IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

Not Reportable

Case No: 2414/2020P

In the matter between:

UNITRADE 1047 CC t/a ISIDINGO SECURITY SERVICES **APPLICANT**

and

THE MEMBER OF THE EXECUTIVE COUNCIL FOR TRANSPORT: KWAZULU-NATAL **FIRST RESPONDENT**

THE DEPUTY DIRECTOR-GENERAL: CORPORATE SERVICES **SECOND RESPONDENT**

MJAMHLO SECURITY SERVICES (PTY) LTD **THIRD RESPONDENT**

Heard: 9 October 2020.

Delivered: 12 October 2020.

ORDER

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1. The rule nisi issued on 4 May 2020 is discharged.
2. The costs of Part A of the application are reserved for the court determining Part B of the application.

JUDGMENT

GORVEN J

[1] This application arises from the award of a tender by the first and second respondents (the MEC) to the third respondent (Mjamhlo). The applicant (Unitrade) also tendered but its tender was ruled non-responsive. Unitrade approached this court on an urgent basis. It sought to interdict the implementation of the award of the tender to Mjamhlo pending the outcome of an application to review and set aside the award. The review application formed Part B of the application. The present aspect concerns only Part A, the interdict pending the outcome of the review.

[2] The interdictory relief was preliminarily argued on 4 May 2020 and the following order was granted:

'A rule nisi is hereby issued calling upon the Respondents to show cause to the Court on 25 May 2020 at 09h30 why the following order should not be made final:

1.1 Pending the final determination of the review application set out in Part B of the notice of motion:

1.1.1 The First Respondent is interdicted from allocating sites pursuant to the award of Tender No. ZNB 0031/19T to the Third Respondent;

1.1.2 In the event that the sites have already been allocated, the First Respondent is interdicted from concluding agreements with the Third Respondent, alternatively implementing any agreements already concluded with the Third Respondent;

1.1.3 The costs of this application shall be costs in the cause of the review application.

2. The orders in paragraphs 1.1.1 and 1.1.2 shall operate as interim orders with immediate effect.'

This is the extended return day of the rule nisi. The effect of confirming the rule nisi would be to confirm interdictory relief pending the outcome of the review application. In other words, it remains an interim interdict. The discharge of the rule nisi would simply mean that the review application proceeds without any interdict in place.

[3] The court can, in its discretion, grant an interim interdict pending an action. This is an extraordinary remedy.[1] The test is well-worn. Applicants must show that they have:

'(a) a right which, "though prima facie established, is open to some doubt";

(b) a well grounded apprehension of irreparable injury;

(c) the absence of ordinary remedy.

In exercising its discretion the Court weighs, *inter alia*, the prejudice to the applicant, if the interdict is withheld, against the prejudice to the respondent if it is granted. This is sometimes called the balance of convenience.'[2]

As to the balance of convenience, the stronger the applicant's prospects of success, the less is its need to rely on prejudice. The more the right asserted is 'open to some doubt', the more the balance of convenience

[1] *Erikson Motors (Welkom) Ltd v Protea Motors, Warrenton & Another* 1973 (3) SA 685 (A) at 691C.
[2] *Erikson Motors* at 691C-E, citing *Setlogelo v Setlogelo* 1914 AD 221 at 227.

enters the equation.[3] In arriving at this position, a court is enjoined to weigh the facts and probabilities appearing from the affidavits as a whole.

[4] Mjamhlo opposes the application on the basis that the order was erroneously granted because the founding affidavit was not served on it. The MEC also raises this as a point *in limine*. In my view, this does not bear on the issue at hand and does not merit further attention.

[5] The right asserted by Unitrade is simply framed as a right to just administrative action. Against that there can be no quarrel. But the actual right asserted is the right to have the award by the MEC to Mjamhlo reviewed and set aside. For this, Unitrade has to show that it has prospects of success in the pending review application. Unitrade has the obligation of showing the prima facie right in this form.

[6] In the founding affidavit, Unitrade deals with this by way of simple assertion. It says:

'The applicant submitted its tender, with all the supporting documents, on 15 November 2019.'

It goes on to say that it has not retained a copy of its bid document.

[7] The MEC raises three bases of opposition. First, that, because no internal appeal was lodged, Unitrade has no prospects of success in the review application. Secondly that Unitrade has not shown that it has locus standi to review the award since it did not meet the pre-qualifying criteria to bid. This has two aspects to it which will be dealt with below.

[3] *Olympic Passenger Service (Pty) Ltd v Ramlagan* 1957 (2) SA 382 (D) at 383D-G.

[8] As to the internal appeal, it is clear that it is a requirement that a tenderer who seeks to challenge an award must first exhaust internal remedies. It is also clear that Unitrade failed to lodge an appeal within the requisite five-day period after publication of the award. In response, Unitrade says that it did not know the requirements for an internal appeal. As a result, it directed a letter to the MEC requesting guidance concerning an internal appeal. The MEC failed to provide that information. This does not avail Unitrade. A party wishing to assert rights such as the present one is obliged to establish the measures it needs to take in order to do so. In a situation such as this, when the invitation to tender and all other information concerning the internal appeal are in the public domain, it does not suffice to simply direct a request at the MEC and expect legal advice in return.

