



IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)
REPUBLIC OF SOUTH AFRICA

Case Number: 44499/2017

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ~~YES~~/NO

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO

(3) REVISED

DATE:

20/03/2018

SIGNATURE:

allan mca...

20/3/18

In the matter between:

POWERTECH TRANSFORMERS (PTY) LTD

Applicant

and

CITY OF TSHWANE METROPOLITAN MUNICIPALITY

First Respondent

SOPITYO ENGINEERING AND CIVIL CC

Second Respondent

DEPARTMENT OF TRADE AND INDUSTRY

Third Respondent

NATIONAL TREASURY

Fourth Respondent

STHABISO BUSINESS ENTERPRISE CC	Fifth Respondent
WEG TRANSFORMERS AFRICA (PTY) LTD	Sixth Respondent
REFQUIP (PTY) LTD	Seventh Respondent
DEEP BLUE SEA INVESTMENTS CC	Eighth Respondent
SETHEO ENGINEERING	Ninth Respondent
STS ENERGY (PTY) LTD	Tenth Respondent
UNIQ HOLDINGS (PTY) LTD	Eleventh Respondent
SUPERFECTA TRADING 209 CC	Twelfth Respondent
CONTINENTAL AFRICA POWER SUPPLIES (PTY) LTD	Thirteenth Respondent
KATSHESHA ENGINEERING SERVICES	Fourteenth Respondent
KGOSHI ELECTRICAL CC	Fifteenth Respondent
RESQUIP (PTY) LTD	Sixteenth Respondent
ENZANI TECHNOLOGIES (PTY) LTD	Seventeenth Respondent
MDINA ENGINEERING CC	Eighteenth Respondent
OURKINGDOM ENGINEERING AND PROJECTS CC	Nineteenth Respondent
CYTOTOUCH (PTY) LTD	Twentieth Respondent
LEBOGANG ELECTRICAL WHOLESALERS CC	Twenty-first Respondent
ACTOM INVESTMENT HOLDINGS (PTY) LTD	Twenty-second Respondent
AFRICAN POWER TRADERS (PTY) LTD	Twenty-third Respondent
LJ TRADING & MAKROTI ENTERPRISES JV	Twenty-fourth Respondent

JUDGMENT

DIPPENAAR AJ

Introduction

- [1] During the hearing on the 23rd of February 2018, the second respondent, after abandoning an application for postponement, sought leave to deliver a supplementary affidavit dealing with the discretionary relief sought by the

applicant. Pursuant to argument, an order was granted dealing with the main relief sought. The order further set time limits for the filing of such supplementary affidavit and supplementary heads of argument.

[2] In terms of the order, two issues were reserved for determination:

[2.1] the discretionary relief under Regulation 14 of the Preferential Procurement Policy Framework Act Regulations, 2017 ('PPPFA Regulations'); and

[2.2] costs.

[3] This is the judgment on the reserved issues.

Discretionary relief under the PPPFA Regulations

[4] The applicant seeks an order that the first respondent be directed to take steps against the second respondent in terms of Regulation 14. It does not seek any relief against the second respondent on this issue. The discretionary relief has no effect on the second respondent and does not presuppose any findings against the second respondent and its conduct.

[5] The relevant portions of Regulation 14 provide as follows:

"14.(1) Upon detecting that a tenderer submitted false information regarding its BBBEE status level of contributor, local production and content, or any other matter required in terms of these Regulations which will affect or has affected the

evaluation of a tender, or where a tenderer has failed to declare any subcontracting arrangements, the organ of state must —

(a) inform the tenderer accordingly;

(b) give the tenderer an opportunity to make representations within 14 days as to why —

(i) ...

(ii) ...

(iii) the tenderer should not be restricted by the National Treasury from conducting any business for a period not exceeding 10 years with any organ of state; and

(c) if it concludes, after considering the representations referred to in subregulation (1)(b), that —

(i) such false information was submitted by the tenderer —

(aa) disqualify the tenderer or terminate the contract in whole or in part; and

(bb) if applicable, claim damages from the tenderer; or

(ii) the successful tenderer subcontracted a portion of the tender to another person without disclosing, penalise the tenderer up to 10 percent of the value of the contract.

(2)(a) An organ of state must —

- (i) *inform the National Treasury, in writing, of any actions taken in terms of subregulation (1);*
- (ii) *provide written submissions as to whether the tenderer should be restricted from conducting business with any organ of state; and*
- (iii) *submit written representations from the tenderer as to why that tenderer should not be restricted from conducting business with any organ of state.”*

[6] The provisions of Regulation 14 thus envisage an investigative process which should result in a conclusion. During this process, the second respondent is afforded an opportunity of making representations and stating its case. There is no prejudice to the second respondent; as was contended in argument; and it does not automatically result in any blacklisting.

