



Reportable:	<u>YES</u> / NO
Circulate to Judges:	<u>YES</u> / NO
Circulate to Magistrates:	YES / <u>NO</u>
Circulate to Regional Magistrates:	YES / <u>NO</u>

**IN THE HIGH COURT OF SOUTH AFRICA
(Northern Cape High Court, Kimberley)**

CASE NO: **898/2016**
DATE HEARD: **14/12/2016**
DATE DELIVERED: **19/12/2016**

In the matter between:

JODAN CONSTRUCTION (PTY) LTD

Applicant

and

PREMIER NORTHERN CAPE PROVINCE

1st Respondent

**THE MEMBER OF THE EXECUTIVE COUNCIL FOR THE
NORTHERN CAPE DEPARTMENT OF ROADS AND PUBLIC WORKS**

2nd Respondent

DOWN TOUCH INVESTMENTS (PTY) LTD

3rd Respondent

Coram: Olivier J *et* Mamosebo J

JUDGMENT

Olivier J:

- [1.] The applicant, Jodan Construction (Pty) Limited, submitted a tender to the Department of Public Roads and Works, Northern Cape, for the upgrading of a gravel road. Eighteen other tenders were received by the Department.
- [2.] The contract was eventually awarded to Down Touch Investments, the third respondent, after the applicant's tender had been found to be non-responsive and was disqualified from further evaluation.
- [3.] On 6 May 2016 the applicant brought this application. In the first part of the notice of motion it sought an order preventing the handing over of the site to the third respondent, pending the review of the award, and in the second part of the notice of motion the relief sought in respect of the award was set out.
- [4.] The third respondent opposed the first part of the application. The applicant's attitude was that the third respondent had no interest in the interdict proceedings. That part of the application was heard on 19 May 2016 and on 25 May 2016 Erasmus AJ decided the issue of the third respondent's standing in that part of the application in its favour, but nevertheless granted the interdict. The costs of 19 May were ordered to be costs in the review application, but the costs occasioned by the postponement of 6 May were reserved for later determination.
- [5.] What serves before us at this stage is the second part of the application. The Premier of the Northern Cape province and the Member of the Executive Council for the Northern Cape Department of Roads and Public Works have been cited as respectively the first and second respondents, and will at times collectively be referred to as "*the Department*".

[6.] The relief sought in terms of the amended notice of motion¹ is set out as follows in paragraphs 4, 4A and 4B thereof:

"4. That the first and second respondents are called upon to show cause why the decision that:

4.1 The proceedings, and/or;

4.2 The decision pursuant to the proceedings, and/or;

4.3 The awarding of the tender (whether to the third respondent or to any other person or entity)

be reviewed and/or corrected and/or set aside.

4A That following an order in terms of prayer 4, the court issues an order in terms of which the applicant's tender is declared responsive.

4B That following an order in terms of prayer 4A above, the first and second respondents be ordered to award and give the tender to the applicant and to conclude a contract with the applicant in respect of the rendering of the services and performance of the works in terms of the tender."

[7.] This part of the application is opposed by the second and third respondents.

[8.] In evaluating the applicant's tender both the Bid Evaluating Committee and the Bid Adjudicating Committee of the Department referred to "*NCP4 (para 2.10)*"

¹ Subsequent to the lodging of the record with the Registrar, and as authorised in the first part of the application, the applicant filed a supplementary founding affidavit and amended its notice of motion by the insertion, after paragraph 4, of paragraphs 4A and 4B.

and found the tender to be non-responsive because the applicant "*did not disclose other business interests*".

- [9.] The paragraph referred to, forms part of Section NCP 4, which in turn was part of Form C of the so-called returnable documents in terms of the Department's procurement document. The section is titled "*DECLARATION OF INTEREST*", and it is in this section, under this heading and in paragraph 2 that tenderers had to answer certain questions, which included the following question in subparagraph 2.10 :

"Do you or any of the directors/trustees/shareholders/members of the company have any interest in any other related companies whether or not they are bidding for this contract?"

