



**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, EAST LONDON CIRCUIT COURT**

CASE NO. EL 1056/2022

In the matter between:

SHINE AFRICA FINANCIAL SERVICES (PTY) LTD

Applicant

and

BUFFALO CITY METROPOLITAN MUNICIPALITY

Respondent

JUDGMENT

LAING J

[1] This is an application for, *inter alia*, a declarator to the effect that the respondent's sale of tender documents, without making them available free of charge, is unconstitutional and unlawful. The applicant also seeks: an interdict preventing the evaluation and adjudication of the tenders in question, and the implementation of the contracts arising from the award thereof; and an order directing the respondent to refund all bidders from whom it accepted payment.

[2] The application was brought on an urgent basis.

Background

Applicant's case

[3] The applicant claims to be a potential bidder that was precluded from submitting a bid for one of the tenders that form the subject of the application. It asserts that the respondent advertised four different tenders during May and June 2022: the supply of refuse bags, the design and installation of bronze statues in Duncan Village, and the establishment of townships for settlements at Tyutyu and Nompumelelo, respectively. The respondent indicated that tender documents would be available at its offices upon payment of various non-refundable amounts, ranging from R200 to R500.

[4] Subsequently, the applicant complained to the respondent, pointing out that the latter was obligated to have made the tender documents available on its website. No response was received, prompting the applicant to launch the present proceedings.

[5] The basis for the applicant's argument is that the respondent has flouted the provisions of the National Treasury guidelines for accounting officers in relation to the charging and collecting of a fee for tender documents. Furthermore, contends the applicant, the respondent has contravened the Public Finance Management Act 1 of 1999 ('PFMA') inasmuch as the sale of the tender documents resulted in an unfair and non-competitive tender process; this was also in contravention of section 217(1) of the Constitution.

[6] The applicant asserts that other organs of state provide tender documents on their websites, free of charge and in accordance with the National Treasury guidelines. It is entitled to participate in a lawful tender process and argues that it must be granted interim relief. About urgency, the applicant says that the respondent will appoint successful bidders based on an unlawful tender process; this will result in irregular expenditure.

Respondent's case

[7] The respondent raises two points *in limine*. It challenges the alleged urgency of the matter, arguing that the applicant has not explained its delay in launching the application and pointing out that the possible incurring of irregular expenditure did not render the matter urgent. Furthermore, the respondent asserts that the applicant has failed to join the parties that submitted bids for the tenders in question.

[8] Regarding the merits, the respondent says that it is entitled to charge and collect a reasonable fee for tender documents, reflecting the cost of printing and delivery to bidders. The applicant was being unreasonable in refusing to pay a modest fee to participate in a tender process from which it stood to gain significant income while expending vast sums of money to institute legal proceedings.

In reply

[9] The applicant contends, in reply, that any delay (which is denied) was caused by the respondent's refusal to deal with the applicant's complaint. The application was launched at about the same time that the tenders closed. As to non-joinder, the applicant contends that it was incumbent on the respondent to have provided the names and addresses of the bidders. It has not done so, despite being in possession of the tender briefing and bid opening registers, as well as the bids themselves.

[10] Turning to the merits, the applicant argues that the National Treasury guidelines only permit the sale of tender documents when necessary. The respondent has failed to demonstrate such necessity. The actual costs of printing are considerably lower than the fee charged and collected by the respondent; moreover, the respondent has not accommodated the situation where a bidder wishes to print the tender documents itself, when the respondent is unable to make printed copies available free of charge. The applicant insists that the respondent has a duty to make the tender documents available on its website, as envisaged in terms of the standard conditions of tender that applied.

History of proceedings

[11] The application was enrolled for hearing on 12 July 2022 but fell to be struck from the roll by Tokota J for lack of a proper index and pagination.

[12] The applicant subsequently brought an interlocutory application, termed a notice of reinstatement, by means of which it sought to obtain an order that, *inter alia*: directed the respondent to furnish the tender briefing and bid opening registers; directed the applicant to serve a copy of the application upon the bidders for the tenders in question; and joined such bidders to the proceedings.

[13] When the interlocutory application was heard on 10 August 2022, the relief sought in terms thereof was refused by Zilwa J. The main application, only, was reinstated for hearing on 23 August 2022.

Issues to be decided

[14] The points *in limine* must be determined at the outset. These could prove decisive, failing which the court would need to determine the merits of the matter, which pertain to the crisp issue of whether the respondent's sale of the tender documents, without making them available free of charge, is unlawful.

[15] From the history of the matter, non-joinder is an issue that is very relevant to the proceedings.

