



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 642/2013

In the matter between:

**THE INDUSTRIAL DEVELOPMENT
CORPORATION OF SOUTH AFRICA LIMITED**

Appellant

and

**TRENCON CONSTRUCTION (PTY) LIMITED
BASIL READ (PTY) LIMITED**

**First Respondent
Second Respondent**

Neutral citation: *IDC v Trencon Construction* (642/13)[2014] ZASCA 163 (1 October 2014)

Coram: LEWIS, MAYA, TSHIQI JJA and SCHOEMAN and
FOURIE AJJA

Heard: 4 September 2014

Delivered: 1 October 2014

Summary: Tender procedures – evaluation of tenders – decision not to award tender to first respondent influenced by a material error of law – decision correctly reviewed and set aside – no exceptional circumstances shown to warrant substitution order in terms of s 8(1)(c)(ii)(aa) of the Promotion of Administrative Justice Act 3 of 2000.

ORDER

On appeal from: North Gauteng High Court, Pretoria (Mothle J sitting as court of first instance)

1 The appeal is upheld to the limited extent set out below with each party to pay its own costs.

2 Paragraph 1 of the order of the court below is deleted and replaced with the following:

‘The decision of the first respondent to declare the tender submission of the applicant non-responsive and to award the tender T27/07/12: Tender Enquiry for the Principal Building Contract for the IDC Head Office External Upgrade Sandton, Johannesburg to the second respondent is reviewed and set aside. The matter is remitted to the IDC’s Executive Management Committee for reconsideration in terms of s 8(1)(c)(i) of the Promotion of Administrative Justice Act 3 of 2000.’

JUDGMENT

Maya JA: (Lewis, Tshiqi JJA and Schoeman and Fourie AJJA concurring)

[1] This is an appeal against the judgment of the North Gauteng High Court, Pretoria (Mothle J). The high court reviewed and set aside the decision of the appellant (IDC) to award a tender for the external upgrade of its head office in Sandton, Johannesburg (the Works) to the second respondent, Basil Read (Pty)

Limited (Basil Read) and substituted it with an order that the tender be awarded to Trencon Construction (Pty) Limited (Trencon). The appeal is with the leave of the court below.

[2] The background facts are common cause. On 18 May 2012 IDC invited prospective building contractors to submit proposals (the RFP) to prequalify for the tender. The tender process would be conducted in two phases. The first phase involved the request for and screening of the contractors' profiles based on their technical ability, management experience, personnel capabilities, financial standing and litigation history. Shortlisted contractors would be eligible to participate in the second phase which concerned the bidding itself. In this leg, their tender submissions would be evaluated on the basis of price and preferences in a staggered process conducted at different stages by IDC's bid evaluation committee (the BEC), procurement department, procurement committee (the PC) and, finally, IDC's executive committee (Exco). These committees would be assisted in this process by Snow Consultants Incorporated (Snow), an independent firm of experts engaged by IDC as its principal agent to conduct the tender evaluation process.

[3] The RFP provided various rules and conditions which, subject to IDC's Procurement Policy, would govern the process. Among these were clauses 2.6 which stated that IDC did not bind itself to accept any of the applications submitted nor to continue with the tender process; 2.7 in terms of which applications received after the stipulated closing date, 'Monday 04 June 2012 at 12:00 noon', would not be evaluated or assessed; 2.9 which entitled IDC at its sole discretion to disqualify any application or applicant that failed to conform to the RFP rules and conditions and the instructions in the official invitation; and 2.15.2 in terms of which IDC reserved the right to reject or accept any application and/or cancel the RFP process and reject all applications.

[4] Trencon and other bidding contractors submitted their RFP timeously. Basil Read submitted 14 minutes after closing time. IDC's procurement manager and member of the PC considered that the Guidelines of IDC, which allowed the acceptance of late bids received on the closing date if it was in IDC's interest to do so, empowered it to condone the transgression and accepted the late RFP. Subsequently, Snow recommended Trencon, Basil Read and five other contractors to proceed to the second phase. On 12 July 2012 IDC issued a tender invitation to the shortlisted contractors which fixed the site handover date as 6 September 2012.

[5] Trencon duly submitted its tender which offered a total price of R133 508 788, the lowest of the bid prices. It stated that its price would 'remain fixed and firm for the planned duration of the contract provided the Works start as per the date indicated in the tender document'. Thereafter, the tenderers were requested to advise on their conditions should site handover occur on 1 October 2012, which was a date later than that contemplated in the conditions of tender. Trencon responded that in that case it would charge an additional monthly 0,6 per cent escalation in the sum of R315 000 excluding VAT. Basil Read on the other hand indicated that its price would remain firm despite the proposed change.

