REPUBLIC OF SOUTH AFRICA

IN THE GAUTENG DIVISION OF THE HIGH COURT, PRETORIA

DELETE WHICH IS NOT APPLICABLE
[1] REPORTABLE: ~~YES~~ / NO
[2] OF INTEREST TO OTHER JUDGES: YES / NO
[3] REVISED
DATE SIGNATURE

CASE NO: 56540/2012

DATE:6TH JUNE 2017

In the matter between:

BUSINESS CONNEXION (PTY) LTD First Applicant

SAFIKA FOR OFFICE AUTOMATION (PTY) LTD Second Applicant

and

CITY OF TSHWANE METROPOLITAN MUNICIPALITY First Respondent

ITEC MOTLEKAR (PTY) LTD

Second Respondent

KERBYN 232 (PTY) LTD Third Respondent

BID EVALUTATION COMMITTEE: CITY OF TSHWANE METROPOLITAN MUNICIPALITY Fourth Respondent

JUDGMENT

LOUW, J

[1] This matter relates to three applications in which the merits have become moot and in which the only issue which remains is that of costs. The first application was an application brought by the first and second applicants for the review and setting aside of the award of a tender by the first and/or fourth respondents (I shall refer to the first respondent as the CoT) to, according to what the applicants alleged, a joint venture between the second and third respondents in respect of office automation equipment, which involved photocopying equipment and services. The third respondent filed an answering affidavit in which it was alleged that the tender awarded to the third respondent was awarded to a joint venture consisting of the third respondent and Bravo Pro 270 CC ("Bravo"), that Bravo was aware of the review application and that it supported the third respondent's opposition thereto. It was further alleged that the second respondent submitted a totally different tender to that of the third respondent, and that the awards of tenders to the second and third respondents are separate and distinct. The second respondent did not oppose the application.

The second application was brought by the first and second applicants as an urgent application and was an interlocutory application in which they sought an order interdicting the CoT from entering into any service level

agreement with the second and third respondents or from proceeding with any implementation of the tender pending the final outcome of the review application. The third application, also an urgent application, was brought by the third respondent and Bravo for an order that the CoT be directed to take all steps necessary to implement the tender awarded to them pending the outcome of the review application.

[2] The first and second applicants both responded to the CoT's invitation to tender by each submitting a tender. Their tenders were unsuccessful. After the tender was awarded to the second and third respondents, the applicants became aware, through an anonymous facsimile which was sent to the second applicant, of certain irregularities in the award of the tender. On 3 September 2012, the second applicant addressed a letter to the CoT in which the irregularities were spelled out and in which they objected to the award of the tender to the second and third respondents. The CoT was requested in the letter to suspend the award process until a final review by all parties. The CoT responded in a letter dated 4 September 2012 in which it dealt with the sequence of events leading up to the approval by the fourth respondent, the Bid Adjudication Committee, of the award of the tender. The letter did not deal with any of the irregularities listed in the second applicant's letter, and there was no response to the request that the award process be suspended pending a review by all parties. The applicants thereafter, on 28 September 2012, launched the review application. The application was opposed by the CoT

and by the third respondent. The third respondent filed an answering affidavit, but none was filed by the CoT.

[3] On 19 October 2012, the applicants' attorneys wrote a letter to the CoT's attorneys and to the second and third respondents in which an undertaking was required within 48 hours of receipt of the letter not to implement the tender. The CoT's attorneys responded on the same date, advising the applicant's attorneys that they have forwarded their letter to the CoT for instructions and that they would revert shortly. A further letter was written by the applicants' attorneys to the CoT's attorneys on 23 October 2012 in which they demanded an answer by close of business on 24 October 2012, failing which they threatened to launch an urgent application. There was no response forthcoming from the CoT's attorneys. The third respondent's attorneys indicated in writing on 22 October 2012 that the third respondent would not provide the undertaking which was sought. On 23 October 2012, the second respondent's attorneys also indicated that the second respondent would not provide an undertaking.

