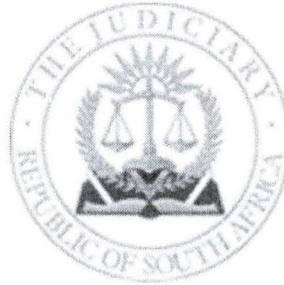


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NUMBER: 2021/15418

DELETE WHICHEVER IS NOT APPLICABLE

1.REPORTABLE: NO

2.OF INTEREST TO OTHER JUDGES: NO

3.REVISED: NO


Judge Dippenaar

In the matter between:

MOMBEEG (PTY) LIMITED

APPLICANT

AND

ESKOM ROTEK INDUSTRIES SOC LIMITED

RESPONDENT

JUDGMENT

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail. The date and time for hand-down is deemed to be 11h30 on the 15th of December 2022.

DIPPENAAR J:

[1] The application concerns review proceedings under r 53 in which the applicant sought the setting aside of a decision to disqualify a responsive bid made by the applicant pursuant to the respondent issuing an invitation to tender number ERI/2020/BMS/07 to the public on 22 July 2020 for the provision of certain traffic management services for the daily operation of power stations ("the tender").

[2] The applicant seeks final relief. It is well established that the so-called Plascon Evans Rule¹ applies. The respondent put up a detailed version in response to the applicants' averments and its version cannot in my view be rejected as palpably false or untenable². Neither party sought the referral of the application to oral evidence and the application is to be determined on the papers.

[3] The relevant factual matrix is by and large not contentious. It was common cause that the tender process was governed by Eskom's Standard Conditions of Tender, except where there was a conflict between the Tender Data and the Standard Terms and Conditions in which event the Tender Data would take precedence.

[4] It was further undisputed that the tender process was regulated and governed by the tenets of the Public Finance Management Act ("the PFMA")³, the Preferential Procurement Policy Framework Act⁴ ("the PPPFA"), the Preferential Procurement

¹ Plascon Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A) 634E-635C; National Director Public Prosecutions v Zuma 2009 (2) SA 277 (SCA)

² JW Wightman (Pty) Ltd v Headfour (Pty) Ltd 2008 (3) SA 371(SCA)("Wightman")

³ 56 of 1999

⁴ 5 of 2000

Regulations⁵, (“the PPPF Regulations”), the Broad-Based Black Economic Empowerment Act⁶ (“the B-BBEE Act”) and the Framework for Measuring Broad-Based Black Economic Empowerment. Under s 9 of the Broad Based Economic Empowerment Act, the Minister of Trade and Industry published the Amended Code series 000, Statement 000: Codes of Good Practice on Broad Based Black Economic Empowerment⁷.

[5] The mandatory pre-qualification criteria of the tender were: (i) the tenderer had to have a minimum B-BBEE status level 1; (ii) the tenderer had to be an Exempted Micro Enterprise (“EME”); and (iii) A minimum of 30% of subcontractors to be used had to be EME’s or Qualifying Small Enterprises (“QSE’s”) of which 51% had to be owned by black people living in rural and undeveloped areas or townships.

[6] It was not disputed that in terms of the “Tender Returnables”, proof was required that the tenderer is a B-BBEE status level contributor⁸. This required proof of: (a) the B-BBEE status level certificate issued by an authorised body or person; or (b) a sworn affidavit as prescribed by the B-BBEE Codes of Good Practice; (c) any requirement prescribed in terms of the B-BBEE Act. If proof of B-BBEE status level contributor was required for pre-qualification purposes in terms of PPPF regulations and was either not submitted by the tender submission deadline or deemed invalid; the respective tender must be disqualified.

[7] A further Tender Returnable was a completed NEC service contract and pricing schedule and data.

[8] In terms of the Conditions of Tender, (i) the respondent was entitled to cancel the tender process at any time prior to finalisation of the NEC contract⁹; (ii) the respondent was entitled to obtain clarification of any matter in the tender which may not be clear or

⁵ 2017

⁶ 53 of 2003

⁷ GG no 42496 dated 31 May 2019

⁸ Clause 1.3

⁹ Clause 1.6.1

could give rise to an ambiguity in that contract arising from the tender¹⁰; (iii) the respondent was entitled to score the B-BBEE status of the tender based on the certificate or affidavit which was provided¹¹; (iv) the respondent would award the tender only once approval had been granted by the adjudication authority by publishing it on Eskom's tender bulletin and NT e-Tender Portal.¹²

[9] The applicant submitted a bid during the tender validity period in August 2020. The total budget for the tender was some R178 Million. The contract price stipulated in the applicant's tender was for some R133 million. The tender validity period was twice extended by agreement between the parties as the evaluation process took longer than anticipated, ultimately to 18 February 2022. The applicant stated that it satisfied the B-BBEE requirements and as proof of compliance submitted two B-BBEE certificates issued by the Companies & Intellectual Property Commission for EME's. The certificates reflected the applicant's registration date as 20 February 2020 with a single shareholder, Ms Moremedi. The second B-BBEE certificate indicated that the applicant was an EME and B-BBEE Level 1 contributor.

