



REPORTABLE

**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

Case Number: 5472/2013

In the matter between:

**GOODHOPE PLASTERERS CC trading as
GOODHOPE CONSTRUCTION**

Applicant

and

THE INDEPENDENT DEVELOPMENT TRUST

First Respondent

**GVK-SIYA ZAMA BUILDING CONTRACTORS
(PTY) LTD**

Second Respondent

JUDGMENT DELIVERED ON 29 APRIL 2014

SALIE-SAMUELS A.J:

1. This application concerns a review of a decision to award a tender and a subsequent decision to withdraw the tender. The matter came before me in terms of Rule 53 of the Uniform Rules of Court, a review

application in respect of a tender process for the construction of the new Plettenberg Bay Magistrate's Court building.

2. During July 2012 First Respondent (The Independent Development Trust, hereinafter referred to as "the IDT") invited tenders for the construction of the new court building, pursuant to which tenderers submitted bids, *inter alia*, the Applicant (Goodhope Plasterers CC trading as Goodhope Construction, hereinafter also referred to as "Goodhope") and the Second Respondent (GVK-Siya Zama Building Contractors (PTY) Limited hereinafter referred to as GVK).
3. The Applicant was represented in court by Mr Olivier SC assisted by Mr. Vivier. Appearing for the First Respondent was Mr. Leech SC assisted by Mr. Mokutu.
4. On 14 November 2012 the IDT notified GVK in writing that the tender had been awarded to it subject to certain conditions. The other tenderers were formally notified in writing of the outcome of the tender on 1 February 2013. On 19th February 2013 the IDT notified GVK in writing that the award of the tender to it had been withdrawn and reasons for such withdrawal and cancellation of the tender were given.
5. The Applicant now seeks a review and setting aside of the IDT's decision to award the tender to GVK as well as the IDT's subsequent decision to withdraw the tender. It further seeks an order that the tender

be awarded to itself (Goodhope) together with ancillary relief as provided for in Section 8 of the Promotion of Administrative Justice Act, Act 3 of 2000 ("PAJA").

6. The Application was issued on 12 April 2013, for relief set out in the Notice of Motion as follows:

- "1. *Interdicting and restraining First Respondent from taking any steps to call for new tenders in respect of tender with reference: TENDER NO: DOJ MC 02, PLETTENBERG BAY MAGISTRATES COURT (HEREINAFTER REFERRED TO AS "THE TENDER"), pending the final determination of this application;*
2. *That First Respondent's decision to award the tender to Second Respondent be reviewed and set aside;*
3. *That First Respondent's decision to withdraw the tender be reviewed and set aside;*
4. *That the tender be awarded to Applicant.*
5. *That First Respondent be ordered to take all steps and do all things necessary to put into effect the awarded tender.*
6. *That First Respondent pay the costs of this application unless Second Respondent opposes in which event Second Respondent be ordered to be liable for Applicant's costs jointly and severally with First Respondent, the one to pay, the other to be absolved....."*

7. IDT opposes the application, while GVK has filed a notice that it would abide by the decision of this Court.
8. In June 2012 the IDT, upon the instructions of the Department of Justice, was mandated to attend to the planning and implementation for the construction of the new Plettenberg Bay Magistrate's Court. This instruction follows a memorandum of agreement in terms of which IDT has undertaken to assist the Department with its "Construction of New Courts Programme", a project which provides for the construction of new court buildings and the provision of court room furniture.
9. Pursuant to a bid adjudication process of all submitted tenders by the tender evaluation committee, it was recommended to the tender adjudication committee that the project be awarded to the second respondent, which recommendation was approved. On 14 November 2012, a letter was addressed to GVK informing it of its conditional appointment for the implementation of the project.
10. Insofar as the tender herein falls within the ambit of administrative action, the evaluation of the tenders is subject to three criteria, that being: functionality, price and broad-based black economic empowerment compliance. Points are awarded to the tenderers according to the assessment of each tender in respect of these criteria. The tenderer who scores the highest points, is awarded the tender. In particular, the black economic empowerment criterion (hereinafter

referred to as "*the B-BBEE-evaluation*") constitutes 10% of the total criteria, for which points are awarded on a scale of 1 to 10.

