

**IN THE HIGH COURT OF SOUTH AFRICA
(NORTH-GAUTENG HIGH COURT, PRETORIA)
Case No.: 44681/08**

In the matter between:

GROUP YWO TRADING ENTERPRISE CC Applicant

and

**CONSTRUCTION INDUSTRY DEVELOPMENT BOARD
Respondent**

JUDGMENT

Judgment reserved:: 05 August 2009

LEGODI J,

1. In this application, the applicant is asking for relief as follows:

"1. *The decision by the Regulatory Hearing Committee/tribunal of the respondent, alternatively the administrative action taken by the Respondent on a date unknown to the Applicant and of which the Respondent informed the Applicant under cover of a letter dated 16 July 2008, is judicially reviewed in terms of section 24 of the High Court Act read with Rule 53, alternatively in terms of the Promotion of Administrative Justice Act, 2000 (Act no. 3 of 2000) and the Order by the Respondent is replaced by the following order:*

1. *Group Ywo Trading Enterprises CC is fined to an amount of R30 0000 (thirty thousand rand), payable in no more than three (3) consecutive instalments commencing on the first day of the month following this order. The fine is to be paid into the account of the CIDB, the particulars of which is in the possession of Group Two Trading Enterprises CC.*

2. *Proof of payments as stipulated above is to be faxed to the CIDB for the attention of Mr Stephen van Huyssteen within four calendar days after payment has been made to fax number 086 688 0443 and to Mrs H Strydom at 012 664 0307.*
3. *The CIDB shall publish the order in the Government Gazette.*
4. *The CIDB is ordered to update database and website to correctly reflect the contents of this order.*
2. *The respondent is ordered to pay the costs of this application*
3. *Further/or alternative relief"*

- 1.
2. The applicant is a construction company, its main business being building and doing construction work as its main source of income.
3. The respondent is Construction Industry Development Board (established in terms of Act 34 of 2002), its core business being to promote a uniform and ethical standard within the construction industry, with an ancillary obligation to publish and enforce a wide of conduct for all construction related procurement, and participants involved in the government procurement process.

4. The applicant falls under the respondent insofar as it relates to construction work falling within the respondent's control that is, for Government Tenders.
5. The applicant had previously been graded by the respondent to a Grade 4 CEPE, and thus entitling the applicant to tender for work up to R3 000 000 in value.
6. Subsequent to the upgrading, an allegation was made against the respondent that it paid an official of the respondent R6 000 to increase the grading up to Grade 5 CEPE.
7. This resulted in the Regulatory Hearing Committee of the respondent finding the applicant guilty. It then made its recommendations to the Board, the respondent. The first respondent having considered the recommendations made an order or issued a sanction as follows:

1. That the following specific provisos are set by the Board, pertaining to the continuation of or commencement of construction-related work falling within the ambit of the CIDB's mandate:

- *Group Ywo Trading Enterprises CC and any other legal entity of which Mr Madoda Richmond Khoba (ID number 680520 5864 081), Ms Lebohang Patience Twala (ID number 820511 0688 089), Ms Vangile Eunice Kosie (ID number 710226 0658 080) and Ms Zoleka Sylvia Khoba (730413 0723 082) are*

directors or members as per Registrar of Companies and Close Corporations' database, are prohibited to commence with, procedure or attempt to procure any construction-related work falling within the ambit of the CIDB's mandate, for a period of twelve (12) calendar months, from the effective date of the sanction, which is the date on which you receive this notice; and

- *Group Ywo Trading Enterprise CC and any other legal entity of which Mr Madoda Richmond Khoba (ID number 680520 5864 081), Ms Lebohang Patience Twala (ID number 820511 0688 089), Ms Vangile Eunice Kosie (ID number 710226 0658 080) and Ms Zoleka Sylvia Khoba (730413 0723 082) are directors or members as per Registrar of Companies and Close Corporations' database, are allowed to continue with or complete any construction-related work falling within the ambit of the CIDB's mandate, which commenced prior to the effective date of this sanction; and*
2. *That Group Yw Trading Enterprises CC's grading designation of 5CEPE as per CIDB register of contractors be downgraded to 4CEPE with immediate effect; and*
 3. *That, Group Ywo Trading Enterprises CC and other legal entity of which Mr Madoda Richmond Khoba (ID number 680520 5864 081), Ms Lebohang Patience*

*Twala (ID number 820511 0688 089), Ms Vangile Eunice Kosie (ID number 710226 0658 080) and Ms Zoleka Sylvia Khoba (730413 0723 082) are directors or members as per Registrar of Companies and Close Corporations' database, be barred from applying for an amendment of category status to a higher grading designation or registration in a different class of works on the registrar of contractors, in any class of construction works listed in Schedule 3 of the CIDB regulations for a period of **twelve (12) calendar months**, which period will commence on the effective date of this sanction; and*

