REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
(LIMPOPO DIVISION, POLOKWANE)

(1)	REPORTABLE: ~~YES~~/NO
(2)	OF INTEREST TO THE JUDGES: ~~YES~~/NO
(3)	REVISED.

Signature [redacted]

Date 4/5/2021

CASE NO: 2245/2021, 2246/2021, 2247/2021, 2248/2021, 2249/2021, 2250/2021

In the matter between:

ROADMAC SURFACING (PTY) LTD **APPLICANT**

and

ROAD AGENCY LIMPOPO SOC LTD AND OTHERS **RESPONDENTS**

JUDGMENT

MAKGOBA JP

[1] In this urgent application before me there are 6 (six) similar applications which are dealt with as one application by agreement between the parties.

[2] The six applications were launched in terms whereof:

2.1. The First Respondent, Road Agency Limpopo SOC Ltd ("RAL") is requested to provide the Applicant with written reasons in terms of Section 5 of the Promotion of Administrative Justice Act 3 of 2000 ("PAJA") for its decision to award various tenders to the successful tenderers referred to in the applications.

2.2. An interim interdict is sought pending finalization of a review application in terms of which:

(a) The First Respondent be ordered not to give any further instructions to the successful tenderers to perform work under the various tenders pending a review application to be instituted by the Applicant;

(b) The successful tenderers are interdicted from commencing with work under the tenders referred to in the 6 (six) applications.

[3] The identified documentation and reasons requested by the Applicant in the six applications have since been submitted or furnished to the Applicant on 21 April 2021 and 26 April 2021 respectively. In the result the prayer in 2.1 above falls away.

[4] This matter came before Muller J in the Urgent Motion Court on 20 April 2021 and by agreement the matter was postponed to 30 April 2021 to allow the First Respondent to furnish the requested reasons and file its opposing papers.

Factual matrix

[5] The Applicant and various tenderers, including the six successful tenderers in the present application reacted and submitted road construction and maintenance bids on an invitation by the First Respondent (RAL) under various tender numbers. All bids submitted were to be evaluated in terms of the "Evaluation Methodology" set out in the tender documents and were subject to a five stage evaluation process.

All the completed tender documents submitted by the various tenderers were captured on the Applicant's internal "One Note" system.

[6] The Applicant allege that in all the bids submitted and referred to in these six applications, its bids were lower in price than the successful tenderers.

On the 29 March 2021 the Applicant obtained knowledge that the various bids were awarded to the various successful tenderers referred to in the six applications.

[7] The Applicant contends that it had a legitimate expectation to be awarded the tender especially considering that:

7.1. The Applicant was a compliant tenderer and should have progressed to the final stage in the evaluation process;

7.2. The Applicant should have scored higher than the successful tenderers on 80/20 preferential point system, namely lower in price and the highest B-BBEE rating.

[8] The First Respondent (RAL) oppose the six applications and based its opposition on the following facts:

8.1. The Applicant's bids were rejected during the first phase, namely the "compliance phase" in particular the Applicant's failure to complete the prescribed "Certificate of Authority" contained in Form T2.IA;

8.2. The non-compliance with the prescribed requirements does not concern "substance" but "form" requirements, and RAL applied the compliance rules strictly in accordance with the letter of the rule.

8.3. The Applicant failed to establish any grounds of review, and failed to establish a *prima facie* right.

8.4. The balance of convenience does not favour the granting of the interlocutory relief sought.

[9] The Applicant's main contention is that its *prima facie* right to approach this Court for an order sought is premised from the facts that the Applicant was obviously the successful tenderer, and no objective criteria existed to justify RAL's decision to exclude the Applicant and to award the tenders referred to in the six applications to the successful tenderers.

[10] On the other hand the First Respondent (RAL) contends that the Applicant has no *prima facie* right worth of protection by an interlocutory interdict and that on the merits the Applicant's review application has no prospects of success anyway.

Interdictory relief

[11] Interlocutory interdicts are normally granted *pendent lite*, and it is aimed at ensuring, as far as it is reasonably possible, that the party who is ultimately successful will receive adequate and effective relief[1].

