

IN THE HIGH COURT OF SOUTH AFRICA
(TRANSCAAL PROVINCIAL DIVISION)

CASE NO: 26791\05

19/8/2005

Ekageng Construction (Pty) Ltd
Reg No: 2002\008437\07

Applicant

and

The Member of The Executive Council For
Public Works And Roads, Limpopo Province

First Respondent

The Roads Agency Of Limpopo (Pty)
Ltd Reg No: 2001 \225832\07

Second Respondent

Globul Roads (Pty) Ltd
Reg No: 2004\030989\09

Third Respondent

JUDGMENT

SHONGWE, J

- [1] This is an urgent application by the applicant seeking an interim interdict and ancillary relief, pending the finalization of its contemplated review of the second Respondent's award of tender No T361 \05 to the third Respondent.

- [2] The applicant seeks an order interdicting and restraining the second Respondent from giving effect to the tender awarded to the third Respondent or from concluding a contract with the third Respondent in respect of Tender No T361 \05 in the event that such contract has not yet been concluded pending the final determination of the review proceedings.
- [3] Alternatively, interdicting and restraining the third Respondent from performing or further performing their obligation in terms of any contract concluded in respect of Tender No T 361 \05, in the event that such contract has been concluded, pending the final determination of the review proceedings.
- [4] There is a long and a short answer to the applicant's alleged conundrum. Due to time constraints in the urgent court, I prefer to stick to the short answer for obvious reasons.
- [5] The gist of the applicant's case is that it complied with the relevant Preferential Procurement Policy Framework Act 5 of 2000 ("PPPFA") and its regulations therefore qualified as a black economic empowerment entity, ("BEE"), but that the second respondent failed to consider the applicant as such, and therefore did not award the tender to it. The applicant further points out that the second respondent made

certain arithmetical errors when calculating the evaluation criteria applicable to Tender No T 301\05.

[6] The applicant further states that the second respondent was not entitled to enlist the Services of Empowerdex, a rating agency, to undertake its function in assessing the status of the applicant. The applicant's contention is that the second respondent delegated its powers to Empowerdex which is contrary to the provisions of the PPPFA and its regulations.

[7] This court has to determine whether there was a violation of Section 33 read with the provisions of Section 195 of the Constitution of the Republic of South African in the alleged failure on the part of the second respondent in informing the tenderers in both the tender invitation and the tender specifications of the involvement of Empowerdex in the Adjudication process. I wish to hasten and state that there is no evidence in support of the allegation that Empowerdex was involved in the adjudication process. The objective evidence shows that Empowerdex was consulted to assist and advise the second respondent regarding the ratings. The second respondent only was authorized to adjudicate in the process. Nothing points to the contrary except unfounded speculation.

[8] The second respondent's defence is simply that the applicant failed to comply with the legislative framework and the principle as contained in the tender document. Clause 9.3.1.3 dealing with principles states as follows-

"(b) The equity ownership contemplated in sub-regulation (6.4 (a)) must be equated to the percentage of an enterprise or business owned by individuals or in respect of a company, the percentage of a company's shares that are owned by individuals, who are actively involved in the management of the enterprise or business and exercise control over the enterprise, commensurate with their degree of ownership as (at) the closing date of the tender.

(c) In the event that the percentage contemplated in sub-regulation (6.4(b) changes after the closing date of the tender the tenderer must notify the agency and such tenderer will not be eligible for any preference points."

[9] it is common cause that the closing date for the tender was the 11 May 2005. It is furthermore common cause that as at 11 May 2005, the applicant was not a BEE entity as required. The applicant's BEE structure was only amended on the 18 July 2005 well after the closing date. Consequently the applicant, in terms of sub-clause "C" quoted above, cannot be 'eligible for any preference points'. The fact of the

matter is that on the date of closure of the tender, (11 May 2005) not a single black person was appointed as director of the applicant since the appointments only took place on the 30 May 2005. Therefore the applicant failed, as at the closing date, to comply with preferential procurement legislation or the policy of the second respondent which it accepted as the guidelines in accordance with which tenders would be evaluated.

[10] In a nutshell the second respondent is saying that there are no prospects of success in the intended review proceedings. That there is no *prima facie* right to justify an interim interdict. The requirements of an interim interdict are trite law. (**See Setlogelo vs Setlogelo 1914 AD 221 at 227**). Briefly these are:

- (a) a right *prima facie* even though open to some doubt;
- (b) a well-grounded apprehension of irreparable harm if the interim relief is not granted;
- (c) a balance of convenience in favour of the applicant;
- and
- (d) the lack of another remedy adequate in the circumstances.

