HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA) 25/01/18

CASE NO: 45529/2016

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ~~YES~~ / NO.
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO.
(3) REVISED. ✓
DATE 25/1/2018
SIGNATURE

In the matter between:

SPECIAL INVESTIGATION UNIT	Applicant
and	
CHAUKE QUANTITY SURVEYORS & PROJECT MANAGERS IN ASSOCIATION WITH LISTED ENTITIES T/A CHAUKE MBENYANE CO-ARC CONSULTANTS	First Respondent
CHAUKE QUANTITY SURVEYORS CC t/a CHAUKE QUANTITY SURVEYORS & PROJECT MANAGERS	Second Respondent
CO-ARC INTERNATIONAL ARCHITECTS CC	Third Respondent
AZIZ TAYOB ARCHITECTS INC	Fourth Respondent
MALANI PADAYACHEE & ASSOCIATES CC	Fifth respondent
GEORGE BARBIC & ASSOCIATES CC	Sixth Respondent

MAREPO CC	Seventh Respondent
NATHOO MBENYANE ENGINEERINGS CC	Eighth Respondent
LETCHMIAH DAYA MANDINDI JHB INC	Ninth Respondent
MINISTER OF PUBLIC WORKS	Tenth Respondent

JUDGMENT

DAVIS, J

[1] This is an interlocutory application concerning the production and discovery of the record of proceedings concerning the award of a tender for the redevelopment and construction of border facilities at the Lebombo Border Post involving expenditure of some R103 million. The significance of the record of proceedings appears from the facts set out in the main application.

The main application

[2] The facts averred by the deponent on behalf of the Applicant, being the Special Investigation Unit (the "SIU") and which facts are to date hereof uncontroverted, can be summarized as follows:

2.1 In terms of Proclamation R 38 of 2010, published in Government Gazatte No 33425 on 30 July 2010 ("Proclamation R 38") the SIU was tasked with investigating "certain matters" as set out in the schedule to the proclamation pertaining to the affairs of the Department of Public Works ("the Department") and, pursuant to such investigations, take steps to recover losses suffered by the Department when the circumstances merit such recovery. These

would include maladministration or unlawful expenditure of public money;

2.2 During May 2007 the Department invited tenders for the provision of professional services by civil, structural, electrical and mechanical engineers for a project known as the Lebombo Port of Entry: Redevelopment: Construction of one-stop facilities at the Lebombo Border post between South Africa and Mozambique ("the project");

2.3 The First Respondent was established as a professional service provider consortium to represent the Second to Ninth Respondents ("the Consortium");

2.4 On 12 October 2007 the Department accepted the Consortium's bid and concluded an agreement with it for the rendering of the required services for the project ("the agreement");

2.5 In terms of the agreement (a copy which forms part of the Applicant's papers) the Consortium agreed to charge a fee of R40 028 914, 02 for the professional services to be rendered;

2.6 The estimated project costs increased significantly following upon the appointment of the Consortium after "it was decided" to "unbundle" the project into twelve phases. As a result hereof and due to various other project escalations in the costs, the final estimated project costs shot up to more than R1.9 billion;

2.7 To date of the launching of the main application and, after having completed the first eight of the envisaged twelve phases, the

Consortium had been paid R 103 003 696.00, being the total of the VAT inclusive invoiced amount for professional fees and disbursements. The invoices and proof of payment of the amount (which is for more than double the amount of the initial agreement) also form part of the SIU's Papers;

2.8 The SIU avers that the increase in the scope of the costs of the project and the acceptance of the Consortium's new sketch plans were not authorized nor approved by the Department;

2.9 In addition, the SIU concluded, after having conducted a forensic investigation, that the increase in the scope of the project and, in particular, the value or costs of the tender were in contravention of section 217 (1) of the Constitution, the Preferential Policy Framework Act, the Preferential Procurement Regulations, the Treasury Regulations as well as the Department's own delegation of powers.

Relief sought in the main application

[3] In the main application the SIU initially sought an order setting aside the agreement and the "purported" amendments thereto as well as orders for the declaration of the payments to the Consortium as "unconstitutional, invalid and of no force and effect" and for the repayment thereof alternatively for leave to institute action for the recovery of the payments.

