

SOUTH AFRICA / JUDGMENT

OS Holdings (Pty) Ltd v Rustenburg Local Municipality and Others (927/24) [2024] ZANWHC 303 (2 December 2024)

[2024] ZANWHC 303**COURT**

North West High Court, Mafikeng

BEFORE

WESSELS AJ

CASE / FILE NUMBER

927/24

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IN THE HIGH COURT OF
SOUTH AFRICA
NORTH WEST DIVISION,
MAHIKENG
CASE NUMBER:927/24

Reportable:

YES/ NO
Circulate
to Judges: YES/NO
Circulate
to Magistrates: YES/NO
Circulate
to Regional Magistrates: YES/NO

In the matter between:

OS HOLDINGS (PTY)
LTD
APPLICANT
and
RUSTENBURG LOCAL
MUNICIPALITY
FIRST
RESPONDENT

MUNICIPAL MANAGER: RUSTENBURG
LOCAL MUNICIPALITY
SECOND
RESPONDENT
THE EXECUTIVE
MAYOR: RUSTENBURG
LOCAL MUNICIPALITY
THIRD
RESPONDENT
CHAIRMAN: BID
EVALUATION COMMITTEE
FOURTH
RESPONDENT
CHAIRMAN: BID
ADJUDICATION COMMITTEE
FIFTH
RESPONDENT
Coram: WESSELS AJ
Date: 2 December 2024
ORDER
i.
The application is dismissed.
ii.
The applicant is ordered to pay the costs on a party and party scale
B.

JUDGMENT

- [1] The applicant took part in a tender process initiated by the first respondent for the provision of a financial system described in the tender invitation as an “mSCOA compliant financial system”. Tenders were invited from the public for the provision of a financial system for a period of 36 months. This tender will be referred to as “the first tender”.
- [2] Following a tender process, the first respondent informed the applicant on 10 November 2023 that the applicant had not been selected for the provision of goods and/or services in terms of the tender.
- [3] It is common cause on the papers before this Court that no service provider was appointed in terms thereof. The applicant took issue with the fact that it was not appointed as a service provider. The applicant’s objection is, inter alia, that on the conclusion of the bid evaluation process, the first respondent was expected to decide on the awarding of the tender to the applicant.
- [4] The first respondent re-advertised a new tender, on 18 November 2023, for a “mSCOA compliant financial system” for a contractual period of 60 months. This tender will be referred to as the “second tender”.

[5] On 14 February 2024, the applicant issued a review application in this Court (“the review application”) to review and set aside the first respondent’s decision not to appoint the applicant as a preferred service provider in terms of the first tender and to declare the first respondent’s decision not to appoint the applicant in the first tender unlawful and unconstitutional. Strangely, despite the applicant’s

insistence that the first and second tenders are essentially similar, the applicant did not take part in the second tender process.

[6] In a letter dated 15 February 2024, the applicant’s attorney sought the first respondent’s unconditional undertaking that it would not evaluate and/or adjudicate or take any action in pursuance of the awarding of the second tender pending the outcome of the applicant’s review application.

[7] The first respondent did not acquiesce to the applicant’s

afore-mentioned request, prompting the applicant to bring this application on an urgent basis. This application sought to

interdict the adjudication of the second tender pending the finalisation of a review application brought by the applicant to review its non-appointment as successful tenderer in the first tender.

[8] On 1 March 2024, this application was struck off the urgent roll due to a lack of urgency. The applicant then re-enrolled this application on the normal opposed roll before this Court for hearing.

[9] This Court is not called upon to decide on the veracity of the tender process but is only engaged to decide on the merits of the interdict sought against the implementation of the second tender.

[10] Since this matter was struck from the urgent roll, the applicant had not provided any explanation to this Court dealing with the manner in which the tender process in the second tender had unfolded. This information was essential to the determination of the relief sought in this application. After all, if it is found that the second tender had been awarded at the time of the hearing of this application, the interdict sought in terms hereof could logically not be granted. The position that an interdict is destined only to protect future conduct and not decisions already made is settled. On this point, the Constitutional Court in *National Treasury and others v Opposition to Urban Tolling Alliance and others*[1] found that:

“Under the Setlogelo test, the prima facie right that the claimant must establish is not merely the right to approach a Court in order to review an administrative decision. It is a right to which, if not protected by an interdict, irreparable harm would ensue. An interdict is meant to prevent future conduct and not decisions already made. Quite apart from the right to review and to set aside impugned decisions, the applicants should have demonstrated a prima facie right that is threatened by an impending or imminent irreparable harm. The right to review the impugned decisions did not require any preservation pendente lite.”

