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

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: YES

DATE: 20 AUGUST 2021
SIGNATURE OF ACTING JUDGE:

Case number: 21/22210

In the matter between:

MAOPENG ELECTRICAL (PTY) LTD Applicant

and

JOBURG MARKET (SOC) LTD First Respondent

BASH ELECTRICAL CC Second Respondent

JUDGMENT

SLON AJ

1. The first respondent is an entity wholly owned by the Johannesburg Metropolitan Municipality, and was formerly known as the Johannesburg Fresh Produce Market. It operates in City Deep. It is (or is part of) an 'organ of state' in the local sphere of government and is subject to the 'Procurement' provisions of section 217 of the Constitution and the national legislation promulgated under section 217(3) thereof, such as the Municipal Finance Management Act No 56 of 2003 and the Preferential Procurement Policy Framework Act No 5 of 2005, and the regulations in turn published thereunder. Its decisions comprise administrative action as defined under the Promotion of Administrative Justice Act No 3 of 2000 ('PAJA').

2. The vendors who trade at the market in City Deep do so from individual stalls which are serviced with electricity. The applicant and the second respondent are in the business of supplying and installing electricity meters. They are competitors in that market.

3. On 18 March 2021, the second respondent was appointed as a service provider to the first respondent pursuant to its submission of a successful bid in response to a tender invitation for the supply, installation and commissioning of smart electricity meters. These would be installed in each vendor's stall at the market who would then be charged for their use of electricity accordingly. The service level agreement in regard thereto was signed by respondents on 28 April 2021. It is stated to have become on 1 April 2021 and to have a currency of 27 months; the total service fee provided for therein is R44 258 309.53, including VAT ('the SLA').

4. As will appear shortly below, the tender invitation in response to which the second respondent successfully bid, referred to above, was one which succeeded an earlier

tender invitation from the first respondent for exactly the same services, in which the applicant participated but failed. I will refer to this tender invitation as 'the first tender' and to the tender invitation in which the second respondent was successful as 'the second tender', although the second tender was in fact merely a repeat or reissuing of the first.

5. Before me, the applicant seeks an interim interdict under Part A of the relief claimed in its notice of motion against the award and implementation of the tender, and the conclusion or performance of any agreement pursuant thereto, pending a review under rule 53 and the provisions of PAJA by way of Part B of the relief to be heard at a later stage. I see from the documents filed of record and understand from Mr Hollander, who appeared for the applicant, that the papers and record for purpose of Part B are at an advanced stage, and that an expedited date for hearing has been or will be applied for in that regard. Save in one instance as will appear further below, I have not had regard to the papers relevant to Part B of the relief.

6. The application is dated 4 May 2021. The applicant initially enrolled the Part A relief for hearing as a matter of urgency, but the matter was struck off the roll for lack of urgency. At that stage, the applicant avers that it did not know of the fact that the SLA had been concluded; the relief stated in Part A of the notice of motion is therefore of wider import than can now be granted.

7. Save in one respect, the facts pertaining to the first tender are largely common cause and may be briefly summarized as follows.

8. The first tender was advertised by the first respondent on 15 September 2020 and specified a closing date of 15 October 2020.

9. The applicant, in the person of Mr Sam Moerane, who is also the deponent to the applicant's papers, submitted its bid which was then evaluated with 18 other such bids, eventually making its way to the first respondent's Bid Evaluation Committee ('BEC') and then its Bid Adjudication Committee ('BAC'), both of whose reports are put up by the applicant in its papers.

10. The BAC report shows that:

10.1. 15 bidders failed to comply with certain minimum requirements, amongst whose number, incidentally, was the second respondent for lack of a warranty;

10.2. the applicant was the highest scoring bidder at 100 points and a price of R41 658 750.00;

10.3. an entity called Volt Consulting Engineers ('Volt') appears to come in second, also with 100 points, at a price of R45 896 436.75;

10.4. a recommendation was made to the CEO of the first respondent, Ms Leanne Williams 'to consider awarding the bid' to the applicant.

11. I understand from the papers before me that the process described above was the usual one in terms of which the relevant committee, having evaluated all the bids, then makes a recommendation to the CEO to appoint the bidder which best complies with all the relevant requirements. As will be seen, I need not venture into any but one of these.

12. Ms Williams did not accept the recommendation of BAC allegedly for the sole reason mentioned below, and rejected the applicant's bid.

13. No award was made pursuant to the first tender. It was decided instead to readvertise the tender in the form of the second tender on 9 December 2020, with a closing date of 22 December 2020. The second respondent was successful therein and was later engaged by way of the SLA referred to above.

14. The answering affidavit of the first respondent is surprisingly terse as regards all of these matters. The facts pertaining to them are peculiarly within its own knowledge and ought to have been fully canvassed.

