

In the KwaZulu-Natal High Court, Durban
Republic of South Africa

Case No : 4139/2013

In the matter between :

WJ Building & Civil Engineering Contractors CC

Applicant

and

Umhlathuze Municipality

First Respondent

PMPZ Construction CC

Second Respondent

Judgment

Lopes J

[1] During 2012 the first respondent, the Umhlathuze Municipality, called for tenders for a project known as 'Mzingazi Village Sewer : Phase 1' ('the project'). The second respondent, PMPZ Construction CC, was the successful tenderer.

[2] In this application the applicant, W J Building & Civil Engineering Contractors CC, who was an unsuccessful tenderer, seeks an interdict restraining the first

respondent from giving effect to its award of the contract to the second respondent and interdicting the second respondent from commencing or carrying out any work on the site. The relief is sought pending the finalisation of the applicant's objection to the appointment of the second respondent as the successful tenderer for the project.

[3] The legal requisites for an interim interdict, such as is sought by the applicant, were set out in *Olympic Passenger Service (Pty) Ltd v Ramlagan* 1957 (2) SA 382 (N). They are :

- (a) a prima facie right, though open to some doubt;;
- (b) an injury actually committed or a reasonable apprehension of irreparable harm;
- (c) that the balance of convenience favours the applicant;
- (d) the absence of similar protection by any other ordinary remedy.

With regard to the balance of convenience, Holmes J stated at page 383 E - G :

'In such cases, upon proof of a well grounded apprehension of irreparable harm, and there being no adequate ordinary remedy, the Court may grant an interdict – it has a discretion, to be exercised judicially upon a consideration of all the facts. Usually this will resolve itself into a nice consideration of the prospects of success and the balance of convenience – the stronger the prospects of success, the less need for such balance to favour the applicant : the weaker the prospects of success, the greater the need for the balance of convenience to favour him. I need hardly add that by balance of convenience is meant the prejudice to the applicant if the interdict be refused, weighed against the prejudice to the respondent if it be granted.'

See also: *National Treasury v Opposition to Urban Tolling Alliance* 2012 (6) SA 223 (CC)

[4] The facts of this matter may be summarised as follows :

- (a) tenders for the project were called for at the beginning of 2012;
- (b) tenders were to be evaluated on a 90/10 point scoring system in terms of the Preferential Procurement Policy Framework Act, 2000 ('the PPPFA Act');
- (c) the tender closing date was the 23rd March 2012;
- (d) it is not disputed that the applicant attended the requisite site meeting and delivered its tender timeously;
- (e) the applicant's tender was the second lowest, in the price of R8 771 192,62, but the lowest tenderer was disqualified for delivering a non-responsive tender;
- (f) on the 24th July 2012 the first respondent wrote to the applicant advising it that the tender had been awarded to the second respondent whom it described as 'the second highest contender' at a price of R9 654 683,64;
- (g) aggrieved at this award, the applicant's managing member, Willem Breedt wrote to the respondent requesting a written explanation, in terms of the Promotion of Administrative Justice Act, 2000, as to why the second respondent's tender offer had been accepted when it was not the lowest tender. Various details such as the name of the person who carried out the evaluation of the tenders, the manner in which the evaluation was done, etc were requested by Breedt;
- (h) the first respondent replied on the 20th August 2012 providing some of the details requested. They recorded the basis, for the recommendation by the

evaluation committee, that the project be awarded to the second respondent as being :

‘Council found that the contractor is professional in their work and has the capacity to deliver. Secondly, the National Treasury database was checked and it was found that the company is not registered as a defaulter. Thirdly, due to the fact that the contractor met the minimum CIBD requirements as per the specifications in the tender, no risk assessment was required.’

- (i) on the 21st August 2012 Breedt replied requesting certain documentation in order to enable him to clarify the reasons why the tender of the applicant was not accepted;
- (j) Breedt records in his founding affidavit that at that stage he intended pursuing an internal appeal or objection on the applicant's behalf once he had received the documents referred to in his letter of the 21st August 2012;
- (k) the first respondent then wrote to Breedt on the 11th December 2012, curiously referring to his letter of the 31st July 2012. That letter appears to be a repeat of the letter sent to Breedt on the 20th August 2012 save that the date was altered to read the 11th December 2012;
- (l) the next communication between the parties was on the 19th March 2013 when Endecon (Zululand) Trust, the supervising engineers on the project wrote to Breedt recording that on the 13th March 2013 the first respondent had instructed them to proceed with the tender award to the second respondent at an inclusive amount of R8 771 192,62. Following a meeting with the second respondent the site handover took place on the 18th March 2013;
- (m) on the 3rd April 2013 Breedt again wrote to the first respondent recording;
 - (i) that the first respondent had unilaterally lowered the bid of the second respondent to an amount equal to the bid made by the applicant as the lowest tenderer;

