

IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Case No: 3564/2013

In the matter between:

BLACKBIRD TRADING T/A BB TECH

Applicant

versus

MANGAUNG METROPOLITAN MUNICIPALITY

1st Respondent

NAMBITI TECHNOLOGIES

2nd Respondent

CORAM:

NAIDOO, AJ

HEARD ON:

21 NOVEMBER 2013

DELIVERED ON:

28 NOVEMBER 2013

JUDGMENT

[1] This is an application in which the applicant seeks the following order:

“1. That, pending the outcome of mediation proceedings or, in the event of a failed mediation, the final adjudication of an action or application to be instituted within 20 days after the conclusion of the mediation in order to establish the respective rights of the parties:

1.1 The First Respondent be interdicted and restrained from limiting, curtailing or invading in any unlawful manner the Applicant's contractual rights in terms of Purchase Contract No. C051/A;

1.2 The First Respondent be ordered to allow the applicant to continue rendering the goods and services contemplated in

terms of Purchase Order No C051/A for as long as the contract prevails:

- 1.3 The First Respondent be interdicted and restrained from procuring or utilizing any services, goods or products of the Second Respondent or any third party that falls within the ambit of the goods and services that the Applicant is obligated to render to the First Respondent in terms of Purchase Contract No. C051/A for as long as the contract prevails;
2. That the First Respondent be ordered to pay the cost of the application, save in the event of the Second Respondent opposing then, and in such event, the First and Second Respondents be ordered to pay the costs of the application jointly and severally – the one paying the other to be absolved.
3. Further and /or alternative relief.”

[2] The first respondent opposed the application, alleging fraud and impropriety on the part of the applicant, a breach of contract by the applicant and that the contract was void *ab initio* largely because the applicant failed to register for Value Added Tax (VAT) in terms of section 23 of the South African Revenue Act 56 of 1999. The second respondent did not oppose the application. Mr WA Van Aswegen appeared for the applicant while the first respondent was represented by Mr TL Manye.

[3] The first respondent called for tenders for the supply and maintenance of computers and related equipment, and the installation and configuration of network equipment, in response to which the applicant placed a bid for the provision of the required goods and services. Following the successful bid by the applicant, the first respondent and the applicant entered into Purchase Contract No C051/A (the Purchase

Contract) during December 2011, which extensively regulated the contractual relationship between the applicant and the first respondent. Notwithstanding the date of signature, the contract was to endure for a period of three (3) years, from 26 October 2011 to 25 October 2014.

- [4] It is perhaps useful to highlight certain provisions of the Purchase Contract, which are pertinent to the present application and which will serve to contextualise the current dispute. These are clauses 20, 21 and 24, which provide as follows:

“20. BREACH OF AGREEMENT

20.1 In the event that either of the parties is in breach of any term of this Agreement, and fails to remedy such breach within **14 (fourteen) days** after receipt of a notice calling upon it to do so, then in such event the party furnishing the notice shall be entitled to:

20.1.1 compel the other party to comply with the terms and obligations of the contract;

20.1.2 cancel the contract forthwith;

20.1.3 in both instance, claim any damages suffered as a result of the breach.

21. TERMINATION FOR DEFAULT

21.1 The Municipality may, without prejudice to any other remedy for breach of contract, by written notice of default sent to the Contractor, terminate this contract in whole or in part:

21.1.1 if the Contractor fails to deliver any or all of the goods within the period(s) specified in the contract, or within any extension thereof granted by the Municipality;

21.1.2 if the Contractor fails to perform any other obligation(s) under the contract; or

21.1.3 if the Contractor, in the judgment of the Municipality, has engaged in corrupt or fraudulent practices in competing for or in executing the contract.

21.2 In the event that the Municipality terminates the contract in whole or in part, the Municipality may procure, upon such terms and in such manner, as it deems appropriate, goods similar to those undelivered, and the Contractor shall be liable to the Municipality for any excess costs for such similar goods, works or services. However, the Contractor shall continue performance of the contract to the extent not terminated.

24. SETTLEMENT OF DISPUTES

24.1 If any dispute or difference of any kind whatsoever arises between the Municipality and the Contractor in connection with or arising out of the contract, the parties shall make every effort to resolve amicably such dispute or difference by mutual consultation.

24.2 If, after thirty (30) days, the parties have failed to resolve their dispute or difference by such mutual consultation, then either the Municipality or the Contractor may give notice to the other party of his intention to commence with mediation. No mediation in respect of this matter may be commenced unless such notice is given to the other party. If the Parties are unable to agree on the choice of a Mediator, any Party may apply to the President for the time being of the Law Society of the Free State Provinces or another mutually agreed nominating organisation, to appoint a Mediator. If the Parties accept the recommendations of the Mediator, the

Parties shall record such recommendations in an agreement, which shall be legally binding on the Parties.

24.3 Should it not be possible to settle a dispute by means of mediation, it may be settled in a South African court of law.

24.4 Notwithstanding any reference to mediation and/or court proceedings herein:

24.4.1 the parties shall continue to perform their respective obligations under the contract unless they otherwise agree; and

24.4.2 the Municipality shall pay the Contractor any monies due to the Contractor for goods delivered and services rendered according to the prescripts of the contract.”

- [5] It is common cause that the applicant performed in terms of the contract, for just over a year after signature of the Purchase Contract, and was paid approximately R14 million by the first respondent. By way of a letter dated 15 February 2013, the first respondent unilaterally suspended the contract *“pending finalisation of an investigation into non-compliance with Supply Chain Management practises”*. From the papers it is apparent that the applicant made several attempts to obtain further information regarding the suspension of the contract, without success. On 19 June 2013, the applicant received a communication via electronic mail from the first respondent, advising that *“the outcome of the investigation was forwarded to our Anti-Fraud and Corruption unit for their recommendations”*. It is apparent from this that the investigation was complete, as the outcome thereof was

forwarded as indicated. The applicant's complaint is that up to the date of the hearing of this matter, it had not received a report or any other information concerning the investigation.

