



**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MAKHANDA)**

Not Reportable

CASE NO. 5049/2024

In the matter between:

STHATHU FUNDING (PTY) LTD

Applicant

and

AMATHOLE DISTRICT MUNICIPALITY

First respondent

SKG AFRICA (PTY) LTD

Second respondent

CHIPCOR DEVELOPERS (PTY) LTD

Third respondent

KOLOSA PROJECTS (PTY) LTD

Fourth respondent

JUDGMENT

LAING J

[1] This is an urgent application to interdict the first respondent from proceeding with a tender for the lease of office accommodation, pending review proceedings.

[2] It is common cause that the first respondent initially advertised a tender with a closing date of 12 June 2024. The applicant submitted a bid for R 54,841,646; the second respondent's bid was for R 96,226,627. The first respondent did not proceed with the evaluation of the bids because both were non-responsive; they exceeded the price for the stipulated preference point system, as prescribed under the Preferential Procurement Policy Framework Act 5 of 2000 ('PPPFA') and the regulations thereto. It decided, instead, to advertise a second tender, based substantially on the first, but stipulating that either the 80/20 or the 90/10 preference point system would apply, depending on the value of the lowest acceptable bid received. Points would be awarded for price and specific goals, which comprised four categories: black youth (4 or 7 points), black women (4 or 7 points), people with disabilities (1 or 3 points), and military veterans (1 or 3 points).

[3] The first respondent's advertisement of the second tender prompted the applicant's institution of the present proceedings. The issue of interim relief is before court, which only the first respondent opposes.

[4] In its papers, the first respondent challenged the urgency of the matter, indicating that the applicant had known about the second tender when it was advertised on 28 October 2024. This overlooks the fact, however, that the applicant made three separate enquiries about the status of the first tender and why the second tender had been advertised. The final ultimatum was 14 November 2024. The first respondent simply refused or failed to respond, constraining the applicant to launch its application. Mindful of the closing date for the second tender, being 28 November 2024 (tomorrow), the urgency is obvious.

[5] Turning to the merits of the matter, the requirements for interim relief are well-known. The applicant's claim to a *prima facie* right is founded on the constitutional requirements for public procurement, given effect through the PPPFA and its regulations. Importantly, the applicant recognizes that an organ of state such as the first respondent is authorized to implement a procurement policy that provides for categories of preference in the allocation of contracts, as well as the protection or advancement of persons disadvantaged by unfair discrimination. This is clear from section 217(2) of the

Constitution. The applicant also accepts that section 2 of the PPPFA provides a framework for the implementation of a preferential procurement policy and that the first respondent's supply chain management policy ('SCMP') is based thereon. At the core of the applicant's challenge, however, is the argument that the first respondent's selection and inclusion of the specific goals, as stipulated, as well as the corresponding points to be earned in relation to each category, was irrational. The inclusion of the goals in question amounted to a so-called 'cut and paste' exercise, using, without qualification, the example provided in the SCMP. There was no rational connection between the decision to include such goals and the purpose of such decision. Consequently, the applicant contends that this gives rise to a reviewable irregularity under the Promotion of Administrative Justice Act 3 of 2000 ('PAJA').

[6] In contrast, the first respondent points out that the inclusion of the specific goals was done in compliance with the SCMP. That was, on its own, sufficient.

[7] The court is inclined to agree with the first respondent. The Constitution expressly allows categories of preference in the allocation of contracts; it also allows for the protection or advancement of persons disadvantaged by unfair discrimination. Globally, public procurement is recognized as a mechanism by which the state can promote certain socio-economic objectives. It can well be argued that the first respondent's decision to include the goals stipulated in the second tender was to facilitate the achievement of, *inter alia*, the socio-economic objectives encapsulated in section 217(2) of the Constitution and given effect through the PPPFA and its regulations. There is a rational connection between the decision and the purpose.

[8] Regarding the points to be earned under each category, the first respondent has clearly weighted the goals to give preference to black youth and black women. This is consistent with the stated objective in its SCMP:

'[t]he municipality endeavours to allocate projects to designated groups, in particular, black women and black youth owned businesses.'

[9] The SCMP goes on to state that the first respondent's procurement of goods and services will be done in accordance with the PPPFA, which permits the implementation of the SCMP to achieve the goal of contracting with persons historically disadvantaged by unfair discrimination based on race, gender, or disability. The decision to include people with disabilities as a separate category aligns with such purpose. Regarding military veterans, it might well be debatable whether this is a category envisaged in terms of the legislative framework, but it cannot be refuted that it is stipulated as such in the SCMP. The applicant has challenged neither the lawfulness of the category nor the lawfulness of the policy itself.

