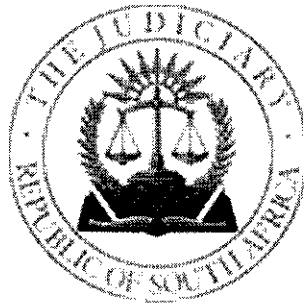


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA,
NORTH GAUTENG DIVISION, PRETORIA

CASE NO: 24799/2013

(1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO
(3) REVISED. ☒
SIGNATURE _____ DATE 20.4.2017

20/4/17

In the matter between:

VIP CONSULTING ENGINEERS (PTY) LTD

1st APPLICANT

REG NO. 1997/005608/07

IGNATIUS WILHELM HENNING

2ND APPLICANT

PIETER VAN IMMERZEEL

3RD APPLICANT

STAFANUS PRINSLOO

4TH APPLICANT

JOHAN JANSEN VAN RENSBURG

5TH APPLICANT

JOSEPH RAMATHLODI RAMALOPE

6TH APPLICANT

GRAEME ARTHUR LLOYD AMBROSE

7TH APPLICANT

STRATFORD FULTNER POHL

8TH APPLICANT

IRVIN BAFFANA SIBISI

9TH APPLICANT

and

THE MINISTER OF FINANCE: MR PJ GORDHAN 1ST RESPONDENT

**in his capacity as the responsible Minister for
the Department of National treasury**

EKURHLENI METROPOLITAN MUNICIPALITY 2ND RESPONDENT

**DEPARTMENT OF FINANCE: EKURHULENI 3RD RESPONDENT
METROPOLITAN MUNICIPALITY**

THE CHAIRPERSON OF THE BID ADJUDICATION 4TH RESPONDENT

**COMMITTEE: EKURHULENI METROPOLITAN
MUNICIPALITY**

THE CHAIRPERSON OF THE BID EVALUATION 5TH RESPONDENT

COMMITTEE: EKURHULENI METROPOLITAN

J U D G M E N T

MSIMEKI J.

INTRODUCTION

[1] The applicants brought this application which is in two parts. In Part A the applicants sought an order directing the first respondent to remove the applicants' names from the database of restricted suppliers which is kept

and/or administered by the Department of National Treasury in accordance with the Treasury Regulations for Departments, Trading Entities, Constitutional Institutions and Public Entities, issued in terms of the **Public Finance Management Act, 1999**, pending the final adjudication of the review application referred to and envisaged in Part B.

[2] Part B and its relief were postponed *sine die* and now serve before me.

[3] Part A was brought on an urgent basis and has been disposed of. Part B is opposed by the second to fifth respondents.

[4] Before the Court could deal with Part B of the Notice of Motion, the respondents raised two points *in limine*. However, they abandoned the first point *in limine*. I dealt with the second point *in limine* which was that the applicants had brought the judicial review proceedings outside the stipulated 180 days which simply meant that the proceedings had been brought out of time. This, according to the respondents, amounted to a bar to the bringing of such review proceedings. The first respondent did not file an answering affidavit as he was abiding the decision of the Court. I found in favour of the applicants and dismissed the second point *in limine* with costs.

[5] The respondents also brought an application to have the applicants' replying affidavit struck out on the basis that it introduced matters which had not been dealt with in the applicants founding affidavit. This, according to the respondents, amounted to the applicants abandoning their original cause of

action and substituting it with a new one. I again found in favour of the applicants and dismissed the interlocutory application which had been brought by the second to the fifth respondents (in the main review application).

[6] The second, third, fourth and fifth respondents were ordered to pay the costs of the interlocutory application including the costs consequent upon the employment of senior counsel.

[7] Advocate F. W Botes SC and Advocate L. P. Mkize acted for the applicants and the second, third, fourth and fifth respondents respectively when the points *in limine* and the interlocutory application were heard and argued.

[8] On 9 February 2016 I gave judgment in favour of the applicants, as alluded to above, on the point *in limine* and the interlocutory application. The matter was then postponed *sine die*.

[9] The matter, approximately 8 months after my aforesaid judgment was again placed on the roll for further hearing. The parties, on 6 October 2016, when the matter again came before me, were represented by the same legal representatives. I must hasten to add that my first judgment has not been appealed.

