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**

Review number: 4699/2020

In the matter between:

LEROSTYLE (PTY) LTD Applicant

and

THE MEC: FREE STATE PROVINCIAL GOVERNMENT: DEPARTMENT OF EDUCATION 1st Respondent

THE HOD: FREE STATE PROVINCIAL GOVERNMENT: DEPARTMENT OF EDUCATION 2nd Respondent

LEBONE LITHO PRINTERS (PTY) LTD 3rd Respondent

ALTRON TMT (PTY) LTD 4th Respondent

DSV SOLUTIONS (PTY) LTD 5th Respondent

HEARD ON: 29 NOVEMBER 2021

CORAM: MATHEBULA, J *et* DE KOCK, AJ

JUDGEMENT BY: MATHEBULA, J

DELIVERED ON: The judgment was handed down electronically by circulation to the parties' legal representatives by email and release to SAFLII on 04 March 2022. The date and time for hand-down is deemed to be 04 March 2022 at 11H30.

---

[1] Before us are two (2) applications that are linked to each other. In the main application, the applicant seeks an order brought ostensibly under Uniform Rule 53 to set aside a contract entered into by and between the respondents. In the interlocutory application brought in terms of Uniform Rule 6(11), the applicant seeks an order to compel the first and second respondents to file the Record of the Decision impugned in a pending review application. Both these applications are opposed. Before us appears Mr S Grobler SC for the applicant, Mr M Hellens SC for the first and second respondents and Mr I Hussain SC for the third to fifth respondents. I will henceforth refer to the third to fifth respondents as the consortium.

[2] The approach of the parties is diametrically opposed to each other. The view of the applicant is that it is entitled to the Record of the Decision and its case will be severely hamstrung if it is not made available. The argument advanced is that the interlocutory application must be adjudicated first before the main application. This is evident in the heads of argument filed and oral submissions made by counsel for the applicant which were silent on the main application.

[3] The respondents adopted the view that the interlocutory application cannot be argued independently of the review application. In fact, they raised numerous points *in limine* which they assert are dispositive of the review application. On their strength, they argued, it will be unnecessary to adjudicate the merits of the review application.

[4] It is apposite to set out the background facts which culminated in both applications. The consortium was awarded a tender to print and distribute examination papers by the Gauteng Department of Education ("GDE"). This was after a bidding process conducted in accordance with the law. No dispute arises between the parties on this aspect. The agreed term of the contract was from 1 April 2018 to 31 March 2021. It is common cause that at the time this matter served before us, the contract had expired by effluxion of time.

[5] The Free State Department of Education ("FSDoE") represented by the first and second respondents sought and were granted permission to participate in the GDE contract. The parties were acting in terms of Treasury Regulation 16A6.6.

The contract between the respondents is the same as the one between the GDE and the consortium. The respondents duly signed a service level agreement which remained valid from 12 August 2019 to 27 March 2021.

[6] It is self-evident that when the first and second respondents embarked on procurement using Treasury Regulations, no competitive tender processes took place. The applicant was not an unsuccessful tenderer. It is against these circumstances that the first and second respondents assert that they are unable to produce the record of the decision which led to the entering of the contract between the consortium and GDE.

[7] The applicant only presented a case for the interlocutory application and the crux of its contention is that the matter is not ripe for hearing until the first and second respondents have produced the record of the decision. The applicant contends that the decision and process followed by the first and second respondents in concluding the contract with the consortium, as it did, was unlawful. Therefore, without the record of the decision, the matter cannot be properly ventilated before the court. The nub of the contention is that such refusal to file the record of the decision is against the provisions of Uniform Rule 53. The argument is that the applicant is denied this right for unjustifiable reasons.

[8] Counsel for the applicant argued that if the first and second respondents are excused from filing the record, not all evidential material would be placed before the court. That being the case, the court will be restricted from exercising its constitutionally entrenched function in matters of this nature. The point made is that there are no rights entitling the first and second respondents to refuse to act in accordance with the Uniform Rules thus prejudicing the applicant.

[9] In sharp response, counsel for all the respondents raised the same points of contention with slight variations here and there. It is apposite to repeat their formidable arguments in joint opposition of both the interlocutory and main application. Their point of departure is that the interlocutory application does not have a life of its own. It is linked to the main application. The issues raised as points *in limine* are lack of *locus standi*, the application has been brought

beyond the limits set by section 7 of the Promotion of Administrative Justice Act 3 of 2000 (hereinafter "PAJA"), non-joinder and mootness.

