

**HANDED DOWN: 30 SEPTEMBER 2010
NOT REPORTABLE
IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG HIGH COURT, PRETORIA)**

CASE NO: 22023/08

In the matter between:

MPUMALANGA STEAM AND BOILER WORKS CC

Applicant

and

THE MINISTER OF PUBLIC WORKS

First Respondent

**THE CHAIRPERSON OF THE COMMITTEE THAT
ADJUDICATED UPON TENDER PTO 08/012**

Second Respondent

THE MINISTER OF CORRECTIONAL SERVICE

Third Respondent

TOKOLOGO TECHNICAL ASSIGNMENTS CC

Fourth Respondent

JUDGMENT

MURPHY J

1. The applicant has made application in terms of rule 53 seeking an order reviewing and setting aside the decision of the second respondent to award a tender to the fourth respondent as well as the contract entered into between the first respondent and the fourth respondent flowing from the decision to award the tender. It seeks a further order that the tender

be awarded to the applicant and that the first respondent be ordered to enter into a contract with the applicant for the execution of the tender.

2. The applicant trades as a supplier of mechanical infrastructure and the maintenance thereof. It has considerable experience working within the public sector and was the previous supplier to the first respondent of the services forming the subject of the tender and contract presently in dispute. The first respondent is the Minister of Public Works, the second respondent is the Chairperson of the committee that adjudicated the tender ("the chairperson"), the third respondent is the Minister of Correctional Service and the fourth respondent is Tokologo Technical Assignment CC ("Tokologo") the successful bidder for the tender.
3. The tender in question PTO/08012 is in respect of repair and maintenance of electrical and mechanical installations at Zonderwater Prison. The previous tender which the Minister of Public Works had awarded to the applicant expired in January 2008. At that time the department obtained quotations from various contractors to continue the work at the prison pending the award of a new tender. The applicant's quotation was accepted and the applicant continued to provide the services until 12 May 2008.
4. During February 2008, the Minister issued the tender in question. At closing six tenders were received. A Bid Evaluation Committee was

established comprising several members with varying appropriate expertise in engineering, procurement and project management. The bids were evaluated in accordance with the preferential procurement policy framework and the relevant procurement strategy. Tokologo scored 97 points while the applicant scored 87,20 points in accordance with the points system and for that reason the decision was taken to award the contract to Tokologo.

5. The main grounds of review raised by the applicant allege irrationality and unfairness by the Committee in the allocation of the points and thus the decision to award the tender. It points to various alleged inconsistencies in the awarding of points in respect of previous similar project experience, resources, the method statement and execution plan, the project structure and statutory compliance. The applicant places much emphasis on the fact that its tender price was the lowest of all the bids and was R1,6 million lower than that of Tokologo. The applicant's price was R41 231 493, while Tokologo's was R42 872 051. The respondents argue that price is not the sole criterion and point out that the applicant scored less points for functionality and in respect of historically disadvantaged preference points. For reasons that will become immediately apparent it is no longer necessary to determine the issues of rationality and fairness. The dispute between the parties now stands to be decided on a different and narrower basis.

6. It is necessary first to briefly outline the history of the litigation. Shortly after the tender was awarded the applicant applied on an urgent basis for an order preserving the *status quo*. Bertelsmann J handed down an order on 16 May 2008 interdicting the other respondents, pending adjudication of the review application, from handing over the site to Tokologo or allowing it to execute the contract flowing from the award of the tender, and ordering the respondents to preserve the *status quo* as it was on 24 April 2008. Thereafter there were a number of delays in filing papers with the main application being postponed on two prior occasions. The matter was eventually set down and enrolled for hearing before me on 25 August 2010.
7. The issue upon which the matter is to be resolved relates to Tokologo's Tax Clearance Certificate. Regulation 16 of the Regulations made in terms of section 5 of the Preferential Procurement Policy Framework Act 5 of 2000 provides:

“No contract may be awarded to a person who has failed to submit an original Tax Clearance Certificate from the South African Revenue Service (“SARS”) certifying the taxes of that person to be in order or that suitable arrangements have been made with SARS.”

