IN THE HIGH COURT OF SOUTH AFRICA

LIMPOPO DIVISION, POLOKWANE

CASE NO: 2425/2020

(1) REPORTABLE: NO/~~YES~~

(2) OF INTEREST TO OTHER JUDGES: NO/~~YES~~

(3) REVISED.

08/09/2020 _____

DATE SIGNATURE

In the matter between:

MABOTWANE SECURITY SERVICES CC **APPLICANT**

AND

THE SEKHUKHUNE DISTRICT MUNICIPALITY **FIRST RESPONDENT**

MOGOLA SECURITY & CLEANING **SECOND RESPONDENT**

TUBATSE SECURITY SERVICE (PTY) LIMITED **THIRD RESPONDENT**

SESANE PROJECTS CC **FOURTH RESPONDENT**

THE FETAKGOMO TUBATSE LOCAL MUNICIPALITY **FIFTH RESPONDENT**

Summary: Civil procedure – urgent application – applicant required to set forth explicitly facts and reasons for urgency and reasons why substantial redress could not be available at a hearing in due course – rule 6 (12) (b) uniform rules – Insertion of these requirements by law giver not an intended surplusage – a mere subjective perception by applicant for own convenience that matter is urgent, not reason to elevate it as urgent – more is required to meet Rule 6 (12) threshold - in every case, court required to evaluate whether explanation proferred for delay is reasonable – eg. An attempt to settle dispute a classic example – held, *in casu,* delay was not only unreasonable, but self-manufactured – held further – application struck off roll with costs.

JUDGMENT

MG PHATUDI J

[1] This matter found its way to this court by way of urgent review application. The applicant seeks an order to review and set aside the decision of the first respondent to award Tender no: SK08/3/1-04/2019/ 2020 ("the Tender") to the third respondent.

1.1 The tender is in essence the rendering of security services to Cluster 1, being Fetakgomo local Municipality.

1.2 Full prayers as contained in the notice of motion are set out as follows:-

"

1.2.1 That this application be heard as an urgent application in terms of the provisions of Rule 6 (12) of the Uniform Rules of Court and that the necessary condonation be granted to the applicant in respect of the non-compliance with the prescribed time periods, forms and service;

1.2.2 That the decision of the first respondent to award Tender SK08/3/1-04/2019/2020 in respect of Cluster 1 (Fetakgomo Tubatse Local Municipality) ("the Tender") to the third respondent be declared constitutionally invalid and set aside;

1.2.3 That any agreement between the first respondent and the third respondent pursuant to the awarding of the Tender, be set aside;

1.2.4 That the tender be awarded to the applicant;

1.2.5 That the first respondent be ordered to pay the applicant's costs, alternatively, and only in the event that the application is opposed by the third respondent, that the first and third respondents jointly and severally, the

one paying the other to be absolved, be ordered to pay the applicant's costs.

1.3 The first, third and fifth respondents are opposing the urgency of the application. The matter was, of course, heard as a special urgent motion pursuant to Makgoba JP's directives, after the hearing of preliminary arguments on 26 May 2020.

[2] This matter was then enrolled for hearing on 03 June 2020 before me as a special urgent motion since from the 26 May 2020, (initial urgent court roll) it never lost its space on the urgent court roll.

FACTUAL BACKGROUND:

[3] The first respondent on 06 October 2019 issued an invitation to the public to make an offer to participate in the tender for provision of physical security for a period of three (3) years, under Bid No: SK-8/3/1 – 04/2019/2020 for duration of 3 years.

3.1 This tender it appears, was for the provision of security services in respect of four (4) Clusters located within Sekhukhune District Municipality, ("SDM") the first respondent herein. The Clusters were in terms of the tender document the following:-

3.1.1 Cluster 1: Fetakgomo – Tubatse Local Municipality;

3.1.2 Cluster 2: Elias Motsoaledi Local Municipality;

3.2.3 Cluster 3: Makhuduthamaga Local Municipality;

3.1.4Cluster 4: Sekhukhune District Municipality.

3.2 It appears further from the bid document that even thou the "bid called for proposals in respect of all four Clusters, "**no successful bidder shall be considered or awarded a contract for more than one cluster"**[1]

3.3 It is common cause that the applicant like other business entities participated in the bids, in particular, in respect of all Clusters. If successful, the award could only be made in respect of one cluster as stipulated *ex facie* the tender document. Despite participating in bidding in respect of all clusters, the applicant's bidding was unsuccessful. The tenders were awarded to the second to fourth respondents.

3.4 The applicant, notably, takes issue against the decision by the first respondent ("SDM") to have awarded the security tender in respect of Clusters 1 and 3, respectfully, to the third respondent.

[1] Paragraphs/ clauses 6.2 and 6.3 – Tender Document.

