

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

23/2/18
CASE NO: 3616/2016

Not reportable

Not of interest to other judges

In the matter between:

MUNICIPAL INFRASTRUCTURE SUPPORT AGENT

Applicant

and

ROBERT SLAUGHTER

First Respondent

SHAHIT WADVALLA

Second Respondent

REGINALD LEGOABE

Third Respondent

STEVEN NJIRI

Fourth Respondent

JUDGMENT

PETERSEN AJ:

Introduction

[1] This is an opposed application for rescission. At issue is an order granted by default on 4 March 2016 by Nobanda AJ against the applicant in the following terms:

1. to give written reasons for the administrative action with regards to the Applicants unsuccessful bids for MISA/PPM/003/2015 respectively in terms of Section 33 of the Constitution of the Republic of South Africa and Section 5 of the Promotion of the Administrative Justice Act 3 of 2000 (PAJA);
2. to hand over all bid evaluation and adjudication records including the minutes and attendance registers of Bid Committee meetings and curricula vitae of all appointees who participated in Bid MISA/PPM/003/2015 for Programme/Project Managers and MISA/CE/003/2015 for Civil Engineers Technical Consultants as advertised by the Respondent in national newspapers as well as the State Tender Bulletin No 2878 of the 4th July 2015 including inter alia the CV's of the appointed persons; and
3. to hand over all the curricula vitae of its Supply Chain Management Unit team including the curricula vitae of its Bid Evaluation and Adjudication Committee Members who participated in Bid MISA/PPM/003/2015 for Programme/Project Managers and MISA/CE/003/2015 for Civil Engineers Technical Consultants as advertised by the Respondent in national newspapers as well as the State Tender Bulletin No 2878 of the 4th July 2015.

Background

[2] The respondents were employed by the Development Bank of Southern Africa and subsequently transferred by the state to the applicant with effect from the 1 April 2012 as part of the "Siyenza Manje" local government support programme. The respondents were subsequently re-contracted by the applicant as employees from 1 April 2012 to 31 September 2012 and then as consultants in terms of a specialist consultancy service level agreement from 1 October 2012 to 30 September 2015. The applicant published requests for proposals under tender numbers MISA/PPM/003/2015 for Programme/Project Managers and MISA/CE/003/2015 for Civil Engineer/Technical Consultants in national newspapers and the State Tender Bulletin No 2878 of the 4th July 2015. The respondents' applied in line with their respective skills. The respondents' were unsuccessful in their bids with the ensuing result being the automatic expiration of their contracts as service providers for MISA on 30 September 2015.

The litigation

[3] The respondents' employment having ceased and having been unsuccessful in their tender bids they launched an urgent application on 2 December 2015 in this court under case number 95285/2015. In that application they sought an order including, amongst others, that the appointments made by the applicant in terms of MISA/PPM/003/2015 and MISA/CE/003/2015 be declared null and void due to gross tender irregularities, alternatively that the respondents be re-appointed in terms of their contracts of consultants in terms of MISA Tender bids PPM/003/2015 and CE/003/2015. The application was struck from the roll with costs for lack of urgency and not on the merits. On 19 January 2016, the respondents' withdrew the application of 2 December 2015. A new application was launched on the same date to compel discovery of all tender records under the present case number. The new application was set down for 24 February 2016 on the unopposed roll. The application was served by the Sheriff of the Court on the State Attorney as the applicants' legal representative, on 20 January 2016. No notice of opposition was filed by the applicant with the Registrar of the Court or served on the respondents' attorney of record. On 24 February 2016, the matter was removed from the unopposed roll by the respondents' (applicants' in the application at the time) and re-enrolled by the respondents' attorney of record on the unopposed roll of 4 March 2016. The State Attorney was served with a notice of set down for 4 March 2016 by the Sheriff of the Court on 25 February 2016 and on 1 March 2016 notice was delivered by hand to the State Attorney. No notice of opposition was filed by the State Attorney in response to the service of the application on 20 January 2016. On 4 March 2016, the order which forms the subject of this application was granted by default and served on the applicant on 13 May 2016.

[4] The applicant launched a rescission application on 13 May 2016. On 30 June 2016, the respondents' secured an order under hand of Baqwa J declaring the applicant to be in contempt of the order of 4 March 2016. The applicant was given thirty (30) days to comply with the order of 4 March 2016 under threat of arrest. The rescission application in the interim was set down on the opposed roll for 14 August 2017. However, following the filing of a notice of removal by the applicant on 10 July 2017, the application for rescission was accordingly removed from the roll on 14 August 2017. On 14 December 2017 the respondents' gave the applicant notice of

its intention to have the present application set down for hearing on the opposed roll on 29 February 2018, whilst the date was in fact 19 February 2018. Be that as it may counsel for the applicant duly appeared on brief on 19 February 2018.

The grounds for rescission

[5] The applicant's main ground for rescission is that the service of the notice of set down on 01 March 2016 for hearing on the unopposed roll of 4 March 2016 constitutes short service which is not countenanced by the Uniform Rule 6(5).

The rules

[6] The relevant provisions of rule 6(5) provide as follows:

6 Applications

(5)(a) Every application other than one brought *ex parte* must be brought on notice of motion as near as may be in accordance with Form 2 (a) of the First Schedule and true copies of the notice, and all annexures thereto, shall be served upon every party to whom notice thereof is to be given.

(b) In a notice of motion the applicant must –

(iii) set forth a day, not less than five days after service thereof on the respondent, on or before which such respondent is required to notify the applicant, in writing, whether he intends to oppose such application, and must further state that if no such notification is given the application will be set down for hearing on a stated day, not being less than 10 days after service on the said respondent of the said notice.

(c) If the respondent does not, on or before the day mentioned for that purpose in such notice, notify the applicant of his intention to oppose, the applicant may place the matter on the roll for hearing by giving the registrar notice of set down before noon on the court day but one preceding the day upon which the same is to be heard.

...

(13) In any application against any Minister, Deputy Minister, Administrator, officer or servant of the State, in such capacity, the State or the administration of any province, the respective periods referred to in paragraph (b) of subrule (5), or for the return of a rule *nisi*, must not be less than 15 days after the service of the notice of motion, or the rule *nisi*, as the case may be, unless the court has specially authorized a shorter period.

[7] Rule 4(9) further provides that:

4 Service

(9) In every proceeding in which the State, the administration of a province or a Minister, Deputy Minister or Administrator in his official capacity is the defendant or respondent, the

summons or notice instituting such proceeding may be served at the Office of the State Attorney situated in the area of jurisdiction of the court from which the summons or notice has been issued: Provided that such summons or notice issued in the Transvaal Provincial Division shall be served at the Office of the State Attorney, Pretoria...”

Discussion

[8] The Municipal Infrastructure Support Agent (“MISA”) is accountable to the Minister of Co-operative Governance and Traditional Affairs, having been constituted as a national government component in terms of section 7(2) Schedule 3 of the Public Service Act of 1994 (as amended). MISA as a component of national government therefore falls within the ambit of rule 4(9) of the Uniform Rules of Court for purposes of service of process. The respondents’ could therefore as they did serve the notice instituting the application against MISA at the Office of the State Attorney, Pretoria. When the notice of motion was served on the State Attorney on 20 January 2016 in terms of rule 4(9), the applicant was called upon within 14 days of service to notify the applicant, in writing, whether the applicant intended to oppose the application. The applicant was further informed that if no such notification was given the application would be set down for hearing on the 24 February 2016 at 10h00. In this regard the respondents’ complied fully with the rule 6(13).

[9] The respondents’ fail to explain in the answering affidavit why the application was removed from the unopposed roll of 24 February 2016 and later re-enrolled on the unopposed roll of 4 March 2016. Notwithstanding this failure to explain the removal and subsequent re-enrolment one week later, the fact remains that the application served on the 20 January 2016 remained unopposed. The respondent’s served a notice of set down on the State Attorney for the 4 March 2016 on 25 February 2016 through the Sheriff of the Court and again on 1 March 2016 by hand.

[10] The applicant explains in its founding affidavit that the notice opposing the application of 24 February 2016 was served at the address which appears on the notice of motion, but the attorneys which appear in the Notice of Motion could not be found at the address which frustrated the process of the applicant defending the application. The deponent of the founding affidavit, Mr Luvo Mpengesi, defers to the State Attorney, Mr Thando Sitelo to confirm this allegation. Mr Sitelo in a confirmatory affidavit confirms the allegation insofar as it relates to him. What is absent from the founding affidavit and confirmatory affidavit is when attempts were made at service of the notice of intention to oppose and by whom. In particular, however, the tenor of the founding affidavit is that the notice of opposition was in fact served. This assertion lacks particularity, in that if the notice of opposition was in fact served, no proof thereof is provided by the applicant of such service or the drafted notice of opposition itself. If service of the notice of opposition had in fact occurred, it is peculiar, why knowing that the application is set down for 24 February 2016, the State Attorney made no effort to brief Counsel to appear on the said date to make

submissions on this point to the court. The applicant in its founding affidavit simply fails to explain its non-appearance on 24 February 2016.

[11] In respect of the notice of set down for the 4 March 2016 served by the respondents' through the Sheriff of the Court and by hand at the Office of the State Attorney Pretoria, Mr Mpengesi states that "although it appears that the respondents served on the applicant a notice of set down dated 4 March 2016, the notice of set down never reached the Attorney of Record and as a result MISA was unaware that the matter was set down for the 4th March 2016." The notice of set down was in fact served in the two manners as stated aforesaid and not that it appears to have been served by the respondents'. The return of service of 25 February 2016 pertinently states that the notice of set down was served at 15h00 at the Office of the State Attorney, Pretoria on Miss Mthathoa (Reception). Further to that the notice of set down served by hand on 01 March 2016 at the Office of the State Attorney Pretoria, bears the stamp of the State Attorney with a signature and time of 15h00. The statement that the notice of set down never reached the attorney of record is therefore misplaced. There was only one attorney of record at that stage, the State Attorney, Pretoria. No explanation is given why Miss Mthathoa was not approached to explain what happened to the notice of set down served by the Sheriff on her or to depose to an affidavit in this regard. Similarly no affidavit is filed by the person who received the notice of set down served by hand to explain any remissness in this regard.

[12] The application for rescission premised on short service of the notice of set down for 4 March 2016, within the ambit of rule 42(1)(a), is without merit. In addition, the applicant has failed to show that it has a *bona fide* defence or that it was not in wilful default.

Order

[13] In the result the application for rescission of judgment is dismissed with costs.

A handwritten signature in dark ink, appearing to read 'AH Petersen', is written over a horizontal line.

AH PETERSEN

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

Appearances:

For the Applicant: Adv. MH Mhambi

Instructed by: Mokono Attorneys

For the Respondent: Adv. TD Molea

Instructed by: Ngeno and Mteto Incorporated

Date heard: 19 February 2018

Date of judgment: 23 February 2018