

SOUTH AFRICA / JUDGMENT

Afrocentric IP (Pty) Ltd v Buffalo City
Metropolitan Municipality and Others
(EL575/2024) [2024] ZAECELLC 33 (15 April 2024)
[2024] ZAECELLC 33

COURT

Eastern Cape High Court, East London Local Court

BEFORE

B Hartle

CASE / FILE NUMBER

EL575/2024

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IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION, EAST LONDON CIRCUIT COURT)

CASE NO: EL575/2024

NOT REPORTABLE

In the matter between

AFROCENTRIC IP (PTY) LTD

Applicant

and

BUFFALO CITY METROPOLITAN

MUNICIPALITY

First Respondent

THE MUNICIPAL MANAGER, BUFFALO CITY

METROPOLITAN MUNICIPALITY

Second Respondent

MEC RESPONSIBLE FOR COOPERATIVE

GOVERNANCE & TRADITIONAL AFFAIRS,

EASTERN CAPE

Third Respondent

CHAIRPERSON OF PROJECTS BOARD,

MUNICIPALITY

Fourth Respondent

BRIEF REASONS AND

RULING

UNDER PART A OF APPLICATION

FOR INTERIM RELIEF

HARTLE J

- [1] The applicant seeks interdictory relief under Part A pending a judicial review under Part B.
- [2] In the latter respect the applicant seeks the review firstly of the first respondent's decision ("the first impugned decision") that it took in terms of its procurement processes to publish the Request for Quotation ("RFQ") preceding the appointment of Durchame Asset Management and Accounting (Pty) Ltd ("Durchame") to "assist the Department with addressing the audit qualifications for 2022/2023 financial year for a period of four months", and secondly, the purported termination by the municipality of a service level agreement that the municipality entered into with it which was due to expire by effluxion of time on 29 November 2024 but for the unlawful termination ("the second impugned decision").
- [3] Although the Municipality[1] opposed the application on the basis that urgency was self-created, the parties were in agreement, each for reasons of their own, that the matter should be promptly heard before me and instantly determined, at least in respect of the relief sought under Part A to clarify Ducharme's position. The latter the company was appointed by it on 12 March 2024 pursuant to the RFQ aforesaid for a specific short term objective.
- [4] On the issue of the objection by the Municipality of the non-joinder of "Ducharme", the manner in which Mr. Dyke who appeared for the applicant reframed the proposed notice of motion to allow for an expedited return date to deal with this isolated facet would have catered for Ducharme's interests in the short term given the claimed urgency in the matter. By virtue of my ruling I make herein however it is unnecessary to rule on the question whether I should have non-suited the applicant or deferred the determination of the issues sought to be promptly resolved under Part A until it was joined. The parties are in agreement that based on the relief sought in both applications Ducharme would have a direct and substantial interest in the matter and has, according to Mr. Dyke who appeared on its behalf, now being appropriately served. (The applicant contends that it would certainly have joined it sooner had it been timeously apprised of its identity before launching the application and if the municipality had not deflected that it should find out of its identity via media the machinery of the Promotion of Administrative Justice Act, No. 3 of

2000 (“PAJA”).

- [5] The most critical aspect is whether the applicant has established a prima facie right to assert its entitlement to the relief sought pending the review application. (It is a trite principle that the requirements which an applicant for an interlocutory relief must establish are firstly such a right coupled with a well-grounded apprehension of irreparable harm if the relief is not granted and the ultimate relief is eventually granted that, the balance of convenience favours the granting of the interim relief sought, and the absence of any other satisfactory remedy.)
- [6] The applicant has clarified two bases for its interest in the matter.
- [7] Not only is it concerned with the purported termination of its service level agreement under perceived mysterious and claimed unlawful circumstances which it contends should not be countenanced in the realm of public law since it would be ultra vires the legislation governing how the municipality is required to conduct its affairs and how, constitutionally, issues if procurement and cancellation should be approached, but it contends that the appointment of Ducharme under the RFQ mechanism was in effect to substitute it as the exclusive provider of these services pending the natural expiry of its service level agreement.
- [8] Whatever suspicions the applicant initially entertained that Ducharme was upstaging it, however, this was evidently laid to rest in what was revealed by the Municipality in its answering affidavit. It transpires that it had, by way of public advertisement on 22 April 2022 already and well before there was any hint of a dispute between the applicant and the Municipality arising from the terms of their service level agreement, procured the appointment of a panel of professional service providers to assist the municipality with “Financial Management Support for a period of three years”. Ducharme was self-evidently appointed to that panel on 6 July 2023 under a different contract (CE 430), and was thereupon appointed from that panel in terms of the RFQ on 12 March 2024. (The only scrutiny that remains is around the timing of the order being issued to Ducharme relative to the applicant’s own unique relationship with the municipality and the termination of its service level agreement.)
- [9] It is evident that the applicant was appointed under a different contract (CE 351) for the “Supply, Implementation, Support and Maintenance of an Integrated, Full Asset Life Cycle Management System” for a period of three years. Even if conceptually these services may overlap, little purpose is served for present purposes in trying to map the areas of commonality with a fine-tooth comb.
- [10] The municipality has also provided what appears to be an objective motivation for its appointment latterly of Ducharme as a consequence

of adverse audit findings by the Auditor-General extensively revealed in Annexure “AA 20”, which is dated 19 November 2023. This it would be entitled to do under Chapter 2 of the Local Government Municipal Systems Act, No. 32 of 2000, especially when a service delivery agreement is expected to expire or be terminated within the next twelve months.[2]