- [10.] The form provided the tenderer, or the person completing the form on behalf of the tenderer, with a choice between only two answers; either "Yes" or "No". In the event of the answer being "Yes", subparagraph 2.10.1 required particulars, presumably of such interests.
- [11.] The general purpose of the particular section is quite clearly to elicit assurances and information that would satisfy the Department that there would be no risk or perception of favouritism or corruption in respect of any particular tender.
- [12.] Mr Nico Pretorius, who completed the form in the case of the applicant and who is also the deponent for the applicant in this matter, answered "No" and furnished no particulars under subparagraph 2.10.1.
- [13.] It is common cause that the committees, in the process of verifying answers provided on behalf of the applicant, subsequently established that the directors of the applicant indeed had interests in other companies and that it is on the

basis of that information that the applicant's tender was then found to be non-responsive and was disqualified.

- [14.] It is not in dispute that, if the finding that the applicant's tender was non-responsive was correct, the tender would not have qualified for further evaluation. What is in dispute is whether that finding was indeed correct and, if not, whether the applicant is entitled to the relief sought in terms of the amended notice of motion.
- [15.] It is also not in dispute that the decisions to disqualify the applicant's tender and to award the contract to the third respondent constitute administrative action for the purposes of the **Promotion of Administrative Justice Act**²("the Act").
- [16.] Mr Pretorius says he interpreted subparagraph 2.10 as only pertaining to interests in "*related*" companies, and that "*related*" in the context of the subject of this tender referred to other companies in the road construction industry.
- [17.] In their findings the committees simply referred to "*other business interests*" of the applicant's directors. No mention was made of the nature of those other interests, or indeed of the businesses of the companies in which those interests were held. The word "*related*" was not so much as mentioned. On the face of it the committees applied subparagraph 2.10 as if it referred to any other companies at all, which would mean that they disregarded the word "*related*" in the question.
- [18.] Despite the fact that Mr Pretorius in his supplementary founding affidavit made it clear that the applicant's case is that the question in subparagraph 2.10 only pertained to interests in related companies, more specifically companies involved in the business of road construction, the deponent for the Department, Mr Fabian Borman, has not explained how subparagraph 2.10 was intended, and even less how it was indeed interpreted by the committees.

² 3 of 2000

- [19.] This can also not be established by comparing the evaluation and treatment of the other tenders as far as the question in subparagraph 2.10 is concerned, because the applicant's tender was the only one where there was a "No" answer and where the directors of the tenderer were then found to have interests in other companies.
- [20.] The unqualified reference to "*other business interests*", together with the fact that the committees decided that those interests should have been disclosed in response to the question in subparagraph 2.10, leads to the inescapable inference that the committees indeed disregarded the word "*related*" in subparagraph 2.10.
- [21.] That this is in effect what the committees did, is exactly the applicant's case and the second respondent has not even remotely challenged it, nor for that matter has the third respondent.
- [22.] In interpreting subparagraph 2.10 it has to be assumed, as a starting point, that the word "*related*" was included in the wording of the question with a purpose³.
- [23.] A meaning therefore has to be attributed to the word, "*having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed*"⁴.

³ Compare **National Credit Regulator v Opperman and Others** 2013 (2) SA 1 (CC) para [99]; **Kilburn v Tuning Fork (Pty) Ltd** 2015 (6) SA 244 (SCA) para [15]

⁴ **Natal Joint Municipal Pension Fund v Endumeni Municipality** 2012 (4) SA 593 (SCA) para [18]

- [24.] The word "*related*" in my view clearly qualifies the words "*any other ... companies*" and restricts the wide meaning they would arguably otherwise have had⁵.
- [25.] Even the application of the interpretational principle and aid *inclusio unius est alterius exclusio*⁶ would also result in an interpretation that the "*other*" companies referred to were intended to include only "*related*" companies, to the exclusion of "*unrelated*" companies.
- [26.] According to the **Concise Oxford English Dictionary**⁷ the word "*related*" would refer to a "*causal connection between*" what is being compared. This is the "*ordinary grammatical meaning*" of the word⁸ "*related*".
- [27.] As already mentioned it is the applicant's case that, in the context of this matter, this "*causal connection*" would have had to be found between the nature of the business of the tendering company and those of the "*other ... companies*" concerned.
- [28.] This interpretation is in my view strengthened by the presence in the question of the words "*whether or not they are bidding for this contract*", immediately after the words "*any other related companies*". If the question was intended, and should be interpreted, as referring to interests in literally any other company whatsoever, there would not have been any need to inform the tenderers that interests in a company should also be declared regardless of the fact that such a company has not submitted a tender. Companies not in any way involved in road construction would in any event not have been able to tender for this contract. An interpretation that the question was aimed at interests in any conceivable kind of "*other*" company would therefore in my opinion render the words

