IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Re

portable

Case No. 047/2005

In the matter between:

THE MEC FOR ROADS AND PUBLIC WORKS, EASTERN CAPE
First Appellant
THE CHAIRMAN OF THE PROVINCIAL TENDER BOARD, EASTERN CAPE
Second Appellant

and

INTERTRADE TWO (PTY) LTD
Respondent

CORAM: **HOWIE P, FARLAM, HEHER, VAN HEERDEN JJA et MAYA AJA**

HEARD: **23 FEBRUARY 2006**
DELIVERED: **27 MARCH 2006**

Summary: Promotion of Access to Information Act 2 of 2000 s 7(1) – whether tenderer instituting application for review in terms of uniform rule 53 against public body that had called for tenders is precluded from seeking order for production of documentation relating to the tender adjudication which allegedly falls, in part, outside the ambit of the record referred to in uniform rule 53(1)(b) – whether documentation 'requested' prior to the commencement of review proceedings in terms of s 7(1) of PAIA.

Neutral citation: MEC for Roads & Public Works v Intertrade Two

(Pty) Ltd [2006] SCA 34 (RSA)

JUDGMENT

MAYA AJA:

MAYA AJA:

[1] This appeal concerns the right of an unsuccessful tenderer who has instituted review proceedings in terms of uniform rule 53 against the public body that called for tenders, to obtain information relating to the tender adjudication process from such body.

[2] The respondent, Intertrade Two (Pty) Ltd ('Intertrade'), is a supplier and repairer of mechanical and electrical plant and equipment. It instituted application proceedings in the Bhisho High Court (Dhlodhlo ADJP) seeking various forms of relief, inter alia, the review of the appellants' tender process, in which it was a tenderer, on the grounds of irregular conduct on the part of the appellants' officials. In addition to the record envisaged by rule 53(1)(b), Intertrade requested a wide range of documents relating to the tender process to enable it properly to formulate its case. The appellants raised a question of law in terms of rule 6(5)(d)(iii), challenging the validity of the procedure adopted by Intertrade. The objection was aimed at Intertrade's request for additional documents on the basis that its invocation of rule 53 confined it to the production of only those documents falling within the ambit of the record envisaged by the rule. The appellants contended that s 7 of the Promotion of Access to Information Act 2 of 2000 ('PAIA') precluded Intertrade from demanding such additional documents before it had exhausted its procedural remedies under both rules 53 and

35(12). Dhlodhlo ADJP dismissed the objection and granted the relief sought. The appellants appeal against that order with his leave.

[3] The facts on which Intertrade based its application were not in dispute. In March 1997 the first appellant ('the department') awarded a tender to Intertrade's corporate predecessor for a two year contract for preventative maintenance and repairs of plant and equipment at various provincial hospitals in the Eastern Cape. Prior to the expiration of the contract, the parties agreed to extend it for a further one year period on the same terms. Similar extensions followed until 31 March 2003. After the expiry of the initial contract in March 1999, the department had, in three successive tender processes, invited tenders for the contract in different formats in an attempt to include other suppliers. Intertrade was the only tenderer on each occasion but the contract was not awarded. This occurred again in 2002 despite the department's recommendation in favour of Intertrade. The second appellant ('the Tender Board') rejected the recommendation and instructed the department to 'rephrase the tender specifications' - which had in fact been done in the previous processes - and re-advertise the tender to accommodate other service providers. The tender was once again not awarded.

[4] In September 2003, the department invited tenders, valid for 90 days, for four contracts – two for mechanical and electrical work ('the ME contracts') and two for laundry and kitchen repairs and maintenance ('the LK contracts') at provincial hospitals in certain municipal districts. Intertrade was the only tenderer for the ME contracts and one of two

tenderers for each of the LK contracts. When the Tender Board did not make a decision on the tenders within the stipulated time, Intertrade complained to it and to the department in a number of letters. In its reply, the department expressed surprise that Intertrade had not been awarded the contracts. Intertrade then wrote to the Premier of the Province, subsequently cited as one of the respondents in the court *a quo*, seeking his intervention. The Premier asked the Provincial Strategy Planning Division (the PSPD) to investigate the matter. In its report to the Premier in March 2004, the PSPD had expressed dismay at the undue delay, referring to its 'desperation and frustration after having had no appropriate response' from the relevant officials. It also raised concern at the death of patients and other problems which had resulted from the failure to maintain the relevant hospital equipment. At a related meeting of the relevant heads of department, it was apparently concluded that Intertrade had not been treated fairly and the Premier apparently expressed the view that the contracts should have been awarded to it.

