

/SG
IN THE HIGH COURT OF SOUTH AFRICA
(TRANSVAAL PROVINCIAL DIVISION)

DATE: 19/04/2006
CASE NO: 24770/2005

UNREPORTABLE

In the matter between:

RAUBEX (PTY) LIMITED

APPLICANT

And

ROADS AGENCY LIMPOPO
(PTY) LIMITED

1ST RESPONDENT

MUYAI MALAKA ENGINEERS
(PTY) LIMITED

2ND RESPONDENT

EMPOWERDEX (PTY) LIMITED

3RD RESPONDENT

MURRAY & ROBERTS CONSTRUCTION
(PTY) LIMITED

4TH RESPONDENT

MULTILAYER TRADING 358 CC

5TH RESPONDENT

THAMAFA PROJECTS CC

6TH RESPONDENT

CONCOR HOLDINGS (PTY) LIMITED

7TH RESPONDENT

THUSO-YA-PELE CONSTRUCTION
ENTERPRISE CC

8TH RESPONDENT

KPMM ROADS AND EARTHWORKS
(PTY) LIMITED

9TH RESPONDENT

BR TSIMA CONSTRUCTION (PTY) LIMITED	10 TH RESPONDENT
WBHO CONSTRUCTION (PTY) LIMITED	11 TH RESPONDENT
LESEDISEDI CONSTRUCTION SUPPLIERS CC	12 TH RESPONDENT
PFUNDO CONSTRUCTION CC	13 TH RESPONDENT
WK CONSTRUCTION (PTY) LIMITED	14 TH RESPONDENT
VHAKHUBA CIVIL ENGINEERING AND PLANT ENTERPRISE CC	15 TH RESPONDENT
THIHU BUILDING AND CIVIL ENGINEERING CC	16 TH RESPONDENT
LIMPOPO PROVINCE	17 TH RESPONDENT

JUDGMENT

SERITI, J

A. INTRODUCTION

This is a review application.

In the notice of review application the applicant states that it intends making application to the court for an order in the following terms:

1. That the award by the first respondent of tender no T356/04 to the fourth, fifth and sixth respondents (hereinafter referred to as the “joint venture” and which tender and award pertains to the upgrading of road D3681 from Phiphidi to Donald Fraser Hospital in the Vhembe district of Limpopo be reviewed and/or set aside.
2. That any and all contracts concluded between the first respondent and the “joint venture” pursuant to and/or as a consequence of the award be declared null and void.
3. That the tender referred to in paragraph 1 above be awarded to the applicant.

The abovementioned review application was issued on 28 November 2005.

Prior to the issuing of the review application, applicant launched an urgent application which was issued on 19 October 2005.

On 21 November 2005, my brother PRELLER J granted an order in the following terms:

“1. Interdicting and restraining

1.1 The first respondent from implementing and/or giving effect to, in any manner and/or respect whatsoever, the tender awarded by the first respondent to the fourth, fifth and sixth respondents (hereinafter referred “the joint venture”) and which tender was awarded in respect of the first respondent’s tender no T356/04 and pertaining to road D3681 from Phiphidi to Donald Fraser Hospital in the Vhembe district of Limpopo (“the tender”) alternatively from continuing to give effect to the tender;

1.2 The joint venture and/or any of the fourth, fifth and/or sixth respondents from carrying out any work and/or continuing with any work in terms of the award of the tender and/or any contracts which may have been concluded between the first respondent and the joint venture (and/or any of the fourth, fifth and or sixth respondents;

1.3 The first respondent and the joint venture (and/or any of the fourth, fifth and/or sixth respondents) from concluding any contracts as a consequence of and/or pursuant to the award.

2. That the relief in terms of paragraph 1 above will operate as an interim interdict pending: –

2.1 The furnishing by the first respondent to the applicant of the written reasons for the award as contemplated in terms of the provisions contained in section 5 of the Promotion of Administrative Justice Act no 3 of 2000.

2.2 The furnishing by the first, second and/or third respondents to the applicant of the following

2.2.1 Copies of the winning tender document(s) of the joint venture and including any and all amendments thereof;

2.2.2 Copies of all documents, certificates and reports, including but not limited to those produced by the third respondent on which the second respondent relied for purposes of calculating the Preferential Procurement and/or Historically Disadvantaged Individuals (HDI) status of each of the fourth to sixteenth respondents and/or their respective joint ventures.

