IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE – BHISHO)

Case mo: 805/09
Date Heard: 28/02/2012
Date Delivered:27/03/12

In the matter between:

DEPARTMENT OF ECONOMIC DEVELOPMENT
AND ENVIRONMENTAL AFFAIRS **APPLICANT**

AND

JGL FORENSIC SERVICES LTD **RESPONDENT**

JUDGMENT

SMITH J:

INTRODUCTION

[1] This matter is somewhat peculiar. The applicant, who is the Head of the Department of Economic Development and Environmental Affairs, Eastern Cape, seeks an order reviewing and setting aside the decision of his predecessor, Dr Nkem-Abonta, taken on 22 January 2009, to appoint the respondent to conduct forensic investigations into the department's supply chain management function. Dr Nkem-Abonta's services as Head of the Department have terminated on 31 January 2009 and he is no longer in the employ of the department.

THE FACTS

[2] The applicant apparently first became aware of the existence of the contract on 3 September 2009 when he received a letter from the respondent's senior manager, Ms Rhoda York, to the effect that she had been informed that the department wished to review the contract and wherein she requested "*a mutually satisfactory resolution to the matter*".

[3] The applicant thereafter called for the file relating to the aforesaid contract and realized that the information was "*patchy*". The file contained only correspondence between the Department and the respondent. On the 28th of September 2009 he requested Ms York to furnish him with copies of all the relevant documents. This she did on 29 September 2009.

[4] The applicant has stated that the aforesaid documents evinced the following:

(a) That the department had, apparently during January 2009, invited written proposals for a forensic investigation to be conducted into its supply chain management functions. (In this regard the applicant has initially averred in his founding affidavit, that Dr Nkem-Abonta had invited only the respondent to submit a quotation. When however the respondent averred in its answering papers that other two service providers, namely PWC and KPMG were also requested to submit quotations, the applicant admitted that PWC had submitted a quotation but averred that he had made enquiries with KPMG and had established that "*KPMG has no record of either an invitation or that it submitted such a proposal to the Department."*).

(b) That Dr Nkem-Abonta did not record his reasons for diverting from the usual tender procedures and;

(c) Has not submitted a report to the Provincial Treasury as he was required to do in terms of the law.

[5] Mr *Bloem SC*, who appeared for the Applicant, submitted that it is nowhere apparent from the documents which the department had at its disposal (as well as those which had been provided by the respondent), that Dr Nkem-Abonta had valid reasons for departing from the department's supply chain management policy, more particularly to dispense with the requirement that competitive bids must be invited. He argued that the fact that no such reasons have been recorded and submitted to the Provincial Treasury in accordance with the relevant statutory provisions, simply mean that they do in fact not exist. Under these circumstances, so he argued, the decision to award the contract to the respondent was fundamentally flawed. He submitted further that the respondent has not been able to proffer any information to support its contention that the deviation was rationally considered by Dr Nkem-Abonta and that the decision was taken on the basis of valid reasons which could have led him to conclude that the calling of competitive bids should be dispensed with on the basis of impracticality or urgency.

[6] The respondent is unsurprisingly at a considerable disadvantage in this regard. It is unlikely that the respondent would have been aware of the reasons for Dr Nkem-Abonta's decision to dispense with the calling of competitive bids. These reasons are ordinarily within the peculiar knowledge of the functionary or public body who took the impugned administrative decision. The respondent has however, through Ms York, attempted to provide some factual basis for its assertion that Dr Nkem-Abonta's decision was based on urgency.

[7] In this regard she has stated that:

(a) The department's invitation to submit written proposals stated that the

(b) forensic investigation would run concurrent to the preparations of the 2008 -2009 audit for the financial year ending on 31 March 2009:

(c) The investigations had to commence on 11 January 2009, the onsite investigation had to be completed by 20 March 2009 and the final report had to be submitted to the Head of Department by 20 March 2009.

(d) The invitation to submit proposals stated the following:

"Due to the nature and urgency in finalizing the forensic audit/investigation, written proposals together with the price quotations and a Valid Tax Clearance Certificate must be submitted to Mrs Candy Brandav before 16:00 on Tuesday, 6 January 2009".

(e) The required forensic investigation was pursuant to previous investigations conducted by the respondent on the instructions of the Provincial Treasury. The terms of reference for the original investigations were not wide enough to include the investigation into the department's supply chain management function, hence the invitation to submit a further proposals;

(f) The respondent actually commenced its investigation on the 2nd of February 2009 and had deployed an investigation team for those purposes within the department.

THE LAW

[8] It is common cause that Dr Nkem-Abonta, in deciding not to call for competitive bids, purported to have acted in accordance with section 16 A.6.4 of the Regulations promulgated under the Public Finance Management Act, 1 of 1999 (read with paragraph 3.4.3 of the National Treasury Practice Notice (no.8 of 2007/2008) issued by the Minister in accordance with section 76 (4) (c) of the PFMA).

[9] These provisions read as follows:

Regulation 16 A.6.4:

> "If in a specific case it is impractical to invite competitive bids, the accounting officer or accounting authority may procure the required goods or services by other means, provided that the reasons for deviating from inviting competitive bids must be recorded and approved by the accounting officer or accounting authority."

