

IN THE HIGH COURT OF SOUTH AFRICA

(NORTH GAUTENG HIGH COURT)

03/07/2013.

Case Number: 35410/13

DELETE WHICHEVER IS NOT APPLICABLE	
(1)	REPORTABLE: YES / NO.
(2)	OF INTEREST TO OTHER JUDGES: YES / NO.
(3)	REVISED.
3 July 2013	
DATE	SIGNATURE

REGISTRAR OF THE NORTH GAUTENG HIGH COURT, PRETORIA
PRIVATE BAG/PRIVAATSAK X67 JUDGE'S SECRETARY
2013 -07- 03
REGTERS KLERK PRETORIA 0001
GRIFFIER VAN DIE NOORD GAUTENG HOË HOF, PRETORIA

In the matter between:

CERVANTIES TRADING CC

APPLICANT

and

**CITY OF TSHWANE METROPOLITAN
MUNICIPALITY**

1st RESPONDENT

**THE MUNICIPAL MANAGER OF THE CITY OF
TSHWANE METROPOLITAN MUNICIPALITY**

2nd RESPONDENT

THE EXECUTIVE DIRECTOR: WASTE

3rd RESPONDENT

**MANAGEMENT OF THE CITY OF TSHWANE
METROPOLITAN MUNICIPALITY**

THE STAREGIC EXECUTIVE DIRECTOR: **4th RESPONDENT**
ENVIRONMENTAL MANAGEMENT SERVICES OF
THE CITY OF TSHWANE METROPOLITAN
MUNICIPALITY

THE MUNICIPAL MANAGER OF THE CITY OF **5th RESPONDENT**
MPACK PLASTIC CONTAINERS (PTY) LTD

Coram: **HUGHES AJ**

REASONS FOR JUDGMENT

Order made on: 14 June 2013

Reasons delivered on: 3 July 2013

Heard on: 14 June 2013

HUGHES AJ

1. I encountered this matter in the urgent court on 14 June 2013 and the following order was made:

"(a)The urgent application brought by the applicant in respect of Part A of the notice of motion dated 6 June 2013 is dismissed with costs.

(b) The costs are to be costs on a party and party scale."

2. The parties were informed that my reasons would follow and these are my reasons.

3. In Part A the applicant sought the following:

"1.1An interdict be granted against the first respondent from continuing with ordering, placing any new order, receiving any goods as a result of any order so placed or paying for any order placed on the fifth respondent pursuant to any appointment to supply 240 l grey refuse bins, pending the finalisation of Part B of this application;

1.2 First to fourth respondents are ordered to pay the costs of this application on a scale as between attorney and own-client, jointly and severally, the one paying the other to be absolved."

4. This matter was heard on an urgent basis as the procurement procedure that the applicant complained of would be finalised on 30 June 2013.
5. The applicant was awarded tender CB328/2011 to supply and deliver, "as and when" required, 240 l grey refuse bins. They were appointed on 24 May 2012 and the said appointment would end in 2015. However on 12 September 2012 the first respondent advertised a tender for the supply and distribution of 240 l refuse bins under tender CB214/2012. This involved the roll out of new 240 l refuse bins in the previously disadvantaged areas by replacing the old 85 l refuse bins.
6. There had been some attempt, on 18 December 2012, by the applicant to interdict the evaluation, adjudication and award process of tender CB214/2012. That urgent application was dismissed with costs on 22 April 2013. The reason for the dismissal in short was that the applicant had failed to prove that it had a real right or any right for that matter, not even a *prime facie* right, to seek an interdict since the tender that the applicant had been awarded differed from the tender advertised. The difference was that the new tender did not encompass the same goods and services sought to be delivered.

7. Incidentally, that specific tender which the applicant seeks to be interdicted was cancelled. On 28 May 2013 the first respondent appointed MPact Plastic Containers, a service provider from the George District Municipality (under tender FIN 005/2012), to supply 65 000 240 l Waste bins at R397,60 per bin exclusive of VAT, for the period 1 September 2013 until 31 August 2014. This tender was due to be accessed up until 30 June 2013.
8. Adv Snyman, for the applicant, argued that the first respondent had failed to comply with its own procurement policy in terms of section 2(1)(b)(i) of the Preferential Procurement Framework Act 2000 which reads as follows:

"FRAMEWORK FRO IMPLEMENTATION OF PREFERENTIAL PROCUREMENT POLICY

2.(1)(b)(i) An organ of state must determine its preferential procurement policy and implement it within the following framework:

(a)...