4. *That, Group Ywo Trading Enterprises CC must pay fine of R30 000 (thirty thousand rand) in no more than three instalments during the periods of prohibition mentioned in paragraph 1 and 3, in terms of sub-regulation 29(2)(e) of the CIDB regulations. The amounts shall be paid into the following bank account of the CIDB:*

- a. *Account holder: Construction Industry Development board.*
- b. *Bank: Standard Bank*
- c. *Branch: Menlyn*
- d. *Account Type: Current*
- e. *Account number: 03 224 346 4*
- f. *Bank code: 01-23-45-15*

Please note the following proviso set by the Board, pertaining to the periods referred to in paragraph 1 and 3 and the payment of the fine:

- *That the periods of prohibition will continue to be effective beyond **twelve (12) calendar months** from the effective date of this sanction, in the event that Group Ywo Trading Enterprises CC fails to settle the full fine on or before the date the period of twelve (12) calendar months lapses, in which case the prohibitions will remain effective until the fine has been paid in full.*

5. *That proof of such payment must be faxed to the CIDB, fax number 086 688 0443 for the attention of Mr Stephen van Huyssteen, within 4 (four) calendar days after the payment has been made, and for attention Mrs H Strydom, fax number 012 664 0307.*

8. This decision was communicated to the applicant in the letter of the 16 July 2008. It is this decision against which a review is being sought.

9. The grounds of review are set out as follows:

“13.1 The respondent exceeded its powers in terms of the Act and Regulations in that the Regulations merely allow the

Respondent to impose a fine OR barring from tendering and not both.

13.2 The respondent was not authorised to take the action it had taken and acted ultra vires the empowering provision.

13.3 The respondent's action is not authorised by the empowering provision of the Regulations.

13.4 The action by the respondent is unreasonable to the extent that no reasonable person could have so exercised the power performed by the Respondent.

13.5 The action by the Respondent is not consistent with the evidence and circumstances in the matter and is grossly irregular”.

10. Some of these grounds appear to be inter-linked. Having stated these grounds of review in paragraph 14 of the founding affidavit, the applicant concludes as follows:

“14. I state with respect that the order by the respondent is misplaced and grossly unfair in the circumstances. I state that the applicant had been advised and accepted the advice that the purpose for the penalty provision in the regulations in the way it is currently couched in the Regulation, is to either fine a company and allow the company to continue with its work., or to bar a company from tendering and thereby curtail the income of the company, which will have the effect of a sever sanction fine. On the one hand, if a fine is imposed, the company

will have to be able to continue its operations in order to generate an income to be able to pay the fine. On the other hand, barring a party from tendering is with respect a massive sanction. The effect of such an order is that a company is in effect told that it may not make a living for twelve months. I state with respect that the only difference between the two sentence options is that in the case of a fine, the fine is paid to the respondent, whilst in the case of barring a party from tendering, the respondent would not receive any income from a fine. In both instances the guilty party is suffering financially.

15. *I state with respect that in this case where both options were exercised at the same time, the applicant is being severely prejudiced by the action of the respondent. The applicant has to pay a substantial fine whilst being barred from obtaining further contracts. The effect of the order by the respondent is with respect that the applicant will have to lay off its employees, but does not have cash flow to do so. I respectfully point out to the Honourable Court that if the applicant may not tender for any contracts during the twelve months, the knock-on effect would be that the applicant will not have work for the next 18 month, and then when the applicant is allowed to be re-enrolled, it may only tender for the contracts lesser in value due to the downgrading of the applicant. The order by the respondent is therefore with respect completely unrealistic and draconic.*

11. As I said, the main allegation against the applicant was that, it provided a fraudulent and or false financial statements to the respondents during an application to amend its category status to a higher grading designated in contravention of section 19(2) of the Act read with Regulation 10(6)(a). Section 19(2) reads as follows:

“Any registration which is proved to the satisfaction of the Board to have been made in error. As a result of misrepresentation or in circumstances not authorised by the Act, must be removed from the register and the reason for the removal must be made in the register

12. The grading in question was granted on 25 September 2007. This entitled the applicant to tender for R5 000 000 in value as opposed to R3 000 00 which is on grade 4CEPE. In addition, the applicant as a Potential Energy Enterprise would have been entitled to tender for public construction work in one higher grading now that is registered on the register. This would mean that the applicant with a 5CEPE grading designation would be allowed to tender and undertake a contract for public construction works that a grade 6 would qualify for, thus enabling the applicant to tender for and undertake public construction work to the value of R10 000 000.
13. Regulation 29(19) and (20) is relevant to the issue of ultra vires raised by the applicant.

