

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE LOCAL DIVISION, BHISHO)**

Case no: 151/2014
Date Heard: 25/03/2014

In the matter between:

RICKSHAW TRADE & INVEST 49 (PTY) LTD

APPLICANT

and

**THE MEMBER OF THE EXECUTIVE COUNCIL
FOR EDUCATION, EASTERN CAPE PROVINCIAL
GOVERNMENT**

1ST RESPONDENT

**SUPERINTENDENT GENERAL OF THE EASTERN
CAPE DEPARTMENT OF EDUCATION**

2ND RESPONDENT

**THE MEMBER OF THE EXECUTIVE COUNCIL
RESPONSIBLE FOR PLANNING AND TREASURY,
EASTERN CAPE**

3RD RESPONDENT

**SUPERINTENDENT GENERAL OF THE EASTERN
CAPE PROVINCIAL PLANNING AND TREASURY**

4TH RESPONDENT

MKHUMA MULTI PURPOSE PRIM CO-OPERATIVE

5TH RESPONDENT

GLOBAL TOOLS

6TH RESPONDENT

MILANI FURNISHERS

7TH RESPONDENT

REBONI FURNITURE GROUP

8TH RESPONDENT

DECADES INVESTMENTS/FURNITECH (JV)

9TH RESPONDENT

DIVERT STEEL INVESTMENT

10TH RESPONDENT

SBUKUZA TRADING**11TH RESPONDENT****MOBOT CC****12TH RESPONDENT****ANDANGWANYA CONSTRUCTION & CLEANING
SERVICES CC****13TH RESPONDENT****NANGAMSO MANALA CONSTRUCTION****14TH RESPONDENT****BOHN HOLDINGS (PTY) LTD****15TH RESPONDENT**

REASONS FOR ORDER

SMITH J:

[1] When this matter came before me on an urgent basis on 25 March 2014, the applicant sought a *rule nisi*, as well as interim relief, *inter alia*, interdicting the Members of Executive Council and Superintendents-General for the Department of Education and the Treasury (the first to fourth respondents), from placing further orders for the delivery of school furniture with the fifth to fifteenth respondents ("the other respondents"), pending a challenge to the lawfulness of that process, to be instituted within two weeks from the date of the order.

[2] At the hearing of the matter the Centre for Child Law (the Intervening Party) applied to intervene in the proceedings. There having been no objection from either of the parties, and being satisfied that it indeed has a substantial interest in the outcome of the proceedings, I allowed the intervention. The Intervening Party initially opposed the granting of the interim relief on the basis

that the non-joinder of the Minister of Education was a fatal defect. However, once it had become clear that the applicant, at that stage, only sought to interdict the placing of further orders with the fifth to fifteenth respondents, it withdrew its opposition in this regard, and supported the granting of interim relief.

[3] The parties had also agreed that it would be convenient and practical for an application, which was to be brought by Platinum Budget Office Furniture (Pty) Ltd for substantially same relief, to be enrolled for hearing together with this application.

[4] On 26 March 2014 I granted a *rule nisi* as well as appropriate interim relief, and indicated that my reasons would follow in due course. In the light of the fact that the return date is imminent (being 14 April 2014), and that I will be hearing the matter on the return day, I have decided to provide only brief reasons for my decision. They are as follows.

[5] The applicant manufactures, supplies and delivers school furniture to the Department of Education. It contends that the first to fourth respondents have unlawfully ordered school furniture from the other respondents without following prescribed tender procedures.

[6] During November 2013 the department placed an advertisement in the Daily Dispatch, inviting bids in respect of a tender for the manufacturing and

delivery of furniture to various schools in the province. Prospective bidders were also invited to a compulsory briefing session which was to be held on 6 November 2013. The closing date for the submission of bids was 20 December 2013.

[7] The applicant purchased the bid documents and its representative subsequently attended the compulsory briefing session where he lodged a complaint respect of the prescribed specifications which (according to the applicant) differed from those previously set by the department. At that meeting prospective bidders were told that:

- (a) the total budged for the tender was approximately R60 million;
- (b) orders would be placed by 12 December 2013; and
- (c) delivery of the furniture should be completed by the end of March 2014.