[4] It was this decision, which the applicant contended that it offended the provisions of Clauses or paragraphs 6.2 and 6.3 of the Security Tender document. The relevant clauses or paragraphs stipulated as follows:-

> "6.2. Respondents are advised that this tender will be awarded to four (4) preferred security services providers as per the clusters.
>
> 6.3 .Respondents are allowed to bid for all the clusters if they wish to, and if they are found to be suitable, will only be appointed for a single (1) cluster".

[5] Additionally, the tender document also impelled prospective bidders to comply with mandatory requirements in relation to Cluster 1 as per paragraphs 3.1.2 of the bid document. I point out that they are quiet extensive.[2] I for that reason consider it unnecessary for present purposes to set them in detail herein. It suffices however to mention, that same being required to have been captured in a compact Disc (CD), the third respondent allegedly failed to meet all the mandatory requirements referred to.

[6] Be that as it may, it was the decision by the first respondent to award the security contract to the third respondent in the manner at

[2] Index to urgent application – Vol 1, PP 13-14

variance with the clauses to which reference is made, [para 4 above] that triggered the present urgent review application. A closer reading of the relief sought in the application amounts, to my mind, to applicant seeking a final relief in respect of the declaration of Constitutional invalidity and subsequently the setting aside of the disputed administrative action. The applicant in addition, seeks final relief in setting aside "any agreement" entered into by and between the first and third respondent pursuant to the awarding of the contested tender.

THE ISSUE:

[7] In view of the fact that the application had since been allocated for hearing as a special urgent motion, I consider it apposite therefore to determine the merits of its urgency.

[8] The issue before court on 03 June 2020 when the matter was called, was whether or not the review application was urgent within the meaning of rule 6 (12) (a) and (b) of the Uniform Rules of Court (" the rules")

8.1 This question, I venture to suggest, may be determined upon a consideration of the history and factual background prior to the launching of the application.

8.2 I have already set out the relevant background as laid to bear in the founding papers. (para [3] and [4], above)

[9] The applicant's deponent in support of the alleged urgency of the matter, and on own version, stated that:

> **"On 31 January 2020 the applicant was informed that it should vacate the site to enable the third respondent to commence with its security services. It was only after I made certain enquiries that I became aware of the award of the Security Tender to the second, third and fourth respondents.[3]"**

[10] My understanding of the aforegoing statement is simply that having made "certain enquiries" the applicant became aware of the fact that the security bid in question had been awarded to the second, third and fourth respondents. Crucially, the applicant was "informed" on 30 January 2020 to vacate the site to which he rendered security services to the fifth respondent for the past six years or so before. I assume without deciding that the information to vacate the site was either disseminated to applicant by the first respondent, or alternatively, by authorities responsible for Cluster 1.

[3] Ibid. P16, para: 12 (12.1) – founding affidavit ("FA")

[11] Possessed with this information as and from 30 January 2020, applicant for some obscure reasons, opted to launch the application on "urgent" basis only on 20 March 2020.

11.1 The applicant, despite being informed to vacate the said site, and later knowing that it had lost the bid to second, third ,fourth and fifth respondents, decided to consult its attorneys of record on Wednesday, 08 March 2020, and somewhat in explicably so, to consult counsel on Friday 06 March 2020. I find the arrangement of dates and the sequence of events here somewhat strange and illogical.

11.2 Be that as it may, if follows that it took the applicant some five (5) ordinary weeks from January 2020, only to consult with chosen counsel on Friday 06 March 2020 at which occasion, **"the decision was taken to immediately proceed with launching of an urgent review application."**

[12] The five weeks period leading to prior 20 March 2020 was not in my view, covered and is unaccounted for. There is a *lacuna* that required a comprehensive explanation by the applicant for the inordinate delay.

[13] The applicant's version in its founding affidavit [4] that if the application was launched in the normal course for hearing in due course, would allow the first respondent to execute the Security Tender in favour of the third respondent (Cluster 1) is something which, in my view, if the applicant seriously viewed as a mischief, would have promptly and without undue haste, decided to seek an injunction against the first respondent and forthwith also sought a declaration of constitutional invalidity. This regrettably, applicant delayed for five weeks before seeking relief as it did.

If there was any urgency in the matter as alleged, this is but a classic example of what I may term a **self-manufactured** urgency.

[14] The reasons for the urgency alleged would have had substance only if the interim urgent application was brought much earlier and perhaps in parts. Part A, being interim urgent interdict and in part B, a review application and the setting aside of the impugned decision.

[15] As matters stand in the petition and the prayers sought therein, clearly, the application in prayers 2,3 and 4, seeks finality in respect

[4] Ibid P17, para 12.4 "FA"

thereof. These prayers, in essence, seek so-called "substitution orders".

[16] As already shown, (para: 1 (1.3)) above the second to fifth respondents are opposing the urgency of the matter.

LEGAL FRAMEWORK:

[15] Urgent applications in a High Court a regulated by the provisions of rule 6 (12) of the rules of court Rule 6 (12) (b) in particular provides that:

Rule 6 (12):

(a).....