[4] Despite the application having been launched in June 2016 already and despite the State Attorney acting for both the Applicant and the Department, no answering affidavit has been lodged by the Department nor has any explanation been furnished for this. There is also no answering affidavit by the Consortium or any member thereof, save for the Seventh Respondent, Marepo CC

("Marepo") being the only party who took any further steps, last mentioned being the present interlocutory application.

The interlocutory application

[5] Marepo contends that the SIU's application amounts to a review application and that it is therefore incumbent on the SIU to call upon the Department to produce a record of the proceedings which lead to the decision which resulted in the alleged unlawful increase of the scope of the project and the amendment of the initial contract.

[6] Marepo served a notice in terms of Rule 30A on the SIU, labelling its application irregular and, upon the SIU's refusal to call for the delivery of a record as provided for in Rule 53 of the Uniform rules, now applies for the following interim relief:

> "1. That the Applicant (SIU) be ordered to comply, within 15 days of the date of this order, with the provisions of Rule 53(1)(b) of the Uniform Rules of Court, as set out in the [seventh] respondent's notice in terms of Rule 30A dated 20 October 2016 to call upon the forth respondent to dispatch to the registrar the record of decision sought as they are by law required or desire to provide and to notify the seventh respondent that they have done so;
>
> 2. The applicant and the tenth respondent are ordered to dispatch to the registrar the record of the decision sought to the set aside and to notify the respondent that they have done so."

[7] The notice is headed with a reference to Rule 30A and 35(13) and costs are also claimed. For clarity's sake I mention that the tenth respondent referred to is the Department.

[8] The interim application is opposed principally on the basis that the SIU contends that it merely seeks to recover "losses" suffered by the Department "*arising from the unlawful implementation of the agreement, in particular the unauthorized increase in the scope of work that resulted in a substantial increase in the fees and disbursements paid by the Department to the Consortium*". The SIU contends that it does not seek to review any particular decision and that its claim is one based "*on the principles of contract law*". It further contends that since it's response to Marepo's preceeding Rule 35(12) notice no further documents need to be called for in terms of Rule 53.

Questions to be decided

[9] The first question to be decided is, therefore, whether the SIU's application or the relief sought by it, amounts to a review application and, secondly, if so, whether Marepo is entitled to relief under Rule 53 (or Rule 35).

A review or not?

[10] The SIU contends that, once the Department has entered into a contract with the Consortium pursuant to a bidding process, contract law and only contract law applies and the relief claimed is therefore merely contractual in nature.

[11] This contention loses sight of the fact that state procurement of services must, in terms of the legislative framework under section 217 of the Constitution, the Procurement Act and the Public Finance Management Act, be fair, equitable, transparent, competitive and cost-effective. Any implementation of such procurement would therefore constitute administrative action. See: *Allpay Consolidated v CEO SASSA* 2014 (1) SA 604 CC.

[12] It cannot (and has not) been contended by the SIU that the initial bidding process and the decision to award the project to the Consortium did not constitute administrative action. It must follow, in my view, that any subsequent decision to alter, amend or extend the scope of the project (in this case to almost fifty-fold its value), would also constitute administrative action. To contend otherwise, namely that this can be done purely in terms of the law of contract, would lead to absurd avoidance of the constitutional and legislative framework.

[13] Furthermore, the relief claimed by the SIU, namely the setting aside of a set of actions as having been unlawfully taken, in itself involves the "review" of a decision, last mentioned being the decision to "unbundle" the already awarded contract into twelve phases and with it the simultaneous decision to increase the costs way beyond what was initially catered for in the tender invitation. See: *Johannesburg Consolidation Investment Co v Johannesburg Town Council* 1903 TS 111 at 115 as to the issue of a "review" of a decision by a court.

