FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No: 476/2011

In the matter between:

JORIAN CONSTRUCTION CC	Applicant
and	
MANGAUNG LOCAL MUNICIPALITY	1st Respondent
THE CHAIRMAN: BID ADJUDICATION COMMITTEE: CONTRACT W0906	2nd Respondent
Q-CIVILS (PTY) LTD	3rd Respondent

CORAM: KRUGER *et* MOCUMIE JJ

JUDGMENT BY: KRUGER, J

HEARD ON: 30 JANUARY 2012

DELIVERED ON: 2 FEBRUARY 2012

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[1] The applicant seeks to review and set aside the decision by the first respondent on 26 November 2011 to award a tender under contract number W0906 for the Estoire Race Course Sewer mains and connections to the third respondent, Q-Civils (Pty) Ltd. The second respondent is the chairman of the Bid Adjudication Committee, who did not file papers and who was not represented at the hearing. Mr Grobler appeared for the

applicant, Mr Manye for the first Respondent and Mr Snellenburg for the third respondent.

[2] The site was handed over to the successful bidder, the third respondent in January 2011 and work commenced in February 2011. It was a 32-week contract. In January 2011 the attorneys of the applicant sent a letter to the third respondent stating that applicant intended taking legal action and informing third respondent that if it proceeded with the contract it would do so at its peril. No interdictory relief was applied for. The Notice of Motion and Founding Affidavit were served on the first and second respondent on 4 February 2011, and 14 March 2011 on the third respondent. The third respondent signed its Answering Affidavit on 19 May 2011 and its deponent stated that at that time it was 15 weeks into the contract, and 3rd respondent had already incurred costs of R3.5 million to date and a contract with a subcontractor had been concluded.

[3] At the outset of the hearing before us on 30 January 2012 Mr Grobler, for the applicant informed us that the contract forming the subject matter of this review application has been 98%

completed. On the basis of practicalities he conceded that the court could not set aside the award of the tender. He did however contend that, because of the conduct of the first respondent, it should be ordered to pay applicant's costs. The thrust of this argument is that the first respondent did not respect applicant's procedural rights. First respondent did not give applicant an opportunity to respond to the allegations that Ms Elizabeth Mojatau, the managing member of the applicant, was merely fronting, and was not a truly historically disadvantaged person. Mr Manye, for the first respondent, said that the first respondent, and in particular its deponent, Mr Msibi, the City Manager, had sufficient reason to disqualify the tender of the applicant. There are time frames within which tenders must be awarded and the work done. There was no time to embark upon a further investigation before the tender was awarded. That is a persuasive argument. The onus is on the applicant to show that it acted expeditiously and that it was not due to its inaction that the litigation became academic. The dates of handing over of the site and commencement of the contract were known to the applicant at the latest in March 2011, and the applicant took no steps to obtain interdictory relief or, apparently, to expedite the review application.

The applicant must have realised from the outset that the situation was developing day by day and was aware at the latest in March 2011 that the contract was being performed by the third respondent, which would lead to this application becoming academic (see **SEBENZA KAHLE TRADE CC v EMALAHENI LOCAL MUNICIPALITY COUNCIL AND ANOTHER** [2003] 2 All SA 340 (T) at 351g – i).

[4] A declaration of invalidity cannot be considered in isolation. One must consider the possible consequences (**MOSEME ROAD CONSTRUCTION CC AND OTHERS v KING CIVIL ENGINEERING CONTRACTORS (PTY) LTD AND ANOTHER** 2010 (4) SA 359 (SCA) 359 (SCA) par [12]). The court must consider the practicalities (par [16]). The court must have regard to the position of the innocent successful tenderer, here the third respondent. Where on the facts, the contract has practically been concluded, as here, even if the administrative process was not perfect, the review will not readily succeed. Mr Grobler appreciated as much, and for that reason limited his argument to one of costs.

