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

Case No: 4493/2013

In the matter between

NUCON ROADS AND CIVILS (PTY) LTD Applicant

And

MANGAUNG METROPOLITAN MUNICIPALITY 1st Respondent

SXB CIVILS and PROPERTY DEVELOPERS CC 2nd Respondent

MOVE-IT PLANT HIRE CC 3rd Respondent

CORAM: NAIDOO, J

JUDGMENT: NAIDOO, J

HEARD ON: 5 FEBRUARY 2015

DELIVERED ON: 2 APRIL 2015

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[1] This is an application to determine costs arising out of two previous applications.

[2] The applicant and others submitted tenders for certain road works to be undertaken for and on behalf of the first respondent. The applicant's tender was rejected; the first respondent awarded the tender to the second respondent and concluded a contract with it accordingly. The

third respondent was sub-contracted by the second respondent to perform the works in accordance with the contract.

[3] The applicant brought an urgent application (the interdict application) and obtained a court order on 22 August 2013 which, inter alia, granted a *rule nisi* interdicting the first respondent from giving effect to the contract awarded to the second respondent and directed the first respondent to give written reasons with regard to the evaluation and adjudication of the tender and award of the contract. Costs of that application were reserved for determination by the court hearing the review application referred to hereafter. On the return day of that application, being 12 September 2013, an order was taken by agreement between the parties regarding the further conduct of the matter and the costs of that hearing were also reserved for determination by the court hearing the review application. The court also directed that the rule nisi (the interim order) issued on 22 August 2013 continue to serve as an interim interdict.

[4] As directed in the court order dated 22 August 2013, the applicant subsequently, on 6 November 2013, applied for the review and rescission of the first respondent's decision to reject the applicant's tender and its decision to award the tender to the second respondent, as well as for the setting aside of the contract that the first respondent concluded with the second respondent for completion of the works in terms of the tender (the review application). The applicant cited a number of grounds for such review, including the fact that the second respondent was under provisional liquidation at the time of the submission of its bid and the award of the tender. Although the first respondent opposed the review application on 19 November 2013, it did not file an opposing affidavit, leaving the applicant's averments and

allegations unchallenged. The second respondent also opposed the application but withdrew its opposition some ten months later. The third respondent did not oppose the application and it appears that no relief was sought against it.

[5] The first respondent made a settlement offer to the applicant in January 2014, which the latter did not accept, mainly because the first respondent disclaimed any liability for the applicant's costs and presumably also because it did not deal with all the grounds on which the review application was premised. The first respondent thereafter filed a notice in terms of Rule 34(1) and 34(5)(d) of the Uniform Rules of Court, on 14 April 2014, in terms of which it made a settlement offer, essentially in the same terms as it did in January 2014. The applicant's response was to bring an application to compel the first respondent to deliver a proper and complete record of proceedings concerning, *inter alia*, the evaluation and adjudication of all the bids of tenderers and the award of the tender to the second respondent. The court granted such an order on 31 July 2014 and the first respondent thereafter delivered the complete record of proceedings. Upon receipt of the record, the applicant, on 1 September 2014, filed a supplementary affidavit in terms of Rule 53(4), in order to point out the shortcomings in the second respondent's bid, which rendered such bid non-compliant with the first respondent's procurement policies and tender requirements. The applicant's purpose was to demonstrate that the first respondent did not properly consider the bid documents and did not properly apply the procurement policies and tender requirements to the second respondent's bid, thus rendering the award of the tender to the second respondent irregular and erroneous, hence my conclusion that this is one of the reasons that the applicant did not accept the offer in January

2014. The applicant persisted in the relief sought in the notice of motion relevant to the review application referred to in paragraph [3] above.

[6] The first respondent's response was to bring an interlocutory application on 29 September 2014, in which it sought an order declaring that the dispute between it and the applicant in the review application has been resolved, that the second respondent pay its costs and that of the applicant up to 15 April 2014 (referring presumably to the day after the offer in terms of Rule 34 was made by the first respondent), that the applicant pay its costs from 15 April 2014 to the date of the order in the interlocutory application. After that application was heard the court ordered as follows:

> "1. It is declared that the dispute between applicant and the first respondent in the review application under case number 4493/2013 has been resolved.
> 2. No order is made as to the costs of this application;
> 3. The applicant (first respondent in this application) is ordered to set down the review application number 4493/2013 on the question of costs only within Thirty (30) days from date hereof, failing which the second respondent must do so within Fifteen (15) days after the expiry of the Thirty (30) days referred to above.
> 4. The applicant is ordered to remit the outstanding tenders including that of the first respondent for re-evaluation and adjudication within Thirty (30) days of the finalisation of the costs hearing under case number 4493/2013."