[4] The applicants thereafter, on 1 November 2012, launched the interlocutory application, to be heard in the urgent court on 13 November 2012, for an order, inter alia, that the CoT be interdicted from entering into any service level agreement with the second and third respondents or from implementing any such agreement pending the finalisation of the review application. The application was served on the CoT on 1 November

2012. For some inexplicable reason, the application was not served on the second and third respondents.

[5] On 2 November 2012, the CoT's attorneys provided the applicants' attorneys with a written undertaking to cease implementation of the tender pending the disposal of the review application. They further stated in the letter that they awaited confirmation that the applicants' attorneys would withdraw the application and that a draft to that effect would be made an order of court. It appears from a supplementary affidavit deposed to on behalf of the applicants on 13 February 2013 that conversations then took place between the attorney representing the applicants and the attorney representing the CoT, which conversations led to a draft order being forwarded to the CoT's attorneys on 5 November 2012 with a request to indicate in writing their consent to the proposed draft. No response was received from the CoT's attorneys.[1] The draft order provided for an order that the CoT be interdicted from entering into any service level agreement or any other agreement with the second and third respondents or from proceeding with any implementation of such agreement pending the final outcome of the review application and for ancillary relief. It further provided that the CoT be ordered to pay the costs of the interlocutory application.

[1] The applicants' attorney's letter of 5 November 2012 did not form part of the papers in the interlocutory application. A copy of the letter was handed up to me during argument. It was common cause between applicants' counsel and the CoT's counsel that no other letters were written between 5 November 2012 and 13 November 2012.

[6] When the matter was called in the urgent court on 13 November 2012, with no agreement having been reached in respect of the draft order, applicants' counsel informed the presiding judge of the undertaking which had been given on 2 November 2012 by the CoT. As a result, the application was removed from the roll and costs were reserved. In a letter written by the CoT's attorneys the following year, on 21 January 2013, it was noted "*with great concern that this matter was seemingly removed from the court roll by you in contrast with our agreement as set out and confirmed by yourselves in your letter*". The reference was to the applicants' attorney's letter of 5 November 2012. That letter did not confirm any agreement. It sought the written consent of the CoT's attorneys that the draft order be made an order of court.

[7] On 10 December 2012, the CoT informed the second and third respondents that implementation of the tender was suspended. On 9 January 2013, the third respondent, through its attorney, demanded an undertaking from the COT to implement the tender notwithstanding the pending review application. On 18 January 2013, the CoT replied that it refused to provide such undertaking. On 1 February 2013, the third respondent and Bravo launched an urgent interlocutory application, to be heard on 26 February 2013, for an order that the CoT be directed to forthwith take all steps necessary to implement the tender pending the outcome of the review application. The application was served on the applicants and on the CoT on 1 February 2013.

[8] On 13 February 2013, the CoT's attorneys wrote a letter to the applicants' attorneys in which they, on behalf of the CoT, revoked the undertaking given to the applicants in their letter dated 2 November 2012. That caused the applicants' attorneys to re-enroll the applicants' interlocutory application in the urgent court on 26 February 2013, the same date for which the second and third respondents' interlocutory application had been enrolled.

[9] The two interlocutory applications were dealt with by Preller J on 26 and 28 February 2013. After hearing argument, Preller J indicated what order he proposed making. This was confirmed by counsel for the applicants and for the CoT in the present matter, who represented their respective clients at that hearing. A draft order was then prepared by counsel along the lines indicated by Preller J, which was then made an order of court. In terms of the order, the CoT was granted a period of one month from date of the order to complete all internal investigations and to decide whether to implement or cancel the tender and to notify the applicants and the third respondent in writing of its decision. The order further interdicted the CoT from implementing its decision within a period of one month from the date on which it advises the applicants and the third respondent of its decision. The costs of the two interlocutory applications were reserved. The question of the urgency of the two applications was also reserved.

[10] The CoT finalised its investigation on 18 March 2013. The investigation revealed some serious irregularities in the tender process. The investigators appointed by the CoT recommended that the tender be terminated with immediate effect, that a new tender process be initiated and that the prejudice suffered by the CoT be recovered from every official implicated in the investigation. On 28 March 2013, the CoT's attorneys wrote to the second and third respondents, advising them of the outcome of the investigation which necessitated the withdrawal of the award of the tender to the second and third respondents. The CoT's decision to withdraw the tender caused the review application and the two interlocutory applications to become moot, save for the issue of costs in respect of each of the applications.

