IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG

CASE NO: 7572/2022P

In the matter between:

SMEC SOUTH AFRICA (PTY) LTD	**Applicant**

and

THE MEC FOR ECONOMIC DEVELOPMENT, TOURISM AND ENVIRONMENTAL AFFAIRS, KWAZULU-NATAL PROVINCE	**First Respondent**
THE DEPARTMENT OF ECONOMIC DEVELOPMENT, TOURISM AND ENVIRONMENTAL AFFAIRS, KWAZULU-NATAL	**Second Respondent**

In re:

SMEC SOUTH AFRICA (PTY) LTD	**Applicant**

and

THE PREMIER OF KWAZULU-NATAL PROVINCE	**First Respondent**
THE MEC FOR ECONOMIC DEVELOPMENT, TOURISM AND ENVIRONMENTAL AFFAIRS, KWAZULU-NATAL PROVINCE	**Second Respondent**
THE DEPARTMENT OF ECONOMIC DEVELOPMENT,	**Third Respondent**

TOURISM AND ENVIRONMENTAL AFFAIRS, KWAZULU-NATAL

THE CHAIRPERSON OF THE KWAZULU-NATAL PROVINCIAL BID APPEALS TRIBUNAL **Fourth Respondent**

THE MEC FOR FINANCE, KWAZULU-NATAL PROVINCE **Fifth Respondent**

HATCH AFRICA (PTY) LTD **Sixth Respondent**

JUDGMENT

Nicholson AJ:

Introduction

[1] SMEC South Africa (Pty) Ltd, the applicant herein ('SMEC'), makes application in terms of rule 30A of the Uniform Rules of Court, for an order compelling the first and second respondent to comply with the notice of motion delivered in terms of rule 53(1), in a pending application to review and set aside decisions of the second respondent, which will become apparent herein below.

[2] It is instructive that this is an interlocutory application where SMEC is both the applicant in this application and the main application. The MEC for Economic Development, Tourism and Environmental Affairs, KwaZulu-Natal Province ('the MEC') is the second respondent in the main application and the first respondent in this application. The Department of Economic Development, Tourism and Environmental Affairs, KwaZulu-Natal Province ('the Department') is the second respondent in this application and the third respondent in the main application. Where I refer to the MEC and the Department jointly as the respondents, I refer to the respondents in the interlocutory application.

[3] In the main application, the applicant seeks to review and set aside the decision of the Department where a tender, with tender number Z[...], that was

awarded to Hatch Africa (Pty) Ltd ('Hatch'), the sixth respondent in the main application.

[4] Leading up to the tender, eight bids were received, of that eight, five were disqualified and therefore not scored, and three bids were eventually evaluated; namely, those of SMEC, Hatch and Gibb (Pty) Ltd ('Gibb'). Of the three bids evaluated; SMEC scored the highest points, which means they were the most responsive in terms of price and BBBEE status.

[5] It is common cause that the Department has delivered a record in terms of rule 53(4) of the Uniform Rules; however, SMEC contends that the full record was not provided and has compiled a list of sixty-seven documents which they deemed to be outstanding.[1]

[6] I pause to mention that item 6 of the said list is a request for the bids of the other six unsuccessful bidders and for the bid of Hatch, the successful bidder. In that regard, applicant contends that they only received part of the bid documents of Hatch and Gibb, while the Department contends that they have provided the entire bid document for Hatch. Further, the Department contends that the bid documents in relation to the other unsuccessful bidders are privileged and therefore the applicant is not entitled to the bid documents, and the Gibb bid documents were given to them in error.

The issues

[7] In the premises, there are two issues for determination: (1) whether SMEC is entitled to the requested documents, and (2) the issue of non-joinder.

[8] It is convenient to mention here that rule 53 of the Uniform Rules does not specify what the record is meant to contain and reads as follows:

'(1) Save where any law otherwise provides, all proceedings to bring under review the decision or proceedings of any inferior court and of any tribunal, board or officer

[1] The record volume 1 at 65 to 79.

performing judicial, quasi-judicial or administrative functions shall be by way of notice of motion directed and delivered by the party seeking to review such decision or proceedings to the magistrate, presiding officer or chairperson of the court, tribunal or board or to the officer, as the case may be, and to all other parties affected –

(a). . .

