IN THE HIGH COURT OF SOUTH AFRICA NOT REPORTABLE

EASTERN CAPE, PORT ELIZABETH

Case No.: 467/2012
Date Heard: 29 February 2012
Date Delivered: 8 March 2012

In the matter between:

MACROVEST 102 (PTY) LTD t/a BUSINESS INTELLIGENCE AND MAZIZI Applicant

and

THE MUNICIPAL MANAGER OF THE NELSON MANDELA BAY METROPOLITIAN MUNICIPALITY First Respondent

THE BID ADJUDICATION COMMITTEE OF THE NELSON MANDELA BAY METROPOLITIAN MUNICIPALITY Second Respondent

THE NELSON MANDELA BAY METROPOLITIAN MUNICIPALITY Third Respondent

BUSINESS CONNEXION (PTY) LTD Fourth Respondent

EPWEB ICT SOLUTIONS Fifth Respondent

JUDGMENT

EKSTEEN J:

[1] The applicant seeks an interim interdict restraining the first, second and third respondents from awarding a tender to the fourth or fifth respondents for the support, development and maintenance of an online web based financial management tool, pending the finalisation of review proceedings which have been instituted. In addition the applicant seeks access to certain documentation relating to the evaluation of the bids submitted together with any reports, recommendations and written decisions which may have been taken.

The background

[2] During 2005 the third respondent invited suitable applicants to apply to assist it with stakeholder engagement facilitation, business process management and project management in order to aid and improve the existing financial management and controls of the third respondent. The applicant submitted an application which was successful and on 1 June 2006 the applicant concluded a service level agreement with the third respondent in this regard. In the course of the execution of this contract the third respondent requested the applicant to design a financial management tool (FMT). The applicant accordingly designed and prototyped the FMT between August 2005 and July 2007. The FMT was initially called the “Management Information Assistant” although the name was subsequently changed.

[3] During 2007 the third respondent called for tenders for the "development, support and maintenance of Nelson Mandela Bay Municipality 'financial management tool' for a three year period". In December of that year the contract was awarded to the applicant. Although the award of this contract was only finalised in December 2007 the contract period lapsed on 31 June 2010. Upon the lapsing of this contract the first respondent, alternatively the second respondent, approved repeated deviations from time to time to extend the services of the applicant, until 31 December 2011 when the final deviation lapsed.

[4] During 2010 the third respondent again called for tenders for the "support, development and maintenance of an online web based financial management tool". This process culminated with the cancellation of the tender process and a decision not to accept any of the tenders submitted. The tender was re-advertised in April 2011. This tender process too was later cancelled as it was allegedly flawed. Finally, in September 2011 the tender was advertised yet again and it is this tender process which forms the subject of the present litigation.

[5] It is common cause that the applicant and the fourth and fifth respondents submitted bids in response to the September 2011 tender invitation. Of significance for purposes of the present application is that the invitation to tender which was advertised records the evaluation criteria and the weighting to be applied in order to assess the scores of

the various tenders. The evaluation criteria is, however, conditional on each tenderer's "functionality pre-evaluation" and only tenderers scoring a total of 60% (60 points) or higher on this test are evaluated further. It follows, subject to what is set out below, that unless a bidder meets the minimum functionality criteria its bid will not be further considered, will not be evaluated and will not be scored.

[6] The applicant in its founding papers has dealt extensively with the criteria for functionality and contends, convincingly, that it clearly meets the functionality requirements of the tender. This much is not seriously disputed.

The applicant's contention

[7] Mr van Schoor, who deposed to the founding affidavit on behalf of the applicant, says:

> "13. I have been reliably informed that the Applicant's tender was deemed unsuccessful as a result of the Applicant's failure to score the minimum 60% "Functionality Requirement" score recorded in tender invitation. I am not able to disclose the source of this information as this may jeopardize the future employment of the person conveying the information and such person sought the assurance that their identity would not be disclosed. I emphasize however that I have every reason to believe that the information conveyed is accurate."

I set out this averment in full as the admissibility of these averments was the subject of much controversy at the bar. I shall revert to this aspect below.

[8] The previous deviations which extended the applicant's earlier contract from time to time expired on 31 December 2011. The applicant contends that it has therefore made repeated enquiries as to the progress of the evaluation and the adjudication of the September 2011 FMT tender, particularly from the office of the supply chain of the third respondent. It alleges that it was unable to obtain any meaningful information during January 2012 as to the progress with the evaluation and adjudication of the tender. Early in February 2012 Van Schoor says that he was able to make contact with one Minnaar, an official in the third respondent's Supply Chain Management Unit. Upon this enquiry as to the status of the tender Minnaar advised that the applicant would receive a letter informing it of the outcome of the tender on Friday, 3 February 2012. He received no such communication. In the circumstances he again contacted Minnaar who advised him that the matter was presently before the first respondent.