[10] The respondents vehemently deny the authority of the deponent of the founding affidavit. They base this on the fact that the applicant has not attached or filed a resolution authorising him to institute these proceedings. In support of their assertions, heavy reliance is placed on the decision of Chesiwe J (with Naidoo J concurring) in **K2011148986 South African (Pty) Ltd v SITA SOC Ltd and Others**.[1] In that matter, the applicant had not attached a resolution authorising the deponent to institute the proceedings. The court held that the deponent of the founding affidavit lacks the necessary *locus standi* despite stating that he is the director of the applicant and conversant with its business activities.

[11] There is an overlap between the two issues. Counsel set out the pertinent dates of the tender between GDE culminating in a contract between the respondents. Briefly as clarity permits they can be summarised as follows. On 27 October 2017, GDE invited tenders for contract GDE 159. The consortium was chosen as a successful tenderer and entered into contract with GDE for the period 12 August 2019 until 27 March 2021. The first and second respondents participated in the aforementioned contract for the period 12 March 2019 until 27 March 2021. It is on these basis that the respondents contends that the application was brought way out of the 180 days stipulated by section 7(1) of the PAJA.[2] This assertion dovetail with the argument of mootness. Counsel pointed out that the contract had expired by effluxion of time on 27 March 2021.

[12] The respondents' assert that the application should be dismissed for fatal non-joinder. Again this proposition is reliant upon the **K201114896** decision. They

---

[1] K2011148986 (South Africa) (Pty) Ltd v State Information Technology Agency SOC Limited and Others (3996/2019) [2020] ZAFSHC 135 (18 August 2020).

[2] Section 7(1) of the PAJA reads as follows: -

> "Any proceedings for judicial review in terms of section 6 (1) must be instituted without unreasonable delay and not later than 180 days after the date –
> (a) subject to subsection (2) *(c)*, on which any proceedings instituted in terms of internal remedies as contemplated in subsection (2) *(a)* have been concluded; or
> (b) where no such remedies exist, on which the person concerned was informed of the administrative action, became aware of the action and the reasons for it or might reasonably have been expected to have become aware of the action and the reasons."

argue that the Free State Provincial Treasury Department and Free State SITA played a critical role because the first and second respondents did not make a decision on their own.

[13] They also allege that GDE has a substantial interest in the matter. This submission is bereft of any merit because the applicant takes no issue whatsoever with the award of the tender by the Gauteng Provincial Government. The respondents also pointed out that FSDoE is not cited as part of the proceedings. This submission too does not make sense at all to me. The first and second respondents are sued in their capacities as political head and accounting officer of FSDoE collectively they are the Department of Government.

[14] Having set out the background facts and arguments advanced on behalf of both parties, the remaining question is whether the applicant has made out a case for the relief sought. In order to succeed, an applicant must make out a case in the founding affidavit. There the applicant must not only state its case but also define the issues. Right at the outset, it is my considered viewpoint that the interlocutory application ought to succeed. My reasons for concluding as such are stated in the succeeding paragraphs.

[15] The applicant quoted and relied on the decision of Le Grange J where he said the following on paragraph 14: -

> "It is settled law that the Rule is primarily intended to operate in favour of and to the benefit of an applicant in review proceedings and to avoid review proceedings being launched in the dark. The Rule essentially confers the benefit that – all the parties have identical copies of the relevant documents on which to draft their affidavits and that they and the Court have identical papers before them when the matter comes to Court."[3]

[16] The first and second respondents simply allege that it does not have the record of the decision. This cannot be true. It is expected of a public entity to assist the court to comply with its constitutional mandate. In the HSF decision, the court held that an applicant should not be deprived of the benefit of this procedural

[3] Helen Suzman Foundation v Judicial Service Commission 2015 (2) SA 498 (WCC).

right unless there is a clear justification therefor. The reasons advanced by the first and second respondents seems to justify such denial without cogent reasons. The consortium claim that the applicant is after their trade secrets. There are no details set out to elevate this assertion to a justifiable reason. In any event, the respondents were not interested to argue this point except that they sought an order disposing of this matter on other grounds without adjudication of the merits.

