

SOUTH AFRICA / JUDGMENT

Freestate Steam & Electrical CC v Minister of Public Works and Others (7810/2008)

[2008] ZAGPHC 256 (18 August 2008)

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COURT

High Courts - Gauteng

BEFORE

C Pretorius

CASE / FILE NUMBER

7810/2008

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In the matter between:

FREESTATE STEAM & ELECTRICAL CC Ap plicant

and

PRETORIUS J,

This is an interlocutory application in which the applicant seeks that:

“1 . The provisions of Rule 35 of the Uniform Rules of Court are declared applicable to this A pplication to the extent detailed in paragraph s 2 and 3 below. 2.

The FIRST and SECOND RESPONDENTS are ordered to severally make available to the APPLICANT for inspection and copying within 10 (ten) days of service of this O rder, the following documentation:

The minutes of technical meetings No's 1 -13 in respect of the project at I Military Hospital of which the Fourth Respondent is the contractor; The minutes of the site meetings for the period coinciding with technical meetings 1 – 14 in respect of the project at 1 Military Hospital mentioned in (i) above; The minutes of all technical and site meetings in respect of the project at the Waterkloof Air Force Base Clinic of which the fourth respondent is the contractor; The minutes of any meetings and other documentation pertaining to any disciplinary steps taken against J de Wit; A lists of all projects in respect of which J de Wit was the project manager; All documentation that was before mr Molotsi (the A cting H ead of the D irectorate) when he supported the declaration of Johann de Wit as is reflected on page 5 of Annexure “NN6” to the A pplicants F ounding A ffidavit; The tender evaluations and adjudication documents at the time the 1 Military Hospital and Waterkloof Air Force Base Clinic projects were awarded to the fourth respondent; Any e-mail or other letters pertaining to the status of the APPLICANT as preferred

bidder as alluded to in paragraph 10.11 of the Founding Affidavit. 3.

In the event of the FIRST and SECOND RESPONDENTS not being able to comply with the order in paragraph 2 above, the FIRST and SECOND RESPONDENTS are ordered to state under oath within 10 (ten) days from date of this Order that such documents are not in its possession, and if known to FIRST AND SECOND RESPONDENTS, their whereabouts. 4. That the costs of this application be costs in the cause, unless opposed, in which event costs be awarded against the opposing party or parties, jointly and severally. ”

The applicant relies on the provisions of rule 35 (13) of the Rules of Court which reads as follows:

“ (13) The provisions of this rule relating to discovery shall mutatis mutandis apply, in so far as the court may direct, to applications. ”

This application relates to an urgent review application which was set down for hearing on 19 February 2008. The parties agreed to a court order by Ledwaba J which interdicted the first respondent and fourth respondent to continue with contract H07/052 and to preserve the status quo as on 13 February 2008. Furthermore the court order set out that both parties are in agreement that the adjudication of the review application is urgent. The review application is concerned with a tender awarded to the fourth respondent which pertains to 2 Military Hospital, Wynberg, Cape Town. The tender evaluation report and scoring model by the Evaluation Committee was available. Unfortunately no minutes was kept by the Adjudication Committee. On 18 February 2008 the applicant filed a notice in terms of Rule 35 (14) requiring the first and second respondents to make available certain documentation listed in the notice.

The first and second respondents replied by delivering a notice in terms of rule 30 (2) (b) on 28 February 2008, which resulted in the applicant withdrawing the rule 35 (14) notice on 6 March 2008.

On 31 March 2008 the applicant filed a notice in terms of rule 35 (11) and 35 (13) – the present application. This application is opposed by the respondent.