[9] On 6 February 2012 the applicant, through its attorney of record, addressed a letter to the first respondent, which was hand delivered to the first respondent on the same day, in which it sought certain

information and undertakings. In the letter Attorney van Wyk, on behalf of the applicant, records:

> "It has come to our client's attention that it has been contended that our client's tender was regarded as 'unresponsive' as allegedly not being compliant with the functionality requirement of the relevant tender. This is of course absurd given the fact that our client has designed the Municipality's FMT and has vast experience in the operation of the system since August 2005 …"

[10] The letter proceeds later to record as follows:

> "7. In the circumstances we are instructed to require the following:
>
> a. Copies of the recommendations of the Bid Evaluation and Adjudication Committees in respect of the relevant tender.
>
> b. Whether the Municipal Manager has made any decision in respect of such tender.
>
> c. Full reasons as to the basis upon which our client's tender was allegedly found to be non-responsive.
>
> d. An undertaking that no final award will be made in respect of the 2011 FMT Tender pending the final outcome of a review application which our client will institute in the High Court to interdict the award and/or implementation of the tender should the Municipality insist that such award and implementation is to proceed to be awarded to any Third Party.

> 8. We require you urgent response by no later than 2pm on Wednesday 8 February 2011, failing which we have instructions to launch an urgent application to obtain the necessary interdictory relief to protect our client's rights as set out above."

[11] No response was forthcoming from the first respondent and at the time of argument of the matter on 29 February 2012 there had still been no response from the first respondent. In the circumstances these proceedings were issued. The applicant contends that the decision of the Bid Evaluation Committee to exclude the applicant from the tender process on the basis of its alleged failure to meet the "functionality requirement" is irrational and that the decision of the second respondent, or the decision which it proposes to make, is tainted thereby. It alleges further that the first respondent "is to shortly award the tender to either the fourth or the fifth respondent". Van Schoor proceeds in addition to state as follows:

> 'The delays in the finalisation of the tender process have never been explained by the Municipality or its officials. I respectfully submit however that a more than reasonable period of time has elapsed for the relevant internal processes of the Municipality to be finalised if there was to be a proper evaluation and adjudication upon the said SEPTEMBER 2011 FMT TENDER. It is untenable for tenderers, including the Applicant, to be left "*in limbo*". Tenderers are, with respect, entitled to reasonably expeditious processing of tenders and

> are entitled to be informed, within a reasonable time, of the outcome of the processes. This has not occurred in the present case.'

[12] Initially the first, second and third respondents entered an appearance to defend, however, no papers were filed. On the morning of the hearing the opposition to the application was withdrawn and the first, second and third respondents filed a notice indicating that they would abide the decision of the court. The fourth respondent never entered an appearance to defend and the fifth respondent has vehemently opposed the grant of any relief.

Fifth respondent's opposition

[13] At the outset the fifth respondent filed an application to strike out the entire paragraph 13 of the applicant's founding affidavit being the averments relating to the "reliable" information received by the applicant from an undisclosed source that the applicant had failed to score the minimum 60% "functionality requirement", which I have quoted above. The application to strike out is based on the allegations being hearsay and the fifth respondent contends that these allegations are the corner stone of the entire application. The fifth respondent points out that the source of the information is not disclosed nor is it stated when or how the applicant was informed that its tender was "deemed unsuccessful". In addition the fifth respondent points out that the founding affidavit does not state whether the alleged source has personal knowledge of the

information conveyed and it is contended that no basis is laid by the applicant for his belief that the information is accurate.

[14] Turning to the merits the fifth respondent has raised a number of defences on the papers. Firstly it is contended that the application is premature and therefore not ripe for hearing as no administrative action has yet been taken. This is the thrust of the fifth respondent's case. Secondly the fifth respondent contends that the form of the relief claimed is inappropriate and that it is not competent. Thirdly it is contended that the applicant ought to have exhausted his internal remedies in terms of the Supply Chain Management Policy prior to the institution of these proceedings. In the fourth instance an attack is made on the *bona fides* of the founding affidavit and it is alleged that Van Schoor has failed to make an adequate disclosure. Finally it was contended on the papers that the applicant's failure to comply with the rules of procedure for judicial review of administrative action under the Promotion of Administrative Justice Act 3 of 2000 (PAJA) is fatal.

[15] At the hearing of the matter the last defence, that relating to the rules of procedure under PAJA was abandoned. Not all of the remaining defences were pursued with equal enthusiasm at the hearing of the matter and the attack upon the *bona fides* of Van Schoor for his alleged inadequate disclosure was not pursued at all. I shall accordingly not consider this latter issue herein.

[16] Much of the argument underlying these defences is based upon the founding affidavits of the applicant. The fifth respondent, understandably, is not in a position to dispute a great deal of the factual averments set out in the founding papers. The answering papers do, however, deal fully with the fifth respondent's tender and its communications with the third respondent. The deponent on behalf of the fifth respondent, Njoko, says:

> "17. The Fifth Respondent submitted a complete tender in response to the September 2011 tender to the NMBM on or about the 22nd September 2011. Thereafter the Fifth Respondent was requested to make a presentation to the Bid Evaluation Committee of the NMBM on the 1st November 2011, which the Fifth Respondent duly did.
>
> 18. On or about Tuesday the 17th January 2012, Mr Minnaar of the NMBM contacted me and enquired if the prices quoted by the Fifth Respondent would remain valid for the ensuing 3 months. I informed Mr Minnaar that it would remain valid. Mr Minnaar then asked me to confirm this in writing, which I duly did in an e-mail. Thereafter Mr Minnaar contacted me again on 7th February 2012 and requested me to sign the e-mail, which I duly did."

