

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE LOCAL DIVISION, EAST LONDON)**

Case No: EL 783/2018

In the matter between:

CERIMELE-UKHOZI JOINT VENTURE

Applicant

And

BUFFALO CITY METROPOLITAN MUNICIPALITY

First Respondent

RANDCIVILS (PTY) LTD

Second Respondent

THE MINISTER OF WATER AFFAIRS & FORESTRY

Third Respondent

JUDGMENT

BESHE J:

[1] The merits of the dispute between the parties in this matter has been settled in the sense that applicant abandoned the application for the substantive relief it was seeking. The issues that remains for determination is: Between the applicant and first respondent which party should bear the costs of the application until its abandonment?

[2] For the claim to entitlement to costs, applicant contends that the application was both warranted and necessary and it was substantially successful. First respondent on the other hand asserts that they are entitled to costs based on the

following reasons: Applicant failed to exhaust internal remedies, the application was not urgent, it was improperly premised in that the provisions of PAIA should have been used and not PAJA and the notice of intended proceedings was improperly served.

[3] The following facts appear to be common cause:

Applicant launched the application in question on 2 July 2018 seeking *inter alia* orders:

that the application be heard on an urgent basis;

that the first respondent be directed to provide written reasons for awarding the tender in question to second respondent and not to the applicant;

directing the first respondent to provide documents to support the said reasons.

[4] It is also common cause that first respondent's decision was communicated to the applicant on the 6 June 2018 by the Acting General Manager **N Mxo**.

[5] Applicant asserts that in the aforementioned communique it was advised to direct communications "about the tender" to **Ms du Plessis**. Further that after receiving the communique, they enquired from **Ms du Plessis** about the identity of the successful bidder. No response was received. On the 15 June 2018 reasons for awarding the tender to second respondent were sought from **Ms du Plessis** together

with supporting documents. **Ms du Plessis** responded that the request has been referred to the General Manager. In the General Manager's response, it was indicated that that the matter has been referred to the first respondent's legal department.

[6] Attempts by applicant to get second respondent to suspend operations in implementation of its obligation in terms of the contract concluded with the applicant failed.

[7] According to the applicant, it was after not getting any joy from first respondent after these endeavours that resort was had to launching the urgent application in question.

[8] It would appear that applicant abandoned the application after reasons for not awarding the tender to it became apparent from paragraph 27 of the first respondent's Municipal Manager. Paragraph 27 of the answering affidavit records:

"I admit only that applicant submitted the tender. I specifically deny that the tender complied with all the conditions, as alleged. I state however that the applicant's tender was non-responsive as it did not comply with the local content requirement as specified in the addendum and it was disqualified for that purpose."

Applicant contends that had the first respondent provided reasons timeously, the necessity for the application would have been obviated.

[9] I have already stated the basis upon which first respondent asserts it is entitled to costs. I do not propose to repeat them. In his affidavit, the Municipal Manager makes the point that no request for reasons was directed to him. He further states that he is the only functionary empowered by first respondent's council to deal with litigation and potential litigious matters.

[10] For options open to it in respect of internal remedies, applicant did not need to go any further than the note appearing on the foot of the latter advising that its bid for the tender was unsuccessful. The note reads as follows:

"Note: In terms of Clause 49 of the BCMM Supply Chain Management Policy, you may lodge a written objection or complaint against the decision within fourteen (14) days of such decision having been taken. Alternatively, in terms of Section 62 of the Municipal Systems Act, you may appeal against the decision within twenty-one (21) days of notification of the decision."

There is no evidence that these options were pursued by the applicant.

[11] Comments made by *Alkema J* IN ***Evaluations Enhanced Property Appraisals (Pty) Ltd v The Buffalo City Metropolitan Municipality NO¹*** were drawn to my attention by first respondent. I find these remarks apposite as regards the correct approach to follow when requesting reasons. As well as to the previous point of failure to exhaust internal remedies for purposes of the Promotion of Administrative Justice Act (PAJA) as well as the person whom the request for information should be directed. *Alkema J* had this to say:

“the letter of 21 August 2012 can by no stretch of imagination be construed as either a request for reasons or a notice of appeal. The letter is a request for information relating to the tender process and documentation. The right of access to information must be exercised in the manner prescribed by PAIA. It requires the completion of certain formal request forms, the payment of a fee, and must be addressed to the Information Officer. It has nothing to do with the right to be given written reasons for a decision, which is exercised under section 5 of PAJA read with section 33(2) of the Constitution. PAIA and PAJA serve different purposes and cater for different rights, and are not to be conflated. It is not possible to use PAIA for the purpose of PAJA as Applicant seems to suggest. The letter requesting access to information can thus not be construed as a request for a decision under section 5 of PAJA.”

[12] Similarly in ***Nolusizo Makhambi v MEC for Health, Eastern Cape and Another² Mbenenge JP*** stated as follows in this regard after referring to *Section 14 and 16 of Access to Information Act (PAIA)*:

¹ Case number EL 1554/2012 (unreported).

² Mthatha case number 3262/2018 (also unreported).

“[15] Upon a proper reading of these sections it is the manual of a public body contemplated in section 14 that sheds light regarding, inter alia, the address to which a request and where applicable, an appeal should be sent, the functionary to whom the request should be made and a description of the remedies available to an aggrieved requestor before court proceedings can be instituted.”

I share the views expressed in these matters.

[13] *Section 3 and 4 of the Institution of Legal Proceedings Against Certain Organs of State*³ deal with notices of intended legal proceedings to organs of state. *Section 4 (2) (b)* provides that where such organ of state is the Municipality, the notice must be served to the Municipal Manager. There is therefore in my view merit in the submissions that the General Manager of the SCM was not the correct functionary to whom the letter in question should have been directed.

[14] It does not assist the applicant to suggest that the letter advising the applicant that its bid was not successful cited **Ms du Plessis** as the person to whom enquiries regarding the tender should be directed. In fact the letter does not state that enquiries regarding the tender should be directed to her in so many words. Her name is provided in a box at the top of the letter under “enquiries”.

³ Act 40 of 2002.

[15] It is not difficult to phantom why the contents of applicant's letter was referred to the second respondent. Paragraph 12 of the said letter records:

"12. We require a written undertaking by no later than **12h00 on Tuesday, 19 June 2018** that no steps of whatsoever nature will be taken to implement any aspect of the Tender pending receipt of the documents we have requested and for a period of 10 (ten) days thereafter to enable our client to consider its position. Randcivils is hereby requested to provide the same undertaking sought from our client in this paragraph."

[16] It was argued on behalf of the first respondent that applicant did not succeed in its application. That as a general rule the successful party is entitled to costs.

[17] It is trite that costs are awarded to a successful party in order to indemnify him for the expense to which he has been put through either having to initiate or defend litigation. It is also trite that costs follow the event that the successful party is entitled to their costs. In my view, success in this case would entail applicant succeeding even if partially in obtaining an order directing the applicant to do the things that were sought by the applicant. For example – reasons, even if only part of documents required and some reasons. This did not happen. The reason that applicant gleaned from the answering affidavit could have been obtained without resort to court had the applicant followed the correct channels and procedures to obtain them.

[18] I am not persuaded that applicant achieved any success in relation to the application. Applicant is therefore not entitled to costs. This includes the costs of the postponement of the 10 July 2018 which as I understand was at the behest of the applicant.

[19] In the result, the applicant is ordered to pay the costs of the application including the costs of the postponement of 10 July 2018.

NG BESHE
JUDGE OF THE HIGH COURT

APPEARANCES

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Date Heard : 21 February 2019

Date Reserved : 21 February 2019

Date Delivered : 2 April 2019