – requirements for interim interdict – no apprehension of irreparable harm established by applicants – applicants not establishing that balance of convenience favours them – application dismissed with costs.

JUDGMENT

PLASKET, J:

[1] During 2012, the Road Accident Fund (RAF) – the first respondent – called for tenders from firms of attorneys to act on its behalf in litigation arising from motor vehicle accidents. Joubert, Galpin & Searle (JGS) – the first applicant – is a Port Elizabeth-based firm of attorneys that has been a member of the RAF's panel of

attorneys for about ten years. It tendered unsuccessfully to remain on the panel. The RAF has given it notice of the termination of the contract with it, effective from 31 December 2013. JGS launched these proceedings as a matter of urgency. It claims relief in two parts: first, it claims interim relief aimed at stopping the implementation of the tenders by the RAF pending the determination of its application to review and set aside the tenders; and secondly, it has applied in terms of rule 53 of the uniform rules to review and set aside the award of the tenders.

[2] After the proceedings were launched, the new panellists were joined as respondents. Some of them have chosen to oppose the relief sought at both the interim and final stages. Two unsuccessful tenderers – Rehana Kahn Parker & Associates and Z Abdurahman Attorneys, both of Cape Town – applied to be joined as applicants, and were joined as the second and third applicants respectively. At the hearing of this matter, a lawyers association representing some 700 lawyers country-wide, the Black Lawyers Association (BLA), applied successfully to be joined as the fourth applicant. (The BLA was not a party to the application for interim relief. It was only joined as an applicant at the end of the hearing.)

[3] These developments, coupled with the sheer bulk of the papers – over 2 000 pages – and delays in the furnishing of the record, which runs to about 6 000 pages, meant that the review was not ripe for determination. It has been agreed that I shall hear it on 5, 6 and 7 February 2014. The parties were unable to reach an agreement on an interim arrangement pending the hearing in February 2014 and so the issue of interim relief was argued before me, and is the subject-matter of this judgment.

[4] The RAF gave an undertaking that to the extent that the applicants have instructions from it, they may continue to discharge those instructions until the review is finalised. The practical result of this undertaking is that the applicants will not have to hand over their RAF files at the end of 2013 but can continue with the work they have, while the RAF will be able to begin to instruct new panellists.

[5] The applicants took the view that the undertaking did not provide sufficient protection for them. They persisted in claiming relief in the following terms:

- '2. That the decision of the First Respondent to award the tender RAF/2012/00021: Panel of Attorneys for the Road Accident Fund to provide Specialist Litigation Services (the "Tender") in South Africa and the further implementation (to the extent that this has occurred) by both the First Respondent and any of the Second to Thirty Fourth Respondents, be suspended pending the finalisation of Part B of the notice of motion;
3. In the alternative to paragraph 2 above, that the decision of the First Respondent to award the tender in the Eastern and Western Cape and the further implementation (to the extent that this has occurred) by both the First Respondent and any of the Second to Thirty Fourth Respondents, be suspended pending the finalisation of Part B of the notice of motion;
4. That the First Respondent is directed, to the extent necessary, to extend the agreement between it and its panel attorneys to ensure no disruption to the legal services which the First Respondent requires on an ongoing basis, pending the finalisation of Part B of the notice of motion;
5. As to the costs in respect of Part A of the notice of motion, that the First, Tenth, Twenty Second and 30th Respondents be ordered to pay the First, Second and Third Applicants' agreed or taxed party and party costs, jointly and severally, the one paying the others to be absolved, such costs to include the costs of 2 (two) Counsel;
6. That the First, Second and Third Applicants be granted such further and/or alternative relief as this Honourable Court may deem fit.'

The facts

[6] I turn now to the facts. I shall do so briefly. I shall then address whether the matter is urgent before turning to whether the requirements of an interim interdict have been established.

[7] When the RAF called for tenders in July 2012, it made it clear that any offers made by tenderers would only be binding and open for acceptance during a validity period. That period was 90 days and it began to run from the closing date for bids on 20 August 2012.

[8] Although the RAF's Bid Evaluation Committee (BEC) dealt with the bids that had been submitted, and furnished a report to the RAF's Procurement Control Committee (PCC), before the expiry of the validity period, the PCC only met to consider the BEC's evaluation report two weeks after the validity period had expired.

It took a decision that bidders who had not submitted certificates of good standing for individual attorneys should be disqualified and remitted the matter to the BEC. In January 2013, the PCC considered a revised evaluation report submitted to it by the BEC which recommended the appointment of various of the bidders. The PCC resolved that audits should be conducted and later, in February 2013, it directed the BEC to correct certain mistakes in the evaluation of the bids. The process was finalized by 28 February 2013.

[9] In March 2013, the regularity of the process was first called into question. The RAF took advice, including an opinion from its attorneys, Webber Wentzel. This opinion dealt with two options. They were either to initiate a new tender process, an option that was described as being ‘more risk averse’, and a notice and comment process calling on bidders to give their views on extending the validity period. The second option was decided upon by the RAF Board on 29 July 2013, even though Webber Wentzel warned that legal challenges could be expected.