(b) calling upon the magistrate, presiding officer, chairperson or officer, as the case may be, to despatch, within 15 days after receipt of the notice of motion, to the registrar the record of such proceedings sought to be corrected or set aside, together with such reasons as the magistrate, presiding officer, chairperson or officer, as the case may be is by law required or desires to give or make, and to notify the applicant that such magistrate, presiding officer, chairperson or officer, as the case may be has done so.

. . .

(4) The applicant may within ten days after the Registrar has made the record available to him or her, by delivery of notice and accompanying affidavit, amend, add to or vary the terms of his or her notice of motion and supplement the supporting affidavit.'

[9] In the circumstances the question is what is the record? Or what does the record contain? Is applicant entitled to the full record or only portions of the record that are relevant to SMEC? In motivation for requesting the full record, SMEC relies on *Helen Suzman Foundation v Judicial Service Commission*[2] where the Constitutional Court sets out the position as follows:[3]

'[13] The purpose of rule 53 is to "facilitate and regulate applications for review". The requirement in rule 53(1)(b) that the decision-maker file the record of decision is primarily intended to operate in favour of an applicant in review proceedings. It helps

[2] *Helen Suzman Foundation v Judicial Service Commission* [2018] ZACC 8; 2018 (4) SA 1 (CC); 2018 (7) BCLR 763 (CC). See the applicant's heads of argument.
[3] Applicant's heads of argument: paragraph 6

ensure that review proceedings are not launched in the dark. The record enables the applicant and the court fully and properly to assess the lawfulness of the decision making process. It allows an applicant to interrogate the decision and, if necessary, to amend its notice of motion and supplement its grounds for review.

[14] Our courts have recognised that rule 53 plays a vital role in enabling a court to perform its constitutionally entrenched review function:

"Without the record a court cannot perform its constitutionally entrenched review function, with the result that a litigant's right in terms of section 34 of the Constitution to have a justiciable dispute decided in a fair public hearing before a court with all the issues being ventilated, would be infringed."

[15] The filing of the full record furthers an applicant's right of access to court by ensuring both that the court has the relevant information before it and that there is equality of arms between the person challenging a decision and the decision-maker. Equality of arms requires that parties to the review proceedings must each have a reasonable opportunity of presenting their case under conditions that do not place them at a substantial disadvantage vis-a-vis their opponents. This requires that "all the parties have identical copies of the relevant documents on which to draft their affidavits and that they and the court have identical papers before them when the matter comes to court".

[16] In *Turnbull-Jackson* this Court held:

"Undeniably, a rule 53 record is an invaluable tool in the review process. It may help: shed light on what happened and why; give the lie to unfounded ex post facto (after the fact) justification of the decision under review; in the substantiation of as yet not fully substantiated grounds of review; in giving support to the decision maker's stance; and in the performance of the reviewing court's function."

[17] What forms part of the rule 53 record? The current position in our law is that - with the exception of privileged information - the record contains all information relevant to the impugned decision or proceedings. Information is relevant if it throws

light on the decision- making process and the factors that were likely at play in the mind of the decision-maker. Zeffertt and Paizes make a comment on the exclusion of evidence on the grounds of privilege. That comment must surely be of relevance even to the exclusion of privileged information from a rule 53 record. After all, the content of a rule 53 record is but evidentiary in nature. The authors say that in the case of privileged information, the exclusion is based on the recognition that the general policy that justice is best served when all relevant evidence is ventilated may, in some cases, be outweighed by a particular policy that requires the suppression of that evidence. The fact that documents contain information of a confidential nature "does not per se in our law confer on them any privilege against disclosure".' (footnotes omitted)

[10] In *General Council of the Bar of South Africa v Jiba*,[4] the court held:

'Therefore compliance with Rule 53 regarding time frames and providing complete record, is not just a procedural process, but is substantive requirement which serves to ensure that the substance of the decision is properly put to the fore at an early stage. Any attempt to frustrate this, should be met with displeasure by our courts.'