[8] The applicant appeared to have been determined to further pursue its objections to the tender specifications, and on 7 November 2013 it wrote to the regional secretaries of the O.R Tambo and Joe Gqabi regions, setting out its concerns in this regard. The department subsequently published a tender bulletin (on 8 November 2013), wherein it announced certain changes to the bid specifications. These changes were however never incorporated into the tender documents, and the applicant submitted his bid on the basis of the unaltered tender documents before the dead-line on 20 November 2013. Twenty-nine other bids were also submitted in response to the aforesaid tender invitation.

[8] When by December 2013 it had not received any communication from the department, its Managing Director, Mr Bongile Nkola, enquired from the department's acting Chief Director, one Carstens, about the progress of the adjudication process. Carstens told Nkola that the Bid Adjudication Committee had recommended the acceptance of a number of bids to the Integrated Bid Award Committee. He also told Nkola that the department was not prepared to change the specifications.

[9] On 20 January 2014 the applicant's legal representative again wrote to the department regarding its concerns in respect of the tender specifications. In that letter the applicant requested an opportunity to discuss the "technical difficulties" mentioned in its earlier letter with representatives of the department before the tender was awarded. It, however, never received a reply to that letter.

[10] Although the bid adjudication was supposed to have been finalised by 20 February 2014, this did not happen for some reason, and on 11 February 2014 the department wrote to all the bidders informing them that "*due to unforeseen circumstances*" it was not possible to finalise the bid adjudication process. The bidders were thus requested to hold their bids valid for acceptance until 20 May 2014.

[11] It appears however that, instead of expediting the bid adjudicating process, the department chose instead to approach various manufacturers of school furniture with requests that they agree to deliver available stock to

schools on an urgent basis. During March 2014 Nkola was informed by an employee of the seventh respondent, one Sirunu, that the department had enquired from the seventh respondent what quantities of school furniture it had available for immediate delivery. And on 7 March 2014 the department had addressed letters to various companies which read as follows:

"Dear bidder,

Please be so kind as to confirm your current stock on hand status of the items listed below.

Please note the stock on hand refers to complete units, fully assembled and fully compliant with the specification for Saligna.

Please also indicate what you have available in complete component sets and how long it will take to assemble.

Please reply with reference to the table below."

[12] Nkola was subsequently informed by an employee of the department that, based on the responses the department received to the aforesaid letters, it had placed orders with each of the other respondents to the value of some R32 million. The departmental functionary also furnished Nkola with copies of the orders placed with the other respondents. The applicant never received any such request despite the fact that it had furnished the department with its contact details.

[13] On 17 March 2014, an employee of the department, one Salela, visited the applicant's premises in Mthatha and enquired whether the applicant had storing space available for school furniture to be delivered by a Durban based company. The applicant, however, refused to store the furniture.

[14] The fifteenth respondent thereafter also requested the applicant to manufacture school furniture on its behalf. When, however, the applicant insisted on a deposit of 50% of the value of orders, the fifteenth respondent reverted with a request that the applicant should waive the deposit, and in return it would arrange for other companies, who had received similar orders, also to order stock from the applicant.

[15] Being of the view that the orders may have been unlawfully placed, the applicant lodged a complaint with the Anti-Corruption Task Team of the South African Police Services on 17 March 2014. On 19 March 2014 the investigating officer wrote to the applicant stating that, pursuant to their investigations, the Task Team had determined that the fifteenth respondent had indeed delivered "*components of school furniture as well as school furniture to a warehouse in Mdantsane*". A Durban based company (which Nkola surmised to be the sixth respondent) had also delivered furniture which are being stored at the department's Mthatha district offices. School furniture to the value of R8. 6 million had apparently been ordered from the sixth respondent.

[16] The applicant's legal representatives thereafter wrote to the department, on 17 March 2014, querying the legality of the orders which had been placed with the other respondents. The reply to that letter on 18 March 2014 stated rather disingenuously that the department will only respond: "*once the proper process of obtaining documents in terms of PAIA (sic) had been observed*". The applicant's reply to the aforesaid letter drew attention to the fact that it did not request any documents from the department, but merely wished to be apprised

of the legal basis on which the orders had been placed. At the time of the hearing there had not been any response to that letter.

