

**IN THE HIGH COURT OF SOUTH AFRICA  
(EAST LONDON CIRCUIT LOCAL DIVISION)**

**CASE No.: EL 1258/12**

**ECD 2958/2012**

In the matter between:

**CONTINENTAL OUTDOOR MEDIA (PTY) LIMITED**

Applicant

and

**BUFFALO CITY METROPOLITAN MUNICIPALITY**

1<sup>st</sup> Respondent

**HLUMA STATIONERS CC**

2<sup>nd</sup> Respondent

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**JUDGMENT**

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**Y EBRAHIM ADJP:**

[1] This application was brought on an urgent basis for the following relief:

'PART A

1. that the rules relating to forms and service as required in accordance with the provisions of rule 6(12)(a) of the Uniform Rules of Court be dispensed with and that this matter be heard as one of urgency;
2. pending:
  - 2.1 the final determination of the review sought in Part B hereof; and
  - 2.2 the applicant launching an application within 10 days of the first respondent having delivered the documentation referred to in paragraphs (n), (o) and (p) hereafter; alternatively within 10 days of the date of hereof; inter alia to

intervene in the application launched by the second respondent against the first respondent under case number EL 314/2012 ECD 814/2012 and to rescind the order granted by Dukada J on 24 July 2012,

the first respondent is interdicted and restrained from:

- 2.3 implementing contract number 89(e), described in the first respondent's tender invitation as "tender for the sole rights for the supply, erection and maintenance of advertising billboard within the area of jurisdiction of the Buffalo City Municipality", purportedly awarded to the second respondent ('the tender');
- 2.4 removing or interfering with in any way the advertising billboards erected and owned by the applicant and situated within the area of jurisdiction of the Buffalo City Municipality;
3. that the costs of this application be costs in Part B hereof, save and in the event of any of the respondents opposing the relief sought;
4. further and/or alternatively relief.'

[2] Part B in the notice of motion details the relief the applicant intends seeking in review proceedings it will institute, namely to review and set aside the decision of the first respondent to reinstate the tender and award it to the second respondent.

[3] The first respondent delivered notice of intention to oppose the application for urgent interdictory relief but did not file an answering affidavit. The second respondent did not respond to service of the application on it.

[4] Mr Nongugo, the attorney representing the first respondent, in the absence of Mr Kubukeli who had been instructed to appear for the first respondent, applied from the bar for the urgent application to be postponed to afford the first respondent time to file an answering affidavit. Mr Eyles, with Ms Dreyer, who appeared for the applicant opposed the application for a postponement. Mr Kubukeli, on arriving later, was afforded an opportunity to make further submissions in support of the

application for a postponement. Due to the limited and unpersuasive reasons advanced on behalf of the first respondent, the application for a postponement was refused with costs.

[5] Mr Eyles proceeded with the urgent application and submitted argument in support thereof. Mr Kubukeli, on the other hand, informed the Court he was not presenting any argument in opposition. At the conclusion of argument I granted an order substantially in the form prayed for in the notice of motion and indicated that reasons for my decision would follow in due course. These are the reasons.

[6] I set out briefly the factual circumstances giving rise to this application. During March 2011 the first respondent invited interested parties to tender for the sole rights for the supply, erection and maintenance of advertising billboards within the area of jurisdiction of the Buffalo City Municipality. Tenders were to be submitted before 12h00 on 3 May 2011. The first respondent also placed an advertisement in the Sunday Times Newspaper in relation to the tender and indicated therein that tenders were to be submitted before 12h00 on 6 May 2011. The applicant, on the basis of this information, submitted its tender on 6 May 2011 while the second respondent submitted its tender on 5 May 2011. Both tenders were, therefore, submitted after 3 May 2011, the closing date specified in the official documents.

[7] On 18 November 2011 the first respondent addressed a letter to the applicant to inform it of 'the withdrawal of this contract due to technical reasons' and requested the applicant to 'indicate acknowledgement by signing below and returning the document .....'. The applicant duly complied with this request. The first respondent did not elucidate

on the technical reasons for the withdrawal of the contract but stated that the contract would be re-advertised.

