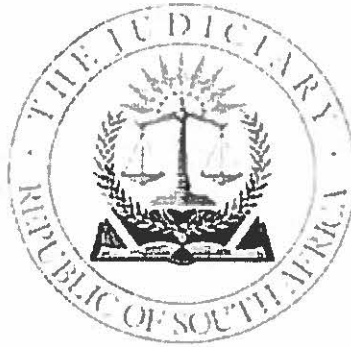




IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	NO
Of Interest to other Judges:	NO
Circulate to Magistrates:	NO

Case number: 1082/2017

In the matter between:

JORIAN CONSTRUCTION CC

Applicant

and

KOPANONG LOCAL MUNICIPALITY

Respondent

HEARD ON: 19 OCTOBER 2017

JUDGMENT BY: DAFFUE, J

DELIVERED ON: 20 OCTOBER 2017

- [1] The applicant is Jorian Construction CC, an unsuccessful tenderer. It seeks costs of an application brought by it on an urgent basis. The only dispute to be adjudicated is costs.

- [2] Respondent is the Kopanong Local Municipality.
- [3] On Friday 3 March 2017 the application was issued and served on respondent at 16h05 on even date. In terms thereof respondent was directed to inform applicant's attorney on or before Tuesday 7 March 2017 at 09h00 if it intended to oppose the application and in such event, to file an answering affidavit on or before Friday 10 March 2017 at 12h00. Applicant allowed it an opportunity to file a replying affidavit by Monday 13 March 2017 at 12h00. The matter was to be heard on Thursday 16 March 2017. Applicant regarded the application as urgent as can be gathered from the abridged time frames set out in the notice of motion as well as the evidence contained in the founding affidavit.
- [4] Applicant sought the following relief which I quote *verbatim*:
1. "The Applicant's non-adherence to this court's rules related to the time periods and service is condoned, and the application is heard as an urgent application in terms of Rule 6(12);
 2. The time period cast in section 5 of the Promotion of Administrative Justice Act, 3 of 2000 for provision of the reasons and documents sought below is reduced in accordance with the provisions of prayer 3 below and in accordance with section 9 of this Act.
 3. The Respondent is ordered to provide the Applicant, within 10 days after the granting of this order, with full and written reasons for its decision to discard the Applicant's bid for contract no. **KLM/RD/WT/09/2013/P – AUGMENT WATER SUPPLY AND INCREASE WATER PRESSURE: REDDERSBURG PIPELINE, PUMP STATION AND WATER**

TREATMENT AND PLANT WORKS, such reasons to include the following documents:

- 3.1 Copies of any and all evaluation reports, whether internally generated or externally sourced;
 - 3.2 Minutes of the Bid Evaluation Committee Meeting(s) and Bid Adjudication Committee Meeting(s);
 - 3.3 Letter of appointment to the successful contractor;
 - 3.4 Contract concluded between the Respondent and the successful contractor;
4. The Respondent is ordered to pay the costs of the application.
5. Further and /or alternative relief."

[5] The relevant portions of ss 5 and 9 of the Promotion of Administrative Justice Act, 3 of 2000 ("PAJA") read as follows:

"5 Reasons for administrative action

- (1) Any person whose rights have been materially and adversely affected by administrative action and who has not been given reasons for the action may, within 90 days after the date on which that person became aware of the action or might reasonably have been expected to have become aware of the action, request that the administrator concerned furnish written reasons for the action.
- (2) The administrator to whom the request is made must, within 90 days after receiving the request, give that person adequate reasons in writing for the administrative action.

9. Variation of time

(1) The period of-

(a) 90 days referred to in section 5 may be reduced; or

(b) 90 days or 180 days referred to in sections 5 and 7 may be extended for a fixed period,

by agreement between the parties or, failing such agreement, by a court or tribunal on application by the person or administrator concerned.