[10] The submissions by both Counsel, when the matter came before me for the first time, were such that it was clear that both Counsel could not have

argued the matter without touching on the merits of the case. This, clearly, is indicative of the fact that the matter was substantially argued when it came before me for the first time. My judgment, in the main, dealt with all the issues that were raised and argued by both Counsel. Counsels' arguments and submissions in this judgment, in the main, have been covered in my first judgment. This judgment, as a result, will be brief.

[11] This application has been brought in terms of **Rule 53 of the Uniform Rules of Court** (which I shall refer to as the "**Rules of Court**").

[12] The applicants, in this review application, and in accordance with **Rule 53 of the Rules of Court**, seek an order which reviews and sets aside the decision or resolution which the second respondent's Bid Committees (the fourth and fifth respondents) adopted on 23 July 2012, prohibiting first applicant from participating in contracts involving organs of State with effect from 23 July 2012 for a period of 5 years and publishing and/or listing the applicants' names on the database of restricted suppliers which is kept or administered by the Department of National Treasury.

[13] The second respondent's tender and procurement committee, on 12 February 2007 resolved to appoint the first applicant as consulting engineers in accordance with the provisions of paragraph 36(1)(a)(v) of the Supply Chain Management Policy, to render specific services to the second respondent. The engineering services included the rendering of professional

engineering services for the construction of civil engineering infrastructure for the western portion of Etwatwa Extension 34.

[14] The second respondent, on 30 July 2007, on its own accord, contracted with Niloti Carpentry and Construction CC (hereinafter referred to as "Niloti") for the construction of the civil engineering infrastructure for the western portion of Etwatwa Extension 34 (hereinafter referred to as "the works"). The construction of the civil engineering infrastructures was to be administered by the first applicant.

[15] I need to mention that the second up to and including the sixth applicant are currently directors of the first applicant and the others were previous directors.

[16] The second respondent contends that the first applicant breached the contract between them and this, as a result, caused it to cancel the contract. The first and second applicants' names have been listed on the database of the restricted suppliers which is kept and/or administered by the Department of National treasury (the first respondent). This resulted in Part B of this application which seeks the order referred to above. The applicants, in Part B, seek an order for costs against the second up to and including the fifth respondent jointly and severally the one paying the other to be absolved.

[17] My first judgment extensively deals with the issue raised namely, that the review application was brought out of time. I have, in the judgment,

demonstrated why I found in favour of the applicants on the issue. The judgment clearly evinces how I arrived at the decision that the applicants were not given an opportunity to be heard before the second respondent's Bid Committees' decision to cancel the contract was taken and before the listing of the applicants' names on the database of restricted suppliers which is kept or administered by the Department of National Treasury was done. My judgment further discloses that the second respondent's Bid committees contemplated barring the first applicant from participating in contracts involving organs of State with effect from 23 July 2012 for a period of 5 years. This sanction was not communicated to the first applicant before the decision was taken on 23 July 2012. The reasons therefor were also not communicated to the first applicant. The review application, therefore, could not have been brought out of time.

[18] My aforesaid judgment carefully deals with the respondents' contention that the applicants abandoned their original cause of action and substituted it with a completely new cause of action. I have referred to case law which supports my findings and decision. I therefore deem it unnecessary to repeat all of that in this judgment as the first judgment is still intact.

[19] The fact that the applicants initially referred to incorrect legislation, as submitted by Mr Mkize, is also dealt with in my aforesaid judgment. It is important to note that I specifically mention in the judgment that it is not correct that the applicants founding affidavit fails to disclose a cause of action and that the applicants failed to make out a case for the relief that they seek.

One need only read paragraphs 32 and 64 of the founding affidavit together with paragraphs 28, 29 and 37 of my first judgment to better understand the applicants' case, my reasoning and my decision.

[21] On the basis of what I said in my aforesaid judgment, the law I referred to and applied and the clear case of the applicants I come to no other decision than that the applicants have made out a clear cut case for the relief that they seek in Part B of the Notice of Motion.

[22] They were given no opportunity to be heard on the matter before the decision was taken by the second respondent's Bid Committee. The minutes of the Bid Adjudication Committee meeting dated 23 July 2012 (paragraph 12 of its recommendations on page 18 of file 5) confirms this. See also paragraph 18 of my first judgment.

[23] The applicants were not even aware of the sanction of being prohibited from participating in the contracts involving organs of State with effect from 23 July 2012 "for a period of 5 years". (my emphasis).

[24] No reasons for the decision that the Bid Adjudication Committee made were given (See paragraphs 14, 15 and 20 of my first judgment).

