IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE LOCAL DIVISION, BHISHO)

Case No: 602/14

In the matter between:

MILANI FURNITURES **APPLICANT**

And

THE MEC, DEPARTMENT OF EDUCATION

EASTERN CAPE **1ST RESPONDENT**

THE SUPERINTENDANT-GENERAL

DEPARTMENT OF EDUCATION

EASTERN CAPE **2ND RESPONDENT**

THE MEC, PROVINCIAL PLANNING

TREASURY, EASTERN CAPE **3RD RESPONDENT**

THE HEAD DEPARTMENT OF PROVINCIAL

TREASURY AND PLANNING **4TH RESPONDENT**

REASONS FOR JUDGMENT

MBENENGE J:

[1] The dispute in this matter falls within a very narrow ambit, and is a sequel to a tender process which was the subject of an advertisement published at the instance of the first respondent in the Daily Dispatch newspaper during November 2013. The advertisement invited interested bidders to apply for a bid described as SCMV6-13/14-0004 ostensibly for the manufacture and delivery of furniture for Grade R-12 including pre-primary schools (the Tender). The facts of the application are largely common cause.

[2] The applicant, a manufacturer and supplier of furniture products, was one of thirty entities that responded to the advertisement, whose closing date was 20 November 2013.

[3] During January 2014 the applicant received a document dropped off at its offices by an anonymous source. The document purports to be a memorandum from the Independent Bid Adjudication Committee (IBAC) set up under the auspices of the third respondent. The memorandum embodied recommendations to the first respondent's Bid Evaluation

Committee (BEC) and the Bid Adjudication Committee concerning how the award should be allocated.

[4] It came to pass, during October 2014, that the applicant received information concerning the award of the Tender and the placing of orders pursuant to such award. The applicant, through its attorneys of record, set out to verify the information and, to that end, a letter to the second respondent seeking verification of the information, was penned on 15 October 2014. That letter attracted no response, and resulted in a follow up letter being written complaining about the lack of response from the respondent's camp. The follow up letter was responded to with the applicant being informed, on 23 October 2014, that the applicant's bid had not been successful. The applicant did not take kindly to this revelation, holding the view that after the passage of such lengthy period it had been deprived of the opportunity to lodge objections against the award within the time frames stipulated in the applicable regulatory framework.

[5] By letter dated 4 November 2014, the applicant, through its attorneys of record, sought to know why the applicant was not informed timeously about the award of the Tender in line with the relevant Supply Chain Management Regulations and just administrative process, and what steps had been taken pursuant to the recommendations embodied in

IBAC'S memorandum referred to in paragraph [3] above. The letter further informed the second respondent that the applicant had reason to believe that proper procedures had not been followed and that litigation was looming.

[6] When the letter of 4 November 2014 attracted no response, the applicant invoked the provisions of the Promotion of Access to Information Act, 2 of 2000 (the PAIA), seeking to be furnished with records, minutes of meetings and any other information relative to the award of the Tender, scorecards and written reasons for the award. The request for information attracted a response from the first respondent's senior legal administrative officer, Edward Scheun (Scheun), stating that the information requested was "*available*", but due to its voluminousness it was necessary for the applicant to make an appointment to view the information and possibly make copies thereof at Scheun's office.

[7] An arrangement was made to visit Scheun's office on 3 March 2015. On the appointed day Mr Molefe of the applicant's attorneys of record (Molefe), being in the company of the applicant's directors, converged at Scheun's office where they were furnished, by a clerk, with a box containing bid documents of the different bidders. None of the records specifically described in the applicant's request for information and

covering the selection process was availed. Further enquiries revealed that the lacking information was contained in files that had been uplifted by a Mr Ngaba, ostensibly a Director of Assets in the first respondent's Department (Ngaba). Attempts to access the information alleged to be in the possession of Ngaba yielded naught.

[8] Molefe, once more, visited Scheun's office on 4 March 2015, on which occasion Scheun requested to be afforded until 6 March 2015 to secure the files embodying the requested information and provide same to Molefe. The request was acceptable to the applicant.

