

SOUTH AFRICA / JUDGMENT

**Mathatha General Trading CC and Others v
Head of the Department of Safety, Security and
Liason Mpumalanga Province and Others
(2350/2022) [2023] ZAMPMBHC 37 (14 July 2023)
[2023] ZAMPMBHC 37**

COURT

Mbombela High Court, Mpumalanga

BEFORE

KGOELE

CASE / FILE NUMBER

2350/2022

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA,

MPUMALANGA

DIVISION (MAIN SEAT)

Case

Number:

2350/2022

1.

REPORTABLE: YES

2.

OF INTEREST TO OTHER JUDGES: YES

3.

REVISED.

DATE:14

JULY 2023

[SIGNED]

SIGNATURE

In

the matter between:

MATHATHA
GENERAL TRADING CC
First Applicant
MABOTWANE
SECURITY SERVICES CC
Second Applicant
MAFOKO
SECURITY PATROLS (PTY)LTD
Third Applicant
and
THE
HEAD OF THE DEPARTMENT OF SAFETY,
First Respondent
SECURITY
AND LIASON MPUMALANGA PROVINCE
MEMBER
OF THE EXECUTIVE COUNCIL
MPUMALANGA
DEPARTMENT OF COMMUNITY
SAFETY,
SECURITY AND LIAISON
Second Respondent
NHLANHLA
YETHY SECURITY SERVICES
Third Respondent
TUBATSE
SECURITY SERVICES
Fourth Respondent
E7
SECURITY SERVICES
Fifth Respondent
LL
SECURITY SERVICES
Sixth Respondent
PRAXOS
324
Seventh Respondent
EZINGENI
SECURITY SERVICES
Eight Respondent
AFRICAN
RENAISSANCE SECURITY SERVICES
Ninth Respondent
BOTHILE
SECURITY SERVICES
Tenth Respondent
XILOTA
PROJECTS SECURITY
Eleventh Respondent
PHEPHA
MV SECURITY SERVICES

Twelfth Respondent

AMABUSO

SECURITY SOLUTIONS

Thirteen

Respondent

DIXOSCAPE

SECURITY

Fourteenth

Respondent

GUBIS

85 SOLUTIONS

Fifteenth Respondent

BOTH

BEST TRADING & PROJECTS

Sixteenth Respondent

SINQOBILE

EQUESTRIAN SERVICES

Seventeenth

Respondent

BILANE

SECURITY

Eighteenth

Respondent

MEDTEX

SECURITY SERVICES

Nineteenth

Respondent

This

judgment was handed down electronically by circulation to the parties' representatives by email and released to SAFLII. The date and time for hand-down is deemed to be 11:30 on 14 JULY 2023.

JUDGMENT

KGOELE J:

1. This is an application for the rescission of an order which was granted by Roelofse AJ(the Court) on 23 June
2022. The order was granted pursuant to an urgent application for an interim interdict which was brought by the applicants (Mathata, Mabotwane, and Mafoko) aimed at interdicting the first and the second respondents from giving effect to the decision to award and appoint the third to nineteenth respondents (successful bidders) for the provision of security services for the Mpumalanga Government Buildings. I will collectively refer in this judgment throughout to the first and second respondents as “the Department” and to the third to nineteen respondents as “the successful bidders”. The applicants will where necessary be referred to by their respective names. The rescission application is opposed

by all the applicants.

2. A brief background to this application is as follows: As already indicated above, the application stems from an urgent interdict application brought by Mathata in two parts. Part A sought an interim interdict pending the outcome of the review proceedings, whereas Part B sought to review the awarding of the tender to the successful

bidders. Paragraph 4 of the notice of motion sought an order that the interdictory relief operates as interim interdict pending a review application to be instituted within thirty

- (30) days from receipt of the documents requested in one of the preceding paragraphs in the notice of motion.

