



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

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

SIGNATURE

DATE: 8 September 2023

Case No. 23/075060

In the matter between:

ALTRON TMT (PTY) LTD

Applicant

and

CITY OF TSHWANE METROPOLITAN MUNICIPALITY

First Respondent

BRILLIANT TELECOMMUNICATIONS (PTY) LTD

Second Respondent

CBX TECH (PTY) LTD

Third Respondent

JUDGMENT

DE VOS AJ:

Introduction

- 1 The Court must decide if a successful tenderer can object to the disclosure of portions of the Rule 53 record, on confidentiality grounds, in the context of a tender review.
- 2 The City awarded a tender to the second respondent for R 585 million. The second respondent's bidding price was R 74 million. There is a R 510 million difference at play. The applicant, as unsuccessful tenderer, has launched a review of the award of the tender. It is as a matter of process entitled to a Rule 53 record, but has been denied the full record as the second respondent's confidentiality claim.
- 3 The case engages section 34 of the Constitution. Without the record the applicant has to litigate in the dark. The record allows of a levelling the inequality of arms between the reviewer and the decision-maker. It serves the purpose of shining a light on the reasons for the decision. Without the record both the litigants and the Court are disadvantaged in their task to interrogate the decision.¹
- 4 The case also engages section 217 (1) of the Constitution. Section 217(1) of the Constitution requires that awards must be made in accordance with a system that is fair, equitable, transparent, competitive and cost-effective. The Constitution requires that tender awards must be done in a transparent manner.
- 5 The second respondent claims that portions of the record contains trade secrets. The second respondent does not want its competitors to gain access to these trade secrets. It ranks the applicant as a competitor. There

¹ Helen Suzman Foundation v Judicial Service Commission 2018 (4) SA 1 (CC) paras 16 - 19

is little to gainsay that they are competitors. The second respondent's position is that it has delineated what is confidential and what is not and has already disclosed the non-confidential documents.

6 The affidavits, in the confidentiality application before this Court, run to over 600 pages. The confidential papers, which the case turns on, themselves are 7 lever arch files. The bundle is in excess of 7 000 pages. The case was heard in the urgent Court on 18 August 2023. Argument required more than one day. The parties agreed to a holding order that would operate until submissions could be concluded on 1 September 2023. On 1 September 2023 this Court extended the operation of the interim order until the hand down of this judgment.

7 The interim order permitted the Court an opportunity to consider the matter whilst protecting the second respondent's confidentiality claim in the interim. The proceedings were conducted in camera and the confidential documents provided to the Court only in hardcopy.

8 The case must be considered in the context of the tender and the review.

The tender

9 The tender concerns the operation and maintenance of the City's Information and Communication Technology ("ICT") corporate network equipment and the expansion of the existing ICT network. The successful bidder was to provide hardware, equipment and support services to ensure the reliable functioning and ensure City's ICT services had sufficient capacity.

- 10 The tender reaches into the data system, the telephone system and the entire ICT system for the City. The tender affects 12 000 data users and 14 000 voice users. These systems run in approximately 370 buildings and covers the area from Bronkhorstspruit to Hammanskraal, and from Midrand to the Carousel.
- 11 The services covered in the tender are integral to the functioning of the City. Those directly affected by the ICT network services include the Office of the Executive Mayor, the Office of the Speaker, the Office of the City manager, all political office bearers, the Chief Operating Officer, the Chief Financial Officer, the Group Heads, the Divisional Heads, the Directors, the Deputy Directors and all personnel reporting to the Deputy Director.
- 12 Inclusive in this, is the City's emergency call centres. The ambulance, hospital, fire brigade and rescue departments all run on these systems. The tender also covers the call centres that deal with general municipal services such as domestic bins, electricity, bus services, sewerage potholes traffic fines, faulty traffic light, water leaks, meter readings, faulty street lights, water problems and billing issues. If these systems do not work, then the public cannot, for example, call a hospital or the fire brigade.
- 13 The systems underpin the acute and every day needs of those that engage with the City and runs the gamut from the Office of the Mayor to those starting out their careers within the City.
- 14 The applicant and second respondent responded to the invitation to bid. The City awarded the tender to the second respondent.