[8] There were no further developments until the second respondent, in a letter dated 24 August 2012, informed the applicant that:

'In terms of the Court Order delivered on the 24<sup>th</sup> July 2012 in the EL Circuit Local Division. (*sic*) In the matter between Hluma Stationers cc and Buffalo City Metropolitan Municipality under case no. EL314/2012 ECD814/2012, it was ordered that:

1. That the purported withdrawal of the bid known as "Contract no. 89E: Sole Rights for the Supply, Erection and Maintenance of Billboards Advertising Signs within the Area of Jurisdiction of the Buffalo City Municipality" by the respondent on 18 November 2011, ..... be and is hereby set aside.
2. That the respondent finalise the said bid process.
3. That the bidders be informed of the outcome of the bid process within one month of the granting of this order.

Pursuant to the above order the BAC re-considered the bid and has resolved on the matter. This therefore serves to inform you that the bid your company submitted has been unsuccessful.

Buffalo City Metropolitan Municipality hereby wish you all the best for all future endeavours.

Yours faithfully

A FANI

CITY MANAGER'

[9] In a letter to the applicant dated 6 September 2012 the first respondent stated:

**'TERMINATION OF BILLBOARD ADVERTISING CONTRACT: BUFFALO CITY METROPOLITAN MUNICIPALITY AND CONTINENTAL OUTDOOR MEDIA (PTY) LTD**

My letter dated 12 November 2004 refers. (Copy attached for your reference)

You are hereby kindly advised that a contract for billboard advertising within the Buffalo City Metropolitan Municipality's area of jurisdiction for a period of three years has recently been awarded to the successful bidder.

You are therefore requested to remove all billboard advertising structures within the Buffalo City area as advised in my previous correspondence. Your contract was terminated on 28 September 2004 as per Council resolution.

It is requested that you remove your structures within 30 days from the date of this letter, failing which Council will remove them and you will be liable for the costs of removal thereof.

Should you require any additional information in this regard please do not hesitate to contact Mr Mbewu Mbolekwa at the above telephone number.

Yours faithfully

N. MABLI-MAJENG

DIRECTOR OF PLANNING AND ECONOMIC DEVELOPMENT'

[10] In response to this communication the applicant's attorneys informed the first respondent in a letter dated 11 September 2012 that they had been instructed to apply to court for the review of the decision to award the tender to the second respondent and required a written undertaking that the first respondent would not implement the tender or remove the billboards, structures and advertising of their client, failing which application would be made for an urgent interim interdict. The first respondent did not reply to this letter nor a further letter dated 28 September 2012 and the applicant thereupon launched these proceedings.

[11] The first respondent has not contested the factual circumstances set out in the applicant's founding affidavit and elected not to present argument to counter the submissions Mr Eyles made on behalf of the applicant. On the basis of the facts set out in the founding papers, which the submissions of Mr Eyles have underscored, it is evident that the entire tender process was flawed. As a result of the inconsistency between the official tender documents and the advertisement regarding the closing date for submission of tenders, the bids of both the applicant and second respondent

were submitted late. The decision of the first respondent not to proceed with the contract and to withdraw it was in the circumstances correct. Even though the second respondent stated at first that this was for 'technical reasons' and later that it had become 'apparent to the [first] respondent that the tender evaluation process had been compromised and for that reason it was decided by the Bid Evaluation Committee on 15 November 2011 that the tender be withdrawn and the process started afresh', I do not consider the differing explanations vitiate the second respondent's decision to withdraw the tender since the process was clearly flawed.

[12] The order Dukada J issued was in terms of an agreement between the first and second respondents and had its genesis in an application launched by the second respondent to compel the first respondent to grant it access to certain documentation relating to the withdrawal of the tender. The order, however, bore no resemblance to the relief sought, or the cause of action made out, by the second respondent in its application which was premised on the provisions of s 18(1) of PAIA.<sup>1</sup>

[13] The first respondent had withdrawn the tender process and informed tenderers it would re-advertise the invitation to tender. It was, therefore, not in a position to conclude an agreement with the second respondent to reinstate the tender and, even less so, to award it to the second respondent. The first respondent was obliged to comply with the procedures provided for in its own supply chain management policy in regard to the advertising and awarding of tenders. In the absence thereof the tender of the second respondent was not an acceptable one<sup>2</sup> and the first

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<sup>1</sup> Promotion of Access to Information Act 2 of 2000

<sup>2</sup> *Transnet Ltd v Rubenstein* 2006 (1) SA 591 (SCA); *The Nelson Mandela Metropolitan Municipality v Greyvenouw CC and Others* 2004 (2) SA 81 (SECLD); *Chairperson, Standing Tender Committee & Others v JFE Sapela Electronics (Pty) Ltd & Others* [2005] JOL 15567 (SCA)

respondent's decision to agree to reinstate the tender and award it to the second respondent was consequently manifestly unlawful.<sup>3</sup>

[14] The first respondent's demand that the applicant remove all billboard advertising structures within the Buffalo City area within 30 days and the concomitant threat that it would do so itself if the applicant did not comply lacked legal validity.