- (ii) the applicant had formally objected in writing on the 31st July 2012 and requested reasons for its non-appointment;
 - (iii) the first respondent had replied, but failed to reply to the questions raised;
 - (iv) that the first respondent had failed to provide some of the information sought by the applicant, including a copy of the tender evaluation report, an explanation of how the evaluation report was prepared, etc;
 - (v) that the first respondent had not dealt with the applicant's objection to the original award and that the conduct of the first respondent was unlawful. The letter continues that unless the first respondent replied to the applicant by the 5th April 2013 the applicant would seek an interdict to suspend construction;
- (n) the applicant's attorneys then addressed the first respondent on the 17th April 2013 and the 19th April 2013 notifying them of the pending application to be heard on Monday 22nd April 2013. The applicant contends that :
- (i) the project should have been awarded to it;
 - (ii) the award by the second respondent was in conflict with the 90/10 points system and the invitation to tender, and was accordingly irrational and unlawful;
 - (iii) on the 8th April 2013 representatives of the applicant became aware that the second respondent was establishing itself on site. Despite requesting an undertaking from the first respondent that work would cease forthwith pending the outcome of this application, no such undertaking was given. The applicant accordingly brings this

application to interdict the first and second respondents from proceeding with the project.

[5] With regard to the first requirement of an interdict, a prima facie case, though open to some doubt, the applicant submits that the award of the tender to the second respondent was not in compliance with the 90/10 evaluation scoring system. Ms *Annandale* SC who appeared for the applicant submitted that it was important for me to consider the extent of the breach because, on the test as formulated in *Olympic Passenger Services*, the stronger the applicant's prospects of success, the less the need for it to establish that the balance of convenience favours it.

[6] The first respondent acknowledges that the second respondent was not the lowest bidder. It appears, however, to have awarded the tender on the basis that the accounting officer of the first respondent would, in terms of the Supply Chain Management Policy of the first respondent, negotiate the difference between the first respondent's tender and the applicant's tender – i.e. that the second respondent would only get the tender if it agreed to do the job for the same price as the applicant.

[7] In the invitation to tender put up by the first respondent, it indicates that tenders will be evaluated in terms of the 90/10 method for amounts above R1 000 000 as set out in the PPPF Act. A further document was put up, signed by the city manager which purports to notify tenderers that the request for tenders is

subject to the first respondents' Preferential Procurement Policy and will be evaluated in terms of the 90/10 method as set out in the PPPF Act.

[8] Immediately following the tender application in the annexures to the first respondent's answering affidavit, is an extract from the Preferential Procurement Regulations which were published under Government Notice R725 in Government Gazette 22459 of the 10th August 2001. Regulation 9 of those regulations is quoted by the first respondent which provides that a contract may, on reasonable and justifiable grounds, be awarded to a tenderer that did not score the highest number of points.

[9] The invitation to tender was apparently published on the 5th March 2012. This followed a resolution of the Bid Specification Committee on the 27th February 2012, that the tender be approved and published. However, pursuant to the provisions of a judgment in this division declaring certain of the Preferential Procurement Regulations of 2001 to be invalid, new Preferential Procurement Regulations were published under Government Notice R502 in Government Gazette 34350 of the 8th June 2011, which came into effect on the 7th December 2011¹. The first respondent was accordingly bound to apply only those regulations in inviting and considering tenders. The former regulation 9, referred to by the first respondent as support for its right not to award the tender to the tenderer scoring the highest total number of points, does not appear in the new regulations. Instead, clause 7 of the new regulations provides :

¹ Sizabonke Civils CC t/a Pilcon Projects v Zululand District Municipality and others 2011 (4) SA 406 (KZP)

‘7. Award of contracts to tenderers not scoring the highest number of points

- (1) A contract may be awarded to a tenderer that did not score the highest total number of points, only in accordance with section 2(1)(f) of the Act.’

The Act referred to was the PPPF Act, and s 2 provides :

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

...

(d) the specific goals may include

- (i) contracting with persons, or categories of persons, historically disadvantaged by unfair discrimination of the basis of race, gender or disability;
- (ii) implementing the programmes of the Reconstruction and Development Programme as published in Government Gazette No 16085 dated 23 November 1994;

(e) any specific goal for which a point may be awarded, must be clearly specified in the invitation to submit a tender;

(f) the contract must be awarded to the tenderer who scores the highest points, unless objective criteria in addition to those contemplated in paragraphs (d) and (e) justify the award to another tenderer;’

[10] The extract of the minutes of the Bid Adjudication Committee, put up as an annexure by the first respondent to its answering affidavit, does not deal with the factors which were considered by the Bid Adjudication Committee, but rather the result at which the committee arrived. The Bid Adjudication Committee clearly relied upon the recommendation of the Bid Evaluation Committee, which recorded that the applicant had been the highest scoring tenderer with the lowest price, but should not be awarded the contract because :

- (a) the applicant had benefitted over the last five years on two major projects worth approximately R49.5 million; and
- (b) the council had expressed the need to encourage the rotation of service providers who carry out work for the council.

