

IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG DIVISION, PRETORIA

CASE NO: 2019/61441

In the matter between:

MAGOBA MATHUPI ASS (PTY) LTD

Applicant

and

EKURHULENI METROPOLITAN MUNICIPALITY

Respondent

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JUDGMENT

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MOKOSE J

[1] This is an urgent application to review a decision of a refusal to award a tender under Contract Number A-RS-01-2019 to the applicant.

[2] The applicant had participated in the bidding process for the appointment of contractors for the upgrading and construction of roads and storm water infrastructure by the respondent. The tender was awarded on 11 March 2019 and the applicant was not informed that his bid had been unsuccessful. During the week 15 to 19 July 2019, it came to the applicant's attention that the tender had been awarded to other bidders and that he had been unsuccessful.

[3] The application was launched as an urgent application under Part A and Part B but before the hearing in respect of Part A was heard, the respondents complied with Part A supplying the documents and information requested. The application under Part A discontinued. After consideration of the documents and information supplied, an amended Notice of Motion was filed by the applicant.

[4] The applicant in the amended notice of motion seeks the following order:

- (i) that the matter be heard as one of urgency;
- (ii) that the respondent's decision not to award the tender be reviewed and set aside and an order be made that its bid in the tender be declared to be successful;
- (iii) that the matter be referred to the office of the Auditor-General for investigation;
- (iv) that the respondent be interdicted from awarding any further contracts under the tender; and
- (v) the respondent to pay the costs of the application including those occasioned in Part A of the application.

[5] It is common cause that the applicant issued its Notice of Motion on 20 August 2019. The respondent filed a notice to oppose on 27 August 2019 and an exchange of correspondence exchanged, whereupon the parties agreed to settle the matter on 3 September 2019. The applicant then served its amended Notice of Motion on 5 November 2019, which matter was set down for hearing on 26 November 2019.

[6] Rule 6(12)(b) confers a general judicial discretion on a court to hear a matter urgently. It provides that the applicant must:

*“....set forth explicitly the circumstances which he avers render the matter urgent and the reasons why he claims that he could not be afforded substantial redress at a hearing in due course.”*

[7] It is common cause that the full record of proceedings of the tender award was received by the applicant on or about 3 September 2019. The amended Notice of Motion was served on the respondent on 5 November 2019, 42 court days after receipt of the record.

[8] The applicant persists that the matter remains urgent as there were serious irregularities in the tender process. Furthermore, the applicant is of the view that the respondent can and will implement the tender to the prejudice of the applicant. It believes that it would have been a successful bidder. As such, the matter is still urgent.

[9] In the matter of **Mogalakwena Local Municipality v Provincial Executive Council, Limpopo and others**<sup>1</sup> Tuchten J went so far as to note:

*“It seems to me that when urgency is in issue the primary investigation should be to determine whether the applicant will be afforded substantial redress at a hearing in due course. If the applicant cannot establish prejudice in this sense, the application cannot be urgent.”*

[10] The applicant in its affidavit avers that the matter has become urgent in the Public Interest and that it is in the interest of Justice that the respondent be interdicted from awarding any further contracts under the said tender. Furthermore, it seeks an order referring the

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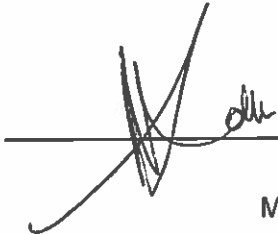
<sup>1</sup> [2014] 4 All SA 67 at para [64]

matter to the office of the Auditor-General for investigation into the respondent's conduct in the award of the tender.

[11] The applicant has failed to address the court on the lack of substantial redress it will or will not be afforded at a hearing in due course. The applicant can therefore not establish prejudice in this sense and the application cannot be urgent.

[12] I am accordingly of the view that the matter is not urgent. Accordingly, the following order is granted:

The application is struck for lack of urgency.



MOKOSE J

5 December 2019