In the review application the applicant relies on two allegations namely:

“ That the tender could not reasonably have been awarded to the fourth respondent by reason of the fact that its performance in respect of an identical contract which was in the process of execution was to the knowledge of the second respondent so poor and inadequate that such performance should reasonably have disqualified the fourth respondent. The fourth respondent scored full marks in respect of performance. ”

and:

“That the project manager in respect of both such projects, i.e. a project at 1 Military Hospital (which was the subject-matter of the tender), Mr De Witt, was replaced as project manager by the deponent to the answering affidavit in the present application by reason of the fact that there are disciplinary proceedings against Mr de Witt. Such Mr de Witt was also a member of the Bid Specification Committee and the Bid Evaluation Committee. ”

Discovery in application proceedings is rare and the requirement of the existence of exceptional circumstances must be met. In this matter the court has to decide whether to make the rules of discovery applicable to the present application for review and to direct that the provisions of rule 35 (13) applies .

In *Moulded Components and Rotomoulding South Africa (Pty) Ltd v Coucourakis and Another* 1979 (2) SA 457 (W) at 470 D – E Botha J found:

“ In application proceedings we know that discovery is a very, very rare and unusual procedure to be used and I have no doubt that that is a sound practice and it is only in exceptional circumstances, in my view, that discovery should be ordered in application proceedings. ”

In *MV Rizcun Trader (2) M a nly Appledoor Shipping Ltd v Owner of the M v erus Contrader and Another* 1999 (3) SA 956 (C) Knoll AJ found at p 963 A – B: “I n my view, the general rule that discovery should only be granted in motion proceedings, and particularly before all affidavits are filed, when exceptional circumstances are present embraces the test referred to, and sight should not be lost of the whole picture and the particular circumstances of each application. ” The applicant could only invoke the provisions of the Promotion of Access of Information Act 2 of 2000 (PAIA) prior to launchi ng the review application, as section 7 provides it can only be invoked prior to instituting proceedings. The burden of proof is on the applicant to demonstrate exceptional circumstances. The first and second respondent s allege that applicant is on a fishing expedition and that the court should not grant the relief requested .

The applicant further relies on section 34 of the Constitution of the Republic of South Africa which provides: “ E veryone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum. ”

In *de Beer NO v North Central Local Council and Others* [2001] ZACC 9; 2002 (1) SA 429 (CC) at 439 G – 440 A Yacoob J explained section 34 as follows: “ The right to a fair hearing before a court lies at the heart of the rule of law. a fair hearing before a court as a prerequisite to an order being made against anyone is fundamental to a just and credible legal order. Courts in our country are obliged to ensure that the proceedings before them are always fair. Since procedures that would render the hearing unfair are inconsistent with the Constitution courts must interpret legislation and Rules of Court, where it is reasonably possible to do so, in a way that would render the proceedings fair. It is a crucial aspect of the rule of law that court orders should not be made without affording the other side a reasonable opportunity to state their case. ” (my emphasis)

The applicant argues that the documents sought are a necessary and rational extension of what the applicant has already put before the court. It is clear from the papers before court that the applicant had requested the documentation even before the urgent application was heard on 19 February 2008 , although using the wrong procedure.

The first and second respondents knew from 18 February 2008 that the applicant requires the said documents – the same list of documents were requested in the Rule 35 (14) notice. Mr Pelser, for the applicant, argues that the applicant is only seeking limited discovery and has specified exactly which documents are sought – the applicant is not requesting general discovery and is thus not on a fishing expedition. It must be emphasized that the Court order of 19 February 2008 which was made by agreement between the parties reads as follows :

“It is recorded that the parties are in agreement that the adjudication of the review application is urgent and that the parties will co-operate in applying to the Deputy Judge President alternatively the Registrar of this court to have the review application heard on an urgent basis. ”

Counsel for the applicant argues that it is unfair to distinguish between action and motion proceedings and to hold that the applicant will only be entitled to discovery if exceptional circumstances exist. It must further be clear that the first and second respondents also regarded the matter as urgent, hence the court order by agreement. It is rather strange, to say the least, for Miss Hassim, on behalf of the first and second respondents, to argue that the respondents do not regard the matter as urgent having regard to the Court order to which the respondents had agreed of 19 February 2008.