[7] The applicant's papers contain substantial and detailed allegations regarding fraudulent conduct on the part of the second respondent. The applicant further alleges collusion between the first respondent and second respondent in relation to the tender awarded to the second respondent. Neither respondent has answered such allegations.

[8] I am of the view that in the circumstances of this matter, the first respondent has the clear obligation to investigate the allegations of impropriety in the municipal tendering process, as held by the Constitutional Court in *Viking Pony Africa Pumps (Pty) Ltd t/a Tricom Africa v Hidro-Tech Systems (Pty)*

Ltd and Another.¹ In the present context, Regulation 14 of the PPPFA Regulations prescribes the steps to be taken by the first respondent.

[9] The second respondent's supplementary affidavit ('the supplementary affidavit') was delivered late and absent any condonation application; despite the advices of its legal representatives that a condonation application would be delivered. I have, nonetheless, taken the contents of the affidavit into account as it has a bearing on both the issues which must now be determined.

[10] During argument and in seeking leave to deliver the supplementary affidavit, the second respondent's main complaint was that if the relief is granted, its affairs would be open to scrutiny and it may be blacklisted.

[11] It was further submitted that the first respondent threw the second respondent under the proverbial bus by not persisting with its opposition to the application. It was argued that extensive discussions took place between representatives of the first and second respondents respectively regarding the application and that second respondent was under the impression that the first respondent would persist in its opposition to the application.

¹ 2011 (1) SA 327 CC at para [22].

- [12] These submissions are disturbing and render further credence to the applicant's contentions of apparent collusion between the first and second respondents pertaining to the award of the tender.
- [13] In its supplementary affidavit, the second respondent attempted to meet applicant's allegation that its bid was seen and copied by the second respondent by denying such conduct and any knowledge of what happened to its bid after submission.
- [14] It was further contended that the applicant must prove how the second respondent obtained its tender and should have obtained security camera footage from the first respondent. These contentions are untenable.
- [15] The second respondent did not address the important contentions that its tender falsely misrepresented its position in relation to the local minimum threshold content in its documents submitted to the first respondent and that it could not meet such content threshold requirements.
- [16] The second respondent's allegations are woefully inadequate to meet the case put up by the applicant and constitute little more than a general bald denial of wrongdoing, which does not create any *bona fide* dispute of fact. The version put up by the applicant must thus be accepted.²

² *Wightman t/a JW Construction v Headfour (Pty) Ltd and Another* 2008 (3) SA 371 SCA, pp 12-13.

- [17] The second respondent further contends that the first respondent must detect the wrongdoing before Regulation 14 is applicable and that the relief sought violates the principle of separation of powers and a court lacks jurisdiction to make the order sought.
- [18] This view is misconceived. Both section 172(1)(b) of the Constitution³ and section 8 of the Promotion of Administrative Justice Act⁴ confer a generous jurisdiction⁵ on courts in proceedings for judicial review to make orders that are just and equitable.⁶
- [19] Regulation 14 is triggered upon the detection that a tenderer submitted false information. Once the regulation is triggered, the process is mandatory and not discretionary.
- [20] In the present circumstances, there is no precursor required on the part of the first respondent in detecting that false information has been submitted.
- [21] The first respondent has not challenged the veracity of the applicant's averments and has ultimately chosen to abide the decision of court and withdraw its opposition to the application after delivery of the applicant's replying papers. It is thus fully aware of the facts evidencing the submission

³ 18 of 1996

⁴ 3 of 2000.

⁵ *Electoral Commission v Mhlope and Others* 2016 (5) SA 1 (CC) paras [83] and [132].

⁶ *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 (3) SA 121 (CC) paras [29]-[30].

of false evidence to it by the second respondent and does not oppose the granting of the discretionary relief sought.

- [22] On the papers, it is undisputed that the second respondent misrepresented the position in relation to the minimum local content threshold in its tender documents. The facts put up by the applicant which illustrate the falseness of the second respondent's representation to the first respondent, is corroborated by no less than eight affidavits. These facts are not disputed or dealt with in either the second respondent's answering or supplementary affidavits.
- [23] In my view, there is no legitimate basis of opposition to the relief sought against the first respondent disclosed in the second respondent's affidavits.
- [24] The allegations pertaining to the misrepresentations made in the tender documents submitted to the first respondent were raised in the applicant's papers. Since at least June 2017, the first respondent was aware of the facts which triggered its statutory obligations under Regulation 14. The first respondent has failed to comply with its statutory obligations and has not delivered any affidavit evidencing compliance with those obligations.
- [25] In my view, in the present circumstances, where the first respondent has remained supine and has taken no steps to comply with its statutory duties, it

is in the interests of justice⁷ to grant relief against the first respondent to oblige it to comply with its obligations under Regulation 14 of the PPPFA Regulations and to compel it to comply with its statutory obligations thereunder.

