

**IN THE HIGH COURT OF SOUTH AFRICA
(TRANSVAAL PROVINCIAL DIVISION)**

UNREPORTABLE

Case No: 29635/2000

Date heard: 22/03/2005

Date of judgment: 27/07/2005

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: /NO

(2) OF INTEREST TO OTHER JUDGES: /NO.

(3) REVISED.

In the matter between:

Nu- Vita Stationaty Manufacturers (Pty) Ltd

Applicant

and

Mr Thaba Mafumadi

1st Respondent

The Northern Province Tender Board

2nd Respondent

Mr lannie ZMoolman

3rd Respondent

Advocate Ben Bokkie Mohlala

4th Respondent

JUDGMENT

DU PLESSIS J:

Over one million pupils in the Limpopo Province must be supplied with stationary in the first term of every school-year. In order to procure the stationary, the tender board of the province (the second respondent) annually calls for tenders for the supply of such stationary. Tender NTP 6830 called for tenders in respect of the 1999 school-year, tender NTP 6861 called for tenders in respect of 2000 and tender NTP 7308 called for tenders in respect of 2001. In each of these years the applicant submitted a tender, but without any success. As a separate contract to supply the stationary is concluded in respect of each school district within the province, the second respondent concluded contracts with a relatively large number of successful tenderers.

On 17 November 2000 the applicant launched this application seeking an order reviewing and setting aside the tender awards in respect of the 2001 school-year. Although the relevant prayer in the notice of motion is inelegantly phrased, I assume in the applicant's favour that it also sought the review and setting aside of the tender awards for 1999 and 2000. As it turns out, all of this is now academic as the relevant tenders have not only been awarded but all the stationary have been supplied and all the suppliers have been paid. In the circumstances no effective order reviewing and setting aside the relevant tender awards can be made.

There is one remaining issue that is not moot however. Relying on the provisions of section 8(1)(c)(ii)(bb) of **the Promotion of Administrative Justice Act, 3 of 2000** (PAJA), the applicant asks this court to order the respondents to pay to it (applicant) compensation in the amount of R46 252 745,00.

Before I deal with the applicant's claim for compensation, I must make two preliminary observations.

Firstly, PAJA came into operation on 30 November 2000, after this application had been launched. For the respondents Mr Maritz submitted that the relevant provision of PAJA does not have retrospective effect and that the applicant's claim for compensation for that reason alone cannot succeed. I shall assume, without so finding, that P AJA applies to the applicant's claim. I do that because, even if PAJA did not apply, the applicant might have a claim for constitutional damages in terms of section 38 of the **Constitution of the Republic of South Africa, 1996** (as to which see the discussion in **Chaskalson *et al*, Constitutional Law of South**

Africa (9.3 (h)). Therefore, I prefer to consider the merit of the applicant's claim for compensation.

Secondly, I have serious doubt whether the applicant has made out a case for the review and setting aside of the tender awards. Although the parties, mainly the applicant, have managed to produce nearly 1500 pages of papers, the applicant's case for review does not seem to go beyond generalised complaints and arguments. I do not find it necessary however to make any firm finding in this regard. I shall assume in the applicant's favour that it has made out a case to review and set aside the relevant decisions.

According to the notice of motion, the applicant seeks compensation in the amount of R26 489 633,82 in respect of the tender for 2001. In respect of 1999, the applicants seeks R929 205,15 and in respect of 2000 R18 833 906,03.

In terms of section 8(1)(c)(ii)(bb) of PAJA, a court that sets aside administrative action on review, may "in exceptional cases ... direct the administrator or any other party to the proceedings to pay compensation".

The only allegation that the applicant makes and that might be taken as an attempt to show that the present case is exceptional, is that the relationship between it and the respondents is "damaged beyond repair". I assume in favour of the applicant that one must infer that compensation is its only appropriate remedy. I shall assume that that is an exceptional circumstance.

As regards the claims in respect of 1999 and 2000, the applicant did not in the papers even attempt to show how these amounts are made up and why the court should award such amounts as compensation. The claim for these amounts must fail.

As regards the claim in respect of 2001, the applicant, in the founding affidavit, baldly (and rather boldly) states that it would have made a profit of 31 % on the tender amount. The R26 489 633,82 that the applicant seeks as compensation is that alleged profit. In an affidavit in support of one of a number of amended notices of motion, the applicant seeks to substantiate this claim by setting out its costs in respect of the different items of stationary. This attempt amounts to no more than a statement of figures.

The applicant states a conclusion but does not by way of evidence put the court in a position independently to assess the potential profits the applicant

could have made. In the result the applicant has completely failed to prove the allegation that it would have made profit in the amount claimed.

There is a further reason why the applicant's claim for compensation cannot succeed. The claim is premised thereon that the applicant's tender should have been successful in respect of every single district in the Limpopo Province. I have pointed out that, ordinarily, a different contract is entered into in respect of each district and that different suppliers are used. While it is notionally possible that one supplier might be successful in respect of more than one district, it is quite improbable that one supplier could be successful in respect of all districts. Moreover, the applicant does not even show that its tender was lower than that of any of the tenders actually awarded.

In the result the applicant is not entitled to any compensation.

The respondents were represented by two counsel. Regard being had to the sheer bulk of the papers and the vast amounts claimed as compensation, the employment of two counsel was warranted.

The application is dismissed with costs, including the costs of two counsel.

A handwritten signature in black ink, appearing to read 'B.R. du Plessis', with a stylized flourish at the end.

B.R. du Plessis

Judge of the High Court