3. The application was set down to be heard on 21 June 2012. On 7 June 2021, Mabotwane brought an application to be joined as the second applicant to support the urgent application brought by the Mathata. Three days before the matter can be heard, Mafoko entered the fray and brought an application divided into three parts. The first part was a prayer for leave to intervene and in the second part, an order that its affidavit filed serve as support of the interdictory relief sought by Mathata, and the third part, an alternative to the interdictory relief that the decision of the Department to appoint the successful bidders be reviewed and set aside.

4. The urgent application came before Roelofse AJ and the following order(the impugned order) was granted:

‘[1] A rule nisi is hereby issued calling upon all interested parties, including the parties in this matter, the successful bidders listed in annexure ‘CL1’ to the First and Second Respondent’s

answering affidavit, dated 15 June 2022 (attached to this order, marked “X”) (the service providers), to show cause on 8 August 2022, why the orders in paragraphs [2] to [7] below should not be made final.

- [2] It is declared that the award of the tender Number: SS/048/21/MP, for the provision of security services for the Mpumalanga Provincial Government buildings for a period of three years (the tender) is

constitutionally invalid.

- [3] The declaration of invalidity of the tender is suspended pending the

determination

of a just and equitable remedy.

- [4] The Applicants, the First to Fourteenth Respondents, the interested parties and the service providers are directed to furnish factual information on affidavit, as well as further written submissions, on the following aspects:

- (a) The time and steps necessary in the initiation, response and completion of a new tender process for the provision of security services for the Mpumalanga Provincial Government buildings (the services).
- (b) The time and steps necessary, and the costs likely to be incurred, in the implementation of the services after the new tender process, if so ordered is completed.

The just and equitable arrangements that should be made for the continued delivery of the services until new agreements for the services are implemented.

- (c) The cost implications for the Applicants, the Respondents, the service providers if a new tender process is ordered and implemented, and how these costs could be ameliorated or offset.
- (d) What would be in the public interest when determining a just and equitable remedy.
- (e) The exact extent of the implementation of the tender to date, including all contracts concluded, payments made, amounts received and costs incurred in respect of the tender.
- (f) Any other information considered relevant.

- [5] The Applicants, the First to Fourteenth Respondents, interested parties and the service providers must comply with the directions in paragraph [4] above by no later than Wednesday, 26 September 2022 or

on such extended date the court deems meet.

- [6] Parties are directed to, by no later than 3 October 2022 approach the Registrar of this court with a duly completed Form B to this court's Practice Directive for purposes of case managing the proceedings for the grant of a just and equitable remedy.

- [7] The grant of a just and equitable remedy is reserved pending the further hearing on a date determined during the case management in paragraph [6] above.

- [8] The First and Second Respondents are directed to:

- (a) Within 5 (FIVE) days of the date of this order, to furnish a copy of this order to the Third to Fourteenth Respondents and the service providers;

- (b) File a service affidavit setting out full compliance with the order in paragraph [8](a) above.

- [9] The First and Second Respondents are ordered to pay the applicants' costs and, in Mathata's instance, the costs consequent upon the employment of two counsel."

- 5. When the order was granted, the successful bidders had not yet joined the proceedings. On 3 August 2022, the Department, aggrieved by this order, issued this application to rescind the impugned order. After a successful recusal application brought against Roelofse AJ by the successful bidders, this application was enrolled for hearing on 2 March 2023. In the meantime, before this hearing, as per the impugned order dated 23 September 2022, the

parties, including the successful bidders complied with the Directive and Order of Roelofse by completing Form “B” wherein times frames for filling of further papers in this application was agreed upon.

