IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NUMBER: 8654/20/4

4/3/2016

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

29/2/16

In the matter between:

TOURVEST HOLDINGS (PTY) LTDQ	Applicant
And	
THE AIRPORTS COMPANY SOUTH AFRICA SOC LTD	1ST Respondent
NOMANINI CRAFTS	2ND Respondent
THEBE TOURISM GROUP	3RD Respondent
THE TRUSTEES FOR THE TIME BEING OF THE SIYA ZISIZA TRUST	4TH Respondent

JUDGMENT

TOKOTA AJ

[1] The first respondent is the Airports Company South Africa Soc Ltd, (ACSA) a State owned company and as such an organ of State. From time to time it invites tenders for the lease of space at the OR Tambo International Airport from various service providers. As an organ of State it is obliged to procure goods and services in accordance with a system which is fair, equitable, transparent, competitive and cost-effective.

[2] The applicant has been conducting businesses of retail stores at the OR Tambo International Airport since March 2000 having been awarded a tender by ACSA. It had initially occupied the space in terms of written lease agreements concluded with ACSA. The lease agreements had been expiring from time to time by efluxion of time. After the lease agreements had come to an end the applicant had, by agreement, continued to occupy the space and paid rentals to ACSA on a monthly basis pending the finalisation of valid proper procurement processes.

[3] In 2013 ACSA invited a Request for Bids in terms of Bid No.ORT011/13 for arts and curio retail stores in the Departures Airside Terminal at the Airport.

[4] Bidders were invited to submit their bids for the conclusion of a five year lease agreement in respect of three opportunities, namely:

4.1 Opportunity 1, pertaining to Shop DF02 which was occupied by the applicant under a previous lease agreement trading as Out of Africa Megastore;

4.2 Opportunity 2, being Shop DF20 trading as Sneakers Sports Apparel; and

4.3 Opportunity 3, Shops BS02, IPR04, and DFE04, then and there trading as Tourvest's Out of Africa Impulse, Out of Africa Kiosk, and Indaba Origins stores respectively;

[5] Four bids were received. These were from the applicant, Thebe Tourism Group, Nomanini Crafts, and Siyazisiza Trust.

[6] The applicant was suspected of having colluded with Siyazisiza Trust, one of the tenderers, in respect of opportunity 3. They were then invited to make representations explaining the alleged collusion. ACSA was not satisfied with the explanation. It then disqualified the applicant in respect of all opportunities. It was therefore effectively excluded from the process.

[7] On 28 November 2013 ACSA awarded the tender for opportunities 1 and 2 to Nomanini Crafts and opportunity 3 was awarded to Thebe Tourism Group.

[8] On 5 December 2013 the applicant received a communication from ACSA notifying it that it's tender has been unsuccessful.

[9] On 3 February 2014 the applicant launched review proceedings seeking an order reviewing and setting aside the decision to disqualify it in respect of all the opportunities. Further it sought an order declaring it to be the winner of the bid.

[10] On 17 February 2014 the applicant brought an application, on an urgent basis, to this Court for an interim interdict restraining and interdicting ACSA from interfering with or disturbing its possession and

occupation of premises which it leased from ACSA at the OR Tambo International Airport where it is carrying out its businesses as aforestated. Furthermore it sought an interim interdict, pending the review of the decision of ACSA to award a tender to the second respondent.

[11] On 22 April 2014 Tuchten J granted the application for an interim interdict.

[12] After an exchange of some correspondence between the parties the record of the proceedings was delivered in terms of Rule 53. The applicant was not satisfied that it was a complete record. It requested further documents to be delivered. ACSA claimed that the documents sought were privileged and therefore the applicant was not entitled to demand delivery thereof.

[13] This is now an interlocutory application in terms whereof the applicant seeks an order compelling ACSA to deliver those documents:

[14] At the hearing of this matter these documents were confined to the following:

(a) documents that were given to ACSA's in-house legal adviser for purposes of providing an opinion as well as a copy of the opinion relating to the disqualification of the applicant;

(b) Copies of all documents which were given to ACSA's attorneys, Mkhabela, Huntley, Adekeye attorneys as well as those that were given to Counsel briefed by Mkhabela attorneys seeking an opinion in this regard including copies of the respective opinions;

(c) Audio recordings of the deliberations of the Board Meeting of ACSA Board on 28 November 2013.