The review application

[11] The irregularities relied upon by the applicants for the review and setting aside of the tender, the facts about which they gathered from documents which were anonymously sent to them, included that the speed (pages per minute) of the machines for which the second and third respondents had tendered was slower than that specified in the invitation to tender and that the smaller, and therefore lower-priced, machines quoted by the first and second respondents, placed them in an unfair position to be awarded the tender. In the letter which the second

applicant wrote to the CoT on 3 September 2012 in which all the irregularities of which they had become aware were set out, the CoT was also requested to provide certain information and documents, specifically the technical evaluation report since the tender specification document clearly states in the evaluation section that the minimum points to qualify was 80%.

[12] It appears from a supplementary answering affidavit which was filed on behalf of the CoT for purposes of the present matter that the CoT's investigation revealed a number of irregularities regarding the award of the tender to the second and third respondents. I quote from the affidavit:

"*12.1 The correct tender procedures and bid processes were not adhered to as the specifications in the tender were not considered;*

12.2 Letters of appointment to successful service providers were issued but the dates do not correspond with the date of the BAC[2] final resolution (in other words, although the BAC formally approved the award of the tenders on 20 August 2012, the letters of appointment addressed to the applicants were signed and provided to the applicants on 31 July 2012);

[2] Bid Evaluation Committee

12.3 The tender specifications did not include the requirement for joint ventures to be registered with Cipro prior to applying for the tender as a Joint Venture;

12.4 A printing environment audit project was done by T-IT Consulting, however the findings of the audit were not considered;

12.5 The BAC accepted and approved monthly billing prices from bidders without considering the advertised value of the tender. This had the effect that the bid quotations exceeded by far the tender value;

12.6 The ceding of the contract awarded to Kerbyn and Bravopro270 (sic) *to Messrs Merchant West (Pty) Ltd was in contravention to the tender specifications as contained in paragraph 14 of the tender document headed 'Price Proposal'*."

[13] The affidavit continues to state that, over and above the findings of the investigation, there were further grounds necessitating the withdrawal of the award of the tender. Reference is made to the complaint of the applicants that the machines (colour copiers) did not comply with the technical requirements of the tender document in that they have a lower copying speed than required, and that such non-compliance afforded the applicants and unfair,

inequitable and uncompetitive advantage over all other tenders. The affidavit further refers to the bid evaluation document which is annexed to the affidavit and from which it appears that the third respondent did not attain the required 80% scoring in technical evaluation. Its score was 60%.

[14] It is clear from the aforegoing that the applicants' complaints about irregularities in the award of the tender were confirmed by the CoT's own investigation and that additional irregularities were discovered by the CoT itself, all of which resulted in the CoT withdrawing the tender. It follows that the applicants would have succeeded with the review application if it had to be decided by the court. The applicants should, as a result, be entitled to their costs of the review application.

[15] It was submitted on behalf of the CoT that it should not be ordered to pay the applicants' costs of the review application as it did not file an answering affidavit to the application, that it was not at any stage said by the CoT that the allegations made by the applicants were wrong and that the CoT was busy investigating the allegations, which is a process which takes time. In my view, there is no merit in these submissions. The evidence on behalf of the COT was that the tender was at no stage implemented. There is therefore no

reason why it could not, when it was requested to suspend the implementation of the tender before the review application was issued, have informed the applicants that implementation of the tender had not begun and that it would first investigate the applicants' allegations of irregularities before the tender was implemented.

The applicants' interlocutory application

[16] I have set out above what transpired before the granting of the order on 13 November 2012. Having regard to the letters which were written to the CoT in which an undertaking was sought, to which there was no response from the CoT, and the fact that an undertaking was given the day after the launch of the application, the applicants are, in my view, entitled to the costs of 30 November 2012. The draft order which the CoT's attorneys say they agreed to, in any event provided that those costs would be paid by the CoT.

[17] The subsequent withdrawal of the undertaking by the CoT fully justified the re-enrollment of the interlocutory application by the applicants. The CoT adopted the attitude that, because it had been unaware that the draft order had not been made an order of court,

it was entitled to withdraw the undertaking. I find that to be a surprising proposition. The CoT had given the applicants and unconditional undertaking not to proceed with the implementation of the tender pending the finalisation of the review application. They were clearly not entitled to withdraw the undertaking unilaterally.

