

## IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

DELETE WHICHEVER IS NOT APPLICABLE	
(1)	REPORTABLE: <del>YES</del> /NO
(2)	OF INTEREST TO OTHER JUDGES: <del>YES</del> /NO
(3)	REVISED
1/4/2014	<i>[Signature]</i>
DATE	SIGNATURE

CASE NO: 34176/2013

In the matter between :

21/4/2014

THE EKURHULENI METROPOLITAN MUNICIPALITY

Applicant

and

LESIRA TEQ PROPRIETARY LIMITED

Respondent

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JUDGMENT

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BAM J

1. On 14 December 2012 the respondent instituted action against the applicant in the South Gauteng High Court claiming payment in the amount of more than R8M based on the alleged breach of the general conditions of a contract entered into by the parties in April 2011, concerning the appointment of the applicant's appointment to supply, install and maintain domestic intelligence water meters.

2. On 3 June 2013 the applicant lodged an application (The "*Main Application*") in this Court for the following relief:
  1. Declaring that the Respondent's purported appointment by the applicant's Bid Adjudication Committee in terms of clause 32 of the applicant's Supply Chain Management Policy to supply, install and maintain domestic intelligent water meters for a period of three years with effect from 19 April 2011 is unconstitutional, unlawful and invalid;
  2. Setting aside the Respondent's purported appointment referred to in paragraph 1 above;
  3. That the costs of the application be paid by the Respondent.
3. The main application was duly accompanied by the standard founding affidavit.
4. On 5 July 2013 the respondent filed its answering affidavit.
5. It is common cause that the action in the South Gauteng Court was stayed pending the outcome of the main application. The main application has not been enrolled yet.
6. On 29 July 2013 the applicant served on the respondent a Notice of Conditional Application for an order condoning the filing of the applicant's supplementary founding affidavit.
7. On 13 August 2013 the respondent gave notice to the applicant that the applicant's Notice of Conditional Application is irregular and that the

applicant was afforded the opportunity to remove the complaint within 10 days.

8. The purpose of the respondent's supplementary founding affidavit, as stated in the respondent's founding affidavit, was to supplement the grounds of relief relied upon in the main application.

4. The additional ground upon which the respondent intends to rely reads as follows:

*"The respondent's appointment which is sought to be set aside in this application was induced by fraud."*

The affidavit then proceeds to set out the basis for the said ground.

9. On 6 November 2013 the respondent filed its application in terms of Rule 30 and 30A for an order:

1. Condoning the respondent's failure to comply with the time periods prescribed in Rule 30(2);
2. That the following be set aside as irregular steps in terms of Rule 30(3)
  - (i) The applicant's notice of Conditional Application; and
  - (ii) The respondent's supplementary affidavit filed on 29 July 2013.

10. The respondent's grounds to have the applicant's so called "*conditional application*" and the purported supplementary affidavit set aside as irregular steps are the following:

- (i) No provision is made in the Rules for "*conditional applications*";
- (ii) The applicant did not seek nor was a court order granted allowing it to file a further affidavit;

- (iii) The respondent will be prejudiced in that it is not allowed by the Rules to file further affidavits, (apparently in answer to the allegations made by the applicant);
- (iv) That the respondent is prejudiced in that it *"is being compelled to make answer to a process which is in terms of the Rules . . . pro non scripto."*
- (v) The contents of the affidavit deviate almost entirely from the grounds in the founding affidavit, now introducing a new allegation of fraud;
- (vi) The new allegations would result, to the prejudice of the respondent, in a dispute of fact;
- (vii) The replying affidavit of the applicant that was filed simultaneously with the supplementary is *"replete with new matter"*, apparently raised in the supplementary affidavit.

11. The applicant, in its answering affidavit to the respondent's application in terms of Rule 30, clearly abandoned the *"conditional application"* and consequently the application that the supplementary affidavit be admitted' by stating in the answering affidavit to the respondent's application in terms of Rule 30, that *"the contents of the supplementary founding affidavit are now contained in the respondent's replying affidavit and it is therefore no longer necessary to proceed with the conditional application."*

12. Notwithstanding the applicant's grounds for bringing the application in terms of Rule 30, referred to above, it suffices to state that, in my view, the respondent would have been entitled lodge an application to file a supplementary founding affidavit. However, due to the fact that the respondent has abandoned that application, as alluded to above, I deem it unnecessary to consider that issue, including the applicant's grounds for this application any further.

13. The applicant elected to rely on its replying affidavit to supplement its founding affidavit. The applicant's replying affidavit is now a material part of the main application and, consequently, the contents and the evidential value thereof, including the question whether it should be admitted, will have to be considered by the court hearing the main application.

14. Accordingly this application should, in my opinion be struck from the roll.

15. Pertaining to the costs of this application, it appears that the opposing affidavit containing the abandonment of the main application, was served on the applicant's attorney of record already on 28 November 2013, however, without a Notice of Withdrawal thereof. Notwithstanding, the applicant decided to proceed with this application. Accordingly, in my view, it will be fair if the parties bear their own costs.

16. Accordingly I make the following order:

1. The application is struck from the roll.
2. Each party should bear its own costs.



A J BAM

JUDGE OF THE HIGH COURT

31 March 2014