For more than a century our law has authoritatively required an applicant seeking a final interdict to:

(1) demonstrate a "clear right";

(2) show an injury in the form of irreparable harm actually committed or reasonably apprehended and

(3) the absence of an alternative remedy.

See **Setlogelo v Setlogelo 1914 AD 221 227**

Where an interim relief is sought, like in the present case, a further requirement for the interdict is that a balance of convenience is in favour of the granting of the interim relief.

[12] In the present case in order for the Applicant to succeed in an application for an interlocutory interdict, the Applicant must establish:

12.1. A *prima facie* right;

[1] Pikoli v President of the Republic of South Africa 2010 (1) SA 400 (GNP) at 403H-404

12.2. A well-grounded apprehension of irreparable harm if the interim relief is not granted and the ultimate relief is eventually granted;

12.3. A balance of convenience in favour of the granting of the interim relief; and

12.4. The absence of any other satisfactory remedy[2].

[13] In **National Treasury and Others v Opposition to Urban Tolling Alliance and Others**[3] it was held that:

> *"Under the Setlogelo test, the prima facie right a claimant must establish is not merely the right to approach a court in order to review an administrative decision. It is a right to which, if not protected by an interdict, irreparable harm would ensue...... Quite apart from the right to review and to set aside impugned decisions, the applicants should have demonstrated a prima facie right that is threatened by an impending or imminent irreparable harm. The right to review the impugned decisions did not require any preservation pendente lite[4]."*

[14] RAL's reasons for disqualifying the Applicant's bids are set out in the letter RAL's attorneys addressed to the Applicant's attorneys on 26 April 2021. In the said letter it was emphasized that the tender documents upon which the Applicant responded to the bids contained unambiguous and mandatory terms and conditions and evaluation methodology.

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[2] Superior Court Practice, Erasmus Second Edition, Van Loggerenberg, Volume 2, D6-16-D6-22

[3] 2012 (6) SA 223 (CC) at para 50

[4] See also Down Touch Investments (Pty) Ltd v Matjhabeng Local Municipality and Others (1172/2016) [2016] ZAFSHC 131 (13 April 2016)

[15] The crisp reason for disqualifying the Applicant's six bids is failure to complete the *"Certificate of Authority"*, as stipulated in the tender documents. The issue in respect of each of the Applicant's six bids is that item T2.IA, namely the *"Certificate of Authority"*, were not completed as prescribed.

Bidders were required to complete all the forms and returnable documents, including item T2.IA in black ink. This the Applicant did not do. The Applicant rather left blank each item T2.IA. The certification was not completed by the Applicant's chairperson of its board of directors as required. The chairperson did not confirm that the attached resolutions authorised a person to sign the documents and did not contain witness signatures next to that of the Chairperson or the date.

[16] For the better understanding of the requirements for the completion of the *"Certificate of Authority"*, that is item T2.IA, attachments "A" to this judgment illustrates the blank item T2.IA which the Applicant was supposed to have completed and attached its board of directors' resolutions. On the other hand attachment "B" to this judgment illustrates what purports to be the Applicant's completion of the *"Certificate of Authority"*.

Even a bird's eye view of attachments "A" and "B" shows clearly that the Applicant did not complete item T2.IA (attachment "A") but went astray to redesign its own *"Certificate of Authority"* (attachment "B").

"A"

"D6"

T.22

ROADS AGENCY LIMPOPO SOC Ltd

RAL/T981/2020: MAINTENANCE OF ROAD D2537 FROM BURGERSFORT TO PENGE WITHIN SEKHUKHUNE DISTRICT OF LIMPOPO PROVINCE

T2.1 A CERTIFICATE OF AUTHORITY

Indicate the status of the tenderer by ticking the appropriate box hereunder. The tenderer must fully complete the certificate set out below for the relevant category.

