

SOUTH AFRICA / JUDGMENT

Down Touch Investments (Pty) Ltd v Matjhabeng Local Municipality and Another (1172/2016) [2016] ZAFSHC 68 (29 March 2016) [2016] ZAFSHC 68

COURT

Free State High Court, Bloemfontein

BEFORE

C.D Pienaar

CASE / FILE NUMBER

1172/2016

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IN

THE HIGH COURT OF SOUTH AFRICA

FREE

STATE DIVISION, BLOEMFONTEIN

Case

Number: 1172/2016

In

the matter between:

DOWN
TOUCH INVESTMENTS (PTY)
LTD
Applicant
and
MATJHABENG
LOCAL MUNICIPALITY
1st Respondent
REMBU
CONSTRUCTION (PTY) LTD
2nd Respondent
HEARD

ON:

24 MARCH 2016

JUDGMENT

BY: PIENAAR, AJ

ORDER ON:

29 MARCH 2016

REASONS

FOR JUDGMENT

DELIVERED ON: 8 APRIL 2016

INTRODUCTION:

[1] The applicant has applied on an urgent basis for an interim interdict pending the finalisation of a review application which the applicant intends to launch in respect of the first respondent's decision to award Bid 22/2015: Upgrading of Dr Ngoma Road and Storm Water Management to the second respondent.

[2] The first respondent opposed the application.

[3] The application was heard on the 24th of March 2016, whereafter I granted the following order on the 29th of March 2016:

'1. The Applicant's failure to adhere to the court's rules relating to time periods and service is condoned and the application is heard as an urgent application in terms of Rule 6(12).

2. Pending the finalisation of the proceedings contemplated in paragraph 3 below:

2.1 the First and Second Respondents are interdicted and restrained from in any way further implementing the First Respondent's decision to award Bid 22/2015: Upgrading of Dr Ngomo Road and Storm Water Management to the Second Respondent;

2.2 the First and Second Respondents are likewise interdicted and restrained from concluding and/or giving any further effect to any service level agreement which may have been concluded between them, pertaining to the works mentioned in paragraph 2.1 above and by the time this application is heard;

2.3 the First and Second Respondents are interdicted and restrained from performing any construction related activity related to either the decision, or the contract.

3. The order contained in paragraphs 2.1 to 2.3 above, is to serve as an interim interdict with immediate effect, pending the finalisation of the urgent review proceedings to be embarked upon by the Applicant in terms of Rule 53.

4. The Applicant is ordered to institute such review proceedings within five days after the granting of this order, failing which the interdict order granted in terms of paragraphs 2 and 3 above will lapse.
5. The costs of this application stand over for adjudication during the review proceedings.'

BACKGROUND:

- [4] The applicant is a construction company that specialises in all fields of general construction and civil engineering works. It has a Contract Industry Development Board ('CIDB') grading of 8CEPE and a certified BBBEE status of Level 2.
- [5] During or about September 2015, the First Respondent, being a municipality established in terms of the Local Government: Municipal Structures Act, 117 of 1998 and with its head office situated in Welkom, Free State Province, called for tenders for the upgrading of a street situated in the Matjhabeng area, Free State Province under the tender and contract styled as "Contract No. 22/2015: Upgrading of Dr Ngomo Road and Storm Water Management".
- [6] The closing date for the submission of the tenders was the 9th of November 2015. The prospective tenderers were also invited to attend a compulsory clarification meeting on the 16th of October 2015.
- [7] The applicant and the second respondent were two of the total of 43 tenderers that submitted bids in respect of the tender.
- [8] The second respondent was the successful bidder and was as such appointed as contractor by the first respondent in terms of a letter of appointment issued and signed by the first respondent's municipal manager on the 3rd of February 2016.
- [9] The appointment was made on account of the evaluation of the respective bids by the Bid Evaluation Committee ('BEC'),

its recommendation to the Bid Adjudication Committee ('BAC') and the BAC's subsequent recommendation to the first

respondent's municipal manager.

