CONSTRUCTION INDUSTRY DEVELOPMENT BOARD ("CIDB")

CASE SUMMARIES AND ANALYSES

JULY 2012 – SEPTEMBER 2012

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CASE SUMMARY: OCTOBER 2012

Inkunzi Civils CC v Greater Kokstad Municipality

KwaZulu-Natal High Court, Pietermaritzburg

(11800/07) [2012] ZAKZPHC 54 (28 August 2012)

FACTS: This case deals with a contractor's claim for damages in respect of the costs of labour and plant standing time consequent upon the employer's breach of contract.

The plaintiff, a civil engineering contractor, had tendered for and was awarded a contract by the defendant Municipality for the construction and rehabilitation of certain roads in the Municipality's jurisdiction. The plaintiff performed its obligations in terms of the contract, but the Municipality, in breach of the terms thereof, failed to make timeous payment in respect of certain duly certified payment certificates by the contract engineer, as a result of which the plaintiff eventually cancelled the contract.

The contract engineer testified that the plaintiff had made every effort to keep the contract alive and was initially prepared, in the event that it was paid, to reinstate and complete the contract. However, payments were not forthcoming from the Municipality. Both the contract engineer and a representative of the Municipality, one Chetty, the technical head of the municipality, understood that the job would have to be completed eventually and that to hire another contractor to do so would be an expensive exercise. They accordingly persuaded the plaintiff not to de-establish the site and abandon the works. Promises of payment induced the plaintiff not to abandon the site. These promises, however, were not kept.

These entreaties resulted in the plaintiff staying on site for about six months after it had terminated the agreement, as a result of which it instituted proceedings to recover the costs of three months' standing time of plant and labour, which it had been advised was reasonable.

In granting judgment for the plaintiff, Lopes J said the following:

"[25] The claim for standing time arises out of the defendant's breach of contract, the cancellation of the contract by the plaintiff and the fact that the defendant asked the plaintiff not to de-establish its site after cancellation, pending payment by it of the amounts due. The damages for standing time arose as a direct, natural and probable consequence of the defendant's breach of contract. They were clearly within the contemplation of the parties at the time they concluded the agreement. The equipment remaining on site after cancellation, and the rates applied, were agreed between the parties and no issue arises in that regard."

ANALYSIS: As has previously been observed in these very pages, unjustified delays by organs of state in effecting certified progress payments are an industry-wide problem. This case is relevant to the *cidb* and the construction industry at large in so far it considers in which circumstances a contractor who has incurred damages in respect of the labour and plant standing time as a result of the employer's breach of contract may recover those damages.

CONSTRUCTION INDUSTRY DEVELOPMENT BOARD

CASE SUMMARY: OCTOBER 2012

Toll Collect Consortium v South African National Road Agency Ltd and Another

KwaZulu-Natal High Court, Durban

(8422/2011) [2012] ZAKZDHC 43 (27 July 2012)

FACTS: This case deals with the detail which an employer must communicate to prospective bidders regarding the benchmarks of evaluating functionality in order to foster transparency and competitiveness. It also deals with the employer's duty to act fairly in evaluating and adjudicating tenders.

The first respondent, SANRAL, had invited bids for a contract for the operation and maintenance of the N2 South Coast Toll Plazas within KwaZulu-Natal. It received eight bids and, having evaluated these, awarded the contract to the second respondent, Tolcon Lehumo (Pty) Ltd ("*Tolcon*"). The applicant, which had also submitted a bid, took umbrage at the award and launched an application to have the award reviewed and set aside.

The tender document had provided that SANRAL would, in the first instance, score the bids for quality and would be entitled to reject all tender offers that failed to score the minimum number of points of 75%.

SANRAL's frontline defence was that the applicant did not score the minimum of 75% when assessed for quality. In particular, it contended that the applicant's tender had failed to meet the quality standards due to its inexperience in toll operations, more particularly, in the management of toll operations.