- [11] It is not necessary to venture intimately into the merits of this application as it turns out that the adjudication process in terms of the second tender had already been concluded and a successful tenderer had been appointed. This renders the relief sought in this application academic.
- [12] In argument, counsel for the applicant informed this Court that in the period between this application appearing on the urgent roll and the hearing of this application on the normal roll, the applicant had lodged a separate ex parte application[2] (“the ex parte application”). Mfenyana J who heard the ex parte application found that the relief called for therein was similar to the relief contained in this application. This finding is evident from paragraph 24 of the judgment[3] (For the sake of clarity, the “application to be heard on 15 November 2024” as referred to by Mfenyana J is the application that now serves before this Court):

“At the hearing of the matter on 15 May 2024, the applicant was adamant that this application differs from the matter to be heard on 15 November 2024 in that the bases for each of the applications are different. In the present application, Mr Monnakgotla contended on behalf of the applicant, the aim is to interdict the respondents from disregarding the process of court and ‘preserve’, lest it be rendered nugatory by the respondents’ decision to proceed with the adjudication of the second tender. In the application to be heard on 15 November 2024, the purpose is to interdict the respondents from proceeding with the adjudication as the respondents

have refused to give an undertaking, he further contended. The more Mr Monnakgotla pointed out the distinction between the two applications, the more they appeared the same.”

(my emphasis)

- [13] The ex parte application was also struck from the roll due to lack of urgency.
- [14] Save for the applicant counsel’s fleeting reference thereto in argument, this Court had not formally been provided with any insight into the progress of the awarding of the tender in the second tender process or any information regarding the ex parte application.
- [15] In argument, the respondents’ counsel referred this Court to a very recent judgment of this Division in CCG Systems (Pty) Ltd v Rustenburg Local Municipality and Others[4] by Petersen J (handed down on 14 November 2024). This judgment dealt with the second tender process. This judgment had the effect that the appointment of a successful tenderer for the second tender was suspended ex lege pending the finalisation of an internal appeal by an unsuccessful tenderer in the second tender.
- [16] The judgment in CCG Systems[5] is a further factor that renders the relief sought by the applicant in this application academic.
- [17] In essence, what remains to be decided is the costs of this application.

- [18] Applicant's counsel submitted that it was incumbent on the respondents to bring the judgment of CCG Systems[6] to the applicant's attention timeously. Applicant's counsel further submitted that was this judgment[7] and the status of the second tender process brought to the attention of the applicant, the applicant would not have enrolled this application for hearing.
- [19] This Court is troubled by these submissions of the applicant's counsel suggesting that the applicant had no knowledge of the judgment of CCG Systems[8] or of the status of the second tender process. The applicant's aforesaid contentions are improbable on account of the following facts. The attorney representing the applicant in this application is Dirk Kotze Attorneys from Roodepoort Gauteng. What the applicant's counsel neglected to draw this Court's attention to is that the applicant in the application that served before Petersen J in CCG Systems[9], regarding the second tender, was also represented by Dirk Kotze Attorneys.
- [20] For obvious reasons, it is highly improbable if not inconceivable that the applicant in this application, or at least Dirk Kotze Attorneys, would not have had knowledge of the tender process of the second tender, the application instituted concerning the second tender as well as the ensuing judgment in CCG Systems[10]. If the applicant was unaware of the judgment in CCG Systems[11] there rested, at the very least, a duty on the applicant's attorney to have brought this judgment under the attention of this Court.
- [21] Regrettably, the applicant persisted with this application. Considering these facts, ordering the applicant to pay the costs of this application on a punitive scale would have been warranted. However, the absence of an explanation from the applicant regarding the applicant's knowledge of the outcome of the proceedings in CCG Systems[12] and the progress with the finalisation of the second tender moved this Court to refrain from granting a special cost order against the applicant.

Order

[22] Resultantly the following order is made:

- i. The application is dismissed.
- ii. The applicant is ordered to pay the costs on a party and party scale B.

M WESSELS

ACTING JUDGE OF THE HIGH COURT

Date of hearing : 15 November 2024

Date of judgment : 2 December 2024

APPEARANCES

Counsel for Applicant : Adv L Monnakgotla

Instructed by

: Dirk Cootsee Attorneys

Krugersdorp

c/o Maree & Maree Attorneys

Mahikeng

Counsel for Respondent : Adv M Motlogelwa

Instructed by

: Setshedi Makgale & Matlapeng Inc

[1] National Treasury and others v Opposition to Urban Tolling Alliance and others 2012 (6) SA 223 (CC) at paragraph 50

[2] Rustenburg Local Municipality and Others v OS Holdings (Pty) Ltd (2358/2024)

[2024] ZANWHC 188 (17 July 2024)

[3] Rustenburg Local Municipality and Others v OS Holdings (Pty) Ltd supra

[4] CCG Systems (Pty) Ltd v Rustenburg Local Municipality and Others, a yet unreported judgment of the North West High Court under case number 5442/2024.

[5] Supra, footnote 4

[6] Supra, footnote 4

[7] Supra, footnote 4

[8] Supra, footnote 4

[9] Supra, footnote 4

[10] Supra, footnote 4

[11] Supra, footnote 4

[12] Supra, footnote 4

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