



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 No: 1063/2019

In the matter between:

PRO CARE CONTRACTING (PTY) LTD

First Applicant

HT PELATONA PROJECTS (PTY) LTD

Second Applicant

And

**THE MUNICIPAL MANAGER OF THE
MASILONYANA LOCAL MUNICIPALITY**

1st Respondent

**THE EXECUTIVE MAYOR OF THE
MASILONYANA LOCAL MUNICIPALITY**

2nd Respondent

MASILONYANA LOCAL MUNICIPALITY

3rd Respondent

MATJABENG JV

4th Respondent

JUDGMENT

JUDGMENT BY: NAIDOO J

HEARD ON: 18 MARCH 2019

DELIVERED ON: 20 MARCH 2019

- [1] This matter came before me as an urgent application, which was previously enrolled for hearing on 14 March 2019, and was postponed to 15 March 2019 for hearing. Due to the late filing of the opposing affidavit of the 1st to 3rd respondents, and a power outage, due to electricity load shedding, the matter was postponed to 18 March 2019 for hearing. The 4th respondent also opposed the application and filed his opposing affidavit on 13 March 2019. Mr S Grobler represented the applicants, Mr N Rampai represented the 1st, 2nd, and 3rd respondents and Mr Steenkamp represented the 4th respondent.
- [2] The background, very briefly, is that the two applicants and the 4th respondent, amongst others, were bidders in respect of a tender invitation put out by the 3rd respondent for the upgrading and rehabilitation of the Winburg Water Treatment Plant. It came to the attention of the applicants in December 2018 that they were not successful, and at that stage they were not aware who the successful tenderer was. Their attorney requested reasons and supporting documentation such as minutes and reports relevant to the decision in question, from the 3rd respondent. No response was received from the 3rd respondent, and the 1st and 2nd applicants decided to join forces, as they both believed that they had submitted compliant bids, which should have been

successful. This belief was based on the release of the tender results showing that both applicants were shortlisted as successful bidders. They would of, course be subject to the two stage assessment referred to later in this judgment. An application was launched on 11 December 2018, in which an order was sought to compel the 3rd respondent to furnish the required information. Mr Grobler advised that this application was ultimately withdrawn, ostensibly on the advice of the Judge President, who indicated that other parties should be joined.

[3] The 3rd respondent's failure to furnish the requested information continued, causing the applicants to launch an application, on an urgent basis, to compel the 3rd respondent to furnish the requested information. This application was heard on 14 February 2019, and the court granted the order, setting out specifically the information and documentation to be furnished by the 3rd respondent, who was given 5 days from the date of the order to furnish the information. These five days expired on 21 February 2019. There was still no response from the 3rd respondent. The applicants then launched the current application on 7 March 2019, for hearing on 14 March 2019. The 1st, 2nd and 4th respondents were joined as parties.

[4] The orders initially sought in this application, in essence, are:

4.1 The 1st and 2nd respondents are found to be in contempt of the order granted on 14 February 2019;

4.2 A *rule nisi* be issued, returnable on a date determined by the court, in terms of which the 1st and 2nd respondents are to appear

personally before this court and provide any evidence they desire to give, or make any representation they wish in respect of how the court should sanction their defiance of the court order;

4.3 Pending the finalisation of application by the applicants, to be instituted within 5 days (presumably of this court's order), for urgent review, the respondents are interdicted and restrained from in any way further acting upon the decision of the 1st and/or 2nd respondents to award the contract to the 4th respondent; The 1st and 2nd respondents are ordered to pay the costs of the application personally on the scale as between attorney and client. Should the 3rd or 4th respondents oppose, they are ordered to pay the costs, jointly and severally with the other respondents, the one paying the other to be absolved.

[5] It is also common cause that the applicants received on 13 March 2019, the documentation from the 1st, 2nd and 3rd respondents that was ordered by the court on 14 February 2019. This consisted of the minutes of the respondents' Bid Evaluation Committee and the Bid Adjudication Committee. This led to discussions between the parties, and the applicants advised this court that they will no longer pursue the prayer for an order of contempt of court against the 1st 2nd and 3rd defendants. This therefore left two issues for this court to determine, namely the urgency of the application and the interdict against the continuance of work by the 4th respondent, in terms of the contract between it and the other respondents.