A Company	B Partnership	C Joint Venture	D Sole Proprietor	E Close Corporation

A. Certificate for company

I,…………………………………………………, chairperson of the board of directors of ………………………………………………, hereby confirm that by resolution of the board (copy attached) taken on ………………20…., Mr/Ms………………………acting in the capacity of…………………………………………….,was authorised to sign all documents in connection with this tender and any contract resulting from it on behalf of the company.

As witness

1……………………………………   ……………………………………

Chairman

2……………………………………   ……………………………………

Date

B. Certificate of partnership

We, the undersigned, being the key partners in the business trading as ………………………………

hereby authorise Mr/Ms…………………………………………………, acting in the capacity of………………………………………to sign all documents in connection with the tender for Contract…………………………………………………………and any contract resulting from it on our behalf.

NAME	ADDRESS	SIGNATURE	DATE

NOTE: This certificate is to be completed and signed by all of the key partners upon whom rests the direction of the affairs of the Partnership as a whole.

SEE ATTACHED

"B"

ROADMAC SURFACING

Physical address
34 Empire Road
Bartlett
Boksburg
1459

Postal address
PO Box 15584
Impala Park
1472

Contact details
Tel: +27 11 966 4000
Fax: +27 11 966 4013

www.raubex.com

Roadmac Surfacing (Pty) Ltd Registration number: 1992/001299/07

EMPLOYER: ROADS AGENCY LIMPOPO (SOC) LTD

CONTRACT: MAINTENANCE OF ROAD D2537 FROM BURGERSFORT TO PENGE WITHIN SEKHUKHUNE DISTRICT OF LIMPOPO PROVINCE

CERTIFICATE OF AUTHORITY FOR SIGNATURE

By resolution of board of directors passed on a round robin basis in terms of section 74 of the Companies Act, 2008.

MR JACOB GERHARD VAN DER BIJL, whose signature appears below, has been duly authorized to sign all documents in connection with;

CONTRACT NO: RAL/T981/2020

And any contract, which may arise there from on behalf of **ROADMAC SURFACING (PTY) LTD.**

SIGNED ON BEHALF OF THE COMPANY: [redacted]..........................

FULL NAME: GRACE MIRIAM CHEMALY

IN HER CAPACITY AS: COMPANY SECRETARY

DATE: 5^{TH} NOVEMBER 2020

SIGNATURE OF SIGNATORY: ....[redacted]..............................
JACOB GERHARD VAN DER BIJL

WITNESS: 1. [redacted]..............................

2. ....[redacted]..

L.L. M

[17] RAL's tender documents published mandatory terms and conditions for compliance by all prospective tenderers. The terms and conditions clearly state that

> "*all bids must be submitted on the official forms provided (not to be retyped) or in the manner prescribed in the bid document and in the manner prescribed in the bid documents or complete all forms.*"

The tender documents further state that

> "*all forms, certificates and schedules shall be completed.......Failure to comply will be a disqualification.*"

Importantly, the terms and conditions also state that

> "*non-compliance with any of the requirements will render the tender non responsive and it will not be carried forward to the next stage.*"

[18] Counsel for the Applicant submitted that the Certificate of Authority attached to Form T2.IA is compliant, alternatively substantially compliant with the requirements set out in Form T2.IA, and as a result thereof the Applicant should have passed the first phase to the evaluation criteria.

I disagree. My reasons therefor are apparent from the illustrations given as per attachments "A and B" above.

[19] In my view RAL was obligated to disqualify the Applicant for two reasons. The first reason is that the Applicant's tender documents were not "acceptable tenders" within the meaning of the Preferential Procurement Policy Framework Act No 5 of 2000. This was clearly stated in the reasons furnished by RAL's attorneys to the Applicant's attorneys on 25 April 2021:

The Preferential Procurement Policy Framework Act requires the implementation of a procurement policy by following a preferential point system in respect of any *"acceptable tender"*.

An *"acceptable tender"* is being defined in Section 1 of the Act as being

> *"any tender which in all respects complies with the specifications and conditions of tender as set out in the tender document"*

See **Millennium Waste Management (Pty) Ltd v Chairperson Tender Board: Limpopo Province and Others**[5]; and

Chairperson, Standing Tender Committee v JFE Sapela Electronics (Pty) Ltd[6].