The applicant had already set out in the founding affidavit of the main application that:

“ However, I submit that a serious backlog and mal-performance as is reflected in the minutes of 10 December 2008 does not fall out of the air. There can be little doubt that the minutes preceding the one of 10 December 2008 will reflect an ongoing failure on the part of the fourth respondent to perform adequately. For that reason the first and second respondents are challenged to make available for purpose of the hearing, all of the minutes of Technical Meetings No’s 1 to 13. The first and second respondents are likewise challenged to make available for the hearing the minutes of the site meetings that were conducted parallel to the technical meetings. ”

Therefore the first and second respondents knew from the outset that the applicant will request these documents. Mr Pelser, for the applicant argues, that in any event the court should find that there are exceptional circumstances pertaining to the review application. The court has a discretion whether to direct discovery in terms of rule 35 (13) in motion proceedings.

In *Rail Commuter Action Group v Transnet Ltd* 2003 (5) SA 518 CPD Davis J et van Heerden J commented as follows: 587 C – E “First, this would appear to be the kind of case where the applicants could not reasonably or realistically have been expected to make out a proper case in their founding affidavits without access to voluminous background information and knowledge pertaining to the internal affairs and structures of the respondents (especially the first and second respondents). This background information, as is clear from the papers before this Court, is certainly such as was peculiarly within the knowledge of the respondents. ” In *MV Urgup : Owners of the MV Urgup v Western Bulk Carriers (AUST)* 1999 (3) SA 500 (CPD) at 339 E – F Thring J found:

“ In both cases, before these Rules can come into play in this matter this Court must so direct in terms of Uniform Rule 35(13), this being an application. Whether or not the Court gives such a direction is likewise a discretionary decision. ”

This application is not opposed by the fourth respondent , the successful party when the tender was awarded by the Adjudication Committee. It is also clear that no minutes were kept when the Bid Adjudication Committee deliberated and decided to grant the tender to the fourth respondent.

The applicant argues that M r J de Wit, who was the chairperson of the Evaluation Committee who drafted the report which resulted in the contract being awarded to fourth respondent , was biased. He was the author of the recommendation to the Adjudication Committee on which the decision was made . The argument is that , although M r de Wit knew of the quality problems of previous work done by the fourth respondent , he nevertheless scored 5 out of 5 for the fourth respondent in regards to quality. It is further noted that M r de Witt does not file a n affidavit . It is, according to counsel for applicant, this action by M r de Wit which resulted in the present application for discovery of documents relating to the work of the fourth respondent and M r de Wit's disciplinary hearing. The minutes of the Technical Meeting No. 14 held at 1 Military Hospital on 10 December 2007 are attached and from that it can be gleaned that the fourth respondent was the contractor. These minutes reflect serious problems and backlogs on the part of the fourth respondent. Mr Pelser argues that the application for limited discovery of the list of documents is necessary to show the failure of the fourth respondent to perform in a comparable representative sample of work as is required .

In Johannesburg City Council v The Administrator Tvl and Another (1) 1970 (2) SA 89 T at 91 H – 92 C Marais J found: “ A record of proceedings is analagous to the record of proceedings in a court of law which quite clearly does not include a record of the deliberations subsequent to the receiving of the evidence and preceding the announcement of the court's decision. Thus the deliberations of the Executive Committee are as little part of the record of proceedings as the private deliberations of the jury or of the Court in a case before it. It does, however, include all the documents before the Executive Committee as well as all documents which are by reference incorporated in the file before it. Thus the previous decision of the Administrator, and the documents pertaining to the merits of that decision, could not have been otherwise than present to the mind of the Administrator-in- Executive- Committee at the time he made the second decision. If they were not, he could not have brought his mind to bear properly on this issue before him, which is of course denied by the respondents. ” (my emphasis) The factors the court has to consider when deciding whether exceptional circumstances exists are set out in LTC Harms, Civil Pcedure in the Superior Courts, at p B253: “ (a) the discretionary nature of the relief; (b)

the principles of fairness and equity; (c) whether the applicant for discovery is the applicant or respondent in the main matter; (d) the stage of the proceedings (e) the nature of the matter and the evidence adduced; (f) the extent of discovery sought; and (g) whether the applicant can obtain the documents through other routes. ”

Mr Pelser argues that it would only be fair to direct discovery as the applicant is only applying for very limited discovery of documents which cannot be obtained in any other way and that it is vital that the applicant be supplied with the documents to enable the applicant to show bias. It is ingenious of the first and second respondents to argue that the matter was not urgent and is no longer urgent, after agreeing to a court order which found the review had to be heard urgently.