6. The Department bemoans in the current application in the main that the order reviewing and setting aside its decision was granted without them being offered an opportunity to be heard in relation to the merits of the review application and thus, in its absence. According to the Department, what was before the court on the day of the hearing was the interdictory application, as well as the joinder including the application to intervene and not the review. Their submission is that the answering affidavit filed on behalf of the Department was only filed in response to the interdictory application and not the review, as the review application was not brought on an urgent basis. The Department furthermore contends that in entertaining the review application and deciding it without affording it an opportunity to file its answering affidavit thereto, the Court, not only took away the Department’s rights in terms of Section 34 of the Constitution, but also committed a procedural irregularity which is serious enough to satisfy the

requirement of an error in Rule 42(1) (a) of The Uniform Rules of Court(the Rules).

7. The successful bidders simply echoed the same sentiment expressed by the Department that the Court entertained the review application when it was not yet ripe for hearing and in their absence when the Court was aware that they are the interested parties who will be affected by the outcome of the interdict and the review application. They argued that he should have postponed the matter for them to be joined.
8. It is trite that in order to succeed in an application for rescission of judgment and or order under Rule 42(1)(a), the applicant must demonstrate (i) that the order was granted in his absence, (ii) that the order was erroneously sought and obtained. It is furthermore not necessary for a party to show good cause under this subrule.
9. Before I deal with the merits of this application, there was an objection raised by the applicants during the hearing of this application which requires me to first deal with it in order to clear the path. The objection relates to the participation of the successful bidders in this application. The argument advanced is that they ought not to be allowed an audience during hearing of this application including not making submissions and addressing the Court as they are not applicants in the rescission application. Their supporting capacity ought not to be allowed by the Court, the argument continued. As a result of the fact that the objection was raised during the hearing of arguments, I allowed the successful bidders represented to continue making submissions, ordered that a formal written objection be filed, and that this Court will during the writing of this judgment, consider the objection and rule on whether it is upheld or not. If it is upheld, the submission made by the successful bidders will not be considered in the final analysis of this application. This I did, to avoid the application being further postponed in the middle of the hearing.

10. I may hasten to indicate that, after reading the papers filed, I find that this objection is not only belated, but not made bona fide and lacks merit. A simple answer to this objection is that on 23 September 2022 when Roelofse AJ granted the recusal Order, the

successful bidders were already joined as parties to this proceedings. Secondly, Form “B” which Roelofse AJ ordered

all the parties to complete before 26 September 2022 to case manage this application was completed, agreed to, and signed by the legal representatives of all the parties. Paragraph 3.1 thereof requires the third to the nineteenth respondents (the successful bidders) to file their affidavit in support of the rescission application by not later than 21 October 2022. Their heads of arguments were to be filed by no later than 30 November 2022 in terms of paragraph 3.9 of form “B”. This, the successful bidders did in compliance with the directive. It, therefore, baffles one’s mind (a)What was the purpose of this agreement? (b)Why a sudden change of heart when the applicants filed a replying affidavit to the successful bidder’s affidavit? (c)Why the objection was not made timeously before the hearing started? (d)Can a party be allowed to file papers including heads and not be allowed to make any submissions during the hearing?

11. I find it absurd, to say the least, because even when the hearing of this matter started, I invited all the legal representatives to address me if any preliminary issues needed to be sorted out first but they all indicated that there were none. It was only in the middle of the arguments that this objection erupted. The belated renege of the applicants on their case management agreement,

irrespective of how belated it is, will not advance the applicants' case any further or at all, as it will become apparent later in this judgment that the absence of the successful bidders’ submissions will not alter or affect in any way the tenor and the analysis including the final order this Court is to make. The submissions made by the Department is sufficient enough for this

Court to make an informed decision concerning the main issue before this Court. It is for these reasons that the objection by the

applicants is summarily dismissed/turned down.

12. Having cleared this hurdle, I revert to the main issue before this Court which is whether the Department and the successful bidders met the requirements as espoused in their rescission application. I pause here to indicate that the arguments advanced by the successful bidders are similar to that of the Department. They will therefore be analysed at once. It is important to quote only the relevant parts of the notice of motion the Department is relying on in support of their application:

“However, before I do so, I find it apposite to mention that I shall confine my response given the urgency with which this affidavit was prepared to those allegations as contained in these affidavits, in so far as they impact on the urgent relief sought herein.