[14] Despite the SIU's opposite contentions made in the affidavit opposing Marepo's interim application, the review of an administrative decision was already foreshadowed in prayer 2 of the notice of motion in the main application itself where the court is called upon to set aside any purported amendments' to the award of Tender no HP07/07 as referred to in prayer 1 of the said notice of motion. I am fortified in this view by the SIU's founding affidavit claiming that *"by failing to implement a new procurement process for professional services relating to the new scope of works and new designs for the project, the Department and the Consortium acted unlawfully and unconstitutionally"*. Clearly this breach of the legislative work frame regulating state procurement can only amount to administrative action (or failure to take action in a prescribed manner) rather than mere contractual election or exercise

of contractual freedom. This is even more so where public interest considerations and the public purse is involved. Despite a contract conceivably being unlawful for other reasons such as in *Fellner v Minister of the Interior* 1954(4) SA 523 (A) and therefore liable of being set aside, the breaches of the legislative frame work would still amount to administrative action which would be reviewed by a court.

[15] It must further follow that, for the SIU to recover the "losses", the decision preceeding the extension of the scope of the project and the payment of funds must in itself be reviewed and set aside, for until this is done, the administrative action remains *in esse*.

See: *Oudekraal Estates (Pty) Ltd v City of Cape Town & Others* 2004 (6) SA 222 SCA, *MEC for Health, Eastern Cape v Kirland Investments (Pty) Ltd* 2014 (3) SA 481 CC and, more recently *Merafong City v Anglogold Ashanti Ltd* 2017 (2) SA 211 CC and *Department of Transport v Tasima* (Pty) Ltd 2017 (2) SA 622 CC.

[16] I therefore find that the SIU's main application amounts, in substance, if possibly not fully in form, to a review application. This does not mean that the SIU necessarily had to proceed in terms of Rule 53. In fact, on behalf of Marepo it was conceded that the SIU had been within its rights to proceed in the fashion that it had done. The only disclosure that Marepo now contends for is that both it and the court are entitled to and indeed should be provided with the record of the action to be reviewed.

[17] For this contention, Marepo relies inter alia on the authorities of *Democratic Alliance & Others v Acting National Director of Public Prosecutions & Others* 2012 (3) SSA 486 (SCA) at [37] and *Turnbull-Jackson v Hibiscus Coast Municipality and Others* 2014 (6) SA 592 (CC) at [37] wherein

the importance of such a record has been not only been underscored, but found to be indispensable.

[18] Clearly the above contention is correct, but is it incumbent on the SIU to provide the record? The SIU's challenge to the extension of the project is an "indirect review" which our courts have found to be permissible without recourse to Rule 53. The *Oudekraal* – case supra is an example thereof. Another is *Jockey Club of South Arica v Forbes* 1993 (1) SA 649 (A). As mentioned by Hoexter in Administrative Law in South Africa, Second Edition at p527, this case mentioned that the Rule "was designed to aid an applicant, not to shackle him". The SIU had conducted extensive investigations of all documentation and has, in response to Marepo's notice in terms of Rule 35 (12) already provided copies and inspection of all the documents found during the course of its investigation to be relevant to the issue of the unlawfulness or not of the extension of the project.

[19] Where it was therefore permissible for the SIU to launch the main application without the aid of Rule 53, it appears improper to now force it to call on the tenth respondent to act in terms of Rule 53(1)(b) and in addition thereto to force, beyond production of the record, also the provision of reasons by the Department where in the present circumstances it has chosen not to contest the conclusion advanced by the SIU.

[20] Furthermore, after the SIU has fully complied with Marepo's Rule 35(12) notice, save for documents in request of which privilege is claimed and which claim is not attacked by Marepo, it appears from the parties' arguments that the only remaining issue is whether the Department might be in possession of a more complete record than that discovered by the SIU. This is a question which

the Department, and not the SIU, can answer and which pertains to the discovery of documents.

[21] In regard to discovery of documents the following has been stated by this court in *Afrisun Mpumalanga (Pty) Ltd v Kunene NO and Others* 1999 (2) SA 599 (TPD) at 613 C – 614C:

> "There is no definition of the concept "record of proceedings" although the words are clearly qualified by the following words: "sought to be corrected or set aside". These qualifying words indicate that the content and extent of the "record of proceedings" will depend upon the facts or circumstances of the particular case. Thus in *Muller and Another v The Master and Others* 1991 (2) SA 217 (N) it was held that, where the applicants sought to set aside the decision of the Master .... all that was required was that part of the record dealing with this question while in *Johannesburg City Council v The Administrator, Transvaal and Another* (1) 1970 (2) SA 89 (T) Marias, J held that the record of proceedings went much further ." (reference was then also made by Southwood, J to *Pieters v Administrateur, Saudwes – Afrika* 1972 (2) SA 220 (SWA)).