⁵ Compare **Rex v Milne and Erleigh** (7) 1951 (1) SA 791 (A) at 859C-860B; **Eagle Star Insurance Co Ltd v Willey** 1956 (1) SA 330 (A) at 335 G-H

⁶ Compare **Administrator, Transvaal, and Others v Zenzile and Others** [1991 \(1\) SA 21 \(A\)](#) at 37G - H

⁷ 10 Edition (Revised)

⁸ Compare **Premier Foods (Pty) Ltd v Manoim NO and Others** 2016 (1) SA 445 (SCA) para [42]

"whether or not they are bidding for this contract" superfluous; a result that the parties must be assumed not to have intended⁹.

- [29.] An alternative argument could be that, because most of the other questions under paragraph 2 seem to pertain to interests in state entities and connections with the bid committees of the Department, this is the "*causal connection*" to which the word "*related*" in subparagraph 2.10 was intended to refer.
- [30.] For purposes of the question whether the committees' decisions is reviewable it is, however, not really decisive which of these causal connections was intended to be referred to by the use of the word "*related*". The point is that the word must be assumed to have been intended to refer to some causal connection that had to exist and which would narrow down the class or number of companies in which interests should be disclosed.
- [31.] The committees clearly approached the question on the basis that interests in literally "*any*" companies, and with any conceivable businesses, had to be disclosed. In doing so they by necessary implication disregarded the qualifying word "*related*". In the absence of any explanation by Mr Borman for this, their decision to apply the wording of the question in this manner must be assumed to have been taken arbitrarily, and this in itself renders their decisions reviewable¹⁰.
- [32.] The committees' decisions in any event make no reference to any relationship, which appeared from the information obtained by them, between the business interests referred to and the applicant, its business and the contract. Mr Borman has also not shed light on this in his answering affidavit on behalf of the second respondent. If there was in fact no indication in the information of such a relationship, there would in any event not have been any rational connection

⁹ Compare **Wellworths Bazaars Ltd v Chandler's Ltd and Another** 1947 (2) SA 37 (A) at 43; **African Products (Pty) Ltd v AIG South Africa Ltd** 2009 (3) SA 473 (SCA) para [13]

¹⁰ See section 6(2)(e)(vi) of the Act.

between that information and the decisions¹¹, in other words even if it could be said that the committees did not disregard the qualifying word "*related*".

- [33.] The action is also not rationally connected to the purpose of the question in paragraph 2.10, namely to elicit information about interests in related companies¹².
- [34.] Even if it could somehow be said that the committees did have regard to the word "*related*" in considering the applicant's answer, Mr Borman has failed to explain in what way the other companies in which the directors of the applicant have interests were considered to be "*related*" to the applicant for the purposes of the particular question.
- [35.] The allegations by Mr Pretorius that the companies in which the directors have interests are not related to the applicant and that they are not involved in the same industry as the applicant have not really been challenged. They may have been included in broad denials of paragraphs in the supplementary founding affidavit which also contained other averments, but they were never responded to by means of an allegation that there is indeed some relationship, let alone by providing particulars of such relationship.
- [36.] At this juncture it has to be considered what the appropriate remedy would be in the circumstances of this matter.
- [37.] A finding that a decision is irregular and reviewable would not in all cases justify it being declared invalid and set aside. The court would still have to consider what relief would in the circumstances be "*just and equitable*"¹³. In doing so the interests of the successful applicant, those of the tenderer to which the contract had already been awarded and those of the community will be weighed up and

¹¹ See section 6(2)(f)(ii)(cc) of the Act.