(2) The court or tribunal may grant an application in terms of subsection (1) where the interests of justice so require." (emphasis added)

- [6] Applicant's case is that it requested reasons from respondent for not being awarded a tender pertaining to water supply, but that the request was ignored which entitled it to launch the application. The letter relied upon is dated 23 February 2017. It is addressed to the Municipal Manager, Kopanong Local Municipality, Trompsburg, without indicating a postal or street address. Provision was apparently made for sending the letter by e-mail to lebo@kopanong.gov.za and/or faxing it to 051 713 0335.
- [7] Applicant did not provide proof that the letter was e-mailed and/or faxed. The municipal manager of Kopanong to whom the letter was addressed, Ms L Y Moletsane, wants the court to find that she did not receive such letter. I quote the following from her affidavit filed on 23 March 2017:

"4.6 It is of paramount importance at this stage to mention to the Honourable Court that the request attached as "JS1" is a carbon copy of a request for written reasons that was also forwarded to the Respondent in a similar application between the same parties under

case number 1081/2017. I attach the request hereunto marked Annexure "OP5".

- 4.6.1 The two requests are the same in almost all respects except for the reference number, which also only differ at the end thereof.
- 4.6.2 The request in the other application was sent by e-mail and proof thereof was attached to the other application.
- 4.6.3 The Respondent has replied to the other request without delay.
- 4.7 In the matter at hand there was no confirmation attached that the said request for written reasons and documents was sent either by e-mail or fax or otherwise.
- 4.8 There is also no indication or averment in the founding affidavit that Respondent has refused to provide the Applicant with the requested reasons and/or documents.
- 4.9 Despite the above the Applicant elected to approach the Honourable Court on an urgent basis for the relief sought without pursuing the matter with the Respondent.
- 4.10 Due to the similar nature of the two different applications as well as the request for written reasons and documents, the Respondent was not aware that documents were requested for a different matter other than the one that is already in an advance stage in this Honourable Court under case no 1081/2017.
- 4.11 As I have indicated herein before, the Respondent provided the requested documents to the Applicant, which was done in an attempt to curb unnecessary further legal costs and expenses. It was also done as soon as possible taking into account the structure of the Respondent and different functionaries involved in the tender process as well as other duties imposed on me and other functionaries." (emphasis added)

- [8] In paragraph 5 of the answering affidavit respondent's deponent carried on in similar vein, alleging that the "...application is premature in light of the fact that written reasons were never effectively requested as per Section 5 of PAJA." Respondent also complains that it had 90 days to respond in terms of PAJA and that only the court could reduce the prescribed period of 90 days. It is so that applicant failed to provide proof of delivery of the aforesaid letter and also forfeited the opportunity to provide such proof in a replying affidavit. It elected not to reply, where upon the matter was set down by it as long ago as 30 August 2017 for hearing on 19 October 2017.
- [9] The bulk of information and documentation required by the applicant *ex facie* the notice of motion were delivered by respondent on 15 March 2017 and the remainder shortly afterwards, but still prior to the filing of the answering affidavit.
- [10] On 13 March 2017 respondent gave notice of its intention to oppose the application, but notwithstanding that, delivered reports of its consultant and the Bid Evaluation and Bid Adjudication Committees on 15 March 2017. The next day an order was obtained by agreement in terms whereof applicant withdrew its "application for reasons", the costs thereof to stand over for adjudication during the proposed interdict and review application. However, no such application was launched. It could perhaps be argued that the application has become moot *in toto* in that applicant intended to argue costs in a totally different application to be launched in the future. The parties did not address me on this issue and it is only fair to consider costs of the application now.

- [11] As is apparent from the answering affidavit of Ms Moletsane, she was probably under the impression that the information and documentation were requested by means of a letter of the same date, but in respect of application number 1081/2017. That application was also set down for hearing on 16 March 2017 as I was informed from the bar. The same parties are involved in that application, although the reference numbers of the two projects differ slightly. The reader is referred to the similarity evident from the two letters attached as annexures "JS1" to the founding affidavit and "OP5" to the answering affidavit.
- [12] It is admitted that respondent received the letter requesting reasons and documentation in application 1081/2017, which letter is also dated 23 February 2017. Ms Moletsane alleges that, unlike in the application before me, applicant provided written proof of delivery of that particular letter. Mr Grobler argued that she did not in so many words deny receipt of the relevant letter *in casu*, but that she relies on a technicality without unambiguously stating that the letter was not received.
- [13] I need to mention that, even if I accept for the moment that the letter was indeed emailed or faxed on 23 February 2017, or at all, I find it inconceivable that applicant could be so unreasonable to request respondent to provide reasons for a decision and copies of several documents within two working days. Even though Kopanong Municipality is a small municipality, it was highly unfair to seek a response at such short notice. Applicant went further and decided to reduce the 90 days allowed a decision maker in terms of s 5 of PAJA to provide reasons; however, it sought condonation in prayer 2 of the notice of motion.