- [10] It is evident from the minutes of the BEC's meeting that was held on the 7th of January 2016, that:
 - i. the bid amount of the second respondent amounted to R9 076 138-19, which is also the contract amount at which the second respondent was appointed, and that the applicant's bid amounted to R8 228 470-43;

- ii. the applicant submitted a responsive bid, but was disqualified on functionality as it did not score any points for the company experience criteria and therefore did not meet the minimum threshold of 60% for functionality. It only scored a total of 30% for functionality;
- iii. at the last stage of evaluation, being in respect of price and BBBEE status, the second respondent was the lowest in price of the 14 bids that advanced to this stage of evaluation and, having regard to its BBBEE status level, scored the highest points; and
- iv. the BEC therefore recommended that the tender be awarded to the second respondent as ‘they are fully compliant with the requirements of the Bid and scored the highest preference points.’

[11] At the BAC’s meeting of the 28th of January 2016, the BAC resolved that it concurs with the recommendation of the BEC and recommended that the tender be awarded to the second respondent.

THE APPLICANT’S APPLICATION FOR INTERIM RELIEF:

- [12] The applicant heard on the 15th of February 2016 that the tender was awarded. As it was dissatisfied with the outcome, a request for formal reasons was addressed to the first respondent.
- [13] Although not relevant to this application, the applicant had to launch an urgent application for the provision of the reasons and certain other relevant documents, as the giving thereof were delayed by the first respondent. An order in respect of that application was issued in favour of the applicant on the 2nd of March 2016. The first respondent was, inter alia, ordered to give reasons for its decision within 21 days. When this application was heard, the applicant was not yet provided with the said reasons as the 21 day period has not yet lapsed.
- [14] The first respondent was further ordered to provide the applicant within five days of that order with the BEC’s evaluation

reports, the minutes of the BEC and BAC meetings and recommendations and the second respondent’s letter of appointment. The

applicant was provided with the said minutes and letter of appointment, but has not received a copy of the evaluation report from the first respondent.

- [15] Based on the documents that the applicant received from the first respondent, and as a result of the information it gathered from those documents, the applicant launched this application on the 14th of March 2016.
- [16] The applicant intends to take the first respondent’s decision in awarding the tender to the second respondent on review as:

‘Down Touch should have been given the contract described in the Notice of Motion. Its rights to administrative action that is just, fair and equitable and its rights to partake in the procurement process that is transparent and fair, have been violated. The decision does violence to several provisions of section 6 of the Promotion of Administrative Justice Act, 3 of 2000 (‘PAJA’) and is unlawful.’

[17] The Applicant’s attack against this decision is premised on the irregularities in the scoring and evaluation of its bid in respect of functionality.

[18] At the functionality stage of evaluation, bidders had to meet the minimum threshold of 60% in order to advance to the final stage of evaluation. At the evaluation of the bidders’ functionality, bidders were scored on their ‘company experience’, ‘plant and equipment’ and ‘bank rating’. The maximum points for these criteria were 35 points for company experience, 5 points for plant and equipment and 10 points for bank rating. A bidder will be disqualified if the bidder does not meet the minimum threshold and will then not be considered at the last stage of evaluation.

[19] It is common cause that the applicant was awarded zero points for its company experience by the BEC. The applicant avers that this scoring exercise is seriously tainted by irregularity as the applicant submitted proof of its company experience in the form of schedules that contained the information of its ‘contracts in progress’ and ‘contracts completed’. In confirmation of this, the applicant attached screenshots of a video recording that was made of the pages to its bid.

[20] The Applicant avers that if the scoring exercise had been done correctly, it would have advanced to the final stage of evaluation,

at which it would have received 90 points for price, being the lowest in price of all the bidders that advanced to that stage, and 9 points for its BBBEE status. It would have received a total of 99 points, with the second respondent at 95 points. The contract should therefore have been given to the applicant.

THE DISPUTES:

[21] The first respondent raised a point of law as well as in limine points in its opposing affidavit. However, the first respondent did not persist with all the in limine points during argument.

[22] The first respondent relied on the applicant’s failure to satisfy the requirements for an interim interdict, more so as the applicant seeks to temporarily restrain the first respondent from exercising statutory power and that there are no prospects of success in the applicant’s envisaged review application.

[23] Before I deal with these contentions, it is apposite to summarise the essential factual disputes between the parties in respect of the relevant tender requirements.

[24] The first respondent denies that the applicant's bid showed that it has the company experience requisite for the successful

submission of the project as the applicant failed to submit and provide completion certificates in respect of the completed projects,

which was essential for the functionality requirement of the bid.