SANRAL assessed the question of quality under three principal elements of *Toll Operations* which was allocated a score of 45 points, *Toll System* which was allocated a score of 50 points, and *Electrical and Mechanical Systems* which was allocated a score of 5 points. These principal elements were in turn broken down into a number of further sub-elements: *Toll Operations* was split into *Organisational Structure* (20 points) and *Operations Management* (25 points); *Toll System* was split into *Organisational Structure* (5 points) and *Risk Management* (45 points). Each of these sub-elements was also divided into sub-categories. However, while prospective tenderers were told of the three

principal elements in the tender documents, they had not been told of the further sub-elements and their sub-categories, or the weightings to be attached to such sub-elements and their sub-categories.

In this respect, Vahed J held that it was incumbent upon SANRAL to set out all the benchmarks up front so that a tenderer must know how to achieve the predetermined scoring. SANRAL's failure to do so, he concluded, constituted a reviewable irregularity.

In addition, the tender document was designed such that in that portion of the document which contained the contractual offer to be made by a prospective tenderer ("*Form of Offer*") the contract price was required to be expressed in a Rand amount inclusive of VAT. Elsewhere in the tender documents, in the section styled *Schedule of Payments/Cost Matrix* ("*the cost matrix*") the items there were required to be expressed exclusive of VAT.

It followed that the contract price would ordinarily be the sum of the amounts contained in the cost matrix plus VAT. However, the total of the items in the applicant's cost matrix, that is, the price arrived at, was identical to the figure included in the Form of Offer. During the evaluation of the tenders, SANRAL simply accepted that VAT had erroneously been omitted from the contract price and corrected the same to include VAT, thus leading to a 14% increase in the applicant's contract price and a concomitant reduction in the points scored by the applicant for price.

Vahed J criticized this course of action, indicating that it was difficult to understand why SANRAL chose unilaterally to do what it did and why it did not seek clarity as to whether the price stated in the Form of Offer did indeed include VAT instead of simply assuming that it did not. By so doing, SANRAL had embarked on administrative action that was not rationally connected with the information before it and thus also offended section 217 of the Constitution.

The court thus reviewed and set aside the award of the contract to Tolcon and remitted the matter to SANRAL for reconsideration.

ANALYSIS: This case is relevant to the *cidb* and the construction industry at large as it considers what the employer's duty to act fairly and transparently entails when communicating how it will assess functionality.

CONSTRUCTION INDUSTRY DEVELOPMENT BOARD

CASE SUMMARY: OCTOBER 2012

Country Cloud Trading CC v MEC Department of Infrastructure Development

South Gauteng High Court, Johannesburg

(2010/34662) [2012] ZAGPJHC 166 (8 August 2012)

FACTS: This case restates the principle that the failure by an organ of state to comply with government procurement prescripts renders the contract invalid and open to nullification by a court, no matter the consequential harm suffered by a supplier or third party.

During 2006 the respondent Department called for tenders for the building of a hospital in Jabulani and required the inclusion of a number of black empowerment construction companies to participate in a joint venture and then awarded the contract to this joint venture.

Numerous difficulties arose as regards the joint venture and its constituent companies, as well as cash flow difficulties on the part of the Department. By May 2008, at which time the hospital project should have been completed, the works were only very partially commenced, the joint venture had collapsed and one member of the erstwhile joint venture, Ilima, was the only contractor remaining on site.

The Departmental Acquisition Council ("*the DAC*") recommended that the completion of the hospital project should be once again put out to a competitive bid process on tender. However, the head of department decided to disregard the DAC's decision and concluded a "*completion contract*" between the Department and Ilima for the completion of the construction of the hospital.

Associated with this completion agreement, Ilima entered into a loan agreement with the plaintiff ("*Country Cloud*"), in terms of which the latter would provide funds to enable Ilima to furnish the requisite performance bond to the Department as a guarantee against default in the construction of the hospital. In order to secure Country Cloud's investment, a "*repayment agreement*" was entered into between the Department, represented by its

managing agent, and Country Cloud providing for repayment of the loan to Country Cloud.