[17] It must have been abundantly clear from my summary of the facts that the procedure adopted by the department when placing the orders for the delivery of school furniture with the other respondents is *prima facie* unlawful. It is trite that an organ of state can only procure goods and services in accordance with a system which is fair, equitable, transparent, competitive and cost effective; and in accordance with the prescripts of the Constitution and the Preferential Procurement Policy Framework Act, 5 of 2000.

[18] The circumstances under which an organ of state may deviate from competitive bidding processes are also circumscribed by the regulations promulgated under the Public Finance Management Act, 1 of 1999, and practice notices issued by the Minister in accordance with section 76(4)(c) of that Act. In terms these provisions an organ of state may only deviate from the prescribed competitive bidding system where: it is impractical to invite competitive bids; the accounting officer has approved the deviation; and the reasons for the deviation had been recorded.

[19] To justify a deviation from the prescribed tender procedures an organ of state must thus show that:

- (a) there are valid and rational grounds for the decision to deviate from the usual tender procedures;
- (b) the deviation had been approved by the accounting officer; and

- (c) the reasons for the deviation had been recorded and reported to the relevant Treasury. (*Chief Executive Officer, African Social Security Agency and Other v Cash Paymaster Services (Pty) Ltd 2012 (1) SA 216 (SCA) at 224, paragraph 8*).

[20] The respondents have not placed any facts before me to bring themselves either within the ambit of prescribed tender procedures, or the regulations which authorize deviations from competitive bidding processes. In this regard it is trite that it was only incumbent on the applicant to establish a *prima facie* right, though open to some doubt. There can be little doubt, having regard to the facts before me at this stage, that the applicant has established such a right.

[21] Mr *Mbenenge SC*, who appeared for the first to fourth respondents, has not made any submissions in this regard, but opposed interim relief only on the bases that:

- (a) the applicant had failed to give 72 hours' notice as required in terms of section 34 of the General Law Amendment Act, 62 of 1955;
- (b) there has been non-joinder of the parents of learners who are parties to Related application which served before Goosen J during February 2014; and
- (c) the non-joinder of the Minister of Basic Education, who had assumed the executive functions of the department of education in

terms of section 100(1)(b) of the Constitution, is fatal to the application.

[22] In my view all these arguments were untenable. First, the applicant's attorney had written to the respondents on 18 March 2014 setting out the bases on which it contended the process was *prima facie* unlawful, and indicated its intention to apply urgently for appropriate relief. And, in addition, I was of the view that the notice given to the respondents was reasonable under the circumstances.

[23] Second, I was also of the view that the parents of learners involved in the matter that served before Goosen J cannot conceivably have any substantial interests in the outcome of this application. The purpose of the application is not to interfere with Goosen J's order, but only to ensure that the time limits mentioned therein are complied with in a lawful manner.

[24] And third, it was also not clear to me on what basis the Minister of Basic Education would have an interest in an application which is meant to stop a tender procedure which is *prima facie* unlawful. All the relevant departmental functionaries who are responsible for procurement, and have an interest in the outcome of the matter, had been duly cited. In the event, I have ordered that the application papers be served on the National Minister by 26 March 2014.

[25] I was satisfied that, the interim order effectively only prohibiting the placing of further orders from the other respondents, and the *rule nisi* being

returnable within a relatively short period of time, the balance of convenience was firmly in the applicant's favour. I was also of the view that the applicant has shown that it had no other satisfactory remedy and that it would indeed suffer irreparable harm if interim relief was not granted. I was thus satisfied that the applicant had established all the requirements for interim relief.

J. E SMITH
JUDGE OF THE HIGH COURT

Appearance

Counsel for the Applicants	:	Advocate Buchanan SC
Attorney for the Applicants	:	Gordon McCune 140 Alexander Road King Williams' Town Ref: Mr G McCune
Counsel for the First to Fourth Respondents	:	Advocate Mbenenge SC
Attorneys for the First to Fourth Respondent	:	State Attorney Office of the Premier King Williams' Town
Counsel for the Intervening Party	:	Advocate Muller
Attorneys for the Intervening Party	:	Legal Resources Centre 116 High Street Grahamstown Ref: Cameron McConnachie
Date Heard	:	25 March 2014