It has accordingly become practice for invitations to tender emanating from the public sector to require tenderers to submit such certificates. The certificate included in the papers in this matter and forming part of the

tender documentation of the applicant is under a SARS letterhead and is headed: "Tax Clearance Certificate-Tender" and confirms compliance with the relevant tax legislation. The certificate is stated to be valid for a period of one year and provides: "Verification of this certificate can be done at any SARS Revenue office nationwide".

8. In paragraph 53 of the applicant's supplementary affidavit filed in terms of rule 53(4), Mr Nkosinathi Nkwanyana, the chairman of the board of the group of companies of which the applicant is a member, and the holder of a 50 percent members interest in the applicant, made the following averment

"After reasons had been furnished Mr Arnold Retief of Applicant phoned the toll free number which appears on Fourth Respondent's certificate ... He spoke to a female employer at SARS who informed him that the certificate is not genuine as the tax clearance certificate number does not appear on their system. According to her an investigation is in progress according to a note in their system. SARS was not willing to provide an affidavit but Second and Fourth Respondent are invited to prove the contrary."

Tokologo's Tax Clearance Certificate is at page 2 of its tender documentation forming part of Bundle B, being the record of decision filed by the Committee in these proceedings. It is identical in all *pro forma* respects to the one filed by the applicant and bears the Tax Clearance Certificate Number 0083/1/2007/0000079845. The approval date is

recorded as 30 November 2007 and the expiry date is recorded as 29 November 2008.

10. The Committee's reasons are dated 19 May 2008 and the applicant's supplementary affidavit was deposed to on 29 August 2008. Accordingly, the phone call made by Mr Retief (confirmed in a confirmatory affidavit) would have been made at some time during that period, being within the validity period recorded on the certificate.
11. Tokologo has not filed any answering papers in the application. The other respondents only filed an answering affidavit more than a year after the applicant filed its supplementary affidavit. Because a notice of opposition had been filed, the matter was originally set down on the opposed roll, despite no apparent opposition, for the week commencing 4 May 2009. On Thursday 30 April 2009, one court day before the set down date, Tokologo served a notice of withdrawal of its intention to oppose, without any accompanying explanation, and indicating that it would abide the decision of the court. On 8 May 2009 Potterill AJ (as she then was) granted the first and second respondents' application for a postponement and awarded punitive costs.
12. The answering affidavit filed in the name of the first and second respondents is deposed to by Mr Brian Ndanganeni, the second

respondent. He deals with the averment regarding the alleged false Tax Clearance Certificate in paragraph 91 of his affidavit, as follows:

“I do not have knowledge of the contents of this paragraph. I therefore cannot admit or deny same.”

The answer is somewhat disconcerting in the light of the requirements of Regulation 16.

13. In paragraph 30 of the replying affidavit deposed to on 26 October 2009 the applicant took issue with the attitude of the second respondent, pointing out that no bidder's bid may be accepted if it does not submit a valid Tax Clearance Certificate and that the bid documentation quite evidently regards the requirement as paramount. It contended that the respondents should have verified the validity (or not) of the bidders' certificates, more specifically and importantly at least the one submitted by the preferred bidder before the tender is finally awarded. It added that the respondents had more than sufficient time to verify the validity of the certificate and challenged the respondents to verify the validity of the certificate before the matter was heard. It reserved the right to file a supplementary affidavit dealing further with the issue.
14. The applicant filed a supplementary affidavit about 10 days later on 4 November 2009. The affidavit discloses that the applicant's attorney

addressed a letter to the Chief Information Officer of SARS in which it enclosed a copy of Tokologo's Tax Clearance Certificate and requested SARS to advise whether the certificate was valid or not. The Deputy Information Officer for SARS, M Milner, responded promptly on 28 October 2009. The second last paragraph of the letter reads:

"Your request for confirmation that the Tax Clearance Certificate is valid will fall into this category of automatically available (information to the public) as it is clearly stated on these Certificates when issued by SARS that "Verification of this Certificate can be done at any SARS Revenue Office nationwide". *In answer to your request it is hereby confirmed that Certificate No 0083/1/2007/0000079845 is not valid*" (my emphasis).

On the basis of this letter, the applicant submitted in its supplementary replying affidavit that the second respondent had a legal duty to verify the validity of the certificate and that Tokologo's bid should have been disqualified forthwith. It submitted accordingly that the award of the tender should be set aside for that reason alone.

