

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No.: 2289/2013

In the matter between:-

MOLEFI THOABALA INCORPORATED

Applicant

and

MANGAUNG METROPOLITAN
MUNICIPALITY

First Respondent

THE CHAIRPERSON OF BID
EVALUATION COMMITTEE

Second Respondent

THE CHAIRPERSON OF THE BID
ADJUDICATION COMMITTEE

Third Respondent

MOROKA ATTORNEYS

Fourth Respondent

HEARD ON:

21 JUNE 2013

JUDGMENT BY:

ZIETSMAN, AJ

DELIVERED ON:

27 JUNE 2013

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- [1] In an urgent application, the applicant seeks an interim interdict restraining the fourth respondent from performing any rights and duties arising out of Tender Bid No. MMM/BID64:2013/2013, dealing with the re-registration and deregistration of title deeds of erven in Thaba Nchu and Botshabelo, Free State Province. Together herewith, the

applicant seeks an order interdicting and restraining the first respondent from performing the rights and duties arising out of Tender Bid No. MMM/BID64:2013/2013, pending a final determination of Part B of the Notice of Motion, being relief sought on review of the decisions taken by the first respondent, alternatively the second, alternatively the third respondents, alternatively all the respondents in the proceedings in Bid No. MMM/BID64:2013/2013, insofar as the decision and/or proceedings resulted in nomination of the fourth respondent as the preferred bidder.

- [2] I am called upon only to decide upon Part A of the Notice of Motion, being the interim interdict. The requisites for the right to claim an interim interdict are as follows:

- 2.1 A *prima facie* right (although open to some doubt);
- 2.2 A well-grounded apprehension of irreparable harm if the interim relief is not granted and the ultimate relief is eventually granted;
- 2.3 That the balance of convenience favours the granting of an interim interdict; and
- 2.4 That the applicant has no other satisfactory remedy.

- [3] It needs to be confirmed that in view of the discretionary nature of an interim interdict, the aforementioned requisites are not judged in isolation, but in interaction with each other.

See Eriksen Motors (Welkom) Ltd v Protea Motors, Warrenton and Another 1973 (3) SA 685 (A).

- [4] With reference to the *prima facie* right that should be made out by the applicant, the requisite is proof of facts that establish the existence of a right in terms of substantive law. Furthermore, the degree of proof, according to Harms: **Civil Procedure in the Supreme Court**, A-41 is formulated as follows:

“The right can be *prima facie* established even if it is open to some doubt. Mere acceptance of the applicant’s allegations is insufficient but the weighing up of the probabilities of conflicting versions is not required. The proper approach is to consider the facts as set out by the applicant together with any facts set out by the respondent which the applicant cannot dispute, and to decide whether, with regard to the inherent probabilities and the ultimate onus, the applicant should on those facts obtain final relief at the trial. The facts set out in contradiction by the respondent should then be considered, and if they throw serious doubt on the applicant’s case he cannot succeed.”

- [5] Again, in accordance with Harms, *supra*, on page A-43, the discretion of the court is described as follows:

“A court always has a wide discretion to refuse an interim interdict even if the requisites have been established. This means that the court is entitled to have regard to a number of disparate and incommensurable features in coming to a decision, and not that the court has a free and unfettered discretion. The discretion is a judicial one, which must be exercised according to law and upon facts. On the other hand, a court has no discretion to grant an interim interdict if the requirements have not been established.”

See also **Hix Networking Technologies v System Publishers (Pty) Ltd and Another** 1997 (1) SA 391 (A) at 401.

[6] During argument both counsel for the respondents abandoned their point *in limine* relating to Uniform Court Rule 16(A), raising of a constitutional point. However, the respondents still argued that urgency of the application was created by the applicant itself and that the matter should be removed from the roll on this basis alone. I will deal with urgency later.

[7] As far as the facts of this application are concerned, the following needs to be set out:

7.1 During February 2013 the first respondent invited tenders under Bid No. MMM/BID64:2012/2013 to tender for the “Appointment of a Service Provider for the Deregistration and Re-registration of Title Deeds in Thaba Nchu (Part A) and Botshabelo (Part B)”.

7.2 The evaluation method determined would be 90/10, which meant that 90% of the tender is evaluated based on the price, and 10% is based solely on the verified B-BBEE status of tenders.