The review

- 15 The applicant's focus, is naturally on the R 510 difference between original bid price and the bid price as awarded. However, the applicant has also raised other questions in these proceedings. The applicant identifies that one of the mandatory conditions of tender is that the bidder had to hold two valid licenses from ICASA (Individual Electronic Communications Service License and an Individual Electronic Communications Network Service License). The applicant has subpoenaed ICASA for a list of license holders. ICASA's response to the subpoena shows that there is no license registered which reflects the second respondent's company number. The second respondent is listed as a license holder – but under a different company registration number. In other words there is a license which reflects the second respondent's name, but when the registration number is investigated – it belongs to a different company.
- 16 In addition, the City stated in its bid document that it had invested heavily in the Alcatel-Lucent and Huawei range of products and equipment. To protect the City's investment the successful bidder "must be able to maintain the current Alcatel Productions on the corporate network". The tender documents stated that "any vendor must have the highest possible partnership with the Original Equipment Manufacturer of the proposed equipment". Practically, the successful bidder cannot procure products, warranties, support services or software from Alcatel—Lucent or Huawei (being the Original Equipment Manufacturer OEMs) without a partnership agreement in place with these two.

- 17 The applicant has been provided with a letter from Pinnacle – who is the sole distributed of Alcatel-Lucent products - confirming that the second respondent was not an Alcatel-Lucent partner at the time when pricing for the Tshwane tender was provided. The applicant contends that this letter indicates that the second respondent was not an accredited partner of Alcatel-Lucent at the time of the bid, and it failed to satisfy a minimum mandatory condition of tender and it ought to be haven disqualified from the tender evaluation process.
- 18 After launching the review, the applicant awaited the filing of the Rule 53 record. The City did not provide the record in time. The applicant had to launch an urgent application to compel the production of the Rule 53 record. From that, first urgent application, it emerged that the delay was caused by the second respondent's objection to the disclosure of certain parts of the record as they contain confidential information. In response to the second respondent's classification of the documents as confidential, the parties entered into a confidentiality agreement.
- 19 The parties complied with the confidentiality required in that the second respondent identified the documents it regards as confidential, the applicant's legal representatives were given access to the confidential documents and remain contractually prohibited from disclosing these documents to their client. The applicant's legal representatives were then given an opportunity to challenge the second respondent's classification of these documents as confidential. It is this challenge which serves before this Court.

Merits of the confidentiality claim

20 The second respondent claims confidentiality over three sets of documents: its price schedule, the CV's of its key personnel and certain annexures to the Service Level Agreement.

Price Schedule

21 The second respondent must support its objection to the production of the documents and provide the grounds for its objection.² In order to sustain a claim of confidentiality the second respondent must indicate which documents contain confidential information, the nature of such information and the legal basis on which the right to confidentiality is asserted.³

22 Confidentiality is determined with reference to the nature of the information⁴ and a fact-specific claim to confidentiality needs to be sustained.⁵ The second respondent has to show clear evidence of trade secrets.⁶

23 The Court has not been told how the final prices included in the second respondent's Price Schedule is confidential, a trade secret or even how a competitor can gain a competitive advantage from gaining access to these documents. The second respondent has not set out the basis and grounds for the confidentiality of these documents. It has presented the Court with conclusions it has drawn that the documents are confidential without providing the basis for this conclusion.

² Crown Cork & Seal Inc and Another v Rheem South Africa (Pty) Ltd and Others 1980 (3) SA 1093 (W), at 1101F

³ Tulip Diamonds FZE v Minister of Justice and Constitutional Development and others 2012 (4) SA All SA 401 SCA para 15

⁴ Helen Suzman Foundation v Judicial Service Commission 2018 (4) SA 1 (CC) ("Helen Suzman Foundation") para 63

⁵ Helen Suzman Foundation para 76

⁶ Afrisun Mpumalanga (Pty) Ltd v Kunene NO and Others 1999 (2) SA 599 (T) at 628 F – J

24 The second respondent's Price Schedule shows the final price for each item. The Price Schedule does not reveal the pricing formula, discounts, cost price or profit margins. The prices are specific to this bid. The advantage to other competitors to have access to this information has passed. The tender has been awarded, and no one can alter their bid to match these prices. These prices are of relevance only to the review application.