"

(b) In every affidavit or petition filed in support of any application under paragraph (a) of this subrule, the applicant shall 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."(own emphasis)**

16.1 The insertion by the lawmakers of this procedure at the time, was, in my view, not an intended mere surplusage. The subrule not only requires of an applicant to pertinently aver the circumstances that he/she claims the matter is urgent, but is also required to set fourth explicitly the reasons why he/she

avers could not be afforded substantial redress at a hearing in due course.

[17] Accordingly, a mere perception by a litigant seeking to be heard on an urgent basis and subjectively for own convenience thinking that the matter is sufficiently urgently, cannot in itself be reason that the matter be elevated to urgency. More has to be done to meet the threshold laid down in subrule 6 (12).

[18] The a foregoing observation is consonant with the sentiments echoed by Notshe AJ in the case of East ROCK TRADING 7 (PTY) LTD v EAGLE VALLEY GRANITE (PTY) LTD & ANOTHER[5] where the learned Acting Judge remarked in paragraph [9] that :

"[9]

It means that if there is some delay in instituting the proceedings, an applicant has to explain the reasons for the delay and why he claims that he cannot be afforded substantial redress at a hearing in due course. I must also mention that the fact that the applicant wants to have the matter resolved urgently does not render the matter urgent. The correct and crucial test is whether, if the matter were to follow the normal course as laid down by the rules, an applicant will be afforded substantial redress....."

[5] 2011 JDR 1832 (GSJ) delivered on 23.09.2011. (marked "Reportable")

[19] It was for that reason, in my view, that Coetzee J (as he then was) stated emphatically that "practitioners should carefully analyse the facts one each case to determine, for the purpose of setting the case down for hearing, whether a greater or lesser degree of the relaxation of the Rules and of the ordinary practice of the court is required. The degree of relaxation should not be greater than the exigency of the case demands. It must be commensurate therewith.....[6]

[20] This court in considering the circumstances and the facts which the applicant avered render the matter urgent, is required to evaluate whether the explanation proffered for the delay is reasonable. A delay might just be indicative that the matter is simply not urgent. Conversly, a delay may have been on account of the Applicant's attempts to settle the matter amicably or collate internal information held by the opponent or even, to first exhaust internal remedies, as the case may be.

[21] In our contemporary law which is in a state of flux, it is quiet permissible in certain circumstances to condone the delay in launching an urgent application if, of course, it is just and equitable

[6] Luna Meubel Vergaardigers (EDMS) BPK v Making & Another. 1977 (4) SA 135 (W)

to do so. An attempt at settlement of the dispute is a classic example[7]

In casu, the applicant did not evince such an attempt on paper.

[22] In sum, the applicant in the main, stated in its papers that it was informed by the first respondent to vacate the site on which for the past six years it had rendered security services to it. The delay as and from that time, until it brought the present application, on an urgent basis on 26 March 2020, was in my opinion, at least for that period not reasonably accounted for. The urgency, if any, was accordingly self-manufactured.

[23] Furthermore, it is not clear on the papers why the applicant elected to approach the court on an urgent basis seeking a final declaratory order as well as a final mandatory interdict, simultaneously in a single once off application. This was as if it were a foregone conclusion that the relevant bid was to be awarded to the applicant by hook or by crook.

[24] The proper approach, in my view, in order to have arrested the proverbial "bolted horse", was for applicant to have at least applied for an interim interdictory relief in Part A pending the declaration of

[7] Nelson Mandela Metropolitan Municipality v Greyvenou 2004 (2) S.A 81 (SE) at 94 C-D. See also, Stock v Minister of Housing 2007 (2) SA. 9 (C) 12-13A.

[25] the constitutional invalidity of the impugned tender in Part B in due course. In this way, applicant would not have bemoaned the alleged lack of substantial redress in due course. Nothing precluded the applicant from approaching the court by pursuing this simple, less stressful and most convenient procedure. It was a simple case of preservation and protection of its perceived *prima facie* rights in this instance, if any.

[25] For all the aforementioned reasons, I find that the applicant failed to demonstrate reasons for urgency, and a plausible explanation for the delay that covers the period from January to March 2020, and moreover, why it would not obtain substantial redress at a hearing in due course. For that, the application falls to be struck off the urgent court roll.

I therefore decree the following:

ORDER:

(a) The application is struck from the urgent court roll with costs.

MG PHATUDI
JUDGE OF THE HIGH COURT

LIMPOPO DIVISION, POLOKWANE

REPRESENTATIONS:

Counsel for the applicant	:	Adv. A.P.J Els
On brief by	:	Albert Hibbert Attorneys, Pretoria
Counsel for First and Fifth Respondents:	:	Adv K.B Kgoroeadira
On brief by	:	ML Mateme Attorneys, Polokwane
Date heard (urgent roll)	:	03 June 2020
Date handed down	:	08 September 2020