IN THE HIGH COURT OF SOUTH AFRICA

(EAST LONDON CIRCUIT LOCAL DIVISION)

CASE NO: EL757/15

ECD1557/15

In the matter between:

SLIP KNOT INVESTMENTS 777 (PTY) LTD APPLICANT

and

MAYIBUYE TRANSPORT CORPORATION RESPONDENT

REASONS FOR JUDGMENT

_____

MBENENGE J:

[1] On 17 July 2015 this Court entertained this application, brought by way of urgency. Due to the urgency of the matter, an order, favourable to the applicant, was granted, with an indication given that reasons therefor would be handed down today.

[2] In effect the order –

(a) condones the applicant's non-compliance with the Rules of this Court in respect of service and notice, and grants the applicant leave to proceed with the application as one of urgency in terms of rule 6 (12) of the Rules of this Court;

(b) restrains and interdicts the respondent from proceeding with or implementing the tender process it commenced by publishing, in the Daily Dispatch newspaper, a tender invitation, on 22 May 2015, under bid reference number SCM 2015/16/04, pending the finalisation of a review application to be instituted by the applicant or any other interested party, within 10 days of receipt by the applicant of the full written record and documents pertaining to the decision taken by the respondent to award the tender;

(c) directs the respondent to furnish the applicant with the record referred to in paragraph 2 above by 4 August 2015; and

(d) directs the respondent to pay the costs of the application.

[3] At the heart of this application is a tender process set in motion without compliance with a requirement that bids be advertised in the government bulletin. The facts underlying the application are largely common cause.

[4] During the course of 2014 the respondent, a provincial government business enterprise subject to the provisions of the Public Finance Management Act 1 of 1999 and the Preferential Procurement, 2011 Regulations invited tenders to provide office accommodation under bid number SCM 2014/15/17 (the initial bid). The initial bid was, however, cancelled by the respondent on 17 December 2014, for reasons not relevant hereto, after Saldosol Investments (Pty) Ltd had submitted a tender.

[5] It came to pass that the respondent set in motion a tender process in pursuance of a tender notice published in the Daily Dispatch on 22 May 2015 (the bid). The applicant, which specialises in the acquisition, development and leasing of commercial buildings throughout the Republic of South Africa, became one of the potential and prospective bidders in the tender process. It is not in dispute that the applicant became aware of the advert in the 22 May 2015 Daily Dispatch newspaper on 29 June 2015. It is also not in dispute that the oversight resulted from the fact that the bid had not been advertised in the government bulletin. It is perhaps timely to refer to the respondent's Supply Chain Management Policy, clause 14.1.1(a) of which reads:

> "The procedure for the invitation of competitive bids is as follows:
>
> (a) Any invitation to prospective providers to submit bids **must** be by means of a public advertisement in the provincial tender bulletin and local newspaper appropriate ways...". (emphasis supplied)

[6] The applicant became dissatisfied with the non-publication of the bid in the government bulletin and instructed its attorneys of record to seek an undertaking from the respondent that it would not make an award in pursuance of the bid and that the bid would be cancelled. The applicant also sought to be furnished with the relevant and applicable documentation and information in terms of the relevant provisions of the Promotion of Administrative Justice Act 3 of 2000 (the PAJA) and the Promotion of Access to Information Act 2 of 2000 (the PAIA).

[7] The respondent confirmed the award of the bid, but did not make the undertaking sought. Nor did the respondent furnish the details of the successful bidder, which the applicant had requested to be furnished with. As at the time the application was heard the applicant was still oblivious to the identity of the successful bidder.

[8] Eventually, the respondent advised the applicant that the tender process had been finalised as an award was made and that, therefore, an agreement had been concluded with an occupation date being set.

[9] The steadfast stance of the respondent of not giving the requested undertaking and of suspending the further implementation of the bid resulted in this application being launched, by way of urgency.

[10] The applicant is of the view that its right to procedurally fair administrative action which encompasses a system that is fair, equitable, transparent, competitive and cost effective had been adversely affected by the failure on the part of the respondent to comply with the requirement that the bid be advertised in the government bulletin and that, therefore, the subsequent decision by the respondent to award the tender notwithstanding such failure is liable to be set aside on review. The applicant, so goes its case, is bent on challenging the decision on appeal or on review. Those intentions have been thwarted by the fact that the relevant documents and information have been withheld by the respondent.

[11] The respondent raised the following contentions in opposition to the application, namely:

(a) that the application lacks urgency;

(b) that, insofar as the application is founded on the provisions of PAJA, the applicant has failed to exhaust available domestic remedies, this being clause 25 as read with clause 26 of the respondent's Supply Chain Management Policy (the Supply Policy) which makes provision for a mechanism in terms whereof persons aggrieved by decisions or actions taken by the respondent in the implementation of the Supply Policy may lodge a written objection or complaint and for the referral of disputes or complaints to an independent, reputable and impartial dispute resolution body;

(c) that the applicant has not applied to the Court to wave its obligation to exhaust domestic remedies; and

(d) that the applicant has not established the requisites for the grant of interim relief.