[14] I wish to refer to the following authorities pertaining to the adjudication of opposed applications. In motion proceedings the affidavits not only serve as the pleadings, but must also contain the essential evidence which would ordinarily be led at the trial. See *Transnet Ltd v Rubenstein* 2006 (1) SA 591 (SCA) at para [28]. A party in motion proceedings is obliged to state the facts as well as the conclusions drawn from such facts in his or her affidavits and is not allowed to base an argument on passages and documents annexed to the papers unless the conclusions sought to be drawn from such passages have been canvassed in their affidavits. See *Minister of Land Affairs and Agriculture and Other v D & F Wevell Trust and Others* 2008 (2) SA 184 (SCA) at 200B-E. In line with *Plascon-Evans* final relief may only be granted in motion proceedings if the facts averred by the applicant which have been admitted by the respondent justify such an order, unless the allegations and denials by the respondent are so far-fetched or untenable that the court is entitled to reject the respondent's version merely on the papers. In general, decisions of fact cannot properly be made in motion proceedings on a consideration of the probabilities, unless the court is satisfied that there is no real and genuine dispute on the papers regarding the facts in question, or that one of the parties' allegations are so far-fetched that it may be rejected on the papers, or *viva voce* evidence would not disturb the probabilities. See *Administrator of the Transvaal and Others v Theletsane & Others* 1991 (2) SA 192 (A) at 197A-B. Heher JA stated the following in *Wightmann t/a JW Construction v Headfour (Pty) Ltd and another* 2008 (3) SA 371 (SCA) at para [13]: "A real,

genuine and *bona fide* dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in its affidavit seriously and unambiguously addressed the fact said to be disputed.....But when he signs the answering affidavit, he commits himself to its contents, inadequate as they may be, and will only in exceptional circumstances be permitted to disavow them. There is thus a serious duty imposed upon a legal advisor who settles an answering affidavit to ascertain and engage with facts which his client disputes and to reflect such disputes fully and accurately in the answering affidavit. If that does not happen it should come as no surprise that the court takes a robust view of the matter.”

[15] The only dispute to adjudicate is the costs issue as mentioned *supra*. Applicant, alleging that it is the successful party in that respondent capitulated and provided what was required and failed to file an answering affidavit within the time stipulated in the notice of motion, seeks costs of the application. Respondent, on the other hand, submits that the application should never have been brought. It never refused to provide reasons and documentation, but immediately responded on receipt of the application to address applicant's request. Therefore, applicant shall be held liable for the costs of the application, including respondent's costs of opposition, alternatively each party should be ordered to pay its own costs.

[16] Generally speaking the successful party is entitled to its costs. However, in given circumstances a successful party may be deprived of its costs and may even be ordered to pay the costs of the unsuccessful party. Van Loggerenberg, *Erasmus Superior Court Practice*, Service 4 states the following with reference to authorities at D5-11: “A court should not be astute to deprive a successful

litigant of any of his costs. In the absence of special circumstances the successful litigant is entitled to his costs. The successful party should not be ordered to pay the costs of the unsuccessful party except where the conduct of the successful party has been the cause of all the costs of the proceedings. An unsuccessful party cannot escape liability for costs by labelling the litigation as a 'test case' when it is clear that a resort to litigation was the only way in which the successful party could obtain delivery of that which the unsuccessful party unlawfully refused to deliver.

The grounds upon which a successful party may be ordered to forfeit costs or pay those of his opponent are various, but may for convenience be roughly classified under the following heads:

- (a) making excessive demand;
- (b) causing unnecessary or frivolous litigation;
- (c) succeeding on a technicality only;
- (d) increasing costs through wrong procedure;
- (e) allowing defects in pleading;
- (f) being guilty of misconduct generally.

