

**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, PORT ELIZABETH**

Case no: 3900/2010
Date Heard: 18/01/2011
Date Delivered: 19/01/2011

In the matter between:

**MONOCEROS TRADING 135 CC T/A
METRO SECURITY SERVICES**

APPLICANT

Versus

NELSON MANDELA BAY MUNICIPALITY

1ST RESPONDENT

**FIDELITY SECURITY SERVICES
(PTY) LTD**

2ND RESPONDENT

SIZWE RISK CONSULTANTS CC

3RD RESPONDENT

**NATIONWIDE SECURITY HOLDINGS
(PTY) LTD**

4TH RESPONDENT

UMSIMBITHI SECURITY SERVICES

5TH RESPONDENT

JUDGMENT

SANDI J:

[1] In this application the applicant seeks an order morefully set out in Part A of the notice of motion against the Nelson Mandela Bay Metropolitan Municipality (the first respondent). In essence, it is an application for access to information in the possession of the first respondent which is relevant to a tender for the provision of

security services, access control, patrol duties and escort services.

[2] The application was launched and served on the first respondent on 23 December 2010. In the notice of motion the first respondent was granted an opportunity until 4 January 2011 to file its notice of opposition and its answering affidavits, if any, by the close of business on 7 January 2011.

[3] No notice of opposition or answering affidavits were delivered by the first respondent. Instead Mr Buchanan SC, who appears for the first respondent together with Mr Nobathana, handed up from the bar a draft order which reads :

“

1. The First Respondent undertakes, within five (5) court days, to deliver the record concerning all decisions taken by the First Respondent in respect of contract enquiry 45/5, which was originally advertised on 8 April 2009.
2. The First Respondent further undertakes to provide, within five (5) days, reasons for all relevant decisions taken in respect of the aforementioned contract enquiry.

The costs occasioned by the hearing on 18 January 2011 are reserved for decision at the hearing of the main application herein.”

[4] Mr Quinn SC, who appears together with Mr De Waal for the applicant, declined to accept the undertaking and submitted that the applicant has made out a case for the relief sought in Part A of the notice of motion.

[5] Mr Buchanan submitted that the applicant will not suffer any

prejudice by an acceptance of the undertaking. He submitted that the question of costs should be decided at a later stage when the main application is heard.

[6] I have not been referred to any authority which enjoins the applicant to accept the undertaking tendered by the first respondent.

[7] A brief history of this litigation satisfies me that the stance adopted by the applicant is appropriate in the circumstances of this case.

[8] The tender which forms the subject-matter of these proceedings was advertised by the first respondent on 8 April 2009. The closing date for the submission of tenders was 7 May 2009. The applicant's tender was submitted timeously on 29 April 2009.

[9] The tender that we are concerned with was intended to replace a previous one which was to expire on 7 September 2009.

[10] After consideration of the applicant's tender, it was awarded the highest score *vis a vis* the other tenders that were considered and evaluated.

[11] First respondent's Directorate: Budget and Treasury recommended that the tender be awarded to the applicant for a period of three years and failing capacity or proper execution, to the second, third or fourth respondents.

[12] At a meeting held on 5 January 2010 first respondent's security director advised the applicant that the tender was awarded to it.

[13] However, on 13 January 2010, the letter of 5 January 2010 which awarded the tender to the applicant was withdrawn by the first respondent in writing. The letter of withdrawal was written by T Motatsi, the Acting Director: Supply Chain Management Unit. In that letter Motatsi advised that as the contract was in excess of R10 million, it had to be approved by the Municipal Manager. According to Motatsi that approval was outstanding. He stated that the letter of 5 January 2010 was despatched to the applicant prematurely. Motsatsi advised the applicant that he would inform it of the outcome of the award and the approval.

[14] Thereafter nothing happened until April 2010 when the applicant launched an application for a mandamus.

[15] The mandamus was settled and on 6 May 2010 an Order of

Court was obtained by agreement. That Order reads as follows:

“

1. That the (first) Respondent decide the tender contract 45/5 for the provision of protection, access control and escort services, and to communicate its decision to the Applicant within 14 calendar days of this Order.
2. That the (first) respondent pay the Applicant's costs including the costs of two counsels.”