[6] Trencon scored the highest points on price and BEE rating, which were relevant considerations in the evaluation. The BEC recommended its revised bid subject to a number of conditions relating, inter alia, to arithmetical errors allegedly made by Trencon in respect of certain items and the quantity surveyor's interpretation of the bill of quantities. During September 2012 a meeting of the PC considered the recommendation of the appointment of Trencon as the preferred tenderer. Consequently, it recommended Trencon's

appointment to Exco for approval subject to several conditions which included a request for clarity on the total estimated price and the additional cost for site handover after 1 October 2012. One of the issues raised in the recommendation was a view that the additional cost relating to the changed site handover date, which would now possibly shift to 1 November 2012, constituted a contravention of 'IDC's conditions of tender (tender validity period and fixed price) ... and thus potentially posed an audit challenge regarding compliance with internal processes'. The PC's view was that Trencon's additional charge had no basis as the new site handover date fell within the tender validity period of 120 days prescribed in the tender document, which would lapse only on 4 December 2012.

[7] Prior to Exco's meeting on 19 September 2012, a confidential legal opinion was obtained on this issue and the PC's other concerns. It was subsequently submitted to Exco together with the PC's recommendation in a comprehensive board pack. The opinion expressed a view that Trencon's bid was not firm and fixed and would likely attract a challenge by the other bidders if accepted. After its deliberations, Exco resolved that (a) the Trencon bid was not fixed and valid for 120 days; (b) after the closing date Trencon amended its initial price which rendered the bid non-responsive¹ and invalid as it contravened the tender conditions. Exco then declined to award the tender to Trencon and decided to appoint Basil Read.

[8] It is this decision that Trencon challenged in the court below. It contended that Exco's decision that its bid was invalid was influenced by a

¹ Clause F.3.8.2 of the Standard Conditions of Tender (SCT), in annexure "F" of the CIDB Standard for Uniformity in Construction Procurement in Board Notice 12 of 2009, *Government Gazette* No 31823 of 30 January 2009, defines a responsive tender as one 'that conforms to all terms, conditions and specifications of the tender documents without material deviation or qualification ... which ... would ... detrimentally affect the scope, quality, or performance of the works, services or supply identified in the Scope of Work ... significantly change the Employer's or tenderer's risks and responsibilities under the contract, or ... affect the competitive position of other tenderers presenting responsive tenders, if it were to be rectified.'

material error of law. This was so, it was argued, because Exco misunderstood the provisions of the tender documents in relation to the adjustment of the contract price. According to Trencon, the SCT and the JBCC Series 2000 Principal Building Agreement,² which also applied to the tender, prohibited the adjustment of the bid price as a result of costs in labour, plant and material but allowed price adjustment resulting from delays in site handover, which IDC also conceded. All that Trencon did, it was contended, was to undertake to keep its price fixed for the duration of the contract provided the work started on the date specified in the tender document. And there was no evidence in any event that it changed its bid price at any time as it merely responded to a speculative question about a possible shift of the site handover date.

[9] Trencon further argued that Exco committed a material procedural irregularity by considering Basil Read's late RFP because clause 19.3.2 of the Procurement Policy, which in its view superseded the Procurement Procedure Guidelines relied upon, allows condonation only where no bid or acceptable bid has been received. It also imputed bias to IDC officials and its lawyers which the court below correctly dismissed as baseless.

[10] The court below found merit in these contentions. It held that the decision to award the tender to Basil Read, which scored lower points than Trencon and was not recommended by the tender evaluators, had to be reviewed and set aside on two separate and distinct grounds: Exco (a) committed an error of law in declaring Trencon's bid non-responsive and (b) acted in a manner that was procedurally unfair, as contemplated in s 6 of the Promotion of Administrative Justice Act 3 of 2000 (PAJA),³ by accepting, evaluating and

² Published by the Joint Building Contracts Committee Inc.

³ Section 6(2)(c) and (d) of PAJA respectively empower 'a court or tribunal ... to judicially review an administrative action if the action was procedurally unfair [or] the action was materially influenced by an error of law'.

assessing Basil Read's late RFP at the initial stage of the tender evaluation process. Having thus found, the court below refused to cancel the tender process and order it to start afresh or remit the matter to IDC for reconsideration. In its view, IDC had shown no reason why the tender should not be awarded to Trencon when the decision was a foregone conclusion considering the recommendations which favoured Trencon. The court below concluded that it would be just and equitable to award the tender to Trencon itself as delaying the implementation of the project would prejudice not only Trencon but IDC and National Treasury too in view of the substantial public funds involved.