- [6] The respondents disputed that the matter was urgent and asserted that any urgency claimed by the applicants was self-created and therefore ought not to be entertained by this court. Mr Steenkamp referred to a number of cases in his Heads of Argument handed up during argument, which deal with the issue of self-created urgency. The essence of these decisions is that the applicant must act swiftly and institute proceedings at the earliest available opportunity. The longer the applicant takes to institute litigation, the more urgency diminishes. Mr Steenkamp argued that the applicants knew in December 2018 that they should have asked for an interim interdict, as they requested the municipality to give an undertaking that implementation of the contract would be suspended. This was not done in the application launched in December 2018, and subsequently abandoned, nor was it prayed for in the application heard on 14 February 2019. They cannot now claim, four months later that the matter is urgent. He also argued that in the special conditions to the tender the municipality indicated that it will not necessarily accept the bid with the highest points. In the interim, the 4th respondent has already established the site and made enormous financial commitments in order to execute the contract. It would suffer severe prejudice and face financial ruin if the interim order suspending the contract were to be granted. Mr Steenkamp also argued that the applicants have not yet launched the review application.

- [7] Mr Rampai argued along similar lines regarding urgency, arguing that the applicants knew in December 2018 that neither of them was awarded the tender. Nothing stopped them from bringing an

application for an interdict at that stage, even if they did not have reasons from the 1st to 3rd respondents as to why the tender was not awarded to them. He alleged that the 3rd respondent complied with the court order of 14 February 2019 by forwarding the documents, via e-mail to the applicants' attorney on 22 February 2019. Mr Rampai addressed a letter to Ms Sonel Pienaar, the applicants' attorney on 12 March 2019 advising her that the documents had already been furnished to her office. A screenshot of an email allegedly forwarded to sonel@peyperattorneys.co.za on 22 February 2019 at 4.59 pm, with attachments reflected, *inter alia*, as "Bid Evaluation Committee report" and "Bid Adjudication Committee report", was attached to the letter. The e-mail was sent by a Neo Rabanye from the e-mail address nrabanye@masilonyana.co.za. An attachment to the 1st respondent's Opposing Affidavit was a letter by Ms Pienaar indicating that she responded the same day (12 March 2019) and advised that the documents were not received by her, and pointed out that the current application would not have been launched if the documents had been received. She also indicated that they would not to proceed with prayers 1 and 2 of the Notice of Motion if the documents were received by 13 March 2019. I do believe she meant prayers 2 and 3, as prayer 1 is for condonation for the applicants' non-adherence to the Rules of Court. The documents were then furnished by Mr Rampai to Ms Pienaar on 13 March 2019.

- [8] Mr Grobler, in Reply pointed out that it would have been inadvisable for the applicants to proceed with an application for an interdict prior to receiving the information requested from the municipality. The

appellants did not know if there was an irregularity or not. This could only be determined upon receipt of the requested information. Prior to that the appellants would not have been able to make out a prima facie case for the interdict. I agree. He also pointed out that in terms of section 5(1) of the Promotion of Administrative Justice Act 3 of 2000 (PAJA), the applicants had 90 days from the time they became aware of the administrative decision to request reasons for the decision. If there is no reply, then, in terms of section 5(3) of PAJA there is a legal presumption that the decision was taken without good reason. The respondents had not addressed these issues.

- [9] With regard to special conditions of the tender regarding the non-acceptance of the bid with the highest points, he acknowledged that the municipality would have such a discretion but that in terms of the Preferential Procurement Framework Act (5 of 2000), there must be objective criteria for doing so and tenderers must be informed beforehand of such criteria. This was not done by the municipality in this case. The 4th respondent alleged that two water pumps in Winburg had broken down and the residents of Winburg are without water. The pumps need to be replaced urgently and if the contract is suspended then the residents of Winburg would be without potable water. Mr Grobler's answer to this is that the

applicants have no objection to the municipality instructing the 4th respondent to repair or replace the water pumps immediately so that water can be supplied to the residents. The rest of the contract can then be suspended pending finalisation of the review application which the applicants intend instituting urgently.

- [10] As indicated, the municipality furnished the requested documents to the applicants only on 13 March 2019. In considering the probabilities of the applicants receiving the documents on 22 February 2019, the actions of the parties must be examined. The applicants have been making concerted efforts since December 2018 to obtain reasons and documentation from the municipality to substantiate its decision to award the tender to another bidder, without success. Their attorney took the trouble to write to the municipality a day or so prior to the expiration of the five days stipulated in the court order of 14 February 2019 to enquire if the information would be forthcoming, and received no response. It would have made no sense for them to launch this current application, seeking a contempt of court order against the municipality and its functionaries, if they had received the very information they had been repeatedly requesting. The municipality, on the other hand, did not react with the surprise and/or indignation that would have been expected, when the current application was served on it on 7 March 2019. If it did indeed send the documents to the applicants' attorney, it would have been expected of either the 1st or 2nd respondent to immediately call or write to the applicants' attorney and enquire why the application

was launched in view of their having furnished the requested documents. Their response five days later is telling.

