

Not Reportable

**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE LOCAL DIVISION – PORT ELIZABETH**

Case No: 3087/2016
Date Heard: 1/12/16
Date Delivered: 13/12/16

In the matter between:

ALFDAV CONSTRUCTION CC	Applicant
and	
MEC FOR ROADS AND PUBLIC WORKS	First Respondent
HOD: DEPARTMENT OF ROADS AND PUBLIC WORKS	Second Respondent
DEPARTMENT OF ROADS AND PUBLIC WORKS	Third Respondent
BLUE DISA TRADING 754 CC JOINT VENTURE	Fourth Respondent
EDGE TO EDGE 1275 CC	Fifth Respondent
NEPA PROJECTS JOINT VENTURE	Sixth Respondent
EXPRESS BUILDERS CC	Seventh Respondent
GVK SIYAZAMA BUILDING CONSTRUCTORS (EP) (PTY) LTD	Eighth Respondent
REITY TRADING ENTERPRISE JOINT VENTURE	Ninth Respondent
BREETZKE SMITH PAXTON CONSTRUCTION (PTY) LTD	Tenth Respondent
MEC FOR EDUCATION	Eleventh Respondent

JUDGMENT

GQAMANA AJ:

[1] The sole remaining issue in this application is the issue of costs. The application was brought by the applicant on an urgent basis seeking an interdict against the first to the fourth respondents from implementing the tender which was awarded to the fourth respondent. In the same application, the applicant also sought an order reviewing and setting aside the aforesaid tender. I will deal later in this judgment with the facts giving rise to this application.

[2] The urgent application was resolved through an agreement by the parties¹ to expedite the main review application. Such agreement was made an order of this court on 13 October 2016. Subsequent thereto, record in compliance with Rule 53 of the Uniform Rules was filed. The applicant thereafter filed supplementary affidavit and an amended notice seeking an order that the award of the tender to the fourth respondent be reviewed and set aside and substituted with an order directing that such tender be awarded to the applicant.² Also in its supplementary affidavit, the applicant indicated that it intends to apply for an order referring the matter for hearing of oral evidence and I will deal with this later in this judgment.

¹ The applicant and the first to third respondents, the fourth respondent was not involved therein.

² Index: page 167 para 1 and 2.

[3] Opposing papers were filed by the first to third respondents and the fourth respondent also joined the fray and opposed the relief sought by the applicant. However shortly before the hearing of this application³ the applicant abandoned all of the substantive relief originally sought by it, but persisted with its stance on the costs against the first to the third respondents and without even tendering the costs of the fourth respondent.

[4] The facts relevant to this application can be summarised as follows: an invitation to tender for the repairs and renovations of Bhongweni Primary School, SCMU-15/16-0099SB was issued by the Department of Roads and Public Works (the third respondent). The closing date for such tender was 14 April 2016. Number of entities/companies responded to such invitation, however for purposes of this application, I will confine myself only to the applicant and the fourth respondent. In terms in tender invitation, parties were required to submit their B-BBEE certificate in order to qualify for preference points for B-BBEE. Parties were further aware that failure to submit the B-BBEE certificate will result in zero points score for B-BBEE.

[5] In terms of the standard conditions of tender, the department was required to open tender submissions in the presence of tenderers' agents and to announce at the said meeting the total prices and preference points

³ This appears from the first time in the applicant's heads of argument filed on 25 November 2016 and the application was set down on 1 December 2016.

for each tenderer. At the said meeting the applicant was represented by Ms Xayi. It is contended in the founding affidavit by the applicant that at this meeting preference points claimed by each tenderer were not announced. The respondents take issue with this contention. In response to this allegation the fourth respondent filed the transcript of the mechanical recordings of what exactly occurred at this meeting and to support its submission that preference points were indeed announced. The first to the third respondents also filed an affidavit of Mr Philip Browley-Gans, an independent witness who also confirmed that there was no B-BBEE certificate attached to the applicant's tender and as a result the applicant preference points score was noted as zero.

[6] Fundamental point on this is that: the entire case of the applicant hinges on the question of the B-BBEE certificate. The first to third respondents argued that the applicant failed to attach the B-BBEE certificate to its tender hence it received zero points for the B-BBEE status. Throughout the course of this application the applicant persisted with its stance that it had submitted the B-BBEE certificate and accordingly it was entitled to receive the B-BBEE preference points.

