

IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE HIGH COURT: MTHATHA

CASE NO: 2896/11

Heard on: 31/05/12

Delivered on: 21/06/12

In the matter between:

ALEXANDER MAINTENANCE AND

ELECTRICAL SERVICES CC

First Applicant

SUPERFECTA TRADING 426 CC

Second Applicant

and

NYANDENI LOCAL MUNICIPALITY

First Respondent

QHAMA AND QHAWA CIVILS CC

Second Respondent

XESIBE CONSTRUCTION CC

Third Respondent

JUDGMENT

NHLANGULELA J:

[1] On 04 April 2011 Mageza AJ granted an order under case No. 726/2011, *inter alia*, interdicting the first respondent from taking any further steps in connection with the tender contract (number MIG/EC2018/RST/10/11) for the construction of access road between Nothintsila and Mvilo localities. In this present application a similar interdict is sought against the second and third respondents. It is not in dispute that the first respondent has complied with the interdict. As a result it did not become necessary for the interdict as contained in Part A of the Notice of Motion in this matter to be argued when the matter served before me on 31 May 2012. A need for the interdict was conceded by the respondents. Consequently, both parties were content with addressing the Court only on the relief as sought by the applicants that the decision of the first respondent awarding the tender to the second and third respondents on 15 July 2011 be reviewed and set aside; and that, if the applicants are successful, the tender be awarded to it by the Court. In the alternative, the applicants seek an order that the award of the tender contract be remitted back to the first respondent for a fresh decision to be made.

[2] A historical background of this case is that in late 2010 the applicants advertised a public tender for the construction of a road between Nothintsila to Mvilo Access Road at the price of R5 676 652,80. The applicants, the

second and third respondents, as a joint venture, as well as other interested contractors filed their competing bids. On 14 January 2011, and after ten bidders had been considered, the first respondent awarded the contract to the second and third respondents at R5 480 647,76. Aggrieved by such outcome the applicants applied for a review of that decision under Case No. 250/2011. On 18 February 2011, the application served before Alkema J who granted an order in the following terms:

- “1. The decision of the municipal manager of the third respondent (*Nyandeni Local Municipality*) to award the contract to the first respondent be and is hereby reviewed and set aside.
2. The award of the contract is remitted back to the third respondent (*Nyandeni Local Municipality*) for a fresh decision.
3. The costs of the interdict and the costs of the review applications be paid by the third respondent (*Nyandeni Local Municipality*).

[3] The first respondent was the third respondent in Case No. 250/2011, the second and third respondents being first and second respondents respectively. When the matter served before me the arguments advanced

would fall on the meaning of the term: “the award of the contract” which appears in paragraphs 1 and 2 of the order by Alkema J. I will revert to this later on in this judgment.

[4] It appears from the papers that pursuant to the order of 18 February 2011 the first respondent (the respondent) re-advertised the tender contract in an apparent attempt to comply with the order that the award of the contract should be remitted for a fresh decision. The advert provoked the bringing of a second application for an interdict. Mageza AJ entertained that application under Case No. 726/2011 on 04 April 2011. He granted an order in the following terms:

- “1. The matter be and is hereby treated as urgent;
2. The decision of Respondent to call for re-tenders for the contract for the construction of the Nothintsila to Mvilo Access Road, which invitation to re-tender was advertised in the Daily Dispatch on 16 March 2011 is hereby reviewed and set aside;
3. The Respondent is interdicted from taking any further steps in connection with the contract for the construction of the Nothintsila to Mvilo Access Road arising from the advertisement issued by the Respondent and contained in the Daily Dispatch

dated 16 March 2011;

4. Respondent is hereby directed to give effect to the Order of this Court dated 18 February 2011 under case number 250/2011, that is, to make a fresh decision on the award of the contract.
5. Respondent is to pay the costs of this application.”

