

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

CASE NO: 21 / 11114

- (1) REPORTABLE: NO
- (2) OF INTEREST TO OTHER JUDGES: NO
- (3) REVISED. NO

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SIGNATURE

DATE: 3 May 2022

APPLICANT

And

**AIR TRAFFIC NAVIGATION SERVICE SOC
LTD**

RESPONDENT

JUDGMENT

MANOIM J

- [1] The applicant in this case seeks certain records from the respondent in relation to a cancelled tender.

- [2] The application is brought in terms of the Promotion of Access to Public Information Act, No 2 of 2000 (PAIA).
- [3] The respondent has taken several points *in limine* including; that the application has become moot; that there has been no refusal to provide the information and hence the application is abusive and; finally, that it is a fishing trip to engage in impermissible pre-litigation discovery.
- [4] The applicant is a private company whose sole director is its deponent to the founding affidavit, Sydney Maapola. Apart from the fact that it was formed in 2015 the record contains little detail about it.
- [5] The respondent is a state-owned company (hence its designation as an “SOC”) involved in the provision of air traffic navigation services. Like the applicant it discloses little else about its functions, but this notwithstanding, the only relevant fact concerning it for present purposes is that it is a public body.
- [6] The reason this is relevant is that the application has been brought in terms of section 11 of PAIA which states:
- (1) A requester must be given access to a record of a public body if-
- (a) that requester complies with all the procedural requirements in this Act relating to a request for access to that record; and
- (b) access to that record is not refused in terms of any ground for refusal contemplated in Chapter 4 of this Part.
- [7] A public body is defined as:
- (a) any department of state or administration in the national or provincial sphere of government or any municipality in the local sphere of government; or
- (b) any other functionary or institution when -
- (i) exercising a power or performing a duty in terms of the Constitution or a provincial constitution; or

(ii) exercising a public power or performing a public function in terms of any legislation'

[8] Since it is common cause that the respondent is a public body, it is not necessary for me to consider under which of these sub-paragraphs it qualifies to be such.

Background

[9] In March 2019, the respondent issued a tender for the replacement of its digital airfield information display. (Note the respondent constantly refers to this solicitation as a 'request for a proposal' whilst the applicant refers to it as a tender, but nothing turns on this distinction for the purpose of this case. I will refer to this from now on as a tender.)

[10] The applicant along with other bidders submitted a proposal. In August 2019, the respondent requested the applicant to meet with its committee considering the bid. Maapola and two colleagues attended the meeting and according to him they satisfactorily dealt with all their queries. I refer to this meeting from now on as the clarification meeting.

[11] On 25 September 2019, the respondent cancelled the tender and notified all the bidders. In the case of the applicant, he was notified that a new tender would be issued and that he would be entitled to bid again.

[12] However, what the applicant did was to issue a series of requests for information regarding the cancelled bid. Overall, he submitted four requests and two internal appeals to the respondent, between February 2020 and February 2021. Since he instituted the present application in March 2020 it means a request had been made even after the commencement of the current litigation.

[13] The respondent has furnished certain of the documentation requested. Importantly the Technical evaluation report was furnished to him in September 2020. This report contains the Bid Evaluation Committee's (BEC) evaluation of all the bids, their scoring and their reasoning.

- [14] The report acknowledges that the applicant had the lowest priced bid but also stated it was the least technically compliant with the most risks associated with it. In addition, it noted, there was no evidence that the applicant had any past experience.
- [15] At the end of the report the Technical committee asks the management of the respondent to advise it on the fact that the applicant has the lowest priced bid but had risks the respondent "... cannot overlook."
- [16] This observation does not seem to have deterred Maapola, who in his founding affidavit states, that after reviewing the documents disclosed to him "...I have gathered that the applicant had the best tender bid response."

What information does the applicant seek?

- [17] Although not set out in the Notice of Motion the applicant seeks the following as he describes it:
- Records and minutes of the clarification meeting;
 - Notes of everyone on the BEC taken during the clarification meeting.
 - Further any documents evidencing the interaction between the respondent's management committee and the members of the BEC.
- [18] I have described them more broadly than they are in the letter but since the dispute does not turn on any individual item this suffices.

Respondent's response

- [19] There have been various responses from staff of the respondent over this period to the request. But its final position can be summed up thus; it has furnished the applicant with the minutes of the clarification meeting and the report of the technical committee which evaluated the bids; the tender has in any event been

cancelled; it has not refused access to the remaining documents requested but sought clarification for what is being sought; clarification that has never been provided. Thus, the legal and compliance officer wrote back to indicate the uncertainty:

[20] "...we can neither confirm or deny the existence of the documents in your ... form. This is mainly due to the fact that we are not sure what is being requested or even aware of the existence of such documents thus we seek from yourselves, a more detailed and clarified description thereof in order to adequately respond to you."

[21] The applicant's response was that sufficient particularity had been given and that nothing further needed to be provided to the respondent to enable it to comply. This remained the applicant's position in the litigation.