[5] The 2004 national elections, which brought a new minister for the department and a new Premier in the province, appear to have interrupted the process. In May 2004, the department informed Intertrade in writing that one of its tenders had not been approved because it was overpriced. This raised suspicion on the part of Intertrade that its tender prices had been tampered with after the closure of tenders as its prices as tendered had been lower than the tender estimates on submission. Strangely, this departmental communication was subsequently telephonically withdrawn by one of the department's officials without explanation. Having informed Intertrade that it had decided to award one of the LK contracts to the other tenderer

concerned (who was also cited as a respondent in the court *a quo*), the department then requested Intertrade to extend the validity of its tenders in respect of both LK contracts. Intertrade agreed to do so. In a bizarre turn of events, Intertrade was at this stage approached by a woman who offered to get its tenders approved in return for a 10 per cent stake in the contracts. Intertrade rejected the offer out of hand. More time elapsed and a decision was still not made. Further entreaties to the new Premier elicited no response.

[6] Finally, on 27 July 2004, Intertrade, through its attorneys, wrote to the department and the Tender Board formally enquiring, amongst other things, whether the relevant tenders had been awarded. It further requested the identity of the successful tenderer, written reasons for the decision and copies of specified, wide-ranging documents concerning the tender process relative to the four contracts in the event that its tender bids had been unsuccessful. The department subsequently provided Intertrade with a disjointed bundle of documents relating only to some of the tenders. Some of the documents were undated and others were incomplete extracts of minutes apparently relating to relevant proceedings. It appeared from some that the tender estimates of the Intertrade's competitors were extremely low and unrealistic. The relevant tender documents were, however, withheld, as were most of the documents requested by Intertrade. This included a document emanating from the Premier which, in essence, directed that the contracts be awarded to Intertrade and which employees of Intertrade had seen during a visit to the department. A further letter addressed by Intertrade's attorneys to the department and the Tender Board requesting the outstanding documents went unanswered. Intertrade then launched the

review application.

[7] It was common cause that the appellants had purported to produce a record for purposes of rule 53 in the court *a quo* where a judgment on the review proceedings is still pending. Prior to the hearing of the appeal, the appellants filed a 'notice' listing which of the documents, as requested in Intertrade's notice of motion, they contended did not form part of the rule 53 record. These are:

'1. minutes of all other departmental meetings and relevant committee meetings at which the tenders in relation to the contracts were considered and evaluated;
2. all correspondence, interoffice memoranda and other documents relating to the tenders and the award or non-award or postponement of the award of the contracts during the period August 2003 to date;
3. all directives or recommendations or correspondence issued by the Premier of the Eastern Cape (past or current) relating to the award or non-award of the contracts;
4. any costing exercises in relation to contracts produced by the First and Second Respondents [appellants] or provided to such Respondents; and
5. extracts of the tender documents of the Fourth and Fifth Respondents [Intertrade's co-tenderers] in respect of contracts 1893 LK and 1894 LK which relates to their costing of their tenders and setting out their rates and how their tender prices are made up.'

[8] Section 32 of the Constitution confers upon every person a general and unqualified right of access to any information held by the state and its organs. It then requires the enactment of national legislation to give effect to the right, which legislation 'may provide for reasonable measures to alleviate the administrative and financial burden on the state'. PAIA is that legislation. The right to obtain information is conferred also, albeit for the limited purpose of litigation, by uniform rules 53 and 35, which regulate review proceedings and the discovery procedure, respectively.

[9] As indicated above, the appellants' central contention was that Intertrade's right to access the documents that it sought lay in rules 53 and

35(12). Their counsel sketched the rather circuitous legal route that he submitted Intertrade had to take. He argued that Intertrade should first have requested a copy of the relevant record in terms of rule 53. In the event that some of the documents sought fell outside the scope of the record envisaged in that rule, Intertrade would then have to invoke the discovery procedure under rule 35(12). If that process did not yield the desired results, Intertrade could then utilize PAIA to access the missing documents. Or it could, so the argument went, have reversed the process and brought a separate application in terms of PAIA before proceeding on review.