7.3 The closing time for such tenders was 1 March 2013 and of relevance to this application, the first applicant and the fourth respondent’s tenders were the only tenders to be considered. The applicant tendered to do

the work as invited, at the price of R650,00 per title deed, whilst the fourth respondent tendered the amount of R2 500,00 per title deed.

- 7.4 It also seems that 17 000 units were at stake, and that the difference between the two tender bids, was an amount of approximately R31 million.
- 7.5 It is common cause that on 18 April 2013, a certain Sabata Mofokeng, from the office of the first respondent, phoned the applicant, calling upon the applicant to furnish a price breakdown of the R650,00 it tendered per unit price. Although surprised, the applicant indeed submitted its breakdown to Mr Mofokeng.
- 7.6 It is common cause that the bid evaluation committee, which evaluated the tenders after they were opened on 1 March 2013, made a final recommendation to the bid adjudication committee of the first respondent, on 17 April 2013, that the applicant's tender should not be allowed because of the fact, amongst others, but mainly that the applicant's tender is a non-responsible tender.
- 7.7 In accordance with the supply chain management policy of the first respondent, "non-responsible tenders" are defined as tenders with a price that is very high or very low and is not considered a fair and acceptable market price. (The last-mentioned in terms of paragraphs 16.2.16.2 of the supply chain management policy.)

7.8 Counsel for the first to third respondents argued that although the bid evaluation committee referred the bids back for further investigation on 5 April 2013, and although the bid evaluation committee made a final recommendation on 17 April 2013 to the bid adjudication committee that the applicant's tender is a non-responsible tender, the bid adjudication committee (which convened on 24 April 2013) indeed considered the information requested from the applicant on 18 April 2013 because, amongst others, in the minutes of the adjudication committee, the following was recommended

“That **Molefi Thoabala Incorporation**, have scored the highest procurement points in line with Preference Procurement Policy Framework Act No 5 of 2000, however the following were risks identified, namely:

- Project publication cost not included on price submitted.
- Project submitted is unrealistically low and not market related.
- Price submitted is way below conveyancing fees as prescribed by law societies with deeds office charges.”

7.9 It was therefore recommended by the adjudication committee that

“... the bid of **Molefi Thoabala Incorporation** be regarded as non-responsible in terms of clause 16.2.16.2 of the Supply Chain Management Policy;”

7.10 It is the applicant's argument that the information requested from it on 18 April 2013, was not considered by the bid evaluation committee (because of the fact the aforementioned committee already made a final recommendation on 17 April 2013), and furthermore even if the further information (the breakdown of the tender price) was put before the adjudication committee (which is still not clear) no provision was made in the terms of reference on which tenders were to be submitted to the first respondent of anything more than the price to be tendered for deregistration and re-registration of the erven involved. In this regard, and in accordance with the applicant's argument, no specific provision was made in the terms of reference, for instance, for advertisement costs, being referred to as project publication costs in the minutes of the adjudication committee.

7.11 The fourth respondent also referred to the tables of calculation in accordance with the guidelines prescribed by the various Law Societies of deeds office charges according the list in Notice R166 dated 29 February 2012, published in the Government Gazette 35083. The guidelines refer to a total amount of R3 718,00 per title deed as being transfer costs for a property with a value between R0,00 and R80 000,00. Therefore, in accordance with the arguments on behalf of the first to third respondents, as well as the fourth respondent, a tender price of R650,00 per title deed, is

clearly and obviously too low, and for that reason a non-responsible tender.

- [8] If reference is made to the right, or even the *prima facie* right, although open to some doubt, it is clear that the right referred to is the applicant's right to have a fair and justifiable administrative action by the first respondent. In this regard the following is of importance:

- 8.1 Administrative action that is lawful, must also be reasonable and procedurally fair as prescribed in section 33 of the Constitution.
- 8.2 It is not clear whether bidders in the tender process of the aforementioned matter, were specifically invited to tender for anything other than the deregistration and re-registration of the specific erven in Botshabelo and Thaba Nchu.
- 8.3 It is therefore not clear whether publication costs had to be included in tenders (with reference to advertisements to inform the general public as to the basis of such deregistration re-registration and in general to make the general public aware of the reasons for such re-registration and deregistration of the aforesaid erven).
- 8.4 Further information was sought from the applicant on 18 April 2013, whilst the bid evaluation committee had already made a final recommendation on 17 April 2013 without taking into consideration such further information given by the applicant.

8.5 From the minutes of the meeting of the bid adjudication committee, which made the final recommendation to the municipal manager, it is not clear what else was considered besides the recommendations by the bid evaluation committee.

