

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No: 3401/2011

In the matter between:

JORIAN CONSTRUCTION CC

Applicant

and

TOKOLOGO LOCAL MUNICIPALITY

1st Respondent

COLEMO PROJECTS

2nd Respondent

JUDGEMENT:

MATHEBULA AJ

HEARD ON:

22 SEPTEMBER 2011

DELIVERED ON:

15 DECEMBER 2011

- [1] The applicant is approaching the court seeking and interim interdict pending an application to review and set aside the award of contract awarded by the first respondent to the second respondent. This was for the provision of bulk water under tender number **TLM/BWS/BL/3** in Hertzogville. The matter is duly opposed by the first respondent.

- [2] The first respondent called for tenders for provision of work as explained which closed on the 8th December 2010. The tender was to construct approximately 10 kilometres water pipeline from Christiana to Hertzogville. On the 8th December 2010 the tenders were opened in public and read out loud. The applicant was the one who tendered at the lowest price. It is on this basis including points to be earned on functionality that the applicant formed the impression that success has been achieved. The tender will be awarded to the applicant.
- [3] The applicant enquired on a monthly basis regarding the tender but to no avail. It was only in August 2011 that the applicant learned that the tender had been awarded to the second respondent. The reasons were sought from the respondent as to why the applicant was unsuccessful. These could not be provided and this led to this application.
- [4] The requirements for an interim interdict have well been established in our law. These requirements as set out in **SETLOGELO v SETLOGELO** 1914 AD 221 at 227 are the following:

1. A prima *facie* right.
2. A well granted apprehension of irreparable harm, if interim relief is not granted and the ultimate relief is eventually granted.
3. The balance of convenience in favour of the granting of the interim relief.
4. The absence of any other adequate ordinary remedy.

[5] I will deal with these requirements at a later stage. The applicant did make enquiries from the first respondent in terms of the provision of Promotion of the Administrative Act 3 of 2000. It is not in dispute that this tender process is an administrative action.

[6] It was submitted by Mr Grobblers that the first respondent did not act in a fair, equitable and transparent manner. In actual fact the first respondent provided arbitrary reasoning why the second respondent was awarded the tender.

[7] Mr Knoetze submitted that the applicant knew of the

disqualification by not complying with the requirements. Further, the first respondent waited too long for reasons much to its detriment. He further submitted that once the tender is non responsive, the issue of price becomes irrelevant. Further, it was also irrelevant to refer to the Construction Handbook as it carried no legislative value.

- [8] The requirements in matters of this nature are for the applicant to show that there is a prima facie right. The correct approach was succinctly stated by MALAN J (as he then was) in **JOHANNESBURG MUNICIPAL PENSION FUND v CITY OF JOHANNESBURG** 2005 (6) SA 273 (W)

- “1. *exists when there is a prospect for success in the claim for the principle relief, albeit that such prospect may be assessed as weak by the judge who hears the interim application.*
2. *to be satisfied that the review application which is to be brought, is not frivolous or vexatious, and that some plausible justification is present which is based upon the facts which were put up before that Court.”*

- [9] This was the approach of the court by DENNIS J in **CIVILS 2000 (PTY) LTD v INTERSITE PROPERTY MANAGEMENT SERVICES (PTY) LTD AND TWO OTHERS** (Case Number 25288/2009). It is not a mere allegation of taking a matter on review but it must be a serious matter. The right to be proved must not be frivolous or vexatious. In this matter, I am satisfied that given all the facts there seems to be flaws which may be fatal. A public body need to act in an equitable, fair and transparent manner. There need to be balanced reasoning for all decisions taken and not in an arbitrary manner.
- [10] This tender is for a period of a year. It stands to reason that unless the relief is granted the review may be of academic value when granted or denied. The action for damages must pass a stringent test in order to succeed. This means that there exists no alternative remedy in this regard. It does not mean that the tender will be awarded to the applicant.
- [11] It was submitted that the community of Hertzogville will be severely prejudiced if services are not adequately and promptly provided to them. Several waterborne diseases will

be the order of the day which will cause health hazard and bring hardship to the community. Further that this was a project initiated from the National Government Department. If the money is not utilised, it will be rolled back and such funds may not be allocated again. Although the submission is made in this regard, I am not privy to the extent of such allegations. This aspect is dealt with by the court in CIVILS SUPRA where the judgment by BINNS-WARD AJ (as he then was) in **SEARLE v MOSSEL BAY MUNICIPALITY AND OTHERS** (unreported 12 FEBRUARY 2009) is cited with approval at paragraph 29:-

“When it comes to the balance of convenience... in the situation in which the applicant has on the current state of the papers, established her alleged prima facie right quite strongly, the prejudice of the respondents that will be occasioned by a cessation of the building work, must be subordinate to the applicant’s entitlement to the enforcement of a principle legality”.

I could not find no reasons to depart from what is stated by court in the above matter.

[12] I make the following order:-

12.1 Pending the finalisation of a review application that the applicant stands to launch against the decision by the first respondent to award the contract for the construction of the Regional Bulk Water Supply Phase 1: Hertzogville Bulk Water Pipeline under tender number TLM/BWS/PL/3, to the second respondent;

12.2 The first respondent is interdicted and restrained from executing in any manner whatsoever upon the contract concluded and pursuant to the granting of the tender by the first respondent to the second respondent;

12.3 First respondent is interdicted from further implementing or acting upon the award of tender in favour of the second respondent;

12.4 The second respondent is interdicted in carrying out any works envisaged by the tender and/or any other contract concluded pursuant to award thereof;

12.2.1 The applicant shall institute the review referred to in paragraph 1 within thirty (30) days of this order;

12.2.2 First Respondent is ordered to pay costs of
this application.

M.A. MATHEBULA, AJ

On behalf of the applicant:

Adv. S. Grobler
Instructed by:
Gous Vertue & Associate
BLOEMFONTEIN
Ref: CV463

On behalf of the respondents:

Adv Barnard Knoetze SC
Instructed by:
Stander & Partners
BLOEMFONTEIN
REF: HJS/cvdm/GT0098