

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No.: 2300/2013

In the matter between:-

SMEC SOUTH AFRICA (PTY) LTD
(PREVIOUSLY KNOWN AS VELA CONSULTING
ENGINEERS (PTY) LTD

Applicant

and

MANGAUNG METRO MUNICIPALITY
THE COMMISSIONER FOR THE SOUTH
AFRICAN REVENUE SERVICES

1st Respondent

2nd Respondent

HEARD ON: 18 JUNE 2013

JUDGMENT BY: ZIETSMAN, AJ

DELIVERED ON: 27 JUNE 2013

- [1] The applicant issued an urgent application out of this Court on 12 June 2013, to be heard on 18 June 2013, in which the applicant, amongst others, moves for a declaratory order in which the first respondent is obliged to report and furnish to applicant certain information regarding a tender process in which the applicant was one of the tenderers on a project of the first respondent.

- [2] The first respondent filed opposing affidavits on 18 June 2013, and the second respondent filed a notice to abide on 13 June 2013.
- [3] No replication had been filed by the applicant.
- [4] During the hearing of the matter, the applicant (with the information it obtained from the opposing affidavit of the first respondent), decided not to proceed with the orders sought in paragraphs 2 and 3 of the Notice of Motion. It still, however, argued that condonation should be granted permitting the applicant to enrol the application as an urgent application, and furthermore, the applicant still moves for an order that the first respondent pay the applicant's costs in both the application number 432/2013 (the previous application) as well as the present application.
- [5] The reason why the applicant do not proceed with the declaratory order, is because of the fact that the first respondent answered in its answering affidavit that (according to annexure 'SM3" thereto) the applicant's tender having been considered by the first respondent was unsuccessful for the project and reasons for this unsuccessful tender was furnished by the Mangaung Municipality to the Legal Services Department already on 28 May 2013.
- [6] The applicant's contention is that the main reason why the present urgent application was lodged, was because of the

fact that the first respondent (notwithstanding various requests thereto) failed to inform the applicant whether the applicant's tender was submitted and evaluated during the tender process, and/or what the outcome of the tender process was. In this instance it is important to note that the applicant, through its attorneys, amongst others, enquired from the first respondent's Department: Legal Services, Advocate Naidoo on 27 May 2013 that they have not received any formal confirmation that the applicant's tender would have formed part of the evaluation process, and that it came to his client's attention that a tender has been awarded to a Johannesburg based company. Reasons and/or disclosure of the correct facts and information were enquired.

- [7] On 31 May 2013 a letter was again addressed to Advocate Naidoo of the first respondent's Legal Services Department in which reference is made thereto that no response was received by the applicant and that the applicant will proceed with the necessary court application in this regard.
- [8] On 31 May 2013 the first respondent replied by way of an e-mail by one Karin von Wielligh, as follows:

"We hereby acknowledge receipt of your letters and wish to inform you that the matter is receiving our attention.

The Municipality was unable to submit the requested information within the stringent time frame provided in your letter dated 27 May 2013.

Legal Services is in the process of coordinating the required information and will respond to you shortly."

[9] Then again on 3 June 2013 a letter was addressed to Advocate Naidoo enquiring the information regarding the tender process, if the applicant's tender was accepted or not, the reasons therefore, whether the tender was awarded to someone else, the name of such other successful tenders etc. The aforesaid information was requested before or on Wednesday, 5 June 2013, 12h00, because of the fact that the applicant needed the aforesaid information to enable them to file an appeal in terms of section 62 of the Systems Act or a review application, if need be.

[10] On 4 June 2013 the aforesaid Karin von Wielligh, on behalf of the Legal Services Department of the first respondent, responded as follows:

“We hereby acknowledge receipt of your letter, dated 3 June 2013.

Your request for information should be dealt with in terms of the Access to Information Policy of the Municipality and has therefore been referred to Mr Sabata Taje...

Kindly liaise with him directly with regards to the process that needs to be followed.”

[11] The applicant thereafter issued the present urgent application. As referred to above, the applicant realised from the opposing papers in this application that the applicant's tender was indeed unsuccessful, which fact was indeed conveyed to the Legal Services Department of the first respondent already on 28 May 2013. The last-mentioned fact is confirmed in the opposing affidavit.

- [12] It is quite clear that the first respondent, through its Legal Services Department, was in possession of the necessary information regarding the fact that the applicant's tender was unsuccessful, and the reasons therefore, on 28 May 2013. When a further demand was dispatched to the Legal Services Department on 3 June 2013 by the applicant's attorneys, requiring such information, it would have been quite easy for the Legal Services Department of the first respondent to enlighten the applicant of the reasons for the fact that its tender was unsuccessful, which was in the Legal Services Department possession on 28 May 2013 as per annexure "SM3" to the opposing papers.
- [13] It is furthermore clear that the reason why the Legal Services Department sent an e-mail to the applicant on 4 June 2013 whereby it indicated to the applicant that they must utilise the internal process of access to information manual, in order to obtain information, it did so most probably, because it felt that the municipality could not be bullied into the furnishing of information within the timeframes as the applicant has set down.
- [14] In the aforesaid circumstances, it is understandable why the applicant thereafter launched an urgent application to obtain such information, which was for no good reason, withheld from the applicant.
- [15] In the circumstances, and whereas the first respondent is obliged to be open and transparent, with specific regard to

such a tender process, as to at least who was successful and who was unsuccessful in the tender bidding and the reasons therefore, it is understandable why the applicant launched the present application. In those circumstances I am inclined to accept the arguments on behalf of the applicant that it was obliged to lodge the present urgent application and that it should be awarded the costs of the application.

[16] Although the present applicant also moves for the costs of application number 432/2013, a previous application, such previous application had to do with an order to compel the first respondent to accept the applicant's bid in the aforesaid tender process. That order was taken by agreement (although there was an initial notice of intention to oppose). The first respondent complied with that order and the applicant's bid was evaluated together with other tenders. The order made as far as costs, in that application, was that costs should stand over. It is not clear why the court ordered such a costs order, whereas that application was finalised at that stage. I am of the view that I should not exercise my discretion, as far as the costs of that application is concerned, in the present application. I therefore make no order as to costs with reference to case number 432/2013.

[17] As far as the present application is concerned under case number 2300/2013, I am satisfied that the application brought by the applicant was of an urgent nature, and that the applicant should be awarded the costs of the application.

[18] On the aforesaid basis I make the following orders:

18.1 Under case number 432/2013 no order as to costs is made.

18.2 In case number 2300/2013, the costs of the application is awarded in favour of the applicant, and therefore the first respondent is ordered to pay such costs.

P. ZIETSMAN, AJ

On behalf of applicant:

Adv J.Y. Claasen SC
Instructed by:
Alberts Attorneys
BLOEMFONTEIN

On behalf of first respondent:

Adv Rathadili
Instructed by:
Moroka Attorneys
BLOEMFONTEIN

/spieterse