[18] It was submitted on behalf of the COT that the applicants would not have succeeded with the interlocutory application as they failed to show that the application was urgent and also failed to show that they would suffer irreparable harm if the order was not granted. The fact of the matter is that the application was not struck off the roll by Preller J for lack of urgency and that he did make an order in terms whereof the CoT was effectively interdicted for a period of two months from implementing the tender. Although Preller J did not give a judgment, the order made by him in my view implies that he must have considered whether the applicants would suffer irreparable harm if an order was not granted preventing the implementation of the tender and that he was satisfied that the applicants at least had a well-grounded apprehension of irreparable harm, which is what is required to be shown for the grant of an interim interdict. An applicant for a temporary interdict is not required to show a probability of actual harm. The case made out by the applicants in the founding affidavit was if the CoT allowed the second and third respondents to implement the tender, such

implementation would cause damage to the applicants in the event of the award of the tender being reviewed and set aside. The applicants feared that if the implementation of the tender proceeded, it may have a detrimental effect on their review application. This is understandable as a court may, in appropriate circumstances, decline to set aside an invalid administrative act for considerations of pragmatism and practicality.[3]

[19] In light of the order granted by Preller J, the applicants were substantially successful. I find, therefore, that the applicants are entitled to payment of their costs of the interlocutory application by the CoT.

The third respondent's and Bravo's interlocutory application

[20] The deponent to the founding affidavit in this interlocutory application states that on 10 December 2012 a project manager in regard to the tender addressed an email to the third respondent's project director, advising that she had been instructed that no work should be performed in terms of the tender due to "the litigation". At that stage, the second and third respondents had no knowledge of the applicants' interlocutory application. They only became aware of

[3] See *Chairperson: Standing Tender Committee and Others v JFE Sapela Electronics (Pty) Ltd and Others* [2005] 4 All SA 487 (SCA) para [28]

the application when the third respondent's attorney was advised telephonically thereof on 10 January 2013.

[21] After the review application was served on the second and third respondents, the third respondent's attorney made several inquiries to the CoT about its stance in respect of the review application. No reply was received from the CoT. The third respondent had, in the meantime, incurred costs and expenses in preparation of the implementation of the tender. On 9 January 2013, the third respondent's attorney sent a letter by email to the CoT in which an undertaking was demanded by 14 January 2013 that the CoT would allow the third respondent to continue to perform in terms of the "contract". No response was received from the CoT.

[22] On 17 January 2013, the third respondent's attorney sent a further letter of demand which required the undertaking to be given by 18 January 2013. The CoT's attorneys then addressed an email to third respondent's attorney on the same date in which it is stated that the CoT had been interdicted from concluding any service level agreement or taking any further steps to implement the tender and that the CoT was therefore not in a position to accede to the undertaking sought. The third respondent's attorney had in the meantime found out from the applicants' attorneys that no interdict had been granted against the CoT. He wrote a letter to the CoT's

attorneys on 21 January 2013, informing them that no interdict had been granted and requested the CoT to provide the undertaking previously requested. No response was received, and the third respondent and Bravo thereupon launched the interlocutory application.

[23] The cause for the bringing of the interlocutory application was clearly the dilatoriness of the CoT in investigating the irregularities of which it was apprised by the applicants and its failure to respond to requests for information. It was submitted on behalf of the CoT that it was sandwiched between the applicants on the one hand and the second and third respondents on the other, and that it was trying to keep a balance between the rights of the applicant to bring a review application and the rights of the second and third respondents as the preferred tenderers. I disagree with the submission. The duty of the CoT was to investigate the applicants' allegations of irregularities diligently and to keep the respective parties informed of the progress of the investigation it was doing. It ultimately needed a court order to get it to make a decision, which was eventually made more than six months after the irregularities were reported to the CoT by the applicants.

[24] The argument on behalf of the CoT was again that no urgency or irreparable harm had been shown by the third respondent and Bravo.