[16] On the same day, i.e 6 May 2010, the applicant came into possession of two documents. The first document is a report by the Executive Director: Safety and Security to the Evaluation Committee requesting a deviation from the Procurement Process of the first respondent. The report stated that on 7 December 2009 the Bid Adjudication Committee held a meeting at which it did not approve the contract because it required clarity on the specifications. However, the report goes on to state that on 14 December 2009, and once clarity had been obtained regarding the specifications, the Bid Adjudication Committee approved the contract. From the above it is apparent that the tender of the applicant was approved on 14 December 2009.

[17] In the said report it is stated that the current contract of the fourth and fifth respondents (who are not opposing the relief sought in Part A) which terminated on 30 January 2010 would be extended on a month to month basis “in order to allow sufficient time for the completion of the ... administrative processes.” The Municipal

Manager approved the document by appending his signature to it.

[18] The Municipal Manager authorised the extension of the services of the fourth and fifth respondents on a month-to-month basis from 1 February 2010 for a period not extending beyond 31 March 2010.

[19] It is to be noted that there is no indication as to what the status of the contract is from 31 March 2010 to date hereof.

[20] Purporting to comply with the Order of Court obtained on 6 May 2010, the Municipal Manager referred the matter back to the Bid Adjudication in spite of the fact that it had awarded the tender to the applicant.

[21] On 2 June 2010 the applicant's attorney wrote to the first respondent's attorney in the following terms:

"To that end, as a matter of urgency, please furnish us with a copy of the minutes of the meetings of the Bid Evaluation Committee and the Bid Adjudication Committee and all correspondence reports and documents which go to make up the record of decision. We are aware that the Bid Adjudication Committee met on 7 December 2009 and it resolved to award the tender contract to our client at its meeting of 14 December 2009.

Since both in terms of legislation and the provisions of your client's procurement policy your client is required to act with transparency there should be no need for us to invoke the provisions of the Access to Information Act nor Rule 53."

In that letter the applicant's attorneys queried the decision to refer

the matter to the Bid Adjudication Committee for its reconsideration.

[22] First respondent's attorneys acknowledged the above letter and undertook to revert to the applicant - which has not been done to this day.

[23] On 3 June 2010 the first respondent's contracts controller, one Vanessa Balie, was advised that the applicant's tender price was still valid. This was said in response to an enquiry made by Vanessa Balie. This enquiry must have given some hope to the applicant that the matter was being considered. Due to the lack of response from the first respondent, the applicant filed a formal application for access to the records of the first respondent relevant to the tender on 22 November 2010. Those records have not been furnished.

[24] During argument Mr Buchanan conceded that there is no legal basis upon which the first respondent can refuse to give the applicant access to the documents and information sought by it in Part A of the notice of motion. However, counsel submitted that the undertaking to furnish the applicant with documents relevant to the tender, would have the same effect as the Order to compel the furnishing of documents as set out in the notice of motion. He submitted that if the undertaking was not complied with by the first

respondent, it was open to the applicant to return to Court at short notice to the first respondent to ask for an appropriate order.

[25] I understood Mr Buchanan to be saying that the documents and information requested are available but cannot be made available to applicant as they are in the process of being prepared and collated.

[26] In view of the history of the matter and the failure by the first respondent to comply with its legal obligation, I am persuaded that the applicant is entitled to the relief sought in the Notice of Motion. In the absence of a Court Order, I do not think that the undertaking will adequately protect the applicant's right which is, in any event, not disputed by the first respondent.

[27] On the evidence placed before me the tender in question was awarded to the applicant. The subsequent withdrawal thereof and the extension of the contract in favour of the fourth and fifth respondents for reasons which do not commend themselves to me, I am of the view that the applicant has a lawful right to the documents set out in the notice of motion. As stated in *Aquafund Pty Ltd v Premier of the Province of the Western Cape 1997 (7) BCLR 907 (C) at 913* I the applicant "reasonably requires the information to enable it to determine whether or not its right to

lawful administrative action... has been violated."

At page 915 I - 916 A of the above judgment the following was stated:

"If the applicant is entitled to lawful administrative action, it must, in my view, follow that it will be entitled to all such information as may be reasonably required by it to establish whether or not its right to lawful administrative action has been violated. The applicant will reasonably require this information to make an informed decision on the future conduct of the matter. If it is shown that the tenders were properly considered, the applicant can abandon any proposed application for a review of the decision. If not, the information will enable the applicant to properly formulate the grounds of review."