The respondents reserve their right to address any other allegation, not specifically addressed herein, at a later stage and in due cause.”

Absence of any party affected thereby

13. The applicants’ opposition is basically that neither the Department nor the successful bidders met the requirements under Rule 42 (1); that the impugned order is interim in nature; that Rule 42 applies to final orders; that the purported failure to grant the Department and the successful bidders

an opportunity to consider their position was not a procedural error, as they elected to be absent from the proceedings; that the

Department and the successful bidders’ rights have not been infringed as they are at liberty to show cause on the return date on any or all aspects why the orders in paragraph 2 – 7 of the impugned order should not be made final.

14. In amplification of their arguments, the applicants contended that the impugned order was not granted in the Department’s absence because they were present in court during the hearing and also filed an answering affidavit. In answer to this contention, the Department submitted that although they were present in court, they were there to answer to the interdictory application they were to meet as dictated by the prayers as couched by Mathata in their notice of motion. They reasoned that the urgent relief sought by the Mathata was an interdict and not the review itself. Their answering affidavit was, according to them, solely filed to meet this case and not the merits of the review. Insofar as the Department may have dealt with the allegations relating to the invalidity of the tender, the argument continued, same was done in the context of demonstrating that Mathata has failed to satisfy the requirements for the interdictory relief sought, and not in response to the review.
15. As far as the urgent relief sort by Mabotwane and Mafoko, the Department also submitted that it responded to the allegations as contained in their affidavit in so far as those allegations had a bearing on the urgent interdictory relief sought. Therefore, the Department argued, the review application was granted without them being afforded an opportunity to be heard in relation to the merits of the review application and thus, in the Department’s absence.
16. It has long been established that the issue of presence or absence of a party as envisaged in Rule 42 has little to do with actual or physical presence or absence. The full Court in the Limpopo Division, quoting the Appellate Division (as it was then), explained what it meant by “absence” in *Rainbow Farms v Crockery Gladstone Farm*[1] as follows:

“The Court a quo decided that the judgment was not a judgment taken on default of appearance by the Appellant. It did so on the basis that the Appellant’s Counsel was present in Court when the Order was made. The Court a quo erred in this regard. This matter was an application and the presence or absence of a party can only be determined by whether that party has submitted affidavits or not. The presence of the actual party and/or Counsel in Court is irrelevant to that issue. In the absence of any affidavits

(bearing in mind that there is no option available for the party to testify at such a hearing), it is logical to conclude that that party is in default of appearance when the Order was made notwithstanding that Counsel may have been in Court"

"In my view where opposing papers have not been filed, there is a "default" even if the Respondent in the matter or his

legal representative is present in Court."

"The question of what is meant by "default" was considered in Katritsis v De Macedo 1966 (1) SA 613 (A). In this matter the Appellate Division (as it then was) held that "default" which then as is the case now is not defined in the Rules or the Act, meant a default in relation to filing the necessary documents required by the Rules in opposition to the claim. In casu the judgment was granted in the absence of an opposing affidavit by the Appellant and was therefore a "default judgment" even if it was not a default in the sense of the absence of the party"