2.3 The final determination of the review application referred to in paragraph 3 below.

3. That the relief sought in terms of paragraph 1 above will lapse in the event of the applicant failing, within five days of the receipt of that set out in paragraph 2 above to bring an application for an order in the following terms:

3.1 For the review and/or setting aside of the
award;

4. That in the event of the applicant not succeeding to
upset proposed review, the applicant will be liable to
the fourth, fifth and sixth respondents for the payment
of such loss as the fourth, fifth and sixth respondents
can prove to have suffered as a result of the delay ...”

In the papers dealing both with the urgent application and the
review application applicant requested that leave be granted to it to
bring the proposed review application on the papers filed in the
urgent application, supplemented as and where necessary. The
requested leave was granted to the applicant.

B. FOUNDG AFFIDAVIT – URGENT APPLICATION

The deponend to the founding affidavit is Mr J E Raubenheimer.

He alleges that he is a professional engineer and the managing
director of the applicant.

The different parties are described and the said deponent further alleges that the applicant along with the seventh to sixteenth respondents (in their respective joint ventures) unsuccessfully tendered for the project under consideration. The applicant scored the third highest overall points of the tenderers. The joint venture scored the highest points and was awarded the tender.

First respondent by making its decision to award the tender to the joint venture, performed, an administrative action and in so doing failed to comply with the principles of just administrative action as prescribed by section 33 of the Constitution of the Republic of South Africa of 1996 and the provisions of the Promotion of Administrative Justice Act 3 of 2000 (PAJA).

In terms of the Tender Report prepared by the third respondent and issued by the first respondent, the applicant was ultimately placed third overall on 90.55 points and the joint venture was placed first on 92.71 points. Accordingly, the third respondent recommended the award of the tender to the joint venture, a recommendation confirmed by the first respondent. Had it not been for the patent error pertaining to the calculation of the applicant's HDI status and/or the points allocated to the applicant in respect of same, the

applicant would have scored the highest points and would and should have been awarded the tender.

From Monday 16 May 2005 to Friday 20 May 2005, the first respondent advertised for tenders for contract no RAL/T356/2004. Tender documents were made available at the first respondent's offices from Monday 23 May 2005.

Applicant timeously submitted its tender documents for the project.

The shares in the applicant are held by the following companies:

- | | | |
|-----|---|-------|
| (a) | Kenworth (Pty) Ltd ("Kenworth") | – 20% |
| (b) | Business Venture Investments no 918
(Pty) Ltd (BV) | – 25% |
| (c) | Raubenbel (Pty) Ltd ("Raubenbel") | – 55% |

Kenworth is a 100% black owned, controlled and managed private company. It has 5 equal shareholders who are HDI.

BVI is a 100% subsidiary of Matlapeng Strategic Investments (Pty) Ltd which in turn is a 100% subsidiary of Matlapeng Holdings

(Pty) Ltd. Matlapeng Holdings (Pty) Ltd, in turn, is owned by the following shareholders:

(a)	Millenium Investments (Pty) Ltd	– 10%
(b)	Black Management Forum Investments (Pty) Ltd	– 25%
(c)	Kopana Ke Matla Investment Company (Pty) Ltd	– 26%
(d)	Diedricksen Investment	– 12.5%
(e)	Quco Trust	– 8.5%
(f)	Zamon 5 (Pty) Ltd	– 9%
(g)	Westside Trading 117 (Pty) Ltd	– 9%

Black Management Forum Investment (Pty) Ltd in turn is 70% black owned, and individual black members own 8% shares, and Black Management Forum owns 62% shares.

Kopano Ke Matla Investment Company, the Quoco Trust, Zamori 5 (Pty) Ltd and Westside Trading 117 (Pty) Ltd are all black owned entities.

The third respondent is an Economic Empowerment Rating Agency. In July 2005, the third respondent issued an SMME/HDI Rating Certificate relating to Road Mack Surfacing (Pty) Ltd (“Road Mac”), which is wholly owned subsidiary of the applicant.

As appears from the said certificate the third respondent calculated the “total effective black shareholding” within Raubex Construction (Pty) Ltd to be 37.5%. Reference therein to Raubex Construction (Pty) Ltd should be reference to the present applicant.

As stated earlier, the applicant timeously submitted its tender documents. The second respondent evaluated all the tenders, including those of the applicant and the joint venture, and presented a tender report to the first respondent.

According to the said tender report, the applicant only scored and obtained rating of 3.4% for its “total effective (HDI) ownership”, as a result of which, the applicant was placed third overall on 90.55 points in the tender report and the joint venture was placed first on 92.71 points.

