




IN THE NORTH GAUTENG HIGH COURT, PRETORIA

(REPUBLIC OF SOUTH AFRICA)

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES:
	YES/NO
(3)	REVISED.
6 May 2011	
DATE	SIGNATURE

CASE NO: 51442/10

DATE: 20 May 2011

In the matter between:

STERADIAN CONSULTING (PTY) LIMITED

APPLICANT

AND

ARMAMENTS CORPORATION OF SOUTH

AFRICA LIMITED

FIRST RESPONDENT

ADOAIR MAINTENANCE (PTY) LIMITED

SECOND RESPONDENT

INTERJET MAINTENANCE (PTY) LIMITED

THIRD RESPONDENT

THE MINISTER OF DEFENCE

(The Honourable Me Lindiwe Sisulu N.O)

FOURTH RESPONDENT

JUDGMENT

MABUSE J: (1) This is an application, by the Applicant for certain relief. Because of the disparity in what the Applicant seeks in the Notice of Motion and what it started as the purpose of the application in the Founding Affidavit, I would quote verbatim the relief that the Applicant seeks in the Notice of Motion.

(2) The Applicant is a company with limited liability duly registered and incorporated in terms of the company laws of this country, with its registered address at 418 Vista Drive, Faerie Glen, Pretoria, Gauteng. The First Respondent is a company with limited liability duly registered and incorporated in terms of the company laws of the Republic of South Africa and established in terms of the Armaments Corporation of South Africa Act Limited No. 51 of 2003 as amended, and with its main place of business situated at 370 Nossob Street, Erasmuskloof, Extension 4, Pretoria, Gauteng. The Second Respondent is a company with limited liability duly registered and incorporated in terms of the company statutes of the Republic of South Africa and having its business address at Lanseria International Airport, Office 1, Mezzanine Level, Lanseria Terminal building, Lanseria. The Third Respondent is a company with limited liability duly registered in terms of the company laws of the Republic of South Africa with its principal place of business at Hangar 6, Gate 5, Lanseria International Airport, Lanseria. The Fourth Respondent is the Honourable Minister of Defence cited herein in her official capacity as contemplated in terms of, among others Section 1 of the Defence Act 44 of 1957, as amended, with the address of service at c/o State Attorney.

(3) According to the Notice of Motion the Applicant seeks the following order:

- "1. That the application be heard urgently and that the court dispense with the forms and rules relating to service in terms of the provisions of Rule 6(12);
2. That the decision of the First Respondent to award the tenders of the aircraft maintenance under tender ELGS/2010/35, ELGS/2010/36 and ELGS/2010/37 second and third respondents respectively, be reviewed and set aside;

- 3.1 That a request for a proposal for the rendering of the aircraft maintenance services under ELGS/2010/35, ELGS/2010/36 and ELGS/2010/37 be cancelled;
 - 3.2 That the first respondent be ordered to immediately inform all tenderers of the cancellation;
 - 3.3 That the contracts entered into as a result of the tender process be declared invalid and void *ab initio*;
- (4) That the first respondent's procurement policy insofar as it is contrary to and not in line with provisions of the Preferential Procurement Policy Framework Act 5 of 2000 be declared to be *ultra vires* and set aside;
 - (5) That the first respondent be ordered to pay the costs of the application between attorney and own client;
 - (6) A cost order will also be sort against the second, third and fourth respondents, jointly and severally, only in the event of opposition to this application;
 - (7) Further and/or alternative relief".
- [4] This application is opposed only by the first respondent, the fourth respondent having filed a Notice to Abide. According to the Founding Affidavit, the second, third and fourth respondents have been cited only in this application for their interest as far as it concerns the subject matter of the application.
- (5) According to paragraph 4 of the Founding Affidavit, the purpose of this application is said to be the following:
- "4.1 This is an application to review and set aside the decision of the respondent not to accept Applicant's tender submitted on 7 June 2010 for the provision

of product support services for the South African Airforce Falcon 50 and 900 aircrafts as well as the South African Airforce Bechcvalt Kingair, Aircraft as well as the South African Airforce Cessna Caravan 205 aircraft;

- 4.2 Secondly an order will be sought in terms whereof the award of the aforesaid contracts. The second and fourth respondents will be reviewed and set aside.
- 4.3 An order declaring that the first respondent's procurement policy is *ultra vires* a Preferential Procurement Policy Framework Act 5 of 2000 insofar as it allows for points in respect of functionality to be added to that of price and insofar as price.
- 4.4 Appropriate cost other will be sought."

