



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN**

CASE NO: D7913/2023

In the matter between:

VEA ROAD MAINTENANCE AND CIVILS (PTY) LTD

APPLICANT

(Registration number: 2010/008853/07)

and

THE SOUTH AFRICAN NATIONAL ROADS AGENCY

1ST RESPONDENT

SOC LIMITED

GOOD PURPOSE CONSTRUCTION PTY (LTD)

2ND RESPONDENT

(Registration number: K2020/822592/07)

REASONS FOR ORDER

E Bezuidenhout J

Introduction

[1] The matter came before me as a special urgent opposed application on 12 September 2023 in Durban. After hearing argument, I granted an order in terms of which the respondents were directed to file supplementary answering affidavits by 21 September 2023 and the applicant to file a supplementary replying affidavit by 20 September 2023.

[2] I also afforded the parties an opportunity to file supplementary heads of argument by 4 October 2023. I indicated to counsel that I would hand down my order on 9 October 2023, when I was to preside in motion court in Pietermaritzburg, together with brief reasons - if possible. On 9 October 2023, I handed down the following order:

- ' 1. The application is dismissed with costs, such costs to include the costs of two counsel, where so employed.
2. If the applicant requires to have its intended review application to be case managed on an urgent basis, a letter should be directed at the office of the Judge President to request a judge to be allocated for such purpose.
3. The reasons for the order will follow in due course.'

[3] These are the reasons. I do not propose to deal with the voluminous papers in any detail and will only deal with the facts very briefly. I have, however, perused and carefully considered the papers and all submissions made and all counsels involved are thanked for their input.

[4] The applicant, Vea Road Maintenance and Civils (Pty) Ltd, brought an application on an urgent basis, seeking the following wide-ranging relief:

- (a) That the time period in section 5 of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) for the provision of reasons and certain documents be reduced.
- (b) That the first respondent, the South African National Roads Agency SOC Limited, be ordered to provide the applicant, within five days of the granting of the order, with full and written reasons for its decision to award Tender: N.002-279-2019/1 (the tender) to the second respondent, Good Purpose Construction (Pty) Ltd, and not to the applicant.
- (c) That the written reasons must include, but not limited, to the following:
 - (i) The date on which the second respondent was appointed.
 - (ii) Copies of the letter of award to the successful tenderers.
 - (iii) Copies of all evaluation reports relating to the tender (including the Bid Evaluation Committee's reports), whether internally generated or externally sourced.

- (iv) Minutes of the Bid Evaluation Committee and Bid Adjudication Committee meetings, together with any reports submitted by these committees, and their recommendations.
 - (v) The completed form of offer and acceptance.
 - (vi) Written reasons why the tender was awarded to the second respondent and not the applicant.
- (d) That the first respondent be interdicted from giving instructions to the second respondent and/or any other tenderer to perform work under the tender.
- (e) That the first and/or second respondent and/or any successful tenderer be interdicted from commencing with work or any further work under the tender.
- (f) That the two aforementioned orders serve as an interim interdict with immediate effect pending finalization of the application for review to be instituted by the applicant.
- (g) That the application for review be instituted within 20 court days from the date on which sufficient written reasons are provided to the applicant.
- (h) That the first respondent pay the costs of the application on attorney and client scale and that the second respondent be ordered to pay the costs of the application if it opposes it.

[5] The matter was initially set down to be heard on 2 August 2023 but was adjourned for a preferent date to be allocated. No interim relief was granted.

[6] As will become clear, the only issues that eventually required determination were whether the applicant still required written reasons and whether it had satisfied the requirements for an interim interdict.

[7] It is common cause that the applicant submitted a bid for the tender, which is a contract for routine maintenance of the N2 from section 27 (KM 1.85) to section 29 (KM 53.57) in the Ilembe and Uthungulu District Municipality. The applicant was one of 14 tenderers, as was the second respondent, who submitted tenders. On 12 July 2023, the applicant received a letter of regret from the first respondent. It ascertained that the tender was awarded to the second respondent. The second respondent had submitted the second lowest bid and the applicant the third lowest bid.

[8] The applicant alleged that the sole director of the second respondent is Mr S S Gama, who is also a director of Zimile Consulting Engineers (Pty) Ltd (Zimile Consulting) which company is the contract engineer on various other projects where the first respondent is also the employer. It was alleged that the second respondent, through Zimile Consulting, would inter alia have access to the applicant's baseline prices and that an unfair advantage over other tenderers would be 'very likely' and that it could lead to bid rigging.

