

IN THE HIGH COURT OF SOUTH AFRICA
(ORANGE FREE STATE PROVINCIAL DIVISION)

Application No. 1291/2004

In the matter between:

MILLENIUM WASTE MANAGEMENT
(PTY) LIMITED

Applicant

and

THE CHAIRPERSON OF THE FREE
STATE PROVINCIAL TENDER BOARD

First Respondent

THE MEC FOR FINANCE:
FREE STATE PROVINCE

Second Respondent

THE MEC FOR HEALTH:
FREE STATE PROVINCE

Third Respondent

COMPASS WASTE SERVICES
(PTY) LTD

Fourth Respondent

CORAM:

MALHERBE J.P.

HEARD ON:

7 MAY 2004

DELIVERED ON:

11 MAY 2004

During December 2003 the Free State Department Health invited tenders for the supply and delivery of medical waste services for the province for a period of 3 years. A document bearing the heading “Special Conditions” (Annexure “FA3”) was made available to all prospective tenderers. The first condition was a compulsory site inspection on 7

January 2004 after a visit to the office of the Department's contact person, a certain Mr De Villiers. Condition 6 reads as follows:

"A price breakdown (i.e. labour, equipment, transport etc) regarding the tender price should be included in the tender document."

Thereafter the following words appear in bold letters:

**"FAILURE TO ADHERE TO ANY OF THESE CONDITIONS WILL
INVALIDATE THE TENDER OFFER."**

Applicant and Fourth Respondent were 2 of 9 tenderers. Applicant's tender did not include a price breakdown whereas Fourth Respondent's did. On 29 March 2004 the Health Department accepted Fourth Respondent's tender. Applicant has now approached the Court on an urgent basis for the following relief:

- "2. The pending the finalisation of the application for review, as referred to in Part B hereafter, the First Respondent be interdicted from implementing the tender with reference DOH 127/03/04 ("the tender"), for the supply and delivery of medical waste services in the Free State Province.
3. That the costs of this application be reserved pending the outcome of

the application for review, referred to hereafter;

3.1 Save and in the event of any of Respondent/s opposing the relief sought herein, in which event that Respondent/s be ordered to pay the costs of this application; and

3.2 That the costs of this application include the costs consequent upon the employment of two counsel.”

Part B of the notice of motion seeks the following orders:

“1. That the decision of the First Respondent to award to the Fourth Respondent the tender with reference DOH 127/03/04 (“the tender”), for the supply and delivery of medical waste services in the Free State Province, be reviewed and set-aside.

2. That the tender be remitted back to the First Respondent for re-decision.

3. That the costs of this application be paid by the First Respondent;

3.1 Alternatively, jointly and severally by any of those Respondents opposing this application;

3.2 Which costs are to include those costs incurred pursuant to Part A hereof; and

- 3.3 Are to include the costs consequent upon the employment of two counsel.”

It appears from the affidavit of Mrs Gouws on behalf of Third Respondent that there is no longer a Free State Provincial Tender Board in existence, it having been abolished by provincial legislation. She also states that Fourth Respondent’s tender was approved by the Head of the Department of Health. In any event, she deposed to her affidavit on behalf of Third Respondent. Fourth Respondent also opposes the application.

All the parties agree that this matter is urgent. Moreover, it appears from Fourth Respondent’s answering affidavit (deposed to by its Managing Director, Mr du Randt) that it has commenced with implementing the tender on 1 May 2004; has employed 14 people specifically to render services under the tender and has already incurred capital expenditure totalling approximately R1,479 million to purchase equipment and specialised vehicles to transport medical waste. It has also rented premises in Bloemfontein and has caused computers and telephone lines to be installed in these premises.

Applicant's case is set out as follows in paragraph 12 of its founding affidavit:

“12. The Applicant seeks to review the decision of the First Respondent to award the tender to the Fourth Respondent, on the grounds that at the first site inspection, the Applicant was instructed by the First Respondent's representative that it was not necessary for the Applicant's tender to include a breakdown of its tender price, this being one of the “special conditions” of the tender. Based on this representation, the Applicant was induced by the First Respondent not to include this particularity in its tender. Despite the First Respondent's aforesaid instructions, it has nevertheless seen fit to invalidate the Applicant's tender, on the ground that the Applicant's tender was not accompanied by a breakdown of its tender price.”

It is common cause that the official referred to in this paragraph is a certain Mr de Villiers. He did not depose to an affidavit. On behalf of Third Respondent Mrs Gouws says the following in reply to paragraph 12 of Applicant's founding affidavit:

“ 16.