(b) It is common cause between the parties that the issue of urgency has fallen by the wayside. Accordingly the battle of the parties is whether or not the Applicant launched its tender papers at or before 11h00 and whether or not the First respondent's employees removed the tender boxes before 11h00. The respondent's counsel put these points otherwise. According to it the issues that the Court is called upon to decide are firstly whether or not the applicant has any *locus standi* in this matter, and secondly, whether or not the points system utilized by the first respondent in accordance with the first respondent's procurement policies, is *ultra vires* the Preferential Procurement Policy Framework Act 5 of 2000. ("PPPFA")

(7) During March 2010, the First Respondent issued three tenders as follows:

- (1) the first one was for provisioning of a product support service for the SA Airforce Beechcraft King Aircraft with reference no. ELGS2010/35

- (2) the second one was a tender for the provision of products support services for the South African Airforce Cessna Caravan 208 Aircraft with reference no. ELGS2010/36; and
 - (3) The third one was for the provision of products support services for the South African Airforce Falcon 50 and 900 aircraft under reference no. ELGS2010/37.
- (8) On 7 June 2010, Zodwa Dlamini, the Chief Executive Officer of the Applicant, and in the company of her assistant, one Lindiwe Mcube, personally took the Applicant's tender documents to the Head Office of the First Respondent where they had to be deposited into tender boxes specially designated for that purpose
- (9) On their arrival at the place or in the room where the tender boxes were kept, they found that two gentlemen from the procurement department had already removed the boxes. They received this information from the security and did not themselves witness the two gentlemen removing the tender boxes. They were informed by the security at that point that the boxes were removed at 10h45 by the said employees. Furthermore he informed them that one of the employees who had removed the boxes was one Van Wyk to whom they had an occasion to speak to. When spoken to the said Van Wyk refused to accept the Applicant's tender documents. The deponent is adamant that she and her assistant were at the point where the boxes were kept before 11h00.
- (10) On the same day the Applicant wrote a letter to the First Respondent in which she complained about Van Wyk's refusal to accept its tender documents. The said letter reads as follows:

"UNFAIR EXCLUSION FROM PARTICIPATING IN TENDER PROCESS DUE TO UNFORESEEN AND WRONGLY EFFECT CUT OFF TIME OF TENDER SUBMISSIONS.

It is with regret that I should lodge a complaint of being unfairly excluded from the participating in the tender process of the following tender documents which I had

arrived at the Armscor tender box at exactly 11h00. The tenders referred to are: --
ELGS/2010/35,

-ELGS/2010/36

- ELGS/2010/37.

In the tender KD 17 forms, it is stipulate that the tender submission time on the stipulated date is up to 11h00 not before 11h00. I unfortunately found it grossly unfair to be excluded based on the grounds that tenders can be submitted at any time of the due date up to 11h00. The procurement personnel namely Pieter Van Wyk et al were already on their way out carrying tender documents received without waiting for the cut off time of 11h00. At that point I questioned the Security officer receiving tenders about the disregard of the tender submission closing time of 11h00.

The Security officer however referred me to Mr Pieter Van Wyk to talk to him since he indicated that they the Procurement personnel concerned started collecting the tenders from the tender box as early as 10h45 today hence they were much earlier than usual in their collection of tenders from the tender box. I then enquired from Pieter Van Wyk himself who unfortunately never wanted to listen to anything I was saying as I made it clear to him that it was unfair for him to collect tenders and leave whilst the submission closing time of 11h00 was still not over.

I therefore request your urgent intervention in this matter since it is legally unfair to exclude any participant based on a procedural defect. Adjudication of tenders mentioned herein should therefore be put on hold whilst addressing this concern in order to ensure that all participants are given a fair chance to without any deliberate exclusion.

Your urgent response will be appreciated.

Yours faithfully

Zodwa Dlamini

Chief Executive Officer”.

The first respondent wrote back and in its reply to the aforementioned letter by the Applicant, denied that the tender boxes were removed before 11h00.

(11) During August 201 the deponent discovered, while perusing the first respondent’s website, that the three tenders had been awarded to the second and third respondents separately. The applicant contends that the award of the tenders to the said Respondents will prejudice other tenderers, such as the applicant itself.

