

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

Case No.: 16558/2011

5/2/2013

DELETE WHICH IS APPLICABLE
(1) REPORTAL NO.
(2) OF INTEREST TO OTHER JUDGES: YES/NO.
(3) REVISED.
05/02/2013
DATE SIGNATURE

In the matter between:

THUNZI CONSULTING (PTY) LIMITED

Applicant

and

CITY OF JOHANNESBURG

1st Respondent

DEPARTMENT OF PUBLIC WORKS AND

INFRASTRUCTURE DEVELOPMENT

2nd Respondent

ESKOM HOLDINGS (PTY) LTD

3rd Respondent

JUDGMENT

MNGQIBISA-THUSI J:

[1] The applicant instituted proceedings in which it sought the following relief against the respondents:

1.1 a final interdict restraining the respondents from putting the implementation of the second phase of the Winterveldt project for the installation of solar water heaters in RDP houses on tender;

1.2 an order directing the first and third respondents to allow the applicant to proceed with the implementation of the second phase in terms of an agreement between the applicant and the first respondent; and

1.3 costs on an attorney and own client scale.

[2] At the hearing of this matter the applicant withdrew the application after it conceded that the relief sought in its notice of motion was academic in view of the fact that the tender for the implementation of the second phase was already granted and implementation of the second phase was near completion. It was apparent to the applicant that the relief sought might not be granted.

[3] The only issue remaining for determination is the costs.

[4] The general rule is that a successful litigant is entitled to his or her costs. The withdrawal of the application against the respondents renders the applicant liable for the costs of this application. It is

incumbent upon the applicant to show that even though it had abandoned its claim and was therefore liable for the cost, that if the application had proceeded, it would have succeeded in its application for a final interdict against the respondents.

[5] The applicant would have had to show that:

5.1 it has a clear right;

5.2 there is interference with its right; and

5.3 there is no alternative remedy available.

[6] In 2005 the applicant submitted a proposal to the first respondent for the installation of solar water heaters (“heaters”) in RDP houses in the Winterveldt area. As a result, during 2007 the first respondent commissioned the applicant to design, specify and manage the implementation of a pilot project for the installation of heaters in 20 households in the Winterveldt area. Thereafter in a letter titled “letter of Intent” dated 28 April 2009, the first respondent mandated the applicant to collect data for an investigation into the potential of electricity costs savings in the area. Further, the first respondent indicated that it would recommend the applicant to the third respondent for appointment in the implementation of its results should they be feasible. The first respondent indicated, however, that such recommendation would

be subject to all conditions and restraints imposed by the third respondent, as well as the first respondent's operational and financial requirements.

[7] As a result of the applicant's recommendation, the first respondent's Council approved the installation of heaters in 3 000 households in the Winterveldt area. The project was to be implemented in two phases. As a result the third respondent entered into an agreement with the applicant in terms of which the applicant was authorised to implement the first phase of the installation of the heaters in 270 households at a cost of R8.4 million.

[8] After completion of the first phase, the first respondent put the second phase on tender. The second phase consisted of 2 730 houses in which the heaters would be installed at a cost of R27.9 million. The applicant wrote various letters to the first and third respondent in which it objected to the second phase being put on tender. The applicant received no response from the first respondent. The third respondent invited the applicant to tender for the implementation of the second phase. Instead of submitting an application, the applicant instituted these proceedings in which it sought in the main to stop the first and third respondents from

proceeding with the tender. In the meantime, the tender for the second phase was awarded and the implementation of the second phase was completed on or about 27 May 2011.

- [9] The applicant based the relief sought on a letter written to it by the first respondent in which the applicant was commissioned to implement the first phase. This letter dated 29 May 2009 reads in part as follows:

“The Energy and Electricity Division (EED) of the City of Tshwane (CoT) hereby gives permission to Messrs Thunzi Consulting to install the 3,000 solar water heater units in the RDP houses in Winterveldt as part of the investigation which was undertaken by Messrs Thunzi Consulting under contract Q49/2007. We hereby refer to the initial letter of intent dated 13/09/2007 in which it was mutually agreed that Messrs Thunzi will first present a proposal and feasibility report to the efficiency project to EED. The EED further committed that should the assessment prove to result in information that can be structured into a formal EEDSM project subject to all the conditions and constraints imposed by Eskom DSM as well as the EED operational and financial requirement then Messrs Thunzi will be given an exclusive right to formalise a contractual DSM agreement with EED and ESKOM DSM which is confined to the 3,000 DP houses in Winterveldt.”

- [10] In its papers the applicant contended that, based on the passage quoted in paragraph 5 above, it had concluded an agreement with the first respondent in terms of which the applicant would install all 3000 heaters making up the project.

