

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 24270/2022

DATE: 2022-05-17

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: NO.

(2) OF INTEREST TO OTHER JUDGES: NO.

(3) REVISED. YES

DATE : 18 JULY 2022

SIGNATURE

10 In the matter between

UNITRADE 1047 (PTY) LTD ISIDINGO SECURITY SERVICE Applicant

and

MINISTER OF HOME AFFAIRS & OTHER Respondent

J U D G M E N T

DAVIS J:

20 This is an urgent application in which an order is sought that the first respondent deliver a selection of documents to the applicant. The applicant is Unitrade 1047 (Pty) Limited trading as Isidingo Security Services. The applicant had in mind to bid and be appointed as a security services provider in respect of a bid labelled DHA19-2021, for the provision of physical guarding services in Mpumalanga Province for a

period of 36 months. The respondents in the application are the Minister of Home Affairs (the Minister), the Department of Home Affairs, the information officer for the Department of Home Affairs and the Director General of Home Affairs.

The relief sought is directed against the Minister. The relief claimed has been formulated in the notice of motion as follows:

10 *"That the Minister be directed to within five days of the granting of this order deliver to the applicant:*

1. *Copies of all internal memoranda and recommendations relating to the decision to award tender DHA19-2021.*
2. *The report of the Bid Evaluation Committee, that is the BEC and the minutes of the meeting of the meeting of the Bid Adjudication Committee BAC in respect of that tender.*
- 20 3. *Reasons why the tender was not awarded to the applicant.*
4. *'Any additional information taking into account in the decision to award the tender'.*
5. *The scoring sheet for all tenders*

received.

6. The details of the winning tender.”

The background facts are briefly the following: In the applicant's own founding affidavit it is already stated that the tender calling for the bids was cancelled on 3 February 2022. Confirmation hereof is found in the applicant's deponent's founding affidavit whereto he annexes a letter of cancellation marked FA4. This confirms the cancellation in
10 writing.

The applicant alleges that since the cancellation it attempted to obtain information regarding the decision to cancel the tender which was unsuccessful. The applicant then lodged a formal application in terms of the Promotion of Access to Information Act 2 of 2000 requesting certain documents.

The applicant says when the documentation was not forthcoming it launched an internal appeal in terms of that
20 Act. However the response from the Department of Home Affairs, apparently referring to the initial request but not mentioning the subsequent appeal, is dated 16 March 2022. The relevant portion thereof reads as follows:

"The department has considered your request in this regard. In accordance with the provisions of

the Promotion of Access to Information Act 2 of 2000 and they have considered the said request but regret to inform you we are unable to provide you with the requested information due to the following grounds as provided for in the act.

(a) Mandatory protection of commercial information of third parties in terms of section 36(i).

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(b) Mandatory protection of certain confidential information and protection of certain other confidential information of third parties section 37(i).

(c) The information involves internal operations of a public body, section 44. The only information that can be disclosed in this regard is the list of all the companies who submitted a bid for this tender. A list of the companies is herewith attached and marked B for easy reference."

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The list then includes 64 different companies who submitted bids for the tender. Regarding the present application, in the founding affidavit the deponent thereto states:

"I am advised that the current situation is very

similar to the one which was the subject matter of the decision of the supreme court of appeal in Tetra Mobile Radio (Pty) Limited v MEC Department of Works and Others 2008 (1) SA 438 (SCA) where the SCA ordered information to be provided for purposes of internal appeal.”

The facts in the *Tetra Mobile* case are completely distinguishable from the facts in the present matter. In
10 *Tetra Mobile* the applicant seeking information was an unsuccessful tenderer in a completed tender process and needed documents to proceed with its review of the award of the tender.

In the present matter there was no such tender process. In fact the answering affidavit indicates that neither a Bid Evaluation Committee nor a Bid Adjudication Committee had even been appointed. There were also no score sheets because the tenders were not considered. None of the
20 documents requested in the notice of motion are relevant to the sequence of events. In fact the decision to withdraw the tender or the bid is analogous to that in *Tshwane City and Others v Nambiti Technologies (Pty) Limited 2016 (2) SA 494 (SCA)*. That decision determined that the withdrawal of a tender is not an administrative act and such withdrawal

can only be attacked under a legality review.

The issues regarding the nature of decisions have subsequently with reference to the *Nambiti* case received further attention of the Supreme Court of Appeal in *University of Free State v Afriforum and Another* 2017 (4) SA 283 (SCA). The relevance of these cases regarding the nature of the act whereby a tender is withdrawn is twofold.

10 Firstly, the documents applicable to such a decision are not the same as those in a tender. They may relate to financial viability or other considerations in terms of which a tender may be withdrawn. Secondly a legality review is not in terms of the Promotion of Administrative Justice Act on which the applicant relies for purposes of urgency in this application. The relevance hereof appears from the following statement in the founding affidavit:

20 *"The present application is obviously urgent as the application must launch a review application within 180 days from the date it was notified on the cancellation of the tender i.e. on 3 February 2022. Applicant cannot adequately consider that there are any grounds for a review application should the release sought be granted in the ordinary course."*

Clearly the time period is not applicable but even if one were to have found in favour of the applicant, that a reasonable time period for the launching of a legality review would equate to 180 days, one is surprised to find that the applicant has not even requested reasons why the tender had been withdrawn. Had reasons been granted, the calculation of time would have commenced upon the furnishing thereof and had the reasons been insufficient, of course then alternative remedies could be followed.

In the present case therefore, in summary what one has is an application for the furnishing of information which is not required for the exercise of a legality review and one has an application based on a premise of urgency which is not supported by the facts. Ordinarily if an application is found not to be urgent, the customary order is that it is struck off the urgent court's roll. Notionally the consequence thereof might be that such an application may be re-enrolled.

Although there was some argument from the bar regarding alternate relief, none of that was forthcoming in the replying affidavit nor was there a formal amendment.

There is consequently no sense in merely striking this application from the roll so that it might at some stage in the

future possibly – and I mention the word possibly because there was no indication that it would in fact serve before an opposed motion court – be re-enrolled for the same relief to which the applicant would still not be entitled. To do so would be wasteful of time, costs and judicial resources.

The application for the relief sought is without merit and should be refused. As to the issue of costs, counsel for the applicant valiantly argued that costs should be reserved for
10 determination in a future hearing of this application. As already indicated, there would not be any future hearing after the demise of the application at today's hearing. There is therefore no reason to reserve the costs or to make it conditional upon any other steps taken in this application. The life has gone out of this application and the relief which the applicant might seek, should it wish to question the withdrawal of the tender by way of a legality review or otherwise, would have to form the subject matter of a fresh application.

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Having mentioned these factors I find no reason why the customary principle should not be applied namely that costs should follow the event. Accordingly the order of the court is as follows: The application is dismissed with costs.

MR HLONGWANE: As the court pleases.

MS UNKNOWN: As it pleases the court, M'Lord. M'Lord if I may clarify is it cost on a party-and-party scale or is that for...

COURT: That is customary what follows if no special costs order is made.

MS UNKNOWN: As it pleases the court. Thank you, M'Lord.

COURT: Thank you. The court will adjourn.

10 COURT ADJOURNS

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DAVIS J
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA
DATE SIGNED: 18 JULY 2022