[26] The total failure on the part of both the first and second respondents to address the allegations of fraud in relation to the tender is disturbing and warrants investigation in the public interest.⁸

[27] The second respondent will have an adequate opportunity to deal with the fraud allegations levied against it during the process envisaged by Regulation 14. The circumstances surrounding the award of the tender to the second respondent must be reported and investigated in compliance with the prescripts of Regulation 14.

[28] I have already found that the award of the tender to the second respondent is to be set aside and appropriate relief was granted on the 23rd of February 2018.

Costs

[29] The first respondent, throughout, opposed the application without delivery of an answering affidavit and in which serious allegations of a fraudulent tender are made, supported by plausible evidence.

⁷ *Electoral Commission v Mhlope and Others supra*, paras [83] and [132].

⁸ *Nyathi v MEC for Department of Health, Gauteng and Another* 2008 (6) SA 94 (CC) para [85].

- [30] Procedurally, the first respondent failed to comply with the directives of the Deputy Judge President in relation to the delivery of its answering papers and heads of argument. It did not immediately thereafter advise the applicant that it no longer intended opposing the application. Instead, a notice of withdrawal and intention to abide was only delivered during the afternoon on the 22nd of February 2018.
- [31] Throughout the litigation, the first respondent exhibited an obstructive attitude resulting in various interlocutory applications to obtain documents and interdict the implementation of the tender, up to the eleventh-hour withdrawal of opposition.
- [32] In my view, such obstructive conduct warrants the granting of a punitive costs order against the first respondent in the circumstances.⁹
- [33] Despite withdrawing its opposition at the last moment, it would in my view be a proper exercise of my discretion on costs to hold the first respondent liable for costs up to the hearing.
- [34] The unanswered allegations of fraudulent conduct on the part of the second respondent in relation to the tender has a direct bearing on costs. The

⁹ *MEC for Roads and Public Works, Eastern Cape and Another v Intertrade Two (Pty) Ltd* 2006 (50 SA 1 (SCA) para [21]; *Kalil NO and Others v Manaung Metropolitan Municipality and Others* 2014 (5) SA 123 (SCA), para [30].

fraudulent conduct is causally related to the application¹⁰ and forms the very basis of the application. The approach adopted by the second respondent throughout these proceedings has been aimed at avoiding pertinently dealing with such allegations and to avoid scrutiny of its conduct.

[35] The second respondent moreover failed to comply with the Deputy Judge President's directives and did not file any heads of argument. At the hearing it sought an oral postponement from the bar in order to deliver a further affidavit. The application for postponement was later abandoned and replaced with a request to deliver another affidavit.

[36] At the hearing on 23 February 2018, the second respondent opposed the granting of the relief sought in prayer 5, which is aimed at disclosure of the implementation of the tender and the financial benefits received by the second respondent, notwithstanding that no factual or legal basis exists for such opposition.

[37] Yet further costs were incurred and the finalisation of the proceedings delayed by the delivery of a supplementary affidavit and submissions, which ultimately did not present any valid basis for opposition¹¹ to the relief sought, but sought to prevent scrutiny of the second respondent's conduct.¹²

¹⁰ *Mkhwanazi v Quarterback Investment (Pty) Ltd and Another* 2013 (2) SA 549 (GSJ) at paragraphs [82] and [84].

¹¹ *Fidelity Security Services (Pty) Ltd v Mogale City Local Municipality and Others* 2017 (4) SA 207 (GJ) para [34].

¹² *Graham and Another v Law Society, Northern Provinces and Others* 2016 (1) SA 279 (GP), para [47].

[38] In the circumstances, I am satisfied that a punitive costs order is warranted against the second respondent.

Order

[39] Accordingly, I grant the following order:

1. The First Respondent is directed to comply forthwith and within a period of 30 days from date of service of this order with the provisions of Regulation 14, and specifically Regulation 14(1)(a) 14(1)(b)(iii), 14(1)(c) and 14(2)(a) of the Preferential Procurement Policy Framework Act Regulations 2017.
2. The First and Second Respondents are ordered to pay the costs of the application up to and including the 23rd of February 2018 jointly and severally, on the scale as between attorney and client, including the costs consequent upon the employment of two counsel, where employed.
3. The Second Respondent is ordered to pay the costs of the application incurred subsequent to the hearing on 23 February 2018, on the scale as between attorney and client, including the costs consequent upon the employment of two counsel, where employed.
4. A copy of this order is to be served on the first respondent.



E.F. DIPPENAAR

**ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

DATE HEARD:

23 February 2018

JUDGMENT DELIVERED**ON RESERVED PORTION:**

20 March 2018

APPEARANCES:*Counsel for the Applicant:*

Advocate Steven Budlender and

Advocate Katherine Harding

Instructed by:

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Counsel for the First Respondent:

No appearance

(Intention to oppose withdrawn by notice 22
February 2018)*Instructed by:*

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