11. It was conceded by the First Respondent that an error had been made in the tender evaluation of the Applicant's B-BBEE status in that it was incorrectly awarded 8 points as opposed to 9 points in light of its level 2 B-BBEE status.
12. The First Respondent further conceded that a calculation, allocating the correct points in respect of Applicant's B-BBEE status, would render the Applicant as the highest point scorer.
13. In correspondence addressed to IDT by Goodhope's attorneys on 4 and 11 February 2013, Goodhope pointed out this error and insisted that it was entitled to have been awarded the highest score in respect of the tender. It was thus demanded that the award of the tender to GVK should be set aside and that the tender should be awarded to Goodhope.
14. In the absence of a favourable response by the IDT, Goodhope launched an urgent application on 20 February 2013 (referred to as the first application) seeking (a) the review and setting aside of the IDT's decision to award the tender to GVK, and (b) an order interdicting and restraining the IDT from taking any steps to implement the tender.

15. On the same day the IDT informed Goodhope that the award of the tender had been cancelled, notice having been given to GVK on 19 February 2013 that it was not in a position to negotiate and conclude a contract with it and that its appointment under the tender was withdrawn as a result of the unavailability of funds, unresolved land issues and the revised scope of works. The IDT further informed the Applicant that no contract would be concluded with the second respondent, that there would be no site handover and that a new tender would be advertised in the new financial year. In the premise, the first application was not proceed with.
16. It is not in dispute that the project specifications or scope of the works and a lack of clarity over the design specifications of the new Magistrate's Court have become apparent. Mr. Olivier in fact argued that the new scope of works is yet to be determined and finalised for the construction of this court building.
17. Mr. Leech argued that whilst it is conceded that an error had occurred as alleged by the Applicant during the tender evaluation process, the correct position of which dictates the Applicant as the highest scorer, the actual scoring of the tenders is no longer relevant. In amplification of this contention, it is submitted that, in essence, the revised scope of works to date sees a marked difference between the original scope of works and the new works against which new tenders will be issued and that at present it exceeds an approximate 30% difference in the scope of the works and 43% in the price or value thereof.

18. Mr. Olivier argued that upon awarding the tender, the IDT was *functus officio* and thereby had no right to cancel the tender. In the Founding Affidavit the Applicant maintains that after IDT realised that it had incorrectly awarded the tender to GVK it could not itself change or rectify this decision as it had by then become *functus officio*. Further to that, inasmuch as the Applicant ought to have been awarded the tender, the IDT is bound to the successful bidder to address any change in the scope of works within the contractual boundaries which it believes exist between the IDT and such bidder. That upon the award of the tender to GVK, the IDT was obliged to consult with GVK. By way of such consultation process the three issues which is claimed to be the cause for the cancellation of the tender, that being, unavailability of funds, unresolved land issues and the revised scope of works could be assessed and addressed so as to ultimately comply with the suspensive conditions and that resort to cancellation of the tender was simply not, in this factual context, an option available to the IDT.
19. For the Applicant, reference was made to the letter from the Bitou Municipality dated 27 February 2013 and addressed to Town Planning Services which in effect gives permission to proceed in terms of Section 7 of the National Building Regulations and Standards Act with construction and that the Department may take occupancy for construction purposes accordingly. Mr. Olivier vehemently argued that site clearance was clearly imminent at the time when the tender was withdrawn on 19th February 2013. The argument follows that there was no “real” unresolved land issue and that the IDT raised this speedily as a

front to proceed to cancel the tender when the error in the evaluation process came to their attention, thereby avoiding the ultimate award of the tender to the Applicant. As for the increase in respect of the size of the building including therein the further cost factors, it is argued for the Applicant that this specific issue could be accommodated under the provisions of the JBCC contract.