[15] As I understood the argument on behalf of the applicant the opinions sought will enable the applicant to determine, *inter alia,* whether the decision to disqualify it was as a result of an error of law or was arbitrary or capricious.

[16] The application is opposed by the ACSA primarily on the basis that the opinions and audio recordings sought are irrelevant and privileged information.

[17] There were certain preliminary points that were taken on behalf of ACSA relating to the alleged defective application and other issues which it was claimed have prejudiced ACSA. In this regard I have decided, without deciding whether or not the points are bad or good, to follow the approach of **Trans-Africa Insurance Co Ltd v Maluleka 1956 (2) SA 273 (A)** where it was stated: "*No doubt parties and their legal advisers should not be encouraged to become slack in the observance of the Rules, which are an important element in the machinery for the administration of justice. But on the other hand technical objections to less than perfect procedural steps should not be permitted, in the absence of prejudice, to interfere with the expeditious and, if possible, inexpensive decision of cases on their real merits.*"

[18] The refusal to discover the documents required is based solely on the grounds thereof that they are privileged documents. With regard to the audio recordings it is further contended that these are used for the transcription of the minutes of the meetings.

[19] Mr Berger SC who, together with Mr Sibanda, appeared for ACSA submitted that the opinions sought are not only privileged but are also irrelevant for the determination of the review. The review is directed at the legality of the disqualification of the applicant. The record filed consists of all the information that led to that decision. The review Court will have to decide on the basis thereof, not on the basis of opinions of the legal advisers of ACSA. With regard to the audio deliberations he argued that these are also irrelevant and to discover those recordings would hamper the freedom of the members of the Board to express freely their views in the future conduct of adjudication process. He argued that once the facts relating to a full explanation about the alleged collusion are before Court the Court will be able to formulate its own opinion. The question of collusion is a legal question which must be decided by Court.

[20] The nub of the argument of Mr Maritz SC, who appeared for the applicant, is that the privilege claimed cannot stand in the face of the current Constitutional provisions relating to procurement of goods and services by an organ of State. ACSA, as an organ of State, is expected to act in manner which is fair and transparent. The information which was sent to the in-house legal adviser, to Mkhabela attorneys and to

Counsel for them to be able to give opinions is necessary. This is so because the opinion was based on that information. The opinions are necessary because if the advice was against the disqualification but ACSA nonetheless went ahead and disqualified the applicant then it acted arbitrarily and capriciously in disqualifying the applicant. If the advice was in favour of disqualification then ACSA committed an error of law. He conceded, however, that there is no absolute right to privileged information. In the written heads of argument it is contended that at best for ACSA only those parts of the audio recording which disclosed what advice was given, would be privileged.

[21] Mr Maritz further conceded that the disclosure of the audio deliberations is secondary. He argued, however, that the audio deliberations will give an indication of how ACSA came to the conclusion to disqualify the applicant. He was, however, constrained to concede that if an order is made for the delivery of the information relating to the opinions, audio recordings are not necessary. I debated with him the difference between the deliberations of the Judicial Service Commission (JSC) and those of ACSA. If I understood him well, he contended that the decisions of the JSC relating to any aspect regarding the nomination, selection or appointment of a judicial officer or any other person, in

terms of any law are excluded from judicial review as an administrative action. In terms of the Promotion of Administrative Justice Act No. 3 of 2000 (PAJA) this contention is correct. However, I pointed out to him that some of the decisions of the JSC have been subjected to judicial scrutiny as administrative actions.[1] Since this point is peripheral I need not deal with it. Suffice it to say that some of the decisions of the JSC may well constitute administrative actions and therefore fall to be reviewed under PAJA.