It accordingly recommended that the tender be awarded to the second respondent as 'the second highest contender scorer', but only on the basis that it would effectively do the job at the same price as the applicant.

[11] In its letter to the applicant dated 20th August 2012 the first respondent recorded that the second respondent was professional in its work and had the capacity to deliver. The second respondent was not registered as a defaulter with the National Treasury, and in addition, that as it met the minimum CIDB requirements as per the specifications in the tender, no risk assessment was required. These matters were set out in order to attempt to comply with the provisions of clause 29 of the Supply Chain Management Policy.

[12] The first respondent's rationale for not awarding the contract to the applicant although it was the highest scoring tenderer, must be based on objective criteria which are reasonable and justifiable. The reasons put forward by the evaluation committee are arbitrary, and do not appear in the tender invitation advertisement, nor in the PPPF Act or regulations. They are not evident from the first respondent's Preferential Procurement Policy. In addition the arbitrary use of any measure to determine the success or failure of a bid is contrary to the functions

required of the Bid Evaluation Committee by the first respondent's Supply Chain Management Policy. The fact that the applicant may have benefitted from previous projects is not, of itself, a reason for rejecting its bid. The deciding number of previous projects, for example, is an arbitrary decision by the Bid Evaluation Committee. The need to encourage the rotation of service providers, which may be a legitimate objective of the first respondent, is nowhere expressed as a factor which it will take into account in determining the successful bidder. It should have been reflected in the invitation to bid, otherwise tenderers would not have been able to consider and deal with that item. Other factors are catered for in the weighting system provided for in the PPPF, the regulations thereto, and the first respondent's Preferential Procurement Policy. In the circumstances, the award of the project to the second respondent seems to have been made on an unfair premise, and the applicant has established its *prima facie* case.

[13] Mr *Kuboni*, who appeared for the first respondent, submitted that the applicant was precluded from bringing the application because it was out of time, having failed to lodge a written objection as required by paragraph 50 of the Supply Chain Management Policy, which requires that persons aggrieved by decisions taken in the implementation of that system may lodge written objection or complaint against the decision within 14 days thereof.

[14] Mr *Kuboni* submitted that the letters of the 31st July 2012 and the 21st August 2012 do not constitute written complaints. They were rather requests for information.

In particular he pointed out that the letter of the 21st August 2012 concluded with the following :

‘W J Construction requires the above-mentioned documentation to inform us of the specific reasons why our tender was not accepted to ensure that we will be able to compete on future tenders for the Municipality.’

While there is some merit in that submission, Ms *Annandale* pointed out that each of the letters concerned was headed, inter alia, ‘Objection to appointment of PMPZ Construction and reasons for non-appointment’.

[15] In addition, the letter of the 31st July 2012 warns the first respondent, that its failure to provide information within the time stipulated by it, would leave the applicant with no option other than to pursue alternative causes of action.

[16] In my view the applicant has established that it lodged a written complaint within the 14 day period as provided for in paragraph 50.

[17] With regard to an injury actually committed or a reasonable apprehension of irreparable harm, the applicant points to the fact that the right which it had to be treated fairly in the adjudication of the tender bid, and which was frustrated by the conduct of the first respondent’s representatives. I have no difficulty that this requirement has been established.

[18] With regard to the absence of any similar protection by any other ordinary remedy, the applicant's ability to recover damages from the first respondent, were it to be found that the tender was improperly awarded to the second respondent, is limited. Where an unsuccessful tenderer suffers delictual damages that are purely economic in nature and those damages are suffered because of a bona fide and negligent failure to comply with the requirements of administrative justice in awarding a tender, it has no claim for delictual damages.

See : *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2006 (3) SA 151 (SCA) para 46.

[19] The pursuit of damages was not, however, the only remedy which was available to the applicant. There were internal processes which it could have followed. Indeed, that is what Ms *Annandale* submits should have happened. She submits that the applicant lodged a proper objection in writing on the 31st July 2012, as was required by the Supply Chain Management Policy document of the first respondent, and nothing was done by the first respondent. This submission seems to be a correct reflection of what happened.

[20] With regard to the balance of convenience, Ms *Annandale* submits that the applicant acted in accordance with the Supply Chain Management Policy of the first respondent, and any delays in the process were solely attributable to the conduct of the first respondent in not supplying the particulars of their decision as were sought by the applicant. She submits that in reality the award of the tender took place when

Endecon were instructed by the first respondent to proceed with the tender award which had been made to the second respondent. This instruction was given on the 13th March 2013.

