IN THE HIGH COURT OF SOUTH AFRICA /ES

(NORTH GAUTENG HIGH COURT, PRETORIA)

CASE NO: 57294/2007

DATE: 17/8/2010

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ~~YES~~/NO.

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO.

(3) REVISED. ✓

12/8/10 .... DATE

.... SIGNATURE

IN THE MATTER BETWEEN

DIGITAL VOICE PROCESSING (PTY) LTD — APPLICANT

AND

THE CHAIRMAN OF THE STATE TENDER BOARD — RESPONDENT

JUDGMENT

PRINSLOO, J

[1] This review application was heard together with a similar review application against the same respondent, featuring Sneller Digital (Pty) Ltd and 0thers as applicants. That application was heard under case no 33921/07.

[2] I do not propose embarking upon unnecessary repetition. This judgment should be read in conjunction with the judgment delivered in the last-mentioned matter ("the Sneller application").

Introduction

[3] In January 2000, the applicants in the Sneller application lodged a tender with the office of the State Tender Board for the recording, transcribing and archiving of digitally recorded proceedings in the High Court of South Africa ("the tender").

[4] By that time, the Sneller group of companies had already been rendering similar transcription services to the Department of Justice for some sixteen years. At the time they were servicing nine of the thirteen divisions of the High Court and also rendering other corresponding services.

[5] The tender was lodged in the name of the first applicant in the Sneller application, Sneller Digital (Pty) Ltd, and was awarded to the latter in June 2000. The contract would run until 2005 and it was thereafter extended until 2006. It appears to be common cause that the tender was properly executed by Sneller Digital (Pty) Ltd and that due performance was rendered.

[6] In September 2005, the State Tender Board resolved that Sneller Digital (Pty) Ltd and all its directors, shareholders and associated companies and their members be restricted from doing business with the state for a period of ten years. This

decision was taken without any advance warning to Sneller Digital (Pty) Ltd. The latter challenged the decision in urgent proceedings which culminated in the State Tender Board withdrawing the decision and Sneller Digital (Pty) Ltd withdrawing the urgent application. The State Tender Board was ordered to pay the costs. This happened in February 2006.

[7] In the same month, the State Tender Board, through Chief Director Mathebula in the Treasury department, initiated a fresh process aimed at achieving the same result, namely restricting Sneller Digital (Pty) Ltd and its directors, partners and associated members from doing business with all three spheres of government. This time the State Tender Board purported to give Sneller Digital (Pty) Ltd an opportunity to make representations. This process nevertheless resulted in the aforesaid parties being blacklisted as described.

[8] On 15 June 2007, Chief Director Mathebula wrote to the attorneys acting for the applicants in the Sneller application as well as the present applicant informing them that, on 8 March 2007 the State Tender Board had resolved as follows:

> "Sneller Digital (Pty) Ltd and its directors, partners and all associated members who were part of Sneller Digital (Pty) Ltd at the time of the RT279B/2000 contract be restricted to do business with all three spheres of government institutions for a period of ten years;
>
> The decision to restrict Sneller Digital (Pty) Ltd does not impact on the current contracts awarded to it prior to the above decision."

The single reason for taking this decision was described as follows in the letter:

> "The above decision was taken on the basis that you failed to remove the suspicion of fraud at the time of submission of your tender documents. This is so in the light of the fact that as at 30 January 2000 (closing date of the tender) the directors on whose basis the equity ownership was claimed, were not yet appointed as such as they were only appointed on 11 February 2000. At all material times you were aware that this information was incorrect and therefore fraudulent. This did not only constitute fraud but what is generally regarded as fronting."

This issue was fully canvassed in the judgment I gave in the Sneller application ("the Sneller application judgment") and the details will not be repeated in this judgment.

[9] The applicants in the Sneller application challenged this decision by means of a review application launched in September 2007.

[10] On inspecting the record supplied by the respondent in the Sneller application in terms of the provisions of rule 53, the second applicant in the Sneller application, Ms Van den Heever, who was also a director of the present applicant, stumbled upon the full text of the actual decision taken in March 2007. The relevant portions read as follows:

> "Sneller Digital <u>and DVP</u>, their directors, partners and all associated members who were part of Sneller at the time of the RT279B/2000 contract be restricted to do business with all three spheres of government and government institutions for a period of ten years; ...
>
> The decision to restrict Sneller Digital <u>and DVP</u> does not impact on the current contracts awarded to the companies prior to this decision being taken; ..." (Emphasis added.)

The reference to "DVP" is a reference to the applicant.

It is common cause that when Chief Director Mathebula informed the applicant's attorneys of the decision in his letter of 15 June 2007, *supra*, he quoted an edited version of the resolution by omitting the reference therein to the applicant.