[11] It was submitted on behalf of the applicant that the respondents should be liable for the costs of the application as it was forced to seek a final interdict against the first and third respondents since the respondents, contrary to an agreement concluded between it and the first respondent, had prevented it from implementing the second phase of the project. In this regard the applicant is relying on a letter written by the first respondent to the applicant dated 29 May 2009. Further, it was contended on behalf of the applicant that the applicant was entitled to seek a final interdict against the third respondent as the third respondent by putting the implementation of the second phase to tender, was interfering with an existing contractual relationship between the applicant and the first respondent. In the alternative, the applicant prayed for an order in terms of which each party would pay its own costs.

[12] The submissions made on behalf of the respondents were the following. It was submitted on behalf of the respondents that the applicant should pay the costs of the withdrawn application on an attorney and client scale in that it should not have brought the application in the first place as the applicant was never contracted to implement the second phase of the project but only the first phase. Secondly that at the time the applicant instituted the proceedings the second phase of the project had already gone on

tender. On behalf of the first respondent it was further contended that the applicant adopted a wrong procedure and should have instead applied for the review of the first and third respondents' decision to put the implementation of the second phase on tender. Furthermore, it was contended that an alternative route the applicant should have followed would have been to apply for an interim interdict, pending the institution of review proceedings of the respondents' decision.

- [13] The withdrawal of the application against the respondents renders the applicant liable for the costs of this application. It was upon the applicant to show that had it proceeded with the matter, barring the fact that the implementation of the second phase of the project had been completed, it would have succeeded in its application for a final interdict against the respondents. The applicant would have had to show that it had a clear right in that there was an existing contract between itself and the first respondent for the implementation of the second phase. From the papers filed, I am of the view that the applicant would not have succeeded on this ground in that, as correctly pointed out by counsel for the respondents, looking at the correspondence between the applicant and the first respondent and on which the applicant relies for its clear right, it is apparent that although the applicant would have

been the first respondent's preferred service provider, this intent was subject to any conditions and constraints imposed by the third respondent and also the first respondent's operational requirements. If the contract had been awarded to the applicant without tender, and taking into account the value of the contract, the first respondent would have flouted the regulations governing the awarding of contracts of such magnitude. Furthermore, before implementation of the second phase it would have been necessary, in spite of the undertaking made by the first respondent that a contract should be entered into between the applicant and the third respondent as was done with the first phase of the project. Nothing turns on the fact that the relevant regulations had already been flouted when the applicant was awarded the contract to implement the first phase of the project.

- [14] Assuming that there was a contract existing between the applicant and the first respondent, on the implementation of second phase to put out on tender, the applicant had an alternative remedy. The applicant could have instituted an action for damages based on the assumed contract. Once a decision has been implemented, the courts are reluctant to make an order stopping such implementation particularly where huge costs have been incurred in the implementation of the decision and where innocent third parties

have acquired rights on the basis of the decision. It is common cause that when the application was launched, the implementation of the second phase for the installation of the heaters was nearing completion. There is a possibility that the court would have been reluctant to undo all what has been done bearing in mind the consequent inconvenience to the beneficiaries of the project, even if, had the merits been dealt with and the applicant was successful. Since the value of the second phase was known, the applicant would not have had difficulties quantifying its damages.

- [15] On the above bases, I am of the view that the applicant should bear the costs of this application. However, with regard to the first respondent, taking into consideration that the first phase of the contract had been concluded in contravention of the procurement policy of the first respondent and therefore there was an expectation on the part of the applicant that a contract for the second phase would have been concluded on the same basis as the contract for the first phase, I am of the view that the first respondent should have engaged with the applicant when it became apparent that the implementation of the second phase would have to comply with the relevant procurement policies of the first respondent. Ignoring correspondence from the applicant about the matter was not helpful. This matter could possibly have been

sorted out if the first respondent had responded to the applicant's correspondence. On that basis I am not convinced that it would be fair and just for the first respondent to be awarded costs on an attorney and client scale even though it is considered to be a successful party.

[16] As correctly pointed out by counsel for the third respondent, there was no need to cite the third respondent as, by the applicant's own admission, it had purportedly concluded a contract with the first respondent and not the third respondent. The third respondent did invite the applicant to tender for the contract, which invitation was not taken. The third respondent should not have been put to the cost of defending the application. I am therefore of the view that the third respondent is entitled to costs on an attorney and client scale.

[17] This matter was set-down for hearing on 27 October 2011 but was removed from the roll and costs were reserved. On 20 February 2012 the matter was again removed from the roll and costs reserved due to the fact that the court file was not properly indexed and paginated by the applicant.

[18] In the premises the following order is made:

1. The applicant is liable for the wasted costs occasioned by the postponement of 27 October 2011 and 20 February 2012.
2. The applicant is liable to pay the party to party costs of the first respondent.
3. The applicant is liable to pay the third respondent's costs on an attorney and client basis.


N P MNGQIBISA-THUSI
Judge of the High Court