[7] According to the applicant, on 12 August 2016 it heard rumours that the tender was awarded to the fourth respondent. But the rumours were

confirmed on 16 August 2016. On 17 August 2016, a letter was then addressed to the first and second respondents requesting them to provide certain documentation relevant to the evaluation and adjudication of the relevant tender as well as reasons for the decision. There being no satisfactory response to this letter the present application was instituted. As already indicated above the applicant's entire case was that it had submitted the B-B-BBEE certificate and as such it was entitled to the preference points.

[8] However for some obscure reasons, during argument counsel for the applicant advanced submissions that had the information sought in the applicant's attorneys letter been provided timeously the entire litigation would have been avoided. In developing this argument, it was submitted that the applicant required this information in order to digest its stance on the possible irregularities that may have occurred in the evaluation and adjudication of the relevant tender. The upshot of these submissions are that, even though the applicant has now abandoned the substantial relief but, it has achieved a substantial success hence it should be entitled to the costs order against the first to third respondents.

[9] I have great difficulties to comprehend the above submissions for various reasons. It was never the applicant's case as pleaded in the founding and supplementary affidavits that, the first to second respondents'

failure to respond to its attorney's aforesaid letter necessitated this application. As a matter of fact, the applicant made unequivocal allegation that at the opening of the tenders meeting, preference points were not announced and, it only became aware in August 2016 that, no preference points were given to it. These submissions as Mr Buchanan, counsel for the first to third respondents, correctly so, argued were false. The applicant was aware as early as at the opening of tenders that, it was not awarded the B-BBEE preference points because it had not submitted the relevant certificate. Further no objections were raised in this regard by the applicant's agent Ms Xayi at the said meeting.

[10] My other difficult with the applicant's submissions is that, even after the required information was provided it proceeded with the application and sought an order that the tender be awarded to it. If the requested information was necessary for the applicant to digest its stance on the alleged irregularities in the evaluation and adjudication of the relevant tender, once the information was supplied to it, one would have expected it to have abandoned the relief then and possible only proceeded with the issue of costs. I do not accept that the applicant required the requested information. My view is simple that, based on the founding and supplementary affidavits; the application had no signs of life from the outset. It was a still-born. The fact that parties for convenience agreed to

the interdict and an expedited time period for the main review, could not be viewed as a resuscitation of a still-born application. The application was doomed to fail from the start.

[11] It follows therefore that the applicant's argument that it has achieved substantial success is misplaced. There is no substantial right proved⁴ by the applicant, to the contrary the applicant failed to demonstrate entitlement to any of the relief sought in either the initial notice of motion or the amended notice of motion.

[12] Furthermore even the argument that in exercising my discretion on the issue of costs, I should deprive the successful parties their costs must also fail. There is no conduct of any of the respondents that warrants me to deprive them on their costs. They have not acted unreasonable nor have they caused unnecessary litigation. As I have already found above that, the applicant pursued the relief on the basis of facts which it knew to be false. At no stage had the applicant been misled by any of the respondents.

[13] Lastly during argument, the applicant's counsel conceded, correctly so, that the fourth respondent is entitled to its costs. Having regard to the facts

⁴ See *Esofranki Pipelines (Pty) Ltd v Mopani District Municipality and Others* (2014) 2 All SA 493 (SCA).

and evidence before me, there is no legal basis to depart from the normal approach that costs follows the result.

[14] In the result the following order is made:

The application is dismissed with costs.

NW GQAMANA
Acting Judge of the High Court

Counsel for the Applicant:	Adv A White Port Elizabeth
Instructed by:	Cecil Beyleveld Attorneys Port Elizabeth
Counsel for the 1 st , 2 nd & 3 rd Respondents:	Adv RG Buchanan (SC) Port Elizabeth
Instructed by:	State Attorneys Port Elizabeth
Counsel for the 4 th Respondent:	Adv JD Huisamen (SC) Port Elizabeth
Instructed by:	Kwaku Aduna Attorneys c/o Nash Vandayar Attorneys Port Elizabeth
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