When the Department later cancelled the completion contract on the grounds that Ilima had fraudulently misrepresented that the tax certificate presented by it was valid, Country Cloud sued the Department, claiming that the Department had wrongfully cancelled the agreement with Ilima in circumstances where the Department owed a duty of care to Country Cloud not to cancel such agreement, alternatively that the Department negligently interfered in the contractual right of Country Cloud to receive payment from Ilima. The Department then raised the defence that the contract awarded to Ilima was contrary to the legal prescripts regulating government procurement as it had not been put to tender.

Satchwell J agreed, holding that the HOD had, without authorization, departed from the DAC decision to put the completion contract to tender, and endorsing sentiments expressed in previous cases that contracts concluded in breach of provincial procurement processes were *"entirely subversive of a credible tender procedure"* and would *"deprive the public of the benefit of the benefit of an open competitive process"*. She decided that, even though the impact on Country Cloud was harsh, such harshness could not validate the unlawful administrative act.

ANALYSIS: This case is relevant to the *cidb* and the construction industry at large to the extent that it establishes that not even the harsh effects of the invalidation of irregular government procurement on a third party (who could not have known of the malfeasance) can validate the inherent unlawfulness of such procurement.

CONSTRUCTION INDUSTRY DEVELOPMENT BOARD

CASE SUMMARY: OCTOBER 2012

Circle Seven Trading 26 CC v Minister of Justice and Constitutional Development

North Gauteng High Court, Pretoria

(40325/2009) [2012] ZAGPPHC 197 (29 August 2012)

FACTS: This case concerns the question whether, in the absence of specific agreement on the issue, an organ of state which has contracted with a supplier of goods or services on a month to month basis is obliged to give reasonable notice of its termination of the resultant agreement.

In May 2006, the National Prosecuting Authority ("*the NPA*") advertised a tender for the provision of guarding and special services at all the NPA's offices nationally for a period of three years. The plaintiff was appointed as the successful tenderer for the services in the Eastern Cape Province, while another tenderer, NSA Security Company ("NSA"), was awarded the tender to provide these services in Gauteng, Limpopo and Mpumalanga.

In October 2007 and prior to the expiry of the three year contract, the defendant terminated NSA's services in the Gauteng, Limpopo and Mpumalanga provinces and entered into an oral agreement with the plaintiff, in terms of which the plaintiff was required to continue providing the services in the said provinces (which had been supposed to be provided by NSA) on a month to month basis. On 28 October 2008, the NPA gave the plaintiff three day's notice of the termination of its services in the erstwhile NSA provinces.

The plaintiff instituted action against the Minister of Justice (who is responsible for the NPA) contending that the notice of termination given by the NPA had been unreasonably short and that it had suffered damages as it had had to pay its security personnel a salary *in lieu* of notice, equipment costs and overhead costs for one month. In essence, the plaintiff contended that one month's notice of termination would have been reasonable.

The court found that there had indeed been an oral contract between the parties on a month to month basis. However, it held that no notice period had

ever been discussed and thus that the NPA was not obliged to give any notice of termination of the contract to the plaintiff.

ANALYSIS: This case is relevant to the *cidb* and the construction industry at large, in so far it considers whether reasonable notice must be given by an organ of state which has contracted with a supplier of goods or services on a month to month basis in the absence of a contrary agreement on the issue.

CONSTRUCTION INDUSTRY DEVELOPMENT BOARD

CASE SUMMARY: OCTOBER 2012

Esofranki Pipelines (Pty) Ltd and Another v Mopani District Municipality and Others

North Gauteng High Court, Pretoria

(13480/2011, 17852/2011) [2012] ZAGPPHC 194 (29 August 2012)

FACTS: This case is about the discretion vested in the review court regarding a just and equitable remedy once it has concluded that a tender has been irregularly awarded.