¹² See s 6 (2)(f)(ii)(bb) of the Act; Compare **Millennium Waste Management (Pty) Ltd v Chairperson, Tender Board: Limpopo Province and Others** 2008 (2) SA 481 (SCA) para [19]

¹³ See section 8(1) of the Act.

balanced¹⁴. In paragraph [23] of the **Millennium Waste** judgment¹⁵ it was put as follows:

“The difficulty that is presented by invalid administrative acts, as pointed out by this court in Oudekraal Estates, is that they often have been acted upon by the time they are brought under review. That difficulty is particularly acute when a decision is taken to accept a tender. A decision to accept a tender is almost always acted upon immediately by the conclusion of a contract with the tenderer, and that is often immediately followed by further contracts concluded by the tenderer in executing the contract. To set aside the decision to accept the tender, with the effect that the contract is rendered void from the outset, can have catastrophic consequences for an innocent tenderer, and adverse consequences for the public at large in whose interests the administrative body or official purported to act. Those interests must be carefully weighed against those of the disappointed tenderer if an order is to be made that is just and equitable.”

[38.] Not every irregularity will invalidate the award of a tender¹⁶.

[39.] The closing date for the submission of the tenders for this contract was 29 January 2016, and the expiry date for the acceptance of one of those tenders 28 April 2016. It is not in dispute that it only came to the applicant's knowledge on 20 April 2016 that the contract had been awarded to the third respondent. The applicant had never been notified of the fact that its tender had not been

¹⁴ See **Moseme Road Construction CC and Others v King Civil Engineering Contractors (Pty) Ltd and Another** 2010 (4) SA 359 (SCA) para [21]; **Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer, South African Social Security Agency, and Others** 2013 (4) SA 557 (SCA)

¹⁵ See footnote 11 *supra*

¹⁶ See **Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer, South African Social Security Agency, and Others**, *supra*

accepted, and obviously also not of the fact that its tender had been disqualified as non-responsive.

- [40.] The applicant then immediately approached the court for the interdict alluded to above. It is not clear what led to the considerable delay of more than 6 months since then. The fact is, however, that the delay has had consequences.
- [41.] The third respondent has shown, with reference to the contents of its answering affidavit in the interdict proceedings, that it will suffer significant harm if the award is to be set aside now. The expenses it has incurred and to which it has, presumably after the award of the contract to it, committed itself in anticipation of site handover and the commencement of construction, run into well in excess of a million rand per month.
- [42.] The consequences will, however, not be limited to financial losses. A subcontractor has already been appointed by the third respondent and 34 people will lose their employment if the award is set aside.
- [43.] Mr J J Cronje, the deponent for the third respondent, has also explained that it is in the interests of the community that the work on this derelict road is not further delayed. The setting aside of the award will inevitably result in a considerable further delay, because the tender would have to be re-advertised and the whole process would have to begin again.
- [44.] The applicant's only response to all of this is a statement by Mr Pretorius that the costs allegedly incurred by the third respondent "*are no justification for the Court not adjudicating objectively on the tender process and all that it entails*". In the interdict part of the application Mr Pretorius was content to state only that, if a contract had been concluded between the Department and the third respondent, the latter's remedy would "*lie in that contract*".

- [45.] Although construction has not commenced, significant expenses have already been incurred in preparation and site establishment. Insofar as Mr Pretorius intended to submit that the impact on the third respondent of a setting aside of the reward is not relevant at this stage, he would of course have been wrong.
- [46.] Mr Vlok, counsel for the applicant, argued that it is not clear on the papers that a contract has indeed been concluded between the Department and the third respondent and that the third respondent should somehow have terminated those expenses when the interim relief was granted. This is an untenable proposition. The acceptance of the third respondent's tender would quite obviously have led to it having to begin the process of putting things in place for the commencement of the actual construction work. Whether this flowed from the acceptance of the tender or from the subsequent conclusion of a contract is immaterial. The fact is that those expenses have been incurred as a direct consequence of the award of the contract to the third respondent, and they cannot simply be thought away.
- [47.] Although Mr Vlok's argument did not go that far, it has to be added that it would be far-fetched to speculate that the Department, and therefore the taxpayer and the public at large, would not be liable to compensate the third respondent in the event of the award being set aside because of an irregularity committed by the Department.
- [48.] It is so that it was the irregular decision of the committees that led to the unjustified disqualification of the applicant's tender, but on the other hand the applicant has not even attempted to show why it would be just and equitable to set the award aside on that basis in the circumstances of this particular matter. Mr Pretorius has in fact not even made such an allegation.
- [49.] I realise that it has not been shown that the applicant is in any way whatsoever to blame for the fact that its tender was disqualified. This is, however, exactly what also happened to the innocent tenderer in the **Moseme** case, where the award

