

IN THE HIGH COURT OF SOUTH AFRICA
(ORANGE FREE STATE PROVINCIAL DIVISION)

Case No. : 5254/07

In the matter between:-

KUBU TSA TLHABIROE CONSTRUCTION CC JV First Applicant

KUBU TSA TLHABIROE CONSTRUCTION CC Second
Applicant

P J FISCHER CONSTRUCTION CC Third Applicant

and

MOQHAKA LOCAL MUNICIPALITY Respondent

HEARD ON: 24 APRIL 2008

JUDGMENT BY: VAN DER MERWE J

DELIVERED ON: 15 MAY 2008

[1] The first applicant is a joint venture established by agreement between the second applicant and the third applicant. For the sake of convenience I will herein refer to the applicants simply as the joint venture. The respondent is a duly constituted local municipality ("the municipality").

- [2] The decisive issue in this application is whether the joint venture has proved that a binding agreement was entered into between the joint venture and the municipality for the supply, delivery and installation by the joint venture of 450 VIP toilet structures (“structures”) at Matlwangtlwang Phase 3 (“the area”) within the boundaries of the municipality.
- [3] By notice published in the local press, the municipality *inter alia* invited tenders for the supply, delivery and installation of structures in the area, in accordance with the tender documents available at the offices of the municipality. These tender documents consisted of several parts or sections *inter alia*, conditions of tender, general conditions of contract, special conditions of contract, specifications and schedule of quantities. The conditions of tender included a provision that the successful tenderer shall sign a contract agreement within 21 days after receiving notification that its tender has been accepted or such extended period which the municipality may grant. The schedule of quantities provided for 450 structures but included the following provision:

“10. QUANTITIES PROVISIONAL ONLY

The Quantities set out in the Schedule of Quantities are provisional only and the quantities of work finally accepted and certified for payment, and not the quantities given in the Schedule of Quantities shall be used for determining payments to the Contractor.

The validity of the Contract shall in no way be affected by difference between the quantities in the Schedule of Quantities and quantities finally certified for payment. Work shall be valued at the rates and lump sum prices tendered, subject only to the provisions of the General Conditions of Contract and the Provisions of paragraphs 11 and 12 of the Preamble.”

- [4] The joint venture submitted a tender for 450 structures on the aforesaid basis. On 11 June 2007 the bid adjudication committee of the municipality resolved that the project for the supply, delivery and installation of structures in the area be awarded to the joint venture at the tendered contract sum of R1 544 890,38 and

“... that completion period will be within 16 weeks from the date of site handover.”

[5] On 27 June 2007 the municipality directed the following letter to the joint venture:

“PROJECT NO: MIG/FS/0440/S/07/07: SUPPLY, DELIVERY & INSTALLATION OF VIP STRUCTURES: PHASE III: MATLWANGTLWANG: APPOINTMENT AS CONTRACTOR

We have pleasure in advising you that your tender to the value of R1 544 890.38 (One Million Five Hundred & Forty Four Thousand Eight Hundred and Ninety Rand Thirty Cent) for the above project was accepted on a Bid Adjudication Committee meeting held on 11 June 2007.

Kindly note that there are certain special conditions attached to the awarding of the contract. These include the following:

1. LOCAL PARTICIPATION GOAL

...

2. SITE STAFF

...

3. PROJECT BOARD

...

4. PAYMENT CERTIFICATES

Payment certificates are to be submitted on a monthly basis at least on the 22nd of each and every month.

Please note that the claim form must be attached in each

claim submitted to the Moqhaka Local Municipality. Claims are payable within thirty days after the submission of the Tax Invoice and supporting documents. These must include the stand numbers of the premises where structures were erected with a signature of the occupant of the stand to indicate his acceptance of the completed structure.

5. CONSTRUCTION SURETY

...

6. SITE MEETINGS

...

These will be held on dates to be determined and minutes will be kept in a prescribed format.

7. GENERAL

7.1 NO material must be ordered until the correct number of structures to be erected is determined on site.

7.2 Structures are only to be erected on registered stands, a drawing will be provided indicating the relevant stands, no structures erected for residents on informal stands will be accepted and paid for.

7.3 Your contact, and council representative, for the duration of the project at the Moqhaka Local Municipality will be Mr H Rautenbach. He can be contacted at telephone no 056 216 9255 or fax number No 056 2169 123, and all written

correspondence must be directed to the Manager:
 Technical Services, for attention Mr HB
 Rautenbach.

8. You are requested to reply to the acceptance of this contact in writing within 5 working days of receipt of this letter, following which a site handover meeting will be scheduled.

We hope that we can look forward to a good working relationship regarding the successful and timeous completion of the project.”

The letter was signed by Mr. H. Rautenbach, the said official in the employ of the municipality, on the face of it on behalf of the municipal manager of the municipality. This letter was referred to in the papers and during argument as MM5 and I will do the same.