[9] As regards the pre-qualifying criteria, the MEC raised two aspects. The first is the failure of Unitrade to provide a signed, binding contract between the main contractor and the sub-contractor. This is said to be a peremptory requirement. The second is that anyone other than an EME or QSE contractor is disqualified. It is asserted by the MEC that Unitrade is neither since its monthly turnover is in the region of R48 million.

[10] Unitrade replied to the issue of a binding sub-contract by saying that: 'Clause 2.2 of the bid document is ambiguous in that it only states: "A tenderer who will sub-contract . . ."'

As a result, it says that it was not a bid requirement to enter into a subcontract. The bid document is in the public domain and was put up as part of the record without it being attached to any affidavit. Unitrade, in argument, submitted that, as a result, I should not have reference to it. This cannot be correct. Whilst the party relying on it should have placed it

before the court, there is no dispute as to its terms. The prospects of success in the review application are directly impacted. It is thus appropriate to consider its terms.

[11] As regards pre-qualifying criteria, it provides:

'The pre-qualifying criteria for this bid is as follows:

- A tenderer having a Level 1 B-BBEE Status Level of Contributor;
- A tenderer who is an EME or QSE; and
- A tenderer who will sub-contract a minimum of 35% of the contract to an EME or QSE which is at least 51% owned by black people who are military veterans.
- Sub-contractors are not allowed to bid as main contractors.
- Main contractor must submit a signed binding contract. This contract must be signed by subcontractor and main contractor before submitting the bid proposal.'

It is abundantly clear from this that a tenderer must sub-contract to an EME or QSE with at least 51% of that entity owned by black military veterans. It is also clear from this that a signed sub-contract had to form part of the bid documents. Unitrade does not dispute that it failed to do so. From this, it has failed to show that it met the pre-qualifying criteria. The bid document provides that, in that instance, Unitrade's bid is invalid. As such, on the evidence in the matter at present, Unitrade has no *locus standi* to review the award since it did not qualify to bid. This is because it admittedly relies for its *locus standi* on its own interest, rather than a public interest.[4]

[12] In addition, the MEC said that Unitrade does not fall within the description of an EME or QSE contractor. This because, from its own bid documents, its monthly invoices total over R48 million. Unitrades response in reply is that it is 'not clear what "EME" and "QSE" stand for.' But

[4] *Giant Concerts CC v Rinaldo Investments (Pty) Ltd and Others* [2012] ZACC 28; 2013 (3) BCLR 251 para 31.

Unitrade must show prospects of success on review. It submitted a tender. It seems that it did so without establishing whether it met this particular pre-qualifying criterion. Not only that, but when the MEC testified that it fell outside of these descriptions, Unitrade did not then establish what is meant in order to contest that evidence. It must be said that, in its response to the paragraph under reply, Unitrade issued a blanket denial. But when a specific averment is made to this effect, and Unitrade simply says it does not know what these initials stand for, in my view there is nothing to gainsay that averment. On this basis, as well, Unitrade has failed to show prospects of success in establishing its *locus standi* to review the award.

[13] All of this means that, on these papers, Unitrade has failed to establish a *prima facie* right open to some doubt. Since this is necessary for the grant of an interim interdict, Unitrade cannot be held to be entitled to confirmation of the rule. I stress that the papers in the review part of the application are not complete and that Unitrade may be able to prove its locus standi and overcome the failure to lodge an internal appeal. Unitrade has yet to deliver a supplementary founding affidavit in the review. As such, what is said here deals only with the interdictory aspect of the relief sought. It in no way impacts on findings which must be made in the review once the papers dealing with that aspect are complete.

[14] It remains to consider the question of costs. I was urged by the MEC and Mjamhlo to grant a costs order at this stage and to do so at a punitive level. I do not think it appropriate to do so. There is a single application, brought in two parts. It may well be that Unitrade succeeds in the review part, in which case the court dealing with that aspect will be in a better position to consider the costs of the application as a whole.

[15] In the result,

1. The rule nisi issued on 4 May 2020 is discharged.

2. The costs of Part A of the application are reserved for the court determining Part B of the application.

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GORVEN J

DATE OF HEARING:	9 October 2020
DATE OF JUDGMENT:	12 October 2020
FOR THE APPLICANT:	WJ Pietersen instructed by Dirk Kotze Attorneys, locally represented by Stowell & Company.
FOR THE FIRST AND SECOND RESPONDENTS:	C Reddy instructed by The State Attorney, locally represented by Cajee, Setsubi Chetty Inc.
FOR THE THIRD RESPONDENT:	A Moodley Instructed by Ramouthar Attorneys, locally represented by McGregor & Associates.