In August 2010, the first respondent Municipality invited interested parties to submit tenders for the construction of a raw water bulk pipeline from Nandoni Dam in Thohoyandou to Nsami Dam in Giyani. It was envisaged that, upon completion of the project, raw water will be pumped from Nandoni Dam through a 500mm diameter pipeline to a pressure breaker tank near Malamulele and further through a 600mm diameter pipeline which would convey water by gravity up to a storage tank at Nsami Dam to address the water shortage problem in the Giyani Municipal area, where a local state of disaster with regard to water security had been declared.

On 28 October 2010 the Municipality awarded the tender to the third respondent, a joint venture ("*the joint venture*") after an adjudication process. The first applicant, Esofranki Pipelines (Pty) Ltd ("*Esofranki*"), and the second applicant, Cycad Pipelines (Pty) Ltd ("*Cycad*"), launched separate urgent applications in November and December 2010, seeking to interdict the implementation of the award pending a review application. In January 2011, the two matters were settled on the basis that the award was reviewed, set aside and remitted to the Municipality for reconsideration.

In February 2011, the Municipality re-adjudicated the tender and awarded it to the joint venture again ("*the second award*"). Both Esofranki and Cycad thus launched new urgent applications to interdict the implementation of the second award pending the determination of applications to review and set aside the second award. On 22 March 2011, Esofranki obtained an interim

interdict prohibiting the implementation of the second award pending the finalisation of the review application.

What followed was a slew of applications by the Municipality and the joint venture for leave to appeal against the interim order, as well as applications by the applicants for leave to execute the interim order pending appeal. It seemed, however, that the Municipality and the joint venture had used the times when there was either no interim order in place or when the interim order was suspended by one of the many applications for leave to appeal to execute the tender. By the time the review applications were ripe for hearing, the bulk of works had been completed.

Both review applications were argued in the mid 2012. When judgment was delivered on 29 August 2012, Matojane J held that the award of the tender to the joint venture was irregular in that:

- The tender documents required bidders to have a *cidb* grading of 9CE;
- It was clear that the joint venture did not comply with the requisite *cidb* grading at the time of submitting it's tender and ought to have been disqualified along with the five other bidders who did not comply with the requisite *cidb* grading;
- One the partners in the joint venture (Tlong re Yeng ("*Tlong*")) had failed to submit a list of its qualifications and experience, as well as a list of key personnel or plant equipment, as required by the tender specifications; and
- The joint venture bid could not be regarded as "acceptable" in that it does not comply with the specification and conditions of the municipality's own bid document. The resultant award was accordingly irrational, arbitrary and unreasonable;
- The decision to appoint the joint venture was vitiated by bias, bad faith and ulterior purpose of using Tlong's managing member for fronting.

When considering whether to review and set aside the Municipality's decision to award the tender to the joint venture, Matojane J noted that PAJA grants a court a broad discretion when crafting a remedy to ensure that it is just and equitable.

Esofranki sought an order awarding the balance of the contract to it. This relief, the court held, raised a multiplicity of underlying factual issues that have not been ventilated and was not just and equitable under the circumstances as it would not serve the purpose of ensuring that water is brought to the destitute communities. For instance, Esofranki would not take responsibility for the work done thus far and would not give the Municipality any guarantee for such work. The joint venture on the other hand would not

give the Municipality a guarantee for the work it had done because not all of it had been tested and there would be no incentive to give any guarantee if it is not going to be paid for such guarantee.

The court accordingly held that the public interest would be served if the Municipality could independently, at the joint venture's costs, verify that all the work done meets the required standards and all concerns are remedied by the joint venture. It thus effectively declined to set the award aside.

ANALYSIS: The decision in this case, though controversial, is relevant to the *CIDB* and the construction industry in so far it underscores the principle that review is a discretionary remedy and considers circumstances in which the court will decline to set aside the irregular award of a tender in the public interest because it would not be just and equitable to do so.