[9] The applicant also referred to the tender data, attached to its founding affidavit, and in particular to the Bidder's Disclosure, set out in Form A3.1. Tenderers are required to answer the following questions:

2.1. Is the bidder, or any of its directors / trustees / share-holders / members / partners or any person having a controlling interest in the enterprise, employed by the state?

2.1.1. If so, furnish particulars of the names, individual identity numbers, and, if applicable, state employee numbers of sole proprietor / directors / trustees / shareholders / members / partners or any person having a controlling interest in the enterprise, in table below.

...

2.2 Do you, or any person connected with the bidder, have a relationship with any person who is employed by the procuring institution?

...

2.3 Does the bidder or any of its directors / trustees / shareholders / members / partners or any person having a controlling interest in the enterprise have any interest in any other related enterprise whether or not they are bidding for this contract?

[10] Following upon the questions, a tenderer is required to sign a declaration that he understands that the accompanying bid will be disqualified if the disclosure is found not to be true.

[11] The applicant's case is in essence that as a result of the apparent link between the second respondent and Zimile Consulting, the second respondent should have replied 'yes' to the questions, and, by implication, should have disclosed that Mr Gama was the sole director of both entities. It is apparent from the papers that only the third question posed is relevant.

[12] It is common cause that the second respondent in fact answered 'no' to all the questions. This, coupled with the allegation that the second respondent had an unfair advantage due to its relationship with Zimile Consulting, forms the basis of the applicant's envisaged review application.

[13] The applicant requested the first respondent on 14 July 2023 to provide written reasons for its decision by 18 July 2023, which the first respondent failed to do. The applicant stated that in order for it to be able to ascertain if the tender had been awarded in a compliant way, it required the first respondent to provide it with the requested information and documentation, and it could not obtain the information from anyone else but the first respondent.

[14] As far as the justification for the truncated time period in respect of section 5 of PAJA was concerned, the applicant merely stated that 'considering the extent of the tender amount it is in the interests of justice to reduce the above-mentioned time period of 90 days'. The applicant did not say why it deemed five days to be appropriate.

[15] The applicant stated that it 'contemplated' a review of the first respondent's decision and whilst those contemplated review proceedings are pending, the operation of the tender will not be halted, therefore there is the need to apply for interim relief. The applicant further stated that the only way which the review proceedings can be validly prosecuted and pursued was if the requested written reasons and documents were provided. The applicant did not address the provisions of Uniform rule 53 at all. At the time of the hearing before me, the applicant had still not instituted its review proceedings, despite stating in its replying affidavit that it now intends challenging the first respondent's decision.

[16] As far as the requirements for an interim interdict are concerned,¹ the applicant addressed them only briefly. It stated that it had a prima facie right to be

¹ It is trite that the requirements for an interim interdict are a prima facie right even if it is open to some doubt; a well-grounded apprehension of irreparable harm if the interim relief is not granted and the ultimate relief is eventually granted; a balance of convenience in favour of granting the interim relief; and the absence of any other satisfactory remedy. See *Setlogelo v Setlogelo* 1914 AD 221 at 227, and *National Treasury and others v Opposition to Urban Tolling Alliance and others* [2012] ZACC 18; 2012 (6) SA 223 (CC) para 41.

provided with reasons why it was not awarded the tender and it also had a prima facie right to have the first respondent's decision reviewed and set aside. It did not disclose the grounds. In respect of the apprehension of irreparable harm and the balance of convenience, it was alleged that the applicant will suffer severe prejudice and financial harm if the second respondent is allowed to commence and continue with the work in terms of the tender which has been awarded irregularly and unlawfully, which will in effect condone an unlawful and irregular award.

[17] The first respondent, in its answering papers, stated that the applicant knew the reasons for the award of the tender to the second respondent at the time it launched its application, namely that the second respondent had the better price and therefore scored more than the applicant, utilizing the 90/10 preferential procurement points system. This information was published on the first respondent's website.

[18] The first respondent attached to its answering affidavit the first respondent's acceptance of the second respondent's offer dated 23 June 2023, the minutes of the Regional Bid Evaluation Committee meetings and the minutes of the Regional Bid Adjudication Committee.

