


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG LOCAL DIVISION,
JOHANNESBURG

CASE NO: 2013/21677

(1)	REPORTABLE: YES / <u>NO</u>
(2)	OF INTEREST TO OTHER JUDGES: YES / <u>NO</u>
(3)	REVISED. <input checked="" type="checkbox"/>
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24.5.14	
DATE	SIGNATURE

In the matter between:

OTTO WASTE SYSTEMS (PTY) LIMITED

APPLICANT

and

PIKITUP JOHANNESBURG (SOC) LIMITED

1ST RESPONDENTTHE CHAIRPERSON OF THE BID ADJUDICATION
COMMITTEE2ND RESPONDENT

PHAMBILI SERVICES (PTY) LIMITED

3RD RESPONDENT

JUDGMENT – JUST AND EQUITABLE REMEDY

WRIGHT J

1. On 29 April 2014 I declared the award of the tender forming the subject matter of this case to be constitutionally invalid. I suspended that declaration pending my present decision on the question of a just and equitable remedy.
2. The parties have since filed affidavits and heads of argument on the question of a just and equitable remedy and I have heard oral argument.
3. According to the applicant, as at 30 April 2014 the first respondent has a large number of bins in stock. A re-running of the tender process from scratch would not take more than about 2 months. There are no public health fears. The cost of re-running the bid process would be minimal. The applicant does not suggest that persons who sat on either the Bid Evaluation or Adjudication Committees should not sit on either of these committees in the future. The only loss to any party will be future loss of profits for the third respondent and its supplier Mpact. As neither should be entitled to profits from an unconstitutionally awarded tender this loss of profits is irrelevant. The applicants ask me to set aside the agreement between the first and third respondents only from the date of this judgment.
4. The first and second respondents filed an affidavit by Mr Thakiso, the acting Managing Director of the first respondent. He denies stockpiling bins. He says that bins were needed to address a backlog of 104 000 bins in the northern region of Johannesburg and that there are backlogs in other areas. From the inception of the agreement between the first and third respondents in May 2013 55 000 bins have been delivered by the third respondent. There is still a shortfall of 52 000 bins in a number of areas of which Roodepoort is an example. A delivery of 18 250 bins is expected soon. Delivery of another 30 000 bins is expected at the end of May 2014. He estimates that about 55% of the bins required over the 3 year contract period starting in May 2013 has already been delivered. He speaks of health hazards created by non-clearance of refuse and the need not to interrupt the supply of bins. He says that so far the respondent has performed satisfactorily and he does not expect any change. He says that a fresh tender process could take a year.

5. In my view the first and second respondents raise bona fide disputes of fact and it would be overly robust of me to decide the factual disputes in favour of the applicant.
6. The third respondent filed an affidavit by its Executive Director, Mr Charnley. He says that setting aside the agreement between the first and third respondents would be extremely prejudicial to the third respondent and its handful of employees who would have to be retrenched. What I said above about factual disputes applies equally here.
7. In my view it would not be just and equitable to set aside the agreement between the first and third respondents. Too much time has passed and at least half of the agreement has been implemented. There is a health risk for the inhabitants of Johannesburg including children. The negative impact on the third respondent and its employees of setting aside the agreement weighs with me although not quite to the same extent as the facts alleged by Mr Thakiso.
8. The applicant was entitled to costs of the last round because due process in considering tenders is important and the applicant was successful. However, the applicant's victory is somewhat hollow. It has achieved no success in the present second round and it should pay the costs for this round.

Order

1. The order, in paragraph 2 of my order granted on 29 April 2014 suspending the invalidity of the award, is set aside.
2. Despite the constitutional invalidity of the award of the tender the agreement between the first and third respondents remains in force.
3. The applicant is to pay the respondents' costs relating to the determination of a just and equitable remedy.


JUDGE OF THE HIGH COURT

On behalf of the Applicant:

Adv J Daniels

Instructed by:

Gordon, Stevens &

Ranchhoojee Attorneys

011 782 3770

On behalf of the 1st and 2nd Respondents:

Adv P Mokoena SC

Instructed by:

Malebye Motaung Mtembu

011 262 5075

On behalf of the 3rd Respondent:

Att L Naidoo

011 487 1246

Date of Hearing:

24 May 2014

Date of Judgment:

26 May 2014