IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE LOCAL DIVISION : EAST LONDON

CASE NO. EL 294/2020

In the matter between:

MAMLAMBO CONSTRUCTION (PTY) LTD **Applicant**

And

AMATHOLE DISTRICT MUNICIPALITY **1st Respondent**

NORLAND CONSTRUCTION (PTY) LTD **2nd Respondent**

JUDGMENT

GRIFFITHS, J. :

[1] The word “vertiginous” has been defined as “*extremely high or steep*” and is derived from the Latin word “vertigo”. This, the first respondent has submitted, is the nature of the road the applicant must traverse before this court will grant it relief. The court is thus saddled with the question as to whether the applicant has climbed that road or, indeed, whether it is the first respondent that must scale such “*dizzying*” heights.

[2] The applicant is a civil engineering construction contractor which submitted a bid to the first respondent in response to a tender notice published by the first respondent relating to the construction of certain bulk services in Cathcart. The second respondent likewise submitted a tender and was, in due course, awarded the contract.

[3] In this application the applicant, in essence, seeks two orders, these being, firstly, an order to compel provision of the record relating to the decision to award the tender and, secondly, an interdict pending finalization of a review thereof. It has been opposed by the first respondent, but not the second respondent.

[4] Mr. Beyleveld, who appeared for the first respondent, candidly (and correctly in my view) conceded at the outset that a proper case has been made out for provision of the relevant documentation[1] but has taken issue with the applicant's quest for an interdict on the basis that no *prima facie* right has been established. He has also submitted that I must only consider the allegations in this regard made in the founding affidavit, and not the further allegations raised and dealt with in the applicant's replying affidavit.

[5] It must be remembered that the applicant seeks interim relief pending a review of the tender award. Accordingly, as has been established in a line of cases, the applicant is required to prove that the right which forms the subject matter of the main action, and which the applicant seeks to protect, has been *prima facie* established, though open to some doubt[2]. In the **Spur Steak Ranches** case the following was said in this regard:

> "Save that the requirement of a *prima facie* right established though open to some doubt, is the threshold test, the factors are not considered separately or in isolation, but in conjunction with one another in the determination of whether the Court

[1] Save for the question of costs in relation thereto, dealt with later.
[2] Spur Steak Ranches LTD v Saddles Steak Ranch 1996 (3) SA 706 at 714

> should exercise its overriding discretion in favour of the grant of interim relief……
>
> In determining whether or not the applicants crossed the threshold, the right relied upon for a temporary interdict need not be shown by a balance of probabilities, it is enough if it is *prima facie* established though open to some doubt.
>
> The proper approach is to take the facts set out by the applicants together with any facts set out by the respondents, which the applicants cannot dispute, and to consider whether having regard to the inherent probabilities the applicants should, not could, on those facts obtain final relief at the trial."[3]

[6] When the applicant first heard on 26 February 2020 that the tender had been awarded to the second respondent, it immediately contacted its attorneys who, without delay, set about obtaining information from the first respondent in this regard. This they did, in the normal course, by submitting various letters, emails and telephonically in which all the necessary documentation relating to the award of the tender, and reasons for the applicant's failure to receive the award, were requested. It is largely common cause that, despite the fact that the applicant's attorneys had made it clear that the matter was extremely urgent[4], little or no response was received. In fact, it seems that the only response which was ultimately forthcoming was to the effect that the matter was receiving attention. The applicant's attorney was ultimately forced to place the respondents on terms on pain of launching this application, which it was ultimately forced to do due to such recalcitrance.

[7] On the launch of this application, therefore, the applicant was largely constrained in its allegations regarding the question of a *prima facie* right as it had relatively little information at its disposal. On this basis, the applicant was bound to submit that its *prima facie* right rested on the facts that it had submitted a fully responsive tender (which, as it turned out, contained by far the lowest bid price) and

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[3] ibid. at page 714C – F

[4] In this regard, the applicant had sought to appeal in terms of section 62 of the Municipal Systems Act (No. 32 of 2000) and was bound in this regard by time constraints. This appeal was ultimately withdrawn after the launch of this application and when the applicant was finally informed that a contract had been concluded with the second respondent which would have prevented the appeal from proceeding pursuant to section 62 (3) of that Act.

that it had the same, if not higher, CIDB grading and BBBEE rating than the second respondent.