(12) The first respondent procured on behalf of the National Defence Force and in particular the South African Airforces, in terms of the provisions of the Armaments Corporation Act 51 of 2003. In so procuring, the First Respondent must comply with the provisions of Section 217 of the Constitution of the Republic of South Africa Act 108 of 1996 (“the Constitution”) which provides as follows:

“(1) When an organ of State in the national, provincial or local sphere of government or any other institution identified in national legislation, contracts for goods, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost effective.

(2) Subsection (1) does not prevent the organs of the State or institutions referred to in that subsection from implementing a procurement policy providing for:

(a) Categories of the preference in the allocation of the contracts; and

(b) The protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination.

(3) National legislation must prescribe a framework within which policy referred to in subsection (2) must be implemented”.

(13) Section 2 of the PPPA enjoins an organ of State to apply a points system when awarding tenders. According to the said Act, 90 points must be awarded to the acceptable tender with the lowest tender and 10 points for reaching those goals as set out in Section 2(d) of the said Act.

(14) According to the Applicant, is it clear that the First Respondent's policy is contrary to the provisions of the PPPA, in particular where it provides that points for price will be added to those scored for functionality. Where the regulations issued in accordance with the provisions of the PPP provided for a system in which points for functionality and points for price are to be added to those for (HDI), historically disadvantaged individuals, it is contrary to the PPPA. This situation has, so contends the Applicant, been found to be *ultra vires* the provisions of the Procurement Act. Accordingly where the First Respondent's policy is inconsistent with the provisions of the Act, it should, to that extent, be declared invalid and set aside.

(15) Accordingly the tenders awarded to the second and third respondents should be set aside on the basis that, in considering and awarding them, the First Respondent used completely wrong bases. The principle on which the tenders awarded were considered was wrong. For that reason the Applicant seeks that the tenders should be reviewed and set aside.

(16) As I indicated earlier only the First Respondent opposes the application. In doing so it relies on the Affidavit of one William Roberts, its legal advisor. On the applicant's complaint that the points system used is *ultra vires* the PPPFA, First Respondent's contends that the tenders involved provide for 40 points for price; (pp) 40 points for functionality (pf) and 20 points for Broad Based Black Economic Empowerment (BBEE).

- (17) According to the said William Robert, the First Respondent is an organ of State which is subject to the provisions of Promotion of Administrative Justice Act 3 of 2000 (PAJA) and the Public Finance Management Act (PFMA). The PPPFA is applicable to the Department of Defence but not to the First Respondent. The First Respondent has not been included in the institutions gazetted by the Fourth Respondent. The First Respondent is, according to First Respondent's affidavit, a schedule 2 public entity in terms of the PFMA. The provisions of the PPPFA will only apply to institutions listed by the Fourth Respondent in the government gazette. According to the said William Roberts, the application of the provisions of the PPPFA has not been extended to the First Respondent.
- (18) Because of the nature of the defence industry and the nature of the goods and services procured by the First Respondent for the Fourth Respondent, the functionality issue is of critical importance in the evaluation of the tenders. That it is so, is spelt out clearly in the Request For Offers which precede the receipt of the tenders. According to the First respondent, the value of the tenders in question range from R7 million to R9 million.
- (19) The points system of 90/100 is, according to the First Respondent, not the only system applicable under the PPPFA. In terms of the provisions of Regulation 8(3) of the PPPFA, the total combined price allowed for functionality and price in respect of tenders whose estimated value is above R500 000 should not exceed 90 points. In the circumstances it is not necessary, according to regulation 8(3), that the price alone should account for the 90 points. With regards to the Applicant's complaint that the tenders were not open in public, the First Respondent contends that no such requirement exists that tenders should be opened in public. According to the First Respondent, it used to be a requirement of the old Tender Board that tenders should be opened in public. In this requirement is not applicable in respect of the First Respondent.

(20) The First Respondent contends that it does not have a procurement policy and furthermore that the procurement policy is contained in the Rules that apply to prospective contractors and practice for the selection of contractual forces. The Procurement Policy requires the respective suppliers to register as Acquisition Suppliers with the Department of Defence or as vendors with the First Respondent. Where the acquisition of defence related goods and services are administered by the First Respondent, all the potential local suppliers should, in terms of clause 10.2 of the Procurement Policy, apply for registration. The Procurement Policy outlines the procedure that all such potential local suppliers should follow in order to register. The First Respondent bemoans the failure of the Applicant to allege that it has complied with the requirements for the supply of goods and services to the Department of Defence.