What I said above in regard to those submissions in respect of the applicants' interlocutory application, applies *mutatis mutandis* to the third respondent and Bravo's interlocutory application. As far as irreparable harm, or a reasonable apprehension of irreparable harm, is concerned, the argument on behalf of the CoT was that the third respondent and Bravo would have a claim for damages if the CoT withdrew the tender. The availability of an alternative remedy is a separate requirement for the grant of an interim interdict. But even where damages can be proved, a court will not lightly, by refusing an interdict, in effect compel an applicant to part with his rights.[4] Furthermore, the third respondent and Bravo had a clear right, unless and until the award of the tender to them was validly withdrawn, to be allowed to continue with the implementation of the tender. If an applicant can establish a clear right, an apprehension of irreparable harm need not be established.[5]

[25] I conclude, therefore, that the third respondent and Bravo are entitled that their costs of the interlocutory application be paid by the CoT.

<u>Further costs orders sought</u>

---

[4] *Transvaal Property & Investment Co. Ltd and Ano. v SA Townships Mining & Finance Corp. Ltd. and Ano* 1938 TPD 512 at 521

[5] *Setlogelo v Setlogelo*1914 AD 221 at 227; *LF Boshoff Investments (Pty) Ltd v Cape Town Municipality* 1969 (2) SA 256 (C) at 267

[26] The third respondent further sought an order that its costs of opposing the review application and its costs of opposing the applicants' interlocutory application on 26 and 28 February 2013 be paid by the CoT, alternatively by the first and second applicants jointly and severally, further alternatively by the CoT and the first and second applicants jointly and severally. In view of my finding that the review application would have succeeded and that the applicants were substantially successful in their interlocutory application, there is no basis on which to award any costs against the applicants in respect of those two applications.

[27] The basis on which the third respondent sought a costs order against the CoT was that it had every reason to believe that the tender had been properly and lawfully evaluated and awarded to the joint venture and that it was accordingly justified in opposing the review application. By the time that its answering affidavit was filed, the CoT had not filed an answering affidavit and had not responded to inquiries made by the third respondents But the applicants' founding affidavit contained allegations of serious irregularities, supported by documents attached to the affidavit, which should have made it clear to the third respondent that it was at risk in opposing the review application without knowing what the CoT's reaction would be to the applicants' allegations of irregularities in their founding affidavit. The

same applies to the third respondent' opposition to the applicants' interlocutory application. The third respondent should therefore, in my view, pay its own costs of opposing those applications.

[28] The third respondent also sought an order that the CoT pay its costs in respect of the first enrollment of the applicants' interlocutory application on 13 November 2012. As I have mentioned, that application was not served on the second and third respondents. They also did not take part in the proceedings before court. The third respondent could, therefore, not have incurred any recoverable costs in respect of the hearing on that date.

[29] Lastly, the applicants seek an order that the CoT, together with the third respondent and Bravo, the one paying the other to be absolved, be ordered to pay the costs of the first and second applicants relating to the interlocutory application which was brought by the third respondent and Bravo. When that application was heard on 26 and 28 February 2013, the CoT was still investigating the alleged irregularities and had not decided whether to implement or withdraw the tender. The third respondent and Bravo nevertheless decided to bring the interlocutory application to enforce implementation of the tender. No relief was granted in terms of the interlocutory application. The applicants' costs of opposing that application should,

therefore, be paid by the CoT, the third respondent and Bravo jointly and severally.

[30] In the result, I make the following orders:

1. The first respondent is ordered to pay the first and second applicants' costs in respect of the review application, including the costs of the hearing on 31 May 2017.

2. The first respondent is ordered to pay the first and second applicants' costs of their interlocutory application, including the reserved costs pertaining to the hearing of the application on 13 November 2012 and on 26 and 28 February 2013.

3. The first respondent is ordered to pay the second and third respondents' costs of their interlocutory application.

4. The first respondent, the third respondent and Bravo Pro 270 CC are ordered, jointly and severally, the one paying the other to be absolved, to pay the first and second applicant's costs of opposing the interlocutory application of the third respondent and Bravo Pro 270 CC, which costs include the reserved costs of 26 February 2013 and 28 February 2013

Appearances:

For the applicants: Adv. J C Klopper.
Instructed by: Maritz Smit Inc Attorneys, Pretoria.

For the first and fourth respondents: Adv. K Mnyandu.
Instructed by: Gildenhuys Malaatji Inc, Pretoria.

For the third respondent: Adv. A Willcock.
Instructed by: Gjersöe Inc, Pretoria.