[11] On appeal before us, the issues concerned only the correctness of the finding of the court below that Basil Read's tender should have been disqualified and the substitution order. IDC did not challenge the finding that Exco committed an error of law in declaring Trencon's bid non-responsive. Instead it was conceded on its behalf that Exco could properly have awarded the tender to Trencon and that its decision was therefore reviewable in that regard. It merely argued that the court below erred in finding that Basil Read's tender was disqualified because the degree of its submission's lateness was immaterial, caused no prejudice and ought to have been condoned. It also contended that the court below wrongly granted the remedy of substitution on the facts of this case.

[12] It is established that the starting point for an evaluation of the proper approach to an assessment of the constitutional validity of outcomes under the state procurement process is s 217 of the Constitution.⁴ The section requires an organ of state in the national, provincial or local sphere, when contracting for goods or services, to do so in accordance with a system which is fair, equitable,

⁴ *AllPay Consolidated Investment Holdings (Pty) Ltd and others v Chief Executive Officer of the South African Social Security Agency and others (Corruption Watch and another as amici curiae)* 2014 (4) SA 179 (CC) para 32; *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 (3) SA 121 (CC) para 33; *Millenium Waste Management (Pty) v Chairperson, Tender Board: Limpopo Province and others* 2008 (2) SA 481 (SCA) para 4.

transparent, competitive and cost-effective.⁵ The national legislation prescribing the framework within which procurement policy must be implemented includes the Preferential Procurement Policy Framework Act 5 of 2000 (the Procurement Act) and the Preferential Procurement Regulations.⁶ A decision to award a tender constitutes administrative action so the provisions of PAJA, from which a cause of action for the judicial review of administrative action arises, apply to the process.⁷

[13] In line with these prescripts, IDC's Procurement Policy states among its objectives, in clause 5, the aim 'to ensure a fair, equitable, transparent, competitive and cost-effective procurement process ... and to achieve value for money in all procurement activities'. Clause 3.6.1 expressly requires IDC to apply the Procurement Act and its regulations.

[14] It seems to me that IDC's concession was proper. Section 2(f) of the Procurement Act provides that 'a contract must be awarded to the tenderer who scores the highest points, unless objective criteria ... justify the award to another tenderer.' Clause F.3.11.3(d) of the SCT similarly enjoins the 'employer', IDC, to 'recommend the tenderer with the highest number of tender evaluation points for the award of the contract, unless there are compelling and justifiable reasons not to do so.' Trencon scored the most points in respect of all the relevant tender evaluation criteria both before and after making adjustments for any delay that may have beset the site handover as contemplated in the Procurement Act. It was recommended as the preferred tenderer above Basil Read at all the stages of the rigorous evaluation process. Although various concerns were raised in connection with Trencon's tender, the only reason

⁵ Subsection (1).

⁶ Published in *Government Gazette* 34350 of 8 June 2011, issued in terms of s 5 of the Procurement Act.

⁷ *AllPay* fn 4 para 41; *Minister of Health and another v New Clicks South Africa (Pty) Ltd* 2006 (2) SA 311 (CC) paras 95-97; *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and others* 2004 (4) SA 490 (CC) paras 25-26.

ultimately given by Exco for the award of the tender to Basil Read is the one disavowed by IDC itself; that Trencon's 'rates and prices were not fixed for the duration of the contract and its tender offer was not valid for 120 days'.

[15] As indicated above, Trencon declared at the outset that its price would remain firm for the entire contract period if the works started on the scheduled date. This elicited no objection from IDC. Its contention that a price adjustment resulting from a site handover delay, such as it proposed, was permissible was conceded. Apart from this failed reason, there are no apparent objective criteria or compelling reasons justifying Exco's decision that Trencon's bid was non-responsive and invalid. To my mind, once it is accepted that Exco erroneously excluded Trencon from the tender process and that its decision therefore constitutes a reviewable error, as was conceded, it must follow that Exco could not have lawfully awarded the tender to another bidder. Any attempt to do so would, of necessity, have resulted in another reviewable error. Whether or not Basil Read's late RFP was responsive is wholly irrelevant and cannot sustain the appeal.