[20] The second reason is that RAL did not have the discretion to condone the Applicant's non-compliance with peremptory or mandatory terms and conditions of the tender, hence the Applicant's submission that it has substantially complied with the tender requirements cannot take the matter any further.

This principle was restated in the matter of **Dr JS Moroka Municipality v Betram (Pty) Limited**[7] wherein the Supreme Court of Appeal held as follows:

"[15] This argument cannot be accepted. The clause related to bid 'validly submitted' and, as is indeed stated in clause 2.5.5 of the standard terms and conditions of bid, only tenders submitted 'in the prescribed manner may be accepted as valid bids'. That clause merely states the obvious. A bid that does not satisfy the necessary prescribed minimum qualifying requirements simply cannot be viewed as a bid 'validly submitted'. Moreover, the tender process consists of

[5] 2008 (2) SA 481 (SCA) at paras 17 - 21

[6] 2008 (2) SA 638 (SCA) at para [14]

[7] [2014] 1 AIL SA 545 (SCA)

various stages first, examination of all bids received, at which stage those which do not comply with the prescribed minimum standards are liable to be rejected as invalid; second, the evaluation of all bids validly submitted as prescribed in clause 3; and third, a decision on which of the validly submitted bids should be accepted. The fact that all bids validly submitted are to be taken into consideration as set out in cause 3.1 affords no discretion to condone and take into account bids not validly submitted but disqualified."

[21] In the light of the above stated cases, I am of the view that the Applicant's prospects of success in the prospective review application is non-existent. In this regard, it is trite that this Court should exercise its discretion by refusing to grant the interdict sought by the Applicant. In **Olympic Passenger Service (Pty) Ltd v Ramlagan**[8] it was put as follows:

> *"It thus appears that where the applicant's right is clear, and the other requisites are present, no difficulty presents itself about granting an interdict. At the other hand of the scale, where his prospects of ultimate success are nil, obviously the Court will refuse an interdict."*

[22] It was submitted on behalf of the Applicant that Applicant will suffer severe prejudice should the commencement of work under the various tenders proceed pending the finalisation of the review application which is to be adjudicated on 28 May 2021, and as a result thereof the balance of convenience favours the Applicant.

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[8] 1957 (2) SA 382 (D) at 383 E-G

[23] On the other hand it was submitted on behalf of the First Respondent (RAL) that the balance of convenience does not favour the granting of the interdicts. In its answering affidavit, RAL refers to four essential reasons why it cannot bring an end to any of the works that are subject to the eleven advertised and awarded tenders, including the six impugned tenders.

These are the reasons:

(a) the interests that have already invested in the community by the continued implementation of the projects;

The work is not only necessary but urgent.

(b) the work is extremely urgent from the point of view of the State administration. If the projects are stalled by the interdict, the budget will be forfeited to the national fiscus; The work is not only necessary but urgent.

(c) there has been a creation of employment and improvement of livelihoods of members of the community when the projects are implemented;

(d) the road maintenance work is urgent to save life and limb and allowing for necessary commercial activities to continue.

[24] The Court has the task of weighing up the balance of convenience by assessing the final and irreversible inconvenience which one party will be likely to have suffered if he/she should turn out to be the successful party, and also of assessing the final and irreversible inconvenience which the other party will be likely to have suffered if he should turn out to be the successful party and considering whether the one outweighs the other.

