IN THE HIGH COURT OF SOUTH AFRICA,

FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	**YES/NO**
Of Interest to other Judges:	**YES/NO**
Circulate to Magistrates:	**YES/NO**

Case number: 230/2022

In the matter between:

DOWN-TOUCH INVESTMENTS (PTY) LTD Applicant

and

MANGAUNG METROPOLITAN MUNICIPALITY First Respondent

INATHI CAPITAL PROJECTS (PTY) LTD Second Respondent

MBAKO PROJECTS AND TRADING CC Third Respondent

CORAM: MATHEBULA, J

HEARD ON: 04 FEBRUARY 2022

DELIVERED ON: The judgment was handed down electronically by circulation to the parties' legal representatives by email and release to SAFLII on 10 February 2022. The date and time for hand-down is deemed to be 10 February 2022 at 12H00.

Introduction

[1] This is an urgent application in which the applicant is seeking an interim interdict pending the final adjudication of the review application. The order

sought is that the first respondent be restrained from implementing in whatever manner the decision to award tender number MMN/593:2020/21 Section R, Botshabelo to the second and third respondents ("the joint venture"). The time frames for the bringing of the review application before court is stipulated by the applicant in the papers. The matter served before Molitsoane J on 28 January 2022 who enrolled it for argument on 4 February 2022. The applicant is represented by Mr W.A. Van Aswegen and Mr M.C. Mazibuko appears on behalf of the first respondent. No papers were filed nor appearance made on behalf of the joint venture.

Background facts

[2] The first respondent called for bids from service providers for the installation of internal water reticulation in Section R, Botshabelo. The applicant and other interested business entities submitted their bids. It is common cause that at its meeting on 14 October 2021, the Bid Adjudication Committee of the first respondent considered and approved the recommendation of the Bid Evaluation Committee dated 12 October 2021 to award the bid to the joint venture.

[3] The applicant sought undertakings from the first respondent not to commence with the works pending the lodging of an appeal and/or legal action. The first respondent did provide some of the requested documents but the parties had different opinions about the outcome. They could not resolve whatever disagreement(s) hence the application before court.

Preliminary Issues

Urgency

[4] There are preliminary issues which must be dealt with raised by the first respondent, which if found in its favour, will undoubtedly be dispositive of the application. This aspect was not argued with much vigour by counsel for both parties. The facts of the matter which are largely not in dispute are instructive. When the applicant received information that the successful bid is that of the

joint venture, enquiries were directed to the first respondent to explain as to what transpired in the entire process.[1] The follow up letter dated 18 November 2021 was dispatched to the first respondent asking for the same information after the first respondent seemingly neglected or refused to reply to the first letter. The first respondent acknowledged receipt of the letter on 24 November 2021 and undertook to furnish the information five (5) days later.

[5] After the requested information was provided by the first respondent, the applicant lodged an appeal on 2 December 2021. Another enquiry was made to the first respondent about the outcome. It appears that the appeal was unsuccessful and this led to the launching of this application.

[6] Trying to restrain any person or entity from implementing the outcome of a bid process is akin to chasing a moving target. Once the award to a successful bidder is made, the next stage is the conclusion of service level agreement(s) and handing over of the site. This is a labour intensive project which requires the joint venture to set up itself on site at a great cost. Given these circumstances, matters such as these are ordinarily urgent. Perhaps it is against this background that this aspect was not a top priority for both parties.

Lack of authority

[7] The first respondent contends that the deponent of the founding affidavit did not have the necessary authority to bring the application before court. The basis of the argument is that he does not specifically disclose that he has been authorised to launch the application. The first respondent argued that the application should be dismissed on that ground alone. Heavy reliance was placed on the judgment of Chesiwe J (with Naidoo J concurring) for this proposition. In that matter the court found that the deponent of the founding affidavit lacked the necessary authority and that such defect cannot be rectified retrospectively.[2]

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[1] Paginated papers page 36-37.
[2] K201114896 South Africa (Pty) Ltd v State Information Technology Agency SOC Ltd and 5 Others Case Number 3996/2019 at paragraph 21.

[8] Perhaps in anticipation of this challenge, the first respondent served and filed a notice in terms of Uniform Rule 7. The applicant replied to the notice and attached a power of attorney dated 4 February 2022. The founding affidavit was signed and commissioned on 30 January 2022. This did not dissuade the first respondent from pursuing this point. It has become common practice in this Division for one or both parties engaged in litigation to raise this point which in my view is settled law. It is normally a party whose case is on thin ice who will engage in this unnecessary side show.

[9] The first respondent challenged the authority of the deponent of the founding affidavit to *wit* Henry Charks Lubbe by invoking the provisions of Uniform Rule 7(1). There is unanimity between legal scholars and our courts that the power of attorney required in this instance, is to establish the mandate of the attorney.[3] The primary concern is whether the attorney possesses the necessary mandate to act in instituting or defending legal proceedings on behalf of a client. In **Eskom v Soweto City Council**, the court dealt with this issue at length.[4] It was emphasised that it is a factual question whether a person has a specific authority. A deponent to an affidavit is merely a witness. This means that whether his evidence is credible or not can be proved like any other fact. This cannot be a bar for him to state that the applicant seeks a particular redress. Clearly the first respondent misapplied the Rule.