[11] Ms Van den Heever made the discovery on 27 November 2007. At that point she was in the process of resigning as a director of the applicant. The same applies to the fourth applicant in the Sneller application, Ms Joubert, who had also been a director of the applicant but was also resigning at that time, towards the end of November 2007. On 6 December 2007 Ms Van den Heever conveyed the news that the applicant had also been blacklisted in the resolution to the deponent to the founding affidavit who is also a director of the applicant.

[12] This application was then launched, on an urgent basis, on 7 December 2007. It was aimed at obtaining urgent interim relief restraining the respondent from acting upon or implementing the decision blacklisting the applicant for ten years pending the outcome of the substantive application for review which came before me. On 18 December 2007, this court granted the interim relief applied for and ordered that the costs of the urgent application would be costs in this main application.

[13] What is left for decision is the prayer contained in paragraph 2.2 of the notice of motion:

> "An order reviewing, correcting and setting aside the decision of the respondent as set out in the minutes of its meeting dated 8 March 2007, a copy of which is annexed hereto marked 'A'."

The relevant portions of the resolution have been quoted.

If the relief is to be granted, the order should be limited to refer only to the blacklisting of the applicant, because the order dealing with the blacklisting of the applicants in the Sneller application is contained in the judgment of the Sneller application.

Is there a relevant link, for purposes of the present dispute, between the applicant and the applicants in the Sneller application?

[14] Those blacklisted in terms of the resolution under attack are the following:

> "Sneller Digital and DVP, their directors, partners and all associated members who were part of Sneller at the time of the RT279B/2000 contract."

[15] In the opposing affidavit, the deponent on behalf of the respondent, after referring to the March 2007 resolution, simply makes the following bald statement:

> "I may mention that it came to the attention of the Board that the applicant was one of the companies associated with Sneller Digital (Pty) Ltd and that it was in fact sharing the same directors with Sneller Digital."

In reply, the deponent on behalf of the applicant says the following:

> "The only apparent link relates to the fact that the applicant and Sneller Digital shared two directors at the time, namely Ms Van den Heever and Ms Yolanda Joubert. This association is a consideration not related at all to the decision as formulated by the respondent blacklisting both Sneller and the applicant. It is an irrelevant consideration and is demonstrative of the bias that the respondent has against Sneller Digital being projected against the applicant without any rational basis. The applicant is not part of the Sneller group and is entitled to fair administrative action from respondent in its own right."

Ms Van den Heever and Ms Joubert are the second and fourth applicants in the Sneller application. As I pointed out, they resigned as directors of the applicant before this application was launched.

[16] What is even more important, in my view, is that it is undisputed that the applicant did not even exist at the time when the tender was lodged and the alleged fraud perpetrated by the applicants in the Sneller application. It is undisputed that the applicant was only incorporated in 2001.

[17] In the Sneller application, the respondent argued that the blacklisting took place in terms of the provisions of the tender contract so that the principles of administrative law have no role to play in the outcome of that dispute. Similarly, the applicants in the Sneller application could not rely on the provisions of the Promotion of Administrative Justice Act, 3 of 2000 ("PAJA") for relief. This issue was dealt with fully in the judgment in the Sneller application.

In the present application, the respondent raised the same argument in the opposing affidavit and in heads of argument, but the argument, correctly in my view, was not proceeded with during the hearing before me. The then non-existent applicant was clearly not a party to the tender contract.

Applying PAJA

[18] 0n a proper reading of the resolution of March 2007, it seems that the applicant was blacklisted on an equal footing with Sneller Digital (Pty) Ltd: "Sneller Digital and DVP, their directors, partners ... etc" and "The decision to restrict Sneller Digital and DVP does not impact ..."

[19] The respondent gave the applicant no prior warning that it was being considered for blacklisting and no process was followed by which the applicant was given an opportunity of making representations, whether personally, by writing or by means of legal representatives to the respondent prior to the taking of the decision.

[20] In the founding affidavit, it is alleged that the decision has potentially catastrophic implications for the applicant. This statement is motivated as follows:

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>
> Most of the applicant's business is conducted with various government departments. Its annual turn-over with government departments is currently in the order of R8 million to R9 million. If the applicant cannot continue doing business with the state, then the applicant will close down and its twenty five employees will lose their jobs.
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> The applicant currently provides the following services to the state:
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> 15.1 the supply of delegate, address and conference systems;

15.2 video conferencing and data projection systems;

15.3 court recording systems.

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The applicant has been working with the state in regard to the implementation in South Africa with a video conferencing facility between the prisons and courts. The applicant has successfully installed and run a pilot project between Westville prison and the magistrate courts at Durban and Pinetown.