[9] The above facts establish a *prima facie* right. Although I cannot find that the applicant has made out a clear right, I can find that the applicant has made out at least a *prima facie* right although open to some doubt. It must also be mentioned that at this stage it is not possible to determine whether the first respondent had all the facts before it when it came to a conclusion. That can only be done after the full record with reasons had been disclosed and dissected. At this stage the applicant says he was unfairly treated. The respondents have not been able to cast serious doubt on that allegation by the applicant.

[10] To elaborate further on the aforementioned paragraph, it is my view on the papers before me, that because there is such a big disparity between the bid prices of the applicant and the fourth respondent, before a court can find that the administrative action by the respondent was reasonable and procedurally fair as required by section 33 of the Constitution, it must be clear that the applicant's bid which is far lower than the fourth respondent's bid, and which was rejected, was dealt with in accordance with the Constitution, transparently, fair, and in a cost effective manner. I do not think that this was the case in the present matter, and for that

reason I find that there was at least a *prima facie* case made out by the applicant, although open to some doubt.

- [11] As far as the prerequisite of irreparable harm is concerned, I was referred to the decision of **Nestor and Others v Minister of Police and Others** 1984 (4) SA 230 (SWA) at 244, which reads as follows:

“A reasonable apprehension of injury has been held to be one which a reasonable man might entertain on being faced with certain facts (*Free State Gold Areas Ltd v Merriespruit (Orange Free State) Gold Mining Co Ltd* 1961 (2) SA 505 (W) at 515). The applicant for an interdict is not required to establish that, on a balance of probabilities flowing from the undisputed facts, injury will follow: he has only to show that it is reasonable to apprehend that injury will result (*Free State Gold Areas* case *supra* at 518). However, the test for apprehension is an objective one... *This means that, on the basis of the facts presented to him, the Judge must decide whether there is any basis for the entertainment of a reasonable apprehension by the applicant.*”

- [12] I am of the view that the applicant has indeed made out a case that it will suffer irreparable harm if an interim interdict is not granted in the circumstances.

- [13] As far as the requisite of other remedies is concerned, it is clear that no viable alternative remedy exists in the present matter. The respondents also referred to internal remedies which could have been exhausted. I will deal with such internal remedies herein below.

[14] With regard to the balance of convenience, the following is of importance:

14.1 The fourth respondent contends that it had various expenses in this regard, by the employment of extra employees, the buying of vehicles, the distribution of pamphlets, etc. It must be mentioned that these expenditures had been incurred in a relatively short timeframe.

14.2 These expenses, however, can be claimed back by the fourth respondent from the first respondent, should the fourth respondent's tender eventually be rejected.

14.3 It is of further importance, on the other hand, that not only the applicant's convenience is at stake, but also the public at large insofar as the general taxpaying public can expect that a municipality will award a cost effective tender with a transparent, fair and just administrative process.

14.4 Balance of convenience is often understood to mean that the *status quo* should not be disturbed too much. One has to consider what is reversible, and what the costs and fairness implications are.

14.5 In the circumstances I find that the balance of convenience favours the applicant.

[15] I am therefore of the view that the applicant should succeed with the interim interdict pending the finalisation of the review application referred to in Part B of the Notice of Motion. As far as costs are concerned, I am of the view that costs should

stand over until the adjudication of the review application, mainly because of the fact that I have only found that the applicant has made out a *prima facie* right, although open to some doubt. I am not inclined at this stage to decide upon the issue of costs.

- [16] With reference to the other points *in limine*, being urgency, and the failure by the applicant to adhere to the internal remedies, I find that the application was indeed an urgent one and that the failure to comply with the provisions of section 7(2) of the Promotion of Administrative Justice Act, Act 3 of 2000, would obviously have had the effect that the contract awarded to the fourth respondent would have been executed in full or to a large extent before the internal remedies would be exhausted. The whole purpose of this application, with a follow-up application on review, would have been negated. I therefore exempt the applicant from exhausting its internal remedies in terms of section 7(2)(c) of Act 3 of 2000.

- [17] On the aforesaid premises I make the following orders:

17.1 Prayers 1 and 2 of Part A of the Notice of Motion are granted.

17.2 The costs of the application as far as Part A is concerned, stand over to be adjudicated upon during the hearing of Part B of the Notice of Motion.

P. ZIETSMAN, AJ

On behalf of applicant:

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