17. It is not worth quoting the relevant part of the notice of motion which reveals that Mathata sought, in its application, an urgent interim interdict, as well as access to certain documents relating to the award (the record), which it required in order to institute a review application within 30 days and further that Mabotwane merely sought to intervene to support the application by Mathata as a whole. All of these have been acknowledged by Roelofse AJ in his judgment. On these facts alone, it seems the submission by the Department that the review application was heard without their answering affidavit on the merits because the review application was not yet ripe has merit. The Department was therefore not required to answer or to plead thereto before the review application was launched.
18. But this is not the end of the story, as it appears from the impugned judgment that, the Court was persuaded by the fact that Mafoko sought in the alternative to supporting the application by Mathata, the review and setting aside of the tender, for it to proceed to entertain the review application. The Court did this whilst at the same time acknowledging the fact that it had to consider to some degree the validity of the award because it has a bearing on the prima facie right the applicants had to establish in their interdictory relief. However, this reason in paragraph 47 of the impugned judgment cannot avail the Court to have proceeded with the review application. This is so because, even if it is accepted that Mafoko couched the review in the alternative to the urgent interim interdict, the dies which Mafoko provided to the Department for it to dispatch the record and reasons for the award had not expired if one has regard to paragraph 13 of its notice of motion. Mafoko indicated therein that the Department must furnish the record within 15 days of receiving the notice of motion. It is common cause that the Department was served with this particular notice of motion on 13 June 2022, hardly 8 calendar days before the date when the urgent application was heard.
19. What is more telling is the fact that in paragraph 15 of their notice of motion, Mafoko issued the following direction to the Department: "In terms of Rule 53(5) (b), within 30 days of the applicant filing its supplementary affidavit, deliver any affidavits in answer to the second

applicant's allegations." As to why Mafoko decided to couch the review application in the alternative is difficult to discern when (a) Mafoko in the main supported the application brought by Mathata in its entirety wherein Mathata indicated that the review will be launched in 30 days, and further that, the interim interdict will lapse in the event of it failing to institute internal remedies alternatively, review proceedings in 30 days; (b) When from its own terms Mathata signaled in paragraph 15 of its notice of motion, an intention to supplement its papers in relation

to the review application and further, afforded the Department 30 days to file its answer. Therefore, the dies provided for the filing of the answering affidavit had not yet lapsed.

20. The Department cannot under the circumstances be blamed for having made it clear in its affidavit that its answering affidavit was filed solely to deal with those allegations contained in the affidavits filed by the applicants, in so far as they impact on the urgent relief sought.[2] It is therefore palpably clear that the Department had not during the hearing of the merits, filed an answering affidavit dealing with the merits for the review. I fully agree with their submissions that the answering affidavit was done in the context of demonstrating that the applicants have failed to satisfy the requisites for the granting of an interim interdict and not in response to the review application per se. As far as the successful bidders are concerned, nothing much needs to be said as it is common cause that the impugned order was granted in their absence. I, therefore, find that the Department satisfied the requirement of a "default" judgment even though they were present in Court, as their opposing papers on the review applicants had not been filed.

Whether the order was erroneously granted

21. The finding that I made above signifies that the Court denied the Department and the successful bidders the right to be heard before an order and/or judgment can be made on the review application. The applicants' submission on this is that even if this can be found, the rights of the Department and the successful bidders to a fair trial were not infringed because Roelofse AJ was interim in nature and also, granted them an opportunity to show cause or give reasons why the impugned order cannot be confirmed. They still have the chance to put their version to the Court. A bow added to this argument is that the impugned order is not final and cannot be rescinded.
22. It is trite that the audi alteram principle of the right to be heard is derived from the tenets of natural justice including the founding values of our Constitution.

There can be no doubt about the importance of this right which is why it is entrenched in Section 34 of our Constitution. In *Morudi v NC Housing Services and Development CO Ltd* [3] the Constitutional Court (CC) in finding that granting of an order without affording the party an audience, amounted to an irregularity

that warranted the rescission of the order, said the following:

“It must follow that when the High Court granted the order sought to be rescinded without being prepared to give audience to the applicants, it committed a procedure irregularity. The Court effectively gagged and prevented the attorney of the first three applicants – and thus these applicants themselves – from participating in the proceedings. This was no small matter. It was a serious irregularity as it denied these applicants their right of access to Court.”