[17] In reply to this averment the applicant refers to the tender specification which required pricing to be valid for 90 days only from the

date of the closure of tenders. This, of course, is indicative of the anticipated date of the award of the tender.

[18] The applicant then proceeds to record that it was not contacted by an official of the third respondent to confirm whether its prices as quoted in the tender response would remain valid for the ensuing three months from January 2012. In the circumstances the validity of the applicant's bid prices lapsed.

The hearsay evidence

[19] The fifth respondent, as recorded above, seeks at the outset to strike out the averments made by the applicant in respect of the communication it received to the effect that its bid had been disqualified as non-responsive due to it not meeting the functionality requirement. It is common cause that it is hearsay.

[20] The fifth respondent contends that this hearsay evidence constitutes the corner stone of the applicant's case and without it no case is made out. Mr ***Swanepoel***, on behalf of the fifth respondent, argues that where an affidavit sets out facts based on hearsay information the deponent must state that the allegations of fact are true, to the best of his or her information, knowledge and belief and must state the basis or the grounds for his or her knowledge or belief. He argues that a failure to state the source of the information or the grounds of the belief in the

original affidavit, constitutes an irregularity that cannot be cured by stating them in the replying affidavit. Mr ***Swanepoel*** has referred me to a series of decided cases in support of these contentions all of which were decided prior to October 1988. The relevance of the date is to be found in the fact that the Law of Evidence Amendment Act, 45 of 1988 (the Evidence Act) which was assented to on 15 April 1988 came into operation on 3 October 1988.

[21] At common law the rule that hearsay evidence was inadmissible was strictly applied unless the evidence fell within one of the exceptions recognised at common law or provided for in statute. This notwithstanding our courts recognised that hearsay evidence by way of affidavit could be admitted in urgent interlocutory matters, provided the deponent reveals the source of the information concerned, avers that he or she believes such information to be true and correct and furnishes the grounds for such belief in a statement of information or belief.

[22] After October 1988, however, the common law rule in respect of hearsay no longer applies in South Africa and the issue falls to be determined in accordance with section 3 of the Evidence Act. The relevant portion, for present purposes, of section 3 of the Evidence Act provides as follows:

"3(1) Subject to the provisions of any other law, hearsay evidence shall not be admitted as evidence at criminal or civil proceedings, unless-

(a) ...

(b) ...

(c) the court, having regard to-

(i) the nature of the proceedings;

(ii) the nature of the evidence;

(iii) the purpose for which the evidence is tendered;

(iv) the probative value of the evidence;

(v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends;

(vi) any prejudice to a party which the admission of such evidence might entail; and

(vii) any other factor which should in the opinion of the court be taken into account,

is of the opinion that such evidence should be admitted in the interests of justice.

(2) The provisions of subsection (1) shall not render admissible any evidence which is inadmissible on any ground other than that such evidence is hearsay evidence."

[23] I think that section 3 of the Evidence Act is now the sole standard whereby the admissibility or otherwise of hearsay evidence should be adjudged. It does not require any formality. I recognise that the disclosure of the source and the reasons for the belief in the correctness of the information are factors which may contribute to an assessment of

the probative value of the evidence. I do not consider, however, that they are essential components. I am alive to the fact that in ***Fey NO v Van der Westhuizen and Others*** 2003 (2) All SA 679 (C) at 684, a decision to which I was not referred, Meer J recorded the requirements laid by our courts prior to 1988 and proceeded to apply that test to the matter before her. She concluded that the hearsay evidence in that matter should be allowed. To the extent, that it may be contended that Meer J intended that hearsay evidence could not be permitted in urgent applications unless these averments were made I am in respectful disagreement. It follows that I am also in respectful disagreement with the comments contained in *Erasmus****:*** ***Superior Court Practice*** B1-39-B1-40 which are to the same effect. In these circumstances I do not consider that the failure to have stated in full the facts upon which the deponent bases his grounds for belief and how he obtained the information is necessarily fatal. The court is still required to assess the question of admissibility with reference to the factors as set out in section 3 of the Evidence Act. If, on a consideration of all those factors, the court is of the opinion that such evidence should be admitted in the interest of justice, then it should be allowed.

[24] The nature of the proceedings are of course a consideration to be weighed. In criminal proceedings the courts would be less amenable to admitting hearsay evidence than in civil proceedings. The present matter relates to application proceedings in which interim relief only is sought.

The relief is aimed primarily at preserving the *status quo* pending the finalisation of the review proceedings and the prejudice which may follow is accordingly not as great as it would be were final relief granted. I think that this is a factor which militates in favour of the admission of the hearsay evidence.