[10] Subsequent to submission of the applicant's bid, the applicant was invited to a virtual meeting on 16 February 2021 by representatives of the respondent at which information was requested which applicant provided. A further meeting was held on 18 February 2021 at which the contract price and other issues were agreed to between the parties. The applicant completed the NEC contract received from the respondent a few days later and returned it to the respondent. Various amendments were required by the respondent. The applicant effected the amendments, signed the contract and returned it to the respondent. The respondent failed to sign the contract.

¹⁰ Clause 3.8

¹¹ Clause 1.3

¹² Clause 3.20

[11] After various enquiries by the applicant for provision of the signed contract, the respondent on 2 March 2021 advised it that the respondent's internal processes and approvals were still underway and feedback would be provided in due course.

[12] During a virtual meeting held on 9 March 2021, issues were raised regarding the applicant's failure to submit a Generic Scorecard. According to the respondent, this was a clarification meeting, held after it was discovered during the tender evaluation process by Eskom's Supplier Development Localisation and Industrialisation Department that a Generic Scorecard did not accompany the applicant's bid, meaning that there was an issue with the applicant's B-BBEE status as the tender was for an amount in excess of R50 million. That issue lies at the centre of the dispute between the parties.

[13] The dispute between the parties centered around what occurred at the meeting of 9 March 2021 and whether the respondent disqualified the applicant's bid at that meeting, as contended by the applicant.

[14] The applicant's case was that it was informed that the respondent had decided to disqualify the applicant as it was a start-up company and should have used a different certificate in its bid. The applicant was informed that the respondent on this basis intended to award the tender to the second successful bidder.

[15] According to the respondent on the other hand, the issues surrounding the Generic Scorecard were merely discussed and clarification requested. The applicant had not submitted a Generic Scorecard. It was agreed that the applicant would consult its attorneys and make representations as to why it should not disqualify the tender for failing to submit the required Scorecard.

[16] The applicant's attorneys on 12 March 2021 accused the respondent of unlawfully disqualifying the applicant's bid and demanded that the respondent countersign the NEC

contract, failing which it would launch urgent interdict proceedings, interdicting the award of the tender to any other party pending the review of its decision.

[17] In response, the stance adopted by the respondent by way of letter from its legal department dated 23 March 2021, was that it would not be coerced into entering agreements with tenderers if there was non-compliance and submissions inconsistent with legislation and procurement supply chain processes. It contended that the applicant's demand was premature. The respondent advised the applicant that it had not decided to award or disqualify the applicant's bid. The applicant was also advised that the applicant is a start-up enterprise who submitted its B-BBEE certificate classifying it as an EME for a tender in excess of the threshold for EME's as a Generic Scorecard should be submitted for contracts in excess of R50 million. The respondent advised that it appeared that the applicant had not complied with the legislative requirements of the PPPFA, the PPPF Regulations and the BBBEE Act. The respondent invoked regulation 14 of the PPPF Regulations in terms of which the applicant was afforded 14 days to make representations regarding its failure to comply with the relevant procurement legislation and to provide reasons why the tender should not be disqualified. The applicant was also provided with the opportunity to submit a Generic Scorecard.

[18] The applicant formally declined to make any representations by way of letter of its attorneys on 23 March 2021 and advised that preparation of application papers had commenced. The applicant further refused the respondent's proposal in a further email "to deal with the matter in a cost-effective and efficient manner".

[19] A few days later the applicant launched the review proceedings to set aside the decision by the respondent to disqualify the applicant's bid from the tender, with costs. The applicant's case was that the respondent on 9 March 2021 unlawfully took a decision to disqualify its bid for the tender. Relying on the Promotion of Administrative Justice Act¹³ ("PAJA"), it contended that the said decision was procedurally unfair, was materially

¹³ 3 of 2000

influenced by an error of fact and law and was taken because irrelevant considerations were taken into account, and was liable to be reviewed and set aside.