[8] The first respondent attached to its answering affidavit most of the tender documentation. It was only on receipt of this documentation as read with the answering affidavit that the applicant was able to ascertain the reasons for the award of the tender. Accordingly, in its replying affidavit, the applicant raised various issues based on these documents which, together, afford the necessary fodder to establish its *prima facie* right.

[9] As alluded to earlier, the first respondent has submitted that I should not have regard to the latter submissions but only to what was contained in the founding affidavit. However, whilst it is so that in an application such as this the applicant should not generally be allowed to make out a case in its replying affidavit as that ought to have been done in the founding affidavit, this is by no means an immutable rule. The courts have a discretion to allow new matter in a replying affidavit having regard to various issues, such as prejudice to the first respondent and whether such matter was known to the applicant when the application was launched[5].

[10] As mentioned earlier, the applicant was severely constrained by lack of information. This lack of information was in no part due to its failure to act. It, through its attorneys, made every effort possible to seek the necessary documentation and the reasons upon which it could found its *prima facie* right, if disclosed thereby. That it was not placed in such a position was due solely to the recalcitrance of the first respondent's functionaries. This being so, it can hardly lie in the mouth of the first respondent to demand that the applicant make out its case in the founding affidavit. As to prejudice, the submission by Mr. Ford (for the applicant) that the first respondent had ample time to seek to file a further affidavit which the applicant would have found difficulty in refusing, is clearly apposite.

[5] Erasmus "Superior Court Practice" second edition, volume 2 at D1 – 66 (and cases there cited).

[11] In my view, when one takes into account all these facts there can be little doubt but that the applicant has established a *prima facie* right in this regard.

[12] There are at least two bases upon which the applicant has prospects of success in an application for review. The first of these is the series of contradictions pertaining to the reasons given for the disqualification. The first respondent's bid documents indicate that the applicant was "*non-compliant*" because its site agent's qualifications were not attached to the bid. However, in the pre-qualification assessment document reference is made to relevant projects and key staff experience etc. of the applicant's site agent, which does not square at all with the failure to attach the site agent's qualifications. The answering affidavit itself did not mention a failure to attach such qualifications but gave the reasons for the disqualification as:

> "Mamlambo tendered for an amount of R 19 319 111.28 and was non-compliant on functionality and their proposed site agent, Mr. Brown John Potter had experience as a contract manager but not as a site agent which impacted on the functionality scoring. A copy of his CV is an annex (sic) hereto …."

[13] In addition to this, there is something perverse in the submission made by the first respondent that Mr. Potter does not have the necessary experience as a site agent. In this regard, the applicant has stated in the replying affidavit:

> "It is manifest from Mr. Potter's curriculum vitae and the supporting documentation… that he is eminently qualified as a site agent for the proposed project. Apparent therefrom is that he has a National Diploma (3 years), a National Higher Diploma in Civil Engineering (1 year) and a Certificate of Competency in the Management of Labour Intensive Construction Projects (NQF Level 5) and that he has a combined experience in the construction industry of 34 years. Furthermore, and as is apparent from Mr. Potter's curriculum vitae is that he often acted as contracts manager in similar and bigger projects for various employers, including for the first respondent."

And further:

> "It is well accepted in the construction industry that the position of contract manager requires far more experience than that of a site agent. Contract Managers oversee projects and are responsible for coordinating every aspect of the contract from reviewing and approving contract terms to coordinating deadlines, approving budgets and more. They serve as the liaison between the employer, site agents, employees, customers, vendors and subcontractors. The task of contract managers includes overseeing and directing the actual construction activities on site (both technically and administratively). Site agents typically report to contract managers. The role of the site agent is much more limited as their duties are limited for the management of the construction site."

[14] It is apparent from this extract that it is, at the least, mystifying that a bid adjudication committee would disqualify a tenderer on the basis that its site agent is far more qualified than the usual, run-of-the-mill, site agents. Bearing in mind that I only need to decide whether the applicant has made out a case for a *prima facie* right in this regard, although subject to some doubt, there can be little argument that this has been established.