[25] The nature of the evidence, the purpose for which it is tendered and the probative value of the evidence are all weighty factors to be considered. In ***Hlongwane and Others v Rector, St Francis College, and Others*** 1989 (3) SA 318 (D) at 324E-F Galgut J considered that the fact that hearsay evidence was tendered to establish a fundamental issue as opposed to a subordinate or side issue to be a fact that weighed against the reception of hearsay evidence. This approach has found favour in some subsequent decisions, however, Alexander J took the view that evidence that was otherwise relevant should not depend for its reception on its importance in the case and that it should be admitted if it carried "the hallmark of truthfulness and reliability". (See ***S v Mpofu*** 1993 (2) SACR 109 (N) at 116h-j.)

[26] What do the facts in the present case show? The initial averment by Van Schoor that he had been "reliably informed" that the applicant's tender was deemed unsuccessful as a result of the applicant's failure to score the minimum 60% "functionality requirement" is deliberately vague. He does not, as recorded above, set out the source of his information nor

does he provide any further information from which the reliability of the source may be assessed. It is not evident whether his source had firsthand knowledge of this information or whether the source too relies on hearsay. This Mr ***Buchanan***, on behalf of the applicant, argues that it is done to give as much protection as possible to the identity of the source.

[27] The single paragraph should, however, not be viewed in isolation. I think that there are however a number of other factors which emerge from the evidence which show clearly that this hearsay allegation has "the hallmark of truthfulness and reliability". Firstly, the various deviations in respect of the maintenance of the system which has been granted from time to time lapsed on 31 December 2011 and were not extended thus signalling the end of the applicant's engagement. Secondly, early in February when Van Schoor enquired from Mr Minnaar in respect of the status of the tender he was advised that he would receive a letter on the 3 February 2012 which would inform him of the outcome of the tender. It is apparent from this communication that Minnaar held the view that by 3 February 2012 a final decision would have been made in respect of the tender.

[28] Thirdly, when no letter was received on 3 February 2012 Van Schoor again made contact with Minnaar who advised that the matter was presently before the first respondent, the accounting officer of the third

respondent. It emerges too from the answering papers of the fifth respondent that in this time, between 17 January 2012 and 7 February 2012 the third respondent was actively endeavouring to secure an undertaking from the fifth respondent that its pricing structure set out in its bid would remain firm for a further three months. We don't know whether a similar approach was made to the fourth respondent but we do know from the papers that the applicant did not receive such an approach. This clearly suggests that the applicant had been excluded from further consideration in respect of the tender. Indeed, as recorded above, the validity of its bid prices were allowed to lapse whereas those of other bidders, or at least the fifth respondent, were extended.

[29] On 6 February the applicant's attorney of record addressed a letter which was hand delivered to the first respondent, the accounting officer of the third respondent. In this letter, as recorded above, it was contended that the applicant had been excluded from the tender process by virtue of its bid having been regarded as "unresponsive". This the applicant contended was absurd and irrational and the applicant demanded reasons as to the basis upon which it had allegedly been held to be unresponsive. In this letter Attorney van Wyk also enquired from the first respondent whether a decision had in fact been made in respect of the tender. The letter concluded by threatening litigation unless a clear response was received. In the face hereof the applicant was met with a deathly silence.

In ***McWilliams v First Consolidated Holdings (Pty) Ltd*** 1982 (2) SA 1 (A) at 10E-F Miller JA dealt as follows with a failure to respond to a letter:

> 'I accept that "quiescence is not necessarily acquiescence" (see *Collen v Rietfontein Engineering Works* 1948 (1) SA 413 (A) at 422) and that a party's failure to reply to a letter asserting the existence of an obligation owed by such party to the writer does not always justify an inference that the assertion was accepted as the truth. But in general, when according to ordinary commercial practice and human expectation firm repudiation of such an assertion would be the norm if it was not accepted as correct, such party's silence and inaction, unless satisfactorily explained, may be taken to constitute an admission by him of the truth of the assertion, or at least will be an important factor telling against him in the assessment of the probabilities and in the final determination of the dispute.'

[30] I think that in the ordinary commercial practice and human expectation a firm repudiation of the applicant's contention as set out in the letter of 6 February would have been the norm had the first respondent not accepted as correct the contention that the applicant's bid was considered non-responsive. When all of these factors set out above are viewed together I think that there are strong indications in the papers that, notwithstanding that hearsay evidence is tendered to establish a fundamental issue, it has sufficient probative value to justify its admission.

[31] The reason why the evidence is not to be given by the original source is, I think, satisfactorily explained and, by virtue of the indicators of truthfulness set out above, I have some difficulty in postulating any prejudice which the fifth respondent might endure if such evidence is admitted. The hearsay evidence is evidence against the first, second and third respondent and the process internal to the third respondent. The third respondent has no objection to the evidence. An enquiry to the first and third respondent may readily have provided confirmation of the veracity of the averment had the fifth respondent sought to verify this. In all the circumstances I consider that the evidence should be received in the interests of justice. It follows that the application to strike out these averments in the founding papers must fail.

[32] I pause to mention that on the morning of the hearing a lengthy application to strike out some 32 portions of evidence in the replying affidavits was delivered. Thankfully, Mr ***Swanepoel***, correctly in my view, did not pursue argument in respect of each of these passages individually. His submission is that this application is founded on the fact that the replying affidavit proceeds on a basis inconsistent with the founding affidavit. In the founding affidavit, so it is contended, the applicant based its case on a “decision” having been taken. In reply, so it is argued, it is now contended that there has been a “failure to take a decision”.