Paragraph 3.4.3 of the practice notice provides as follows:

> "Should it be impractical to invite competitive bids for specific procurement, e.g. in urgent or emergency cases or in case of a sole supplier, the accounting officer/authority may procure the required goods or services by other means, such as price quotations or negotiations in accordance with Treasury Regulation 16A6.4. The reasons for deviating from inviting competitive bids should be recorded and approved by the accounting officer/authority or his/her delegate. Accounting officers/authorities are required to report within ten (10) working days to the relevant Treasury and the Auditor-General all cases where goods and services above the value of R1 million (VAT inclusive) were procured in terms of Treasury Regulation 16A.6.4. The report must include the description of the goods or services, the name/s of the supplier/s the amount involved and the reasons for dispensing with the prescribed competitive bidding process."

[10] The jurisdictional facts for a proper deviation from the tender procedures in terms of these provisions therefore are:

(a) There must be valid and rational reasons for the decision to deviate from the usual tender procedures;

(b) The deviation must be approved by the accounting officer; and

(c) The reason should be recorded and reported to the relevant treasury.

Both counsel were in agreement that while the requirement in (a) and (b) are peremptory and the absence of valid reasons would visit the award with invalidity, the recording of those reasons is a formal requirement which is meant only for administrative purposes. **(Chief Executive Officer, African Social Security Agency and others v Cash Paymaster Services (PTY) LTD 2012 (1) SA 216 (SCA) at 224, para8).**

[11] It has been held in a number of cases that the failure by a public body to comply with peremptory competitive tender procedures, visits any contract concluded pursuant thereto with invalidity, despite possible harsh consequences for the innocent party. See in this regard: **Municipal Manager: Qaukeni Local Municipality and Another v FV General Trading CC 2010 (1) SA 356 (SCA) at 361, para 15.** See also: **Eastern Cape Provincial Government v Contractprops 25 (PTY) LTD 2001 (4) SA 142 (SCA), at 148, para 9.**

[12] While the respondent has initially challenged the *locus standi* of the applicant to attack the validity of the decision, this point was understandably abandoned by its counsel, *Mr Hefer* in his heads of argument. It is trite law that a public body is entitled, and in certain

circumstance duty bound, to approach a court of law to set aside its own irregular administrative acts. **(Municipal Manager: Qaukeni (supra) at 364 E-H).**

DISCUSSION

[13] Rule 53 of the Uniform Rules of Court provides for the usual situation where the validity of administrative action is assailed by a member of the public. In such a case the relevant functionary or public body which took the administrative decision is required to produce the record of the proceedings and the reasons for it. The reviewing court or tribunal would therefore have before it all the necessary information to enable it to judiciously pronounce on the validity of the impugned administrative action. The onus is then on the party who alleges the invalidity to convince the court that there are valid grounds for review. The public functionary would in such a case be assisted by the presumption of validity contained in the maxim *omnia praesumumtur rite esse acta*. There is in my view no reason why the approach should be different, where in a case such as this, a public functionary has assailed the validity of its own administrative act. The above-mentioned legal presumption would still be applicable and the onus remains on the party who alleges invalidity to establish the facts required to prove that the act was indeed irregular.

[14] The respondent has contended in this regard that Dr Nkem-Abonta, whose decision is being impugned, should have been cited as an interested party to these proceedings. I do not believe it is necessary for me to decide this issue, suffice it to say that I agree with Mr *Hefer's* submission that at the very least his affidavit should have been placed before the court. No attempt has been made by the applicant to approach Dr Nkem-Abonta to file an affidavit wherein he explains the basis on which he had taken the decision to depart from the usual tender

procedures. The applicant elected instead to approach the court on the basis of its inability to establish the reasons for his decision.

[15] On the respondent's version its services had indeed been procured on an urgent basis. The deadlines which the department had prescribed for the submission of proposals, as well as the prescribed commencement and completion dates, are all indications that, at least in Dr Nkem-Abonta's mind, the services were to be rendered on an urgent basis. There is nothing before me to suggest that this decision was arbitrary or that there were no objective reasons justifying the departure from the usual prescribed tender procedures. Paragraph 3.4.3 of the Treasury Practise Note clearly sanctions a departure from the usual tender procedures on this basis. There is therefore a presumption that the said administrative act was regular and it was incumbent on the applicant, who is the party alleging the invalidity, to place the relevant facts before the court in order to prove the contrary. He has failed to do so.

[16] Regarding Dr Nkem-Abonta's alleged failure to call for three quotations in accordance with paragraph 3.4.3 of the Treasury Practice Note, I agree with Mr Hefer that it is not apparent from the aforesaid provision that this is in fact a requirement. However, even if this were to be read into the aforesaid provision by virtue of the wording of paragraph 3.3.3 (which relates to transactions, the value of which are R10 000.00 but not exceeding R500 000.00), this issue must still be decided on the basis of the facts as averred by the respondent, namely that three quotations had in fact been called for.

[17] In the result I am of the view that the applicant has not been able to prove that Dr Nkem-Abonta did not have valid reasons for his decision to depart from the usual tender procedures and to procure the applicants' services in accordance with paragraph 3.4.3 of the Treasury Practice Note.

ORDER

[18] In the result the application is dismissed with costs.

J SMITH
JUDGE OF THE HIGH COURT

APPEARANCES:

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