It seems to me that the reference to second respondent in paragraph 3 of the court order may well be an error and that the court in all likelihood was referring to the first respondent (applicant in this matter), as paragraph 1 of the court order refers only to these parties, and the second respondent had already withdrawn its opposition to the review

application by the time the interlocutory application was heard. In any event, this hearing to determine costs was set down for hearing by the applicant in the current matter, after the respondent failed to do so in terms of the court order set out above. I also pause to mention that both counsel indicated in their Heads of Argument that the interdict application was made final on 12 September 2013. The order in fact directs that the interdict will continue to operate as an interim interdict. The court order in the interlocutory application would, therefore, have had the effect of discharging the *rule nisi.*

[7] Both counsel correctly pointed out that the determination of costs in a matter is within the discretion of the court, which discretion must be exercised judicially so that it is fair to all parties. The general principle is that the successful party is awarded costs, but the court can deviate from this after consideration of the circumstances of the case before it.
Mr Pienaar, for the applicant, correctly pointed out that the allegations and averments made by the applicant in the founding affidavit in the review application were unchallenged by the first respondent, on account of it not filing an opposing affidavit after it served its notice of opposition to the application. Mr Phalatsi attempted to explain the non - filing of an opposing affidavit by the first respondent on the basis that the issue of the provisional liquidation of the second respondent should be regarded as a point *in limine*, which effectively disposed of the matter and therefore there was no need to oppose the application on the other grounds raised. I do not agree.

[8] Subsequent to the issuing of the *rule nisi,* the applicant attempted to obtain the written reasons from the first respondent for the rejection of the applicant's bid and the award of the tender to the second respondent, which the court order of 12 September 2013, directed it to

furnish to the applicant. From the correspondence attached to the founding affidavit, it is clear that the applicant had great difficulty in obtaining those reasons and that the first respondent's legal representative handed to the applicant a file of documents relating to the bids, certain reports, minutes and the like. As a result of the difficulty in extracting from these documents what could amount to reasons by the first respondent for its decisions, its legal representative was then obliged to point out to the applicant's legal representative certain documents which he claimed constituted the first respondent's reasons. It transpired, however, that these records were not complete. The applicant thereafter launched its review application in November 2013, raising a number of grounds upon which the application was based, one of which was the provisional liquidation. The latter was not raised as a point *in limine.*

[9] The fact that the applicant averred that this ground alone was sufficient to set aside the first respondent's award of the tender to the second respondent would not have entitled the first respondent to refrain from answering the other grounds raised. It must be borne in mind that it chose not to file an opposing affidavit, and therefore appeared to acquiesce in all the allegations made by the applicant. The point that the provisional liquidation should be regarded as a point *in limine* only arose after the application before me was launched. It, therefore, does not appear to have been within the contemplation of the first respondent at the time that it opposed the review application, contrary to what Mr Phalatsi argued. In the founding affidavit to the interlocutory application, the first respondent simply alleges that the Rule 34 offer resolved all disputes between the parties. This is not so, as the issue of costs still remained (which the first respondent was aware of, after the applicant rejected the January 2014 offer), prompting the court in the interlocutory

application to order that the matter be set down for hearing on costs only.

[10] The offer made in terms of Rule 34 disclaimed all liability for costs and indicated that costs should be recovered from the second respondent, at least up to the date of the offer. In my view this is unreasonable, as the first respondent evidently did not conduct proper investigations into the status of the second respondent and in any event awarded the tender to it, without properly complying with its own procurement policies and tender requirements. It can hardly be expected that the applicant should be visited with the consequences of the first respondent's negligent and/or improper conduct in awarding the tender as it did. The applicant was obliged to take steps to establish and enforce its rights in respect of the first respondent's decision, in which the applicant played no part. If the second respondent improperly induced the first respondent into making the decision it did (as it seems to suggest), then the latter will have a right of recourse against the second respondent for appropriate relief, without being absolved from liability for the costs of the applicant. In making the offer it did, the first respondent rendered the applicant successful in its review application, entitling the applicant to recover its costs from the first respondent. The court order in any event provided, in the alternative, for any respondent opposing the application to pay the costs. The first respondent opposed the review application.

[11] The refusal to tender the applicant's costs, in my view, precipitated the actions of the applicant subsequent to the offer being made. The latter successfully brought an application to compel the first respondent to deliver a complete record of proceedings, and did in fact receive such a record, enabling it to properly elaborate on the grounds it earlier raised in the founding papers. It was only after the filing of the supplementary

affidavit that the second respondent withdrew its opposition to the review application. Had the first respondent tendered the applicant's costs in the Rule 34 offer (which it reasonably ought to have done), it would have been unnecessary for the applicant to have taken the subsequent steps it did, including setting down this matter for a costs determination, which the first respondent failed to do, even though it was directed to do so by the court hearing the interlocutory order.

[12] In the circumstances, I make the following order:

12.1 The first respondent is ordered to pay the applicant's costs of the review application under case number 4493/2013.

12.2 The first respondent is ordered to pay the applicant's costs in respect of the interdict application under case number 3311/2013

S. NAIDOO, J

On behalf of the Applicants:	Adv. C. D. Pienaar Instructed by: Rossouws Attorneys BLOEMFONTEIN (Nuc2/0036 -1 (JHC/KJ)
On behalf of the 1st Respondents:	Mr NW Phalatsi Instructed by: NW Phalatsi & Partners BLOEMFONTEIN (Phalatsi/MAN/0001/NW)