[33] I think that this contention is spurious. The foundation of the application in the founding papers and in reply is that a decision was taken which eliminated the applicant from the process because it did not meet the functionality requirement. The applicant in its founding affidavit has in any event made it abundantly clear that it contends that tenderers are entitled to reasonable expeditious processing of tenders and are entitled to be informed, within a reasonable time, of the outcome of such processes. This it is contended did not occur. I have recorded the exact assertion set out in the founding papers at paragraph 11 above.

[34] It is of course true that an applicant must make in his founding papers the case which the respondent is called upon to meet. Thus in ***Naude & Another v Fraser*** 1998 (3) All SA 239 (A) at 260e-g Schutz JA stated:

> "There is little point in granting a person a hearing if he does not know how he is concerned, what case he has to meet. One of the numerous manifestations of the fundamental principle is the sub-rule that he who relies on a particular section of statute must either state the number of the section and the statute, or formulate his case sufficiently clearly so as to indicate what he is relying on."

[35] I think that the paragraph which I have quoted in full from the founding papers earlier dealing with the delays in finalisation of the tender make it abundantly clear that the applicant's contention was that by

February 2012 it had been entitled to a decision. I do not consider, accordingly that there has been a change in stance between the founding papers and the replying papers.

[36] In addition in the second application to strike out there are numerous attempts to strike out references to dates. In the founding papers the applicant alleged that he spoke to Minnaar early in February when Minnaar indicated that he would receive a letter setting out the outcome of the tender on 3 February. It is apparent from the context of the statement that that communication occurred either on the 1st of February or the 2nd of February as the response was to be received on 3 February. It does not appear to be of any significance at all whether it was the 1st or the 2nd. In the replying papers the applicant states that Minnaar so advised him on 1 February. This the first respondent finds offensive and contends that it ought to have been included in the founding papers. I do not agree.

[37] In the founding papers the deponent contends that when he did not receive a reply on 3 February he again made contact with Minnaar who advised him that the matter was presently before the first respondent. Again in the founding papers Van Schoor did not allude to the date upon which this contact was made with Minnaar. On 6 February, however, the applicant addressed a letter, via his attorneys, to the first respondent demanding to know, inter alia, whether the first respondent had made a

decision in respect of the tender. It is accordingly, in my view, abundantly clear from the founding papers that the second communication with Minnaar occurred on the 3rd, 4th or 5th of February. Again there does not appear to me to be any significance whatsoever in the exact date. In the replying papers Van Schoor states that this communication occurred on the 3rd of February 2012. This he referred to on a number of occasions and on each occasion the fifth respondent seeks to strike out this averment as "it amounts to new matter which should have been included in the founding affidavit". I disagree. The founding affidavit is abundantly clear in all material respects.

[38] I do not intend to deal with each passage of evidence to which objection is taken in the replying affidavit. This is particularly so as no argument was presented to me in respect of each individual matter. Suffice it to say that in my view the application to strike out should be dismissed.

The interim interdict

[39] In order for the applicant to succeed in obtaining the interim relief which it seeks in Part A of the Notice of Motion it is required to establish:

1. That the right which is the subject matter of the main action (in this case the review) and which the applicant seeks to protect by means of interim relief is clear or, if not clear, *prima facie* established, though open to some doubt;

2. if the right is only *prima facie* established, that there is a well-grounded apprehension of irreparable harm to the applicant if the interim relief is not granted and the applicant ultimately succeeds in establishing its right;
3. that the balance of convenience favours the applicant in the granting of interim relief and
4. that the applicant has no other satisfactory remedy.

The applicant's *prima facie* right and its apprehension of harm.

[40] Mr ***Swanepoel***, on behalf of the fifth respondent argues that the applicant has not shown a *prima facie* right and that it effectively wants to intervene in an uncompleted, unfinished tender process, which, he argues, is impermissible as the decision making process has not yet been completed.

[41] This argument is founded largely on the third respondent's Supply Chain Management Policy (the Policy) which sets out a layered process of decision making through various committees. A Bid Specification Committee prepares the specification for each procurement which the municipality envisages. Once tenders have been called for and received each bid is referred first to the Bid Evaluation Committee. The obligations of the Bid Evaluation Committee are set out in clause 28 of the Policy. The Bid Evaluation Committee is called upon to evaluate each bid in accordance with the specifications for a specific procurement and the

points system set out in terms of clause 27 of the Policy. In doing so it is required in terms of clause 28(1)(b) to evaluate each bidders ability to execute the contract. This is the functionality requirement. In terms of the specific bid specification in the present matter the tender is subject to functionality pre-evaluation and only tenderers who reach the functionality requirement will be evaluated further. It follows that in adjudicating bids in accordance with the Policy the Bid Evaluation Committee is required by the specifications to eliminate any bidder who has not complied with the requirement of functionality. The Bid Evaluation Committee must then proceed in terms of clause 28(c) and check, in respect of the recommended bidder, whether municipal rates and taxes and municipal service charges are not in arrears, and then to submit to the Adjudication Committee a report and recommendations regarding the award of the bid or any other related matters. Its report and recommendations relate to the award of the bid and related matters.