[11] The Western Cape in *Helen Suzman Foundation v Judicial Service Commission*[5] pointed out that:

'It is settled law that the Rule is primarily intended to operate in favour of and to the benefit of an applicant in review proceedings and to avoid review proceedings being launched in the dark. The Rule essentially confers the benefit that "all the parties have identical copies of the relevant documents on which to draft their affidavits and that they and the Court have identical papers before them when the matter comes to Court" ... Moreover, an applicant should not be deprived of the benefit of this procedural right unless there is clear justification therefor.' (references omitted)

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[4] *General Council of the Bar of South Africa v Jiba and others* [2016] ZAGPPHC 833; 2017 (2) SA 122 (GP); [2016] 4 All SA 443 (GP) para 112.
[5] *Helen Suzman Foundation v Judicial Service Commission* [2014] ZAWCHC 136; 2015 (2) SA 498 (WCC); [2014] 4 All SA 395 (WCC) para 14.

[12] The Department on the other hand while agreeing with the Constitutional Court in Helen Suzman Foundation asserts that as a matter of logic, a party can never be required to provide the record of a decision, which has not been taken on review, or cannot be taken on review by the applicant, and cites *Ekuphumeni Resort v Gambling and Betting Board, Eastern Cape*[6] and *Muller v The Master*[7] in support of that argument.

[13] The Department therefor argues that SMEC is not entitled to seek the record of a decision in respect of which he has no *locus standi* to litigate on, and which has no adverse effect on the applicant's right.

[14] The Department asserts that it has provided all the documents relevant to the decision to exclude SMEC from the bid process in the record filed by the respondents, constitute over 2 926 pages, which is filed before the Provincial Bid Appeals Tribunal.[8]

[15] The Department further avers that SMEC is *mala fide* in its request for the bid documents because its true motive is to obtain access to its competitors' bids which include proprietary and confidential information. The bidders, their employees and their consultants have an interest in maintaining their confidentiality. The Department avers that the bids of the unsuccessful bidders do not have any relevance to the decision to exclude SMEC from the bid process, nor the decision to award the bid to Hatch.

[16] The Department further takes a special plea of material non-joinder; by asserting that while eight bid submissions were received which included SMEC and Hatch, only Hatch is a party to the main application and none of the other bidders, including Hatch, is a party to this interlocutory application.

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[6] *Ekuphumleni Resort (Pty) Ltd and another v Gambling and Betting Board, Eastern Cape and others* 2010 (1) SA 228 (E) para 9.
[7] *Muller and another v The Master and others* 1991 (2) SA 217 (N) at 220C-E.
[8] Respondents' heads of argument: paragraph 4.5

[17] In citing *Amalgamated Engineering Union v Minister of Labour*,[9] the Department avers that SMEC's failure to join the unsuccessful bidders constitutes a material non- joinder of parties who have a material and substantial interest in this application. Any person should be joined if such person has a direct and substantial interest in any order the court might make, or if such an order cannot be sustained or carried out, without prejudicing that party, unless the court is satisfied that he or she has waived his or her right to be joined.

[18] Without citing any authority, the Department avers that this rule 30A application is out of time because the application was not brought within the ten-day period contemplated in rule 53(4) after the Department replied to SMEC advising SMEC that in their view, they have filed all the relevant documents to the review and raised the issue of confidentiality.

[19] In that regard the record was filed and served on 11 July 2022, SMEC delivered a notice in terms of rule 30A on 25 July 2022 and on 1 August 2022, the Department's attorney of record wrote a letter to SMEC's attorney of record advising them that in their view, all the documents relevant to the review had been filed and raised the issue of confidentiality. So argues the Department the ten day period provided in rule 30A(1) would have lapsed on 8 August 2022 and the second ten day period would have lapsed on 23 August 2022; however, this interlocutory application was only brought on 1 September 2022; accordingly, out of time.

The Decision

[20] Mr Wagener SC directed me to pages 301 to 302 of the record which demonstrate the recommendation by the Bid Evaluation Committee ('BEC') and the approval by the Bid Adjudication Committee ('BAC'), dated 11 January 2022 and 11 February 2020, respectively. Those pages demonstrate that the shortlist came down to three bidders; namely, Hatch, SMEC and Gibb, whose bids were R47,647,149.98, R47,255,059.10 and R90,897,809.27, respectively. In the circumstances, Gibb was excluded because their price was almost double of that of SMEC and Hatch.

[9] *Amalgamated Engineering Union v Minister of Labour* 1949 (3) SA 637 (A) at 659.