(b)(i) for contracts with the a Rand value above a prescribed amount a maximum of 10 points may be allocated for specific goals as contemplated in paragraph (d) provided that

the lowest acceptable tender scores 90 points for the price:"

9. Adv Snyman further submitted that Mpact Plastic Containers would gain in excess of the prescribed R1 million because the amount of the tender awarded to Mpact Plastic Containers, exclusive of VAT, amounted to R24 844,000.00.
10. It was further argued, that in addition to the above, there was a deviation from the procedure set out in Regulation 32 of the Supply Chain Management Regulation of the Municipal Finance Management Act ("MFMA"), in that the municipal officials failed to advise of the reason why the first respondent had deviated from the procedure prescribed. The first respondent did not even specify that it could be demonstrated that it was to the advantage of the municipality or that there was an urgent need for the aforesaid procurement, as is required by Regulation 32.
11. Lastly, the applicant submits that it has a clear right alternatively a *prime facie* right, and as such it is entitled to the relief sought.
12. Adv Mnyandu, on behalf of the first respondent, argued that the first respondent had a contract with the applicant and in terms of that contract "*as and when*" the first respondent required the

goods sought from the applicant, it would call upon the applicant to supply same.

13. The new contract proposed with Mpact Plastic Containers did not in any way whatsoever encroach upon the rights of the applicant as envisaged by the contract between the applicant and the first respondent.

14. Adv Mnyandu argued further, that in terms of Regulations 32 of the MFMA, the first respondent was empowered to procure goods or services under a contract secured by another organ of state, subject to the guidelines set out in Regulation 32(1)(a),(b),(c) and (d). Thus the first respondent had complied with Regulation 32 in that Mpact Plastic Containers was a supplier who was already on the data base of the George Municipality.

15. For easy reference I set out Regulation 32 (1) (a) to (d):

"Unauthorized, irregular or fruitless and wasteful expenditure

32. (1) Without limiting liability in terms of the common law or other legislation-

- (a) *a political office-bearer of a municipality is liable for unauthorized expenditure if that office-bearer knowingly or after having been advised by the accounting officer of the municipality that the expenditure is likely to result in unauthorized expenditure, instructed an official of the municipality to incur expenditure;*
- (b) *the accounting officer is liable for unauthorized expenditure deliberately or negligently incurred by the accounting officer subject to subsection (3);*
- (c) *any political office-bearer or official of a municipality who deliberately or negligently committed, made or authorized an irregular expenditure is liable for that expenditure;*
- (d) *for that or any political office-bearer or official of a municipality who deliberately or negligently made or authorized a fruitless and wasteful expenditure*

is liable for that expenditure."

16. The applicant is still contracted to the first respondent and under this contract "*as and when*" the first respondent would require goods to be supplied, it would naturally look to the applicant.
17. This does not preclude the first respondent from sourcing the goods required from other municipalities, as long as the first respondent adheres to the guidelines set out in Regulation 32. It is further evident that the employment of Mpact Plastic Containers from the George Municipal District does not impact on the applicants contract with the first respondent.
18. In my opinion the applicant concern is that it is not the only supplier and by the looks of things not the cheaper supplier. It is evident that the first respondent acted in the best interest of the municipality when it sought the services provided for by the applicant from the George Municipal District. It is relevant to point out that there is no exclusive contract between the first respondent and the applicant. "*As and when*" it required the goods from the applicant, the first respondent would seek these from the applicant, so was the nature of their contract.

19. In my view the applicant therefore does not have a real right and or even a prime facie right to seek the relief that it seeks and as such this application was dismissed with costs following the event.



W. Hughes Judge of the High Court

Order made on: 14 June 2013

Reasons delivered on: 3 July 2013

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