[22] In my view, in similar fashion as determined by this court in *Loretz v Mackenzie* 1999 (2) SA 72 (T) at 74B, which decision Southwood, J applied in *Afrisun Mpumalanga* (supra), the proper relief would be to order in terms of Rule 35 (13) that the provisions of Rule 35 relating to discovery shall apply to the main application. This would avoid the procedural "shackles" of Rule 53 being forced on the SIU whilst at the same time providing for discovery by the Department of the record which, as aforementioned, our courts have found to be indispensable to review applications.

Appropriate relief

[23] To simply make an order in terms of Rule 35(13) in the fashion mentioned above, could conceivably open the door to extensive further

interlocutory proceedings and extended or possibly even protracted discovery procedures.

[24] In the circumstances of this case such protracted proceedings would be unnecessary where the parties all know that that which Marepo seeks to have discovered or produced, is only the balance of the items or documents not obtained by its Rule 35 (12) notice previously directed to the SIU and answered by it. I shall borrow from this notice in formulating the order which I intend making, bearing in mind that the Rule 35 (12) notice was restricted by its nature to references made in the SIU's founding affidavit in the main application, although it must be stated that "the records" were already mentioned there in the widest and not restricted sense.

[25] Although the Department has not been directly targeted by Marepo and although service of the interlocutory application and the preceeding Rule 35(12) notice were only served on the state attorney on behalf of the SIU, the Department has clearly been cited as a party and joined in both the main and interlocutory proceedings. This is clearly an example of the case where an *"organ of state, hiding behind a parapet of silence, adopts a supine attitude towards the matter ..."*, which attitude should not be allowed, procedurally or otherwise, to prejudice the rights of a private respondent in review proceedings. See: *South African Football Association v Stanton Woodrush (Pty) Ltd* 2003 (3) SA 313 (SCA) at [5]. To require Marepo to serve a fresh notice of discovery however, either in general or pertaining to the record of proceedings would be an unnecessary waste of time and money. In the interests of justice, procedural practicality should prevail.

[26] To sum up, I conclude as follows:

26.1 The SIU's main application is, in substance, a review application;

26.2 Not only Marepo, but the court is entitled to have sight of the full "record of proceedings" such as it may be pertaining to the administrative decision and subsequent conduct which lead to the amendment and extension of the project and the contract between the Department and the Consortium;

26.3 The relief sought by Marepo as fashioned in terms of Rule 53(1)(b) of the Uniform Rules are inappropriate in the circumstances;

26.4 The Department should make discovery of the relevant documents.

Costs

[27] I took all the above considerations into account in exercising my discretion in regard to the cost order which I intend making, including a consideration of the possible permutations of costs orders which might result in the main application.

Order

[28] In the result I make the following order:

1. The provisions of Rule 35 relating to discovery of documents shall be applicable to the main application;
2. The tenth respondent is ordered to make discovery of all documents constituting the record of the decisions whereby the scope of TENDER HP07/07 was amended or extended beyond that contained in the agreement between the tenth respondent and the consortium of other respondents dated 12 October 2007, annexed as Annexure FA5

to the founding Affidavit in the main application, including but not limited to the correspondence, reports and bills of quantities pertaining to the "*purported change in the scope of the project, particularly the decision to divide the project into 12 (twelve) different phases and to prepare and design new sketch plans relating thereto*" as referred to in paragraph 54 of the founding affidavit in the main application.

3. The order in paragraph 2 shall not limit any party's rights in terms of Rule 35(3), if applicable;
4. Costs of the interlocutory application shall be costs in the main application.

N DAVIS
Judge of the High Court
Gauteng Division, Pretoria

Date of Hearing: 6 December 2018

Judgment delivered: 25 January 2018

APPEARANCES:

For the Applicant:	R. Bedhesi SC (with him A. J. Lapan) Instructed by: State Attorney, Pretoria
For the Seventh Respondent:	S. Budlender Instructed by: Savage, Jooste & Adams Inc., Pretoria