- [11] The Municipality was in my view ostensibly within its rights to appoint a member from the panel pursuant to a RFQ mechanism. Whilst the timing of the appointment may appear suspicious, the municipality has in my view established an objective entitlement and need per se for the kind of services contemplated by the municipality that Ducharme is expected to provide for a limited basis.
- [12] There are vast implications of the statutory obligations on the municipality to promptly address a qualified audit and even though the applicant alleges that it has achieved a clean audit for the municipality before, it has nowhere suggested that it is presently in a position, given its obviously troubled relationship with the municipality going back to September 2023 and its failure to have gone on site, even if not of its own making, to address the concerns of the Auditor-General in this is short term.
- [13] Though there is still much to be explained and investigated around the circumstances under which the applicant claims to have been sidelined and not to have been prevailed upon itself to engage with the Auditor-General’s adverse findings in the scope of its works, there is in my view an objective imperative to permit the municipality to address these issues as it has through the short term appointment of Ducharme for the limited period and purpose. The applicant cannot claim that by allowing that work

to continue it will suffer irreparable harm inasmuch as it has been precluded from doing the work not as a result of the appointment of Ducharme per se by virtue of the second impugned decision taken. The municipality by its own concession is not duplicating services by its

appointment of Ducharme in the short term and, but for the termination of the service level agreement, would have been obliged

to honour both agreements going forward, but for the claimed unlawful termination.

- [14] But the applicant does in my opinion have a prima facie right insofar as its unique relationship with the municipality is concerned and within the realm of the constitutional value of

legality to question the claimed unlawful termination of its service level agreement. In this regard the issue of exclusivity of services and the timing of Ducharme’s appointment may have a bearing, but the applicant has in my view not established a prima facie right insofar as the RFQ and the appointment of Ducharme is concerned.

- [15] Even if I am wrong in this respect, however, I would in the exercise of my discretion whether to have granted the interdict pending a review of the first impugned decision have declined to grant the relief for the reasons stated in paragraph 10 above.

- [16] In summary, with regard to the requested scrutiny into the circumstances under which the applicant came to be sidelined and its availability to provide the professional services that it was contracted to bring, the applicant certainly has a pressing interest which it is entitled to pursue by way of the interdictory relief sought concerning its own affairs as envisaged in prayer 3 of the notice of motion under Part A.
- [17] The applicant correctly alleges in my view that although its parochial contractual issues are at stake the municipality's conduct in terminating the agreement is very much in the arena of public law and it is entitled to an expectation that the municipality will conduct its contractual affairs properly in this regard. Any suggestion of constitutionally invalid conduct or conduct that threatens to undermine the constitutional value of legality underpins a *prima facie* right and gives ground to the requirement of reasonably anticipated harm.[3]
- [18] It is for example of concern that the municipality is seeking to augment reasons for terminating the service level agreement and has further intimated that it will ask for a rectification (regarding the service level agreement's starting date) to render the issue of any review moot. Even if a review court finds that the Municipality was entitled to hold the applicant to account in its relationship with it as a service provider, it cannot avoid a legality review by simply wishing away the contract. Instead of satisfying this court that there is no harm to be envisaged for the applicant in its recent justification for termination of the service level agreement, which has grown since the issue of the present application, it instead reinforces the need for proper scrutiny and underscores the applicant's claims that it will likely succeed in the proposed review of the second impugned decision.
- [19] As the applicant has further pleaded there is much at stake for it not only in respect of its financial interests arising in terms of the agreement but also from the point of view of its standing as a professional entity in the context of the work envisaged in the service level agreement. It does not sit well with it for the service level agreement to have been prematurely terminated for reasons which casts aspersions on its professional reputation.
- [20] I am accordingly inclined to grant to the applicant the interim relief sought in respect of the second impugned decision pending the proposed review under Part B. By the municipality's own insistence that Durcharme's appointment is unrelated, the balance of convenience favours the service level agreement remaining in place pending the review. As for the question of costs I am satisfied that these should follow the result even if the applicant has only been partially successful. The municipality could surely assuage the applicant's reasonable concern that its conduct toward it was not above board in its appointment of Durcharme if it had appreciated the very public nature of its procurement processes.
- [21] In the result I issue the following order under Part A:

1. The first respondent is interdicted and restrained from giving effect to the termination letter sent to the applicant and/or its attorneys on 8 March 2024 and confirmed on 22 March 2024 pending the finalization of the review application under Part B.
2. The first, second and fourth respondents are liable for the costs of the application under Part A.
3. The costs shall include the costs of employing two counsel, where applicable.

B HARTLE

JUDGE OF THE HIGH COURT

DATE OF HEARING : 11 April 2024

DATE OF JUDGMENT : 15 April 2024

Appearances:

For the applicant: Mr. B Dyke SC instructed by Poswa Incorporated c/o Drake Flemmer & Orsmond (EL) Inc., East London (ref. Mr. Pringle). For the first, second & fourth respondents: Mr. S Rorke SC instructed by Wesley Pretorius & Associates, East London (ref. Mr. Pretorius).

[1] This is a collective reference to the first, second and fourth respondents cited herein.

[2] See section 77 (b)(ii).

[3] See for example Down Touch Investment (Pty) Ltd & Another v SA National Road Agency SOC Ltd & Another 2064/2000

[2020] ZAE CGHC 120 (29 October 2020) and LSM Security & Others v MEC, Department of Social Development, EC (2300/2022) [2023] ZAE CGQBHC 12 (24 January 2023).

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