[9] What happened beyond this point is at the heart of this application. Being of the view that its request to access information held by the respondent was not yielding the intended result, the applicant resorted to the instant proceedings seeking, in the main, an order directing the respondents to grant the applicant access to and allow for the copying of the following records relating to the Tender, namely:

> "1.1 Reports and recommendation of committees including the Bid Evaluation Committee (BEC) and Bid Adjudication Committee (BAC) of the First Respondent;
>
> 1.2 Reports and recommendations of the Independent Bid Adjudication Committee (IBAC) of the Provincial Planning and Treasury assigned to consider this Tender
>
> 1.3 The Minutes of meeting of the different committees, BEC, BAC and IBAC;
>
> 1.4 The Minutes of meeting that were held between the First Respondent and the Third Respondent's IBAC including that was held on 24 January 2014;

1.5 Correspondence sent received,"

[10] Apart from seeking "*further and/or alternative relief"* and a cost order, the applicant prayed that the respondents be directed to provide the information sought within 7 days from the date of the order sought being granted.

[11] The application was opposed by the respondents, with Scheun being authorized to depose the affidavit filed in opposition to the application "*on behalf of the respondents*", by virtue of him being in possession of "*information, records and documents that are relevant to this matter*."

[12] Besides raising certain preliminary technical points, the respondents' principal contention was that the files containing the information sought were availed on a date and at a venue agreed to by the parties. The applicant and its legal representative, so the respondents' case went, spurned the opportunity by not showing up on the appointed day.

[13] Before delving into and pronouncing on the merits of the application, it is timely to deal with the preliminary points raised by the respondents to resist the application. In the first place, the respondents contended that the application had been resorted to heedless of section 78(1) of the PAIA, which requires that a requester resort to Court for appropriate relief in terms of section 82 only after an appeal in terms of section 74

against a "*a decision of the information officer of a public body to refuse a request for access has been lodged."* The respondents further contended that the information sought "*is protected in terms of sections 34(1), 34(2)(f), 36(1)(b) and (c), 37(1) and 44(1)(a)and (b)of the PAIA."*

[14] Had the contention based on section 78(1) been upheld, the merits of the application would not have to be gone into, as indeed internal remedies would not have been exhausted.

[15] The appeal contemplated in section 74 is one against a decision refusing access to information. If an officer fails to give the decision on a request for access to the requester within 30 days after the request is received, the information officer is regarded as having refused the request.[1]

[16] Scheun, the official who considered the applicant's request to access information relative to the subject tender process in whose possession the "*information, records and documents that are relevant to this matter*," did not take any decision refusing the requested information. Nor can it be said that he should be regarded as having refused the applicant's request.

[1] Section 27 of the PAIA

[17] On 23 February 2015 Scheun conveyed his decision availing the requested information. He invited the applicant's camp to attend upon his office to view the information and to make copies of what the applicant would consider relevant. The applicant's camp attended upon Scheun's office on 3 March 2015, but their quest was thwarted by the absence of Ngaba who surreptitiously uplifted the files containing the information.

[18] It is common cause that on 4 March 2015 Molefe of the applicant's attorneys of record met Scheun who requested that (Scheun) be afforded until Friday 6 March 2015 to secure the relevant files and provide same to the applicant's attorneys. Agreement was reached that the parties would meet on 6 March 2015 as proposed by Scheun. Subsequent thereto, the applicant's attorneys of record addressed a letter to Scheun, worded thus:

> "We refer to the earlier conversation between the writer and your Eddie, during which the following transpired:-
>
> 1. That the information provided to us was not the one requested.
> 2. You requested extension till Friday to deliver the requested information per our request received by your office on the 8/12/2014.
>
> **with times to review the documents on Friday, the 06th of March 2015."** (emphasis is mine)

[19] The manner in which the parties engaged one another and, in particular, the conduct of Scheun set out above, belies the respondents' second preliminary contention that the requested information is protected in terms of the relevant provisions of the PAIA. This

contention, which was, correctly so, not persisted in when the matter was being argued and which constitutes an unsubstantiated conclusion of law, is spurious. Nothing more will be said about it.

[20] In so far as the letter quoted in paragraph [18] above seeks confirmation of the agreement reached that the respondent would deliver the requested information, the letter might be regarded as constituting a step taken merely for the sake of caution and completeness. But the letter did not end there! It requested Scheun to provide the applicant's attorneys of record "*with times to view the documents on Friday, the 06th of March 2015.* It has not been denied that the letter was received. According to Scheun, there was *"no need to respond to the letter confirming the agreement".* He was supine regarding why the letter in so far as it requested him to provide the applicant's camp with possible convenient times for accessing the documents on the appointed day was not responded to. Absent an appropriate response regarding the time of the meeting, there was bound to be yet another aborted meeting. Little wonder, therefore, that no one from the applicant's camp attended upon Scheun's office on 6 March 2015. The dispute regarding whether or not telephone calls were made to Scheun's office on the appointed day is, in my view, nothing to go by.[2] The respondents were asked to provide a suitable, convenient time for the meeting. They

[2] According to the applicant telephone calls to Scheun's office proved fruitless as he was reported as being out of office. On the other hand, Scheun denies that telephone calls to him were not answered; when he is not in the office his secretary attends to the calls

adopted the cavalier stance that there was no need to engage in discussions to fix a mutually convenient time.