[22] It is contended that the decision to disqualify the applicant in respect of the three bids was informed by and based on one or more of the legal opinions obtained. Therefore if any of the legal opinions was wrong, then the decision was based on an error of law and would be reviewable under PAJA.

[23] The object of review proceedings in terms of Rule 53 is to enable an aggrieved party to get quick relief where the rights or interests are prejudiced by wrongful administrative action. The furnishing of a complete record of the proceedings is therefore an important element in

[1] **See Freedom Under Law v Acting Chairperson: Judicial Service Commission 2011 (3) SA 549 (SCA); Acting Chairperson: Judicial Service Commission v Premier of the WC Prov 2011 (3) SA 538 (SCA)**

the review proceedings: see **Jockey Club of South Africa v Forbes 1993 (1) SA 649 (A) at A 660D--I; S v Baleka and Others 1986 (1) SA 361 (T) at 397I--398A**. The applicant should not be deprived of the benefit of this procedural right unless there is clear justification therefor: see **Crown Cork & Seal Co Inc and Another v Rheem South Africa (Pty) Ltd and Others 1980 (3) SA 1093 (W) at 1095F--H. B.**

[24] I did not understand Mr Maritz to be contending that the opinions and audio recordings are not covered by the rule of privilege. It is settled law that an opinion given by a lawyer in his or her professional capacity is confidential and privileged.

[25] In **Thint (Pty) Ltd v National Director of Public Prosecutions; Zuma v National Direfctor of Public Prosecutions 2009 (1) SA 1 (CC)** para 184 Langa CJ stated the position of privilege thus:

"[184] The right to legal professional privilege is a general rule of our common law which states that communications between a legal advisor and his or her client are protected from disclosure, provided that certain requirements are met. The rationale of this right has changed over time. It is now generally accepted that these communications should be protected in order to facilitate the proper functioning of an adversarial

system of justice, because it encourages full and frank disclosure between advisors and clients. This, in turn, promotes fairness in litigation. In the context of criminal proceedings, moreover, the right to have privileged communications with a lawyer protected is necessary to uphold the right to a fair trial in terms of s 35 of the Constitution, and for that reason it is to be taken very seriously indeed." (Footnotes omitted).

[185] Accordingly, privileged materials may not be admitted as evidence without consent. Nor may they be seized under a search warrant. They need not be disclosed during the discovery process. The person in whom the right vests may not be obliged to testify about the content of the privileged material. It should, however, be emphasised that the common-law right to legal professional privilege must be claimed by the right-holder or by the right-holder's legal representative. The right is not absolute; it may, depending upon the facts of a specific case, be outweighed by countervailing considerations."

[26] In **Jeeva v Receiver of Revenue, PE 1995 (2) SA 433 (SE)** **Jones J stated:** **"***The law relating to privilege unquestionably limits a person's constitutional right of access to State-held information. It is part of the common law of evidence and hence a law of general application; and the limits it places on the right of access to information do not*

negate the essential nature of the right (Phato v Attorney-General, Eastern Cape, and Another (supra at 67); S v ***Majavu 1994 (4) SA 268 (Ck) at 316F and 317C; Khala v Minister of Safety and Security 1994 (4) SA 218 (W) at 227E-228C).*** *Are those limits reasonable? And are they justifiable in an open and democratic society based upon freedom and equality? The answers to these questions will depend on considerations of principle which are of general application, and on considerations which are peculiar to the case in hand. Among the general considerations will be, inter alia, the nature of the privilege, the purpose and the function it fulfils in the administration of justice, the reasons which justify its existence, and the extent of the limits it places upon the right of access to information. There will, in addition, frequently be special reasons arising out of the facts and circumstances of a particular case which could operate either for or against upholding the limitation of the privilege."*

He concluded that the limitation of legal professional privilege upon the applicants' right of access to information in terms of s 23 of the Constitution is reasonable and justifiable in an open and democratic state.

[27] In this case I must balance the right to information held by the State and the right to claim privilege of confidential information by ACSA. The crucial question is whether refusal or failure to disclose the information sought will hamper the applicant from exercising its right to review the decision of ACSA. I think not.