[10] The appellants' case, which seeks to limit Intertrade's right of access to information, rests on s 7(1) of PAIA. The objects of the Act are embodied in s 9. They include:

'(a) to give effect to the constitutional right of access to-
(i) any information that is held by the State; and

(ii) . . .
(b) to give effect to that right-
(i) subject to justifiable limitations, including, but not limited to, limitations aimed at the reasonable protection of privacy…and effective, efficient and good governance; and
(ii) in a manner which balances that right with any other rights, including the rights in the Bill of Rights in Chapter 2 of the Constitution.'

[11] It is abundantly clear, therefore, that the interpretation of the provisions of PAIA must be informed by the Constitution (see s 39(2) of the Constitution, which obliges every court to promote the spirit, purport and objects of the Bill of Rights when interpreting any legislation; and see further *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs & Others* 2004 (4) SA 490 (CC) para 72).

[12] I turn now to deal with s 7(1). It reads:

‘(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.’

It is important to note that these jurisdictional requirements are cumulative – all three must co-exist for the operation of the Act to be excluded.

[13] It was not disputed that the appellants fall within the definition of ‘public body’ in PAIA and that they are state organs in terms of the Constitution. It is common cause that the request for the documents in issue was made prior to the institution of the application proceedings and that it was in fact the appellants’ resistance to disclosure that prompted the request for the production of documents contained in the notice of motion. The appellants’ counsel, however, sought to draw a distinction between what he termed an informal request, ie Intertrade’s letters of 27 July 2004 and 25 August 2004 and a request contemplated in s 7(1)(b). As I understood his argument, the letters do not amount to the latter and only the demand set out in the notice of motion could be considered as constituting the request envisaged in PAIA. No authority was cited to support this submission and I have not found any. In my view, there is no merit in the submission and I am satisfied that Intertrade did make a ‘request’ in terms of s 7(1)(b) before the institution of its application.

[14] Counsel argued further that the notice of motion in any event referred to more documents than had been requested before the proceedings and that

the ‘broader proceedings’ thus confined Intertrade to the procedural remedies. The items requested for the first time in the notice of motion are those listed in paragraph 4 of the appellants’ abovementioned ‘notice’. In my view, these documents are so closely linked to those which had been previously requested that there is no basis to distinguish them from the other documents.

[15] Some of the documents sought by Intertrade may not be obtainable by means of either rule 53 or 35. In *Johannesburg City Council v The Administrator, Transvaal* (1) 1970 (2) SA 89 (T), the court described a rule 53 ‘record of proceedings’ as follows (at 91G-92A):

‘The words…cannot be otherwise construed, in my view, than as a loose description of the documents, evidence, arguments and other information before the tribunal relating to the matter under review, at the time of the making of the decision in question. It may be a formal record and dossier of what has happened before the tribunal, but it may also be a disjointed indication of the material that was at the tribunal’s disposal. In the latter case it would, I venture to think, include every scrap of paper throwing light, however indirectly, on what the proceedings were, both procedurally and evidentially. *A record of proceedings is analogous to the record of proceedings in a court of law which quite clearly does not include a record of the deliberations subsequent to the receiving of the evidence and preceding the announcement of the court’s decision. Thus the deliberations of the Executive Committee are as little part of the record of proceedings as the private deliberations of the jury or of the Court in a case before it. It does, however, include all the documents before the Executive Committee as well as all documents which are by reference incorporated in the file before it.’* (My emphasis.)

Some of the items listed in the appellants’ abovementioned ‘notice’ may, conceivably, fall outside the scope of the above description.

[16] Rule 35 is also not without limitations. The discovery procedure is, even when interpreted purposively (see, for example, *Premier Freight (Pty) Ltd v Breathetex Corporation (Pty) Ltd* 2003 (6) SA 190 (SE)), by its nature an extraordinary procedure in application proceedings, allowed only in exceptional circumstances, and does not create an unqualified obligation for

a party from whom discovery is sought to produce the documents. The appellants could possibly resist discovery successfully, for example on grounds of privilege or relevance. If some of the documents sought by Intertrade cannot be obtained in terms of rules 53 and 35, this would mean that without resorting to PAIA, Intertrade would not be able to gain access to such documents. In my view, that may effectively place such documents outside the ambit of s 7(1)(c). However, in view of my conclusion in respect of s 7(1)(b), it is not necessary to decide this point one way or the other.