(21) According to the Request for Offer, so contends the First Respondent, the closing date for the submission of the tender was indicated as not later than 11h00 on 7 June 2010. According to the First Respondent, the Applicant failed to submit its tender by 11h00 o 7 June 2010. As a consequence of the late submission of the tender documents, the Applicant was precluded from further participation in the tender process. It is on the basis of these two reasons that the First Respondent has applied for the dismissal of the Applicant's application.

(22) The battlefield of the parties is twofold, firstly, it is whether or not the Applicant has *locus standi* and, secondly, whether the PPPFA applies to the First Respondent. It was argued by counsel for the Applicant that Applicant has jurisdiction in this matter because it a registered vendor and, in that capacity, can bring an application of this nature to challenge the procurement policy of the First Respondent.

- (23) Relying on the provisions of Section 217(1) of the Constitution, Counsel for the Applicant argued that it is imperative that an organ of State, as defined by section 239 of the Constitution, must procure goods and services in a system that is fair, equitable, competitive, transparent and cost-effective. It is common cause between the parties that the First Respondent is an organ of State as defined by Section 235 of the said Act. Section 217 of the Constitution states as follows:

“When an organ of State in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, competitive, transparent and cost effective”.

According to the Section 239 of the Constitution an organ of State defined as meaning:

- (a) Any Department of State or administration national; provincial or local sphere of government; or*
 - (b) Any other functionary or institution –*
 - (i) Exercising the power on performing a function in terms of the Constitution or a provincial constitution; or*
 - (ii) Exercising a public power on performing the public function in terms of any legislation, but does not include a Court or a judicial officer”.*
- (24). The crux of the Applicant’s view point is that, because the PPPFA applies to the Department of Defence, therefore it applies also to the First Respondent. The Applicant’s view that the said PPPFA applies to the Respondent is premised on the assumption that the First Respondent is regarded as an agent for the Department of Defence.

125] The Applicant’s complaint about the points system seems to be without any merit. Clause 14 of the tender documents, which is titled “Awarding of Offers” states as follows:

“The awarding of offers will be in terms of Armscor Document – PRAC -4011 “BEE” practice. The applicable points are:

Price	(Pp)	40 points
Functionality	(Pf)	40 points
Industrial participation	(Pi)	0 points
Broad Based Economic		20 points
Empowerment		
Total		100 points”

126] The Applicant was aware at all material times what the point system was and never challenged it. It accepted the points system when it signed the tender documents. I agree fully with the agreement by the First Respondent’s Counsel that, by signing the tender documents containing the above mentioned points system, the Applicant clearly associated itself with the conditions of the tender.

127] In order to succeed with its complaint that the First Respondent’s procurement policy is inconsistent with the provisions of the PPPFA, it must satisfy the Court that the First Respondent is one of the organs of State to which the provisions of the PPPFA have been made applicable. The Applicant can do this by showing that the First Respondent is, in terms of the provisions of the said PPPFA, an organ of State. It is not enough for the Applicant to state that the Department of Defence is an organ of State in terms of the provisions of the PPPFA and to conclude, by analogy, that the First Respondent is, for the purposes of the said PPPFA, also an organ of State.

[16] Section 2(1) of the PPPFA states that:

"2(1) An organ of State must determine its Preferential Procurement Policy and implement it within the following framework:

(a) A preferent system must be followed

(b) (i) For contacts with a rand value of above a prescribed amount a maximum of 10 points may be allocated for a specific goals as contemplated in paragraph D (d), provided that the lowest applicable tender scores 90 points for the price".

[29] It is quite clear that the provisions set out in section 2(1) of the PPPFA apply to an organ of State as defined by section 1 of the said Act and not because, as was argued by Counsel for the Applicant, the provisions of Public Finance Management Act are applicable to it nor because, as was further argued by Counsel for the Applicant, the provisions of the said PPPFA are applicable to the Department of Defence.