[17] At the centre of the Rule is the notion of fairness. There must be a rational basis upon which a decision is taken. The reasons why a particular decision was subsequently taken should be well known. This is important to show how the first and second respondents functioned when the decision was taken[4] and that was within the bounds of the law.[5] Perhaps the most important one goes to the core of checks and balances provided by the constitution of the Republic. Decision(s) of public bodies must be subjected to judicial scrutiny. Clearly as counsel for the applicant correctly argued, the purpose of the Rule is to ensure that all evidential material is placed before court. It is unthinkable how this can be achieved if the applicants are allowed to have their own way. It is part of our law that every person is entitled to a lawful administrative action.

---

[4] Rule 53(1) of the Uniform Rules of Court reads as follows: –

> "Save where any law otherwise provides, all proceedings to bring under review the decision or proceedings of any inferior court and of any tribunal, board or officer performing judicial, quasi-judicial or administrative functions shall be by way of notice of motion directed and delivered by the party seeking to review such decision or proceedings to the magistrate, presiding officer or chairman of the court, tribunal or board or to the officer, as the case may be, and to all other parties affected –
>
> (a) calling upon such persons to show cause why such decision or proceedings should not be reviewed and corrected or set aside, and
>
> (b) calling upon the magistrate, presiding officer, chairman or officer, as the case may be, to despatch, within fifteen days after receipt of the notice of motion, to the registrar the record of such proceedings sought to be corrected or set aside, together with such reasons as he is by law required or desires to give or make, and to notify the applicant that he has done so."

[5] Afrisun Mpumalanga (Pty) Ltd v Kunene NO and Others 1999 (2) SA 599 (TPD) at 630F.

[18] The point pertaining to lack of *locus standi* is repeatedly raised particularly by the respondents in this court. In **Down-Touch Investments (Pty) Ltd v Mangaung Metropolitan Municipality and Others** I wrote the following: -

> "In Ganes and Another v Telecom Namibia Ltd the Supreme Court of Appeal provided the clearest approach to this question in the modern era.[6] 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."[7]

It is on this basis that I conclude that the submissions made by the respondents have no merit.

[19] The respondents raise two important issues namely non-joinder and mootness. Any court can only adjudicate a matter before it, based on credible evidence contained in the papers or orally presented by witnesses. It is unthinkable that any court can decide on issues like joinder when there are no records linking or not linking any entity to the tender.

[20] Only when the record has been filed, can anyone express an opinion on this issue. The record of the decision is sought from the first and second respondents not the consortium. That is what will ultimately be tested before court. It was argued that the applicant is seeking information from third parties. This submission cannot hold. The tender process between GDE and the consortium is not challenged at all. Only the record of the decision that tipped the scale for the first and second respondents to decide to participate in that contract is of utmost importance for any court to decide whether there was a lawful basis for the decision. The respondents seek an unfair position in that this court must decide on this matter without all information being placed before it. The argument that the application should be dismissed cannot be sustained on these grounds.

---

[6] (608/2002) [2003] ZASCA 123.

[7] Down-Touch Investments (Pty) Ltd v Mangaung Metropolitan Municipality and Others (230/2022) [2022] ZAFSHC (10 February) at para 10.

[21] My view is that the two applications are linked to each other but each has a life of its own. The interlocutory application ought to succeed with costs against all the respondents.

[22] I make the following order:

22.1. The first and second respondents are ordered to file the Record of the Decision impugned in the pending review process under case number 4699/2020 in this court within five (5) days after granting of this order.

22.2. The first and second respondents are ordered to provide such reasons for the decision.

22.3. The respondents are ordered, jointly and severally, the one paying the other(s) to be absolved, to pay the costs.

M.A. MATHEBULA, J

I agree

D. DE KOCK, AJ

On behalf of applicant:	Adv. S Grobler SC
Instructed by:	Kramer Weihmann Inc. BLOEMFONTEIN
On behalf of 1st & 2nd respondents:	Adv. M Hellens SC
Instructed by:	State Attorney BLOEMFONTEIN
On behalf of 3rd, 4th & 5th respondents:	Adv. I Hussain SC

Instructed by:	Phatsoane Henney Inc. BLOEMFONTEIN

/TKwapa