It does not seem as if the first and second respondent are of the view that the applicant was never entitled to the documents as Miss Hassim argues, on behalf of the first and second respondents, that the applicant should have invoked the provisions of the Promotion of Access of Information Act 2 of 2000 before launching the review application. This argument contradicts the Court order in which the parties agreed that the review application should be heard urgently.

I cannot agree that the application is a fishing expedition as the applicant applies for specific documents and does not apply for discovery in general.

In *Rail Commuter Action Group v Transnet Ltd* (supra) at 587 I – J Davis J et van Heerden J found:

“ It would appear that an order for discovery before the close of pleadings may legitimately be made by a Court in a situation where there are exceptional circumstances which require such discovery in order to ensure the proper prosecution ”

Miss Hassim does not deal with the discovery requested at all, but only argues that the applicant has not proved “exceptional circumstances”. I cannot agree with this argument as I find that the applicant has proved on a balance of probabilities that exceptional circumstances exist in this matter and therefore the applicant must succeed in the application in terms of rule 35 (13).

Consequent to this finding the court then has to deal with prayers 2 and 3 of the notice of motion dealing with the discovery of the specific documents. The first and second’s respondent’s only argument in this regard is that the applicant is only entitled to a direction for the rules of discovery to apply in the main application.

I find that due to my finding that rule 35 (13) is applicable and due to the Court order which ordered that the review must be heard urgently, there is no reason why prayers 2 and 3 of the notice of motion should not be granted.

Mr Pelser argued that the court should award punitive costs as the first and second respondents are acting in an obstructive manner. However I cannot find that the first and second respondents were not entitled to oppose applicant’s application.

It is ordered:

1. The provisions of Rule 35 of the Uniform Rules of Court are declared applicable to this application to the extent detailed in paragraph 2 and 3 below.
2. The first and second respondents are ordered to severally make available to the applicant for inspection and copying within 10 (ten) days of this order, the following documentation: 2.1

The minutes of technical meetings No's 1 -13 in respect of the project at I Military Hospital of which the Fourth Respondent is the contractor; 2.2 The minutes of the site meetings for the period coinciding with technical meetings 1 – 14 in respect of the project at 1 Military Hospital mentioned in (i) above; 2.3 The minutes of all technical and site meetings in respect of the project at the Waterkloof Air Force Base Clinic of which the fourth respondent is the contractor; 2.4 The minutes of any meetings and other documentation pertaining to any disciplinary steps taken against J de Wit; 2.5 A lists of all projects in respect of which J de Wit was the project manager; 2.6 All documentation that was before mr Molotsi (the acting head of the directorate) when he supported the declaration of Johann de Wit as is reflected on page 5 of Annexure “NN6” to the applicants founding affidavit; 2.7 The tender evaluations and adjudication documents at the time the 1 Military Hospital and Waterkloof Air Force Base Clinic projects were awarded to the fourth respondent; 2.8 Any e-mail or other letters pertaining to the status of the applicant as preferred bidder as alluded to in paragraph 10.11 of the founding affidavit.

3. In the event of the first and second respondents not being able to comply with the order in paragraph 2 above, the first and second respondents are ordered to state under oath within 10 (ten) days of this order that such documents are not in its possession, and if known to first and second respondents, their whereabouts. 4. First and second respondents to pay the costs of the application – the one to pay the other to be absolved.

C Pretorius Judge of the High Court

Case number

: 7810/2008 Heard on

: 12 August 2008 For the Applicant : Q Pelsaer SC Instructed by

: Van der Merwe Du Toit For the Respondent : SK Hassim Instructed by

: State Attorney

Date of Judgment

: 18 August 2008

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