- [6] It is also common cause that shortly after the first respondent suspended the Purchase Contract with the applicant, it employed another service provider to provide the goods and services that it had contracted with the applicant to provide, without taking any of the steps stipulated in the Purchase Contract, particularly as provided for in clauses 20, 21 and 24 of the contract.
- [7] Mr Manye indicated during argument that the report relating to the investigation is not complete and that a fair order would be to direct the first respondent to complete the report, so that an assessment can be made as to whether the Purchase Contract is illegal or not. Mr Manye also conceded that the first respondent has made serious allegations against the applicant in its Answering Affidavit, without the necessary substantiation. In addition, he conceded that the City Manager, acting as Accounting Officer of the first respondent, was perhaps hasty in suspending the contract and employing another contractor. It is clear that certain information would have been brought to the attention of the Accounting Officer, which precipitated her action. It is also not disputed that she was acutely aware of her responsibility to protect public funds (as she is expected to do), and to act in accordance with that responsibility. An investigation was

launched, but seemingly prior to the investigation being finalised, the first respondent took the action that it did to suspend the contract with the appellant and employ another contractor. The appellant was not informed of the outcome of the investigation, which appears to have been completed, at least by June 2013, nor was it given the opportunity to respond to what appear to be serious allegations levelled against it. Additionally, if the first respondent had found any fraud or corrupt conduct on the part of the applicant, it was statutorily obliged in terms of the Municipal Finance Management Act 56 of 2003 and the Preferential Procurement Policy Framework Act 5 of 2000 to act against the applicant. It has not done so. The first respondent also failed to act in terms of the prescripts of the Purchase Contract, which remains a valid contract. The terms of which are binding on the first respondent.

- [8] The first respondent has made a number of bald statements and allegations in its Answering Affidavit regarding fraud and improper conduct on the part of the applicant, without any substantiation. In this regard, Mr Van Aswegen referred the court to an excerpt from the case of **Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Officer, South African Social Security Agency and Others** 2013(4) SA 557 (SCA), which was a case involving a public tender. Nugent JA said at paragraph 4 on page 559:

“Whatever place mere suspicion of malfeasance or moral turpitude might have in other discourse, it has no place in the courts – neither in the evidence nor in the atmosphere in which cases are conducted. It is unfair, if not improper, to impute malfeasance or moral turpitude by innuendo and suggestion. A litigant who alleges such conduct must do so openly and forthrightly so as to allow the person accused a fair opportunity to respond. It is also prejudicial to the judicial process if cases are adjudicated with innuendo and suggestion hovering in the air without allegations being clearly articulated. Confidence in the process is built on transparency and that calls for the grounds upon which cases are argued and decided to be openly ventilated.”

This was said in relation to suggestions and innuendo in the appellant’s affidavits regarding dishonesty and corruption, but which were not pursued as part of the arguments in court. I am in agreement that the views of the learned judge in this regard also find application in this case.

- [9] The first respondent has not provided any challenge to the applicant’s averments that it would suffer irreparable harm if the relief it seeks in this application is not granted. Although Mr Manye, in argument, suggested that the applicant has the option to bring an action for damages against the first respondent, he avoided dealing with the applicant’s averments in this regard, made in the Founding Affidavit. The first respondent similarly did not deal with this in its Answering Affidavit, save to deny the allegations. With regard to the balance of convenience, the first respondent

does not dispute the allegations of the appellant in the Founding Affidavit, but merely states that the contract between it and the appellant was void *ab initio*. The further allegation made by the first respondent in this regard that its employees/officials who unlawfully failed to comply with several statutes in procuring goods and services on behalf of the first respondent have resigned, appears to have no relevance to the issue of balance of convenience.

[10] The first respondent is privy to information that enables it to assess whether or not the applicant has committed a breach of contract or has acted improperly in securing the bid relevant to this matter. If it so finds, then it has the option to proceed in terms of clause 20, 21 or 24 of the Purchase Contract and take the steps provided for therein. The applicant, in any event, seeks interim relief and not a final order in this matter.

[11] On a consideration of all the circumstances relevant to this matter, I am of the view that the applicant has established a case for the relief that it seeks and I accordingly make the following order:

11.1 Pending the outcome of mediation proceedings or, in the event of a failed mediation, the final adjudication of an action or application to be instituted within twenty (20) days after the conclusion of the mediation in order to establish the respective rights of the parties:

- 11.1.1 The First Respondent is interdicted and restrained from limiting , curtailing or invading in any unlawful manner the Applicant's contractual rights in terms of Purchase Contract No C051/A.
 - 11.1.2 The First Respondent is ordered to allow the Applicant to continue rendering the goods and services contemplated in terms of Purchase Contract No. C051/A for as long as the said contract prevails;
 - 11.1.3 The First Respondent is interdicted and restrained from procuring or utilising any services, goods or products of the Second Respondent or any third party, which fall within the ambit of the goods and services that the applicant is obliged to render to the first respondent in terms of Purchase Contract No. C051/A for as long as the said contract prevails.
- 11.2 The First Respondent is ordered to pay the costs of this application.

S. NAIDOO, AJ

On behalf of the applicant: Adv. W.A. van Aswegen
Instructed by:
Peyper Sesele Attorneys
BLOEMFONTEIN

On behalf of the respondent: Adv. T.L. Manye
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