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Following the success of this pilot project, the State Information Technology Agency has requested the applicant to bid for the provision of video conferencing solutions between other prisons and courts in South Africa … The applicant is obliged to submit its bid by 20 December 2007.

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The value of the tender is between R20 million and R30 million. If the project succeeds, further magistrate courts and prisons will be included and the contract value will be worth at least R100 million.

The respondent has, by virtue of its aforesaid decision, placed any business dealings that the applicant has or may have in future with the government and government institutions in serious jeopardy. The applicant cannot, in all fair conscience, engage the government and government institutions in business dealings now knowing that a decision placing restrictions upon it has been taken by the respondent in the circumstances set out above."

[21] Section 3(1) of PAJA provides that administrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair.

[22] In section 1 of PAJA "administrative action" is defined as meaning "any decision taken, or any failure to take a decision, ... which adversely affects the rights of any person and which has a direct, external legal effect ..."

In *Grey's Marine Hout Bay (Pty) Ltd v Minister of Public Works* 2005 6 SA 313 (SCA) at 323D-F it was held that the phrase "must have a direct and external legal effect" was probably intended rather to convey that administrative action is action that has the capacity to affect legal rights.

[23] Section 3(2)(b) of PAJA reads as follows:

> "In order to give effect to the right to procedurally fair administrative action, an administrator, subject to subsection (4), must give a person referred to in subsection (1)-
>
> (i) adequate notice of the nature and purpose of the proposed administrative action;
>
> (ii) a reasonable opportunity to make representations;
>
> (iii) a clear statement of the administrative action;
>
> (iv) adequate notice of any right of review or internal appeal, where applicable; and
>
> (v) adequate notice of the right to request reasons in terms of section 5."

In my view, the exclusion to be found in subsection (4) does not apply for present purposes.

[24] Against this background, I am of the view that the respondent's decision to blacklist the applicant, which is administrative action as intended by PAJA, was clearly procedurally unfair and flew in the face of the peremptory provisions of section 3. For that reason alone, I am of the opinion that the decision, in as far as it affects the applicant, falls to be reviewed and set aside. The relevant ground of review is contained in section 6(2)(c) of PAJA.

On the particular facts, the decision is also reviewable, in my opinion, on other grounds to be found in section 6, namely that it was taken arbitrarily or capriciously, that relevant considerations were not considered and that it was so unreasonable that no reasonable person could have taken such a decision.

The only remaining defence presented by the respondent: the decision was never communicated to the applicant so that the application is premature and falls to be dismissed

[25] As authority for this proposition, the respondent relies on the case of *Lek v Estate Agents Board* 1978 3 SA 160 (C) at 167H-168A-D where it was, *inter alia*, stated that:

> "A decision taken by a corporate or juristic person like the respondent has no legal efficacy until such time as it has been communicated to the person concerned. Until such communication takes place there is no decision which could form the subject-matter of an appeal or a review."

[26] In this case, the written communication by the Estate Agents Board that the applicant's application for a fidelity fund certificate had been refused was in fact communicated in the Cape. The learned judge applied this fact to assume jurisdiction over the matter in the Cape Provincial Division.

[27] In the passages referred to, the learned judge also stated the common law principle that the pronouncement of the decision of a Court is the decisive

moment and that someone affected by the resolution of a company is not bound thereby until the resolution has been communicated to that person. See the authorities quoted in the passages referred to.

[28] The State Tender Board is neither a "corporate or juristic person" like the Estate Agents Board, nor is it a court of law or a company. It is an organ of state which took administrative action adversely affecting the rights of the applicant, as intended by the provisions of sections 1 and 3 of PAJA, *supra.*

The applicant's remedies lie in the provisions of sections 6 and 8 of PAJA. In fact, the applicant has already obtained temporary relief as provided for in section 8(1)(e) and is now asking for the setting aside of the administrative action in terms of section 8(1)(c). The applicant relies on some of the review grounds listed in section 6.

[29] The decision under attack has not been withdrawn by the State Tender Board. Indeed, in this application, the respondent seeks to defend that decision. As I indicated, it does so by alleging that "it came to the attention of the Board that the applicant was one of the companies associated with Sneller Digital (Pty) Ltd and that it was in fact sharing the same directors with Sneller Digital".