15. Remarkably, despite having had almost a year to do so, before the matter was set down before me, the respondents failed to file a supplementary affidavit answering the issues raised, or disputing the alleged invalidity.
16. In his heads of argument filed on 3 August 2010, Mr *Erasmus*, who appeared for the applicant, argued that the fact that the successful

tenderer had submitted a false certificate ought to dispose of the application. As he put it: “to award a tender in those circumstances runs contrary to the whole spirit of a free market consisting of law abiding citizens”. Counsel for the respondents, not entirely without legitimacy, responded that the letter from SARS was ambiguous. The letter from SARS does not state whether the certificate was invalid at the date of the closing of the tender or at the date at which it expired. The expiry date of the certificate is 29 November 2008 and the written response by SARS was written almost a year later on 28 October 2009. It was possible therefore, according to counsel, that the reason the SARS official stated the certificate was invalid was because it had expired. He also argued that the legislation did not place a duty on the Committee to verify a tenderer’s Tax Clearance Certificate, which it was entitled to accept at face value. I cannot accept that submission. Good practice alone would require the Committee to give effective observance to Regulation 16 before awarding a tender, especially in view of the certificate itself inviting interested parties to seek verification, requiring only that a member of the Committee make a phone call to SARS for that purpose.

17. Having read the papers and heads of argument, I was concerned that the respondents had not dealt sufficiently with what in effect amounted to an allegation of possible fraud by Tokologo. For that reason I issued a directive to counsel on 20 August 2010 directing them to file supplementary heads of argument prior to the hearing dealing with (i)

whether the hearsay evidence regarding the status of the certificate ought to be admitted in the interests of justice; (ii) whether adverse inferences might be drawn from both Tokologo's withdrawal of opposition and the failure of the respondents to take up the invitation to investigate the matter; and (iii) whether such evidence would be sufficient for the court to conclude that a false certificate had been fraudulently submitted.

18. Both counsel submitted full and well-reasoned supplementary heads of argument. The respondents also filed a supplementary answering affidavit deposed to by Mr Stephen Ralekwa, Director; Legal Services of the Department of Public Works, who is an admitted attorney. He explained that the file had originally been handled in the department by a colleague, meaning that he has only recently become involved with the matter. Prior to my issuing the directive and in anticipation of the hearing he had already enquired of SARS about the certificate. On 17 August 2010 he received an email from Ms Wilna Turnbull, Legal Manager, Gauteng North which reads:

"I confirm that SARS issued the TCC which you inquired about. I am not at liberty to divulge information regarding the tax affairs of the Taxpayer, but I confirm that the Tax Clearance Certificate was issued by the SARS office at Rustenburg. All prescribed procedures were followed during the issuing of the Tax Clearance Certificate."

19. Subsequent to my issuing the directive, Mr Ralekwa, on 23 August 2010 contacted the Rustenburg office of SARS. He then received an email from the Branch Manager, Mr Daniel Modise which reads:

“The Tax Clearance Certificate that you have sent to me this afternoon, has expired or currently inactive on our records (sic) - it was issued from 30th of November 2007 to the 29th of November 2008. I have attached the new Tax Clearance Certificate that is issued on the 10th of June 2010 and valid till the 10th of June 2011.”

20. In his supplementary heads Mr *Mojapelo*, counsel for the respondents submitted that because at the time of the adjudication of the bids the certificate was not placed in issue it was reasonable for the Committee not to have sought verification. He conceded though that the respondents might have acted more conscientiously when the issue was raised in the supplementary affidavit in August 2008. Be that as it may, the respondents' later investigations left them satisfied that the certificate was valid. No doubt they took some comfort from the fact that SARS had as recently as in June 2010 issued Tokologo with another certificate. It was unlikely to have done that had it been aware of any prior fraud or irregularity. Mr *Mojapelo* submitted finally that given the conflicting versions about the certificate, the version of the respondents had to be accepted.