[10] Letters were sent to bidders requesting their views on the extension of the validity period, even though decisions had already been taken as to who was successful and who was not. JGS and other bidders expressed reservations about the proposed extension of the validity period but agreed to the proposal nonetheless. The unsuccessful bidders were informed of the outcome of the tender process on 16 August 2013.

[11] The decisions to award tenders to the second to thirty fourth respondents is the subject-matter of the review. On 21 August 2013 JGS made a request in terms of s 5 of the Promotion of Administrative Justice Act 3 of 2000 (the PAJA) for reasons for its bid being unsuccessful. On the same day, it also made a request in terms of the Promotion of Access to Information Act 2 of 2000 (the PAIA) for access to the information upon which the tender decisions were taken. On 9 September 2013, JGS received what purported to be reasons: it was informed that its bid had been unsuccessful because other bidders scored higher than it did. More correspondence ensued between JGS and the RAF on the adequacy of the reasons and on the request for access to information. Eventually, on 21 October 2013, JGS launched an application in terms of PAIA for the information that it had requested.

[12] By the last week of October 2013, the successful bidders had signed and returned to the RAF the service level agreements that would regulate their relationship with the RAF. This led JGS to demand an undertaking that the award of the tenders would not be implemented until its validity had been determined. No undertaking was forthcoming. On 1 November 2013, JGS launched this application.

[13] It was only on 13 November 2013, when the RAF filed its answering affidavit, that portions of the record became available to JGS. On 22 November 2013 a much fuller record, comprising of some 5 000 pages, was filed by the RAF. Even that was not a complete record and, on 6 December 2013, further documents, comprising of 140 pages, forming part of the record were provided. On 9 December 2013, a further 1 100 pages were furnished. Despite this, the record remained incomplete. The matter was heard on 12 December 2013.

Urgency

[14] The papers now run to over 2 000 pages and the record is over 6 000 pages long. Two and a half months passed from when the decisions under challenge were taken to when the application, for both interim relief and for the review and setting aside of the impugned decisions, was launched. During that time a great deal of correspondence passed between the RAF and JGS concerning reasons for the decision, access to the record and other matters related to the case, including the possibility of negotiating a settlement. Clearly, JGS did not sit idle during this period.

[15] It was not, in my view, unreasonable for JGS to request reasons and the information relating to the RAF's decision-making before launching its application. It is apparent too that the RAF was not particularly cooperative in this regard, even taking the position that information would not be provided to JGS without following 'the entire formal PAIA process', an attitude, I would have thought, that flies in the face of the spirit and tenor of the PAIA.

[16] In these circumstances, and in view of the pending implementation of the tenders and the termination of the RAF's contract with JGS and the other applicants, I am of the view that the matter is urgent and the urgency was not self-created.¹

Interim relief

[17] I turn now to the main issue for determination at this stage, namely whether a case has been made out for the grant of an interim interdict pending the determination of the review.

[18] An applicant who applies for an interim interdict must establish: (a) the right that forms the subject matter of the main application and which he or she seeks to protect, on a *prima facie* basis at least (even if it is open to some doubt); (b) a well-grounded apprehension that, if the interim interdict is not granted and the main application succeeds in due course, he or she will suffer irreparable harm; (c) the balance of convenience favours the granting of interim relief; and (d) he or she has no other satisfactory remedy.²

[19] I do not intend dealing in any detail with the first element, the existence or not of a *prima facie* right. Suffice it to say that: (i) the right that forms the subject-matter of the main application is the right of JGS and the other applicants to review and set aside administrative action concerning public procurement that is not lawful, reasonable or procedurally fair³ and that is not part of a system that is 'fair, equitable, transparent, competitive and cost-effective';⁴ (ii) based on the facts (that are largely common cause) it appears to me that the applicants enjoy some prospects of success; and (iii) that being so, they have established the first requirement for interim

¹ On the necessity for preliminary investigations and so on prior to launching review proceedings, albeit in the context of delay rather than urgency, see *Scott & others v Hanekom & others* 1980 (3) SA 1182 (C) at 1192G-1193G. On self-created urgency, see *Schweizer-Reneke Vleis Maatskappy (Edms) Bpk v Minister van Landbou & andere* 1971 (1) PH F11 (T) at F11-12; *Nelson Mandela Metropolitan Municipality & others v Greyvenouw CC & others* 2004 (2) SA 81 (SE) paras 33-34.

² *Setlogelo v Setlogelo* 1914 AD 221 at 227; *Webster v Mitchell* 1948 (1) SA 1186 (W) at 1186-1187; *Eriksen Motors (Welkom) Ltd v Protea Motors, Warrenton & another* 1973 (3) SA 685 (A) at 691D-E; Andries Charl Cilliers, Cheryl Loots and Hendrik Christoffel Nel *Herbstein and Van Winsen: The Civil Procedure of High Courts and the Supreme Court of Appeal of South Africa* (5 ed) (Vol 2) at 1456-1457.

³ Constitution, s 33(1); the PAJA, s 6.