25 The Court concludes that these documents are not confidential.

CVs of the key personnel

26 The applicant claims that the CVs of the second respondent's key personnel are relevant to whether the second respondent satisfied the minimum mandatory requirements relevant to personnel and whether the second respondent satisfied the functionality criteria. A maximum of 35/100 points could be allocated to the evaluation of key personnel under the functionality stage of the tender evaluation.

27 The second respondent wishes the CVs of its key personnel to remain confidential as it fears that the applicant may poach its personnel. This does not mean the CVs are confidential. The second respondent's case is not that the nature or content of the CVs are confidential. In any event, the second respondent has other avenues to protect against this perceived harm. No facts have been pleaded to support the second respondent's apprehension of harm in this regard.

28 The Court is however mindful that the CVs contains the cellphone numbers and home addresses of the personnel. These can be redacted to protect the

confidentiality of the personnel. The applicant happily conceded that these can be redacted as it is not the personal details of these CVs that they are interested in, but rather whether their accreditations and qualifications meet the tender specifications.

29 The Court notes that this is not the first time that the tender prices and CVs of personnel were sought to be excluded from a tender review. In *ABBM v Transnet*⁷ the Court dismissed the contention that a part of the tender document such as the tender price and the tenderer's experience and expertise are confidential purely because the successful tenderer claims so.

30 It would be counterproductive and contrary to the Constitution to allow a successful bidder to hide behind an unsubstantiated claim of confidentiality on issues that are directly relevant to determining the merits of the review.

31 The Court rejects the notion that the pricing schedule and CVs of the key personnel enjoy a claim to confidentiality, particularly as no clear basis has been provided for this claim. The second respondent's attempt to categorise these documents, in general as confidential, is at odds with the more nuanced tests of our courts that require a basis be provided for the claim of confidentiality.

Service Level Agreement

32 The second respondent objects to the disclosure of the Service Level Agreement on the basis that they were concluded after the award of the tender and is therefore not part of the Rule 53 record.

⁷ *ABBM Printing & Publishing (Pty) Ltd v Transnet Ltd* 1998 (2) SA 109 (W) at 24.

- 33 The parties have entered into a confidentiality agreement. The confidentiality agreement permits a Court to consider the confidentiality of specific documents. If the Court releases the document from the confidentiality agreement – ie it is no longer covered by the agreement - then it must be released to the applicant. The Service Level Agreement forms part of the documents which a Court may release from confidentiality. The applicant therefore has a contractual right, in terms of the confidentiality agreement to request the Court to release the Service Level Agreement from the confidentiality agreement.
- 34 The second respondent has provided no basis on which it can claim that the annexures to the Service Level Agreement, or the agreement itself is confidential.
- 35 As with the other documents, the second respondent had to lay a foundation and provide the Court with a clear basis on which these documents are confidential. The second respondent has pleaded a conclusion that the documents are confidential without telling the Court what the basis for the confidentiality is. This is insufficient to sustain a claim of confidentiality.

Urgency

- 36 The applicant had to justify its urgent approach to this Court. The applicant relied on its rights to fair administrative action, access to courts, the broader public interest in the lawfulness of tender awards, the absence of any substantial redress in due course and that it had treated the matter as one of urgency from the outset.