[20] The respondent's case was that its procurement team and approval committees had not finally adjudicated upon the tender and the respondent had not taken any decision to disqualify the bid submitted by the applicant. According to the respondent, the tender committee has the authority to either award the tender or disqualify the bid and neither of its representatives present at the meeting had such authority. In terms of the agreed process, tenderers are not advised verbally of the award or disqualification but through a proper written notice. It disputed that tenderers are advised verbally of the award or disqualification of their bids. On that basis the respondent disputed that there was any administrative decision or action which could be reviewed under the PAJA. In its answering papers, the respondent averred that to date the tender has not been awarded to anyone and no notice of the award of tender has been issued or published as provided for in the Conditions of Tender.

[21] The respondent relied on the Standard Conditions of Tender which entitled the respondent to seek clarification from the applicant about its status and failure to submit the Generic Scorecard, which it contended was what occurred at the 9 March 2021 meeting. Issues has also arisen regarding the absence of audited financial statements, given that there was no statement that the applicant was a start-up company. That issue is not relevant to the present application.

[22] According to the respondent, the meeting was adjourned on the basis that the applicant would make representations concerning the issues that were raised at the meeting. The respondent contended that the applicant's conduct, pursuant to it invoking the powers afforded by regulation 14 of the PPPF Regulations, constituted a repudiation of the tender and its requirements which it accepted in its answering papers. It argued that the review application was premature and related to a decision which was never taken and should be dismissed together with a punitive costs order.

[23] In reply, the applicant persisted with the version that the respondent had disqualified its bid. It was contended that the respondent's stance that the applicant's failure to submit a generic scorecard entitled it to disqualify the applicant was simply untrue.

[24] After the delivery of affidavits, including supplementary affidavits and the filing of heads of argument by both parties, the applicant amended its notice of motion on 27 June 2022 and delivered a further affidavit under r 53(4).

[25] In its amended notice of motion and further affidavit, the applicant completely changed tack. It now sought declaratory relief that the tender was awarded to the applicant, alternatively an order setting aside the respondent's decision not to countersign the NEC contract contemplated in the respondent's document titled "Approval of a negotiated outcome and Feedback Report" dated 22 February 2021 ("the approval"), and an order directing the respondent to sign the said contract. The costs of two counsel were sought.

[26] Its new case was that the respondent had awarded the tender to it and notified it of its decision on 16 February 2021. In supplementary heads of argument, the applicant conceded that the respondent had not made a decision to disqualify its bid.

[27] The respondent objected to the procedure adopted by the applicant on the basis that no condonation application was launched and the procedure in r 28 should have been followed. It argued that the supplementary affidavit should be ignored as a nullity and that it was prejudiced as it did not have an opportunity to respond to the applicant's new case. It further argued that the new case in any event lacked merit.

[28] The applicant relied on r 53(4) which entitled it to amend its relief and deliver a supplementary affidavit after provision of the record by the respondent. It further argued that the respondent had delivered no affidavit in response to the new evidence raised for

a period of some three months and did not serve any notice of irregular proceedings under r 30.

[29] Whilst r 53(4) does not require any prior notice of amendment under r 28, the rule expressly affords an applicant a period of ten days to amend, add to or vary its notice of motion and supplementary affidavit. The applicant sought to do so, more than a year after the delivery of the record on 6 May 2021.

[30] In such circumstances it is clear that the applicant should at least have sought condonation for the late delivery of the amendment and supplementary affidavit. No formal condonation application was brought, although a few paragraphs of the supplementary affidavit were dedicated to condonation.

[31] The principles pertaining to condonation under r 27 (3) are trite¹⁴ and require a proper explanation to be given for the delay as well as facts which illustrate that the applicant's claim is clearly not unfounded.

[32] In its r 53(4) affidavit, the only basis advanced by the applicant for condonation was that "due to an oversight on the part of its legal representatives", two documents forming part of the record and referred to in the said affidavit, were not identified in the record. These documents were only identified on 15 July 2022 as being important to the real dispute between the parties during preparation for the hearing which was to have taken place on 25 July 2022. It contended that there was no prejudice to the respondent as there was sufficient time for it to file an affidavit responding to the allegations prior to the matter being enrolled for hearing. The applicant did not seek to make out any case why it should be afforded the opportunity to adduce further evidence at this late stage,

¹⁴ Silber v Ozen Wholesalers (Pty) Ltd 1954 (2) SA 345 (A); Du Plooy v Anwes Motors (Edms) Bpk 1983 (4) SA 212 (O) at 217H

given that it was in possession of such evidence even before delivering its first supplementary affidavit.