[5] The reason why the applicant's tender was not considered, is that first respondent had reason to suspect that the applicant was not a historically disadvantaged individual, but that its member, Ms Elizabeth Mojatau ("Elizabeth Mojatau") was fronting for a certain Mr HJP Steyn ("Steyn"). As is set out below, and as was found by Musi JP (with whom Naidoo AJ concurred in an unreported judgment given in case no 513/2011 delivered on 22 December 2011 between the same parties in respect of a different tender) there were well founded reasons for the belief of fronting.

[6] In the supplementary Founding Affidavit the deponent, Elizabeth Mojatau says in para 3.4 that she is unaware that the applicant was being investigated for fraud by a special task force of the Mangaung Local Municipality. In answer hereto the first respondent, through Mr Msibi, the City Manager, in para 14 of the Answering Affidavit refers to a statement which Elizabeth Mojatau made in Sesotho to the South African Police Service, and attaches a copy thereof with a translation (AA paras 14.1 – 14.5).

[7] In the statement Elizabeth Mojatau says:

"I would like to explain about the issue of work, that I stated in March 2007. I did not have enough experience, until I met a white man Mr Steyn with whom I previously worked and I made him the manager.

We worked together, but the moneys that were paid I did not know how they were dealt with. I am being paid R6 000,00 per month.

I went with him to where he had found the jobs and he showed me. I even went to the surrounding towns. But when payments were made – I would not be told as to how much money were paid and how much was outstanding."

[8] In the Replying Affidavit Elizabeth Mojatau *inter alia* says:

"4.1 I am the 100% shareholder in the applicant CC. It is correct that Mr **HPJ Steyn** is one of the managers of the applicant's business. I am to a large extent a businesswoman and Mr **Steyn** has the necessary knowhow as far as engineering works and construction works in general are concerned. I am however the *de facto* and *de jure* 100% shareholder of the applicant CC.

4.2 I receive a salary from the applicant on a monthly basis, together with a dividend paid out at the end of the fiscal year if the applicant decides to declare a dividend and secondly obviously if there are dividends available.

4.3 I have on several occasions received dividends in the past.

4.4 Between **2007** and **2008**, I had fallen extremely ill. This necessitated that I to a large extent (in that period) hand the management of the entire business to Mr **Steyn**. The only reason for this was because of my illness.

4.5 It is correct that during that time, I was visited by three officials of first respondent. I cannot recall their names.

4.6 They enquired on how the business of the applicant works and it is correct that I had provided documentation appended to the opposing affidavit to them. One of these officials however – after I briefly told him of my illness and what at that stage was going on in the applicant company – dictated to me precisely what I must write and I followed his instructions to the letter.

4.7 It is correct that at that stage I was unsure as to precisely what was going on in the business, how much money had been made, etc. The reason for this was obvious because of my inaction at that stage, which ensued primarily because of my illness. These gentlemen informed me that they have reason to believe that monies are being stolen in the applicant CC, and if I am of assistance, they will launch a full investigation and see to it that all monies due and payable to me are paid.

4.8 Furthermore, it is quite evident that the letter itself or the **"affidavit"** does not expose precisely what the first respondent wishes to rely hereon. I repeat that this letter was written by me sometime ago and as is evident from the stamp affixed by the South African Police Service (which obviously is also incorrect) this letter had been written by me long before the calling of any germane tenders herein. The relevance of this will appear below."

[9] She says the affidavit attached by the first respondent was signed by Steyn by mistake, it was a *bona fide* error (p 126,

para 10.3). She says she is an employee of the applicant and holds a 100% interest, and is "obviously" assisted by persons like Steyn. In the Answering Affidavit of the first respondent the following is stated, and not denied in reply:

> "14.3 The deponent to the Applicant's affidavit, further, claimed that she only receives a monthly salary of R6 000.00 from the Applicant and that seldom would she accompany the manager of Applicant, one Steyn, to places where Steyn would have sourced new projects for the Applicant.
>
> 14.4 She further indicated that she did not know how the finances of the Applicant were administered and that because of being illiterate she never asked anything but only received remuneration on a monthly basis.
>
> 14.5 A copy of the said statement and an English translation thereof are attached hereto as (***"*Annexure SM 3** and **SM 4*"***), respectively."