[42] The obligations of the Bid Adjudication Committee are set out in clause 29 of the Policy. They are required to consider the report and recommendations of the Bid Evaluation Committee and depending on its delegation, either make a final award or a recommendation to the accounting officer to make a final award.

[43] It is common cause that the Bid Adjudication Committee may not award a contract in excess of R10 million and such contracts would have

to be referred, together with their recommendation, to the accounting officer. The fifth respondent in this matter contends that the present contract is one which only the accounting officer can award. That has not been disputed by the applicant. The present contract can therefore only be awarded by the first respondent. Over and above the aforegoing the Bid Adjudication Committee may also make other recommendations to the accounting officer as to how to proceed with the relevant procurement. Clause 29(6) of the Policy provides that the accounting officer may at any stage of the bidding process refer any recommendation made by the Evaluation Committee or the Adjudication Committee back to that committee for reconsideration of the recommendation. On this basis it is argued that the recommendations of the Bid Evaluation Committee and the Bid Adjudication Committee do not constitute administrative action susceptible of review. In these circumstances Mr ***Swanepoel*** contends that the dispute, such as it is, is not ripe for challenge.

[44] I have set out the factual course of events above. What emerges from that is, I think, that after receiving a report from the unnamed source in respect of the disqualification of the applicant's bid the applicant made repeated enquiries to Mr Minnaar. Minnaar indicated on 1 February that the outcome of the tender would be communicated to Van Schoor on 3 February. Clearly what Minnaar was communicating is that by the 3rd of February the process would be finalised. When that letter was not received and further enquiries were to Minnaar he indicated that the

matter was before the accounting officer. That prompted the letter to which I have referred above. The irregularity contended for by the applicant in the form of its exclusion was pertinently raised and the first respondent was requested to indicate whether he had taken a decision. This was not responded to. This, as indicated earlier, constitutes, in my view, a firm indication that the first respondent himself accepted the correctness of the assertion. Added to this there are the events which I have referred to in paragraph [28] above which were unfolding in the same period when the letter was written. I think that it can be said with a measure of confidence that the applicant has manifestly been eliminated from the tender process whilst others, at least the fifth respondent, remain in contention. Even if I accept that the first respondent may yet refer the matter back to the Bid Evaluation Committee or to the Bid Adjudication Committee the prices set out in the applicant's bid will now have lapsed for it unlike other bidders, was not requested to extend their application. The applicant, it would appear, is clearly out.

[45] In ***Chairman, State Tender Board v Digital Voice Processing (Pty) Ltd; Chairman, State Tender Board v Sneller Digital (Pty) Ltd*** (unreported decision of the SCA in case number 764/2010 [2011] ZASCA 202 (24 November 2011) Plasket AJA held at para [18] as follows:

> "[18] To the extent that some of the case law tends to suggest that, as a general principle, notification is the touchstone for ripeness, I am of the view that this is too rigidly expressed. This view has its genesis in cases like *Estate Garlick v Commissioner for Inland Revenue*, which held that the judgment of a *court* only has efficacy once it is handed down, and stems from an era when principles relating to juridical decision-making tended to be applied to administrative decision-making, often without due regard to the differences in the nature, purpose and rationale of these two types of public power."

Estate Garlick v Commissioner for Inland Revenue was reported in 1934 AD 499 at 502.

[46] Plasket AJA went on at para [20] to hold as follows:

> "[20] Generally speaking, whether an administrative action is ripe for challenge depends on its impact and not on whether the decision-maker has formalistically notified the affected party of the decision or even on whether the decision is a preliminary one or the ultimate decision in a layered process …. Ultimately, whether a decision is ripe for challenge is a question of fact, not one of dogma."

[47] On a consideration of the facts of this matter I am satisfied that, notwithstanding the fact that the decision has not been formally communicated, prima facie, a final decision has been taken and its impact is already felt.

[48] *Baxter:* ***Administrative Law*** (1984) at p. 719-720 states:

> "Whether an issue is ripe for adjudication is a question of degree; it is not always clear when an administrative decision is to be regarded as complete. The courts do not require the complainant to wait until all possibility of the action being reversed has disappeared; nor is he required to await a final outcome when the result is a foregone conclusion."

[49] *De Ville*, in ***Judicial Review of Administrative Action in South Africa***, 1st ed, 2006 at p. 452 adds the further consideration that where a final decision should already have been taken but has not occurred, our courts are even less inclined to uphold a contention that a matter is not ripe for hearing. This clearly is such a matter.

[50] In the circumstances I think that the applicant has made out a *prima facie* right, albeit open to some doubt and it appears abundantly clear that he has a reasonable apprehension that the tender process will be completed without its bid being considered.

Balance of convenience

[51] In considering the balance of convenience the court is required to weigh up the likely prejudice which the applicant would suffer if the temporary interdict were refused and the refusal is later shown to be wrong, against the likely prejudice to the respondent if the temporary

interdict is granted and the grant of the interdict is later shown to have been wrong.