Accordingly, the two bidders remaining in the race were Hatch and SMEC, with SMEC being the lowest bidder.

[21] Notwithstanding SMEC being the lowest price, the tender was awarded to Hatch because SMEC's price submission excluded negotiation as a part of their price. In that regard, the BAC and BEC held that the omission marked a material portion of the bid and presented a high risk to the project, due to unknown future costs. I understand this to mean that the manner SMEC had costed negotiations left uncertainty into whether the price would increase in the future when invoicing for negotiations and that uncertainty presented a risk. While the pricing of Hatch included negotiations, which meant, while the bid price was higher, it was more certain, and therefore less risky.

[22] The issue at the heart of the review, therefore, is the pricing for negotiations; because SMEC seeks to assess if, when comparing the pricing for negotiation of Hatch on the one side and SMEC on the other side, it would be reasonably inferred that the manner SMEC priced their negotiations costs, may reasonably increase the bid price, while Hatch's price would not. In the premises, only the documents relating to that narrow issue appear to be relevant.

[23] On this point, *Giant Concerts CC v Rinaldo Investments (Pty) Ltd*[10] is instructive, where the Court held:

'[33] The separation of the merits from the question of standing has two implications for the own-interest litigant. First, it signals that the nature of the interest that confers standing on the own-interest litigant is insulated from the merits of the challenge he or she seeks to bring. An own-interest litigant does not acquire standing from the invalidity of the challenged decision or law, but from the effect it will have on his or her interests or potential interests. He or she has standing to bring the challenge even if the decision or law is in fact valid. But the interests that confer standing to bring the challenge, and the impact the decision or law has on them, must be demonstrated.

[10] *Giant Concerts CC v Rinaldo Investments (Pty) Ltd and others* [2012] ZACC 28; 2013 (3) BCLR 251 (CC).

[34] Second, it means that an own-interest litigant may be denied standing even though the result could be that an unlawful decision stands. This is not illogical. As the Supreme Court of Appeal pointed out, standing determines solely whether this particular litigant is entitled to mount the challenge: a successful challenge to a public decision can be brought only if "the right remedy is sought by the right person in the right proceedings". To this observation one must add that the interests of justice under the Constitution may require courts to be hesitant to dispose of cases on standing alone where broader concerns of accountability and responsiveness may require investigation and determination of the merits. By corollary, there may be cases where the interests of justice or the public interest might compel a court to scrutinise action even if the applicant's standing is questionable. When the public interest cries out for relief, an applicant should not fail merely for acting in his or her own interest.

[35] Hence, where a litigant acts solely in his or her own interest, there is no broad or unqualified capacity to litigate against illegalities. Something more must be shown.' (footnotes omitted)

[24] In the premises, since it is asserted by the Department and not disputed by SMEC that SMEC is an own-interest litigant. Accordingly, SMEC's locus standi is much limited in these proceedings *vis a vis* a public-interest litigant.

[25] *Giant Concerts* further states:

'[41] These cases make it plain that constitutional own-interest standing is broader than the traditional common law standing, but that a litigant must nevertheless show that his or her rights or interests are directly affected by the challenged law or conduct. The authorities show:

(a) To establish own-interest standing under the Constitution a litigant need not show the same "sufficient, personal and direct interest" that the common law requires, but must still show that a contested law or decision directly affects his or her rights or interests, or potential rights or interests.

(b) This requirement must be generously and broadly interpreted to accord with constitutional goals.

(c) The interest must, however, be real and not hypothetical or academic.

(d) Even under the requirements for common law standing, the interest need not be capable of monetary valuation, but in a challenge to legislation purely financial self-interest may not be enough - the interests of justice must also favour affording standing.

(e) Standing is not a technical or strictly-defined concept. And there is no magical formula for conferring it. It is a tool a court employs to determine whether a litigant is entitled to claim its time, and to put the opposing litigant to trouble.

(f) Each case depends on its own facts. There can be no general rule covering all cases. In each case, an applicant must show that he or she has the necessary interest in an infringement or a threatened infringement. And here a measure of pragmatism is needed.'