[10] In the Replying Affidavit Elizabeth Mojatau says that she does not know precisely what the first respondent wishes to rely on in the affidavit (with the signature of Steyn, her name struck out) or in the letter in which she says she was not fully aware of the business activities of the applicant. There are many uncertain aspects of the case put up by the applicant, and in particular the Founding and Replying Affidavits of Elizabeth Mojatau. She does not state what her illness was

"between 2007 and 2008"; she does not state what her exact role and knowledge of the affairs of the applicant now are. In any event the question as to whether the first respondent's suspicion regarding fronting was based on reasonable grounds is comprehensively dealt with by Musi JP in his judgment in case no 513/2011, referred to in para [5] of this judgment. The court in that matter found Elizabeth Mojatau, on the basis of the affidavit, statement and affidavit "clearly untruthful and unreliable". Musi JP points out (para [20]) that in her Replying Affidavit in that case "she has literally left the contents of her incriminating statement undisturbed". She does not provide any details of her role in the operations of the business. The same criticism applies here. In para 4.1 of the Replying Affidavit she says she is "to a large extent a businesswoman."

[11] Further, Elizabeth Mojatau complains about a "quantum leap" which Msibi, the deponent to the first respondent's Answering Affidavit, makes because he refers to a strong suspicion in para 5.1 of the affidavit, and in para 5.5 to a fraudulent basis. Read in context, all Msibi is saying is that there was a reasonable suspicion, which was sufficient to

disqualify the applicant, as set out in the reasoning by Musi JP.

[12] In this case, the substance of the complaint against the applicant was serious. The municipality had reason to doubt the veracity and *bona fides* of Elizabeth Mojatau and the applicant (see **VIKING PONY AFRICA PUMPS (PTY) LTD t/a TRICOM AFRICA, AND ANOTHER v HYDRO-TECH SYSTEMS (PTY) LTD** 2010 (3) SA 365 (SCA) para [13]).

[13] Regulation 15 of the Preferred Procurement Regulations (GN R725 in GG22549 of 10 August 2001) is relevant. In terms of regulation 15(1) the municipality must act against a person who was awarded a contract on a fraudulent basis (see (**VIKING PONY (SCA)** *supra,* par [3]). The first respondent detected that preference was obtained by the applicant in a fraudulent manner, as contemplated in regulation 15. "Detect" here connotes the discovery or awareness of a certain state of affairs, not a conclusion. "Detect" refers to a provisional or unilateral opinion (**VIKING PONY (SCA)** *supra,* par [31]).

[14] Apart from the practicalities, which dictate that the application be dismissed because the tender has been completed, it appears that there was no basis for applicant to assail its exclusion. There was no need to call for an answer from the applicant. In these papers Elizabeth Mojatau created more questions than answers as to the HDI (historically disadvantaged individual) status of the applicant. The application was without merit, and the applicant took no steps to ensure that the application was not academic by the time of the hearing. There was no obligation on the first respondent to delay the completion of the contract and there is no reason why the applicant should not be ordered to pay all the costs. The review application must be dismissed with costs.

[15] **<u>ORDER</u>**

1. The application is dismissed.
2. The applicant is ordered to pay the costs of the first and third respondents.

A. KRUGER, J

I concur.

B. C. MOCUMIE, J

On behalf of the applicant:	Adv. S. Grobler Instructed by: Moroka Attorneys BLOEMFONTEIN
On behalf of the 1st respondent:	Adv. L. Manye Instructed by: Gous Vertue & Associates Inc. BLOEMFONTEIN
On behalf of the 3rd respondent:	Adv. N Snellenburg Instructed by: Rossouws Attorneys BLOEMFONTEIN

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