15. The chief omission is that there is no affidavit from Ms Williams to explain her conduct in declining to endorse the recommendation of BAC. There is also no elucidation as to why such explanation from her could not be furnished. The first respondent's deponent, Mr Boy Ngubo, states that he was appointed the acting CEO after Ms Williams was suspended from her duties on 5 May 2021. Despite that, she remains to date employed by the first respondent. There is nothing on the papers to suggest that she was not available to give evidence on affidavit, or that she could not be compelled to do so by her employer. The reasons for her suspension, and the circumstances surrounding it, are not stated either. The two letters under her hand which are attached to the applicant's papers are of little, if any, assistance to the first respondent.

16. Nor, as Mr Hollander correctly pointed out, is there any affidavit from any member of BEC or BAC whose evidence for the first respondent may also have assisted the Court, not to mention its own case. Similarly, there is no suggestion that any of these

members is not available or could not be compelled, and there is no explanation for their absence.

17. An inference adverse to the first respondent may, in my view, reasonably be drawn in regard to these significant failings.[1] For an organ of state dutybound to act fairly, rationally and transparently, this conduct is, to put it charitably, regrettable.

18. The first respondent's defence on these facts rests on what appears to be hearsay from Ngubo (he does not say that he himself witnessed, or participated in, these events) that, after Williams received recommendation of BAC:

18.1. she requested sight of the tender documents submitted by the applicant which she then studied;

18.2. two days later she requested a meeting with BEC and BAC, which was held on 1 December 2020, at which she raised a 'non-compliance issue' with the applicant's tender;

18.3. that issue was that the applicant had not submitted as part of its bid a public liability insurance certificate or letter of intent of at least R5 million, as was required, and was immediately therefore disqualified.

19. The applicant, continues Mr Ngubo, had submitted the wrong certificate, one of professional (not public) liability insurance; and both BEC and BAC had therefore acted in error. He attaches a document which he says is the latter certificate.

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[1] *cf* ***Elgin-Fireclays Ltd v Webb*** 1947 (4) SA 744 (A) at 749-750

20. In reply, the applicant states that the document so attached could not have been part of its bid since it bears a stamp from the Dawn Park Police Station dated 16 December 2020, whereas its bid was timeously submitted before the closing date of 15 October 2020.

21. It attaches for that purpose what it claims is a copy its entire tender submission prior to 15 October 2020, the very last document of which is a public liability insurance document issued by Auto & General on 18 September and date stamped by the SAPS on 13 October 2020. The certificate attached by the first respondent, the applicant says, is not the same certificate as that attached to its bid; it was the wrong certificate (*viz* for professional (not public) liability insurance) in error submitted by the applicant later in response to the second tender.

22. On the applicant's version, in order to understand how it came about that the first respondent was in possession of a professional liability insurance certificate bearing an SAPS stamp date of 16 December 2020, it is necessary to consider a lengthy confession of Mr Moerane in the founding affidavit, some of which is disputed by the first respondent and all of which is roundly castigated at length by the second as evidencing criminal conduct such as fraud, corruption and collusion. It is not necessary, in my view, for me to traverse all the minutiae deposed to by the parties in this regard, much of which bristles with irrelevant disputes that have largely served only to lengthen the papers and increase unnecessarily the costs.

23. In short, the matter concerns the applicant's conduct when it discovered that the first tender was to be readvertised in the form of the second, and concluded that there was no hope of success in regard to its first bid. Instead of launching review

proceedings at that stage, as it should have done, with or without an application for interim relief pending such review, the applicant, on its own version surreptitiously engaged with representatives of the first respondent to submit a bid in response to the second tender, thereby using the same documents which it had submitted for the first, but at a time some two months after the closing date stipulated for the second tender.

24. Mr Moerane alleges that, in mid-February 2021, he was advised by an employee of the first respondent, whom he met one evening by arrangement at a petrol station in Florida, that, in order to submit a successful bid in response to the second tender, he would have to increase the applicant's original tender price by some R2 million, and procure that the documents therein, which were required to be certified, be back-dated to 16 December 2020 by the SAPS. This would have included the necessary public liability certificate. Mr Moerane did, he sheepishly admits, as he was told, and submitted a response to the second tender in these terms. He was then advised that his 'new' bid had been placed with the bids of the other hopefuls, to await the first respondent's evaluation and decision. Unbeknown to him at the time, however, the insurance certificate submitted with the second bid, was by his own error, the wrong one: it was the professional liability insurance certificate which now bore the SAPS date stamp of 16 December 2020.

25. He was then advised, in late March 2021, that the applicant had failed and that second respondent had been successful.