[16] But there remains the question concerning the correctness of the substitution remedy granted by the court below in terms of s 8 of PAJA. The section provides a wide range of 'just and equitable' remedies following upon a declaration of unlawful administrative action in proceedings for judicial review in terms of s 6(1) of PAJA. These remedies are meant 'to afford the prejudiced party administrative justice, to advance efficient and effective public administration compelled by constitutional precepts and at a broader level, to entrench the rule of law.'⁸ There are no hard and fast rules in determining a just and equitable remedy. Depending on the circumstances of each case, the court

⁸ *Steenkamp NO* fn 4 para 29; see also *Bengwenyama Mineral (Pty)Ltd and others v Genorah Resources(Pty) Ltd and others* 2011 (4) SA 113 (CC) paras 83-84.

will be guided by the ‘kind of challenge presented ... the interests involved and the extent or materiality of the breach of the ... administrative right to just administrative action in each particular case’⁹ in balancing the competing interests of the parties.

[17] The power of a court provided in s 8(1)(c)(ii)(aa) of PAJA to substitute or vary administrative action or to correct a defect resulting from an administrative action is extraordinary. It is exercised sparingly, in exceptional circumstances. In *Gauteng Gambling Board v Silverstar Development* this court described ‘exceptional’ as follows:¹⁰

‘Since the normal rule of common law is that an administrative organ on which a power is conferred is the appropriate entity to exercise that power, a case is exceptional when, upon a proper consideration of all the relevant facts, a court is persuaded that a decision to exercise a power should not be left to the designated functionary. How that conclusion is to be reached is not statutorily ordained and will depend on established principles informed by the constitutional imperative that administrative action must be lawful, reasonable and procedurally fair.’

[18] With these principles in mind, it is clear that the court below erred in substituting its own decision in the circumstances of this case. It overlooked the fact that IDC was not obliged to award the tender to the lowest bidder or at all. The award of the tender could not be a foregone conclusion in the circumstances. Furthermore, the court does not appear to have balanced the substitution remedy against the requirements of the separation of powers and failed to exercise judicial deference.¹¹ As was pointed out in *Gauteng Gambling Board*:¹²

An administrative functionary that is vested by statute with the power to consider and approve or reject an application is generally best equipped by the variety of its composition,

⁹ *Bengwenyama* para 85.

¹⁰ *Gauteng Gambling Board v Silverstar Development* 2005 (4) SA 67 (SCA) paras 28-29.

¹¹ *Logbro Properties CC v Bedderson NO and others* 2003 (2) SA 460 para 21.

¹² *Ibid* para 29.

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. See *Minister of Environmental Affairs and Tourism and Others v Phambili Fisheries (Pty) Ltd*; *Minister of Environmental Affairs and Tourism and Others v Bato Star Fishing (Pty) Ltd* 2003 (6) SA 407 (SCA) at paras [47]-[50]; and *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and others* 2004 (4) SA 490 (CC) at paras [46]-[49]. That is why remittal is almost always the prudent course.’

[19] There is additional practical difficulty which would challenge the implementation of the substitution order. Over two years have elapsed since the beginning of the tender process. The information upon which the tenders were evaluated is obviously dated. The order does not accommodate unavoidable supervening circumstances such as price increases that have to be taken into account.¹³

[20] No exceptional circumstances exist here to justify the order of substitution. This is a proper case to refer back to the administrator for its reconsideration. In light of IDC’s built-in discretion to forego the tender process should it so wish, it does not seem appropriate to impose any conditions for the remittal. The appeal must accordingly succeed in this respect. The parties have each enjoyed success on appeal. Each party therefore should pay its own cost.

[21] In the result the following order is made:

1 The appeal is upheld to the limited extent set out below with each party to pay its own costs.

2 Paragraph 1 of the order of the court below is deleted and replaced with the following:

‘The decision of the first respondent to declare the tender submission of the applicant non-responsive and to award the tender T27/07/12: Tender Enquiry

¹³ *Logbro* paras 19-21.

for the Principal Building Contract for the IDC Head Office External Upgrade Sandton, Johannesburg to the second respondent is reviewed and set aside. The matter is remitted to the IDC's Executive Management Committee for reconsideration in terms of s 8(1)(c)(i) of the Promotion of Administrative Justice Act 3 of 2000.'

MML Maya
JUDGE OF APPEAL

APPEARANCES:

For Appellant: GJ Marcus SC (M Sikhakhane)

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