21. As fate would have it, a few days before the hearing, the Minister of Public Works, Mr Geoff Doidge, expressed himself through the media as being concerned about allegations of irregularities in tendering, especially in the Department of Correctional Services, and gave an indication of his intention to act swiftly and firmly against such practices. At the hearing, I heard argument on all the issues and reserved judgment. During argument, taking judicial notice of what the Minister had said, I intimated to counsel that it was likely that the Minister, as first respondent in this matter, might have preferred a more thorough investigation of the validity of the certificate at an earlier stage. Mr *Mojapelo* readily agreed and left me with the impression that he intended to draw the issue to the attention of senior officials in the department. Being the conscientious counsel I know him to be, as appears from what follows he clearly did so.
22. In his endeavours to get to the bottom of the issue, Mr Gerhardt Ploos van Amstel, the applicant's attorney, continued to engage with SARS before and after the hearing. In two emails he received from Mr Milner of SARS on 26 and 27 August 2010 he was informed that the certificate "does not exist on the system" and that "all indications are that the certificate was not issued by SARS and that any statement made by Ms Turnbull and Mr Letanke were based on what they were told and not what they personally checked". Further discussions took place between the attorney and Mr Mark Kingon, Group Executive of SARS which culminated in the latter

sending a letter to the attorneys for the applicant on 27 August 2010 in which he stated:

“The Tax Clearance Certificate which is the subject of your request was not issued by the South African Revenue Service.”

23. Having received this information the applicant subsequent to the hearing filed a notice in terms of rule 6(5)(e) making application for an order that the further evidence contained in the affidavit accompanying the notice be allowed. There is no opposition to the application and it is accordingly granted. The affidavit details the interactions I have just described and the deponent requests that the court accept the letter of Mr Kingon (Annexure SR10 to the affidavit) as the best evidence available or alternatively that the question be referred to oral evidence and that the relevant official of SARS be called to testify regarding the validity of the certificate. In addition, it was submitted that the approach of the respondents is indicative of the carelessness with which the matter was dealt with, contrary to government policy, and that such would justify the grant of a punitive costs award on the scale as between attorney and client in the event that the tender and contracts are set aside on the grounds of contravening Regulation 16.
24. As it turns out, a referral to oral evidence will not be necessary. In early September, counsel approached me in chambers and requested me to

delay handing down judgment. In view of information that had come to light the respondents wished to reconsider their position. On 16 September 2010 counsel for the respondents filed supplementary heads of argument to which are annexed two letters, being correspondence between Mr SXA Dongwana, the Director General, Department of Public Works and Mr Oupa Magashula, the Commissioner of SARS. The applicant, given the content of the correspondence, can have no objection to the admission of the letters as evidence and all parties no doubt accept the content thereof to be true and correct. In his letter dated 6 September 2010, Mr Dongwana set out the background, the prior correspondence and the fact that the issue had been raised in the litigation and requested clarification on whether:

- “1. Tokologo Technical Assignments CC’s Tax Clearance Certificate number 0083/1/2007/0000079845 was valid during the period 30 November 2007 to 29 November 2008;
2. The tax clearance certificate furnished by the said entity for the purposes of the tender was valid; and that
3. The tax affairs of Tokologo Technical Assignment CC were in order at the time referred to in 1 above.”

25. Mr Mgashula responded to the letter immediately on the same day. The relevant part of the letter reads:

"As correctly stated by you in your letter, conflicting statements have unfortunately been made regarding the validity or not of the Tax Clearance Certificate of the above-mentioned CC.

SARS was recently approached regarding the validity of the Tax Clearance Certificate and it was evident that incorrect information had been given to your office previously regarding its validity.

SARS has no record of the certificate being issued and it would appear on closer inspection of the copy of the certificate in my possession that it has various aspects that differ from the official certificates issued by SARS.

Unfortunately due to stringent secrecy provisions of tax legislation, I am unable to provide further information regarding the tax affairs of this or any other taxpayer.

Further information can only be made available with the consent of the taxpayer concerned or by order of a competent court."

26. On receipt of the letter, the Minister of Public Works immediately accepted that his department had been acting on apparently incorrect information from SARS and that the certificate submitted by Tokologo together with its tender was not valid. As I read Mr Magashula's letter, the distinct possibility exists that the false certificate was either fraudulently obtained or a forgery.