was nevertheless not set aside and where Harms DP set out the relevant considerations in such a case in paragraphs [20] and [21]:

"The setting aside of a contract has a number of consequences. The first contractor may not be able to claim under the revoked contract and be left with an enrichment claim, and the employer may not have a claim for defective workmanship. The second contractor may even have a claim for damages against the employer in respect of loss of profit on the executed part of the contract because it has now become contractually entitled to the whole contract.

These problems may not be of any consequence in the case of corruption or fraud, or where the successful tenderer was complicit in the irregularity. But, as said, that is not the case. The learned judge, in reaching his conclusion, failed to have any regard to the position of the innocent Moseme. He also did not consider the degree of the irregularity. He assumed incorrectly that King was entitled to the contract and he underestimated the adverse consequences of the order. I therefore conclude that he erred in the exercise of his discretion. This means that King, in spite of the imperfect administrative process, is not entitled to any relief. Not every slip in the administration of tenders is necessarily to be visited by judicial sanction".

[51.] These considerations have not been dealt with by Mr Pretorius.

[52.] While it is so that Mr Pretorius has made the allegation that the other companies in which the interests are held are not related to the applicant and to the subject of this tender, he has not explained this allegation and has chosen not to disclose what exactly the business of those companies are. There is therefore insufficient

evidence for this court to find that the contract will, as a fact, be awarded to the applicant in the event of a reconsideration of its tender.

- [53.] Mr Cronje has referred to a number of other aspects in which the applicant's tender had according to him in any event not complied with the requirements of the procurement document, including the fact that Mr Pretorius had not indicated the particulars of the subcontractor that had to be appointed by the successful tenderer. The applicant's case in this regard is that the need for those particulars would only have arisen once the contract had been awarded to the successful tenderer. In view of the above it is not necessary to decide this.
- [54.] Paragraph 1.2 of Form J of the procurement document provided that the "*Main Contractor*", if not based in the Northern Cape, would have to appoint as a subcontractor a part of the contract to a Northern Cape contractor or contractors. If this is where it ended, there may have been merit in what Mr Pretorius said in this regard, but the procurement document went much further.
- [55.] Paragraph 8 of Form K deals with the issue of subcontracting. It required tenderers to indicate whether a subcontractor was going to be appointed and, if so, the tenderer was required to furnish particulars of, *inter alia*, the name of that contractor and its B-BBEE status and to provide proof of such status in the form of a certificate.
- [56.] Mr Pretorius answered in the affirmative, as he was compelled to do in view of the fact that the applicant is not Northern Cape based, but in response to the questions pertaining to the particular subcontractor's name and status he merely answered "*To be confirmed*", and in response to the request for a certificate he noted "*On award of contract*".
- [57.] Mr Pretorius' response quite clearly did not provide the particulars required, and the fact that those particulars were required at the tender stage seems to militate against the argument advanced by Mr Vlok in this regard. Why require

these particulars in the tender documents if the understanding was that they would only be furnished by the successful tenderer upon the award of the contract to it? If Mr Cronje's interpretation is correct, it would mean that the tender documents had not been properly completed.