[17] It has been suggested that the purpose of s 7 is to prevent PAIA from having any impact on the law governing discovery or compulsion of evidence in civil and criminal proceedings (see Ian Currie & Jonathan Klaaren *The Promotion of Access to Information Act Commentary* (2002) at pp 52-54) by prohibiting access, after commencement of litigation, to ensure that 'litigants make use of their remedies as to discovery in terms of the Rules… and to avoid the possibility that one litigant gets an unfair advantage over his adversary' (see *CCII Systems (Pty) Ltd v Fakie and others NNO* 2003 (2) SA 325 (T) para 21). This situation does not, in my opinion, arise on the facts of this case.

[18] In the view I take of the matter, I therefore refrain from expressing any opinion on the question whether or not the right to obtain information conferred by the rules and PAIA can be invoked contemporaneously in so far as the documents sought fall outside the scope of the record envisaged in rule 53(10)(b) and the documents covered by rule 35(12) (cf *Institute for Democracy in South Africa v African National Congress* 2005 (5) SA 39 (C) paras 14-19). Suffice to say that s 2(1) of PAIA enjoins courts, when

interpreting the provisions of the Act, to prefer any reasonable interpretation that is consistent with its objects over any alternative interpretation inconsistent therewith. From various parts of PAIA - the long title, the preamble, s 9 and other sections – those objects are clear, namely, generally to make information held by the state (and private bodies) accessible to the public to promote accountability. The rules themselves were designed 'to secure the inexpensive and expeditious completion of litigation before the courts' (see *Federated Trust Ltd v Botha* 1978 (3) SA 645 (A) at 654C-D) and also to ensure a fair hearing and should, where reasonably possible, be interpreted in such a way as to advance, and not reduce, the scope of an entrenched constitutional right (see *D F Scott (EP) (Pty) Ltd v Golden Valley Supermarket* 2002 (6) SA 297 (SCA) para 9; and cf *De Beer NO v North-Central Local Council and South-Central Local Council* 2002 (1) SA 429 (CC) para 11).

[19] The wording of s 7(1) is clear and must be given effect to. Whilst the jurisdictional requirement set out in subsection (1)(a) has been established, that set out in subsection (1)(b) has not been met in the present case. Section 7 cannot, therefore, operate as a bar to Intertrade's request. The appellants' reliance thereon was misplaced.

[20] There is another issue that requires comment. The appellants' resistance to Intertrade's request for documentation on technical grounds was, in my opinion, most reprehensible. Important issues are at stake here. Intertrade seeks to establish the truth about an extraordinarily extended tender process to exercise and protect its rights. The appellants knew precisely what documents it required from the outset. They did not raise any impediment which would prevent them from producing the documents. Neither did they deny that they had the documents in their possession. Their response is rendered more deplorable by the report contained in the department's own correspondence which shows that, whilst they were embarking on delaying tactics at the taxpayer's expense, sick and vulnerable

citizens were suffering and children were dying in poorly maintained hospitals as a direct result of their failure to comply with their constitutional obligations.

[21] The nature and extent of a public body's obligation where the right of access to information is invoked is eloquently expressed in *Van Niekerk v Pretoria City Council* 1997 (3) SA 839 (T). There, Cameron J, dealing with a claim brought under s 23 of the interim Constitution (the precursor to s 32 of the Constitution) said at (850A-C):

'In my view, s 23 entails that public authorities are no longer permitted to "play possum" with members of the public where the rights of the latter are at stake. Discovery procedures and common-law claims of privilege do not entitle them to roll over and play dead when a right is at issue and a claim for information is consequently made. The purpose of the Constitution, as manifested in s 23, is to subordinate the organs of State… to a new regimen of openness and fair dealing with the public.'

Had it not been for the fact the appellants were granted leave to appeal by the court *a quo*, this court may well have been inclined to make a special punitive costs order as a mark of its extreme displeasure at their conduct.

[22] For the above reasons, the conclusion reached by the court *a quo* was correct. The appeal is dismissed with costs, including the costs of two counsel.

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MML MAYA

ACTING JUDGE OF APPEAL

CONCUR:

HOWIE P
FARLAM JA
HEHER JA
VAN HEERDEN JA