[33] Although the explanation provided by the applicant is in broad and laconic terms, there was sufficient time for the respondent to deliver an affidavit in response to obviate the prejudice contended for by it. Although such prejudice was alleged in bald terms, no particularity or primary facts were provided in support of such conclusion. The respondent elected not to deliver any supplementary affidavit and did not object to the filing of the r 53(4) notice or take any steps to have them set aside as an irregular step¹⁵. Neither party sought a postponement or an opportunity to deliver further affidavits.

[34] Adopting a strict approach to the trite principles applicable to the granting of condonation, I am not persuaded that the applicant has illustrated good cause for condonation. However, even if a benevolent approach were to be adopted in favour of the applicant in the interests of justice¹⁶, the prospects of success and the importance of the case are relevant factors.

[35] I turn to consider the applicant's prospects of success. The respondent's arguments are predicated on the contention that the applicant's new case in any event does not assist the applicant and must fail on its merits. For the reasons that follow, I agree with the respondent.

[36] The new case advanced by the applicant is in conflict with the case made out in its founding papers. Whereas its original case was premised on the contention that the respondent had made a decision to disqualify the applicant's bid, it now contended the opposite and that the respondent had awarded the tender to the applicant. These cases are mutually destructive. It must be borne in mind that a party must make out its case in

¹⁵ Pangbourne Properties Ltd v Pulse Moving CC and Another 2013 (3) SA 140 (GSJ)

¹⁶ Ferris v FirstRand Bank Ltd 2014 (3) SA 39 (CC) at 43G-44A and the authorities cited therein.

its founding papers¹⁷. No attempt was made by the applicant to explain the contradictory versions.

[37] The applicant's contention that its new version is unchallenged, given that the respondent did not deliver an affidavit in response, does not in my view bear scrutiny. The answering affidavits delivered by the respondent and the facts set out therein, cannot be ignored. Given that the applicant seeks final relief, the Plascon Evans rule referred to earlier, must be applied. I further do not agree that the common cause facts relied on by the applicant support a finding that the contract was awarded to the applicant. At best they illustrate that the commercial terms of the NEC contract were agreed on between the parties.

[38] The high water mark of the applicant's new case is the reliance placed on certain internal documents of the respondent allegedly indicating that the respondent in fact made the decision to award the tender to the applicant. It is contended that it was for this reason that the applicant entered into extensive contract negotiations with the applicant. It is then baldly contended that the respondent communicated the decision to award the tender to the applicant during the meeting of 16 February 2021. Central to version, is the contention that the applicant was the highest scoring bidder

[39] Reliance is placed on an internal feedback document addressed to the chairman of the respondent's Divisional Tender Committee dated 22 February 2021, from Mr Mabija BMS Procurement, containing a recommendation. The document is headed "Approval of a negotiated outcome and feedback report". The report cannot be viewed in isolation must be considered in the context of the conditions of tender and process agreed to between the parties.

¹⁷ Hart v Pinetown Drive-In Cinema (Pty) Ltd 1972 (1) SA 464 D

[40] On a purposive, linguistic and contextual reading of the document¹⁸, seen in the context of the tender returnables, a concluded NEC agreement was one of those returnables. The approval document itself does not in my view constitute proof that the tender was indeed awarded to the applicant.

[41] The document does no more than recommend that a contract be awarded to the applicant based on the financial evaluation of the negotiated contract price based on a commercial evaluation of the applicant's tender. In its terms, the report reflects the results of a process in accordance with a mandate provided by the divisional tender committee to negotiate and conclude a contract and requests acceptance of the feedback. The use of the phrase "a contract was accordingly awarded" does no more than to confirm that the commercial terms of a proposed contract were negotiated and agreed upon between the parties.

[42] No evidence was provided by the applicant that the tender was in fact awarded. The respondent's version expressly disavows that this occurred. The applicant's new version entirely disregards the terms and conditions of the tender agreed upon between the parties and the respondent's version that the applicant's tender was still being evaluated by the different levels of authority which were required before the tender could be awarded. It further entirely ignores the intervening compliance issue pertaining to the Generic Scorecard raised at the meeting of 9 March 2021.