[5] Paragraph 4 of the order by Mageza AJ has a direct bearing on the present application as well in that the respondent was, in essence, directed to comply with the earlier order that it must make a fresh decision on the award of the contract, and without involving new contractors.

[6] In this application the respondent re-considered the contract on 15 July 2011 and again awarded it in favour of the second and third respondents (the respondents). As the unsuccessful parties, the applicants bring this application on review as they are not satisfied with the administrative procedures followed by the respondent in awarding the contract to the respondents. The principal complaint raised against the decision of the respondent is that the contract is irregular to the extent that the respondent *erred* in considering a revised scope of the contract instead of an original contract as earlier advertised and presented to it by ten contractors on 14

January 2011. *Mr Paterson SC* , counsel who appeared for the applicants, argued that the consideration of a revised scope of the contract constitutes non-compliance with the order by Alkema J and it is, consequently, liable to be reviewed and set aside. The upshot of the argument is that the respondent should have considered the tender based on tender number MIG/EC2018/RST/10/11 as originally advertised and adjudicated upon on 14 January 2011 regardless of performance of a portion thereof by the respondents.

[7] The applicants allege in the founding affidavit that the respondents' tender was not responsive as the requisite tax certificate submitted to the first respondent was not valid. They also state that the first respondent *erred* in regarding their tender as being not financially viable.

[8] The report compiled by the Adjudication Bid Committee of the first respondent on 14 July 2011 and used to evaluate the applicants' bid forms the basis for review. It shows that at a meeting of the tenderers and the respondent held on 15 April 2011 in the absence of the applicants, the old rates quoted in the original schedule of quantities had to be validated by extension for 90 days starting from 15 April 2011 and were used to evaluate

the tenders. The scope of work already performed by the respondents prior to 18 February 2011 was quantified and deducted from the original scope of work to ascertain the available budget and new prices of tenders. Upon evaluation those calculations left the applicants with a higher tender price of R4 176 275,98 and lower points at 81,95 as compared with lower tender price at R3 878 343,00 and higher points at 94 for the respondents. Meanwhile the budget was reduced from R5 676 652,80 to R4 074 390,09. The first respondent then evaluated financial viability using a 5% variance requirement in terms of the Supply Chain Management (SCM) policy, for each tenderer to ascertain if at the tender price as quoted each of them would be able to complete the tender if appointed. It was found that the applicants fell outside the 5% variation, and that the respondents fell within the range of 5%. On these scores the committee concluded that the respondents were successful bidders for the award of the tender, but subject to tax status verification with SARS within 7 days from 15 July 2011.

[9] The financial officer of the respondent had the following to say with regard to the approach adopted by the respondent in evaluating the tender on 14 January 2011.

“9.7 The first respondent could not ignore the work

already completed by the second and third respondents and the fact that payments were made and that only a portion of the original budget was available. It was impossible to reconsider at the original tenders for the complete works and to appoint a tenderer at the original price tendered. The reason being simple(sic) that a portion of the work had already been completed and only limited funds were available to complete the project. If a tenderer was appointed as the full price tendered such entity would have had the advantage of 30% of the contract already been completed without such entity spending one minute to complete the work.”

[10] In his submission towards the grant of review *Mr Paterson* contended that the decision of the respondent was affected by misdirections in that the first respondent *erred* in separating the portion of work performed by a successful tenderer from the original scope of work because in terms of the order of Alkema J the performance of the tender contract was declared as unlawful. *Mr Botma*, who appeared on behalf of the respondent, submitted that on the authority of *Oudekraal And Others* 2004 (6) SA 222 (SCA) at paras. [26] and [31] the consequences of part performance of the tender should be regarded in law as lawful despite the order of unlawfulness.

