

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No. : 3862/2013

In the matter between:-

KAALE MOSHE CC

Applicant

and

HEAD OF THE DEPARTMENT: FS GOVERNMENT:

DEPARTMENT OF EDUCATION

1st Respondent

TIKWANA COMPREHENSIVE SCHOOL

2nd Respondent

HEARD ON:

8 MAY 2014

JUDGMENT BY:

KRUGER, J

DELIVERED ON:

15 MAY 2014

[1] The only outstanding issue in this matter is costs. In the notice of motion the applicant sought reasons as to why it was unsuccessful to secure a tender relating to work at the premises of the second respondent, the Tikwana Comprehensive School in Tikwana, Hoopstad. After receipt of the notice of motion written reasons were

provided by the first respondent, who opposes the present application only on the basis of the costs order sought against it. The first respondent says that the applicant never approached the first respondent for reasons before launching the present application. The first respondent says the applicant approached the incorrect person about the matter.

[2] The history of the relationship between the applicant and the first respondent relating to the tender can be set out as follows:

- 2.1 October/November 2011: applicant is appointed to execute the tender relating to the redesigning and upgrading of technical workshops at the second respondent school.
- 2.2 January 2012: Applicant commenced work on the R7,5 million tender.
- 2.3 January 2012: After working for a week, first respondent stopped all work by means of a written instruction. Applicant complied with this instruction.
- 2.4 March/April 2012: New Contractor, Twilight Construction started executing contract, and has completed the work.
- 2.5 Applicant's attorney, Mr Kruger, approached Mr Barnard of the first respondent and asked the reasons for the discharge of the applicant. Barnard refused to provide reasons. The deponent

to the answering affidavit, Mr Malope, says he is the information officer of the Department of Education. Barnard, who was approached by attorney Kruger, is the Senior Education Specialist at the Department of Education. Barnard is not an information officer. Mr Malope refers to section 18 of the Promotion of Access to Information Act 2 of 2000 and says the procedure which the applicant had to follow is set out in section 18, which the applicant did not do. The first respondent says that Barnard told Kruger that he did not have authority or power to provide written reasons. Mr Malope says had the applicant followed the proper procedure when it sought the information, same would have been given to him. The applicant's case is that Barnard refused to give the information, and made it clear that the applicant would require a court order to get same. According to applicant, it was never Barnard's view that he was the wrong person, and that he refused for that reason.

2.5.1 8 January 2013: Telefax from applicant's attorney, addressed to Tikwana Comprehensive School, attention Mr Mphatshe. The penultimate paragraph of the letter reads:

"We kindly request copies of any minutes of meetings, as well as documentation pertaining to this tender, which might still be in the possession for the school. We would also like to request that a consultation be scheduled between your

principal and writer hereof, on a date and time which will suit you.”

No response was received to this request.

2.5.2 25 January 2013: Telefax from applicant’s attorney to the Department of Education, Bloemfontein, attention Mr Barnard. The telefax refers to the appointment letter of Kaale Moshe, and in the telefax the applicant’s attorney requests a copy of this letter, as well as any relevant documentation in connection therewith. No response was received to this request.

2.5.3 3 June 2013: Telefax from applicant’s attorney to the Department of Education, Bloemfontein, attention Mr Barnard. The telefax confirms that Mr Barnard refused to provide applicant’s attorneys with documents relating to the contract, stating that the applicant would have to obtain a court order if it wanted the documents. No response was received to this request.

2.5.4 27 September 2013: Notice of motion issued.

2.5.5 18 November 2013: Reasons provided by first respondent.

2.5.6 13 February 2014: Answering affidavit filed.

- [3] First respondent says the applicant should have requested the information from Mr Malope, not from Barnard, and then the information would have been provided.
- [4] The applicant seeks condonation for “any perceived non-compliance with section 5 of the Promotion of Administrative Justice Act 3 of 2000”. The first respondent’s case is that the applicant’s request failed to comply with the procedural requirements of section 18 of the Promotion of Access to Information Act 2 of 2000. The applicant says that the first respondent’s reliance on Act 2 of 2000 is misplaced because, as the notice of motion indicates, applicant relied on Act 3 of 2000. The first respondent does not allege non-compliance with section 5 of Act 3 of 2000.
- [5] The statutory framework:

5.1 Act 2 of 2000: Promotion of Access to Information Act.

This Act makes provision for obtaining information held by the state. Section 18 provides that the request must be in the prescribed form, directed to the information officer. The first respondent relies on Act 2 of 2000, and contends that applicant did not comply with section 18 because applicant did not request the information from the information officer, but from Barnard, and that first respondent was therefore not obliged to respond.

5.2 Act 3 of 2000: Promotion of Administrative Justice Act.

This Act makes provision for the right to written reasons for administrative actions. Applicant bases the relief it seeks in these proceedings on section 5 of Act 3 of 2000. Section 5(1) reads as follows:

“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.”

- [6] From the facts of this case it is clear that the applicant wanted to know why its tender had been terminated. It started enquiring from the school principal, subsequently dealt with Mr Barnard of the first respondent. It is clear from the undisputed evidence that Barnard was not willing to give information to the applicant's attorney. There is no suggestion that he told applicant's attorney that he was the wrong person, and that he gave the applicant's attorney the name of the person who should be approached. A situation similar to what is known in company law as the *Turquand* rule applies here. An outsider is not expected to know the internal workings of the department. Applicant did not want to get information under section 18 of Act 2 of 2000, it wanted reasons under section 5 of Act 3 of 2000. If Barnard believed that applicant merely wanted information, he should have referred applicant's attorney to the information officer. From the papers it is clear that Barnard did not want to disclose the information or reasons.

- [7] In these circumstances there is no reason why the first respondent should not be ordered to pay the costs of the application. The situation is comparable to that in **Robcon Civils / Sinawamandla 2 Joint Venture v Kouga Municipality and Another** 2010 (3) SA 241 (ECP). There the court found that the municipality had provided misleading information in its correspondence (par 24), in breach of its constitutional obligation in terms of section 217 of the Constitution. There appears to be no reason why the information was not provided to the applicant's attorney. Because of the flagrant disregard of the municipality in the **Robcon**-case, the court ordered it to pay the costs on an attorney and own client scale. In **Tetra Mobile Radio (Pty) Ltd v MEC, Department of Works and Others** 2008 (1) SA 438 (SCA) an ordinary costs order was made in circumstances comparable with the facts in this case.
- [8] In this case the first respondent says it would have provided the information if the request had been directed at the correct person. Yet there is no suggestion that Barnard ever offered to tell applicant's attorney who the correct person was. This is not the type of attitude one would expect from a public body. Barnard should have directed the applicant's attorney to the correct person, and not have said he refuses to disclose any reasons. The conduct as evidenced by that of the first respondent and its officials in this matter should be discouraged. In this case no misleading information was given by the officials of the first respondent. The first respondent was merely uncooperative. A special costs order is not warranted.

[9] **ORDER**

1. The first respondent is ordered to pay the costs of this application.

A. KRUGER, J

On behalf of applicant:

Adv S Grobler

Instructed by:

Honey Attorneys

BLOEMFONTEIN

On behalf of 1st respondent:

Adv NJ Khooe

Instructed by:

State Attorney

BLOEMFONTEIN