14. Regulation 29(19) provides that if the accused is found guilty of a transgression charged with or if he or she admits that he or she is guilty of the charge, the committee must inform the Board accordingly and recommend to the Board the appropriate action to be taken.
15. Sub-regulation 20 provides as follows:

“20. The appropriate action to be taken may include-

- (a) where the charge relates to a transgression of section 18(1) of the Act-*
 - (i) allowing the contractor in terms of section 18(4) of the Act to complete the construction works concerned,*
 - (ii) ordering the removal of the name of a contractor from the register in accordance with section 19 of the Act,*
- (b) issuing a warning to the accused,*
- (c) reprimanding the accused,*
- (d) reporting the accused to Director-General or the Public Protector or both,*
- (e) imposing a fine not exceeding R100 000 on the accused or,*

(f) suspending the accused from participating in public sector procurement for period of time, and

(g) making a lost determination that the accused, the Board or the party who initiated the investigation, must defray all or part of the costs incurred to conduct the investigation."

16. Regulation 29(21) provides that the Board must publish the details of the finding in the Gazette and if applicable, update the register of contractors accordingly.
17. The crisp issue raised was whether, the respondent in imposing the sanction could have invoked the provisions of Regulation 29(20)(e) and (f), that is, whether it was entitled to suspend and impose a fine at the same time in terms of subparagraphs (e) and (f) of the regulation as referred to above.
18. Of course, the other issue was whether the extension of the sanction on other people was within the powers of the respondent. Or to put it differently, whether such a sanction was not so unreasonable that it ought to be impugned?
19. I find it necessary to immediately deal with the argument which was presented on behalf of the respondent. The view taken was that in interpreting subparagraphs (e) and (f) referred to earlier in this judgment, regard should be had to the enabling legislation and in particular, section 19(2) of the Act in question. The submission was that, in terms of section 19(2)

the respondent was entitled to issue any sanction. This submission is somewhat clouded. Section 19(2) in my view relates to an application for a registration. That is, discovery of fraud or misrepresentation which led to the registration of a particular construction entity with the respondent. Such a discovery in terms of section 19(2), must lead to the removal of such an entity's particulars from the register held and kept by the respondent. This in my view, has nothing to do with a sanction as envisaged in terms of Regulation 29(20) read with sub-regulation (19).

20. It looks like other than sanction, as in removal in terms of section 19(2), the only sanction that the respondent can impose would be in terms of Regulation 29(20). I do not see the provisions of Regulation 29(19) and (20) to be in anyway inconsistent with the enabling legislation.
21. I now turn to deal with the attack relating to the imposition of both fine and suspension. As correctly pointed out by counsel on behalf of the respondent, "or" in between (e) and (f), means "either of the two" "or" could also be used to show that there is a choice or an alternative. Having correctly given the meaning of "or", counsel for the respondent still argued that the respondent was entitled to impose fine and suspension in terms of sub-paragraph (e) and (f). I have had very serious difficulty in understanding the logic of the submission.
22. Quite clearly, the legislation intended a choice to be made between suspension or fine. You just cannot have it both and this could not have been intended in the Regulation. Such an

entitlement is also not sanctioned in terms of the enabling Act, or to put it differently, it is not specifically sanctioned by the Act. Without much ado, the respondent was not entitled to impose the suspension and the fine at the same time.

23. The other attack as I see it, relates to the broad way in which the sanction had been couched. I am referring here to the suspension to include other persons and or entities which may not necessarily constitute the same members or shareholders of the applicant. Secondly, in my view, a company or close cooperation should be distinguished as a separate legal entity from its members, shareholders or directors. To impose a sanction of suspension and barring as stated in paragraphs 1 and 3 of the sanction quoted earlier in this judgment would be unreasonable and unwarranted.
24. In conclusion, I have been requested by counsel on behalf of the applicant to review and set aside the sanction imposed and substitute it with a sanction as set out in prayers 1 and 3 of the notice of motion. I am not inclined to substitute a sanction for the respondent. Whilst the decision is destined to be reviewed and set aside, and in particular the sanction, I think the best will be to remit the matter to the respondent for reconsideration of a sanction. Remember, it is not the finding of the applicant guilty which is been attacked here, but rather the punishment or sanction. Therefore the finding of guilty should remain intact.
25. Consequently, I hereby make an order as follows:

25.1 The sanction imposed by the respondent and conveyed to the applicant on the 16 July 2008 is hereby reviewed and set aside.

25.2 The matter is remitted to the Board/Respondent for reconsideration of the sanction.

25.3 The respondent to pay for the costs of the application.

Mr LEGODI

JUDGE OF THE HIGH COURT

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