[19] Pursuant to the tender being awarded to the second respondent, the first respondent concluded a contract with the second respondent. The first respondent dealt with the nature of the contract and the work to be done in respect of routine maintenance. It includes:

- (a) Emergency response to inter alia ensure that the road is cleared and that the surface is made safe after an accident.
- (b) Repairs, including pothole repairs and guardrail repairs.
- (c) Clearing the road of obstructions.
- (d) Removal of materials from the road surface caused by slippage of an embankment.
- (e) Grass cutting and burning of the road verge.

[20] With reference to the requirements for an interim interdict and in particular the balance of convenience, it was alleged by the first respondent that the applicant has disregarded the risk of harm which will eventuate if the interdict is granted. Road

maintenance services are required at all times. These services include emergency services, clearing away debris, removing dead animals from the road and removal of obstructions that can happen any time, day or night. The services must be rendered 24 hours a day and 7 days a week during the contract period. If the services are not provided, motorists using the road are at risk of injury and sustaining damages due to potential obstructions on the road. It was stated that it is not in the public interest that the rendering of the services by the second respondent, who has already commenced providing the services, be interdicted pending a review yet to be launched and which may take a long time to resolve.

[21] It was further stated that any prejudice which the applicant may suffer is nothing more than the financial consequences which every unsuccessful bidder suffers, and that the potential risk to road users if the work is not performed far outweighs the alleged prejudice. Stopping the work would have potentially disastrous consequences for motorists. Attention was also drawn to the interests of tax payers, who would have to pay more if the applicant was to perform the work, it having submitted a higher bid price. I may just add that the applicant has made no submissions to the effect that the second respondent is not capable of performing the work. The applicant has also not made a tender to step into the shoes of the second respondent to provide the services in its stead, pending the finalization of its intended review, to ensure that the interests of motorists are protected.

[22] The first respondent dealt at length with the allegations regarding the alleged unfair advantage and the alleged relationship between the first respondent and Zimile Consulting. It was submitted, on behalf of the first respondent, that the review will revolve around the interpretation of the questions contained in the Bidder's Disclosure Form. It was denied that the second respondent should have answered 'yes' to the questions. It was submitted in the written heads of argument that the third question, in particular, raised the issue of what a 'related enterprise' is, having regard to the context and purpose of the question, which was aimed at inter alia preventing collusion between bidders and to avoid artificial control of prices.

[23] The second respondent likewise denied that it should have answered 'yes' to the questions. It set out in detail the nature of its dealings with the first respondent

and Zimile Consulting, most of which will have to be considered in the anticipated review application. The second respondent took exception to the allegations of bid rigging.

[24] The second respondent confirmed that following its successful bid, it had already made financial investments, allocated resources, bought and hired the appropriate equipment and committed to contracts with third parties. During the hearing of the matter, it was confirmed that the second respondent had already commenced providing the services to the first respondent.

[25] The second respondent attached to its answering affidavit an extract of a document, in terms of which Zimile Consulting purports to decline an instruction from the applicant to conduct an independent evaluation in respect of what turned out to be the tender in question. It listed a conflict of interest as the reason for not accepting the instruction. The instruction was only sent to Zimile Consulting after the closing date of the tender, which was on 8 February 2023.

[26] It was this particular document and the submissions made on behalf of the applicant at the hearing in respect of the document, and which did not form part of the applicant's case in its papers, that ultimately led to the order that I made on 12 September 2023, granting the parties leave to file supplementary affidavits and heads of argument. Submissions were made about the nature of the alleged conflict and whether this conflict should have resulted in the second respondent answering differently to the questions in the disclosure form. The conflict, on the face of it, only arose when the applicant instructed Zimile Consulting to conduct an evaluation, and not before then. I, however, do not intend dealing with this issue any further as I am of the view that it firmly belongs before the court hearing the review application and who will ultimately decide on the interpretation to be ascribed to the wording of the disclosure form and the alleged conflict.

[27] The applicant, in reply to the first respondent's answering affidavit, in response to the concerns raised about the safety of the public and road users, stated in a rather flippant manner, that 'it is always any organ of state and tenderers favorite argument to play the "public safety" card'. This is a rather callous attitude to adopt

where road users could literally die if the services in terms of the contract are not performed. The applicant addressed none of the concerns raised by the respondents in this regard, and is clearly of the view that the consequences that will follow if an interdict is granted and the maintenance work is stopped, are of no concern to it.