[43] I agree with the respondent that the applicant's version that contract negotiations could only have happened after the tender was awarded to it, is flawed. In terms of the specific tender processes agreed upon between the parties, the tender would be awarded by the issuing of a notice of award of tender and publication. It was undisputed that this never happened. The tender would only be awarded after a final version of the NEC

¹⁸ Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA) paras [18]-[19] at 603E-605B

contract was successfully negotiated, accepted and signed by the respondent¹⁹ It was also common cause that this never occurred. On a proper interpretation of the NEC contract, a tender would only be awarded after a final version of the NEC contract was successfully negotiated, accepted and signed by the representatives of the respondent.

[44] There is no evidence that the respondent's adjudication authority finally approved the award of the tender to the applicant. The evidence established that it was still finalising and considering the applicant's offer and was finalising its internal processes. From the applicants' founding affidavit it is clear that it never understood the position to be that it was awarded the tender, as the very purpose of the review application was to review and set aside the disqualification decision.

[45] On the applicant's own version, the purpose of the meeting of 16 February 2021 was to negotiate certain terms of the NEC contract, pursuant to which additional information was requested and provided and a further meeting was held on 18 February 2021 to further the negotiations. The tender validity period was also after that meeting extended to 18 February 2022. These facts militate against the awarding of the tender to the applicant on 16 February 2021.

[46] Once seen in context of the various documents and facts the applicant's version that it was awarded the tender simply does not pass muster. There is thus no cogent factual or legal basis established for the declaratory relief sought

[47] In my view, the applicant falls far short of the mark in proving that the agreement was awarded to it, much less on 16 February 2021 as alleged, given the undisputed chronology of events and the applicant's own version of what transpired at the meeting

¹⁹ Sections C1.01 and C1.02 of contract in terms of which the offer of the applicant may be accepted by the respondent by signing the document and returning it to the applicant before the end of the tender validity period stated in the tender data. By signing the agreement, the respondent accepts the applicant's offer on the terms and conditions contained in the contract

of 16 February 2021. The version that the applicant was notified of the alleged decision on 16 February 2021 is not supported by the evidence.

[48] The applicant further manifestly failed to make out any case that any decision made by the respondent not to countersign the NEC agreement fell to be reviewed and set aside under PAJA. It has not established that any such decision is unlawful, given the relevant statutory provisions.

[49] The PPPFA was adopted to give effect to s 217 of the Constitution and to establish a preferential procurement framework. The PPPF Regulations, adopted in terms of s 5 of the PPPFA, contain the methods for evaluating tenders and determining whether tenders meet black empowerment objectives in terms of the BBEE Act.

[50] Regulation 7 of the PPPF Regulations²⁰ contains the formula to be used to calculate the points out of 90 for price in respect of a tender with a Rand value in excess of R50 million. It applies in the present instance considering the value of the contract. Under Regulation 7(4) a tenderer failing to submit proof of B-BBEE status level of contribution or is a non-compliant contributor to B-BBEE may not be disqualified, but-(a) may only score points out of 90 for price; and (b) scores 0 points out of 10 for B-BBEE.

[51] Regulations 4 and 8 of the Amended Code series 000, Statement 000: Codes of Good Practice on Broad Based Black Economic Empowerment, issued under s 9 of the BBEE Act, deal with the requirements to qualify as an EME. Regulation 4.2 provides that start-up enterprises are ordinarily regarded as EME's, unless tendering for a contract in excess of the thresholds for EME's, in which case the corresponding Scorecard will apply.

[52] Regulation 8 deals with the Generic Scorecard and determines the criteria for determining the ownership and management and control elements of enterprises

²⁰ Adopted under s5 of the Preferential Procurement Policy Framework Act

submitting tenders. Regulation 9 represents the B-BBEE Generic Scorecard and identifies the elements.

[53] The certificate from the Companies and Intellectual Property Commission submitted by the applicant does not assist it because the value of the tender is more than R50 million. The certificate reflected that based on available information the applicant's annual turnover was less than R10 million and qualifies as a EME.

[54] The applicant did not dispute that it did not submit the Generic Scorecard. Instead, it argued that its failure to do so is not fatal because tenderers who do not submit B-BBEE status level verification certificates may not be disqualified from the tendering process. It was contended that "they simply score points out of 90 or 80 for price only and zero points out of 10 or 20 for BBEE.