[11] In my view the case of *Oudekraal, supra*, does not support the respondent's case. The following was said by the Supreme Court of Appeal in *Oudekraal* at paragraphs 26 and 27:

“But the question that arises is what consequences follow from the conclusion that the Administrator acted unlawfully. Is the permission that was granted by the Administrator simply to be disregarded as if it had never existed? In other words, was the Cape Metropolitan Council entitled to disregard the Administrator's approval and all its consequences merely because it believed that they were invalid provided that its belief was correct? In our view, it was not. Until the Administrator's approval (and thus also the consequences of the approval) is set aside by a court in proceedings for judicial review it exists in fact and it has legal consequences that cannot simply be overlooked. The proper functioning of a modern State would be considerably compromised if all administrative acts could be given effect to or ignored depending upon the view the subject takes of the validity of the act in question. No doubt it is for this reason that our law has always recognized that even an

unlawful administrative act is capable of producing legally valid consequences for so long as the unlawful act is not set aside.

The apparent anomaly (that an unlawful act can produce legally effective consequences) is sometimes attributed to the effect of a presumption that administrative acts are valid, which is explained as follows by Lawrence Baxter *Administrative Law* at 355:

‘There exists an evidential presumption of validity expresses by the maxim *omnia praesumuntur rite esse acta*; and until the act in question is found to be unlawful by a court, there is no certainty that it is. Hence it is sometimes argued that unlawful administrative acts are “voidable” because they have to be annulled.’”

[12] In this case there was no lawful administrative action, the decision of the respondent dated 14 January 2011, in place on 15 July 2011 as the order of Alkema J had already declared that the award of the tender on 14 January 2011 was unlawful. Similarly, there could not have been a lawful award of a tender to the respondents after 18 February 2011. It was on this background

that *Mr Paterson* argued that the respondent had no reason to take into account the portion of the tender contract performed by the respondents when the contract was considered afresh on 14 July 2011. In so far as the “awarding of the contract” is concerned, the administrative action which was declared unlawful on 18 February 2011, the facts of this case are distinguishable from those in *Oudekraal* where the administrative action had not yet been declared unlawful when the Supreme Court of Appeal had to decide the fate of the consequences of the administrative action. Consequently, there is no legal basis for the argument that the first respondent was correct in excluding the scope of the tender which had been performed by the respondents.

[13] The performed portion argument was approached by *Mr Botma* in a different way. He submitted that it was in the interest of fairness to all the tenderers and the respondent to exclude the scope of work that had already been performed from the fresh evaluation of the tender on 14 July 2011. He sought to anchor this submission on the case of *Logbro Properties CC v Bedderson N.O. And Others* 2003 (2) SA 460 (SCA) at para. [17], where it was stated that tenderers were not entitled to a perfect public tender process in a situation where an administrator in repairing a previously botched

process takes changed circumstances into account. The facts in *Logbro Properties* were that in 1997 the High Court ordered the provincial tender committees to reconsider certain tenders that the appellant and others had submitted in 1995 to buy certain properties. The reason for the order was that although the successful tenderer scored highest points for selection, it had not complied with tender conditions. On reconsideration of the tender anew in 1997 the province's assets committee took into account new factors and circumstances, including the increase in property values since 1995. In my view the case of *Logbro Properties* does not offer assistance to the first respondent because its facts are distinguishable from those of the present case in that when the present matter served before Alkema J, it was never ordered that the tender be reconsidered anew. In so far as the order made by Alkema J on 18 February 2011 stands unchallenged by the respondent, I am bound to give effect to it. To that extent a distinction must be clearly drawn between an authorized consideration of increased property values by the assets committee in *Logbro Properties* and an unauthorized exclusion of the portion of work performed by the respondents in this case.

[14] The complaint that the respondents had not proved to the first respondent that their tax affairs were in order is another ground for review. This ground is valid if one has regard to the fact that nowhere in the

answering affidavit, delivered on 02 December 2011, is an attempt made to explain what steps were taken on the matter since 15 July 2011 when a conditional award of the tender in favour of the respondents was made.