[21] Mr *Kuboni* referred to the allegations in the first respondent's answering affidavit concerning the inevitable delays which would be occasioned by an interdict and a review process of the decision to award the tender to the second respondent. These include :

- (a) the fact that there was no sewer system in the area, the construction of which was the object the tender, and which was of growing concern to the community;
- (b) in the Mzingazi Village people were sub-dividing their plots and selling them without title deeds to third parties causing pressure on the system of pit toilets used by the local community. There was the concomitant danger that Mzingazi Lake alongside which the village exists, could become contaminated by human waste. This is particularly concerning because the lake provides the drinking water to Richards Bay and surrounding areas;
- (c) in addition, the project is financed through funding from the National Treasury as part of the municipal infrastructure grant and it was contemplated at the time of the award of the contract that the money from National Treasury would be used during the 2012 and 2013 financial years. There is a danger that the money may not be re-allocated for the purpose of the sewer project if it is not used by the end of June 2013.

[22] It is common cause that the second respondent is already on site and has moved some materials on site. There is also some concern that the local community may react unfavourably to the removal of the tender from the second respondent, because the second respondent is wholly comprised of historically disadvantaged individuals and the community has been informed of the project through the necessary consultations conducted by ward councillors. These problems are, however, of the first respondent's making.

[23] The conduct of the applicant in pursuing its complaint is relevant to deciding the question of the balance of convenience. Relevant aspects of its conduct are :

- (a) although the applicant registered its complaint within the 14 day period – i.e. on the 31st July 2012 – it did not follow through on its objections in a manner which should have been adopted by an individual concerned that their legal rights had been ignored;
- (b) the Supply Chain Management Policy document clearly provides for the appointment of an independent person to adjudicate complaints, and paragraph 51 of the policy requires that the accounting officer appoint such a person to resolve any dispute. In the event that such a dispute is not resolved, a complainant may refer the matter to the relevant provincial treasury if no response is forthcoming within 60 days. In the present instance, having addressed its concerns on the 31st July 2012, the applicant eventually launched this application for an interdict as a matter of urgency on the 19th April 2013, some nine months after the award of the tender;

(c) Ms *Annandale* has pointed to the first respondent's refusal fully to answer the queries of the applicant as a cause of any delay. Both parties share some blame here. The first respondent did not, despite repeated requests, provide the reasons for its decision, and the applicant could have acted with greater promptitude.

[24] In assessing the harm which would be caused to the first respondent if the interdict were to be granted, there is no doubt that the exhausting of the internal remedies available to the applicant and any subsequent possible legal procedures would take some time to be finalised. The delays in the project, occasioned by various factors, have seen it drag on since the original plans in 2008, and were not due to any fault on the part of the applicant. The second respondent has only been on site since the latter half of March 2013, approximately a month ago.

[25] Ms *Annandale* provided me with two draft orders and invited me to insert strict time limits so as to alleviate any such prejudice. I agree that the procedural conduct of a review can be accelerated to minimise any prejudice caused by the delay of the implementation of the project.

[26] I am mindful of the fact that the applicant's right to pursue a review or other remedy against the first respondent may be cold comfort in circumstances where the project will probably already have been completed by the time those steps are finalised. Where there has been an injustice and the matter can be remedied by a

review, the applicant should be given the opportunity. In my view the balance of convenience favours a solution ensuring a just result.

[27] In the circumstances I make the following order :

1. The applicant is directed to institute a review application against the proceedings relating to the evaluation and adjudication of tenders in respect of contract 8/2/1/151: Mzingazi Village Sewer : Phase 1 and the award of that contract, within five days of the date of this order.
2. The first respondent is directed to produce a record of the proceedings referred to in paragraph 1 above within ten days of delivery of the review application.
3. The applicant may supplement its review application within five days of delivery of the record.
4. The respondents in the review application are directed to deliver their answering affidavits, if any, within ten days of the expiry of the time period referred to in paragraph 3.
5. The applicant is directed to deliver its replying affidavit, if any, in the review proceedings within five days of the receipt of the answering affidavits.
6. Pending the finalisation of the review referred to in paragraph 2 above:
 - 6.1 the first respondent is hereby interdicted from giving effect to its award of the contract to the second respondent and allowing the second respondent to proceed or carry on with any work on site;

- 6.2 the second respondent is interdicted from commencing or carrying on any work on site.
7. In the event of the applicant failing timeously to institute review proceedings as directed in terms of paragraph 2 above, this interdict will ipso facto lapse and be of no further force and effect.
8. The costs this application are reserved for decision by the court hearing the review application.

Date of hearing : 26th April 2013

Date of judgment : 6th May 2013

Counsel for the Applicant : A M Annandale SC (instructed by Cox Yeats)

Counsel for the Respondent : W S Kuboni (instructed by Ngcaweni Attorneys)