[28] First, the deliberations consist mainly of the views of the members of the Board and debates as to whether or not the applicant should be disqualified. Such debates are not necessarily decisive of the matter. To my mind the debates preceding the final decision are irrelevant. **In Johannesburg City Council v The Administrator, Transvaal, and Another (1) 1970 (2) SA 89 (T)**: dictum at 91G--92C

'A record of proceedings is analogous to the record of proceedings in a court of law which quite clearly does not include a record of the deliberations subsequent to the receiving of the evidence and preceding the announcement of the court's decision. Thus the deliberations of the Executive Committee are as little part of the record of proceedings as the private deliberations of the jury or of the court in a case before it.'

[29] In **MEC for Roads and Public Works, Eastern Cape and Another v Intertrade Two (Pty) Ltd 2006(5) SA 1 (SCA) para.15,** the SCA referred to the above quotation apparently with approval where it stated, referring to Johannesburg City Council v The Administrator, Transvaal and Another, "*(s)ome of the documents sought by Intertrade may not be obtainable by means of either Rule 53 or 35.*"

[30] In **Helen Suzman Foundation v Judicial Service Commission 2015 (2) SA 498 (WCC)** Le Grange J stated that the JSC's deliberations are no different to those of a magistrate or those of a judge as reflected in his or her court book, or deliberations which do not form part of the record of proceedings on appeal or review. He accordingly held that the non-disclosure thereof cannot taint the entire review proceedings.

[31] In my view the weight of authorities seem to favour the retention of common law rule that communication between lawyers in their professional capacities with their clients is privileged and this privilege can only be unveiled if special circumstances exist to justify doing so. In my view no special circumstances have been shown to exist in this case. Failure to discover the opinions and the deliberations will not hamper the

applicant from exercising its right of review. I agree with Mr Berger that the opinions and audio recordings of the deliberations of the Board are irrelevant for the determination of the review by the Court.

[32] The position of an in-house legal adviser may arguably be viewed on a different footing. However, although he is part of the organisation his opinion is merely given with a view to assist the decision maker. The decision maker must still consider the facts. In my view rationality can only be based on the facts placed before the decision maker and not on the opinion. Therefore the opinion of the legal adviser is also irrelevant.

[33] It has not been pointed out to me during argument that the documents that were filed as record of the proceedings did not include the documents that were furnished to the attorneys to give advice. In my opinion those documents should form part of the record. I did not peruse the record filed but Mr Berger gave me the impression that full explanation by both the applicant and Siyazisiza Trust form part of record. If this is the case the Court can formulate its own opinion as to whether the disqualification was irregular or not. It will be irrelevant

whether or not the decision of ACSA was right or wrong.[2] Judicial review is, in essence, concerned with the decision-making process. It is not directed at correcting a decision on the merits. Upon review the court is in general terms concerned with the legality of the decision, not with its merits.

[34] Accordingly I am of the view that the application cannot succeed. Mr Berger submitted that if the application fails I should make an order of costs against the applicant. If the application succeeds I should make no order as to costs. I do not agree. The general rule is that costs should follow the event. However in this case if it turns out in the review that the documents that were accompanying the requests for opinion have not been discovered then the applicant would be entitled to those documents to be discovered. I am therefore of the view that costs should be determined at the end of the case.

[35] In the result I make the following order:

(a)1. The interlocutory application is dismissed.

---

[2] See Liberty Life Association of Africa Ltd v Kachelhoffer No and Others 2005 (3) SA 69 (C) para 79; Malema v Chairman, NCOP 2015 (4) SA 145 (WCC) para 49

2. The question of costs of this application is to be determined at the end of the review case.

TOKOTA AJ

ACTING JUDGE OF THE HIGH COURT

DATE OF HEARING: 1 FEBRUARY 2016

DATE OF JUDGMENT:

Applicant's Legal Representatives N G D Maritz SC

Instructed by Mac Robert Inc.

First respondent's Legal Representatives: Daniels Berger SC

M Sibanda

Instructed by Mkabela, Huntley Adekeye Inc.