- 37 The applicant submits that if this matter were heard in the ordinary course, there is a real likelihood that the 36 month lifespan of the contract would come to its end prior to Court being able to scrutinise the application.
- 38 The nature of tender reviews are that, often, the contract is served to completion before the review proceedings are finalised. The practical impact is that often these cases, even if successful, result in no real effective relief for a successful litigant. Despite the success of a review, the effluxion of time means that an invalid administrative act must be permitted to stand. Consequently, the scope of granting an effective relief to vindicate the infringed rights becomes drastically reduced. The Supreme Court of Appeal has held that “it may help if the High Court, to the extent possible, gives priority to these matters.”⁸
- 39 In this particular case, it was possible for the High Court to give priority to this matter. The parties were well prepared, had delineated the issues and concise and helpful written submissions were provided. In addition, the parties were amenable to enter into a holding order which permitted the Court to return to finalise the hearing of the matter. The Court’s roll had largely been alleviated by the time the matter was heard. The Court was also able to obtain the necessary support and approvals from the Court for the matter to be heard over two days. These factors, combined, are rare and permitted the Court to hear the matter. They rarely all exist simultaneously in a burdened urgent roll. The Court does not find, in general, that these types of matters must be heard on an urgent basis.

⁸ Millennium Waste Management (Pty) Ltd. v Chairperson of the Tender Board: Limpopo Province and Others (31/2007) [2007] ZASCA 165; [2007] SCA 165 (RSA); [2008] 2 All SA 145; 2008 (2) SA 481; 2008 (5) BCLR 508; 2008 (2) SA 481 (SCA) (29 November 2007)

40 The applicant further submits that the room for substantial redress in due course, if any, is limited. The applicant relies on the judgments in *Steenkamp*⁹ and *Pipeline*¹⁰ which considered together indicate the limited scope for a successful tendered to obtain monetary relief in the normal course. The applicant contends, based on these cases, that an unsuccessful bidder has no claim in delict for pure economic loss, limited room to claim damages, and potentially can only claim compensatory relief in exceptional circumstances.

41 Substantial redress in the normal course is therefore, at least, severely limited by the pragmatic nature of tender reviews of a short duration contracts and the remedies available to an unsuccessful bidder to claim their losses.

42 In addition, the Court considers that the case engages section 217 of the Constitution which seeks to ensure transparency in tender awards. In order to test the legality of the exercise of public power, thoroughly, is by affording the applicant access to all material relevant to the exercise of that power. If not, there is a risk that withholding information will permit possible irregularities to remain uncovered and therefore insulated from scrutiny. This would limit the effectiveness of the right to review and be at variance with the rule of law, the values of accountability and openness.

43 Aside from the importance of section 217, it weighs with the Court that there is a compelling public interest at risk in the matter. The services which are to

⁹ *Steenkamp N.O. v Provincial Tender Board of the Eastern Cape* [2005] ZASCA 120 at para 33

¹⁰ *Esorfranki Pipelines (Pty) Ltd v Mopani District Municipality* (CCT 222/21) [2022] ZACC 41; 2023 (2) BCLR 149 (CC); 2023 (2) SA 31 (CC) (“Pipeline”)

be provide by the second respondent are integral to the functioning of the City. This may be true for most litigation concerning tender reviews. What is compelling about the particular facts of this case is that it is the second respondent's version that it cannot conduct business anymore. The reason for this is that the second respondent relies on Alcatel-Lucent, an international company, to comply with the tender. Alcatel-Lucent has however taken the view that it will no longer provide any services to the second respondent until this review is finalised. The second respondent therefore has to service a tender without the necessary support to give effect to the tender. The Court must consider the common cause impact of a delay on the litigation on the practical implementation of the tender.

- 44 The second respondent opposes the urgency on the basis that the applicant has taken a casual stroll to urgent court and has not treated the matter with the requisite urgency. The facts do not support this opposition. The chronology, which will unnecessarily burden these reasons, shows that the applicant had to repeatedly request and demand that the second respondent identify which documents are confidential so that it can consider its position. The founding affidavit is filled with letters, one after the other, requesting the second respondent to delineate which documents are confidential and which are not. The second respondent delayed identifying which documents are confidential. Then, the second respondent started releasing the documents in dribs and drabs. The delay is caused by the second respondent not responding with any level of urgency to the applicant's requests.

45 Whilst the confidentiality agreement was signed in June, it was only in July 2023 that the second respondent marked the documents as confidential. It was only then the applicant could know what documents had been carved out so that it could launch these proceedings. The parties then sought to resolve the issue through communications and it was only on 27 July 2023 that it was apparent that that engagement would not yield a fruitful result. The application was then launched within a couple of days. The second respondent was provided a week to respond. The Court is not persuaded that the applicant has delayed the institution of these proceedings.

