

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NUMBER: 6740/2011

DATE: 2011-05-04

In the matter between:

F2 WAARDEERDERS BK

t/a SUID-KAAP WAARDEERDERS

Applicant

and

OUDTSHOORN MUNICIPALITY

1st Respondent

BUY-LINE TRADING 109 (PTY) LTD

t/a M3 & ASSOCIATES

2nd Respondent

JUDGMENT

LE GRANGE. J:

This is an application brought on an urgent basis by the Applicant against the First Respondent, hereafter referred to as The Municipality, to furnish them with certain documentation. The Second Respondent abides by the decision of this Court.

The matter was argued on the 20th of April 2011, and, pursuant to argument, I

indicated to counsel that, as a result of the Easter weekend and various subsequent public holidays, I will make my finding known today.

Before granting the order, I wish to make the following remarks, and will amplify them, if necessary.

The Applicant, F2, was part of a bidding process for a tender with the Municipality. On 13 December 2010 The Municipality informed F2 that the Second Respondent, which I will refer to as M3, was the successful bidder. The subsequent events leading up to the launch of this application on the 28th of March this year can be summarised as follows.

On the 22nd of December 2010, F2 lodged an appeal, or an objection, and raised, *inter alia*, the following grounds of appeal. Firstly, F2 is as qualified, if not more, as the tenderer to whom the tender was awarded. Secondly, M3, who had been awarded the previous tender, had not carried out its obligations in terms of the awarded contract. Thirdly, The Municipality's consultant who facilitated the tender process, was neither neutral nor independent. Finally, F2's tender amount is significantly less than the price quoted by the successful tenderer.

In the appeal document F2 also requested the reasons for The Municipality's decision, including copies of the score cards used in the tender process, and a request that The Municipality not allow M3 to commence work in respect of the work covered by the tender.

On 13 January 2011 The Municipality responded, and in which response dealt with

the various grounds of appeal raised by F2.

It stated, *inter alia*, that it never assumed that F2 did not have the necessary qualifications or experience, but that there were also other requirements to adhere to. The consultant appointed by The Municipality was never part of the Evaluation or Adjudication Committee, which only consisted of municipal officials. The tender was for four years, and is not only evaluated according to the general valuation, or the face value of the tender, but over the full term of the tender, as indicated in the specifications. The tender was thus considered on the total cost effectiveness. The Municipality concluded by stating that if it did not hear from F2 in five days, it would assume the matter to be closed.

On 14 January 2011 a letter was received from F2's attorneys, indicating that F2 could not respond in five days, due to the commitments of F2's members. On the 25 of January 2011 The Municipality wrote a letter to F2 inviting them to a "*without prejudice meeting*" on Tuesday, 1st February 2011 to explain how the calculations for price were determined by The Municipality in order to reach comparative quotes and to identify the preferred bidder. F2's attorneys received the letter, per fax, on the 27th of January 2011. The Municipality expresses confidence that if F2 saw the calculations and effort made by The Municipality it would accept its decision.

On the 28th of January 2011 F2's attorneys confirmed with the Municipality that the meeting would take place on the 4th of February 2011, and requested The Municipality to make available copies of M3's tender, as well as tender documents for the previous evaluation roll of M3, and sought permission to take these copies and documents back to George to study.

On the 1st of February 2011, in a letter addressed to F2, The Municipality adopted the stance that it would not make M3's tender available, as it constitutes the kind of information which is protected under section 42 of PAJA (Promotion of Administrative Justice Act, 3 of 2000). It also reminded F2 that the whole intention of the meeting was to "*in good faith*" explain to F2 how comparative prices were determined, and that, during the meeting, certain relevant information would be shown to F2 on a without-prejudice basis. The Municipality also stated that it was concerned that F2 sought to delay the process with its requests.

On the said date, the meeting was held to discuss the appeal of F2 against The Municipality's decision regarding the tender. The Municipality also indicated at such meeting, that the objection by F2 could be considered by an independent and impartial person not directly involved in the supply chain management process.

On the 17th of February 2011 the attorneys of F2 responded to The Municipality's letter of the 1st and 4th of February, and denied that F2 sought to delay the implementation of the tender and insisted they be given access to the tender documents of M3, which, allegedly, were necessary to prepare the case of F2.

The Municipality replied on the 24th of February 2011, and reiterated its stance that it was precluded from releasing commercially-privileged information, and emphasised that the offer extended to F2 was to inspect and to consider, on an informal basis, the information which was considered by the Bid Evaluation Committee, and the Bid Adjudication Committee. Moreover, it informed F2 that it

had decided to refer the dispute, in terms of Regulation 15(5) of the Municipal Supply Chain Management Regulations, to the Provincial Treasury for resolution.

On 14th March 2011 F2's attorneys responded to The Municipality's letter of the 24th of February 2011, indicating that they were preparing papers to compel The Municipality to provide the information set out in the letter. On the 28th of March 2011 this application was launched and the documents requested in the notice of motion are essentially the copies of M3's tender documents, as well as the documents relating to the tender, compiled by the Bid Evaluation Committee and the Bid Adjudication Committee and the score cards.

It is trite law that a party seeking to bring an application on the basis of urgency must set forth explicitly the circumstances which he avers renders the matter urgent, and the reasons why he claims that it could not be afforded substantial redress at the hearing in due course.

In paragraph 35 to 35(3) of the Applicant's founding affidavit the following is recorded - and I quote:

"Ek voer aan dat die huidige aansoek dringend is, indien die volgende feite in ag geneem word.