[52] In this regard the applicant alleged that it was established for the sole purpose of providing the FMT service to the third respondent. Since August 2005 the third respondent has been the applicant's sole client and the FMT has been its sole project. The applicant has no other projects or clients to utilise its employees. The livelihoods of the applicant's employees remain at risk in the interim period. The applicant's employees are reliant on their incomes generated from their work performed in respect of the third respondent's FMT. If the applicant's employees are lost in the interim period due to the incorrect decision of the second respondent and the applicant is subsequently successful in its review, the applicant would be obliged to appoint new highly skilled and experienced employees. This the applicant contends is untenable as it will effectively lose its entire business knowledge, specially related to the third respondent's FMT.

[53] As against this the fifth respondent has not alleged any material prejudice which it would suffer save that Mr ***Swanepoel*** argues that it would not be fair to the fifth respondent if it were required to wait for the review proceedings to be completed prior to the award of the contract.

[54] Suffice it to say that I am of the view that the balance of probabilities clearly favours the granting of the interim relief.

No alternative remedy

[55] Mr ***Swanepoel*** argues that this element has not been satisfied at all. The basis for this argument lies in the argument relating to the ripeness for hearing. I have already found that in my view this argument is flawed.

Relief sought

[56] The interdict which the applicant seeks is that the first, second and third respondents be interdicted from awarding the September 2011 Financial Management Tool Tender (tender number SCM337/2011-2012)(the "tender") to the fourth or fifth respondents and interdicting the first, second and third respondents from concluding any agreements with the fourth or fifth respondents to perform any work in terms of the tender until the final determination of the review application.

[57] The respondent contends that the applicant is effectively attempting to secure for itself any interim and urgent work (pending the award of the tender) that may be required in relation to the FMT for itself. This, it is argued, the applicant is not entitled to and the court cannot grant it.

[58] The fifth respondent argues that the Policy allows the first respondent to dispense with the official procurement processes in certain circumstances and that he is entitled to conclude ad hoc contracts with service providers to attend to any necessary or emergency work pending the award of the September 2011 tender.

[59] This is of course true, however, it seems to me that the argument is founded upon a misreading of the relief sought. What the applicant seeks is not to prevent the conclusion of ad hoc contracts pending the award of the tender but to preclude the implementation of the award of the tender once it has been made. It seeks only to interdict the first, second and third respondents from awarding the tender or from concluding agreements with the fourth or fifth respondents to perform any work in terms of the tender. Indeed notice of this relief was served on the first respondent by the letter on 6 February 2012 wherein the applicant advised that unless it received an undertaking that no final award would be made it would approach the High Court to interdict "the award and/or implementation of the tender". This, I think, is what is sought because it was not known whether the tender would be awarded prior to the service of the papers. This, in turn, arose because the third respondent declined to respond to the letter of 6 February.

[60] In all the circumstances I do not think that there is any merit in this argument raised on behalf of the fifth respondent in respect of the form of the relief.

Failure to exhaust internal remedy

[61] Whilst this issue was raised in the fifth respondent's papers it was not pursued with any vigour in argument.

[62] Clause 50 of the Policy deals with the resolution of disputes, objections, complaints and queries and provides for the appointment of an independent and impartial person to assist in the resolution of disputes between the third respondent and other persons regarding decisions or actions taken in the implementation of the Policy or any matter arising from a contract awarded in terms of the Policy. Mr ***Swanepoel*** argues that the applicant should first have pursued this route before launching this application.

[63] There are a number of responses to this argument. Firstly Mr ***Buchanan*** referred to clause 50(6) of the Policy which provides expressly that clause 50 should not be read as affecting any person's right to approach a court at any time. On an interpretation of the policy itself it does not seem to me that this "internal remedy" was intended to be a necessary pre-cursor to litigation.

[64] Of significance in this case is events from 1 February 2012 to 7 February 2012 as set out above. The applicant had every reason to believe in these circumstances, that the first respondent was about to award the contract when the application was launched. When the contract is awarded rights and obligations are immediately created, which is precisely what the applicant seeks to prevent. In the circumstances I do not think that the remedy in clause 50 of the Policy could be an effective remedy.

Access to records

[65] The applicant contends that it is entitled to have access to the documentation relating to the decisions taken in respect of the September 2011 FMT tender. It seeks the following documentation:

1. all minutes of the Bid Evaluation and Bid Adjudication Committees, including all reports, memoranda, score sheets, tender responses and other documents forming a part of such minutes and reports;
2. all reports, memoranda and other relevant documents submitted to the said committees by municipal officials, directorates and departments concerning the aforesaid tender;
3. all written reports and recommendations of the Bid Evaluation and Bid Adjudication Committee concerning the aforesaid tender;

4. all written decisions and/or memoranda prepared by or on behalf of the acting municipal manager of the third respondent in connection with the aforesaid tender;
5. all reasons relating to any decision taken in connection with the aforesaid tender, whether by the first or second respondents; and
6. all minutes of the counsel of the third respondent and/or mayoral committees and/or sub-committees in connection with the aforesaid tender.