This list makes no pretence of being an exhaustive or logical classification. In many instances the decisions given below under one head might with equal reason be placed under another; and, in others, grounds falling under two or more heads contributed to the final result. In a confused subject any order is better than none.

It must be stressed that a successful litigant can, as a rule, be deprived of his costs only on the ground of some fault on his own part;..." See the further discussion at D5-12 to D5-16.

- [17] Bearing in mind *Plascon-Evans* and *Wightmann supra* as well as the other authorities quoted I am unable to find that the letter of 23 February 2017 requiring reasons and documentation was not sent to and received by respondent. Respondent failed to unambiguously state that the letter was not received and consequently, there is no real, genuine and *bona fide* dispute in

this regard. The probabilities also favour applicant. There is no reason why its attorney would email or fax the one letter, but not the other. In my view the similarity of the two letters probably confused the recipient, causing her to believe them to be in respect of the same project. It was not required of applicant under the circumstances to file a replying affidavit in order to provide proof of delivery. However, even if I accept that the letter was received by respondent, the applicant acted unreasonable in giving respondent insufficient time to react. Its demand was excessive.

- [18] Mr Grobler submitted that although insufficient time might have been given to respond to applicant's request, it is apparent that respondent did not ask for extra time and even waited until the day before the hearing to present the required documents. It is not correct to suggest as respondent does in its answering affidavit that PAJA allowed it 90 days to provide reasons and that the application was therefore premature. Reasons must be given within 90 days, but that does not mean that the decision maker can keep quiet for about three months and in the meantime arrange with the successful tenderer to complete the project, the subject of the tender. Here, applicant requested respondent to give an undertaking to stop all work in respect of the particular project, but respondent failed to give such undertaking. Applicant was entitled to launch an urgent application, particularly insofar as a handover of the site had taken place on 20 February 2017, an allegation that was not disputed by respondent. It, as the disappointed and unsuccessful tenderer, was entitled to know on what basis and for what reasons the tender had been awarded in order to determine whether its rights to lawful administrative action had been violated.

- [19] Unnecessary costs were incurred in launching the application, but applicant should not be blamed for acting as it did. It received no response from respondent, either in respect of the letter of 23 February 2017 or the notice of motion issued on 3 March 2017, until 15 March 2017. Respondent should have asked for more time to respond (if it was necessary) and undertaken not to allow works on the project to proceed pending the hearing on 16 March 2017. It is now – after the expiry of seven months – clear that applicant was advised not to take the respondent's decision on review, but that does not mean that it did not have a right to the respondent's reasons. The further costs incurred since March 2017 in order to adjudicate costs only is unfortunate. It could have been prevented so easily at an early stage.
- [20] Both counsel submitted in their heads of argument that costs should be awarded in favour of their clients on an attorney and client scale. During oral argument they were not prepared to insist on such punitive costs. In exercising my discretion I seriously considered granting costs in favour of respondent, but eventually came to the conclusion that applicant did not act unreasonable in launching an urgent application. It was entitled to obtain reasons to consider its position as unsuccessful tenderer and the fact that it eventually did not institute review proceedings does not alter the situation. The authorities referred to by Mr Thompson at footnote 18 of his heads of argument do not assist his client's case as they are distinguishable. In *Mahommed v Nagdee* 1952 (1) SA 410 (AD) at 418 the court dealt with two scenarios: firstly that if no prior demand is made before summons is issued, and the debtor tenders or pays the amount claimed, he is not liable for costs;

secondly, if summons is issued against a defendant for payment of a claim without a prior demand and where the amount is not due, except after demand. In *De Kock v Davidson and others* 1971 (1) SA 428 (TPD) at 432 the court referred to the first scenario mentioned in *Mahommed* although the case was decided upon a different basis.

[21] Consequently the following order is made:

1. The respondent shall pay the costs of the application, such costs to be taxed on a party and party scale.



JP DAFFUE, J

On behalf of applicant: Adv S Grobler

Instructed by: Gous Vertue & Associates
Bloemfontein

On behalf of respondent: Adv DR Thompson

Instructed by: Mhlokonya Attorneys
Bloemfontein