35.1. Die key task functions wat aangedui word op bladsy 32 van SDS1 toon sperdatums wat reeds verstryk het. Met die aflegging van hierdie verklaring is die enigste blyke van eerste respondent se houding dat dit M3 opdrag gegee het om met die kontrak voort te gaan. Dit het hoegenaamd nie

gereageer op applikant se versoek om sodanige opdrag terug te hou totdat die dispuut tussen applikant en eerste respondent gefinaliseer is nie.

35.2. Sonder die dokumentasie wat applikant van eerste respondent versoek, is applikant nog in staat om die prosedure in terme van Regulasie 50 van die Municipal Supply Chain Management Regulations behoorlik te volg, nog om sy verdere regie tot hersiening, of die eis van skadevergoeding betyds te oorweeg en uit te oefen.

35.3. Die volg van die tydperk uiteengesit in die Promotion of Administration of Justice Act, Wet 3 van 2000, sal beteken dat M3 reeds soveel van die kontrak waarvoor die tender toegeken is, afgehandel het, dat hersiening waarskynlik nie suksesvol sal wees nie."

These reasons put forward by the Applicant are, in my view, manifestly inadequate to justify the extraordinary urgency with which this application was brought. It is even more remarkable, considering the somewhat resolute exchange of correspondence between the parties during the period, December 2010 and March 2011. and the fact that the Applicant, through its attorneys, took approximately two weeks to respond to The Municipality's letters of 1 and 4 February 2011, and about two and a half weeks to respond to The Municipality's letter of 24 February 2011. In fact, in paragraph 17 of the founding affidavit, the following is recorded regarding some of these delays - and I quote;

"In hierdie verband moet aangemerkt word dat beide van applikant se lede vir dae aaneen waardasies-verpligtinge in ander munisipaliteite en distrikte het,

soms so ver as Strandfontein aan die Weskus. Ter stawing, heg ek 'n opsomming hierby aan van daardie dae van Januahe 2011 tot Maart 2011, wat ek en die ander lid van applikant uitstедig was, as SDS6, 'n totaal van 47 werksdae. Terwyl ons uitstедig is, is dit uiteraard nie moontlik om behoorlike aandag aan aangeleenthede soos die huidige te gee nie. Marais self is deel van 'n twee-man-praktyk, en hanteer dikwels sake op ander dorpe. Hierdie twee gegewe maak dit dikwels moeilik om op kort kennisgewing volledige instruksies te neem van applikant."

In considering these reasons advanced for urgency, the first relates to the deadline dates for the key task functions, as set out on page 32 of SDSL It is said that this shows that The Municipality must have given M3 permission to proceed with the contract envisaged by the tender. These deadlines must have been known to the applicant since the beginning of October 2010, when the invitation to tender was published. Moreover, The Municipality, from the correspondence, repeatedly emphasised the need to resolve the dispute expeditiously, because of the need to adhere to the time frames for the municipal valuations. These deadline dates can, therefore, hardly justify the application being brought on two days' notice to the First Respondent, at the end of March 2011, and, furthermore, being brought with such abbreviated time periods, with no explanation for the preceding delay.

in any event, The Municipality is on record as stating that M3 did indeed start performing work in early February 2011. It has not, however, performed that work in terms of a formal, signed contract between The Municipality and M3, as no such contract has yet been signed by The Municipality, given the current status of the dispute raised by F2.

The second reason for urgency proffered by the Applicant is that the documentation is purportedly necessary in order for F2 to properly follow the procedures in terms of Regulation 50 of the Municipal Supply Chain Regulations, and also to consider or exercise its further rights to bring a review or an action for damages.

The Applicant has entirely failed to demonstrate, on these papers, why it needs the documentation requested to properly follow the procedure in terms of Regulation 50, as it, as long ago as 22 December 2010, alleged there were serious irregularities in the tender process.

Moreover, The Municipality referred the dispute, in any event, to the Provincial Treasury on the 24th of February 2011, as it is entitled to do, in terms of Regulation 54(a), if a dispute is not resolved in 60 days. From the papers filed of record, it is evident that the Applicant did not approach the Provincial Treasury in this regard.

The contention that the documents are thus needed as a matter of extreme urgency for the purpose of participating in Regulation 50 proceedings, in terms of the Supply Chain Management Regulation, is, in my view, contrived.

The information now sought is also plainly not needed as a matter of urgency for any possible damages action. Insofar as information that was genuinely necessary for any such claim to be formulated, the information could be sought and obtained under PAIA (Promotion of Access to Information Act, 2 of 2000).

The third explanation why the application is purportedly urgent, is that adherence to the time periods provided for in the Promotion of Administration of Justice Act 3 of 2000 (PAJA) would mean that M3 would have already completed so much of the contract to which the tender related that a review would probably not be successful.

This justification is, with respect, difficult to understand. Even if any abbreviation of the time periods in PAJA would be required in the event of a review by F2, this can hardly provide a justification for the manner in which this application for information was brought.

Furthermore, the manner in which the Applicant has proceeded with this matter calls into question its seriousness about challenging The Municipality's decision on 13 December 2010 to award a tender to the Second Respondent. A decision at issue was made on 13 December 2010, and an appeal was lodged on 22 December 2010, and reasons were requested. Reasons were furnished on 14 January 2011. The Applicant has waited for more than three months to institute and set down the present proceedings, not for any substantive relief, but merely for documentation. This demonstrates that the alleged urgency was self-imposed by the Applicant

In my view, the Applicant failed to provide proper and adequate reasons for the application to be heard as a matter of extreme urgency. It follows that the application cannot succeed, due to lack of urgency, and, in the result, the following order is made.

THE MATTER IS STRUCK FROM THE ROLL. WITH COSTS

LE GRANGE, J