[12] These contentions are dealt with seriatim.

[13] It is within the context of the applicant's alleged failure to avail itself of internal remedies, including those afforded by the PAIA, that it is being contended that the application lacks urgency. The exchange of correspondence between the parties pre-dating the launch of this application makes it plain that the applicant did not rest on the side-lines and created urgency, but sought, at the outset, information that would enable it to vindicate its rights. Had the respondent furnished the information and disclosed the identity of the successful bidder, the applicant would not have resorted to launching the application. For reasons more fully set out hereunder, the criticism levelled at the procedure adopted by the applicant is devoid of merit. Regard being had to the time from which the applicant started engaging the respondent in meaningful interaction and the fact that the harm sought to be averted (move into the new premises) is imminent, the application deserves of being heard as one of urgency.

[14] Section 7(2)(a) of the PAJA makes provision of the exhaustion of internal remedies prior to the Institution review proceedings. According to the section no court or tribunal shall review an administrative action in terms of the PAJA unless any internal remedy provided for in any other law has first been exhausted. A question to be posed and answered is whether this application constitutes a review within the meaning and contemplation of section 7(2)(a) of the PAJA.

[15] The question at hand falls to be answered in the negative. There is authority for the view that on a purely grammatical interpretation of section 7(2)(a) the prohibition against instituting review proceedings without first exhausting internal remedies is only relevant for the purposes of a full review and not an application for interim relief.[1] There are no reasons for departing from this view.

[16] It is doubtful whether the machinery provided by clauses 25 and 26 of the Supply Policy measures up to the standard of an effective remedy for purposes of section 7(2) and thus an internal remedy in terms of the section. In light of the view I take of this matter, I find it unnecessary to deal with the question of whether these clauses constitute an internal remedy.

---

[1] *Esda Properties (Pty) Ltd v Amathole District Municipality* 2014 JDR 1878 (EGG); Also see P Bolton PER/ PELJ 2010(13) 3

[17] The requisites for the grant of the interim interdict sought have been fulfilled. The right which the applicant seeks to secure is legitimate and ought to be protected. Adequate protection of the right includes considering all the relevant documents and the reasons for arriving at the impugned decision before the applicant can formulate and finalise its grounds for review. Refusing the interdictory relief sought may very well have the effect of rendering the contemplated review proceedings nugatory.

[18] The evidence sufficiently points to the respondent as having awarded the tender to an unidentified successful bidder on or about 30 June 2015. The respondent also seems to have already concluded an agreement with the successful bidder in respect of the awarded tender. Once the agreement is implemented and the respondent has moved into the new premises there will be difficulty (if not impossibility) to undo the situation.

[19] The balance of convenience favours the granting of the interdictory relief sought. Were the respondent to be allowed to implement the award and the successful bidder permitted to move into the premises before the finalisation of the contemplated review proceedings, the court entertaining the review application may be reluctant to undo the rights and obligations emanating from the award or subsequent

agreement, notwithstanding the administrative action given rise to the rights and obligations being declared unlawful.[2]

[20] As already pointed out, this application is not hit by the provisions of section 7(2)(a) of the PAJA. The several attempts made by the applicant to obtain an undertaking from the respondent in order to avoid the launch of this application, all of which were unavailing, make it plain that the applicant was entitled to launch this application, as indeed it did not have, at its disposal, any other speedy effective remedy.

[21] From a reading of the applicant's founding papers, the contemplated review proceedings enjoy reasonable prospects of success. The respondent's Supply Policy obliges the respondent to advertise bids in the government bulletin, as well. The Supply Policy was not complied with in an important respect.

[22] For all these reasons I granted the order I did.

---

[2] *Chairperson Standing Tender Committee and Others v JFE Sapela Electronics (Pty) Ltd and Others* 2008 (2) SA 638 (SCA) at paras 26 to 29; *Moseme Road Construction CC and Others v King Civil Engineering Contractors (Pty) Ltd and Another* 2010 (4) SA 359 (SCA) at para 21; *Oudekraal Estates (Pty) Ltd v City of Cape Town* 2004 (6) SA 222 SCA at 36.

_____

S M MBENENGE

JUDGE OF THE HIGH COURT

Applicant's Counsel:	Mr J F Pretorius (instructed by Sim & Botsi Attorneys Inc. C/o Gravett Schoeman Inc, East London
Respondent's Counsel:	Mr P G Beningfield (instructed by Mbambane & Sokutu Inc. Attorneys)
Delivered on:	28 July 2015