20. In response to the aforementioned argument, Mr. Leech maintained throughout the hearing that the award of the tender to the Second Respondent was made subject to the conclusion of a contract and the meeting of other suspensive conditions. Thus the tender, he argued, was withdrawn and cancelled before these conditions were met. The award of the tender was thus never unconditional and not a final appointment, thereby leaving the functionary fully vested with its power to cancel and withdraw the tender for the reasons it had set forth. Furthermore, it was argued for the First Respondent that in terms of Item 8(4) of the Preferential Procurement Policy Framework Act, 5 of 2000 (*the PPPFA*) the power is expressly reserved unto the Trust to cancel a tender (prior to the award thereof) as a result of changed circumstances or when there is no longer a need for the services or works requested. The word “*award*”, Mr. Leech submitted, must be interpreted to mean a final award of the tender and that the award of the tender to GVK, being a conditional award, cannot be deemed to be final.
21. What appears to be a foregone conclusion is what the Applicant considers a paragon position, perfectly suitable for the exceptional

circumstance as ascribed by our courts whereby it will substitute its own decision for that of a functionary who has a discretion under the Act. In other words, it would merely be a waste of time to order the functionary herein to reconsider the award of the tender. That Goodhope scored more than GVK is argued by the Applicant to be the end of the matter. On review, the Applicant views this circumstance to be ideal for the court to simply award the tender to Goodhope as the highest scorer in the tender process.

22. I am not convinced that the facts arising herein support the notion that the decision sought from this court would be such with which it could proceed to effect what is considered a straightforward swop of the Second Respondent for the Applicant. That is not to say that our courts do not recognise the possibility of usurping a decision made by a functionary and with which the court is fully familiar and qualified to do. See **Theron en Andere v Ring van Wellington van die NG Sendingkerk in Suid-Afrika en Andere 1976 (2) SA 1 (A)**, where it was held on appeal that a court could substitute its own decision for that of the functionary because it was dealing with a type of decision with which it was fully familiar and referring the matter back would serve no purpose. (See also **University of the Western Cape and Others v Member of Executive Committee for Health and Social Services and Others, 1998 (3) SA 124** at page 133 Would an order of this court replacing GVK with Goodhope and the further relief sought amount to the “*type of decision*” as contemplated by our leading authorities. I do not believe this to be the case. Taking account of the authorities directly

in point, I am not convinced that the matter before me allows for this Court to usurp the repository's powers or functions. In my view a substantial deviation of the original scope of works for the construction of the Plettenberg Bay Magistrate's Court compels that such revised works require a new tender process as contemplated in the PAJA..

23. The underlying test to be applied by the Court in terms of its departure from the general practice of remitting the matter back to the administrator has been well established in **Johannesburg City Council v The Administrator, Transvaal 1969 (2) SA 72 (T)** at page 76 thereof. The common law principles establishing the circumstances in which a court will be prepared to substitute an administrative decision were clearly defined as:

23.1 The end result is a forgone conclusion and it would be a waste of time to remit the decision to the original decision maker;

23.2 Any further delay would cause unjustifiable prejudice to the Applicant; and

23.3 The original decision maker has exhibited bias or incompetence to such a degree that it would be unfair to ask the Applicant to submit to its jurisdiction again.

24. In **Gauteng Gambling Board v Silver Star Development Limited 2005 (4) SA 67 (SCA)**, the court added a further principle that such decision may be taken where the court is as well qualified to make that decision.
25. Mr. Olivier primarily anchored his argument in support of this review application premised on the principle that the end result is a forgone conclusion and it would be a waste of time to remit the decision to the original decision-maker. At common law, correction or substitution is the exception rather than the rule.¹ The common law position is given statutory expression in the PAJA which permits a court to substitute or vary the administrative action, or to correct a defect resulting from the administrative action, only in 'exceptional cases'. In **Gauteng Gambling Board** *supra* Heher JA indicated that remittal is almost always the prudent and proper course. The reasons for this are not only constitutional but also institutional in nature, since the administrator is generally best equipped by the variety of its composition by experience, and its access to sources of relevant information and expertise to make the right decision. The court typically has none of these advantages and is required to recognise its own limitations. It follows therefore that this court is by no means qualified to make the decision to award the tender herein given the fact that the prevailing circumstances fall squarely within the authority in point.
26. In the founding affidavit it is made out that the First Respondent withdrew and cancelled the tender capriciously because the Applicant had become aware of the mistake in the scoring of the tenders.

¹ Cora Hoexter, Administrative Law in South Africa, (Second Edition) Page 552 -553

Although not specifically stated in the founding affidavit, Mr Olivier argued that the IDT acted arbitrary in the withdrawal of the award and aborted the tender process, preventing the correction of the award to Goodhope.