[30] The crucial question as to whether or not the First Respondent is an organ of State can best be solved by a quick reference to the definition to an *"organ of State"* as contained in section 1 of the PPPFA. The said section defines an organ of State as follows:

"Any other institution or category of institutions included in the definition of organ of State in Section 239 of the Constitution and recognised by the Minister in the Government Gazette as an institution or category of institutions to which this Act applies".

[31] It was never the Applicant's case nor was it even argued by its Counsel, that the First Respondent was recognised as an organ of State by the Minister in the Government Gazette. The Applicant's case has always been that, because certain Acts apply to the Department of Defence and that because the First Respondent may be required to

procure for or on behalf of the Department of Defence, therefore the provisions of the PPPFA also apply to the First Respondent.

(32) The Applicant has failed to satisfy the Court that the provisions of the PPFA are applicable to the First Respondent. Its application must therefore fail on this point.

(33) I now wish to turn to the question whether or not, as the First Respondent's counsel argued, the Applicant has any *locus standi* or as the First Respondent put it, the Applicant's tender documents were submitted in or on time. This point, according to the First Respondent, stands as a bulwark or a point *in limine* in the way of the Applicant. It was argued by counsel for the First Respondent that should the Court find that the Applicant did not submit its tender documents at 11h00 or before on 7 June 2010, in that event the Court should find that the Applicant does not have the right to challenge the First Respondent's points system.

(34) During argument counsel for the Applicant denied that the Applicant only challenged the point system as a consequence of sour grapes simply because it was late in lodging its tender documents with the First Respondent. He argued that the Applicant is a vendor and on that basis had a right, and therefore a *locus standi*, to challenge the First Respondent's point system. In my view that question is whether ordinarily the Applicant would have any *locus standi*, if it chose to challenge the First Respondent's points system under a different circumstance than the current one. If the answer to the question is yes, then it would have a *locus standi* under the current conditions to challenge the point system. I find that the Applicant has *locus standi* whether or not its papers were lodged in or on time is another issue which I will deal with hereunder.

(35) It is common cause that the closing time and date for the submission of the tender documents were 11h00 on 7 June 2010. Accordingly the tender document had to be submitted at 11h00 before. Failure to comply with the date and the time set was fatal and would have resulted in the rejection of the tender documents with the concomitant exclusion of the Applicant from the tender process. In her Affidavit, Zodwa Dlamini, states that:


"My watch as well as that of my assistant an affidavit of whom are attached hereto as Annexure A4, were clear that we timeously arrived at the facilities of ARMSCOR to submit the relevant documentation".

I have two difficulties with this statement. The first difficulty I have with the statement is that, notwithstanding full knowledge by the deponent that time is of essence and, notwithstanding furthermore that both Zodwa and her assistant had their watches, they failed to indicate their precise time of arrival at the facilities of Armscor. Secondly they have failed to indicate with precision where at the facilities of Armscor they arrived timeously. Failure to be precise on these two points leaves doubt in the mind of the Court whether or not her evidence is reliable.

(36) In the letter that she wrote on 7 June 2010, Zodwa created an impression that she arrived at the tender boxes at exactly 11h00. It is not clear why she did not just deposit the tender documents in the tender boxes if she was there even before the boxes were emptied. She made no attempt seemingly for nowhere does she state that she was stopped by the procurement personnel from either depositing her tender documents into the tender documents. It is clear from the papers that some of the tender documents were bulky and for that reason could not be deposited into the tender boxes. As a consequence tenders chose to place their tender documents next to the tender boxes. In the circumstances removing such tender documents was proper as they had been duly received. Zodwa does not even state in her affidavit

that when she tried to place her tender documents where other people had placed their bulky tenders she was stopped. What she has stated in her letter differs in many material respects from what she stated in her affidavit with the result that her version of events is not reliable. In the absence of any reliable evidence from the Applicant, I can only make a ruling on the basis of the First Respondent's evidence as I found it to be reliable.

(37) In the end I find that the Applicant has failed to satisfy the court that its tender documents were not brought after 11h00 on 7 June 2010. The application also fails on this point too and ought to be dismissed with costs and that is the order of this Court.


MABUSE

APPEARANCES

Applicant's Attorneys	Hugo Ngwenya
Applicant's Counsel	Adv. Snyman M.
First Respondent's Attorneys	Gildenhuis, Lessing Malatji
First Respondent's Counsel	Adv. Heyns G F