[30] When I debated this argument with Mr Tokota for the respondent, namely that the review application was premature because the decision had not yet been officially

communicated to the applicant, I asked him whether that meant that the applicant was, after all, not blacklisted. He indicated, quite properly, that he could not make such a submission. Mr Labuschagne for the applicant argued, if I understood him correctly, that on the stance adopted by the respondent, the applicant is without remedy. The decision adversely affecting its rights was taken, but it cannot proceed with the review application. Mr Labuschagne argued that such an approach would fly in the face of section 34 of the Constitution, which provides for access to courts or other appropriate tribunals. At one point Mr Tokota argued that the applicant's remedy was to apply for a *mandamus* forcing the respondent to remove the applicant's name from the blacklist. I fail to see how such a remedy would differ from the remedies provided for in section 8 of PAJA. In any event, on this argument of Mr Tokota, it is not clear why an application for a *mandamus* would also not be premature in view of the *Lek* decision.

[31] *Lek* was decided long before the Constitution and PAJA were promulgated. The applicant, as it was entitled to do, proceeded in terms of PAJA to attack the unfair administrative action taken by the State Tender Board, adversely affecting the applicant's rights. I cannot see how *Lek* can stand in the way of such a process.

[32] Moreover, I have difficulty with the argument that the decision was never communicated to the applicant. At the very least, the decision was communicated when the record was handed over to the applicant's attorneys in terms of rule 53.

This led to Ms Van den Heever discovering the full text of the resolution and passing it on to the other director of the applicant. If the decision had not been communicated, this application would not have been launched.

[33] It is also clear, from a general reading of the opposing affidavit, that the deponent to that affidavit was at all relevant times well aware of the fact that Ms Van den Heever was also a director of the applicant. The deponent, Chief Director Mathebula, deals with the correspondence exchanged between himself and the applicant's attorneys (who also acted for the applicants in the Sneller application) after the urgent application had been settled in February 2006 and the new process had been launched aimed at purportedly giving the applicants in the Sneller application the opportunity to be heard. This has already been referred to earlier in this judgment and it was also fully canvassed in the judgment in the Sneller application. In dealing with the correspondence, the chief director makes it clear that he knew that the attorneys of record of the applicants in the Sneller application also acted for the present applicant. He was also alive to the fact that Ms Van den Heever, to whom some of the letters were addressed, was a director of both Sneller Digital (Pty) Ltd and the applicant. When referring to a response to one of his letters he says the following:

> "I may mention that save for concluding that restricting these companies will result in chaos in the South African judicial and legislative system no representations were made on behalf of the applicant by the said Linda van den Heever and the applicant's attorneys <u>despite the fact that it was clear</u>

to them that the decision was likely to affect the applicant as well." (Emphasis added.)

In paragraph 32 of the opposing affidavit the deponent says the following:

> "The record that was filed only pertains to Sneller Digital and was not meant to inform the applicant of the decision of the 8th March 2007. However, to the extent that Van den Heever and Joubert were also directors of the applicant, the decision to restrict Sneller Digital also affected the applicant." (Emphasis added.)

In paragraph 34.2 of the opposing affidavit the deponent says:

> "I submit however that Linda Beatrice van den Heever was aware that all associated companies to Sneller, more particularly those in which she was a director, including the applicant, were affected by the decision."

When dealing with the allegation in the founding affidavit that the applicant did not even exist in 2000 when the tender was granted to Sneller Digital (Pty) Ltd, the deponent states:

> "Even if such would be true, which is not conceded, it is an issue that should have been brought to the attention of the respondent by Linda van den Heever when she was called upon to make representations on behalf of Sneller and its associated companies which included the applicant."

Consequently, it is clear from the opposing affidavit that the respondent knew that the applicant's directors were aware of the fact that the decision also affected the applicant. This was even before Ms Van den Heever made the discovery in November 2007.

[34] Quite apart from any other considerations, I am of the opinion that the "editing" of the resolution by excising the name of the applicant when the letter was written in June 2007, in itself constitutes unfair administrative action. It is not the conduct one would expect from the reasonable administrator. It leaves one with the impression of underhand conduct aimed at misleading the applicant.

Conclusion

[35] In all the circumstances, I have come to the conclusion, and I find, that a proper case has been made out, in terms of the provisions of PAJA, for the relief claimed.

The order

[36] I make the following order:

1. The decision of the respondent as set out in the minutes of its meeting dated 8 March 2007, in as far as it refers to the applicant, is reviewed and set aside.
2. The respondent is ordered to pay the applicant's costs, which will include the costs flowing from the employment of senior counsel.

W R C PRINSLOO
JUDGE OF THE NORTH GAUTENG HIGH COURT

HEARD ON: 26 APRIL 2010
COUNSEL FOR THE APPLICANT: E C LABUSCHAGNE SC
INSTRUCTED BY: STEGMANNS ATTORNEYS
COUNSEL FOR THE RESPONDENT: B R TOKOTA SC
ASSISTED BY Z Z MATEBESE
INSTRUCTED BY: STATE ATTORNEY