[15] It is indeed true that the adoption of a wrong approach by the respondent in the re-evaluation of the tender was prejudicial to the applicants. *Mr Paterson* contended that the low scores which were allocated to the appellants ultimately placed them out of the 5% (-5,23) range for financial viability unfairly. Yet the applicants had previously been assessed within range and on the lowest tender price when compared with the respondents, including other 8 competing tenderers based on the grounds.

[16] I find that based on the reasons which I have already given above the decision awarding the contract to the respondents on 15 July 2011 is unlawful, and falls to be set aside. But that is not the end of the matter as the expanded nature of the relief sought by the applicants enjoins the Court to consider whether to award the contract to the applicants or that it be remitted back to the respondent to adjudicate it afresh. This involves an exercise of judicial discretion which is vested in the court of review in terms of s8 of the Promotion of Administrative Justice Act 3 of 2000. The

Constitutional Court stated appositely (per Froneman J) in the case of *Bengwenyama Minerals (Pty) Ltd v And Others v Genorah Resources (Pty) Ltd And Others* 2011 (4) 113 (CC) at 146E as follows:

“This ‘generous jurisdiction’ in terms of s8 of PAJA provides for a wide range of just and equitable remedies, including declaratory orders, orders setting aside the administrative action, orders directing the administrator to act in an appropriate manner, and orders prohibiting him or her from acting in a particular manner.”

[17] The exercise of discretion is particularly apposite here if one has regard to the submission by *Mr Botma* that after all has been said and done the Court ought to make an award of the tender in accordance with a system that is fair, equitable, transparent, competitive and cost effective within the meaning of s 217 of the Constitution, read with s 2(1) of the Preferential Procurement Policy Framework Act 5 of 2000 which provides that contracts must be awarded to the tenderer who scores the highest points unless objective criteria justify the award to another tenderer. See: *Moseme Road Construction CC And Other v King Civil Engineering Contractors (Pty) Ltd And Another* 2010 (4) SA 359 (SCA) at para. [2].

[18] I proceed to deal with the question whether the tender contract should be awarded by the Court to the applicants or be remitted back to the respondent to consider it afresh. The answer to this question lies in the separation of powers between the courts and administrative authorities, and the overriding need for the courts to be sensitive to the interests legitimately pursued by administrative bodies and the practical and financial constraints under which they operate as stated in *Logbro Properties, supra*, at para. [12]. The test for substitution of the decision by courts for that of the administrator was stated in *Johannesburg City Council v Administrator, Transvaal and Another* 1969 (2) SA 72 (T) at 76D-G as follows:

- “1. The ordinary cause is to refer back because the
 Court is slow to assume a discretion which has by
 statute been entrusted to another tribunal or
 functionary.
2. The Court will depart from the ordinary course in
 these circumstances:
 - (i) Where the end result is in any event a foregone
 conclusion and it would merely be a waste of time

to order the tribunal or functionary to reconsider the matter. This applies more particularly where much time has already unjustifiably been lost by an applicant to whom time is in the circumstances valuable, and the further delay which would be caused by the reference back is significant in the context.

- (ii) Where the tribunal or functionary has exhibited bias or incompetence to such a degree that it would be unfair to require the applicant to submit to the same jurisdiction again.”

This statement was confirmed by the Constitutional Court in *Premier, Mpumalanga And Another v Executive Committee, Association of State-Aided Schools, Eastern Transvaal* 1999 (2) SA 91 (CC).

[19] It was argued by *Mr Paterson* that the award of the tender to the applicants will not present difficulties for this Court if the decision of 14 July 2011 has been set aside as the Court would have to focus on the tender of 14 January 2011 when the full scope of the tender was evaluated by the BEC and BAC of the first respondent. He contended that since the respondents did not oppose the *merits* of the application on 18 February

2011 the Court is at large to consider the tender without being restricted by the portion of work performed by the respondents. As to the proper approach to the portion of work that has been performed counsel referred to the case of *Chairperson Standing Committee And Others v JFE Sapela Electronics (Pty) Ltd And Others* 2008(2) SA 638 (SCA), where the following was stated at 649I:

“The order of the court *a quo*, if implemented, is likely not only to be disruptive but also to give rise to a host of problems not only in relation to a new tender process but also in relation to the work to be performed.”