[11] The applicant must satisfy the court that all the above requisites have been established, a court has a discretion to refuse to grant the

interdict. In exercising its discretion the court will have regard to the balance of convenience, the magnitude of the doubt in regard to a *prima facie* right, a consideration of all the circumstances, the probabilities of success of the applicant and the nature of the injury which the respondent will suffer if the application is granted. (See **Ndauti vs Kgami & Others 1948 (3) SA 27 (T) at 36-37**).

[12] The applicant cannot claim to have been a BEE entity at the close of the tender as it obviously lacked the essential requirements as provided in the preferential procurement legislation. It follows that it justifiably did not qualify and will never qualify and therefore there is no prospect of any success with the intended review application whatsoever. In other words, no *prima facie* right to a possible review application.

[13] The fact that the applicant created class A and class B shareholder is a clear indication that it never intended to share equally with the black persons. It is also clear that when the second respondent consulted Empowerdex it did so in an advisory capacity and not to involve it in an adjudicatory capacity. I am unable to find any supporting evidence that the second respondent had delegated its powers to Empowerdex. However, nowhere in the preferential procurement legislation and the regulations is the second respondent prohibited from consulting third parties, on the contrary the second respondent is authorized to consult

experts on advisory capacity. The applicant was also advised to consult with Empowerdex to assist it in evaluating its entity whether it was compliant or not.

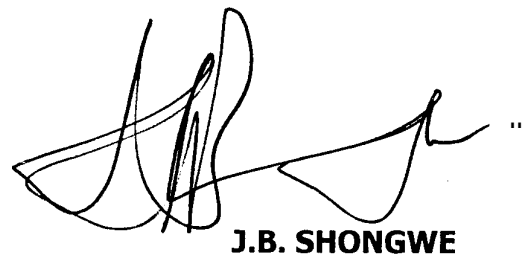
[14] I interpose to mention that the motion to strike out certain two letters marked "Without Prejudice" was heard at the beginning of the hearing. I ruled that the motion should fail because even though marked "Without Prejudice" the contents thereof is of an informative nature and does not prejudice the second respondent in any manner. I think that it is a misnomer to refer to the letters as "Without Prejudice" as they are innocuous to either party. They are infact a clear indication of the spirit of transparency on the part of the second respondent. Practitioners usually use the words "Without Prejudice" as a safety valve even in instances where it is not applicable.

[15] I am thus unable to glean any procedural unfairness which militates against the provisions of the constitution. The second respondent is enjoined to evaluate the empowerment rating of all the tenderers in the evaluation. Consistency and transparency are key to the obligations of the second respondent. If Empowerdex was utilised in the rating of the applicant then the second respondent cannot be seen to use a different rating agency in respect of other tenderers as the criteria would not be the same and that in itself would amount to procedural unfairness.

[16] There are various other non compliances on the part of the applicant for instance, there is no evidence of the registration of the trusts as at the 11 May 2005. The trusts had to be registered as required by the legislative frame work and the conditions of tender.

[17] Therefore based on this short answer to the applicant's predicament, I come to the conclusion that, upon a consideration of all the circumstances and particularly the probabilities of success of the applicant, and the nature of the injury which the second and third respondents would suffer, the balance of convenience favours the second and third respondents. All what the applicant states is that it will suffer irreparable financial harm. No quantification of this financial harm is indicated. The applicant has apparently another remedy adequately to recover whatever financial loss it may incur. Therefore the applicant failed to make out a proper case.

[18] **In the result the application for an interim interdict is dismissed with costs including costs of senior counsel .**

A handwritten signature in black ink, consisting of stylized, overlapping loops and a long horizontal stroke extending to the right, ending in a double quote mark.

J.B. SHONGWE

JUDGE OF THE HIGH COURT

FOR THE APPUCANT: ADV N. CASSIM SC
INSTRUCTED BY: THOMAS AND SWANEPOEL INC c/o VAN DER MERWE AND ASSOCIATES
FOR THE 2nd RESPONDENT: ADV J.J. GOODEY SC
FOR THE 3rd RESPONDENT: ADV C.J. MC ASUN
INSTRUCTED BY:
DATE OF JUDGMENT:
HEARD ON: 12 AUGUST 2005