26. Those, then, broadly speaking, are the facts upon which I believe this application is to be decided.

27. I need not repeat the venerable requirements for interim relief.[2] I turn first to a consideration of whether the applicant has established a *prima facie* right.

28. The respondents argue forcefully that Mr Moerane is guilty on his own version of a host of criminal conduct. They argue that the applicant, through him, comes to Court with dirty hands such that a review could never succeed, and that I should apply some form of the *par delictum* rule so as to disentitle the applicant from any relief claimed.

29. There is indeed cause for concern, if not alarm, at his conduct. Indeed, one gets the impression that there is a great deal more going on underneath the surface of the allegations and counter-allegations in the papers as regards all three of the parties. I doubt that am the first, or that I will be last, person sitting on the bench to say that. There can be little question but that Mr Moerane's conduct was wholly irregular and unacceptable as regards the second tender. The fact that he now, when it suits him for an expedient purpose, throws up his hands and proclaims *mea culpa* can in no way absolve him.

30. Although Mr Bava SC sought to characterize the misconduct of Mr Moerane as a vitiation of any *prima facie* right the applicant may otherwise have established, yet neither he nor Mr Baloyi, for the first respondent, was able to point specifically to any real or clear nexus between the misconduct of the applicant in regard to the second tender and the merits of its case in relation to the first.

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[2] ***Setlogelo v Setlogelo*** 1914 AD 221 at 227; ***Webster v Mitchell*** 1948 (1) SA 1186 (W); City of ***Tshwane Metropolitan Municipality v Afriforum & Another*** 2016 (6) SA 279 (CC) at para [49]

31. In regard to the issue of the certificate, Mr Bava SC referred to a 'contents' page pertaining to the documents allegedly delivered by the applicant in response to the first tender, and which were filed by the first respondent as part of the record under rule 53 for purposes of the review application. The contents page thereof states 'professional indemnity certificate'. From this he extrapolates that the applicant itself thus listed and described the certificate contained in its bid under the first tender – which was not the correct certificate as required.

32. Allied to this, Mr Bava SC presses on me the fact that the applicant's conduct had the effect of corrupting (or, as I understood him, was intended to corrupt) the very record upon which the review is to be determined, thus rendering it unreliable; he submitted therefore that the applicant should not be granted any relief.

33. The first submission, in my view, is not entirely reliable since there is no evidence before me as to the manner in which that index was compiled or, indeed, who compiled it. There is obviously nothing in the affidavits before me as to that matter. That submission is therefore of little assistance. As to the second submission, I do not think that it is a matter which I can determine at this stage, since the full record is not before me and, for present purposes, need not be. In any event, I cannot say, on the facts before me, whether or not the record was corrupted to one degree or another, and if so, whether the applicant was to blame therefor wholly or in part. That question is best left, in my view, to the Court hearing the review.

34. In his heads of argument Mr Bava SC suggests that the applicant, in submitting a bid pursuant to the second tender, thereby waived any rights it may have had under the first tender, thus rendering the entire review application a nullity. He did not pursue

this point in argument – wisely I think, since there is hardly sufficient evidence on the papers to show such a waiver on the part of the applicant, or to justify the contended for result.

35. Those, I believe, were the highwater marks of the case for the respondents.

36. I have already set out my views regarding the unsatisfactory rendition of the conduct of Ms Williams in relation to the BEC and BAC reports. If indeed the wrong certificate was attached by the applicant to the first bid, how could it be that neither BEC nor BAC apprehended this at a much earlier stage? Their reports evidence a methodical and step-by-step evaluation and exclusion process.

37. The need to have readvertised the tender at all has also not been explained by the first respondent. Why, one wonders, was the second candidate in line for the award of the first tender, Volt, not simply promoted in the place of the applicant, had the latter's bid indeed been non-compliant? There are intimations on the applicant's papers that there is some sort of irregular relationship between the respondents which would explain some of these peculiar features. There is nothing here of sufficient weight, however, to have a bearing on my decision.

38. The explanation by the applicant of the genesis of the insurance certificate put up by the respondent, although affected by the circumstances in which the scenario unfolded and misconduct of the applicant in that regard as to the second tender, is, in my view, yet not sufficiently tainted or improbable in all the circumstances to be rejected at this stage of the dispute.

39. One cannot, in my view, escape the fact that the conduct of the first respondent in rejecting the applicant's bid in response to the first tender has not been explained sufficiently such that it may be held to rebut the relatively clear inferences sought to be drawn by the applicant in seeking to establish its *prima facie* right.