[20] In this case, counsel contended that although the award of the contract to the respondents has been set aside the situation in this case is different from that in *Sapela, supra*, in that no attempts were made by the first respondent to oppose the granting of the orders in cases 250/11 and 72/11.

[21] *Mr Paterson* submitted further that the problems often arising from a delay in the finalization of review proceedings as referred to by Jafta JA, as he was then, in *Millenium Waste Management (Pty) Ltd v Chairperson, Tender Board, Limpopo Province And Others* 2008, (2) SA 481 (SCA) at 493D, paragraph [34] do not exist in this case because the performance of

the tender stopped in February 2011 before the order in case number 250/11 was issued and the nature, extent and cost of that performance has since been determined by the first respondent. And further, the principle which is articulated in the case of *Moseme, supra*, give remedies to a successful tenderer with regard to the portion of the tender performed pursuant to a declaration of invalidity of the award of the tender to it. There Harms DP stated as follows at 366H-367A, para. [20]:

“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.”

Mr Paterson then contended that the consequences in this case are two-fold: the respondents have no claim under the revoked contract and they are left with an enrichment claim. An allegation by the respondent that the applicants would effectively become entitled to the whole contract price if the full scope of work is awarded to the applicants is one of the problems arising. To this *Mr Paterson* argued that the problem disappears if regard is had to the fact that one of the terms of the contract is that a successful tenderer can only be entitled to be paid for work performed which has been properly approved by the engineer and calculated on the basis of the

schedule of quantities.

[22] It was argued strenuously that the contract must be awarded to applicants because when the respondent awarded the contract to the respondents in January 2011 the tender price of the applicants was the lowest and the applicants were financially viable when their tenderers were assessed against the SCM policy of the respondent, the respondent had to assume powers which were not provided for in clauses 4(4) and 29(5) of the SCM policy and depart from the recommendations of the BEC and BAC that the applicants were suitable for an award of the contract. The respondent appointed the respondents unilaterally, and without referring the matter back to the committees as prescribed in s 4(4) and informing the Auditor-General, the Provincial Treasury and the National Treasury of the reasons for deviating from the recommendations of the Committees as it was required to do so in terms of s 114(1) of the Finance Management Act 56 of 2003. Yet the respondents did not disqualify to compete in the tender by reason that they did not have a valid tax clearance certificate at the time of evaluation of the tenders.

[23] Having made a concession before Alkema J that the respondents' tax affairs were not in order the first respondent had the audacity to consider the

same persons in the next tender without a valid tax certificate, and proceeded to award them the tender. Having been told by the court on 18 February 2011 that the whole contract should be reconsidered the respondent acted against that order by revising the scope of the tender for the benefit of the respondents, and to the prejudice of the applicants. It was also submitted that the first respondent did not seem to be grappling with the manner in which discretion is exercised in assessing tenderers for financial viability. The respondent was happy to disqualify the applicants on the basis that their scores fell outside the engineer's 5% variation range without considering all the objective factors having a bearing on financial capacity of the applicant.