[10] In the present matter, the determination of whether the applicant has a *prima facie* right overlaps to some extent with the determination of whether the applicant has demonstrated a well-grounded apprehension of irreparable harm. Overall, the court is not satisfied that the first respondent has infringed the applicant's *prima facie* right to just administrative action; more particularly, it has not infringed the applicant's right to a procurement process that complies with the relevant constitutional and legislative requirements. The first respondent's decision to select the specific goals specified in the second tender is rationally connected to the purpose contemplated under section 217(2) of the Constitution, amplified in the PPPFA and its regulations, and expressed in the first respondent's SCMP. The court is also not satisfied that, if the procurement process is allowed to proceed, then irreparable harm will be caused to the right in question.

[11] The applicant, in argument, placed considerable reliance on the decision in *SMEC South Africa (Pty) Ltd v South African National Road Agency*,¹ where Du Plessis AJ held that irreparable harm lay in the possibility that a party's constitutional rights would be infringed if such party was subjected to an unconstitutional scoring system.² A party such as the applicant could not be expected to participate in a possibly unlawful and

¹ 2023 JDR 3374 (GP).

² At paragraph [27].

unconstitutional process. The learned judge held that the party's inability to do so was harmful.³

[12] Because the court in the present matter has already found that there is no indication that the applicant's *prima facie* right to a lawful procurement process has been or will be infringed, there is no need to consider, further, the relevant principles discussed in *SMEC*. Nevertheless, irreparable harm means injury or damage that cannot be rectified, remedied or made good. It is unclear why such harm as might be caused to the applicant by its participation in the second tender would be irreparable when there was still the possibility of successful review proceedings.

[13] Possibly the most problematic of the remaining requirements is the question of the balance of convenience. In this regard, the applicant asserts that, without interim relief, it might be required to participate in a procurement process that could be reviewed and set aside. If the interdict is granted, however, then the first respondent could continue with the second tender where a review court finds that there were no reviewable irregularities. This seems to ignore the common cause fact, however, that the existing lease between the applicant and the first respondent will expire on 28 February 2025. The date is slightly more than three months away. The applicant has not indicated any intention or willingness to extend the agreement; the first respondent does not, in any event, wish to do so. The failure to secure alternative office accommodation will, as the first respondent has argued, attract the risk of irregular expenditure as well as the more fundamental dilemma of where and how to accommodate the numerous councillors and staff involved. The potential inconvenience caused to the applicant, however, is negligible.

[14] Regarding the final requirement for interim relief, it would appear to be indeed so that no alternative remedy exists for the applicant. Considering the court's findings in relation to the other requirements, however, the satisfaction of this requirement advances the applicant's case no further.

³ At paragraphs [31] and [32]. The court referred to the decision of Rogers J in *SMEC South Africa (Pty) Ltd v City of Cape Town* [2022] ZAWCHC 131 (23 June 2022).

[15] It is necessary, at this stage, to mention an additional aspect raised in argument, viz. the extent to which interim relief would infringe the separation of powers doctrine. In *National Treasury and Others v Urban Tolling Alliance and Others*,⁴ the Constitutional Court warned that a temporary restraint against the exercise of statutory power, well ahead of the final adjudication of a claimant's case, could be granted only in the clearest of cases and after careful consideration of separation of powers harm.⁵ The principle was confirmed in *Economic Freedom Fighters v Gordhan and Others*,⁶ where the Constitutional Court held that an interdict that prevented a functionary from exercising public power impacts on the separation of powers and should therefore only be granted in exceptional circumstances.⁷ This court accepts, however, that the case law appears to distinguish the circumstances described above from matters where the claimant seeks interim relief in relation to a procurement process, pending review proceedings.⁸ Nothing more needs to be said in that regard.

[16] In conclusion, the court holds that the applicant has not successfully demonstrated that it has met the requirements for interim relief. There is no reason why the successful party should not be entitled to its costs, which, considering the complexity and value of the matter and its importance to the parties concerned, attract the level of scale C.

[17] The following order is made:

- (a) the application brought in terms of Part A of the notice of motion is dismissed; and
- (b) the applicant is ordered to pay the first respondent's costs in accordance with scale C.

⁴ 2012 (6) SA 223 (CC).

⁵ At paragraph [47].

⁶ 2020 (6) SA 325 (CC).

⁷ At paragraph [42].

⁸ The applicant cited several decisions, including one from this division, *Down Touch Investments (Pty) Ltd v The South African National Road Agency SOC Limited* 2020 JDR 2278 (ECG), at paragraph [44].

JGA LAING

JUDGE OF THE HIGH COURT

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Date heard: 26 November 2024.

Date of delivery of judgment: 27 November 2024.