- [6] The joint venture responded to MM5 on 2 July 2007 by a letter referred to as MM6, in the following terms:

**“PROJECT NO: MIG/FS/0440/S/07/07: SUPPLY, DELIVERY &
 INSTALLATION OF VIP STRUCTURES: PHASE III:**

MATLWANGTLWANG: ACKNOWLEDGEMENT OF
APPOINTMENT

We hereby wish to confirm receipt of your appointment letter as a contractor; the above Project Number bears reference.

We would like to confirm that we accept our appointment as a contractor for the project as indicated above. We would also wish to confirm that we will abide by all the rules and conditions pertaining to the execution of this project that includes finishing the project within the acceptable and specified timeframe.

At the same time, we would like to bring your attention to fact that on the indicating our appointment as a contractor, it appears that our enterprise name has been misspelled thus we would like to provide you with the proper spelling:- **KUBU TSA TLHABIROE CONSTRUCTION CC J/V.**

We would like to thank you for valued support.”

- [7] After MM6, the joint venture on more than one occasion unsuccessfully attempted to commence with the implementation or execution of the project. Finally, on 23 August 2007, the municipality responded by letter signed by

its municipal manager and dated 23 August 2007. In this letter it was conveyed to the joint venture that it had been established that of the 450 sites within the area where structures were supposed to be installed, only 37 sites are on the formal establishment in the area and that the rest of the sites form part of informal settlement. In the light hereof the joint venture was requested to indicate whether it would be prepared to continue with the project on the basis of 37 sites and installations only. The joint venture responded by letter from its attorneys stating in no uncertain terms that it would not be prepared to do so. The evidence in the answering affidavit that there are only 37 formal or registered stands in the area, is not disputed. The attitude of the joint venture that it is not prepared to execute the project on the basis that only 37 structures are involved, was repeated during argument by counsel for the joint venture after taking specific instructions in respect thereof.

- [8] In the answering affidavit the municipal manager of the municipality stated that he has no knowledge of MM5 and

that it was written without his authority. I think that on the evidence as a whole this statement is false. It is not necessary, however, to dwell hereon as the statement is in any event immaterial, as counsel for the municipality was constrained to concede. It is common cause that the municipality's bid adjudication committee was properly authorised on behalf of the municipality to take a resolution in respect of the tender and that as a result of its resolution, MM5 was formally and deliberately communicated by the municipality to the joint venture.

- [9] The case of the joint venture in the founding affidavit and also specifically in the notice of motion, is that a contract in respect of 450 structures was concluded when the joint venture by MM6 accepted the offer made by the municipality by MM5. In the replying affidavit an attempt was made to make a case on the basis that a binding obligation arose as a result of the mere taking of the resolution by the bid adjudication committee. This argument was not abandoned by counsel for the joint venture. The argument can,

however, be briefly disposed of. The joint venture is not only not allowed to make a new case in reply, but the proposed new case is in any event clearly untenable. No binding agreement, let alone a binding agreement in respect of 450 structures, can in terms of the law of contract come into existence in the present circumstances by the mere resolution to accept the tender in itself. Regulation 1(e) of the Preferential Procurement Regulations, 2001 pertaining to the Preferential Procurement Policy Framework Act, No. 5 of 2000, published in Government Notice No. R725 in Government Gazette No. 22549 of 10 August 2001, referred to by counsel for the joint venture, makes no difference to the law of contract and the application thereof. This provision simply defines the term “contract” for purposes of the regulations as the agreement that results from the acceptance of a tender by an organ of state.

[10] I deem it unnecessary to deal with the argument on behalf of the municipality that as a result of outstanding matters no final agreement was reached or constituted by MM5 and

MM6. I am prepared to accept, without deciding, that an agreement was entered into in terms of MM5 and MM6. The decisive question then is whether such an agreement would bind the municipality to the supply, delivery and installation of 450 structures. In my view, that is not the case. It will be remembered that it was stated in MM5 that no material must be ordered until the correct number of structures to be erected is determined on site and that structures are only to be erected on registered stands, that a drawing will be provided indicating the relevant stands and that no structures erected for residents on informal stands will be accepted and paid for. In the result, at best for the joint venture, an agreement in terms of MM5 and MM6 would be one for the supply, delivery and installation of structures only on the registered stands in the area. As stated earlier, it is not disputed that these are only 37 stands. That, however, is not the agreement that the joint venture seeks to enforce. On the contrary, as stated above, it is made clear by the joint venture that it seeks to enforce an agreement in respect of 450 structures.

[11] It follows that the application must fail and that it is not necessary to consider the further arguments presented on behalf of the municipality.

[12] Costs must follow the result, save for the wasted costs of 28 February 2008. Counsel for the municipality correctly accepted that these costs must be borne by the municipality.

[13] The application is dismissed with costs, excluding the wasted costs of 28 February 2008, which costs must be paid by the respondent.

C.H.G. VAN DER MERWE, J

On behalf of applicants:

Adv. Thabo Seneke
Instructed by:
Mabalane Seobe Attorneys
BLOEMFONTEIN

On behalf of respondent:

Adv. G.J.M. Wright
Instructed by:
Bokwa Attorneys

BLOEMFONTEIN

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