[11] In considering the question of urgency, I have looked carefully at the history of the matter and the way the relevant events unfolded. The minutes of the Bid Evaluation Committee (BEC) and Bid Adjudication Committee (BAC) are dated 6 November 2018. These were furnished to the appellants by the municipality only on 13 March 2019, and yet must have been readily available to it in order for it to have awarded the tender to the 4th respondent, presumably some time in November 2018. It is inexplicable why the municipality failed to respond to the applicants' request in December 2018. They certainly have not explained this either in their opposing affidavit or in argument in court. Had they done so, they would have obviated the need for the applicants to have repeatedly approached the court for relief. The fact that the municipality reacted only after facing the threat of an order for contempt of court being granted against it, indicates dilatoriness and an element of wilfulness on its part.

[12] It certainly does not lie in the mouth of the municipality, or for that matter, the 4th respondent, to criticise the applicants for not seeking an interdict in December 2018. The applicants correctly pointed out that they would have been unable to do so, as they had no information upon which to base their application and make out the required *prima facie* case for such an order. It is one thing knowing the procedure that would follow upon the award of a tender and quite another to seek a court order without knowing the reasons for the decision taken in the matter. This only became

apparent to the applicants on 13 March 2019, when the minutes of the BEC and BAC were furnished to them. It seems their suspicions were confirmed that the decision was based on good grounds open to attack.

- [13] The minutes of the BEC reflect that four bidders passed the functionality stage of assessment. The 2nd applicant and 4th respondent were amongst these four. The 1st applicant failed the

functionality stage of the assessment. The 4th respondent scored the highest points in this first stage of the two stage assessment. The 2nd applicant scored the highest points in the Preferential Points System, being the 2nd, and more important stage. The recommendation of the BEC to the BAC is that the choice for appointment of a tenderer for the upgrading and rehabilitation of the Winburg Water Treatment Plant be made between the 2nd applicant and the 4th respondent. The BEC further resolved that “on the basis of locality Matjabeng JV be given consideration to boost the Municipality’s local economy”

- [14] The BAC agreed with the recommendation of the BEC that Matjabeng JV be appointed for the Upgrading and Rehabilitation of the Winburg Water Treatment Works. This recommendation was preceded by the remark that “The BAC further satisfied themselves with the two stage bidding process followed, that being functionality and preferential point system”. It is clear from the BEC minute that the 2nd applicant

scored the highest points in the second stage, and in accordance with procurement procedures, ought to have been awarded to contract, unless there were objective criteria to depart therefrom.

From the papers before this court it does not appear that such criteria were included in the tender documents, and I would have to accept the assertion of Mr Grobler that this was not done, so that tenderers were not informed beforehand that these criteria would be considered. Mr Grobler pointed out that the 4th respondent is a Gauteng based entity, and not local to the Free State or Winburg, so it is not clear how it would boost the local economy. The opposing affidavit of the 4th respondent confirms its locality.

- [15] Based on these factors, the 2nd applicant, in my view, has established a prima facie right, not only to apply for the review of the decision of the municipality to award the tender to the 4th respondent, but also to interdict the municipality and the 4th respondent from continuing with the implementation of the contract. In my view, the earliest opportunity to have effectively done so would have been at this stage, as it would have been inappropriate for the appellants to have done so at an earlier stage, without the requisite information coming to hand. I must point out that it is evident from the citation of the parties in the two earlier applications that the applicants were not aware of who the successful tenderer was. The 4th respondent was only added as a respondent in the current application. It seems that this information only came to the knowledge of the applicants prior to the launching of the current application. Similarly the applicants were clearly not in a position to institute the review proceedings without the relevant information. The submissions by the respondents that the applicants have not issued review proceedings is without merit and certainly not understood.

