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

Case No.: 1455/2004

In the matter between:

BASADI JOINT VENTURE	1st Applicant
ZIPHAKAMISE CAPITAL CATERERS (PTY) LTD t/a CAPITOL CATERERS	2nd Applicant
BAIKEMETSENG BOMME CC	3rd Applicant

a nd

THE MEC OF EDUCATION FOR THE PROVINCE OF THE FREE STATE	st Respondent
THE CHAIRPERSON OF THE CENTRAL PROCUREMENT EVALUATION COMMITTEE FOR THE FREE STATE PROVINCE	2nd Respondent
MDC CATERING SERVICES	3rd Respondent
DEE DEE ENTERPRISES	4th Respondent
AUTUM STAR	5th Respondent
SILVER SOLUTION t/a BACHA TSWELOPELE	6th Respondent
JOTT GENERAL SUPPLIES	7th Respondent
BAIKEMETSENG BOMME CC	8th Respondent
SUH SEM TRADING	9th Respondent
MAMZWAKHE	10th Respondent
BOLATA WHOLESALERS	11th Respondent
ETHOS TRADING 13	12th Respondent

CORAM: **CILLIé, J**

HEARD ON: **22 JULY 2004**

DELIVERED ON: **29 JULY 2004**

This is an application for the review and setting aside of 1st and or 2nd respondents exclusion of the 1st applicant's tender for the supplying of certain presently irrelevant items to the 1st respondent. The exclusion of the 1st applicant's tender was based on the latter's failure to support the tender with a tax clearance certificate from the South African Revenue Service confirming 1st applicant's good standing with the revenue service. First applicant also prays for an order directing 1st and 2nd respondents to accept and consider the 1st applicant's tender as complying with the tender conditions.

I consider the application on the basis that what follows is either common cause or cannot really be disputed:

1. The 1st and 2nd respondents are governmental institutions who are expected to deal with tenders open and transparent in a fair and judicial manner.

2. First applicant is a joint venture consisting of 2nd and 3rd applicants.

3. First applicant is not registered with the South African Revenue Service as a taxpayer and in fact need not be.

4. First respondent's Department of Education, invited tenders in the Provincial Tender Bulletin of 19 December 2003.

5. The conditions of tender required tenderers to submit tax clearance certificates with the tender, i.e. before the closing time and date of the tender and specify that failure to do so would invalidate the tender.

6. Regulation 16 of the Preferential Procurement Regulations specify that no contract may be awarded to "a person" who has failed to submit a tax clearance certificate.

7. "A person" is defined in the said regulations as including a juristic

person.

8. The conditions of tender require each party to a joint venture to complete and submit a separate tax clearance certificate.

9. First applicant's tender was submitted to 2^{nd} respondent under cover of the letter which is Annexure "B" to the 1^{st} respondent's answering affidavit (p.229 of the papers).

10. That letter indicates that 1^{st} applicant has a VAT registration number, namely 4590141323.

11. The tender lacked a tax clearance certificate in respect of 1^{st} applicant.

12. Tax clearance certificates in respect of 2^{nd} and 3^{rd} applicants, however, accompanied the 1^{st} applicant's tender.

13. Per letter dated 25/3/2004 1^{st} applicant enquired whether any

tender had been awarded to it and, if not, to supply a list of winners.

14. First respondent responded by referring the 1^{st} applicant to the provisions of the Promotion of Access to Information Act, Act 2 of 2000.

15. Thereupon the 1^{st} applicant requested to be advised of the reason why its tender was rejected.

16. Per letter dated 6 April 2004, 1^{st} respondent stated that the reason for the rejection was 1^{st} applicant's failure to supply a tax clearance certificate.

17. First applicant replied to the effect that it was not registered for tax purposes and that the aforementioned VAT registration number was applicable to some other instance.

18. First applicant had in the past been awarded tenders in its own name without a tax clearance certificate being furnished.

Mr Koen, on behalf of the applicants; argument is twofold. I shall deal with the first submission first. He submits that as a joint venture is not a juristic person nor a natural person it cannot be classified as “a person” to whom the tax clearance certificate requirement is applicable. As Regulation 16 excludes only “a person” who failed to submit a tax clearance certificate from being awarded a tender, the 1st applicant’s exclusion on this basis was therefore ill-conceived, so the argument goes. He submits that the fact that both parties to the joint venture furnished tax clearance certificates ought to have been sufficient compliance with the conditions of tender.

The problem with this submission, however, is that 1st applicant himself brought the tender committee under the impression that it was in fact registered for tax purposes by submitting its tender under cover of a letter with the applicant’s letterhead quoting a VAT registration number. It is not the responsibility of a tender committee under such circumstances to enquire about the applicant’s juristic nature. Such a tender committee would be justified to accept and to act on the information that the applicant himself supplied. If the applicant himself holds out that it has a

VAT registration number the 1st respondent is entitled to accept that the applicant is, despite its real juristic nature, in fact registered for tax purposes and that a tax clearance certificate is therefore a prerequisite for awarding a tender to it. Mr Koen inasmuch concedes that if the applicant was in fact registered for tax purposes, that it's tax clearance certificate would be a prerequisite for a valid tender. What the 1st applicant in essence asks this Court to do is to undo the completed process of considering, awarding and implementing the tenders as 2nd respondent acted on wrong information but which information was furnished by the applicant himself. That the Court will not do and the applicant has only himself to blame for that.

