



**IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN**

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| Reportable: | YES/NO |
| Of Interest to other Judges: | YES/NO |
| Circulate to Magistrates: | YES/NO |

Case number: 359/2023

In the matter between:

SOUTH BOUND VAN LINES CC

Applicant

and

**THE HOD: FREE STATE PROVINCIAL DEPARTMENT
OF HEALTH**

First Respondent

**THE MEC: FREE STATE PROVINCIAL GOVERNMENT:
DEPARTMENT OF HEALTH**

Second Respondent

HEARD ON: 16 FEBRUARY 2023

JUDGEMENT BY: LOUBSER, J

DELIVERED ON: The judgment was handed down electronically by circulation to the parties' legal representatives by email and released to SAFLII on 24 FEBRUARY 2023. The date and time for hand-down is deemed to be 24 FEBRUARY 2023 at 12:00

[1] This is an application that comes before this court in the form of a semi-urgent application in terms of the Promotion of Administrative Justice Act¹ ("PAJA"). The applicant seeks an order to compel the Respondents to provide full and written reasons why its tender for the provision of distribution and courier services for the Respondents' department was not successful. In addition, it

¹ Act 3 of 2000

seeks a number of documents relevant to the specific tender process that was followed in substantiation of the required reasons, and lastly it seeks an order that all this information be provided within 5 days of the order.

- [2] Section 5 of PAJA provides that any person whose rights have been adversely affected by administrative action and who has not been given reasons for the action, may within 90 days, request that the administrator concerned furnish written reasons for the action. Section 5(2) provides that such reasons must be furnished within 90 days after receiving the request.
- [3] Generally speaking, the Act leaves no doubt that the applicant has the right to call for reasons explaining the decision. In terms of the Act, this is a clear right of any person whose rights have been adversely affected by administrative action.
- [4] It appears from the papers before me that the applicant has submitted a formal bid for tender DOH(FS) 04/2022/2023, which closed on 29 July 2022 at 11 am, to the Free State Department of Health for the provision of certain services. The applicant then became aware of certain irregularities in the tendering opening process, and the applicant bemoaned this fact in a letter to the Department. On 29 November 2022 the applicant requested by letter information as to the status of the tender and when bidders can be informed of the outcome of the tender. The Department failed to respond to this letter. Another letter by the applicant then followed in the same vein, and again there was no response.
- [5] Eventually, on 14 December 2022, the Department responded by informing that the applicant's bid was unsuccessful and that the Department was in the process of concluding contracts with the successful bidders, who will be published on the tender bulletin in early January 2023. The applicants replied that it requires full and adequate reasons as to whom the tender was awarded to by 16 January 2023, and also certain documents to substantiate those reasons. The applicant mentions in its letter that it needed the information and the documents to consider its prospects of successfully impugning the decision to award the tender to another bidder. The applicant expressly stated

that failure to comply with the request timeously, will result in an urgent application in the High Court to compel the Department to provide the required information and documents.

- [6] According to the applicant, the tender opening process was flawed. It is common practice that tenders are opened in public where the names of bidders and the tender prices and the B-BBEE points claimed by bidders are revealed. This did not happen, the applicant alleged.
- [7] It is clear to this court that the applicant needs the required information to consider a review application for the setting aside of the tender award. It speaks for itself that a review application should preferably be launched before the successful bidder assumes his obligations, and therefore a person in the shoes of the applicant cannot wait indefinitely before he takes steps to have the award set aside. There are also financial implications for an unsuccessful bidder in such circumstances which I need not spell out. The result is that I am prepared to accept the notion that this application is at least semi-urgent in nature.
- [8] The applicant points out that the validity period for all tenders submitted was 120 days, which period would have expired on 27 November 2022. This is why the applicant sent letters of enquiry to the Department after this date. It complained, *inter alia*, that they were not yet informed of the outcome of the tender. In their eventual response, the Department did not reveal the name of the successful bidder. It later transpired that a second component of the tender was only awarded after the tender validity period to an entity by the name of Safranic.
- [9] The respondents oppose the application firstly, on the basis that it is not urgent. I have already dealt with this issue. Secondly the respondents opposed the reduction of the 90 day period to a 5 day period within which the information must be provided. They rely on the 90 day period allowed for in section 5 of PAJA. Thirdly, the respondents deny that they were requested reasons for their decision. They were only requested to furnish reasons why the applicant was not selected as the successful bidder. Later the request was