On 4 October 2005 and under cover of a letter dated 30 September 2005, the applicant's attorneys received a fax from the first respondent/s attorneys and to which a copy of a second rating certificate and report prepared and issued by the third respondent were attached. The second rating certificate and report pertained to the applicant and were allegedly used for purposes of evaluating the applicant's tender.

The receipt of the said second rating certificate and report were preceded by a flow of correspondence between the applicant's attorneys, the first respondent and the first respondent's attorneys.

The first letter that was written by the applicant's attorneys relating to the tender is dated 3 August 2005 and was addressed to the Member of Executive Council, Transport and Roads of the Limpopo Province, Mr Stan Motimele. In the said letter, *inter alia*, information and documentations relating to the tender were requested.

In the said letter it is also stated that: –

“Should the required documentation and information not be made available to ourselves on or before 16:00 on Wednesday 10 August 2005 we shall proceed with an application to the High Court to obtain such information. ...
... ..

We also require an undertaking from yourself on or before 16:00 on Wednesday 10 August 2005 that you will place a moratorium on the handing over of the sites to the successful tenderers, pending the finalisation of a review application which our client shall institute (if so advised) in respect of the decisions to award the tenders. Should you fail to furnish such undertaking we shall be instructed to proceed with an urgent application to the High Court to stop the handing over of the particular sites”

On 12 August 2005, the head of the department of transport replied the abovementioned letter. In the said reply, it is stated, *inter alia*, that the abovementioned letter was brought to his attention only on 10 August 2005 and the requested information is in the office of the CEO of the Road Agency and a communication will be send to

the said CEO to make requested information available for onwards transmission to the requestor of the information.

Under cover of letter dated 18 August 2005, Chief Executive Officer of the first respondent sent the documents relating to the tender under consideration to the applicant's attorneys.

In a letter dated 26 August 2005 addressed to the CEO, Roads Agency Limpopo (Pty) Ltd, the applicants attorneys acknowledged receipt of the information they requested. In the said letter, the following is also stated:

“At the outset we would like to take this opportunity to thank you for the manner in which you have attended to this matter. We and our client are indeed of the opinion that the manner in which you have acted in respect of the particular tenders is transparent and we have been placed in a position to advise our client clearly on the particular matters. We commend you for the manner in which you have attended to this matter ...”

In the said letter they also requested information as to how the 3.4 points awarded to the applicant for their HDI points were calculated.

Further correspondence ensued between the applicant's attorneys and the first respondent's attorneys. The applicant's attorneys were quiring the points awarded to the applicant for their HDI's component.

An undertaking, first requested by applicant's attorneys in their letter dated 3 August 2005 that the site will not be handed over to the successful tenderer was never given by the first respondent or its attorneys.

In a letter dated 2 September 2005 addressed to the first respondent's attorneys by the applicant's attorneys, the applicant's attorneys continued querying the points awarded to the applicant for its HDI component. In the said letter the following is also stated:

“When is it intended that the site be handed over to the successful tenderer Messrs M & R C Multilayer / Thamafa

JV? We trust that your client will desist from taking such steps until they have reconsidered the calculation of the points and the award of the tender. All steps taken in this regard shall be at your client's own risk. We are instructed to propose to your client that the previous award of the tender to Messrs M & R C / Multilayer / Thamafa JV be set aside and the award of the tender be made to our client.

We trust that your client will attend to same and that litigation may be avoided. Should it be necessary we are instructed to proceed with a review application and an application to interdict your client from proceeding with the tender pending the review application ...”

Again a letter dated 12 September 2005 was addressed by applicant's attorneys to the first respondent's attorneys advising them that if they do not hear from them on or before 16:00 on 13 September 2005, the necessary application will be launched.

In a letter dated 14 September 2005 the applicant's attorneys advised the first respondent's attorneys, *inter alia* that they are in

the process of preparing to launch an application and the papers will be served and filled in due course.

The deponent of the founding affidavit continues and analyse the Empowerdex report, and pointed out how in his opinion the HDI points awarded to the applicant are incorrect. Correspondence between the parties is dealt with.

The deponent further alleges that after receipt of a telefax dated 30 September 2005 and which was received by the applicant's attorneys on 4 October 2005 wherein the applicant's rating certificate by Empowerdex and the latter's report were included, the applicant decided to launch the urgent application.

The urgent application was issued on 19 October 2005.

The deponent of the founding affidavit further alleges that if the applicant's HDI status points had been correctly calculated, the applicant should have scored a total of 93.28 points which would have been higher than the 92.71 points scored by the joint venture which was awarded the tender.