[66] The respondent opposes this relief, again, on the basis that it is premature. The respondent argues that the applicant is not entitled to such information before the award of the tender. This argument is closely connected to the argument relating to ripeness which I have dealt with above in respect of the review application. The fifth respondent places reliance on the decision of ***Tetra Mobile Radio (Pty) Ltd v Member of the Executive Council of the Department of Works and Others*** 2008 (1) SA 438 (SCA) at 445A-B. I do not think that this decision provides any authority for the proposition that access to information will never be granted prior to an actual decision being taken. The particular passage to which I was referred relates to the interpretation of a particular section of the KwaZulu-Natal Procurement Act 3 of 2001. In that matter it was held that when the provisions of the Procurement Act were read in conjunction with section 217 of the Constitution the appellant in that matter was

clearly entitled, in terms of section 20 of the Procurement Act, to receive such documentation from the time that the tender was awarded.

[67] Once it is accepted, as I have concluded for purposes of this application that it should be, that the review proceedings are not premature and that the applicant has made out a case for the interim interdict sought, then I think that the ***Tetra Mobile*** decision offers greater support for the applicant's contention that it is indeed entitled to have sight of this documentation in order to properly formulate its grounds for review. I think that the applicant is entitled thereto.

[68] During the course of argument, however, Mr ***Swanepoel*** conceded that there could be no prejudice to the fifth respondent if documentation relating to the applicant's bid were made available. Mr ***Swanepoel*** contended, however, that whereas the tender process has not yet been completed the fifth respondent would be prejudiced if details of its bid, in particular its pricing structures, were made available to the applicant. Mr Buchanan, in turn, was constrained to concede this consideration. I consider that the fourth respondent, although it has not opposed the application, is entitled to similar protection. In these circumstances I propose to limit the order in respect of access to documentation and information as set out in the order at the conclusion of this judgment.

Costs

[69] I have had the benefit of full argument on behalf of the applicant and the fifth respondent in respect of the appropriate costs order to be made and in addition each of them have taken the opportunity to file further heads of argument in respect of the appropriate costs order.

[70] By virtue of the conclusions to which I have come above I consider that the applicant has been substantially successful in the application launched and should be entitled to the costs of the application for interim relief and for access to records.

[71] In the result I make the following order:

1. (a) A rule *nisi* will issue returnable on 5 April 2012 at 10h00, or as soon thereafter as counsel may be heard, calling upon the respondents to show cause, if any, why a final order should not be granted:

(i) that the first, second and third respondents be interdicted from awarding the September 2011 Financial Management Tool Tender (tender number SCM337/2011- 2012)(the “tender”) to the fourth or fifth respondents and interdicting the first, second and third respondents from concluding any agreements with

the fourth or fifth respondents to perform any work in terms of the tender until the final determination of the pending review application;

(ii) that the third respondent pay the costs occasioned by this application, alternatively, that the third respondent, jointly and severally with such further respondents as may oppose the application, pay the costs of the application.

(b) The order referred to in paragraph 1(a) above shall operate as an interim interdict with immediate effect pending the return day of the rule *nisi*.

(c) The third respondent and the fifth respondents are ordered, jointly and severally, the one paying the other to be absolved, to pay the costs occasioned by the application for the interim interdict referred to in paragraph 1(b) above.

2. (a) The first, second and third respondents are ordered to provide to the applicant, subject to paragraph 2(b) below, within three (3) weeks from the date of this order, all documentation relating to decisions taken in respect of the aforesaid tender, which documentation is to include the following:

(i) all minutes of the Bid Evaluation and Bid Adjudication Committees, including all reports, memoranda, score sheets, tender responses and other documents forming a part of such minutes and reports;

(ii) all reports, memoranda and other relevant documents submitted to the said committees by municipal officials, directorates and departments concerning the aforesaid tender;

(iii) all written reports and recommendations of the Bid Evaluation and Bid Adjudication Committees concerning the aforesaid tender;

(iv) all written decisions and memoranda prepared by or on behalf of the Acting Municipal Manager of the third respondent in connection with the aforesaid tender;

(v) all reasons relating to any decision taken in connection with the aforesaid tender, whether by the first or second respondents; and

(vi) all minutes of the council of the third respondent and mayoral committees and sub-committees in connection with the aforesaid tender.

(b) The first, second and third respondents are directed to exclude from the aforestated documentation, alternatively, to

block out in the aforesaid documentation all information supplied by the fourth respondent and/or the fifth respondent in their bids which may put either of the said respondents at a disadvantage in the bid process or prejudice them in commercial competition and in particular the first, second and third respondent are ordered to omit or delete any information relating to the pricing structures of the fourth respondent and the fifth respondent's bids.

(c) The costs occasioned by the application for access to information and reasons are reserved.

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J W EKSTEEN

JUDGE OF THE HIGH COURT

Appearances:

For Applicant:	Adv R Buchanan SC instructed by Van Wyk Attorneys, Port Elizabeth
For 1st, 2nd & 3rd Respondents:	Adv Gqamana instructed by Ketse Nonkwelo Inc, Port Elizabeth
For 4th Respondent:	No appearance
For 5th Respondent:	Adv M Swanepoel SC instructed by Schoeman Oosthuizen Inc, Port Elizabeth