23. In *National Pride Trading 452(Pty) Ltd v Media 24*[4] the court in finding that an irregularity in the proceedings, renders an order susceptible to being rescinded on the basis that same was granted erroneously, held as follows:

“It has often been held that where the Rules prescribe a particular procedure, and that procedure is not followed, then such procedural error renders the judgment sought and granted “erroneous” within the meaning of Rule 42 (1) (a). Effectively, what is being rescinded is the procedure in terms of which the judgment was granted, and therefore, by necessary implication; also the judgment.” [Own emphasis added]

24. The Court further remarked as follows:

*“Second, and in any event, the error or irregularity does not have to appear from the proceedings. Some of the earlier cases in this division, such as *Bakoven* (supra) (at 471F) and *Tom v Minister of Safety and Security* (1998) 1 All SA 629 (E) held that the “error” must be patent from the record of proceedings and that the court is confined to the four corners of the record to determine whether or not Rule 42 (1) (a) is applicable. This is no longer good law. If the “error” is of a procedural nature it is “erroneous” within the meaning of the Rule, irrespective of whether or not it manifested itself in the record of proceedings.”*[5]

25. The submission by the applicants misses the point that, as far as the review application is concerned, the exchange of further documents and answering affidavit were to be conducted in accordance with the time periods as laid down in Rule 53 of the Rules. This much was at the least recognised by the applicants in their notice of motion as already indicated above but was unfortunately missed by the Court. The fact that the review application was not ripe for hearing from the papers filed appears to have also not crossed the mind of the Court at all, as the only reason given for entertaining the review application was that Mafoko sought in the alternative, the review application. This reasoning demonstrates that the impugned order was granted at the instance of the intervenor, Mafoko, whose rights to join were still to be determined. The court was still expected to rule on their application and give directions as to the filing of further affidavits dealing with issues that were raised by the intervenor (s), in particular, those issues that fall outside the relief that was sought by the original applicant, Mathata.
26. It is important to reiterate at this juncture that the thrust of the matter concerned an application for review brought under Rule 53 of the Rules. Sub-rule (1) (b) thereof requires that a record be made available. The importance of this record was emphasized in the case of *Helen Suzman Foundation V Judicial Service Commission*[6] to the effect that “a Rule 53 record is an invaluable tool in the review process which may help (a) to shed light on what

happened and why (b) to give the lie to unfounded ex-post factor justification of the decision under review; (c) in the substantiation of as yet not fully substantiated grounds for review; (d) in giving support to the decision makers stance; and (e) in the performance of the reviewing courts function. Furthermore, sub-rule 5(b) gives the respondent 30 days after the expiration of a time mentioned in sub-rule (4), the right to deliver any affidavits in answer to the allegations made by the applicant. It is therefore clear that looking at the provisions of sub-rules (3) and (4), the respondent is not obliged to take any steps to oppose an application for review until a copy of the record of the proceedings has been furnished to the respondent.[7]

27. In my view, it could never have been the intention of the drafters of Rule 53 to empower the decision-maker(the Court) to proceed with a review and make his/her finding based on his/her own conclusion without providing the parties against whom he/she intends to make an order, to file papers(the record and the answering affidavit) and also, allow them to address him in support of their case pleaded.
28. The upshot of all of the above is that the approach the respondent took in filing papers addressing the issue or grounds raised to substantiate their opposition only in respect of the interdictory relief is justified and sound. The approach taken by the Court, unfortunately, flies against the procedural pronouncement as provided by Rule 53, hence my conclusion that the approach amounts

to a procedural error that is rescindable.