The work currently undertaken by the joint venture in respect of the project is merely preparatory.

The application was brought as expeditiously as possible. First respondent only made available to the applicant rating certificate of the applicant by Empowerdex and the relevant Empowerdex report on 4 October 2005. Prior to that the applicant's attorneys attempted without success to resolve the matter amicably.

The finalisation of the application has, however, been hampered by the unavailability of the applicant's counsel over the High Court recess and the obvious logistical difficulties possessed by the applicant's principal place of business being in Bloemfontein and his need to attend to the business needs of the applicant's projects throughout Southern Africa yet at the same time consult with the applicant's counsel in Gauteng. Applicant has also spent more than a week attempting to obtain the necessary particulars of the respondents despite expressly requesting same from the Member of the Executive Council, Transport and Roads, Limpopo Province in a letter dated 3 August 2005.

On instructions of the applicant's legal representatives he personally visited the project site on 29 September 2005. It was clear that work had commenced, however, very little had been done. The joint venture appears to have only commenced to "clear and grub" the site. That is the very beginning of the preparatory work. No signboards were up as he saw no signs of any heavy machinery or of a site camp.

3. ANSWERING AFFIDAVITS –

3.1 FOURTH, FIFTH AND SIXTH RESPONDENTS

Mr Simon Siphiwe Nzimande deposed to the said affidavit.

He alleges that he is a director of the fourth respondent, Murray and Roberts Construction (Pty) Ltd ("M & R"). The answering affidavit is tendered in addition, on behalf of the fifth and sixth respondents, Multilayer Trading 370 CC ("Multilayer") and Thamafa Projects CC ("Thamafa") respectively.

It is evident from the correspondence put up by the applicant in its founding papers that, as far back as 12 September 2005, the applicant's attorneys addressed a

letter notifying the first respondent that the applicant's attorneys had been instructed to proceed with the present application.

Five weeks after that letter this application was eventually launched on 19 October 2005 and a copy of the application was only served on Murray and Roberts on the afternoon of Friday 22 October 2005.

In the meanwhile the joint venture in ignorance of the applicant's threat had continued to incur great expenses in performing the contract.

The joint venture has incurred substantial costs and committed itself to obligations to third parties since having been awarded the tender and which will be wasted expenditure if the contract is stopped until the matter is decided.

The costs, already incurred by the joint venture is (six-million four-hundred and ninety-eight thousand and eight hundred sixty three rands) R6 498 863.00 excluding

VAT as at the end of October 2005. The costs that the joint venture will incur for the month of November 2005 are forecasted to be in the amount of R704 998.00. This amount does not include plant (machinery), labour, fuel and material costs. The foregoing costs are comprised of various components, being salaries, wages, hiring of motor vehicles with fuel, establishing of site office, labour accommodation, staff accommodation, plant transportation costs, insurance policies and other running costs.

The total amount in respect of VAT to be added to the costs incurred already (and for the costs forecasted for the month of November 2005) will be R1 008 540.54 bringing the total costs to R8 212 401.54.

As is evident from the foregoing, the prejudice to the joint venture is immense and there can be no question of the project merely being in its preparatory phase.

The joint venture was awarded the tender on the basis of it having scored the highest number of points in the evaluation of the tenders and of the same being compliant with *inter*

alia, the first respondent's preferential procurement policy and/or it being awarded the tender on reasonable and justifiable grounds.

3.2 FIRST RESPONDENT

The said affidavit was deposed to by Mr Themba Fidelio Madale, General Manager, Business Development and Corporate Services of the first respondent.

He alleges that the contract and the continuation of the work pertaining to the tender has already progressed so far that it is a fact accompli and cannot be reversed at all.

The first respondent evaluates and adjudicates the tenders in accordance with the relevant legislation and the tender and policy document of the first respondent.

The preferential point system is the basis for the evaluation which is in accordance with the abovementioned policy.

It is clear that when the applicant's so-called structures are analysed that it endeavours to reflect black empowerment

and control whilst the Previously Disadvantaged Individuals have no real say in or control over the applicant.

It is correct to say that in some instances where the shareholding of a tenderer seems to be complex, Empowerdex is consulted to assist the first respondent in order to be in a position to evaluate the tenderer and more specifically to evaluate the tenderer's compliance with the provisions of the government's reconstruction and development programme.

In doing so, Empowerdex takes into account the first respondent's preferential procurement policy and the draft charter published by the department of Trade and Industry. In terms of the first respondent preferential procurement policy, effective black management and control (participation and ownership of Historically Disadvantaged Individuals) should also be taken into account.