At 916 D it is stated that "(t)he right which the applicant is seeking to protect is *not* the right to have the decision of the board reviewed with a view to eventually being awarded the contract."

[28] In the present matter, the applicant is seeking to protect its right to lawful administrative action by having access to the information in the possession of the first respondent to enable it to determine whether or not its right to lawful administrative action has been violated.

[29] By its nature the application is urgent. In any event, the applicant has placed sufficient evidence before me in support of urgency.

[30] On the question of costs I am satisfied that an order awarding

the costs of two counsels is warranted. No argument was advanced by the first respondent's counsel as to why such an order should not be made. The only argument advanced by the first respondent's counsel is that the costs be reserved for determination in the application.

[31] On 17 January 2011 the first respondent's attorney was requested in writing to apply her mind to the matter and to consent to the order sought by the applicant. On the same day applicant's heads of argument were telefaxed to the first respondent's attorney. This was an attempt by applicant's attorney to avoid the incurring of unnecessary costs. There was no response from the respondent's attorney.

[32] In the circumstances the following Order is made:

1. The first respondent is directed to provide the applicant, within five days after the date of this Order, with all documentation regarding decisions taken in respect of contract enquiry 45/5: Protection/ Access/ Control/ Escort Services which was advertised on 8 April 2009, including :

1 All minutes (being a brief summary of

events or transactions especially the record of proceedings whether in writing or audio) of the Bid Evaluation Committee and the Bid Adjudication Committee including all reports, memoranda and documents submitted to the said committee by municipal officials, directorates and departments, concerning contract enquiry 45/5: Protection/ Access/ Control/ Escort Services, particularly the minutes of the Bid Evaluation Committee and the Bid Adjudication Committee of 7 December 2009 and the minutes of the Bid Adjudication Committee of 14 December 2009..

- 1 All written reports and recommendations of the Bid Evaluation Committee including supporting documents, to the Bid Adjudication Committee concerning contract enquiry 45/5: Protection/ Access/ Control/ Escort Services.
- 1 All written reports and recommendations of the Bid Adjudication Committee including

supporting documents, to the Accounting Officer and / or the Acting Municipal Manager concerning contract enquiry 45/5: Protection/ Access/ Control/ Escort Services.

- 1 The written decisions of the Accounting Officer and / or the Acting Municipal Manager on the reports and / or recommendations of the Bid Evaluation Committee and / or the Bid Adjudication Committee in terms of which it was decided to deviate, ratify or reject the recommendations of the said Committees and / or refer the decisions of the said Committees back to either of the Committees for reconsideration in respect of contract enquiry 45/5: Protection/ Access Control / Escort Services.

- 1 The written reasons for the Accounting Manager and / or the Acting Municipal Manager of 5 May 2010 for the decision to refer the recommendations of the Bid Evaluation Committee and / or the Bid

Adjudication Committee for its
reconsideration

1 The decision of the Bid Adjudication
Committee on the referral mentioned in
paragraph 1.5 above.

1 All documents relating to the extension of
the tender contracts and / or documents
relating to the month by month appointment
of Nationwide Security and Umsimbithi
Security Services in relation to the provision
of security services of Nelson Mandela Bay
Metropolitan Municipality during the period 1
September 2009 to 31 December 2010.

1 All municipal council
minutes and / or
minutes of the
Executive
Committee and / or
the Mayoral
Committee and the
record of decisions

in respect of
 contract enquiry
 45/5: Protection/
 Access Control/
 Escort Services
 including decisions
 to abandon contract
 enquiry 45/5 and /
 or re-advertise for
 bids/tenders to
 perform Protection/
 Access Control/
 Escort Services for
 Nelson Mandela Bay
 Metropolitan
 Municipality.

- 2 That the first
 respondent pay the
 costs of this
 application
 including the costs
 of two Counsel.

Sandi J,
Judge of the High Court
Eastern Cape, Port Elizabeth

<u>Appearances</u>	:	
Counsel for the Applicant	:	MR QUINN SC (with him MR DE WAAL)
Attorneys for the Applicant	:	Carol Geswint
Attorney for the Respondents	:	MR BUCHANAN SC (with him MR NOBATHANA
Attorneys for the Respondents	:	Lulama Prince and Associates