29. I am fortified on this view by the following remarks made by the CC in MEC for Health, Gauteng v Lushaba [8]wherein the CC inter alia, reaffirmed another principle that is fundamental to judicial adjudication in a Constitutional order when it stated:

“When contemplating the essential purpose of the protection afforded through the notion of procedure fairness, my sight is arrested by this fact: at heart, fair procedure is designed to prevent arbitrariness in the outcome of the decision. The time-honoured principle that no one shall be the judge in his or her own matter and that the other side should be heard is aimed towards eliminating the proscribed arbitrariness in a way that gives content in the rule of law. They reach deep down into the adjudicating process, attempting to remove bias and ignorance from it. Everyone is entitled to an impartial Judge, not because this guarantees a correct decision, but because the human arbiter, not being omniscient, should not be presented with a point of view that his or her position inherently loads. Everyone has a right to state his/her own case, not because his or her version is right, or must be accepted, but because, in evaluating the cogency of any argument, the arbiter,

still a fallible human being, must be informed about the points of view of both parties in order to stand any real chance of coming with an objectively justifiable conclusion that is anything more than chance.” [Own Emphasis added]

30. Even if Mafoko couched the review in the alternative, this fact on its own could not have in my view granted the Court a free ride to review the decision firstly, without the record so requested by the applicants, and secondly, without the Department having filed their papers in opposition to the review or simply put, when the review application was not ripe for hearing even from the applicants' mouth. This is so irrespective of whether the

version of the Department (inclusive of the successful bidders) that was going to be placed before it through its answering affidavit was right or wrong. The consideration of the submission made regarding the invalidity of the award should have been confined to the purpose of determining whether or not the applicants have satisfied the requirements for granting an interdict.

31. The argument that the Department and the successful tenders still have their chance to present their case because the Court issued a Rule Nisi cannot assist the applicants either. The matter before this Court is not an appeal but a rescission application. Although it seeks to set aside a decision like an appeal, it is premised on a set of deliberately narrow requirements. But above all, if the Rule Nisi is allowed to stand, this will result in untenable consequences which are in contrast with the purpose and the provisions of Rule 53 in particular, as far as the exchange of documents or papers is concerned. As it happened in this case, parties will find themselves in an insidious situation wherein the other party (the applicants in this case) will not be afforded a chance to reply to the answers given by the other party (the respondent and the successful bidders) and worse, for the other party (the applicants), to also supplement their founding papers if they so wish.

32. One other catastrophic consequence that stems from this approach is that the impugned order is silent regarding the documents or record of the decision of the award. This absurdity is brought by the fact that the approach adopted tentatively declared the record of the decision of the award and the reasons thereof unnecessary, contrary to the dictates of Rule 53. The successful bidders are still bemoaning the fact that they are unable to prepare or answer properly to the Rule Nisi in compliance with the impugned order because no records or documents relating to the award of the tender were allegedly furnished. The joinder of the successful bidders prior to the granting of the order declaring the award unconstitutional was in my view necessary in the circumstances of this matter and could have simply been averted, by a mere postponement of Part "B" as initially sought by the applicants.

Grounds of review

33. The last argument relied on by the Department to substantiate that the impugned order was erroneously granted was to the effect that Mathata never canvassed any grounds of review in the founding affidavit. This, according to the Department, was expected, as Mathata never sought the review and setting aside of the tender award. A thorough perusal of the founding affidavit of Mathata and Mafoko reveals the following observation which is key to the analysis of this matter:

- a. Nowhere in their founding affidavit did Mathata rely on the issue of the extension of the validity period as a ground to substantiate the relief sought to obtain the interdictory relief, but only on the procedural irregularities before the tender was awarded. But in particular, Mathata pursued and argued the irregularity to convince the Court to grant an interdict contrary to the case they pleaded.
- b. Both Mathata and Mafoko's intention was to obtain an urgent relief to interdict the Department from implementing the tender with the successful bidders.
- c. The irregularity in respect of the extension of the validity period of the tender was only raised by Mafoko in their founding affidavit.