The evaluation and the final adjudication is done by the first respondent who only makes use of the inputs and assistance of various consultants, *inter alia*, Empowerdex.

At the end of the day the evaluation must be in compliance with the requirements of the tender and the first respondent's preferential procurement policy which is in terms of the relevant legislation.

Applicant was evaluated and adjudicated in accordance with the first respondent's policy and did not score enough points to be awarded the tender.

The tender was awarded on 23 July 2005 to the fourth, fifth and sixth respondents, being the joint venture.

The applicant knew or ought to have known about the awarding of the tender at least on Monday 25 July 2005 as it was public knowledge. This is confirmed by the fact that the applicant's attorneys wrote a letter dated 3 August 2005 addressed to the Member of the Executive Council, Transport and Roads, Limpopo Province.

A company known as Raubex Construction (Pty) Ltd tendered on numerous occasions in the past and is thus fully

aware with the tender procedures of the first respondent. The deponent of the applicant's founding affidavit was also a director of Raubex Construction (Pty) Ltd.

In their letter dated 3 August 2005, the applicant's attorneys queried mainly how the applicant's HDI points were arrived at.

The manner in which the applicant's HDI points were calculated is clearly set out in the tender evaluation reports which were send to them on 28 August 2005.

The setting aside of the awarded tender will prejudice the successful tenderer and the public at large.

The public at large, the ratepayers/taxpayers and the first respondent will suffer serious harm and financial losses if the whole process is brought to a standstill and will cost millions more if it has to be redone by another contractor.

New designs will have to be drawn and new tenders will have to be called for, and the whole process will have to start

from scratch costing millions pertaining to the consulting engineers, contractors, etc.

A supporting affidavit was attached. It was deposed to by Mr S M Mnisi a professional civil engineer.

In the said supporting affidavit he alleges that he is the head of the department of engineering of the first respondent.

He has been very closely involved with the planning of roads, the consulting engineers and the invitation and awarding of tenders.

The road which had to be upgraded in terms of the tender under consideration is in a very bad condition.

The road is also very slippery when it rains and is definitely a safety risk and hazard for the traffic, road users and the public at large.

The bridges also need to be upgraded urgently and the contract work cannot be postponed.

The said road is the only access from the villages around Phiphidi, Gondeni, Lunungwi and Tshilapfene to Donald Fraser Hospital and this road is thus very important and in the interest of the public at large and also the residents of the said villages as well as a number of other villages in the vicinity.

He has carried out inspection and there is no doubt that the work by the JV is well underway.

4. APPLICANT'S REPLYING AFFIDAVIT

4.1 TO FIRST RESPONDENT'S ANSWERING AFFIDAVIT

The deponent thereof is Mr J E Raubenheimer, a professional engineer and managing director of the applicant.

He deals with the report of Empowerdex and points out how incorrect is the said report, and he further deals, *inter alia*, with the tender provisions and the first respondent's tender policies, the alleged incorrect allocations of HDI points to the applicant, etcetera.

He further alleges that the applicant has been actively involved in the civil construction industry for over thirty years and is well known and respected in the industry. The applicant has been involved in many large contracts and has an annual turnover of R800 million per annum.

As far as Mr Mnisi's affidavit is concerned, he alleges that same does not give enough details as there is no evidence as to how long is the gravel road which is the subject matter of the tender, and how is the said road a safety risk and hazard and/or why it is now suddenly urgent for it to be attended to. There is furthermore no information as to the number of accidents and/or fatalities on the said road or whether there has been a dramatic increase in same over the past 12 to 18 months.

The contract will in any event take some eighteen months to complete at the very least and the current (dangerous) conditions will remain for the said period.

As is apparent from the founding affidavit and the correspondence annexed thereto, the applicant went out of its way to avoid incurring unnecessary costs and wished to avoid unnecessarily approaching court by obtaining from the first respondent and its attorneys an explanation as to how the 3.4 points was arrived at.

There was ongoing correspondence between the applicant's attorneys and the first respondent and its attorneys in regard to information sought by the applicant's attorneys. It was only after receipt of telefax dated 30 September 2005 that the first respondent's attorneys send the applicant's attorneys the Empowerdex rating certificate and report that the applicant was in a position to consider launching the urgent application.

4.2 TO FOURTH, FIFTH AND SIXTH RESPONDENTS REPLYING AFFIDAVIT

The deponent alleges that it was only on receipt of the second Empowerdex report from the first respondent's attorneys on 4 October 2005 that, *inter alia*, the patent error

underpinning the allocation of HDI points to the applicant in the tender evaluation process became apparent.