[10] In **Ganes and Another v Telecom Namibia Ltd** the Supreme Court of Appeal provided the clearest approach to this question in the modern era.[5] The court unequivocally stated that it was irrelevant whether the deponent to the affidavit was authorised to depose to it. The simple reason is that the deponent to the affidavit need not be authorised by the party concerned to depose to the affidavit. The key issue is that the institution or prosecution of the proceedings must be authorised.

[11] On these grounds it is my considered opinion that the preliminary issues raised by the first respondent has been cleared and I must proceed to deal with the merits of this matter.

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[3] Erasmus Superior Court Practice: Vol 2 at D1 – 93.
[4] 1992 (2) SA 703 (W).
[5] (608/2002) [2003] ZASCA 123.

Interim Interdict

[12] The main purpose of an interim interdict is to preserve or restore the status *quo* pending the determination of the rights of the parties. The requirements for an interim interdict are well established and trite. In order to succeed, the applicant must establish a *prima facie* right, a well-grounded apprehension of irreparable harm if the interim relief is not granted and the ultimate relief is eventually granted, the balance of convenience favours the gravity of an interim interdict and that there is no other satisfactory remedy available.[6] The approach of the courts in applying these requirements is to consider them in conjunction with each other and not in isolation.[7] This being a discretionary remedy it is trite that all facts of the matter ought to be considered.

[13] The applicant was a bidder whose bid was disqualified because it did not meet the project minimum requirements. These were identified as a failure to provide the original bank rating certificate and that the curriculum vitae of the applicant's personnel were not certified. The first respondent is bound to these reasons. It appears that the first respondent rigidly adhered to these requirements and chose form over substance. Counsel for the first respondent was at pains to advance arguments to sustain logic and justification for the requirement of certified curriculum vitae when originals were part of the returned documents. The requirement that the bank rating certificate submitted by the applicant was not an original despite it being electronically produced and stamped by the bank personnel seem to be far-fetched. Counsel for the applicant quoted and relied on section 14 of the Electronic Communications and Transactions Act 25 of 2002 as authority that the submitted document was to be considered an original document.

[14] On these grounds it is safe to conclude that the applicant has a strong *prima facie* case. The applicant, as a bidder, has a right to a fair and competitive tender process. On the strength of the reasons advanced by the first respondent the applicant has good prospects of success. This application

[6] Setlogelo v Setlogelo 1914 AD 221 at 227.
[7] Eriksen Motors (Welkom) Ltd v Protea Motors Warrenton 1973 (3) SA 685 (A).

ought to succeed. It is not for this court to dictate or micro manage an organ of state in the manner that it exercises its core functions. It is a recognised principle of our law that the exercise of such a power by an organ of state is subject to constitutional control and in appropriate cases an interdict may be granted against it.

[15] The applicant will suffer irreparable harm and inconvenience if an interim interdict is not granted. The first respondent will enter into an agreement that is illegal and the joint venture will benefit from it. If this state of affairs is permitted, this court will have abdicated its responsibility that exercise of public power must be subject to judicially scrutiny. It was argued that the community of Botshabelo will be inconvenienced more and denied access to precious water which is a human right. It may well be so, but that community certainly values more to live in a state governed in accordance with the principles underpinning the doctrine of the rule of law. There is no evidence placed before me as to what effect the granting of this interim interdict will have on them. For these reasons I find that the balance of convenience favours the applicant.

[16] I remain convinced that there is no other alternative remedy. If the joint venture is allowed to benefit from what is ostensibly an unfair process and the interim interdict is not granted, the horse would have bolted. There is no other adequate remedy capable of granting similar protection. The prudent thing to do will be to maintain the status *quo* pending the determination of the rights of the parties in the review application.

<u>Costs</u>

[17] The applicant has been successful and costs should follow the result. However, I intend to deviate from the generally accepted principle. This is the first of the many engagements anticipated between the parties on this matter. The review application, should it see the light of the day, is inextricably linked to this application. Therefore, the costs can stand over to be determined at a later stage.

<u>Order</u>

[18] In the result I make the following order: -

18.1. The non-compliance with the ordinary rules in relation to time frames and service is condoned in terms of rule 6(12) of the Uniform Rules of Court.

18.2. Pending the final adjudication of a review application to be instituted within five (5) days of the granting of this order, the respondents are interdicted and restrained from in any way further implementing or acting upon the decision of the first respondent to award the public tender number: MMN/593:2020/2021 styled "BOTSHABELO SECTION R – INSTALLATION OF INTERNAL WATER RETICULATION" to the second and third respondents.

18.3. The order contained in 18.2 above shall serve as an interim interdict with immediate effect.

18.4. Should the applicant fail to so institute review proceedings as contemplated in 18.2, paragraphs 18.2 and 18.3 of this order shall lapse.

18.5. The costs of the application shall stand over for determination in the review application.

M.A. MATHEBULA, J

On behalf of the applicant:	Adv. W.A. Van Aswegen
Instructed by:	Peyper Attorneys Bloemfontein

On behalf of the first respondent:	Adv. M.S. Mazibuko
Instructed by:	Matlho Attorneys Bloemfontein
On behalf of the second & third respondents:	No appearance

/TKwapa