27. Under the circumstances, the First Respondent withdrew its opposition and consented to orders being made in terms of prayers 2, 3 and 5 of the notice of motion, that is orders setting aside the decision of the Second Respondent to award the tender as well as the contract, and to pay the costs of the application. Nothing is said in the supplementary heads about the position of the second respondent. I imagine this is mere oversight, and that he too, given the post he occupies, readily aligns himself with the position taken by the Minister. In terms of section 6(2)(f) of the Promotion of Administrative Justice Act 3 of 2000, a court has the power to judicially review an administrative action which contravenes a law (in this case Regulation 16) and may set it aside on that ground in terms of section 8(1)(c) of that Act. It is trite that the award of a tender is administrative action.
28. Two issues therefore remain in dispute. Prayer 4 of the notice of motion seeks orders that the tender be awarded to the applicant and directing the first respondent to enter into a contract with the applicant for the execution of the tender. The respondents are still opposed to this relief arguing that the matter should be remitted to the Committee and for a fresh tender process to begin. The second issue is the question of costs. The respondents have consented to costs on a party to party basis; the applicant seeks a punitive costs award.
29. Section 8(1)(c) of the Promotion of Administrative Justice Act 3 of 2000 governs the remedies in proceedings for judicial review when the court

sets aside administrative action. The provision provides that the court in proceedings for judicial review may grant any order that is just and equitable including orders setting aside the administrative action and -

- “(i) remitting the matter for reconsideration by the administrator with or without directions; or
- (ii) in exceptional cases -
 - (aa) substituting or varying the administrative action or correcting a defect resulting from the administrative action; or
 - (bb) directing the administrator or any other party to the proceedings to pay compensation.”

30. The substitution by the court of its decision for that of the administrator can only occur in exceptional cases, understood typically to be the case when the administrator has exhibited bias or gross incompetence; when remittal will lead to a foregone conclusion; where further delay is unjustifiable and where the court is in as good a position as the administrator to make a decision.

31. I have considered the various submissions by the parties and in the final analysis I am not persuaded that this is an exceptional case justifying substitution. Too much time has lapsed since the original tender invitation, affecting questions of pricing and the budgeting process in the department. Moreover, there is now less than 6 months to run on the

tender, and it would be inappropriate for the court to bind the department to a tender for 3-4 years into the future and thereby limit its options in the organisation of its affairs. I am also not persuaded on the limited evidence before me that had Tokologo been excluded at the outset, for submitting a false tax certificate, such would automatically have resulted in the tender being awarded to the applicant. In so far as there may be indications of irregularity in the evaluation and comparisons of the bids submitted by the applicant and Tokologo, and I make no finding in that regard, they appear to me insufficient to infer bias or gross incompetence. Moreover, the court is possessed of insufficient information, in relation to all the bids submitted and the ongoing execution of the works while this review was pending, to make an informed decision about the public interest in awarding the tender. Justice will be done in this case by simply setting the tender aside and by giving a direction that should another invitation to tender in respect of repair and maintenance of electrical and mechanical installations of Zonderwater Prison be made, that it should be evaluated and adjudicated by committees comprised of persons other than those who were members of the committees involved in the evaluation, adjudication and award of tender PTO 08/012 which has been the subject of this application.

32. The only remaining question is the question of costs. I agree with the applicants that the respondents could and should have acted when the applicant raised the possibility of a false Tax Clearance Certificate in the supplementary affidavit served upon them in late August 2008. One can

only commend the actions of the Director General, Mr Dongwana and the Commissioner, Mr Magashula for the haste with which they acted to get the truthful position before the court as soon as they were brought into the picture. But the Chairperson of the Committee and the officials in the department should have acted with equal speed in August 2008. Had they done so, much of the litigation would have been avoided and the contractual arrangement been resolved much earlier with less wasted time and effort for all concerned.

33. The stance taken earlier by the respondents that they were under no duty to investigate is worrying and has no place in a constitutional order that places a premium on transparency, accountability and effective service delivery. Regulation 15 of the Preferential Procurement Regulation published pursuant to section 5 of the Act provides:

“(1) An organ of state must, upon detecting that a preference in terms of the Act and these Regulations has been obtained on a fraudulent basis, or any specified goals are not attained in the performance of the contract, act against the person awarded the contract.