The said Empowerdex report was send by the first respondent's attorneys to the applicant's attorneys under cover of a telefax dated 30 September 2005.

It is apparent from the tender documentation that the contract is one for eighteen months. Neither the first respondent nor the joint venture state when work commenced, when the joint venture took occupation of the site and to what extent work has been carried out. When he visited the site on 29 September 2005, very little work had been done. At best for the joint venture, it has only been on site for a period of about two months.

5. REVIEW APPLICATION

The founding affidavit was deposed to by Mr J E Raubenheimer.

He alleges, *inter alia*, that the applicant's attack on the award and the tender evaluation is relatively narrow. The applicant believes that the first, second and third respondents' evaluation process

pertaining to the adjudication of the historically disadvantaged individuals (HDI) status / percentage of tenders and especially that of the applicant was fatally flawed.

Had the applicant been correctly evaluated in respect of its HDI status, the applicant would have been the highest scoring tenderer and would have been awarded the tender. The first respondent's reliance on the HDI rating report produced by Empowerdex was misplaced.

Empowerdex's report on the applicant was fatally flawed as Empowerdex's HDI accreditation of the applicant was premised on draft codes which enjoyed no official status and were in fact "embargoed" and not intended for distribution and publication.

Mr Johan Burmeister qualified civil engineer of the applicant personally visited the site on 23 November 2005.

When visiting the site, Mr Burmeister was attended to by Mr Van Niekerk, the second respondent's resident engineer on site. The latter advised Mr Burmeister that he would need permission from his superiors before he could be of any real assistance and before

he could furnish Mr Burmeister with any information regarding the joint venture's progress with the project.

Mr Burmeister drove over the site and made his own assessment of the joint venture's progress, and the latter advised them, *inter alia*, that in fact in some areas it appeared to him as if the project had been abandoned some time ago and at least few weeks before the interdict was granted, and that according to his calculations the estimated value of the cumulative payment on the project at the date of his visit to the site was approximately R5.5 million and at best for the joint venture R6.0 million.

5.2 FIRST RESPONDENT'S ANSWERING AFFIDAVIT

Same was deposed to by Mr T F Madale, the General Manager of first respondent. In the said affidavit the deponent stated, *inter alia*, that the applicant has tendered on many occasions in the past and therefore knows the tender procedures.

The applicant did not bring its urgent application timeously and its reasons for not doing so, namely unavailability of its counsel is not a good reason.

Furthermore, applicant alleges that the timeous completion of the application was hampered by the fact that Mr Raubenheimer had to attend business needs of the applicant in Namibia, which reason is also not a good excuse for the delay.

As at 26 August 2005 the applicant had received all the information it required to launch the review application.

If the tender award is set aside, new tenders will have to be called and evaluated in accordance with the law and policies of the first respondent.

When granting tenders, the first respondent has certain discretion it exercises and the court cannot exercise the said discretion on behalf of the first respondent.

If the tender is to be reversed there will be need for, *inter alia*, the following:

- all the work done and all the outstanding work will have to be measured and quantified and the rates for the outstanding work will have to be compared.
- the tender rates will have to be applied item by item for all the tenderers in order to come to the revised tendered amounts.
- all tenderers will have to be approached to establish whether their tender rates are still valid since the validity period of 90 days have expired on 21 September 2005.
- should there be an objection by anyone of the tenderers, new tenders will have to be invited, which might take up to sixty days. The new tendered amount will be at least 10% to 15% higher than the current tendered amounts due to price increases on certain items – in short it will cost the taxpayer million of rands more.

A confirmatory affidavit by Mr Mnisi, the professional engineer was attached.

6. APPLICANT'S REPLYING AFFIDAVIT

Same was deposed to by Mr Burmeister, a qualified civil engineer and the applicant's projects and contracts manager.

He deals, *inter alia* with the report of Empowerdex.

He further alleges *inter alia*, that only 7% of the project has been completed.

It was only after receipt of the rating certificate and report prepared by Empowerdex was the applicant in a position to consider launching the urgent application which it then did as expeditiously as possible.

The Empowerdex rating certificate and report were only made available on 4 October 2005 despite the covering letter being dated 30 September 2005.

The applicant's attack on the award and the tender evaluation process is relatively narrow.

After the granting of the interim order, he drove over the site and that his estimation is that approximately 4.5% to 5% of the contract work has been physically completed.

7. APPLICABLE LAW

Section 7(1) of Promotion of Administrative Justice Act no 3 of 2000 provides *inter alia*, that proceedings for judicial review must be instituted without unreasonable delay.