27. Important principles relating to the test for judicial review of administrative action under the Constitution were laid down in the case of **The Pharmaceutical Manufacturer's Association of South Africa and Another v The President of the Republic**. In point it is worthy to record a statement of general principle made by the Court as the basis upon which review applications are to be considered.

*"It is a requirement of the rule of law that the exercise of public power by the executive and other functionaries **should not be arbitrary**. Decisions must be rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary and inconsistent with this requirement."* (paragraph 85 thereof) - emphasis my own.

28. In *casu* the allegation of arbitrary conduct was denied by the First Respondent, which denial was supported by the sequence of events unfolding particularly insofar as the original scope of works had indeed varied substantially. The First Respondent's reasons for the withdrawal and cancellation of the tender have been satisfactorily dealt with and its denial of alleged arbitrary action, in my view, has been successfully ventilated in the papers.

29. Mr. Olivier's submission that it is not open to the Department of Justice to amend the design of the building to such an extent that it would in effect denude the successful tenderer of its vested rights is, with respect, untenable. The primary purpose of the project is not so much to vest a bidder with a contract, but indeed it was to provide the community of Plettenberg Bay a court building to function and serve the needs for which it was created and provided for in the first place. To restrict the Department to an original building project, for which upon revision, it no longer requires to the extent that the tender had been formulated, cannot by any stretch of the imagination be in line of the relevant principles of administrative law.
30. It is of particular relevance to bear in mind that in relation to the procurement of services for the construction of the revised scope of works, the Department will lose the advantage of a competitive bidding process, should this Court grant the relief sought by the Applicant. I do not agree that any revised scope of works should be addressed within a contractual elastic polarised between the Applicant and the First Respondent. The Department is no doubt subject to budgetary constraints and it would not be for a Court to impose upon it a contract for the building of a structure it may very well not be able to finance. The tender process must start afresh for the construction of a building and furnishing thereof which could properly and effectively serve the needs of the Plettenberg Bay community. Accordingly I do not see any basis upon which this court could set aside the IDT's decision to withdraw the

tender. To this end, I find that the functionary's indication to open a fresh tender process for the reviewed scope of works is not only reasonable but indeed the only avenue available to secure a tender process for the building of the magistrate's court, substantially revised from the original tender. It was not *per se* argued that such resort would prejudice the Applicant inasmuch as the Applicant's tender price or formulation for quoting had by way of the original tender process been exposed. However, that I had taken it into account need be stated as well as the prejudice of wasted costs of preparation/presentation of tender costs, to which my view is that the anticipated fresh tender appears clearly to be for a vast variation of the original tender and that such prejudice pales into insignificance given the overall position that the tender would be drastically different, albeit still for a court building. Further to this it is within the nature of the building trade and industry to incur costs in the preparation of tenders, accepting with it the risk that such costs may be in vain should the bidder not secure a final contract in respect of the tender which could be for any one of a multitude of reasons. This rationale must be viewed within the legislative framework.

Section 217 of the **Constitution of the Republic of South Africa 1996** **(as amended)** which states:

"217. Procurement.-

- (1) Where an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it*

must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective.”

31. Furthermore one of the objects of the **Public Finance Management Act, Act 1 of 1999** is to ensure transparency, accountability and sound management of the revenue expenditure, assets and liabilities of the institutions to which it applies.

32. A fresh tender process for a court building (substantially different to the original plan) would compel that the procurement for the construction of the building and supply of court room furniture (as amended) must be done in accordance with a competitive and cost-effective manner with the requirements that such process also be fair, equitable and transparent. This very framework would hopefully be honoured with the strictest application in the anticipated fresh tender process and the First Respondent's attention is respectfully drawn thereto.

33. Mr. Olivier also argued that upon awarding the tender to GVK, IDT had become *functus officio* and was thereby not entitled to make further decision in respect of the tender and more particularly was not entitled to withdraw it. The question at this juncture begs: Was the trust (IDT) after awarding the tender to GVK entitled to withdraw and cancel the tender?
If a public body has made a decision which it afterwards discovers to be²based upon an error of fact or law it appears that it will nevertheless still

² Lawrence Baxter: Administrative Law page 375

be *functus officio* irrespective whether the error was within or beyond its discretionary powers.² In **Jacobsen v George Licensing Court 1934 CPD 452** the court held that where a member of the licensing court had voted under a misapprehension, he was allowed to change his mind once he had discovered his error. However, the decision appears to be based on the court's view that the licensing court had not yet completed its proceedings (at page 455 thereof). In the circumstance, the fact that the tender was awarded subject to conditions, amounts similarly to administrative action not yet completed. Wherefore the IDT could not be held to have been *functus officio* upon the award of the tender to GVK.

