

SOUTH AFRICA / JUDGMENT

AA Solwandle Attorneys Incorporated v Nelson Mandela Bay Municipality (1093/2019) [2019] ZAECPEHC 62 (25 September 2019)

[2019] ZAECPEHC 62

COURT

Eastern Cape High Court, Port Elizabeth

BEFORE

G H Bloem

CASE / FILE NUMBER

1093/2019

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IN

THE HIGH COURT OF SOUTH AFRICA

EASTERN

CAPE LOCAL DIVISION, PORT ELIZABETH

CASE

NO. 1093/2019

In

the matter between:

AA

SOLWANDLE ATTORNEYS

INCORPORATED Applicant

and

THE NELSON MANDELA BAY

MUNICIPALITY Respondent

JUDGMENT

Bloem J.

- [1] The applicant made an application for an order “that the respondent be directed to resolve the applicant’s written objection dated 25 June 2018 within two (2) weeks from the granting of this order” as well as costs.
- [2] The history of this matter is that the respondent, the Nelson Mandela Bay Municipality, issued an invitation to tender for the provision of corporate expert legal services by attorneys. The applicant, a firm of attorneys, submitted a tender. By letter dated 21 June 2018

the municipality informed the applicant that its bid was unsuccessful because it “failed to submit proof of indemnity insurance, as required”. The municipality also advised the applicant that “according to section 52 of Nelson Mandela Bay Municipality (NMBM) Supply Chain Management (SCM) policy a person aggrieved by decisions or actions taken in the implementation of the supply chain management system, may lodge with the Accounting Officer, within 14 days of the decision or action, a written objection or complaint against the decision or action concerned.” The applicant responded by letter dated 25 June 2018 wherein it objected to the respondent’s decision to render its tender unsuccessful on the ground that the applicant failed to submit proof of indemnity insurance. Regarding reference to the respondent’s supply chain management policy, the applicant stated in paragraphs 6 and 7 of its letter that the process to be followed in accordance with the policy “is procedurally incorrect. Your internal policies must be in line with the Local Government: Municipal System Act 34 of 2000. Section 62(1) of this Act provides that:

“A person whose rights are affected by a decision taken by a political structure, political office bearer, councilor or staff member, may appeal against that decision by giving written notice of the appeal and reasons to the municipal manager within 21 days of the date of the notification of the decision.”

- 7) Your internal policies cannot supercede a statutory provision which directs the overall procedures and directives according to which a municipality is run.” (sic)[1]
- [3] During April 2019 the applicant instituted the present application for the relief set out above. The notice of motion was prepared as if a decision or proceedings were under review in terms of rule 53 of the Uniform Rules of Court. For instance, reference was made to the respondent dispatching to the registrar “the record giving rise to the findings and remedial action sought to be reviewed and set aside,” that the record be made available to the applicant and that the applicant, by delivery of a notice and accompanying affidavit, amend, add to or vary the terms of its notice of motion and supplement the supporting affidavit. In the affidavit the grounds of review are set out as follows:

“55. The City’s SCMP prescribed that AAS lodge a written objection against the City’s impugned decision within fourteen (14) days thereof. The written objection against the City’s decision was supposed to be resolved within

- (60) days thereof. The City has failed to resolve AAS’s written objection within this prescribed time period.
56. The City’s failure to resolve AAS’s written objection within the prescribed time period should be reviewable in terms of section 6(2)(g) read together with section 6(3)(b) of PAJA.
57. Accordingly, I contend that in these circumstances that this Honourable court direct the City to resolve AAS’s written objection within two (2) weeks.”
- [4] It was stated in the applicant’s heads of argument that the application was “to compel compliance with the Municipality’s own policies, it is not ... a review of a final decision made by the Municipality or its objection panel.” At the commencement of the hearing Mr

Mullins, counsel for the applicant who drafted neither the applicant's affidavits nor heads of argument, made it clear that the applicant was not seeking to review a decision or proceedings, but that it sought relief in the form of a mandatory interdict. The applicant sought an order that the respondent be compelled to resolve its written objection within two weeks from the date of the granting of the order that it sought.

[5] The three requirements for the granting of a final interdict are: a clear right on the part of the applicant; an injury actually committed or reasonably apprehended; and the absence of any other satisfactory remedy available to the applicant.[2]

[6] It was submitted on behalf of the applicant that the right that it sought to protect in this application was for the respondent to resolve the applicant's written objection. For that submission reliance was placed on paragraphs 49 and 50 of the respondent's supply chain management policy which read as follows:

"49. Objections and complaints

- (1) Persons aggrieved by decisions or actions taken in the implementation of the Supply Chain Management system, may lodge with the Accounting Officer, within 14 days of the decision or action, a written objection or complaint against the decision or action concerned.
- (2) The successful bidder may not commence any work until the expiry of the 14 day appeal period, or confirmation in writing before the expiry of the 14 day appeal period that none of the affected parties intend to appeal, or confirmation of the satisfactory resolution of any appeals, as detailed in the SCM Procedures Manual.