40. On the strength of the facts averred by the applicant together with the facts, such as they are, set out by the respondents which are not or cannot be disputed, on the whole it seems to me that the inherent probabilities are such that the applicant should obtain relief in the main review application under one or more of the provisions of PAJA on which it intends to rely. No serious doubt, in my view, is thrown upon the applicant's case by the facts set up in contradiction by either of the respondents.[3]

41. Not without some measure of discomfort at the skullduggery admitted by the applicant as regards the second tender, but with the consolation that an expedited date for the review is to be obtained, as I believe it should since this matter concerns the expenditure of public funds, I have concluded that, for the purposes of interim relief, the applicant has demonstrated a *prima facie* right, even if open to some doubt.

42. As to the other three requirements for the interim relief, there is nothing of any material significance before me out of the mouth of either respondent to contradict the applicant's largely predictable averments that:

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[3] ***Gool v Minister of Justice & Another*** 1955 (2) SA 682 (C) at 688B-F; ***Simon NO v Operations of Europe AB & Others*** 1999 (1) SA 217 (SCA) at 228G. This is the age-old test for which authority is hardly required.

42.1. it entertains a reasonable apprehension of harm should the interdict not be granted in so far as the continuation of the performance of the SLA would render its position untenable by the time that the review application is determined;

42.2. it has no other satisfactory remedy in the alternative to the interim relief; and

42.3. the balance of convenience lies in its favour in all the circumstances.

43. In regard to these three requirements, the respondents are extremely reserved, almost silent, such that the applicant's contentions go largely undisputed, although some of the applicant's allegations in this regard are denied by the first respondent – but baldly. One accepts that the answering affidavits were deposed to under urgent time constraints as early as May 2021, and that they understandably expend much energy in opposing urgency, but there is essentially nothing therein for me to cling to in regard to hard fact. Neither of the respondents sought to deliver any supplementary papers in regard to these fundamental considerations.

44. The sum total of what the first respondent says is that the SLA has already been concluded and that the second respondent has commenced with the provision of services thereunder, but states nothing further as to any prejudice that may ensue if the interim relief were to be granted.

45. The second respondent's answering affidavit contains a 'disclaimer' for not dealing with the applicant's allegations *seriatim*. While one can readily understand its frustration as an apparently innocent victim of the first respondent's conduct, there is a complete lack of any material as regards the ordinary requirements for interim

relief. Instead, it pumps great energy into its complaints about the applicant's collusion regarding the second tender, and gets side-tracked into no fewer than four points in *limine* (not to mention an objection elsewhere based on a minor technicality in the applicant's a notice under rule 35(14) for the production of the obviously relevant SLA) about matters such as the applicant's *locus standi* and the non-joinder of Mr Ngubo and Ms Lephadi (the alleged nocturnal interlocutor of the Florida petrol station referred to above), none of which, in my view, has even the slightest merit.

46. I accordingly find that the applicant has satisfied the requirements for interim relief and is entitled to the crux of what is sought in Part A of the notice of motion.

47. I requested Mr Hollander to upload a draft order taking into account the matter referred to in paragraph 6 hereof with which the applicant would be content should I grant interim relief. The draft order so uploaded, more than a week after the hearing, seeks to interdict the respondents from '*implementing the awarding of a tender ... including the performance of any formal agreements pertaining to the provisions of the goods and services contemplated by the tender and/or the provision of such goods and services.*'

48. In my view, however, the award of the tender has already been implemented by reason of the conclusion of the SLA, and so is not open to being interdicted. I am also not certain what is meant in law by the term 'formal agreements'. I have accordingly made appropriate amendments and refinements to the order which I grant as appears below. They affect neither the substance of the relief originally claimed nor that suggested in the draft order, and do not prejudice the respondents.

49. The order is as follows:

(1) Pending the determination of the review sought in Part B of the applicant's notice of motion dated 4 May 2021, the respondents are interdicted from further implementing or continuing to perform the service level agreement concluded between them on 28 April 2021 ('the SLA'), pursuant to the award to the second respondent of the first respondent's tender with RFB number FIN-CP-020-2020-2021 ('the tender'), or any other agreement between them in respect of the provision of the goods and services contemplated by the SLA or by the tender;

(2) The costs pertaining to the relief sought in Part A of the notice of motion are reserved for determination by the Court which determines the relief sought in Part B thereof.

B M SLON
Acting Judge of the High Court
Gauteng Local Division, Johannesburg

This judgment was prepared and authored by Acting Judge Slon. It is handed down electronically by circulation to the parties or their legal representatives by email and by uploading it to the electronic file of this matter on Caselines.

HEARD ON:	3 August 2021
DECIDED ON:	19-20 August 2021
HANDED DOWN ON:	20 August 2021
For the Applicant: Instructed by:	Mr L Hollander Faber Goërtz Ellis Austin Inc
For the First Respondent: Instructed by:	Mr F Baloyi Raphela Attorneys
For the Second Respondent: Instructed by:	Mr A Bava SC ST (Sikander Tayob) Attorneys