Mafoko used the validity irregularity in context to prove that he has proven the requirements of an interdict. Mafoko precisely wrote in paragraph 40 that: “even at this stage, it is submitted that Mafoko has made a clear case to set aside the Department's decision to award the tender. Once this is so, it must follow that Mafoko has satisfied the requirement of showing a prima facie right to obtain an interim interdict.” It, therefore, does not come as a surprise why the Department couched its answering affidavit as follows:

“4.19. Against this backdrop of the foregoing, I shall now turn to the question of whether the applicants have satisfied this requirement

for the grant of an interim interdict”

And

“6.2. I find it opposite to mention that I shall confine my responses given the urgency with which this affidavit was prepared to those allegations as contained in the affidavits, in so far as they impact on the urgent relief sought herein.”

34. All of the above presupposes that Mathata did not seek an order declaring the award unconstitutional. Mabotwane likewise did not make out a case of constitutional invalidity as it simply made common cause with the relief sought by Mathata. Mafoko's alternative prayer also was based on the fact that the extension of the tender validity period was irregular and in the context of establishing a prima facie right for the granting of an interdict. It is trite that the grounds for review must be set out explicitly in the founding affidavit in terms of Rule 53. There is also a plethora of authorities to the effect that the Court is bound to adjudicate the case before it as brought by the parties and not a case it wishes to adjudicate.
35. I conclude that the Department together with the successful bidders successfully made a case that the impugned order is rescindable. The impugned order was erroneously granted under the circumstances where (a) there was no review application before the court at that time, as from the applicants' papers they had undertaken to institute it within 30 days of receiving the records; (b) Mafoko's alternative prayer for a review was in contrast/conflict with their main prayer wherein they afforded the Department 30 days of filing of its supplementary affidavit after receipt of the records, to answer to the review application ; (c)

the Department had not in their answering papers addressed the merits; (d) the successful bidders right to the record of the decision and to be heard was paramount. The finding made was not open for Roelofse AJ to make.

36. As far as cost is concerned, the Department and the successful bidders are substantially successful, there is no reason why they should not be granted the costs.
37. Consequently, the following order is made.
 1. The order including the cost order granted on 23 June 2022 by Roelofse AJ is hereby rescinded and set aside.
 2. All the parties cited in this matter are directed to, by no later than 24 July 2023, approach the Registrar with a duly completed Form “B” for the purposes of case managing the proceeding for the adjudication of Part “B” of the first applicant’s notice of motion.
 3. The applicants are ordered to pay the costs, which costs shall include the costs of adjudication of the urgent application before Roelofsae AJ, and the reserved costs occasioned by the extension of the Rule Nisi if any on the 8th of August 2022 and in all instances, such costs shall include the costs consequent upon employment of two Counsel where applicable.

A M KGOELE

JUDGE OF THE HIGH COURT

MPUMALANGA DIVISION MBOMBELA

APPEARANCES

FOR THE 1ST & 2ND APPLICANTS: ADV MATEBESE SC INSTRUCTED BY: DAVID H BOTHA & KRUGER INCORPORATED FOR THE 1ST & 2ND RESPONDENT: ADV VAN DER MERWE INSTRUCTED BY: OFFICE OF THE STATE ATTORNEY FOR THE 3RD – 19TH RESPONDENTS: ADV ZALUKA ZANA INSTRUCTED BY: MKHOMBE MTHINYANE ATTORNEYS DATE HEARD: 2 and 17 MARCH 2023

JUDGMENT

DATE: 14 JULY 2023

[1] Rainbow Farms (Pty) Ltd v Crackery Gledstone Farm (HCA15/2017)

[2017] ZALMPPHC 35 (7 November 2017)

[2] See paragraph 6.2 to 6.3 of the answering affidavit.

[3] 2019 [2] BCLR 261 (CC)

[4] 2010

- [6] 597 (ECP) at para 27
- [5] Para 36
- [6] 2018
- (4) SA 1 (CC) at 10C-11A
- [7] Vereniging van Bo-grondse Mynamptenare van SA v President of the Industrial Court 1983 (1)SA 1143 (T) at 1145E.
- [8] 2017
- (1) SA 106 (CC) para 15
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