[16] The municipality, on the other hand, was clearly aware of the successful tenderer, but also as early as 4 December 2018, became aware that there was a potential challenge to its decision, when it was asked by the applicants to give an undertaking to suspend implementation of the contract until the requested information was furnished to them to enable them to assess whether they will proceed to apply for a review of the decision. In spite of this, the municipality not only completely ignored the legitimate requests of

the applicants, but authorised and allowed the 4th respondent to establish the site and incur the expenses that it alleges it has incurred. The court order of 14 February 2019 was just two weeks after the 4th respondent allegedly established the site, at the end of January 2019. It could not have done much by way of implementation of the contract at that stage. The municipality was made aware on 14 February 2019, by the appellants' attorney that the court had granted an order that morning, and what the import of the order was. The municipality made no attempt at that time to halt the implementation of the contract until the issues between it and the appellants were resolved, and prevent unnecessary escalation of expenses. It was expected of the municipality as the custodian of the public purse to take all reasonable steps to guard public funds jealously and utilise such funds judiciously. The conduct of the municipality in the present matter fell far short of its duties and obligations in this regard.

- [17] I have taken note of the contents of the 4th respondent's opposing affidavit as well as the arguments in court concerning the prejudice it will suffer, with regard to expenses that it has incurred thus far in furtherance of the contract. The court was told that the total value of the contract is in excess of R20 000 000.00. It is in the public interest to ensure that this matter is resolved in a manner that occasions the least wasteful expenditure of public money. The 4th respondent has indicated that it has incurred expenses of just over R500 000.00 in initial expenses. It has a liability of approximately R200 000.00 per month in salaries, and alleges that it would face financial ruin if the contract were to be suspended.
- [18] Mr Grobler pointed out that the applicants would institute the review application within 5 days of this court's order, and will be able to secure a date in May 2019 for the hearing of this matter. I took the liberty of enquiring about available dates from the Chief Registrar of this Court, and was advised that the matter can be enrolled as early as 15 April 2019. The other dates that could be made available are 6 May 2019 and 20 May 2019. With regard to the financial prejudice that the 4th respondent alleges it would suffer, Mr Grobler pointed out that if the 4th respondent is instructed to repair the two broken water pumps, this will be a cost of R200 00.00, which is recoverable from the municipality. The residents of Winburg will then have access to potable water in the short term. The rest of the contract is due for completion by June 2020.

[19] The resolution of this matter on an urgent basis will minimise the costs involved and would still be the cheaper alternative to allowing the 4th respondent to continue with implementation of the contract. The 4th respondent will also be entitled to recover the cost of the work it has performed to date, and costs of “standing time”, so it will not be out of pocket to the extent it claims. The practice in this Division is indeed to treat review applications of this nature on an urgent basis, for the very reason of the costs involved, which ultimately impact on the public whose interests are meant to be served. The hearing of the review application on an expedited basis reinforces my view that this matter is one which falls to be treated as urgent, in order that the negative impact on the interests of the various parties involved, is minimised. I have indicated the dates

available for the hearing of the review application. The parties would be well advised to agree on truncated dates for the filing of further process and documents in order that the matter may be heard without undue delay.

[20] With regard to the issue of costs, the applicant seeks an order that the 1st and 2nd respondents pay such costs personally on an attorney and client scale. While I have expressed my view on the conduct of the municipality, no evidence has been placed before the court that the 1st and 2nd respondent conducted themselves in a manner that warrants an order for costs against them personally. They were not cited in the previous application, and I can only infer that they were joined in this application as a result of their respective positions in the running of the affairs of the municipality. It must be noted that by virtue of their positions, they

would have a number of subordinate functionaries also involved in the day to day functioning of the municipality, and reporting to them. In my view this does not, without more, justify imputation of personal misconduct or negligence to warrant such a punitive costs order at this stage. This aspect would be more appropriately canvassed at the hearing of the review application.. With regard to the 4th respondent, it would be liable on the basis that costs follow the result.

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

- 21.1 Condonation is granted to the applicants for non-adherence to the Rules of Court relating to time periods and service, so that the matter could be heard as an urgent application in terms of Uniform Rule 6(1);
- 21.2 The Applicants are directed to institute, within Five (5) day of the date of this order, an application for the review of the decision of the 1st respondent and/or the 2nd respondent and/or the 3rd respondent awarding the contract to the 4th respondent;
- 21.3 Pending the finalisation of the review referred to in 21.2, the respondents are interdicted and restrained from acting in any way, save as provided in 21.4, to further execute upon the contract arising from the decision of the 1st respondent and/or the 2nd respondent and/or the 3rd respondent to award such contract to the 4th respondent.

- 21.4 The 1st respondent and/or the 2nd respondent and/or the 3rd respondent is/are authorised to instruct the 4th respondent to repair or replace the two non-functional water pumps required to provide potable water to the residents of Winburg, for which the third respondent will be liable to compensate the 4th respondent.
- 21.5 The 3rd and 4th respondents are ordered to pay the costs of the application, jointly and severally, the one paying the other to be absolved.

S NAIDOO J

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