[15] Mr. Ford has also alluded to some very strange flip-flopping in the adjudication documents with regard to the submitted tender price of the second respondent. This was initially some R28 000 000 (R9 000 000 more than that of the applicant) but the tender ultimately awarded was based on exactly the same amount as that which had initially been budgeted for by the first respondent, namely, R23 568 455.32. This, on its own, raises suspicions with regard to collusion in the award of the tender and in particular when it appears that the applicant's disqualification (bearing in mind that its was the lowest tender) appears to be spurious.

[16] I am accordingly satisfied that the applicant has made out a case in this regard. There being no real challenge to the remaining criteria for the award of such an interim interdict, the applicant is entitled thereto.

[17] As to the question of costs, the applicant seeks costs of two counsel on an attorney and client scale. This has been opposed on the basis that the matter is relatively straightforward and does not require the services of two counsel and, although the first respondent was somewhat recalcitrant, this does not warrant an exercise of my discretion to award attorney and client costs. Alternatively, Mr. Beyleveld has submitted that the question of costs should be reserved for decision by the court hearing the review application.

[18] In my view it would be fruitless to reserve the costs. This court is in a position to decide the issue and it would be unnecessarily burdensome to encumber that court with such issues. As conceded, the first respondent has, from the outset, been (to say the least) unforthcoming with regard to both documentation and reasons. These ought to have been available without any difficulty given that the tender had not long before been adjudicated. The ultimately given reason for the disqualification was not a complicated one and could have been set out in a few words. Added to this is the fact that the first respondent has fought these proceedings right to the end. It was only during the hearing that various concessions were indeed made regarding the provision of documentation and the interdict. Furthermore, during these proceedings the applicant actively solicited the respondent to provide the documentation and to give an undertaking not to proceed any further with the tender so as to avoid the necessity of further costs.

[19] All these actions compel me to the conclusion that the first respondent’s unforgiving attitude has run up entirely unnecessary costs on the part of the applicant. The applicant should not be put to these. In the circumstances I believe that attorney and client costs are warranted.

[20] As to the cost of two counsel, it has been submitted that this was unnecessary. In my view, the matter was not unduly complicated but, of more significance, it is of clear importance to the applicant. The amounts involved are not insignificant and there is no reason as to why the applicant should not have employed the services of senior counsel, particularly for the preparation of heads of argument and to argue the matter as I understand the position to be, together with his junior.

[21] In all the circumstances I make the following order:

1. **The first respondent is ordered to, within 10 days of the date of this order, furnish to the applicant with:**

1.1 The full record pertaining to its decision to award the tender in respect of the Construction of Phase 2 Bulk Services Upgrade: Cathcart – Bid No. 8/2/75/2018 – 2019 to the second respondent, including but not limited to copies of:

1.1.1 The section of the first respondent's Supply Chain Management Policies which deals with dispute resolution/appeals;

1.1.2 The relevant tender specifications;

1.1.3 The minutes of the tender evaluation, tender adjudication and tender award committees;

1.1.4 The recommendations made by the aforementioned tender committees;

1.1.5 The letter advising the second respondent of the award of the tender to it;

1.1.6 The letter advising the applicant that its tender was unsuccessful.

2. **The first and second respondents are interdicted and restrained from taking any further steps in the implementation of the tender pending the outcome of review proceedings to be instituted by the applicant against the first respondent's decision to disqualify the tender that the applicant submitted in response to the first respondent's invitation for tenders and/or its decision to award the tender to the second respondent within 10 days of this order;**

3. **The first respondent is ordered to pay the costs of this application on the scale as between attorney and client, such costs to include the cost of two counsel where employed.**

R E GRIFFITHS

JUDGE OF THE HIGH COURT

COUNSEL FOR APPLICANT	**:**	**Mr Ford SC**
	:	**with Mr Taljaard**
INSTRUCTED BY	**:**	**Don Maree Attorneys**
COUNSEL FOR 1st RESPONDENT	**:**	**Mr Beyleveld SC**
INSTRUCTED BY	**:**	**Lionel Tritchardt & Associates**

HEARD ON : 11 JUNE 2020

DELIVERED ON : 12 JUNE 2020