- [58.] This has not been raised by the Department as a reason for awarding the contract to the third respondent, but it could in my view have been a relevant consideration in deciding whether the setting aside of the award to the third respondent, at the instance of the applicant, would be just and equitable. In view of the above it is however not necessary to decide this issue.
- [59.] In my view it has not been shown that it would in the circumstances be just and equitable to declare the award invalid and to set it aside. The relief sought in paragraph 4 of the notice of motion can therefore not be granted.
- [60.] This really renders the relief sought in paragraphs 4A and 4B obsolete. It is therefore unnecessary to deal with it in any detail.
- [61.] As regards the issue of the responsiveness of the applicant's tender there is, as already mentioned, no information before this court about the business of the other companies in which the applicant's directors have interests, which would have made it impossible to come to an independent and informed decision as to whether there is indeed no relationship between the applicant and the subject of the tender, on the one hand, and those companies, on the other hand. The denial of such a relationship alone would have been insufficient, and without insight into the information that the committees had at their disposal, and proper information about the nature of the business of those companies and about the industries they are involved in, this court would not have been able to verify the answer to the question in subparagraph 2.10.

- [62.] The applicant in my view has therefore in any event not made out a case for a declaratory order that its tender is responsive in terms of the procurement document.
- [63.] For the same reason this court would not in the circumstances have been able to award the contract to the applicant.
- [64.] This makes it unnecessary to consider the other aspects of the applicant's tender which the third respondent has submitted would in any event have disqualified it.
- [65.] As far as the costs of the review proceedings are concerned, it is the Department that was responsible for the irregular disqualification. It has also to this day not from its side disclosed the nature of the businesses of the other companies to this court.
- [66.] The applicant, on the other hand, has in any event failed to show why the Department's reviewable action should in the circumstances of this matter lead to the setting aside of the award and to the award of the contract to it.
- [67.] The third respondent is in no way to blame for the irregular disqualification of the applicant's tender. The notice of motion in any event contains no prayer for costs against the third respondent. Its opposition of the relief sought by the applicant was justified.
- [68.] In my view the fair result as far as the costs of the review proceedings are concerned would be for the applicant and the second respondent to each pay their own costs and for them to pay the third respondent's costs.
- [69.] This brings me to the costs of 6 May 2016. The applicant and the second respondent had already before the application was brought on 6 May 2016 agreed that the second respondent would not oppose the relief sought at that stage, but only the review application.

[70.] The application was only served on the third respondent on 4 May 2016, but the applicant's attitude was that the third respondent in any event had no interest in the interim relief then sought and that it had no standing to oppose the granting of that relief. The third respondent's answering affidavit in that part of the application was nevertheless filed, and timeously, and the application was, as already mentioned, postponed to 19 May 2016 for argument.

[71.] The fact that the *locus standi* issue was then decided in favour of the third respondent means that it must for purposes of the costs in the interdict proceedings be regarded as having been entitled to proper notice of the application. On the other hand it was the third respondent's eventually unsuccessful opposition of that part of the application that necessitated the postponement of 6 May 2016.

[72.] In my view the applicant and the third respondent should each pay their own costs as far as the postponement is concerned.

[73.] In the premises the following orders are made:

1. **THE APPLICATION FOR THE RELIEF SET OUT IN PARAGRAPHS 4, 4A AND 4B OF THE AMENDED NOTICE OF MOTION IS DISMISSED.**
2. **THE APPLICANT AND THE SECOND RESPONDENT ARE ORDERED TO PAY THE THIRD RESPONDENT'S COSTS IN THE APPLICATION, INCLUDING THE COSTS OF 19 MAY 2016, JOINTLY AND SEVERALLY, THE ONE TO PAY THE OTHER TO BE ABSOLVED PRO TANTO.**
3. **THE APPLICANT AND THE THIRD RESPONDENT WILL EACH PAY ITS OWN WASTED COSTS OCCASIONED BY THE POSTPONEMENT OF 6 MAY 2016.**

C J OLIVIER
JUDGE
NORTHERN CAPE DIVISION

I concur.

M MAMOSEBO
JUDGE
NORTHERN CAPE DIVISION

For the Applicant:	ADV J VLOK
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For the 1st & 2nd Respondents:	ADV T TYUTHUZA
Instructed by:	Office of the State Attorney, Kimberley
For the 3rd Respondent:	ADV S GROBLER
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