[25] According to the first respondent, all bidders, including the applicant, have been advised at the briefing session about the

importance of the completion certificates, which were required to satisfy the functionality requirement.

[26] As this issue, and the reason for the applicant's disqualification, was only raised in the opposing affidavit, the applicant took issue with the alleged requirement in its replying affidavit. The applicant denies that the tender data and requirements for the bids required the submission of any completion certificates. The applicant further denies that the bidders were informed at the compulsory site clarification meeting of such a requirement. It is therefore fundamentally irregular to have disqualified the applicant's bid because of a non-existent tender requirement.

[27] The applicant further avers that it in any event submitted with its bid a company profile document, which contains many completion

certificates of work done in the past. This profile document is inserted in all the bids it submits.

REQUIREMENTS FOR AN INTERIM INTERDICT:

[28] It is trite that the requisites for an interim interdict are the following:

- i. a prima facie right, although open to some doubt;
- ii. a well-grounded apprehension of irreparable harm if interim relief is not granted and ultimate relief is eventually granted;
- iii. the balance of convenience favours the granting of the interim interdict, and
- v. the applicant has no other satisfactory remedy.

[See: Webster v Mitchell 1948 (1) SA 1186 (W)]

PRIMA FACIE RIGHT:

[29] The test to be applied in adjudicating a prima facie right in the context of an application for an interim interdict is well-known. Having regard to the facts averred by the applicant,

together with those facts put up by the respondent that are not disputed, it must be considered whether, having regard to the inherent probabilities, the applicant should obtain final relief on those facts at the trial. The facts set up in contradiction by the respondent should then be considered and, if serious doubt is thrown upon the applicant's case, it cannot succeed. [See: *Simon No v Air Operations of Europe AB and Others*

[1998] ZASCA 79; 1999 (1) SA 217 (SCA) at 228G]

[30] However, where a temporary interdict is sought against the exercise of statutory power by an organ of state, it may be granted only in the clearest of cases and after a careful consideration of the separation of powers harm. The *prima facie* right that must be established is not merely the right to approach the court for the review of an administrative decision, but a right to which, if not protected by an interdict, irreparable harm would ensue.

[31] This test was recently stated in *National Treasury and Others v Opposition to Urban Tolling Alliance and Others* 2012

(6) SA 223 (CC) as follows:

'[44] The common-law annotation to the *Setlogelo* test is that courts grant temporary restraining orders against the exercise of statutory power only in exceptional cases and when a strong case for that relief has been made out. Beyond the common law, separation of powers is an even more vital tenet of our constitutional democracy. This means that the Constitution requires courts to ensure that all branches of government act within the law. However, courts in turn must refrain from entering the exclusive terrain of the executive and the legislative branches of government unless the intrusion is mandated by the Constitution itself.

[45] It seems to me that it is unnecessary to fashion a new test for the grant of an interim interdict. The *Setlogelo* test, as adapted by case law, continues to be a handy and ready guide to the bench and practitioners alike in the grant of interdicts in busy magistrates' courts and high courts. However, now the test must be applied cognisant of the normative scheme and democratic

principles that underpin our Constitution. This means that when a court considers whether to grant an interim interdict it must do so in a way that promotes the objects, spirit and purport of the Constitution.

[46] Two ready examples come to mind. If the right asserted in a claim for an interim interdict is sourced from the Constitution it would be redundant to enquire whether that right exists. Similarly, when a court weighs up where the balance of convenience rests, it may not fail to consider the probable impact of the restraining order on the constitutional and statutory powers and duties of the state functionary or organ of state against which the interim order is sought.

[47] The balance of convenience enquiry must now carefully probe whether and to which extent the restraining order will probably

intrude into the exclusive terrain of another branch of government. The enquiry must, alongside other relevant harm, have proper regard to what may be called separation of powers harm. A court must keep in mind that a temporary restraint against the exercise of statutory power well ahead of the final adjudication of a claimant's case may be granted only in the clearest of cases and after a careful consideration of separation of powers harm. It is neither prudent nor necessary to define 'clearest of cases'. However, one important consideration would be whether the harm apprehended by the claimant amounts to a breach of one or more fundamental rights warranted by the Bill of Rights. This is not such a case.'

'[50] Under the Setlogelo test the prima facie right a 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.'

[32] When concerned with an application for an interdict restraining the exercise of a statutory power, a Court should therefore only grant the interdict on a strong case being made out for the relief.