50. Resolution of disputes, objections, complaints and queries

- (1) The Accounting Officer must appoint an independent and impartial person, not directly involved in the Supply Chain Management processes –
 - (a) to assist in the resolution of disputes between the NMBM and other persons regarding –
 - (i) any decisions or actions taken in the implementation of the Supply Chain Management system; or
 - (ii) any matter arising from a contract awarded in the course of the Supply Chain Management system; or
 - (b) to deal with objections, complaints or queries regarding any such decisions or actions or any matters arising from such contract.
- (2) The Accounting Officer or another official delegated by the Accounting Officer is responsible for assisting the appointed person in performing his or her functions effectively.
- (3) The person appointed must –
 - (a) strive to resolve promptly all disputes, objections, complaints or queries received; and

- (b) submit monthly reports to the Accounting Officer on all disputes, objections, complaints or queries received, attended to or resolved.
- (4) A dispute, objection, complaint or query may be referred to the Eastern Cape Provincial Treasury if –
 - (a) the dispute, objection, complaint or query is not resolved within 60 days of being lodged; or
 - (b) no response is forthcoming within 60 days of the lodgement of the dispute, objection, complaint or query.
- (5) If the Eastern Cape Provincial Treasury does not or cannot resolve the matter, the dispute, objection, complaint or query concerned may be referred to the National Treasury for resolution.
- (6) This paragraph must not be read as affecting a person's rights to approach a competent court for such order as may be just and necessary in the circumstances at any time."
- [7] The applicant's reliance on paragraphs 49 and 50 of the respondent's supply chain management policy is misplaced. Those paragraphs do not give the applicant a right to claim that the respondent should resolve its written objection, as the relief sought suggests. Those paragraphs also do not give the respondent's accounting officer or the independent and impartial person the power to resolve an objection, complaint or query referred to the accounting officer in terms of paragraph 49(1). The power of the independent and impartial person is limited to striving towards or assisting the parties to resolve an objection, complaint or query or dealing with such objection, complaint or query. The independent and impartial person does not have the power to confirm, substitute or vary the respondent's decision to declare or find the applicant's bid unsuccessful.
- [8] In *Esda Properties (Pty) Ltd v Amathole District Municipality and others*[3] the independent and impartial person was described by Plasket J in a similar supply chain management policy of the Amathole District

Municipality as "a person with no decision-making powers ... appointed to assist the parties to resolve their dispute, acting, it would appear, as a mediator or conciliator." The applicant has failed to demonstrate that it has a right to claim that the respondent should be directed to resolve its written objection. It means that the applicant has failed to prove one of the three requisites for the grant of a final interdict. The application must therefore be dismissed.

- [9] If I am wrong in having found that the applicant has failed to demonstrate that it has a clear right which should be protected, there is another reason for the dismissal of the application.

The applicant has at least one alternative satisfactory remedy available. It could and should have instituted an application

for an order that the respondent's decision to declare or find its bid unsuccessful be reviewed and set aside.

[10] In the circumstances, the respondent successfully opposed the application. It is entitled to its costs.

[11] In the result, it is ordered that the application be and is hereby dismissed with costs.

G H BLOEM

Judge of the High Court

For the applicant: Adv N Mullins SC, instructed by AA Solwandle Attorneys, Sandton and T M Pitana Attorneys, Port Elizabeth.

For the respondent: Adv N L Ntsepe, instructed by Joubert Galpin Searle Inc, Port Elizabeth.

Date heard: 19 September 2019

Date of judgment: 25 September 2019

[1] The correct citation of the relevant Act is the Local Government: Municipal Systems Act, 2000 (Act No 32 of 2000). Furthermore,

section 62(1) was not properly quoted. That subsection reads as follows: “A person whose rights are affected by a decision taken by a political structure, political office bearer, councillor or staff member of a municipality in terms of a power or duty delegated or sub-delegated by a delegating authority to the political structure, political office bearer, councillor or staff member, may appeal against that decision by giving written notice of the appeal and reasons to the municipal manager within 21 days of the date of the notification of the decision.”

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[2] Setlogelo v Setlogelo 1914 AD 221 at 227 and Hotz and others v University of Cape Town 2017 (2) SA 485 (SCA) at 496H.

[3] Esda Properties (Pty) Ltd v Amathole District Municipality and others (2635/2014)

[2014] ZAECGHC 76 (18 September 2014) at para 11, which was referred to with approval in DDP Valuers (Pty) Ltd v Madibeng Local Municipality (233/2015) [2015] ZASCA 146 (1 October 2015) at para 21.

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Prepared on 11 October 2026 · Esheria