

11/12/2009

IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG HIGH COURT, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ~~YES~~/NO.

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO.

(3) REVISED. In the matter between:

11/12/09

DATE

DFS FLEMINGO SA PTY (LTD)

SIGNATURE

CASE NO: 59131/09

APPLICANT

And

AIRPORT COMPANY SA (PTY) LTD

BIG FIVE DUTY FREE (PTY) LTD

THE TENDER BOARD OF ACSA

FIRST RESPONDENT

SECOND RESPONDENT

THIRD RESPONDENT

JUDGMENT

TOLMAY AJ

Applicant applied for urgent interim relief pending the review and setting aside of a tender award and a contract based on such a tender. A review application was instituted during November 2009.

Urgency

The Applicant alleges that the matter is urgent in that if no interim relief is granted the effluxion of time may result in the applicant, even if successful, not being granted effective relief.

The Respondents on the other hand contend that the matter is not urgent.

In the light of the fact that the implementation date of the tender is 1 March 2010, I regard it in the interest of justice to adjudicate on this matter on an urgent basis.

Background

The first Respondent issued invitations to bid for the operation of the Core Duty and VAT free stores in the International Departures and Arrival Airside Terminals at O R Tambo International Airport, Cape Town International Airport and the new International Airport at La Mercy (North of Durban).

The Applicant submitted a tender but the tender was awarded to second Respondent. Second Respondent is the present incumbent of the duty free stores. The first and second Respondent entered into a written agreement on 25 September 2009. The effective date of the agreement is 1 March 2010.

The Applicant alleges that the content of the tender was formulated in a manner which benefitted the present incumbent and prejudiced other bidders. The Applicant requested information in respect of inter alia turnover figures and information regarding the top 10 selling items under each category with their respective selling prices. Applicant was refused the information. Applicant alleges that it needed the information in order to develop a more comprehensive and meaningful proposal. The first

Respondent refused to divulge duty free turnover details of the shops because it was confidential information pertaining to the second Respondent's business. Obviously as a result of the second Respondents present position the information was available to second Respondent. Applicant also complained that the respective weightings allocated to criteria and sub-criteria needed to be disclosed to all tenderers.

The Applicant alleges that due to the aforesaid second Respondent was in a better position to formulate a winning bid. The lack of transparency placed the second Respondent in a better position than other bidders, according to Applicant.

The further allegation is that in the light of the fact that the respective weightings allocated to criteria and sub-criteria were not disclosed the procedure followed was not fair and equitable.

Applicable legal principles

1. The first Respondent is a public entity in terms of the Public Finance Management Act (PFMA) and is enjoined in terms of sec 217 of the Constitution and sec 51(a) (iii) of the PFMA to procure goods and services by means of a system which is fair, equitable, transparent and cost effective.
2. As a result of the aforesaid Applicant is entitled to procedure that complies with the aforesaid legislation.
3. In order to succeed with an interim interdict the Applicant must prove

- (i) A prima facie right;
- (ii) A well grounded apprehension of harm;
- (iii) That the balance of the convenience favours it
- (iv) That no other satisfactory remedy is available.

See: L F Boshoff Investments (PTY) Ltd v Cape Town Municipality; Cape Town Municipality v L F Boshoff Investment (PTY) Ltd 1969 (2) SA 256(C) on 267 B – E

Prima facie right

In order to establish whether a prima facie right exists, I need to consider the facts 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 obtain final relief at the trial. The facts set up in contradiction by the Respondent should then be considered and if they throw serious doubt on the Applicant's case the Applicant cannot succeed.

On an evaluation of the facts in this case the Applicant is entitled to fair and just administrative procedure. Due to the fact that Applicant did not get the information it requested it could be argued that it was not treated fairly and on equal footing with the Second Respondent. It could also be argued that the weightings allocated to the different criteria should have been revealed to the bidders. Consequently the Applicant did prove a prima facie right.

Balance of convenience

The Applicant alleges that since Second Respondent is the present incumbent there is no short term issue of handover from one successful bidder to another. It is argued that the granting of interim relief will not prejudice the First and Second Respondents in that the operation of facilities will continue uninterrupted until the review application has been finalised.

The Respondents contend that the balance of convenience favours them in that they should proceed with the concluded agreement pending the finalisation of the review application. Due to the long term of the contract, 10 years, the Applicant will have more than enough time to challenge the existing contract in due course. The Respondents will be greatly inconvenienced if the contract is not proceeded with.

In my view it is not in the interest of any of the parties to perform in terms of a contract that could be set aside by the Court hearing the review application.

Irreparable harm

Applicant alleges that if First and Second Respondents are permitted to proceed with the implementation of the tender the outcome of the review application will be academic and potentially nugatory. The Respondents dispute this and argues that there will be no irreparable harm.

It is however conceivable that if an interdict is not granted the Applicant could suffer irreparable harm.

No other satisfactory remedy

The Respondents argued that the review application is a sufficient alternative remedy and that therefore I should not grant an interim interdict. This argument however loses sight of the fact that if the terms of the contract are complied with during the time pending the determining of the review application any relief granted may become academic.

Consequently the Applicant did prove the requirements for an interim interdict.

I make the following order:

1. Pending the finalisation of the review and setting aside of the tender and/or setting aside of the decision of the First Respondent and/or Third Respondent to award a tender for the operation of the Core Duty and VAT free stores in the international departures and arrival airside terminals at OR Tambo International Airport, Cape Town International Airport and the new International Airport at La Mercy (North of Durban KZN) in terms of bid reference number CDF08 05/2009 ("the tender").
 - 1.2 The First and Second Respondents are interdicted from implementing and performing in terms of any contract concluded between the First and Second Respondents, pursuant to the award of the aforesaid tender.
2. Costs of this application is to be costs in the review application.


R TOLMAY
ACTING JUDGE OF THE
HIGH COURT