Non-joinder

[16] The test for joinder has been distilled to the following: any person is a necessary party and should be joined if such person has a direct and substantial interest in any order that the court might make; alternatively, if such an order cannot be sustained or carried

into effect without prejudicing such person, unless he or she has waived the right to be joined.¹

[17] The issue can become complicated where numerous parties are affected. In *Road Accident Fund v Legal Practice Council*,² the parties took various steps to notify (potential) necessary parties about the relief that was sought. The court held as follows:

‘[t]his matter, in my view, is one where the joinder of the many thousands of parties, that could be affected by the order of this court, is unnecessary in the light of the steps taken by the RAF to notify as many parties of its application as possible. The steps taken are adequate. The number of affected parties is substantial, and the steps taken by the RAF to notify the sheer volume of parties that could be affected were sufficient to effect their joinder. Only the seventeenth to twenty-third respondents responded and were joined in these proceedings. The failure to respond by those who were notified can be taken to equate to a waiver of the right to be joined.’

[18] Even informal notification of a necessary party may suffice in circumstances where the party has indicated, unequivocally, that it will abide by the decision of the court.³ The point is that notification must be given. A necessary party has a right to participate in the proceedings and must be permitted to exercise such right by making submissions before the court adjudicates the dispute, notwithstanding the fact that numerous parties may be involved. If a person has a direct and substantial interest in an order that may be given by a court or that cannot be implemented without causing prejudice to such person, then he or she must be joined unless he or she has clearly communicated his or her intention to abide by the order to be given or otherwise waived the right to participate in the proceedings.

[19] In the present matter, the applicant argues that it would only have been necessary to have joined the bidders for the tenders in question where the evaluation of their bids

¹ DE van Loggerenberg, *Erasmus: Superior Court Practice* (Jutastat, RS 16, 2021), at D1-124. See, too, *Kethel v Kethel's Estate* 1949 (3) SA 598 (A), at 610; *Amalgamated Engineering Union v Minister of Labour* 1949 (3) 637 (A), at 659; and, more recently, *Watson NO v Ngonyama* 2021 (5) SA 559 (SCA), at paragraph [52].

² 2021 (6) SA 230 (GP), at paragraph [10].

³ In re *BOE Trust Ltd and others NNO* 2013 (3) SA 236 (SCA), at 242A-C.

had been completed. Their right to participate in the tender process remains unaffected and no awards have been made.

[20] The factual basis for the applicant's assertions is not evident from the papers. There is nothing to indicate whether either the evaluation or adjudication of the bids has occurred; there is nothing to indicate whether any awards have subsequently been made. The question, however, is not whether the evaluation of the bids has been completed or whether the respondent has awarded the tenders. The question is whether the bidders are necessary parties who should have been joined.

[21] To answer that, the nature of the possible order must be considered. The applicant seeks the following relief, *inter alia*: that the respondent's conduct be declared unlawful and that it be interdicted from continuing with the evaluation of the bids, appointing bidders, concluding any contracts with the appointed bidders, or implementing any obligations in terms thereof.⁴ The bidders for the various tenders would have prepared and submitted their bids with a view to securing their appointment for the goods or services required- and the concomitant income stream in the event that they were successful. According to the answering papers, it is apparent that the tender for the supply of refuse bags would have been of significant interest to prospective suppliers; the client would be one of the country's large metropolitan municipalities, responsible for the delivery of waste disposal services to an extensive urban community, and for a period of three years. A total of 57 bids were recorded in the bid opening register and the quoted prices reflect values running into many millions of rand. It hardly needs saying that the contract would be an important source of income for the successful bidder over several financial years. Likewise, the tender for the design and installation of bronze statues would be of much interest to potential suppliers for whom, presumably, such work would not often be available. There were only five bidders according to the answering papers,

⁴ The applicant has, in relation to the interdictory relief sought, separated the various sub-paragraphs by means of 'and/or'. This is not always a helpful approach inasmuch as it may leave the respondent (and the court) in doubt about what exactly the applicant seeks. At the least, it would be expected of the applicant to present sufficient evidence upon which to contend that it is entitled to all or a portion of the relief stipulated in its notice of motion, rather than make vague allegations and hope that the net has been cast wide enough to result in a catch of some sort. The onus of proof remains with the applicant.

but the quoted prices also run into millions of rand. It is not unreasonable to expect similar interest and values for the remaining tenders for the establishment of townships, entailing the provision of planning and related professional services.

[22] That the bidders have a direct and substantial interest in an order that could interdict the respondent from evaluating their bids, awarding the tender in question to any one of them, or executing the contract that arises, is obvious. To put it another way, an order to that effect cannot be sustained or given effect without causing prejudice to any bidder that has submitted a bid for any of the indicated tenders.

[23] The applicant has referred to the decision in *Bhala Traditional Council v Dumezweni and others*⁵ where the court dealt with the unlawful sub-division, demarcation and allocation of land in the Flagstaff district. The respondents raised the point of non-joinder, arguing that the applicant had failed to join the committee that had been established to represent the interests of some of the villages in the area and of which the respondents were members. The court found, however, that it was not necessary to have done so inasmuch as the applicant only sought relief against the respondents in their personal capacities; it was not clear that the respondents had been acting in their capacities as members of the committee. The decision is of no assistance in the present matter.