The applicant's reasons

[22] In the founding affidavit in clause 3.12 Maapola contends:

"In considering the furnished information, the Applicant formed a considered preliminary view that a number of irregularities had been committed by the Respondent; that the handling of this tender by the Respondent had been punctuated by illegality and unlawfulness."¹

And he then goes on to state:

"In the respectful considered view of the Applicant, the Respondent ought to have known that the Applicant had identified its nefarious conduct. The Respondent, in the considered view of the Applicant, pretended not to understand what the Applicant was requesting."²

[23] Thus, the message here is that the respondent has committed a number of irregularities, knows it has and because of this, is pretending not to understand the applicant's request.

¹ Founding affidavit 3.12

² FA 3.15

[24] But in the replying affidavit the applicant takes the view it does not need to give a reason and can instead rely on the general right of information;

“I am advised by my attorneys that, as one of the parties who tendered for the cancelled bid, the applicant has a right as the requester to be given access to public records without giving a reason for seeking access to information.”

Analysis

[25] The respondent has explained in a letter to the applicant dated 28 February that the reason the tender was cancelled was that:

“ during the evaluation of the above tender, we identified serious deficiencies on the bid specifications, which led to all submitted bids not fully compliant, (sic) and this resulted on the tender being cancelled.”

[26] The applicant was since that letter invited to re-submit a tender; furnished with a copy of the technical report and with the minutes of the clarification committee.

[27] The applicant despite being asked to do so has refused to explain why the documents provided are an insufficient response to its request.

[28] In Heads of argument prepared by counsel although he did not argue the matter, he stated the reason the tender records were required was to enable them to seek damages arising from their alleged negligent treatment by the respondent.”

[29] However, this negligence argument was not persisted with by Mr Letoka who appeared for the applicant before me, and he reverted to the nefarious conduct theory contained in the paragraphs of the founding affidavit I quoted earlier. The two theories are not compatible. If the reason for the cancellation of the tender was negligence by the respondent, then that is qualitatively different from an allegation of nefarious conduct and a deliberate attempt to obfuscate the request for information on the pretext it was not comprehensible.

- [30] What the applicant is now attempting is to go behind the documents it has already received to make a case that they do not represent the full state of affairs.
- [31] There appear to be two strands to the request. To get further documents regarding the clarification meeting, hence notes of everyone from the BEC present during the meeting; and second to scrutinise the interface between the respondent's management committee and the BEC, assuming there was any by seeking to find a document trail. Hence the request for correspondence exchanged, Management minutes on the subject, etc.
- [32] This is manifestly an abuse of process and amounts to an attempt to gain pre-litigation discovery through the general right to records of a public body afforded by section 11 of PAIA.
- [33] To the extent that the tender was cancelled because the committee had identified problems with bid specification, I would agree with the respondents that this renders any further requests moot. First, because the applicant has been furnished with the reasons for the decision to cancel the bid, which do not appear to relate to the individual firms' compliance with the bid; and second, to the extent that documents have been furnished, they fully outline the BEC's thinking in relation to the then extant bid.
- [34] Manifestly this is an attempt to gain pre-litigation discovery because the applicant is seeking other documents to go behind those furnished to seek to bolster its contention of alleged nefarious conduct.
- [35] Section 7(1) of PAIA states:

7(1) This Act does not apply to a record of a public body or a private body if-

- (a) that record is requested for the purpose of criminal or civil proceedings;*
- (b) so requested after the commencement of such criminal or civil proceedings, as the case may be; and*
- (c) the production of or access to that record for the purpose referred to in paragraph (a) is provided for in any other law.*

[36] Textually, the exclusion only applies after the “commencement” of proceedings. However, the courts have held that the exclusion can apply as well to attempts to obtain “pre-action discovery.”

[37] In **Unitas Hospital v Van Wyk** and Another 2006 (4) SA 436 (SCA) Brand J explained in discussing the purpose of section 7 of PAIA that:

The deference shown to discovery rules is a clear indication, I think, that the Legislature had no intention to allow prospective litigants to avoid these measures of control by compelling pre-action discovery under s 50 as a matter of course. I

[22] I hasten to add that I am not suggesting that reliance on s 50 is automatically precluded merely because the information sought would eventually become accessible under the rules of discovery, after proceedings have been launched. What I do say is that pre-action discovery under s 50 must remain the exception rather than the rule;”

[38] It must be noted that Brand JA was dealing with section 50, a request for information from a private body where the legal threshold to obtain access to information is higher than for a state body under section 11. Nevertheless section 7(1)’s litigation exclusion applies equally to the records of both private and public bodies. There is therefore no reason not to follow this approach in the present matter.

[39] It is clear that the applicant’s request in this matter amounts to a request for pre-action discovery. In the first place, this purpose is admitted in the heads of argument of its counsel. Second, even if it has attempted to walk away from this admission, the nature of the documents requested coupled with the allegations of illegal conduct, nefarious conduct etc., suggests that litigation is precisely what is contemplated.

[40] I am therefore satisfied that the application must fail because it amounts to a matter that is now moot, is an abuse of process and finally is precluded by virtue of section 7(1) of PAIA because it amounts to pre-action discovery.

ORDER

[41] The application is dismissed with costs.

N MANOIM
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

This judgment was handed down electronically by circulation to the parties' and/or parties' representatives by email and by being uploaded to CaseLines. The date and time for hand-down is deemed to be 10h00 on 3 May 2022.

Date of Hearing: 19 April 2022

Date of Judgment: 3 May 2022

Appearances:

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