16.1 I deny that the First Respondent's representative advised the Applicant or any other tenderer that it was not necessary to include a breakdown of the tender price in the Applicant's or anybody else's tender. There was thus no misrepresentation on the part of any

official of the Department. I, at all times, was with Mr De Villiers, an Assistant Director: Environmental Health, who at the time was an Environmental Health Inspector and an expert in this field. At the site meeting he handled the technical specifications. It was I who dealt with the tender document at the pre-site meeting in the offices of Mr De Villiers. To the best of my knowledge Mr De Villiers did not even know of the contents of the tender document.

- 16.2 On the 7th of February 2004 there was a pre-site meeting in the Board Room of Mr De Villiers' office. I dealt with the administrative matters relating to the tender and emphasized various aspects thereof. One of the aspects I specifically emphasized were the six items referred to in "FA3". I specifically emphasized that the tenderer's office would be invalidated in the event of any failure to adhere to the conditions referred to in "FA3". I admit that the Applicant's tender was invalidated on the basis that it was not accompanied of a breakdown of its tender price. There were, however, no instruction that these conditions need not be complied with. To the contrary, such instructions or representation would be contrary to standard policy and procedure."

Mr Venter, a special projects manager employed by Fourth Respondent, attended the site meeting on 7 January 2004. He confirms Mrs Gouws' account quoted above by saying that

"he does not recall De Villiers informing anyone gathered at the site

inspection that they should not concern themselves with the requirement of a price breakdown and that it would be sufficient for the purposes of submitting a valid tender if only the total monthly price was set out in the pricing schedule.”

On this crucial issue there is, therefore, a dispute of fact. On behalf of Applicant Mr Wasserman suggested (in the alternative) that this dispute should be referred for oral evidence as it is capable of speedy resolution. His main argument was that Applicant had satisfied all the well-known requirements for a temporary interdict. I intend dealing only with the requirements of irreparable harm and the absence of another satisfactory remedy.

Irreparable harm:

The main relief sought by Applicant is set out in prayer 2 of the notice of motion viz. to interdict the province from implementing the tender awarded to Fourth Respondent. It appears from Third and Fourth Respondents’ answering affidavits that a contract has already been concluded between the province and Fourth Respondent and that the latter has been rendering services in terms of the contract since 1 May 2004. It follows that the tender has already been implemented and that its

implementation cannot now be interdicted.

The harm that Applicant foresees is a loss of revenue from 4 of the 32 provincial hospitals in the Free State; the retrenchment of workers already trained by it and the loss of revenue from the sale of medical waste containers to the remaining 28 hospitals. In reply to these allegations Third Respondent says the following:

“ 53.

While one of the reasons for the tender was because of the new legislation which was being anticipated the main reason for the tender was because the hospitals did not have the capacity to dispose of their own waste material. Such disposal was not in accordance with the environmental legislation applicable; certain mishaps had occurred, such as the starting of a fire in the veld and there was every possibility that had the situation remained as it was the Department of Health would have been subject to legal proceedings. It is therefore essential for the contract in respect of all relevant Provincial Hospitals to be executed.

54.

In view of the contract already concluded between the Third and Fourth Respondents, the rights and obligations contained therein, and the urgent need for the disposal of all waste material to be outsourced there are no grounds for the granting of an interdict.”

On behalf of Fourth Respondent Mr Pammenter correctly points out that loss of revenue is not irreparable. If Applicant can prove the alleged

misrepresentation by De Villiers and that it has lost revenue as a result thereof, it can claim damages from the Province. There is no suggestion that such a claim cannot be met.

No other satisfactory remedy:

What I have said above regarding a claim for damages applies equally to this requirement for a temporary interdict.

In my view Applicant does not meet the requirements for a temporary interdict.

Both Applicant and Fourth Respondent made use of the services of two counsel. This matter is of sufficient importance to both parties to merit the employment of two counsel. There is no reason to deprive the successful party of the costs of a second counsel.

In the result the application is dismissed with costs, including the costs of two counsel.

J.P. MALHERBE, J.P.

On Behalf of Applicant:

Adv. J.G. Wasserman SC
assisted by:
Adv. A.J. Eyles
instructed by
Webbers
Bloemfontein

On Behalf of Third Respondent:

Attorney I.P. Gough
State Attorney
Bloemfontein

On Behalf of Fourth Respondent:

Adv. C.J. Pammenter SC
assisted by:
Adv. A.V. Voormolen
instructed by
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