[28] As mentioned above when referring to the issues to be determined, and at the hearing of the matter, the only relief still sought by the applicant was that it be provided with the reasons for the first respondent's decision together with the interdictory relief. As far as the provision of reasons was concerned, it was submitted on behalf of the first respondent that it has provided the applicant with its reasons, not only in its answering affidavit but also through the documents it had provided and attached to its papers. I agree with these submissions. I can see no need to make such an order in light of what the first respondent has already stated in its papers.

[29] As far as the interdictory relief is concerned, I was urged by the applicant to consider what was held in *Olympic Passenger Service (Pty) Ltd v Ramlagan*.² The court held that 'the stronger the prospects of success, the less need for such balance to favour the applicant: the weaker the prospects of success, the greater the need for the balance of convenience to favour him.'

[30] However, in *Verstappen v Port Edward Town Board and others*³ Magid J held as follows:

'The Court has a discretion to grant an interdict, which is an extraordinary remedy. The balance of convenience is usually the decisive factor in determining the proper way to exercise such discretion unless the prospects of success are substantially in favour of the applicant.'

[31] The court also proceeded to consider whether the convenience of the public could be taken into account, bearing in mind that the balance of convenience is normally weighed up only as between the parties. The court held, with reference to various authorities, that where 'the wider general public is affected, the convenience

² *Olympic Passenger Service (Pty) Ltd v Ramlagan* 1957 (2) SA 382 (D) at 383D-F.

³ *Verstappen v Port Edward Town Board and others* 1994 (3) SA 569 (D) at 576E-F.

of the public must be taken into account in any assessment of the balance of convenience'.⁴ I fully agree with this approach.

[32] It is, however, important to note that the different requisites for an interim interdict 'should not be considered separately or in isolation but in conjunction with one another in order to determine whether the court should exercise its discretion in favour of the grant of the interim relief sought'.⁵

[33] I have not said much about the applicant's alleged clear right, which entails a consideration of the applicant's prospects of success on review. In *Economic Freedom Fighters v Gordhan and others*⁶ Khampepe ADCJ held that the court adjudicating the interdict application is required 'to peek into the grounds of review raised in the main review application and assess their strength . . . only if a court is convinced that the review is likely to succeed [then] it may appropriately grant the interdict'. There is at this stage no review to peep into as the applicant has chosen not to follow the rule 53 route, combined with interdict proceedings.

[34] Despite the fact that the applicant has not said much about its grounds of review, its basis for its intended review can be gleaned from its papers. I do not intend expressing a strong view on the applicant's prospects of success, as it revolves around a particularly narrow issue which would involve the interpretation of the relevant portion of the disclosure form, bearing in mind its context and a businesslike approach.⁷ Even if the probabilities are in favour of the applicant, it may still be proper to refuse interdictory relief if the balance of convenience is against the granting of relief.⁸

[35] In my view, the interests of the public and the road users of the relevant portion of road have to be taken into account. I am further of the view that the

⁴ Ibid at 576 H-I. See also A C Cillers et al *Herbstein and Van Winsen: Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa* 5 ed (2009) at ch44-p1473).

⁵ D E van Loggerenberg *Erasmus: Superior Court Practice* (RS 21, 2023) at D6-16E.

⁶ *Economic Freedom Fighters v Gordhan and others* [2020] ZACC 10; 2020 (6) SA 325 (CC) para 42.

⁷ *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA).

⁸ See A C Cillers et al *Herbstein and Van Winsen: Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa* 5 ed (2009) at ch44-p1472 and the authorities referred to in footnote 123.

balance of convenience is overwhelmingly against the granting of the interdictory relief. Even if the applicant had succeeded in establishing all the requisites for an interim interdict, it does not mean that it is entitled to its relief.⁹ This is part of the court's general and overriding discretion whether to grant or refuse an application for interim relief. I am not inclined to exercise my discretion in favour of the applicant.

[36] It is for these reasons that I dismissed the application. I ordered the applicant to pay the costs, bearing in mind the general principle that costs follow the result. I also made the applicant aware of the possibility of having its intended review case managed on an urgent basis, which will ensure that the review is dealt with without delay.

E BEZUIDENHOUT J

Date of hearing: 12 September 2023

Date of order: 9 October 2023

Date of reasons: 20 November 2023

The reasons were 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 12h00 on 20 November 2023.

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⁹ D E van Loggerenberg *Erasmus: Superior Court Practice* (RS 21, 2023) at D6-23.

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