Mr Koen submitted that this approach is akin to the principles of estoppel. That he says is a defence which should be pertinently raised by a party who wants to rely on it. He argues that first and second respondents did not avail themselves of this defence. Mr Koen is correct in that the respondents did not mention the defence specifically by its name, but in the 1st respondent's opposing affidavit more than sufficient facts are stated to support such a defence. As a matter of fact, the opposing affidavit is hardly susceptible of any other impression than that the tender committee accepted that 1^{st} applicant is registered with the South African Revenue Service and that for that reason ruled that a tax clearance certificate was necessary.

In its letter of 15 April 2004 the 1^{st} applicant responded that the allegation that 1^{st} applicant was registered for VAT purposes could not have been the reason for rejecting the 1^{st} applicant's tender since this information was not placed before the tender committee. To that the 1^{st} respondent reacted that the information in the tender submitted by 1^{st} applicant does not support the 1^{st} applicant's allegation. In the answering affidavit the 1^{st} respondent pertinently states that the letterhead of the covering letter of the 1^{st} applicant's tender indicated a separate VAT registration number. A copy of that letter is annexed to the opposing affidavit as Annexure "B". That letter clearly states the applicant's VAT registration number to be 4590141323.

To that the 1^{st} applicant in it's replying affidavit explained that

> "the VAT registration number on Annexure "B" to the answering affidavit is likewise one of a party to a previous joint venture … it is not the VAT registration number of either 2^{nd} or 3^{rd} applicant."

Why the specific VAT registration number was supplied under the letterhead of 1^{st} applicant is, however, not explained.

Mr Koen's second submission is based on the legitimate expectation principle. He says that it is evident from the papers that tenders have previously been submitted to 1^{st} respondent by joint ventures with only the joint venture parties and not the joint venture itself submitting tax clearance certificates. To this allegation in the founding affidavit by the 1^{st} applicant the 1^{st} respondent in it's opposing affidavit reacted rather confusingly as follows:

> "It is denied that tenders had been awarded to 1^{st} applicant in the past on the basis as alleged by the 1^{st} applicant. Such tenders were indeed wrongly awarded to 3^{rd} applicant."

Earlier in the opposing affidavit the 1st respondent however seems to admit the allegation but explains that such tenders were

> "completely incorrect and the officials concerned who approved such submissions have subsequently been shown that such submissions were not in order."

I will therefore consider the argument based on legitimate expectation as if joint venture tenders supported by the tax clearance certificates of only the partners to the joint venture were acceptable to 1st respondent in the past. However, it is completely unknown whether such tenders were submitted by joint ventures which were in fact registered as such with the South African Revenue Services. If that was the case, and all other requirements for a legitimate expectation had been satisfied, the submission might have been valid. In the present matter the ambit and exact nature of the existing practice on which the legitimate expectation is to rely for validity is uncertain. There is not even a suggestion in the papers that in the past tenders of such joint ventures were submitted and accepted under cover of a letter stating the joint venture's VAT registration number as was done in this instance.

Mr Hefer, assisted by Mr Merabe on behalf of the 1st and 2nd respondents, emphasised that for the representation underlying the expectation to be legitimate, it must be clear, unambiguous and devoid of relevant qualification. I agree with that. See **<u>NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS v PHILLIPS AND ANOTHER</u> 2002 (4) SA 60 (W)**. See also **<u>SA VETERINARY COUNCIL AND ANOTHER v SZYMANSKI</u> 2003 (4) SA 42 (SCA) on 49E**. In both these judgments this requirement was highlighted. For that reason the 1st applicant's defective tender cannot be validated by the legitimate expectation doctrine.

The 3rd, 4th and 12th respondents filed opposing affidavits although they did not appear at the hearing. The 1st respondent appeared on 20 May 2004 when urgent interim relief, which was subsequently abandoned, was asked by 1st applicant. First respondent should be awarded the costs of that appearance. Mr Hefer asked that costs should include the costs of two counsel. The matter is of sufficient substance to warrant this and Mr Koen did not raise serious objection to that. Part of the 1st respondent's opposing affidavit is a copy of a judgment of the Supreme Court of Appeal in a matter dealing with delictual damages resulting from a tender process. Mr Koen's objection to the 1st respondent's annexing hereof is justified. The costs of that must therefore be excluded from any order of costs in 1st respondent's favour.

The following order is therefore made:

> The application is dismissed with costs, such costs to include the costs of two counsel as well as the appearance on 20 May 2004 on behalf of 1st respondent, but excluding the costs occasioned by annexing pages 231 to 246 (Annexure "C") of the opposing affidavit.

C.B. CILLIé, J

On behalf of Applicants:	Adv. P.A. Koen SC Instructed by McIntyre & Van der Post
On behalf of 1st Respondent:	Adv. J.J.F. Hefer

Assisted by:
Adv. M.J. Merabe
Instructed by
State Attorneys

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