[55] The applicant's version fundamentally ignores its failure to comply with the B-BBEE requirements of tender. It is not for present purposes necessary to make a definitive determination on the outcome of the applicant's failure to submit a Generic Scorecard. For present purposes it is sufficient to conclude that the issues raised by the respondent cannot be said to be irrelevant, or based on a material error of fact or law.

[56] Moreover, the applicant's reliance on it being the alleged highest scoring bidder, is undermined by its own version that it is willing to accept being scored 0 out of 10 points for B-BBEE. If that score is accepted, the applicant may well not be the highest scoring bidder.

[57] No evidence was presented that the respondent was not entitled to raise the issue pertaining to the Generic Scorecard. In terms of the agreed process, the respondent was entitled to seek clarification and verification, which on its version, it did.

[58] Considering the facts, it cannot be concluded that the respondent was actuated by any error in law or in fact by seeking clarification from the applicant as to its B-BBEE status. More importantly, seeking clarification does not constitute a decision for purposes of a review under PAJA.

[59] The fundamental difficulty that the applicant cannot overcome is that it ignores non-compliance with the generic scorecard requirement if it tendered for the contract or seeking any other economic activity covered by s 10 of the PPPFA. A court cannot sanction, by declaring the tender was rightfully awarded to the applicant, non-compliance with statutory requirements.

[60] Another inescapable hurdle that the applicant cannot overcome is that it refused to make representations pursuant to the respondent's invocation of Regulation 14 of the PPPF Regulations. Given the undisputed facts, the respondent was entitled to invoke regulation 14 of the PPPF regulations, as at least the Generic Scorecard issue was one which may effect or has effected the evaluation of its tender.

[61] The applicant cannot escape the consequences of its failure to submit the Generic Scorecard and its obligations to answer the issues which have arisen. Seeking to avoid these consequences by obtaining an order forcing the respondent to sign the NEC contract under these circumstances, is entirely contrary to the terms and conditions of the tender and contrary to the relevant statutory provisions.

[62] Any award of the contract to the applicant, would be effected in violation of the applicable regulations. The respondent squarely impugned the validity of the right the applicant sought to preserve²¹. In addition to the facts not supporting the applicant's

²¹ Department of Transport and Others v Tasima (Pty) Ltd [2016] ZACC 39 (9 November 2016) paras [37], [42]

contentions, the granting of the declaratory relief would effectively be sanctioning an irregularity. Such an approach can and should not be countenanced by a court.

[63] The present stance adopted by the applicant further ignores its repudiation of the tender by refusing to make submissions once the respondent invoked Regulation 14 of the PPPF Regulations, seeking clarification. Only after its repudiation was accepted by the respondent in its answering papers, did the applicant decide to change tack and ignore these consequences.

[64] The applicant placed reliance on *Inventiva Power Minerals (Pty) Ltd and Another v Eskom Holdings SOC Limited and Another*²² (“*Inventiva*”) in support of the contention that the relief sought was competent. The facts are however distinguishable and for the reasons advanced, the relief sought should not be granted.

[65] Considering all the facts, I am not persuaded to exercise the discretion afforded to admit the late amendment and supplementary affidavit, given that the applicant’s new case has no prospects of success. Even if condonation were to have been granted, for the reasons provided, I am not persuaded that the applicant has made out a case for the relief sought.

[66] It follows that the application must fail. There is no reason to deviate from the normal principle that costs follow the result.

[67] The respondent sought a punitive costs order, contending that the application was vexatious and put it through trouble and expense which it ought not to bear. Considering the facts, and the applicant’s conduct in relation to the matter, I am persuaded that such a costs order should be granted²³.

²² (16202/19) [2020] ZAGPPHC 180 (25 May 2020)

²³ *Lemore v Mutual Credit Association and Another* 1961 (1) SA 195 (C) 199 G-H; *Nel v Waterberg Landbouers Ko-operatiewe vereening* 1946 AD 597 at 607

[68] I grant the following order:

[69] The application is dismissed with costs on the scale as between attorney and client.



EF DIPPENAAR
JUDGE OF THE HIGH COURT
JOHANNESBURG

APPEARANCES

DATE OF HEARING	: 04 October 2022
DATE OF JUDGMENT	: 15 December 2022
APPLICANT'S COUNSEL	: Adv. H.P. Van Nieuwenhuizen Adv NS Nxumalo
APPLICANT'S ATTORNEYS	: Tshabalala Attorneys, Notaries & Conveyancers
RESPONDENT'S COUNSEL	: Adv. PL Uys
RESPONDENT'S ATTORNEYS	: Gildenhuis Malatji Inc.