34. Having addressed the above issues, it would be nonetheless pertinent to address the case for the Applicant, that being, that upon the award of the tender to the successful bidder, it has vested such bidder with a legitimate expectation, from which certain consequences in law flow, limiting the functionary's power to cancel the tender without consultation. Differently put, Applicant contends that the First Respondent was not entitled to simply cancel GVK's award of the tender as it had in fact done by written notice on 19 February 2013. That upon an award of a tender to a bidder, such bidder is vested with a legitimate expectation and the functionary is not by any means free to unilaterally cancel the award, Mr. Leech argued that, the award of a conditional tender, at best offers the successful bidder with a *spes*. In other words, a hope to contract in the future. I disagree that a successful bidder within the scope of administrative law enjoys no more than a *spes* (hope). Indeed, the

conditionally successful bidder enjoys a legitimate expectation. In those circumstances, it is vested with an expectation to be the contracting party upon the fulfilment of the suspensive conditions or, at the very least, an expectation to be heard before an adverse decision can be made.

35. In **University of the Western Cape and Others v Member of Executive Committee for Health and Social Services and Others**, *supra* at page 133 Hlophe J (as he then was) deals with the English doctrine of legitimate expectation in South African administrative law. The learned Judge addresses this doctrine with reference to the authority, **Administrator, Transvaal and Others v Traub and Others 1989 (4) SA 731 (A)** whereat the Appellate Division affirmed the importance of the doctrine in our law. The principle was clarified in our law to mean that it covers an expectation which goes beyond enforceable legal rights, provided it is well grounded. In **National Director of Public Prosecutions v Phillips 2002 (4) SA 60 (W)** the courts described the requirements of legitimacy as including:

- (i) a reasonable expectation that was
- (ii) induced by the decision-maker based on
- (iii) a clear, unambiguous representation which was
- (iv) competent and lawful for the decision-maker to make.

In the matter of **South African Veterinary Council and another v Szymanski 2003 (4) BCLR378 (SCA)** the court further clarified that the

representation must be one which was competent and lawful for the decision-maker to make “***without which the reliance cannot be legitimate***”.

36. In the matter before me, it would be absurd to consider an error in the adjudication of a tender that such erroneous award nonetheless affords the recipient a legitimate expectation and furthermore entitles it to the benefit of the consequences recognised in our law. To bolster a legitimate expectation born from an administrative error, such as herein, would not meet the requirement of being based on a representation which was competent and lawful for the decision-maker to have made.
37. Before this court, the Applicant views the award to GVK to mean that as the successful bidder it is entitled to a legitimate expectation, entitling it to be consulted upon with the dawning of hurdles in the subsequent continuation of planning and administration of the project with the view to address it within the entitlement of a final contract. In so doing, the Applicant argues that it (as the actual highest scorer) is to usurp GVK’s position and entitlement in law and ultimately be the contracting party to the project.
38. The question arises, was GVK as the recipient of the conditional tender entitled to the *audi alterem partem* rule? That an error had been made and which had come to light, means that GVK had no entitlement or any legitimate expectation to start off with. Strictly speaking, the tender had not been awarded in the first place and as matters stand had been withdrawn by the functionary as it is empowered to do within specific circumstances in terms of regulation 8(4) of Preferential Procurement Policy Framework Act, 5 of 2000.

I consider the variation in the building works initially tendered for to be a changed circumstance as required by the aforesaid regulation. The IDT is also entitled to cancel the tender at any time prior to the formation of the contract in terms of the Construction Industry Development Board Act, 38 of 2000.

39. In light of the conclusion to which this Court has come, I do not deem it necessary to deal with other arguments advanced for the purposes of this judgment including the points *in limine* raised by Mr. Leech. In all circumstances, the application is accordingly dismissed with costs.

SALIE-SAMUELS, AJ