[24] I do not agree entirely with the applicants on the concerns they have raised in an attempt to persuade the Court to award the tender to them rather than referring it back for a fresh consideration. I doubt that those concerns meet the threshold of circumstances as required for the Court to substitute its decision for that of the respondent. I do not regard the award of the tender to the applicants as a foregone conclusion. They scored high points on 14 January 2011 and lower points on 14 July 2011 but on both occasions were not appointed. The submission that they were failed due to incompetence on the part of the municipal manager of the respondent would be too simplistic

an explanation to be given because the same committees of the respondent which had found that the applicants were financially viable on 14 January 2011 found against them on 14 January 2011. And it seems to me that an assessment of a tender for financial viability is a tricky aspect of the tender process which would invariably require an input from the appointed site engineer. Here I do not have such an input. Neither do I have the input from the committees. I neither have the requisite equipment, experience, access to sources of relevant information, nor the expertise to make the right decision. See: *Gauteng Gambling Board v Silverstar Development Ltd and Others* 2005 (4) SA 67 (SCA) at para. [19]. Added to that is the fact that the rates for costing the items in the schedule of quantities should have changed due to delay already incurred in the implementation of the project. Vital information which is necessary for resumption of the tender has been lost. Updating of information which is necessary for a just consideration of the tender seems to me to be inevitable at this stage. The obvious increase in the total budgeted costs cannot be ignored regardless of who is to blame for the delay. This Court cannot verify the tax affairs of the respondents because they have to date not filed a report from the SARS. With all these limitations on the capacity of the Court to decide the tender a remedy of awarding the contract by the Court as envisaged in s 8(i)(c)(ii) of the PAJA cannot be

made available to the applicants. A referral back seems to me to be the prudent and proper course, and it is fair to both parties in this case. However, a blanket referral will not be helpful to the parties in my view. I deal with this in the paragraph that follows.

[25] The alternative remedy of a referral back is provided for in s 8(1)(c)(i) of the PAJA. The subsection permits a referral back with or without directions. This Court is empowered to fashion any conditions as called for by the circumstances of a case. *Mr Botma's* opening submission was that the situation of the parties might have been different had the court on 18 February 2011 given guidelines on how the respondent should reconsider the tender afresh. In my view this submission is not without substance. Despite the limitations alluded to, I am of the opinion that an attempt by the Court to issue some directions which to it seems necessary should be useful in removing unnecessary obstacles on the path towards full implementation of the order that will be granted.

[26] Counsel for the parties are in agreement that the costs of the application should follow the result. The costs incurred on 08 December 2011 will be treated in the same way. The scale of costs to be paid was left

with the Court to decide. In my opinion punitive costs are undesirable for these proceedings. The arguments advanced on behalf of the respondent, which were very helpful for the decision of the case, highlight the technical challenges, which are unenviable, that faced the first respondent. I did not at any stage of these proceedings harbour a feeling that the respondent was *mala fide* either in the manner in which it conducted itself in the proceedings or in the manner in which it handled the tender at administrative level both on 14 January and 14 July 2011. Had the respondent been *mala fide* in the manner in which it interpreted the order of 18 February 2011 the second court would have been in a best position to mark its displeasure by ordering the respondent to pay costs on a punitive scale.

[27] In the result the following order shall issue:

1. That the decision of the Municipal Manager of the first respondent awarding tender contract number MIG/EC2018/RST/10/11 to the second and third respondents be and is hereby reviewed 1. That the decision of the Municipal Manager of the first respondent awarding tender contract number MIG/EC2018/RST/10/11 to the second and third

respondents be and is hereby reviewed and set aside.

2. That the award of tender contract number MIG/EC2018/RST/10/11 be and is hereby remitted to first respondent for a fresh decision to be made subject to the following directions:

- 2.1. That the first respondent be and is hereby directed to reconsider the tender contract aforesaid in its original and full scope of works as if no part of it has been performed.

- 2.2. That the rates applied on the items of the bills of quantities filed by the tenderers towards consideration of the bids before 14 January 2011 be updated in accordance with increase of the market prices.

3. That only those tenderers who qualified during the first tender process on 14 January 2011 shall participate in the reconsideration of the tender as aforesaid.

4. That the costs of both the *interim* interdict and review application, including costs incurred on 08

December 2011, be paid by the first respondent.

Z.M. NHLANGULELA

JUDGE OF THE HIGH COURT

Counsel for the applicant: Adv. T. M. Paterson SC

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