46 The application raises issues of public importance, the particular facts indicates a concern regarding the implementation of the tender, the applicant has not delayed the institution of these proceedings and there is limited recourse for the applicant in the ordinary course. It weighs with the court that the longer it takes for the matter to be properly argued, the more advanced the implementation of the tender becomes and the harder it will be for the review court to be able to consider an effective remedy in the event the review is upheld.

47 For all these reasons, the applicants have satisfied the test for an urgent audience.

Costs

48 The applicant has been successful in its application. On this basis alone it is entitled to its costs. The applicant's litigation was motivated by its rights to access to court and just administrative

action. As it was litigating to vindicate constitutional rights it is entitled to its costs on this basis also.

49 The applicant has asked for a punitive costs order. The factors that are relevant in this regard are that the applicant had to institute these proceedings before the second respondent released portions of the bid that it had previously marked as confidential. These portions were only released on 16 August 2023. In addition, significant portions of the second respondent's bid that were not confidential were marked as confidential on 4 July 2023. These non-confidential portions of the bid were only released from the confidentiality agreement on 16 August 2023 after the applicant instituted this application, and two days before the hearing on 18 August 2023. These documents should never have been marked confidential. The applicant was justified in launching these proceedings.

50 The applicant further contends that:

50.1 The second respondent claimed confidentiality over documents that did not contain any information relating to the second respondent, for example, the Price Schedule that was not completed by the second respondent.

50.2 The second respondent refused to provide the applicant's counsel, attorney and expert with copies of the documents marked as confidential in terms of a confidentiality

agreement. Copies of the documents marked as confidential were only provided to the applicant's legal team and expert on 18 August 2023. This was in breach of the confidentiality agreement and caused significant delays and prejudice to the applicant in the prosecution of the review.

51 The Court weighs that the second respondent delayed to mark the documents, missed its own imposed deadlines and then marked documents confidential only to release them after these proceedings were launched. It further weighs with the Court that the second respondent claimed confidentiality over documents where it failed to provide a factual basis for this claim. The Court expresses its displeasure with the second respondent's conduct in this application by awarding costs on a punitive scale.

Order

52 The following order is made:

52.1 The forms and service provided for in the Uniform Rules of Court are dispensed with and the application is heard on an urgent basis in terms of Uniform Rule 6(12)(a).

52.2 The second respondent's claims of confidentiality over the documents that form the subject of the confidentiality agreement is set aside, specifically

- 52.2.1 The portions of the second respondent's bid marked confidential.
- 52.2.2 The price schedule attached to the letter of award.
- 52.2.3 The Service Level Agreement concluded between the first and the second respondents. The second respondent is directed to provide the annexures to this agreement.
- 52.2.4 The documents withheld from the BEC Report consisting of CV's of the second respondent's key personnel.
- 52.3 The Court directs the first respondent to deliver the documents that have been released from the confidentiality agreement as part of the record and to upload the documents to caselines and made available to the applicant.
- 52.4 The second respondent is to pay the costs of this application on an attorney and client scale.
- 52.5 The numbers, addresses and other private information of the key personnel must be redacted in the Court file which appears on caselines.



I DE VOS
Acting Judge of the High Court

This judgment was prepared by Irene de Vos. It is handed down electronically by circulation to the parties or their legal representatives by email, by uploading it to the electronic file of this matter on Caselines, and by publication of the judgment to the South African Legal Information Institute. The date for hand-down is deemed to be 15 August 2023.

HEARD ON: 18 August 2023 and 1 September 2023

DECIDED ON: 8 September 2023

For the Applicant: T Prinsloo
Instructed by Lowndes Dlamini Inc

For the First Respondent: Z Matebese SC
Instructed by Mahumani Incorporated

For the Second Respondent: TJ Machaba SC
Instructed by Kekana Hlatshwayo Radebe
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For the Third Respondent: Kruger Attorneys.