[33] However, the OUTA-judgment made it clear that organs of state are not immunised from judicial review:

'[64] In a dispute as the present one, this does not mean that an organ of state is immunised from judicial review only on account of separation of powers. The exercise of all public power is subject to constitutional control. In an appropriate case an interdict may be granted against it.'

[Also see: Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others 2014 (4) SA 179 (CC) par [42]; Gross Border Development Consultants (Pty) Ltd v The MEC: North West Provincial Government: Department of Local Government and Human

Settlements and Others unreported judgment by Landman, J [2015] ZANWHC 42]

The OUTA-judgment also does not imply that the process for the procurement of goods and services by an organ of state is not anymore regulated by section 217 of the Constitution of the Republic of South Africa, 1996 or any of the relevant legislation and the settled procurement dispensation. The first respondent's decision in awarding tenders and contracts in terms of its procurement policy therefore still has to meet the requirements of a lawful administrative action.

- [34] The first respondent contends that the tenders were called for and the work has to be executed in discharging its statutory functions and constitutional mandate to promote the objects, spirit and purport of the Constitution. The project is meant to achieve the legitimate compelling, rational and objective of promoting social and economic development of the Thabong community. There is therefore a close relationship between the right to have the upgrade project not interdicted and other socio-economic rights, like the right to education, the right to health care, food, water, human dignity etc.
- [35] The first respondent therefore contends that the applicant has to satisfy the test and considerations as enunciated in the OUTA-judgment, which it failed to do.
- [36] I do agree that the test and principles enunciated in the OUTA-judgment must be satisfied and considered in determining whether the applicant is entitled on the temporary relief. However, having done so, I am satisfied that the applicant has established a *prima facie* right, being a right to which irreparable harm will ensue if not protected.
- [37] It is in dispute whether the tender data indeed required that completion certificates must have been submitted in order to satisfy the company experience criteria. The Applicant avers that it was not part of the tender requirements. It only had to provide information about its previous company experience, which it did. The facts set up by the first respondent in contradiction, have not thrown serious doubt upon the applicant's case. It is also evident from the report of Tsela Tsweu Consulting Engineers, who has also evaluated the bids on behalf of the first respondent, that the applicant scored 35 points for company experience during their evaluation of the bids and obtained the maximum points for functionality. Although the first respondent disputes the correctness of this report and evaluation, the dispute is not substantiated by any facts or grounds.
- [38] It is also not disputed that the applicant has a CIDB grading of 8CEPE, which certifies that the applicant can do work to the value of R130 million and that the applicant has concluded many successful contracts in the past. During argument, it was also conceded on behalf of the first respondent that the applicant is one of the finest in the industry but that does not mean that the applicant was exempted from complying with the alleged tender requirement, being the submission of completion certificates. Because of its failure to do so, it was disqualified.
- [39] As the applicant has *prima facie* shown that it was not required by the tender data and requirements to submit completion certificates, which was in any event submitted as part of its company profile document, its disqualification and the subsequent decision to award the tender to the second respondent constitutes an irregularity, which justifies interference on review. [See: GVK Siyazama Building Contractors (Pty) LTD v Minister of Public Works and Others [2007] 4 ALL SA 992 (D) at para [68] and [69]; South African National Roads Agency v Toll Collect Consortium 2013

(6) SA 356 (SCA) at 362 – 364.]

[40] Had the applicant's bid been correctly scored, it would have advanced to the final stage of evaluation. As the applicant would have been the lowest in price of all the bidders that advanced to the last stage of evaluation, it would have obtained the highest points and ought to have been awarded the contract.

[41] However, the first respondent contends that even if the applicant scored the highest points, the applicant did not show that it should have been awarded the contract.

[42] It is evident from the minutes of the BEC that the second respondent, being the successful tenderer, scored the highest points at the last stage of evaluation. Based on that, it was recommended that it be awarded the tender. To contend that the same principle would not have been applied to the applicant is implausible and in any event not supported by any facts or evidence. [See: *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd and Another* 2015

(5) SA 245 (CC) at par [65].]

[43] The applicant's constitutional right to administrative action that is just, fair and equitable and its right to take part in a process that is transparent and fair have therefore been violated.

