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**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

Case No: 13477/2022P

In the matter between:

BHAKI TRADING AND SUPPLIERS CC

APPLICANT

and

**ITHALA DEVELOPMENT FINANCE
CORPORATION LTD**

FIRST RESPONDENT

ORDER

1. The application is dismissed.
2. The respondent is ordered to pay costs of the application.
3. The costs includes costs of two counsel where so employed.

JUDGEMENT

Delivered on:

Mngadi J

[1] The applicant seeks an order compelling the respondent to file a record of a decision which is a subject of a review application. The respondent opposes the application. The review application is in terms of the Promotion of Administrative Justice Act No. 3 of 2000 (PAJA)

[2] The applicant is Bhaki Trading and Suppliers CC t/a Bhaki Security, a close corporation duly incorporated and registered in terms of the Close Corporation Act. The respondent is Ithala Development Finance Corporation Limited, a Schedule 3(d) provincial government business enterprise established in terms of the Public Finance Management.

[3] The applicant in the review application seeks to review and set aside the decision by the respondent to cancel the award of Cluster 1 to 3 of a tender. Further, it seeks review and set aside the re-advertisement of a tender to award Clusters 1 to 3 of the tender of the applicant; and to compel the respondent to award Clusters 1 to 3 of the tender to the applicant.

[4] The applicant in its founding affidavit deposed to by Bhekithemba Maphumulo its managing director to the review application states that on is in the business of providing security-guarding services. It submitted a bid to the respondent in response to a tender for the appointment of a security provider to render security guard services to 4 Clusters for a period of 36 months. The applicant then receives a letter dated 20 September 2021, which reads as follows:

'INTENTION TO AWARD: REP04/21 APPOINTMENT OF A SERVICE

PROVIDER TO RENDER SECURITY GUARDING SERVICES AT VARIOUS
ITHALA PROPERTIES IN KWAZULU NATAL

We refer to the above and advise that through our bid selection process, **Bhaki Trading and Suppliers cc** has been identified as one of the preferred bidders and that it is our intention to appoint **Bhaki Trading and Supplier cc** for the **appointment of a service provider to render guarding services at various Ithala properties in KwaZulu-Natal.**

The Ithala SCM Policy provides for unsuccessful bidders to notify Ithala of their intention to appeal within 7 (seven) working days if they wish to do so. The 7 (seven) day notification period for this bid will expire on the **29 September 2021.**

Should Ithala not receive the notice of appeal by this date, Ithala will proceed to issue **Bhaki Trading and Supplier cc** with a letter of award. The awarding of that bid will be subject to **Bhaki Trading and Supplier cc** signing the SLA agreement.

Should a notice to appeal be received within the prescribed period, **Bhaki Trading and Supplier cc** will be informed accordingly and the normal Appeal Process will have to be followed. Whether **Bhaki Trading and Supplier cc** will remain the preferred bidder to be appointed for the appointment of a service provider to render security- guarding services at various Ithala/a properties in KwaZulu-Natal, will depend on the final outcome of such appeal.

Accordingly, this letter is only intended to advise **Bhaki Trading and Supplier cc** preferred bidder status at this stage and our intention to award **Bhaki Trading and Supplier cc** for **appointment of a service provider to render security guarding services at various Ithala properties in KwaZulu-Natal**, it is not intended to create any rights and/or obligations between Ithala and **Bhaki Trading and Supplier cc.**

The contract will be for a period of three years based on your performance to meet business objectives.

*Only once a formal letter of appointment is communicated to **Bhaki Trading and Supplier cc** and thereafter, a signed, written contract is concluded between **Bhaki Trading and Supplier cc** and Ithala, shall a contractual relationship arise between **US**.*

*Should **Bhaki Trading and Supplier cc** require any further clarification as to the process that will follow from this letter, your company can contact the writer on I[...]*

Maphumulo continues and states that in a letter dated 9 march 2022 the respondent awarded to the applicant only Cluster 4, and the respondent advised the applicant that as a results of the complaints received it had cancelled awarding of the tenders to the other three Clusters, which cancellation, the applicant is challenging. On 6 October 2022 the applicant launched the review application.

[5] In the review application the applicant called upon the respondent in terms of Uniform Rule 53(1), Firstly, to show cause why the decision should not be reviewed and set side, and secondly, to despatch within ten (10) days to the Registrar of the court the record of the proceedings of the decision and give such reasons as required.

[6] On 21 October 2022 the respondent in a letter advised the applicant that it did not intend to file a record of the decision and it was not obliged to do so, both under the Rule and under the requirement of PAJA. The respondent stated that the review application was out of the 180 -day requirement prescribed in s7 (1) of PAJA and there was no application seeking extension in terms of s9 of PAJA. In addition, the respondent stated that the applicant did

not exhaust internal appeal remedies.