[25] Given the Applicant's poor prospects of success in the prospective review application, it has to be established that the balance of convenience clearly favours the granting of interdictory relief. In my view, the Applicant has failed to do so. Upon a proper consideration of the conspectus of facts implicated in this matter, RAL and various communities are to suffer more prejudice than the Applicant if the interdict is granted. In the matter of **WJ Building & Civil Engineering Contractor CC v Umhlathuze Municipality**[9] the Court had this to say on the balance of convenience:

> *"In such cases, upon proof of a well-grounded apprehension of irreparable harm, and there being no adequate ordinary remedy, the court may grant an interdict – it has a discretion, to be exercised judicially upon a consideration of all the facts. Usually this will resolve itself into a nice consideration of the prospects of success and the balance of convenience – the stronger the prospects of success, the less need for such balance to favour the applicant: the weaker the prospects of success the greater the need for the balance of convenience to favour him. I need hardly add that by balance of convenience is meant the prejudice to the applicant if the interdict be refused, weighed against the prejudice to the respondent if it be granted…"*

[26] The Applicant has an alternative remedy other than being granted an interdictory relief. Should it turn out in the prospective review that the Applicant was unfairly treated and/or entitled to be appointed on these six tenders, it can sue for damages if it can establish the requisite elements of a delict.

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[9] 2013 (5) SA 461 (KZD) para 3 (replying on the matter of Olympic Passenger Service (Pty) Ltd v Ramalagan 1957 (2) SA 382 (D) at 383 E-G)

[27] I come to a conclusion that the Applicant has failed to make out a proper case for the relief sought and therefore the urgent application ought to be dismissed

Wasted Costs occasioned by the Postponement on 20 April 2021

[28] Counsel for the Applicant argued and submitted that the First Respondent (RAL) should pay the Applicant's wasted costs occasioned as a result of the postponement of these applications on 20 April 2021. A counter-argument was made by Counsel for the First Respondent that such wasted costs be paid by the Applicant.

[29] The Applicant brought the six urgent applications for interlocutory relief pending the institution and finalization of a review application in each of these cases. The applications were issued out of this Court on the 8th April 2021 and were to be heard on the 20th April 2021.

In the Notice of Motion the Applicant called upon the Respondent to file a notice to oppose on or before 15h00 on Friday 9 April 2021 and deliver opposing/answering affidavits on or before 10h00 on Tuesday 13 April 2021, that is only two Court days to deliver opposing affidavits.

[30] I agree with First Respondent's submission that it was well-nigh impossible to deal issuably with the six applications in the limited time decreed in the notice of motion.

[31] The First Respondent (RAL) sought an indulgence based on what it considered to be cogent and reasonable reasons for postponement in its letter dated 16 April 2021. This was rebuffed by the Applicant in a letter also dated 16 April 2021.

The First Respondent was accordingly forced to bring a formal application for the postponement of the urgent application, for one week.

At the doorstep of the Court on 20 April 2021 the urgent application were postponed to 30 April 2021 by agreement between the parties.

[32] The issue at the time of the postponement was merely whether the urgent applications were ripe for hearing. It is common cause that by then, the First Respondent had not delivered its answering affidavit, hence the postponement was granted.

In my view the time periods chosen by the Applicant were irrationally short (two to three days for delivery of an answering affidavit in each of the six applications). The matter ought not to have been entertained on the roll on 20 April 2021. The refusal to allow another week for delivery of the affidavits was completely irrational. This was unnecessary and costly.

[33] The Applicant caused the First Respondent to bring a formal application for postponement and Counsel to attend Court on 20 April 2021 only to concede to the postponement at the doorstep of the Court.

In the circumstances the First Respondent is entitled to the wasted costs occasioned by the postponement of these applications on the 20 April 2021.

[34] In the result I grant the following order:

34.1. The application is dismissed with costs, such cost to include the costs of two Counsel.

34.2. The Applicant is liable and is ordered to pay the wasted costs occasioned by the postponement on the 20th April 2021, such costs to include the costs consequent upon the employment of two Counsel.

[redacted]

E M MAKGOBA
JUDGE PRESIDENT OF THE HIGH COURT, LIMPOPO DIVISION, POLOKWANE

APPEARANCES

Heard on	: **30 April 2021**
Judgment delivered on	: **5 May 2021**
For the Applicant	: **JJ Buys**
Instructed by	: **L & V Attorneys** **c/o Corrie Nel & Kie Attorneys** **Polokwane**
For First Respondent	: **PF Louw SC** **NC Motsepe**
Instructed by	: **Legodi Attorneys** **Polokwane**