[21] The applicant made a final attempt to facilitate the holding of a meeting for the purpose of accessing the requested information. In its letter dated 13 March 2015, besides detailing the history relative to matter, the applicant stated:

> "12. In view of what is now happening, which we consider deliberate attempt to evade our request and frustrate our attempts to get the information requested. We are left with no option but to approach the High Court and seek an order compelling you to provide us with the said information.
>
> 13. In the light of the fact that the information exists, combined with the fact that the person in whose possession the file is, is known, we are bound to give you only until close of business on Tuesday, 17th March 2015, to provide us with the said information or face court proceedings."

[22] In all the circumstances the contention raised by the respondents that the application was launched prematurely could not stand.

[23] The applicant disavowed any reliance on the PAIA to found it's cause of action, and elected to found the application on the common law mandatory interdict remedy. The respondents sought to ward off this approach by contending that the requisites for the grant of an interdict were not fulfilled.

[24] It is trite law that the requisites for the grant of a final interdict, all of which must be present, are:

(a) a clear right on the part of the applicants;

(b) an injury actually committed or reasonably apprehended; and

(c) the absence of any other satisfactory remedy available to the applicant.[3]

[25] In relation to the process followed in awarding the Tender, the applicant has a constitutional right to administrative action that is lawful, reasonable and procedurally fair. That right can only be meaningfully exercised with the applicant accessing the requested information and deciding whether or not to challenge the decision awarding the Tender, in keeping with the applicant's constitutional right of access to any information that is held by the State and required for the exercise or protection of any rights. The conduct of the respondents outlined above resulted in the applicant's right being interfered with. I was of the view that the second requisite for the grant of the interdict sought had similarly been fulfilled. The PAIA does not provide an alternative remedy where, as here, no decision refusing access to the requested information has been taken.

[26] This litigation, which has cost the tax payer, and which was occasioned by failure on the part of the respondents to respond to letters, could have been avoided. The respondents' cavalier stance of not fulfilling its

[3] *Setlogelo v Setlogelo* 1914 AD 221

undertaking to avail the requested information after a decision had been taken to avail the information was found to be reprehensible. The applicant seeks to establish the truth about how it came about for the Tender to be awarded, and thus to exercise and protect its rights in relation thereto. The respondents knew precisely what documents were required, at the outset, and raised no impediments preventing them from producing the requested information. Nor did they deny that the documents were in their possession. It was also of the view that their reliance on technical grounds to resist the application was reprehensible.

[27] Nothing, in my view, stood in the applicant's pathway to obtaining an interdict in effect directing the respondents to fulfill an undertaking made to avail the requested information. Nor did I find a reason to make costs not to follow the result, hence I granted the order I did, which for the sake of completeness, is set out hereunder.

"1. The Respondents are hereby directed to avail to and allow the Applicant to copy the following records relating to the process leading up to and the award of the tender under Tender No. SCMU6-13/14-0004: MANUFACTURING AND DELIVERY OF FURNITURE (the requested information):
   1.1 reports and recommendations of the Independent Bid Adjudication Committee (BAC) of the First Respondent;
   1.2 reports and recommendations of the Independent Bid Adjudication Committee (IBAC) of the Provincial Planning and Treasury assigned to consider this Tender;
   1.3 the Minutes of meeting of the different committees, BEC, BAC and IBAC;

1.4 the Minutes of meeting that were held between the First Respondent and the Third Respondent's IBAC including that was held on 24 January 2014; and

1.5 correspondence sent received;

2. The requested information shall be availed by Wednesday, 09 September, 2015. To that end, the Respondents shall notify the Applicant in writing of the time and venue at which the requested information shall be availed, 24 hours prior to the appointed date.

3. The Respondents shall pay the costs of this application, jointly and severally, the one paying, the other to be absolved."

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S M MBENENGE

JUDGE OF THE HIGH COURT

Plaintiff's Counsel: Mr L Kubukeli

Magqabi Seth Zita Attorneys

EAST LONDON

C/O S.Z Sigabi & Assoc

Kingwilliam's Town

Defendant's Counsel: Ms T Mqobi

Bhisho State Attorneys

EAST LONDON

Heard on: 27 August 2015

Order granted on:	28 August 2015
Reasons furnished:	01 September 2015