⁴ Constitution, s 217(1).

relief, the existence of a *prima facie* right, even if it is open to some doubt. I accept too that the fourth requirement, the absence of any other satisfactory remedy, has been established by the applicants.

[20] The second requirement for the grant of an interim interdict is a well-grounded apprehension of irreparable harm if the interim interdict is not granted and the review succeeds in due course. Put otherwise, the question is: 'Would the applicants be denied their prize if no interim interdict is granted?' This, it seems to me, requires an analysis of what relief the applicants have applied for in the review application and what its practical effect will be if they succeed. It also requires an analysis of the nature of the irreparable harm that the applicants say they apprehend.

[21] The relief for which the applicants have applied is the review and setting aside of every decision taken by the RAF in the tender process after the expiration of the 90-day validity period and an order directing the RAF to commence the tender process afresh. The applicants have also applied for alternative relief, none of which envisages the award of a tender to any of them. In other words, if the applicants succeed in due course, the practical effect of their victory will, on the best-case scenario, be that the whole tender process will have to re-commence and they will have to bid again for the RAF's work. They cannot claim, and do not claim, a right to be awarded a contract to act for the RAF.

[22] In the application for interim relief, however, they seek an order that will, in effect, compel the RAF to continue to give them instructions and not to give instructions to its new panellists. This they seek in the face of a decision taken by the RAF to terminate the contracts that it has with the applicants on 31 December 2013. They claim that they will suffer irreparable harm if interim relief is not granted and they succeed in the review because they may be faced with the situation that it is impossible to 'unscramble the egg': even if they establish that the decisions under challenge were unlawful, they may be denied the remedy of setting aside, and the irregularly awarded tenders to the new panellists may be allowed to stand.

[23] As this is an issue that I may be called upon to decide when I hear the review, I do not wish to deal with it in any detail or to second-guess what may arise when

fuller argument is presented. Suffice it to say at this stage that it seems to me that the argument is unduly alarmist. These are not the type of tenders in which relief is likely to be withheld because too much water will have flowed under the bridge. First, a relatively short period of time will have passed from when the new panellists became eligible to do the RAF's work to the hearing of the review in early February 2014. Secondly, cases in which a tender is not set aside despite it being awarded irregularly typically involve work that has all but been completed by the time the review is heard.⁵ Thirdly, this case involves instructions being given to panellists on an *ad hoc* basis for individual cases from time to time, similar to the tender in *Eskom Holdings Ltd & another v New Reclamation Group (Pty) Ltd*⁶ in which these features led the court to set aside the irregularly awarded tender despite it only having a few months to run. Fourthly, in this case, if the tender process is set aside, a new tender process can be initiated for the same period as the present tenders and if the panellists change, while it may cause inconvenience, it is possible (as the present case shows) to manage a handover of files from old panellists to new panellists.

[24] The third requirement for interim relief is a balance of convenience in favour of an applicant for such relief. In this case, the balance of convenience does not, in my view, favour the applicants. While it is so that they will not receive new instructions before the review is decided, and if they are successful in setting aside the tender process, will have to tender again for the RAF's work, their position is not much different to that of respondents whose bids were successful: they have expended money and committed resources to the restructuring of their practices and many have had to forego motor vehicle accident work for plaintiffs by referring clients to other firms of attorneys and not taking new instructions from potential plaintiffs.

Conclusion

[25] In conclusion, I am of the view that a case has not been made out by the applicants that they will suffer irreparable harm if interim relief is not granted and

⁵ See for example *Chairperson, Standing Tender Committee & others v JFE Sapela Electronics (Pty) Ltd & others* 2008 (2) SA 638 (SCA).

⁶ *Eskom Holdings Ltd & another v New Reclamation Group (Pty) Ltd* 2009 (4) SA 628 (SCA).

they succeed in the review in due course and that the balance of convenience favours them. I am further of the view that costs should follow the result.

[26] I make the following order:

(a) The application of the first, second and third applicants for the relief set out in Part A of the notice of motion is dismissed.

(b) The first, second and third applicants are directed to pay the costs, jointly and severally, of the first, tenth, twenty second, twenty sixth and thirtieth respondents, including, in the case of the first respondent, the costs of two counsel.

(c) The matter is postponed to 5 February 2014 for the relief claimed in Part B of the notice of motion to be determined.

C Plasket

Judge of the High Court

APPEARANCES

First applicant: A Nelson SC and J Huisamen SC instructed by Joubert Galpin & Searle

Second applicant: P J De Bruyn SC and J Huisamen SC instructed by Joubert, Galpin & Searle

Third applicant: D Potgieter SC and G Potgieter instructed by Joubert, Galpin & Searle

First respondent: P Kennedy SC and T Ngcukaitobi instructed by Goldberg & De Villiers

Tenth and twenty second respondents: K Tsatsawane instructed by T M Chauke Inc and Diale Mogoshoa

Twenty sixth respondent: I F Armoed instructed by Boqwana Burns Inc

Thirtieth respondent: A Tiry instructed by Masiza Harker Inc