In *Radebe v Government of the Republic of South Africa and Others* 1995 3 SA 787 (NPD) 798A-C, BOOYSEN J said:

“Whilst appeal has to be noted and prosecuted within specified time limits, no such time limits have been specified for the institution of review proceedings of this nature. In the absence of statutory limits the courts have, however, in terms of their inherent powers to regulate procedure, laid down that review proceedings have to be instituted within a reasonable time. There are two principal reasons for the rule

that the court should have the power to refuse to entertain a review at the instance of an aggrieved party who has been guilty of unreasonable delay. The first is that unreasonable delay may cause prejudice to other parties. ...

The second reason is that it is both desirable and important that finality should be reached within a reasonable time in respect of judicial and administrative decisions.”

See also *Kimberly – Clark of SA (Pty) Ltd v Proctor and Gamble SA (Pty) Ltd* 1998 4 SA 1 (SCA) 15A-B; *Associated Institutions Pension Fund v Van Zyl* 2005 2 SA 302 (SCA) 321 para 46.

In *Mamabolo v Rustenburg Regional Local Council* 2001 1 SA 135 (SCA) at 141I-J, p 11, MTHIYANE JA said the following:

“I should add that, even if it had correctly found that the review proceedings had been instituted after the lapse of a reasonable period of time, that was not necessarily the end of the matter. The court was obliged to consider whether the delay should be condoned.”

8. ANALYSIS OF THE RELEVANT FACTS AND FACTUAL FINDINGS

The tenders were advertised from Monday 16 May 2005 to Friday 20 May 2005. Tender documents were available at the offices of the first respondent from Monday 23 May 2005, site inspection took place on 1 June 2005, tender closed on 23 June 2005 and the tender was awarded on 23 July 2005 to the joint venture comprising of fourth, fifth and sixth respondents.

The process from advertising of the tender to the awarding of same took about nine weeks.

The applicant is an experienced civil construction company with an annual turn over of about R800 million and has experience in the tender process.

The probabilities are that the applicant knew about the awarding of the tender under consideration at least a week after same was awarded, that is the week of 25 and 30 July 2005.

This is borne out by the fact that on 3 August 2005, the applicant's attorneys addressed a letter to the Member of the Executive Council, Transport and Roads, Limpopo Province.

In the said letter, the said attorneys requested certain information and documentation, which they said should be made available to them on or before 16:00 on Wednesday 10 August 2005.

They further stated in the said letter that they require an undertaking on or before 16:00 on Wednesday 10 August 2005 that a moratorium will be placed on the handing over of the sites to the successful tenderers pending the finalisation of review application which their client shall institute (if so advised).

On 10 August 2005 they did not receive the requested documents nor the undertaking that a moratorium will be placed on the handing over of sites to the successful tenderers.

On 12 August 2005 Head: Department of Transport, Limpopo wrote a letter to the applicant's attorneys and advised them that their letter has just come to his attention and he will refer their request to first respondent.

On 18 August 2005 the first respondent made available to the applicant's attorneys the requested information and documentation.

If the applicant's attorney had directed their request to the first respondent and not to the Member of Executive Council they might have received the requested information and documentation earlier that they did.

I also do not understand why applicant's attorneys send their request for information and documentation to the Member of Executive Council. Applicant has been involved in tenders for some time and should have known better where to obtain the information and documentation they required.

The undertaking not to hand over the sites to the successful tenderers requested by the applicant in their letter dated 3 August 2005 was not forthcoming from the first respondent, and the applicant failed to launch his urgent application as he threatened.

On 26 August 2005 applicant's attorneys addressed a letter to the first respondent and acknowledged receipt of information send to them and commended the first respondent for the manner in which first respondent attended to this matter.

In the said letter, they also requested full and detailed information on how the 3.4 points awarded to the applicant for its HDI component were calculated.

Because of its experience in tender processes and the failure of the first respondent to give applicant undertaking that the sites will not be handed over to the successful tenderers as they requested in their letter dated 3 August 2005, the applicant should have known that in the meantime the first respondent is likely to enter into a contract with the successful tenderers and hand over sites to the latter.

Applicant should have brought its urgent application to *inter alia*, stop the first respondent from entering into a contract and handing over sites to the successful tenderers much earlier than it did.

After receipt of the letter from the CEO of the first respondent dated 18 August 2005, the applicant had received enough documentation and information to launch its urgent application to prohibit or stop first respondent from handing over the site to the joint venture.