[25] The second respondent's Bid Committee (fourth respondent) failed to observe the *audi alteram partem* rule as correctly demonstrated by Mr Botes.

[26] The respondents failed or neglected to inform the applicants of their right to review or internal appeal as contemplated in **Section 3(2)(b) of the Promotion of Administrative Justice Act 3 of 2000**.

[27] The respondents also failed or omitted to give adequate notice to the applicants of their right to request reasons from the respondents. This led Mr Botes to correctly submit that the respondents were not authorised to adopt the resolution or decision that they arrived at on 23 July 2012.

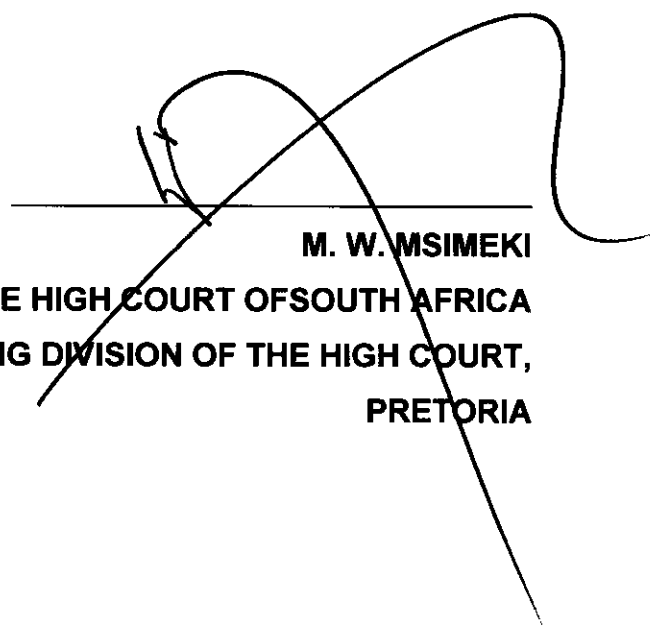
[28] Just as I found for the applicants' in my first judgment, I am not persuaded to find otherwise even in this judgment. The application should succeed.

[29] Mr Botes furnished me with a draft order which I have perused. I agree with its contents which, in my view, should be made an order of the Court.

ORDER

[30] I, in the result, make the following order:

The draft order marked "X" which I have signed and dated is made an order of the Court.



M. W. MSIMEKI
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION OF THE HIGH COURT,
PRETORIA

IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG HIGH COURT, PRETORIA)

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and

THE MINISTER OF FINANCE : MR PJ GORDHAN

1ST RESPONDENT

in his official capacity as the responsible Minister for

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EKURHULENI METROPOLITAN MUNICIPALITY

2ND RESPONDENT

DEPARTMENT OF FINANCE: EKURHULENI

3RD RESPONDENT

METROPOLITAN MUNICIPALITY

11 X 11 20.4.2017 -2-

THE CHAIRPERSON OF THE BID ADJUDICATION
COMMITTEE : EKURHULENI METROPOLITAN
MUNICIPALITY

4TH RESPONDENT

THE CHAIRPERSON OF THE BID EVALUATION
COMMITTEE : EKURHULENI METROPOLITAN
MUNICIPALITY

5TH RESPONDENT

~~DRAFT ORDER~~

AFTER HAVING HEARD counsel on behalf of all the parties concerned and after perusal of the documents (including the record) filed, the following order is made:

1. The decision or resolution adopted by the Second Respondent's bid committees (the Fourth- and Fifth Respondents) to prohibit the First Applicant from participating in contracts involving organs of State with effect from 23 July 2012, is reviewed and set-aside in accordance with the provisions of Rule 53 of the Uniform Rules of Court;
2. The decision or resolution adopted by the Second Respondent's bid committees (the Fourth- and Fifth Respondents) to publish and to list the Applicants' names

on the data base of restricted suppliers which is kept and administered by the Department of National Treasury, in accordance with the provisions of the Treasury Regulations for Departments, Trading Entities, Constitutional Institutions and Public Entities, issued in terms of the Public Finance Management Act, 1999, is reviewed and set-aside in accordance with the provisions of Rule 53 of the Uniform Rules of Court; and

3. The Second-, Third-, Fourth- and Fifth Respondents are ordered to pay the costs of this application, jointly and severally, including the costs consequent upon the employment of senior counsel.

By order, the Court

Registrar