IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, GRAHAMSTOWN

CASE NO: 896/2014
DATE HEARD: 4/09/2014
DATE DELIVERED: 9/09/14
NOT REPORTABLE

In the matter between:

XHOBANI SECURITY CATERING AND DISTRIBUTION AGENCY CC **APPLICANT**

and

AMATHOLE DISTRICT MUNICIPALITY **1ST RESPONDENT**
SITA SECURITY SERVICES CC **2ND RESPONDENT**

Review of administrative decision – tender for security services in eastern, western and central regions of first respondent's area of jurisdiction – merits of review of award of tender for eastern region conceded – applicant contending that it should be awarded tender by court, while first respondent contending that matter should be remitted – applicant applying to compel first respondent to furnish record in terms of rule 53(1)(b) of uniform rules – held that as tender condition precluded applicant from being awarded more than one tender, and it had been awarded tender for western region, no possibility of court substituting its decision in favour of applicant in respect of eastern region – to order first respondent to furnish record in these circumstances would be pointless waste of time, effort and resources – application dismissed with costs.

JUDGMENT

PLASKET J

[1] The crisp issue that I am required to decide in this interlocutory application is whether the applicant is entitled to the record of a tender decision in terms of rule 53 of the uniform rules after the merits of the review application have been conceded by the administrative decision-maker, the first respondent.

[2] The first respondent invited bids for the provision of security services for its personnel and property. The invitation envisaged three separate tenders being awarded – for the central, eastern and western regions of its area of jurisdiction.

[3] The tender for the central region was awarded to Chipcor Asset Protection while the tender for the eastern region was awarded to the second respondent and that for the western region was awarded to the applicant. A contract was entered into by the applicant and the first respondent and the former is providing services to, and being paid therefor by, the first respondent.

[4] The applicant launched an application to review and set aside the award of the tender for the eastern region to the second respondent. The first respondent conceded that the tender was awarded irregularly and so the merits of the review application have been settled.

[5] The only outstanding issue is the remedy. The first respondent takes the view that once the award of the tender is formally set aside, the matter must be remitted for a fresh decision. The applicant takes the view that it should be awarded the tender and that the court dealing with the main application must order this rather than remittal.

[6] The applicant claims an entitlement to the record that arises directly, it says, from rule 53. It points to rule 53(1)(b) which, it is claimed in the replying affidavit, is ‘clear and unambiguous’, providing for ‘one jurisdictional factor for the provision of the record, namely, an application for the review of a decision’. Rule 53(1) provides:

‘(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 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 chairman of the court, tribunal or board or to the officer, as the case may be, and to all other parties affected-

(a) calling upon such persons to show cause why such decision or proceedings should not be reviewed and corrected or set aside, and

(b) calling upon the magistrate, presiding officer, chairman or officer, as the case may be, to despatch, within fifteen 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 he is by law required or desires to give or make, and to notify the applicant that he has done so.’

[7] It is not possible to determine why, at this stage of the proceedings, when the merits are no longer in issue, the applicant wants the record. The applicant is strangely coy in this regard stating only that the first respondent made some allegations in its letter in which it conceded the merits ‘which the applicant seeks to investigate and make its decision whether or not to pursue the matter’.

[8] The only possible reason for the applicant wanting the record must be to search for something to indicate that exceptional circumstances are present: s 8(1)(c)(ii) of the Promotion of Administrative Justice Act 3 of 2000 (the PAJA) entitles a court to substitute its decision for that of an administrative decision-maker in ‘exceptional cases’.

[9] But, in this case, even that reason is not open to the applicant. A tender condition provided that successful bidders would be awarded one tender only. The validity of this condition has not been challenged by the applicant. As the applicant was awarded the tender for the western region and is providing security services to the first respondent in that region, it could not be awarded the tender for the eastern region, even if exceptional circumstances are present.

[10] That being so, an order to compel the first respondent to furnish the record would be a pointless waste of time, effort and resources that would have no practical

effect. To order the furnishing of the record in this case would be as pointless as ordering discovery after a trial had been settled. Although the issue in *Jockey Club of South Africa v Forbes*[1] was different to the issue in this case, that case is nonetheless of relevance because Kriegler AJA stated that, despite rule 53's peremptory language, there was no reason to insist on a slavish adherence to the rule when to do so would be pointless.[2]

[11] I was referred to three judgments by Mr Shishuba who appeared for the applicant.[3] These judgments, he argued, established that an applicant was entitled to the record in review proceedings. That submission is undoubtedly correct, as far as it goes. The judgments he relies on must, however, be viewed in their proper context. In each of them, the review proceedings were still live. That single fact distinguishes them from this case.

[12] The rules of court exist for a purpose. They are, as Van Winsen AJA said in *Federated Trust Ltd v Botha*,[4] 'not an end in themselves to be observed for their own sake' but are intended to 'secure the inexpensive and expeditious completion of litigation before the courts'. Moreover, courts, generally speaking, concern themselves with deciding live, concrete disputes:[5] Holmes JA, in *Rajah & Rajah (Pty) Ltd & others v Ventersdorp Municipality & others*,[6] said that 'the Court is disinterested in academic situations'.

[13] For these reasons, even if rule 53(1)(b) is mandatory in its terms, the applicant is not entitled to the record.

---

[1] *Jockey Club of South Africa v Forbes* 1993 (1) SA 639 (A).
[2] At 661F-G.
[3] See *Aquafund (Pty) Ltd v Premier of the Province of the Western Cape* 1997 (7) BCLR 907 (C), an application to furnish information in terms of s 23 of the interim Constitution; *Ekuphumleni Resort (Pty) Ltd & another v Gambling and Betting Board, Eastern Cape & others* 2010 (1) SA 228 (E), an application in terms of rule 53 to compel the respondent to provide certain information in an uncensored form; and *Zuma v Democratic Alliance & others* (836/2013) [2014] ZASCA 101 (28 August 2014), an application to compel the furnishing of audio recordings and documents in a review of a decision to discontinue a prosecution.
[4] *Federated Trust Ltd v Botha* 1978 (3) SA 645 (A) at 645C-D.
[5] *Shoba v Officer Commanding, Temporary Police Camp, Wagendrift Dam & another; Maphanga v Officer Commanding, South African Police Murder and Robbery Unit, Pietermaritzburg & another* 1995 (4) SA 1 (A) at 14F-G; *Maccsand (Pty) Ltd & another v City of Cape Town & others* 2011(6) SA 633 (SCA) para 39.
[6] *Rajah & Rajah (Pty) Ltd & others v Ventersdorp Municipality & others* 1961 (4) SA 402 (A) at 408A-B.

[14] The application is dismissed with costs.

_____

C Plasket

Judge of the High Court

APPEARANCES

Applicant: MH Shishuba instructed by GM Yeko Attorneys

Respondent: SC Rorke SC instructed by Dold and Stone