[15] I accordingly agree with the submission of Mr Eyles that the applicant has established it has a *prima facie* right to the relief sought, if not a clear right,<sup>4</sup> and has shown there is a well-grounded apprehension of irreparable harm if the relief is not granted. Should the applicant have to remove the advertising structures it will be at considerable cost and inconvenience and it will be precluded from earning revenue. The applicant would also be in breach of its contractual obligations to advertisers and run the risk of them terminating their contract with the applicant. In addition, the applicant's good name and reputation would be tarnished, possibly irreparably.

[16] I am satisfied that the applicant has shown that the balance of convenience favours the granting of an interim interdict. It is apparent that the applicant will suffer prejudice should it not be granted whereas the first respondent will not be prejudiced thereby. Even if there may be prejudice to the first respondent, and in my view there can be none, it is responsible for this. The second respondent is duty bound to proceed with the tender process afresh, which it conveyed to tenderers would be done, and to ensure that the process is conducted in accordance with its own supply

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<sup>3</sup> *Sanyathi Civil Engineering and Construction (Pty) Ltd and Another v Ethekwini Municipality and Others; Group Five Construction (Pty) Ltd v Ethekwini Municipality and Others* [2010] 1 All SA 200 (KZP)

<sup>4</sup> *Simon v Air Operations of Europe AB* 1999 (1) SA 217 (SCA) at 228G-H

chain management policy governing the advertising and awarding of tenders. In circumventing this policy the second respondent acted unlawfully.<sup>5</sup>

[17] I am also satisfied that the applicant has shown that no other satisfactory remedy is available to it. The applicant attempted on three occasions, through letters addressed to the first respondent, to obtain reasons for the first respondent's decision to award the tender including an undertaking not to implement it but these did not elicit any response. I can only infer from the silence of the first respondent that it is unable to proffer a proper explanation for its decision. The applicant contends that it would be very difficult to compute and quantify the reputational damages it will suffer if its structures are removed and third parties cancel the contracts they concluded with it. At this stage, there is nothing to gainsay this contention and I therefore accept same.

[18] In the circumstances, I am satisfied that the applicant has made out a proper case for the relief as prayed for in the notice of motion.

[19] In regard to costs Mr Eyles submitted that the first respondent should be liable for the applicant's costs on an opposed scale including the costs of two counsel. Despite the first respondent not filing an answering affidavit and electing not to present argument the first respondent persisted with its opposition to the application for urgent interim interdictory relief even after its application for a postponement was refused. The first respondent could have abandoned its opposition but chose not to do so. I am thus persuaded that costs be awarded as contended for by Mr Eyles.

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<sup>5</sup> *Eriksen Motors (Welkom) Ltd v Protea Motors, Warrenton* 1973 (3) SA 685 (A)



[20] In the result, I confirm the order issued on 18 October 2012, which reads as follows:

‘1. Pending

1.1 the final determination of the review sought in Part B hereof, and

1.2 pursuant to the applicant having launched an application on 17 October 2012 to intervene in the application launched by the second respondent against the first respondent under case number EL 314/2012 ECD 814/2012 to rescind the order granted by Dukada J;

the first respondent is interdicted and restrained from:

1.3 implementing contract number 89(e), described in the first respondent’s tender invitation as “tender for the sole rights for the supply, erection and maintenance of advertising billboard within the area of jurisdiction of the Buffalo City Municipality”, purportedly awarded to the second respondent (“the tender”);

1.4 removing the advertising billboards erected and owned by the applicant and situated within the area of jurisdiction of the Buffalo City Municipality;

2. that the first respondent pays the costs of this application on an opposed scale including the costs of two counsel.’

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**JUDGE Y EBRAHIM**

**ACTING DEPUTY JUDGE PRESIDENT, BHISHO HIGH COURT**

**3 January 2013**

Heard on:	18 October 2012
Judgment delivered on:	8 January 2013
Counsel for the Applicant:	A J Eyles with C J Dreyer
Attorneys for the Applicant:	Bate Chubb & Dickson Inc EAST LONDON
Counsel for the First Respondent:	L Kubukeli
Attorneys for the First Respondent:	Nongogo, Nuku Inc EAST LONDON