(2) An organ of state may, in addition to any other remedy it may have against the person contemplated in subregulation (1) -

(a) recover all costs, losses or damages it has incurred or suffered as a result of that person’s conduct;

- (b) cancel the contract and claim any damages which it has suffered as a result of having to make less favourable arrangements due to such cancellation;
- (c) impose a financial penalty more severe than the theoretical financial preference associated with the claim which was made in the tender; and
- (d) restrict the contractor, its shareholders and directors from obtaining business from any organ of state for a period not exceeding 10 years."

34. It is not possible to determine on the evidence before me whether Tokologo obtained a preference in terms of the Act on a fraudulent basis or not. If it has done, then the Minister will be able to recover all costs incurred as a result of its conduct. The Minister and the relevant officials will need to investigate whether it is feasible to act in terms of Regulation 15(2). But for present purposes I must conclude that the Minister and officials should have acted to investigate the possibility of a false certificate and non-compliance with Regulation 16 as soon as it was raised in the supplementary affidavit. In *Hidro-Tech Systems (Pty) Ltd v City of Cape Town and others* 2010 (1) SA 483 (C) at para 65-66, it was held that the use of the participle "detecting" in Regulation 15 was intended to cast a wide net "precisely so as to ensure that an organ of state be proactive in responding to the reasonable possibility that a preference has been fraudulently [obtained], or that a specific goal of its

preferential policy, in terms of which the contract was awarded, is not being pursued”. The duty to act on an allegation of fraud does not require conclusive proof on the conclusion of an investigation. On appeal in *Viking Pony Africa Pumps (Pty) Ltd t/a Tricom Africa and Another v Hydro-Tech Systems (Pty) Ltd* [2010] 4 All SA 80 (SCA) at para 31, Heher JA held that the duty to act arises on the fraudulent preference being “detected” and elaborated on the meaning of the term as follows:

“... because “detect” connotes the discovery or awareness of a certain state of affairs not previously known to the person who so detects, it would strain the meaning unduly to limit it to a conclusion reached at the end of a process of investigation or confirmation; in everyday speech “detect” bears the sense of a provisional or unilateral opinion as to the given state (as in “I detect hesitation in your voice”) which is open to contradiction rather than carrying the force of a final judgment on the matter.”

35. While the applicant was principally motivated by its own interests, its conduct of this litigation has been in the public good and for the public benefit. It would be unfair for it to be placed substantially out of pocket because the state failed to act earlier when it had a duty to do so. A punitive costs award is accordingly justified.
36. The matter should not rest there. As indicated, if there has indeed been fraud, the state may be entitled to recover its costs, and should do so. For that reason I propose to refer this judgment to the Director of Public

Prosecutions with a request that he institute an investigation into the possibility of any crime having been committed with a view to instituting a prosecution.

37. In the result, the following orders are made:

- i) The decision of the second respondent to award tender contract PTO 08/012 to the fourth respondent, Tekologo Technical Assignments CC, is reviewed and set aside.
- ii) The contract entered into between the first respondent flowing from the decision referred to in paragraph (i) of this order is set aside.
- iii) In the event that the first respondent or the Department of Public Works invites tenders in respect of repairs and maintenance of the electrical and mechanical installations of Zonderwater Prison in the future, it is ordered that such be evaluated, adjudicated and awarded by committees comprised of persons other than those who were members of the committees involved in the process resulting in the award of the tender contract to Tokologo Technical Assignments CC on 16 April 2008.

- iv) The first respondent is ordered to pay the applicant's costs on the scale as between attorney and client.
- v) The Registrar of this court is directed to serve a copy of this judgment on:
 - a) Mr Oupa Magashula, the Commissioner SARS;
 - b) Mr SXA Dongwana, Director-General, Department of Public Works; and
 - c) The Director of Public Prosecutions.
- vi) The Director of Public Prosecutions is requested to investigate whether any conduct on the part of the members and/or the employees of Tokologo Technical Assignments CC in relation to the submission, evaluation and adjudication of its tender application in respect of contract PTO 08/012 constitutes criminal conduct warranting prosecution.



JR MURPHY
JUDGE OF THE HIGH COURT

Date Heard: 25 August 2010
For the Applicant: Adv FJ Erasmus
Instructed By: Van der Merwe Du Toit Inc., Pretoria
For the Respondents: Adv MM Mojapelo and Adv TR Masevhe
Instructed By: The State Attorney, Pretoria