The urgent application was launched only on 19 October 2005 which is about ten weeks after applicant became aware or should have been aware of the awarding of the tender.

Furthermore, when the urgent application was launched, the first respondent had already handed the site to the joint venture and the joint venture had already started performing in terms of the tender.

The review application itself was launched about another two weeks down the line, which is almost twelve weeks after applicant became aware or should have known about the awarding of the tender.

My view is that the applicant's delay to bring the urgent application and review application, in the circumstances of this case is unreasonable. The joint venture commenced work on the

site during September 2005, and the applicant should have brought the urgent application before that date.

The applicant should have brought its urgent application promptly before the consequences of the award of the tender to the joint venture are entrenched.

I think I should mention that in their letter dated 2 September 2005, after receiving the tender report, the applicant's attorneys, *inter alia*, wrote the following:

“When is it intended that the site be handed over to the successful tenderer Messrs M & RC / Multilayer / Thamafa JV? We trust that your client will desist from taking such steps until they have reconsidered the calculation of the points and the award of the tender. ...

We are instructed to propose to your client that the previous award of the tender to Messrs M & RC / Multilayer / Thamafa JV be set aside and that the award of the tender be made to our client.”

It is clear from the above that the applicant was hoping to persuade the first respondent to cancel the award they made to the JV and award the tender to them.

I do not know how the first respondent can agree with their proposal without inviting a variety of difficulties.

The probabilities are that the hope of the applicant that first respondent can simply set aside the award to the JV and award said tender to the applicant also contributed to the delay in bringing the urgent application and review application.

When dealing with urgency in the urgent application, the deponent of the founding affidavit said the following:

“The finalisation of this application has, however, been hampered by the unavailability of the applicant’s counsel over the High Court recess and the obvious logistical difficulties possessed by the applicant’s principal place of business being in Bloemfontein and my need to attend to the business needs of the applicant projects throughout Southern

Africa yet at the same time consult with the applicant's counsel in Gauteng. ...”

The reasons for delay as stated in the above quoted paragraph are unacceptable reasons.

The applicant failed to advance any satisfactory explanation for the delay to launch its urgent application and consequently also its review application.

The urgent application and the review application should have been brought at an earlier stage in order to, *inter alia*, minimise the prejudice to the successful tenderer, first respondent and the community that is going to benefit from the project in question.

The rating certificate and report prepared by Empowerdex were received by applicant under cover of letter dated 4 October 2005, and the applicant delayed to institute court proceedings. The delay is unreasonable as the applicant failed to advance satisfactory explanation for the said delay.

Furthermore, my view is that the delay in starting and finalising the upgrading of the road in question is affecting negatively the communities that are suppose to benefit from the upgraded roads and bridges.

Setting aside the tender will prolong the sufferings of the communities that are suppose to benefit from the upgraded roads and bridges.

The successful tenderer had already started with the project when the interim order was granted. The probabilities are that they had to employ employees to work on the project, who are now without work ever since the interim order was granted.

Prior to commencing with the project, the successful tenderer, in all probability, entered into contracts with different subcontractors and suppliers, which contracts might have been suspended because of the interim order.

Furthermore, the first respondent has mentioned the delay and extra costs, and logistical difficulties which will ensue if the tender is set aside.

9. CONCLUSION

The applicant has failed to launch its urgent application and review application within reasonable time.

The applicant has failed to advance any satisfactory explanation for the delay.

The manner in which the applicant went about with this case, *inter alia*, directing request for information to the Member of the Executive Council, instead of addressing same to the first respondent also contributed to the delay and there is no explanation for directing the said correspondence to the Member of the Executive Council instead of directing same to the first respondent.

Furthermore the delay occasioned by the manner in which applicant dealt with this matter, cannot be condoned because of the prejudice that the said delay caused to the successful tenderers, the first respondent and the communities that were suppose to benefit from the upgraded roads and bridges.

In view of my conclusion on the question of unreasonable delay and other related issues and the decision I have arrived at, it is not necessary to deal with other evidence and other legal arguments advanced by the parties in this case.

The court therefore makes the following order:

1. Application for review is dismissed.
2. Applicant is ordered to pay the costs of the first respondent which costs will include the costs of a senior and junior counsel.

W L SERITI
JUDGE OF THE HIGH COURT

24770/2005

HEARD ON:
FOR THE APPLICANT/PLAINTIFF: ADV
INSTRUCTED BY: MESSRS
FOR THE RESPONDENT/DEFENDANT: ADV
INSTRUCTED BY: MESSRS
DATE OF JUDGMENT: