IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

Case Number: 16285/2019

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES / NO

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

(3) REVISED. ✓

28/3/19 — DATE

SIGNATURE

In the matter between:

MOIPONE FLEET (PTY) LTD — APPLICANT

And

CITY OF TSHWANE METROPOLITAN MUNICIPALITY — 1ST RESPONDENT

NATIONAL TREASURY — 2ND RESPONDENT

JUDGMENT

Fabricius J,

[1] In this urgent application the Applicant seeks the following relief:

"2. That the first respondent be interdicted and restrained from taking any further steps in the procurement process under tender no. RT57/2016 which pertains to the "*appointment of suitably qualified service providers for the supply of vehicles to the City of Tshwane*" pending the determination of the review application under case number 27752/17.

3. That the first respondent be interdicted and restrained from issuing any further invitations to bid or requests for quotations for the supply of category A and category C vehicles (as defined in the PPP agreement dated 24 March 2016) pending the determination of the review application under case number 27752/17.

4. That the first respondent pay the costs of this application on the attorney and client scale."

This tender called for the supply of vehicles to First Respondent, and according to Applicant these vehicles also fall within the "Exclusivity clause" contained in the agreements. First Respondent is of a different view.

The question of urgency arose, but was not debated in Court although I do note that the Respondents, as per the Notice of Motion, were only given 24 hours to file an Answering Affidavit after indicating their intention to oppose the application. The Founding Affidavit gives no reason why this short period was stipulated for, and there is in my view no reason for such at all. It is also unfair.

[2] Nevertheless, the application was heard and I will decide it on the basis of my overall discretion relating to the issuing of interim interdicts, which discretion I undoubtedly have. One of the issues is of course the question

whether or not the Applicant can be afforded substantial redress at a hearing in due course. I will briefly revert to this question.

Brief overview:

[3] On 24 March 2016, and pursuant to a tender process, two Public Private Partnership Agreements were concluded between the Applicant and the First Respondent, in terms of which the former was appointed to provide the city with all vehicles falling under categories A and C of those agreements. Category A vehicles were defined as were category C vehicles. The agreements were to endure for a minimum period of 60 months up to February 2021.

[4] Clause 39 of Part A of the agreement provided for "EXCLUSIVITY" and the interpretation of this clause resulted in a number of applications to this Court.

[5] On 29 March 2017, Davis AJ made the following order:

"1 The Respondent is directed to comply with its obligations under the Public Private Partnership Agreement ("the agreement") concluded between the Applicant and the Respondent on 24 March 2016 pending the final conclusion of any process, application, action or arbitration whereby the validity of the agreement is finally determined or unit such as the agreement is validly cancelled.

2. The Respondent is interdicted and restrained from appointing and/or concluding any agreement with any other service provider for the rendering of the services that the Applicant is obliged to render in terms of the agreement pending the final determination of the validity or valid cancellation thereof as aforesaid."

It will be noted that the order made is substantially the same that is being sought in the present proceedings. Leave to appeal against that order was refused. The first part of that order was made pending the final conclusion of further proceedings, and these were indeed launched by the First Respondent under case number 27752/17, and this review application is

set down for hearing on 15 and 16 April 2019. There was also a contempt of Court application heard by Mokose AJ. The order made therein, is being appealed, leave to appeal having been granted and a hearing before the Supreme Court of Appeal is awaited. It is clear that the interpretation of clause 39 of the relevant agreements will also be a topic before that Court.

[6] There was a further application before Tuchten J in which leave to execute the judgment of Mokose AJ was sought. The learned Judge also referred to clause 39 and made certain observations regarding its interpretation, which differed from those of the other Judges, and also from Applicant's Counsel.

[7] In light of the order of Davis AJ (as he then was), and the pending review application on 15 and 16 April 2019, it is in my view highly undesirable that I again interpret clause 39 of the relevant agreement, even if only on a *prima facie* basis. The order of Davis AJ is substantially the same that I am being asked to grant again. The application can in any event not be urgent having

regard to the mentioned facts, as well as the fact that it is in my view abundantly clear that Applicant would have a claim for damages against the First Respondent should it be ultimately found that First Respondent had breached the terms of the agreements between them. The fact that it may be difficult to quantify such damages does not detract from the fact that such remedy will exist in law. Difficulty in quantifying a claim should in my view not be a factor that should be given undue emphasis. Litigation is often difficult, but in the present context, that does not mean that I can find that the Applicant will have no other reasonable manner of redress in due course.

[8] In the light of the abovementioned facts it is not necessary to deal with any other arguments presented by Counsel for the First Respondent.

[9] I can also adopt the approach suggested by the Constitutional Court in ***National Treasury v Opposition to Urban Tolling Alliance and Others 2012 (6) SA 223 (CC)*** namely, that an order against an entity exercising statutory

powers should only be made if it is constitutionally appropriate. First Respondent is supplying services to the public, is enabled and obliged to do so by Statute, and this is also be an important consideration when I consider the facts holistically.

[10] In the light of all of the above, the following order is made:

The application is dismissed with costs, including the costs of two Counsel, and the costs of the hearing before Mavundla J on 20 March 2019.

JUDGE H.J FABRICIUS

JUDGE OF THE HIGH COURT GAUTENG DIVISION, PRETORIA

Case number: 16285/2019

Counsel for the Applicant: Adv A. P. Rossouw SC

Instructed by: VZLR Inc. Attorneys

Counsel for the 1st Respondent Adv K. Tsatsawane SC

Adv K. D. Magano

Adv C. Marule

Instructed by: Gildenhuys Malatji Attorneys

Date of Hearing: 26 March 2019

Date of Judgment: 28 March 2019 at 10:00