[24] Furthermore, the applicant referred to *Judicial Service Commission and another v Cape Bar Council and another*,⁶ where the court confirmed that it had become settled law that the joinder of a party was only required as a matter of necessity where that party has a direct and substantial interest that may be affected prejudicially by the judgment of the court. The mere fact that a party may have an interest in the outcome of the litigation did not warrant a plea of non-joinder; the right to raise such an objection was limited. Similarly, the decision is of no assistance in the present matter. This court has already found that the bidders for the various tenders in question have more than just an interest in the outcome; the test for joinder has been met and the bidders must be deemed to have a

⁵ (3486/2018) [2018] ZAECHMHC 17 (3 June 2020), at paragraph [26].

⁶ 2013 (1) SA 170 (SCA), at paragraph [12].

direct and substantial interest in the order that this court may give, alternatively that such an order cannot be implemented without causing prejudice to them.

[25] In its replying papers, the applicant points out that the respondent is in possession of the particulars of the bidders, including their contact details. The applicant does not have these. If the respondent has relied on the point of non-joinder, then it should have furnished the applicant with the bidders' particulars and contact details to have enabled the applicant to have dealt with the point and to have arranged for proper service. This was not possible in the circumstances.

[26] The applicant seems to have missed the point somewhat. As *dominus litis*, the applicant (assisted by its legal team) is responsible for shaping its cause of action, working out the nature of relief to be sought, and identifying the necessary parties. It must prepare and execute a strategy that will adequately manage the many variables that come into play once the decision to litigate has been taken. These include the problem of dealing with a multiplicity of (potential) necessary parties. Insofar as time does not allow the applicant to use the available statutory tools for purposes of obtaining information in anticipation of litigation,⁷ the Uniform Rules of Court can assist once proceedings have started.

[27] The facts of the matter at hand lend themselves, moreover, to a review application under rule 53. If the procedure had been followed correctly, then the respondent would have been required to have produced the record of the decisions, including the tender briefing and bid opening registers, from which the particulars and contact details of the bidders would have been apparent. It is not evident on the papers that the applicant was ever prevented from adopting such an approach. Without intending to make any specific finding in relation thereto, the court is not at all convinced that the matter was as urgent as the applicant contends.

⁷ The most obvious example is the procedure contained in the Promotion of Access to Information Act 2 of 2000 ('PAIA').

[28] In *Insamcor (Pty) Ltd v Dorbyl Light & General Engineering (Pty) Ltd; Dorbyl Light & General Engineering (Pty) Ltd v Insamcor (Pty) Ltd*,⁸ the court held as follows:

[28] ...in some instances it would be wellnigh impossible to join every party to a contract with the deregistered company and any other third party who may be prejudicially affected by the registration order as respondents in the application. That, however, is not a novel dilemma. It often arises in cases where necessary parties may be numerous and sometimes even unknown. For many years this problem has been resolved by the mechanism of issuing a rule *nisi*, as an alternative to actual joinder of all necessary parties...

[29] ...since failure to react to the rule *nisi* will give rise to deemed consent, proper care should be taken in issuing directions as to service of the rule. Where a particular party can be identified a priori as a necessary party... service of the rule on that party should be directed, while notice to unknown potentially interested parties can be ensured through publication of the rule...

[29] It may have been preferable for the applicant to have adopted a similar strategy, relying on a rule *nisi* to obtain the particulars and contact details of the bidders and subsequently joining them to the proceedings. This was never done.

[30] Ultimately, it was not the respondent's responsibility to have ensured that the applicant was fully armed with the relevant information before embarking upon litigation. It was up to the applicant, as *dominus litis*, to have identified the necessary parties beforehand and to have prepared and executed an appropriate strategy with regard to joinder.

Relief and order

[31] The determination of the question about the lawfulness of an organ of state's not making tender documents available, free of charge, would certainly be of interest to supply chain management practitioners, potential bidders, and lawyers who practise in this field. However, the vehicle by which to do so must be up to the task. The present application is not well-considered; it is replete with shortcomings, of which non-joinder is

⁸ 2007 (4) SA 467 (SCA).

simply the most immediate. On its own, the point of non-joinder is sufficient to deny the relief sought by the applicant.

[32] The respondent has sought costs on an attorney-and-client scale. However, the court has confined its focus to the point of non-joinder and has not considered the question of urgency or the remaining issues. There is no basis upon which to deviate from the usual relief that should follow in that regard.

[33] In the circumstances, the following order is made:

- (a) the application is dismissed; and
- (b) the applicant is directed to pay the respondent's costs.

JGA LAING

JUDGE OF THE HIGH COURT

APPEARANCE

For the applicant: Adv Nyangiwe, instructed by Moletsane PN Attorneys,
East London.

For the respondent: Adv Zietsman, instructed by Wesley Pretorius &
Associates Inc, East London.

Date of hearing: 24 August 2022

Date of delivery of judgment: 08 November 2022