[26] In *Administrative Law in South Africa*,[11] the learned authors stated:

'This approach was affirmed in Giant Concerts, where Cameron J noted once again that the own interest litigant need not be the person whose constitutional right has been infringed or threatened. Ultimately, "a litigant need not show the same 'sufficient, personal and direct interest' that common law requires, but must still show that a contested law or decision directly effects his or rights or interests, or potential rights or interests.' (my emphasis)

[27] In *Tupac Business Enterprises CC v KwaZulu-Natal Gaming and Betting Board*,[12] the Court held:

[11] C Hoexter and G Penfold, Administrative Law in South Africa 3 ed (2021) at 670.

'[18] ... It seems to me that what was said in Giant Concerts (quoted above) is a complete answer to the applicant's question of standing. It is inconceivable that the applicant can be allowed to put in a completely non-responsive tender, accept that such tender has been rightly rejected and then thereafter be heard to complain about the process and a right to have the process set aside so as to enable a fair tender process to thereafter unfold to give it a second bite at the cherry. The special condition made it abundantly clear that all those "blocks" had to be "ticked" before the tender could be considered. A tenderer not meeting those requirements has no interest in the outcome of the tender because it would never be entitled to be awarded the tender in the first place.'

[28] In the matter at hand, the responsiveness or non-responsiveness (I use the term responsiveness broadly) is still at issue. However, Tupac appears to suggest that the reason for the rejection of the tender and whether or not it was rational is the only interest in the bid process. Accordingly, an unsuccessful litigant cannot be granted a broad sweep of the tender process to determine irregularities that would not have turned on its non-responsiveness.

[29] Having considered the authorities before me and the facts, it is apparent that SMEC, in its capacity as an own-interest litigant, is only entitled to the documents relevant to the narrow issue of the review. While SMEC relies heavily on the Constitutional Court's decision in *Helen Suzman Foundation, Helen Suzman Foundation* referred to a public-interest litigant and not to an own-interest litigant as is the case of SMEC. Being an own-interest litigant, SMEC would have been entitled to the documents had the interest of justice demanded such. This, following Giant Concepts will be possible if 'there is at least a strong indication of fraud or other gross irregularity in the conduct of the [Department]'.[13] There has been no suggestion in these papers of fraud or other gross irregularity.

[30] I now return to the issue of the material non-joinder.

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[12] *Tupac Business Enterprises CC v KwaZulu-Natal Gaming and Betting Board* [2018] ZAKZPHC 63.
[13] *Giant Concerts CC v Rinaldo Investments (Pty) Ltd and others* [2012] ZACC 28; 2013 (3) BCLR 251 (CC) para 58.

[31] SMEC in its papers has not seriously opposed the material non-joinder and in oral argument stated in the alternative that should I view the material non-joinder as having merit, SMEC can live without the documents of the unsuccessful bidder.

[32] It is axiomatic that the unsuccessful bidders do have a material interest in this matter because of the potential proprietary and confidential information that the bids contain. Mr Dickson SC stated that pricing is but one side of it but due to the nature of what the bid entails, i.e. planning, negotiations and developing, SMEC will receive an unfair advantage in the event they are successful in the main application. Accordingly, I am of the view that other bidders should have been joined in the matter to provide their view to share their bids.

[33] Having regard to the aforementioned, I am of the view that the material non-joinder should be upheld and therefore, SMEC cannot be provided with the bids of both Hatch and the other unsuccessful bidders.

[34] With regard to the remaining items on annexure "A" to the notice of motion, I shall make an order for the Department to deliver the items that are relevant, and only to the extent that they are available.

[35] With regard to costs, I am of the view that the costs in this matter should be the costs in the cause because both parties enjoyed limited success.

Order

[36] In the result, I make the following order;

1. The first and second respondent are directed to deliver the items listed in annexure "AA" stated hereafter, within ten days of this order being granted, provided that they are available: item 3, item 7, item 8, item 9, item 10, item 11 , item 12, item 13, item 14, item 15, item 20, item 21, item 22, item 23, item 25, item 26, item 27, item 28, item 29, item 30, item 31, item 32, item 33, item 34, item 35, item 37.

2. In the event that any of the items directed to be made are unavailable, the respondents must provide a list to applicant of the items, which are listed in order 1, that are unavailable.

3. The costs of this application shall be the costs in the cause of the main application.

NICHOLSON AJ

Date heard: 4 August 2023

Judgment handed down: 29 September 2023

Appearances

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