[44] I am therefore satisfied that the Applicant has established a prima facie right in terms of the test as set out in the OUTA-judgment as well as a prima facie right to review the impugned decision.

WELL-GROUNDED APPREHENSION OF IRREPARABLE HARM AND BALANCE OF CONVENIENCE:

[45] The first respondent contends that the applicant did not show that it will suffer any prejudice if the order is not granted and the review eventually succeeds and has also not demonstrated the possibility of irreparable harm.

[46] It is indicated in Tsela Tsweu's evaluation report that the total construction period of the project is 6 months. When the order was granted, no work of any value has been executed by the second respondent. The respondents have also not yet concluded a service level agreement.

[47] Without a temporary interdict, the respondents will continue to implement and execute the contract and the works. At the time the intended review application is adjudicated, the works might have reached an advanced stage which probable could have the result that, notwithstanding the finding of unlawfulness, the respondents may be allowed to complete the work. The applicant will then be left with a hollow judgment. [SEE: *Moseme Road Construction CC And Others v King Civil Engineering Contractors (Pty) Ltd And Another* 2010 (4) SA 359 (SCA) at 361; *Joubert Galpin Searle Inc v Road Accident Fund and Others* 2014

(4) SA 148 (ECP) at para [93] – [101]; Gross Border Development Consultants (Pty) Ltd v The MEC: North West Provincial Government: Department of Local Government and Human Settlements and Others, *supra*, at par [22]].

[48] That, in itself, constitutes an apprehension of irreparable harm.

[49] The temporary interdict will restrain the first respondent from immediately implementing the contract and works, but will not do so irreparable. Thus, it will not irreparably disrupt the executive functions conferred by the law. The interdict will however ensure that the first respondent's exercise of its statutory power and its administrative actions taken in the procurement process be subjected to the required constitutional control, as the applicant *prima facie* showed that the first respondent's decision infringed upon the applicant's rights envisaged in section 217 of the Constitution

and also violated the legislative provisions and principles relevant to the procurement process.

[50] The order will also not irreparably harm the community, as there is no evidence before this court that without the immediate upgrading of the said road, the community will not have access to the socio-economic centres in the adjacent sub-urban localities.

[51] The first respondent contends that if the project is not concluded by the 30th of June 2016, the grant it received from the National Treasury for the project has to be returned. It also avers that, from the implementation plan of the project, it was directed by the National Department of COGTA that the project had to start during 1 July 2015 and has to be finalised by 30 June 2016. The first respondent however does not aver that if the grant is returned, it will not be entitled to any further funding for the project after the 30th of June 2016.

[52] It is also evident that the second respondent has not yet commenced with any work of value. The respondents have at this stage not even concluded a service level agreement. It is therefore, in any event, improbable that the work could be completed by the 30th of June 2016, whether the order is granted or not.

[53] Finally, the first respondent also contends that the community has been employed for the project. However, in the opposing

affidavit, the municipal manager only avers that the project 'also provides employment opportunities for the communities within the area of the First Respondent's jurisdiction as the labour of such community members is needed.'

[54] The temporary interdict will not adversely affect the employment opportunities. Once the review proceedings has been adjudicated and the contract is lawfully awarded to the successful tenderer, the employment opportunities will still be available to the community

members. There is no evidence before this Court that any member of the community has already been employed and is presently

conducting any work in respect of the project.

[55] I am therefore satisfied that the applicant demonstrated a prima facie right that is threatened by pending or imminent harm and that the balance of convenience favours the applicant.

NO OTHER SATISFACTORY REMEDY:

[56] The applicant does not have any other satisfactory remedy. The applicant acted immediately upon receipt of the documents from the first respondent. If the temporary interdict is not granted, the applicant may still proceed with the intended review application. But, as stated above, if the interdict is not granted, the applicant may be left with a hollow judgment and will therefore not be able to vindicate its rights.

CONCLUSION:

[57] For these reasons, I am satisfied that the applicant satisfied all the requisites for an interim interdict in terms of the

Setlogelo-test as well as the OUTA-judgment.

[58] Therefore, I made the order set out in paragraph 3 supra.

C.D PIENAAR, AJ

On behalf of the Applicant: Adv S Grobler

On instructions of:

Peyper Attorneys

BLOEMFONTEIN

On behalf of the First Respondent: Adv S Lebala SC

Adv N Khooe

Maroka Attorneys

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