[7] On 2 November 2022 the applicant filed a notice in terms of Rule 30 A indicating that if the respondent failed to produce the record of a decision within ten (10) days of the notice it shall apply for an order that the respondent be compelled to comply with Uniform Rules 53 (1) (b). Despite the lapse of the ten days, no record of the decision was filed.

[8] The respondent in opposing the application to compel stated that the review application was launched outside the 180-day period and it is not accompanied by an application seeking the extension with a full explanation of the delay. As such, it contends, the review is still born and the applicant is not entitled to the record of the decision. In addition, the review application should not be entertained because the applicant failed to exhaust internal remedies.

[9] The respondent further claimed that the applicant agreed to the cancellation by accepting Cluster 4 and rejecting the other three and not lodging any internal appeal, and participating in the ongoing tender process of cluster 1 to 3.

[10] The respondent states that since the decision was taken in March 2022, the entertaining of the review shall cause it real prejudice.

[11] The applicant in its founding affidavit to the review application under the heading 'Conditional Application', in terms of section 7 of PAJA states that it ought to have launched the application within 180 days by 11 September 2022 in respect of decision to cancel the tender, it sets out detailed chronology setting out its engagement with respondent. It claimed that it took proactive steps to address the manifest irregularities with the respondent. By 8 September 2022, it would appear that the respondent had undertaken its own investigation. It claimed that the delay by it is minimal, it had been occasioned by the respondent's recent desire to institute its own internal investigation into

the irregularities alleged by the applicant and there is no prejudice to the respondent created by the delay. It concluded that the interest of justice favour the granting of condonation in terms of section 9 (1) of PAJA.

[12] Rule 53 by a mere issue of a notice of motion of proceedings to bring under review the decision entitles the applicant to call upon the filing of the record of a decision. If there is law regulating the period within which the review application needed to be launched, the obligation to file the record of a decision only arises in review application launched within the period so specified. The applicant concedes that it launched the review application outside the stipulated 180 day period from the date of the decision. Thereafter, the respondent could but it was not obliged to file the record of the decision. It would become obliged to do so after the applicant has been granted extension for the filing of the review application.

[13] The right to receipt of the record is not dependent on the merits of the review application. The obligation to produce the record automatically follows upon the launch of the proceedings, however ill-founded that review application might turn out to be. *Competition Commission v Computicket (Pty) Ltd* [2014] ZASCA 185(26 November 2014) para20. In *Competition Commission of South Africa v Standard Bank of South Africa Ltd* 2020 (4) BCLR 429 (CC) paras 118-21, it was held that a court should order production of the record without requiring a *prima facie* case on the merits to be made out., but only once it has been established that it has jurisdiction

[14] The applicant's so- called 'Conditional Application in terms of section 9 of PAJA as contained in the founding affidavit contains no relief sought and it contains no grounds for any particular relief. An application for the extension of a period within which to launch review proceedings can be enrolled for hearing before an application to compel is heard. Whether the applicant was obliged to exhaust internal appeal remedies or not, is a question, in my view, to be determined by the court hearing the review application.

[15] It is trite that a delay in challenging administrative action may serve as a bar to the challenge. To soften the impact, the affected party is granted a right to apply for the extension of the period within which to bring the review application. The balance, in my view, justifies holding the requirement not to delay as a strict requirement. As long as the delay has not been excused, there is a bar to the challenge which means the court has no jurisdiction to entertain the review. As long as the court has no jurisdiction to entertain the review, there is no obligation to furnish a record of the decision.

[16] The applicant has not elected to seek condonation for the delay or extensions of the period of the launching of the review application. It results, in not having *prima facie* established that the court has jurisdiction. In *Opposition to Urban Tolling Alliance v South African Road Agency Ltd* [2013] 4 All SA 639 (SCA) paras 29-30 it was held that a court is only empowered to entertain the review application if the interest of justice dictates an extension in terms of s9 of PAJA. Absent such an extension, the court has no authority to entertain the review application at all

[16] In the result, the application to compel is premature and it falls to be dismissed.

[17] It is ordered:

1. The application is dismissed.
2. The respondent is ordered to pay costs of the application.
3. The costs includes costs of two counsel where so employed

APPEARANCES

Case Number	13477/2022P
Applicant represented by:	Adv JP Brester
Instructed by:	Garicke & Bousfield Inc. UMHLANGA
Defendant represented by:	Adv Indhrasen Pillay SC
Instructed by	K Gcolothela & Peter Inc. DURBAN NORTH
Date of Hearing	2 May 2023
Date of Judgment	10 May 2023