for reasons for selecting the successful bidder. In my view, nothing turns on this contention. Clearly the applicant wanted information and reasons for the Department's decision, irrespective of how the request was formulated. The respondents add that should reasons for the decision itself be requested, they will supply same within the period stipulated in PAJA. Lastly, the respondents contend that they are not obliged by PAJA to produce any documents on which their decision was based, but only to the reasons for their decision.

[10] As for the last-mentioned contention advanced by the respondents, I was referred to two different decisions of this division of the High Court where it was held that an applicant cannot demand documents underscoring a decision when reasons for that decision are sought in terms of PAJA. In the **Democratic Alliance v The Head of the Department of Human Settlements, Free State Province**² Van Zyl, J held that an applicant cannot rely upon PAJA for the relief sought regarding the disclosure and production of documentation. This is so, because there is no provision in PAJA itself entitling the applicant to the disclosure or production of documents.³

[11] In **Cell C Service Provider (Pty) Ltd v MEC: Free State Provincial Government: Department of Treasury**⁴ Rampai, J came to the same conclusion. "It is rather quite vivid that the legislation ... called PAJA is exhaustively concerned with written request for written reasons relative to an administrator's decision or action and not an administrator's record or information relative to an administrative decision on which the action was based. The applicant's reliance on the legislation that concerns reasons instead of the legislation that concerns information was fundamentally misguided," he stated.⁵ The legislation to which the learned Judge referred to in this respect, was the Promotion of Access to Information Act.⁶

² Case no. 3101/2015 FS High Court

³ Page 8 of the judgement.

⁴ Case no. 2812/2018 FS High Court

⁵ Par 104 of judgement

⁶ Act 2 of 2000

[12] I agree with the sentiments expressed in the two decisions mentioned. It follows that the applicant in the present application is not entitled to the documentation it seeks in terms of PAJA.

[13] Upon a proper and due consideration of all the application papers before me, I come to the conclusion that the respondents were unreasonably reluctant to provide the applicant with the reasons for their decision. In addition, the application was filed more than two weeks ago, and still the respondents did nothing to provide the applicant with the required reasons. On the other hand, I am mindful of the fact that the reluctance of the respondent probably stemmed from the misguided request for documentation underscoring the decision, and from the prayer in the notice of motion requesting that the 90 day period for the furnishing of the information be reduced to a period of only 5 days. Since the legislature has obviously considered the 90 day period as a reasonable period, I am of the view that a mere 5 day period is unreasonable in the circumstances.

[14] As for costs, I am guided by the fact that the applicant is only partially successful in the application, while the respondents were correct in viewing the request for documentation and a reduction of the 90 day period as inappropriate. There was nothing, however, that could have stopped the respondents from providing the reasons for their decision timeously, as they were obliged to do in terms of PAJA. In the circumstances, it would be fair to both parties not to make any order of costs.

[15] The following orders are made:

1. The applicant's non-compliance with the Rules of Court relating to time periods and service is condoned, and the application is heard on a semi-urgent basis.
2. The first and the second respondents are ordered to, within 20 days after the date of this order, provide the applicant with full and written reasons for its failure to secure Public Contract styled DOH(FS) 04/2022/2023: Appointment of Suitable Service Provider to Render Distribution and Courier Services for Pharmaceutical, Medical

Consumables, Forms and Cold Chain Items to Various Institutions
within the Free State Department of Health.

3. No order as to costs.

P. J. LOUBSER, J

For the Applicant:

Adv. S. Grobler SC

Instructed by:

Honey Attorneys, Bloemfontein

For the Respondents:

Adv. N. Snellenburg SC

Instructed by:

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