CASE SUMMARIES AND ANALYSES

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Command Protection Services (Gauteng)(Pty) Ltd v South African Post Office Limited

Supreme Court of Appeal, Bloemfontein

(214/12) [2012] ZASCA 160 (16 November 2012)

FACTS: This case deals with the question when a conditional award of a tender gives rise to a contractual relationship between the employer and the tenderer.

In October 2002 the respondent ("*the Post Office*") invited tenders for the guarding of post offices in six specified regions of the country. The appellant submitted tender documents corresponding to the terms of the Request for Proposal document ("*the RFP*"). Clause 5 of annexure E to the RFP stipulated that '*acceptance of our proposal will be communicated to us by letter or order through the post*' and that '*communication as envisaged above will constitute an agreement between the … Post Office Limited and ourselves*'.

Subsequently, the appellant indeed received a letter of acceptance from the Post Office dated 28 July 2003 ("*the acceptance letter*"), which read as follows:

> "LETTER OF APPOINTMENT
>
> It is with pleasure that we inform you that the Tender Board has awarded the above tender proposal to [you]. As a result you are appointed as the supplier of the above-mentioned service as per our tender proposal.
>
> This appointment is subject to the following:
>
> - BEE improvement; and
> - The successful finalisation and signing of a formal contract.
>
> A draft contract will be forwarded to you within (7) seven working days for your comment and to the effect mutually agreed on amendments and finalisation into a formal contract. You are kindly advised to acknowledge receipt of this letter of appointment and provide this office with the contact information of the person(s) responsible for the finalisation of the contract process.
>
> Yours sincerely
>
> [Signed on behalf of the appellant]
>
> Accepted and signed on behalf of the respondent]"

At a meeting held on 30 July 2003 and attended by representatives of both parties, the appellant was advised that, it had been awarded the tender in respect of three of the six regions for which it had tendered and it was agreed that, since the Post Office's contract with its previous service provider would terminate on 31 August 2003, the appellant would provide the guarding services in the three regions as of 1 September 2003.

Shortly after the meeting, the Post Office provided the appellant with a draft contract which, though envisaged to soon be finalised, was never finalised. Four further drafts – the last in December 2003 – were to follow. A common feature of these drafts was a clause devoted entirely to the issue of BEE, which in both drafts provided, *inter alia*, that the appellant would maintain a BEE component of at least 40 per cent throughout the contract period.

While the parties were negotiating the terms of the consecutive drafts, the appellant started providing guarding services for the Post Office in the three regions as was contemplated at the meeting of 30 July 2003. As it happened, however, the drafts never metamorphosed into a formal agreement. By way of a letter dated 30 January 2004, the Post Office terminated negotiations and contended that the parties' relationship (which it described as a month-to-month basis from 1 September 2003, subject to and until finalisation of negotiations and conclusion of the written agreement) would come to an end on 29 February 2004, on which date the appellant must vacate all premises of the Post Office.

The appellant instituted action, contending that the RFP constituted an unconditional acceptance by the Post Office of the appellant's offer contained in the RFP with the result that a contract came into existence on those terms. Accordingly, the appellant contended that the Post Office's letter of 30 January 2004 was a repudiation of that contract and claimed damages of about 13 million.

The Post Office demurred and contended that the acceptance letter was not an unconditional acceptance of the appellant's tender contained in the RFP; that, on the contrary, the acceptance was especially made subject to two conditions; that these conditions were never fulfilled; and that in consequence the contract between the parties relied upon by the appellant, with the terms reflected in the RFP, never came into existence.

The court agreed with the Post Office, reasoning that the expression "subject to" used in the acceptance letter is generally understood to introduce some or other condition. Thus understood, the introduction of this expression meant that the acceptance letter was not an unconditional acceptance of the tender in the RFP. Although the tender, the RFP, expressly dictated an unconditional acceptance of its terms, the acceptance letter did not adhere to that demand. Instead, it presented the appellant with a conditional

acceptance or counter-offer which the latter then formally accepted at the foot of the letter.

Similarly – the court held – one of the conditions that had to be complied with was the requirement of the '*successful finalisation … of a formal contract*'. This requirement can only mean that unless and until the further negotiations that were contemplated resulted in a formal agreement, there would be no contractual relationship between the parties. The contract would only come into existence upon the successful finalisation of the contract process, after inter-action between representatives of the parties.

The court thus concluded that:

- the acceptance letter did not constitute an unconditional acceptance of the tender contained in the RFP; but that it was intended by the respondent and accepted by the appellant as a counter-offer. The agreement that came into existence when the appellant accepted this counter-offer was an agreement to negotiate; and
- The most likely inference is that the appellant rendered the guarding services from 1 September 2003 pursuant to a collateral agreement and not in terms of an agreement reflected in the RFP and the acceptance letter. Whether this collateral agreement was impliedly on a month-to-month basis as suggested by the respondent, or on some other basis, is therefore of no consequence.

ANALYSIS: This case is relevant to the *cidb* and the construction industry at large in so far it considers the proper legal impact of the tender conditions and what the resultant award means to the legal relationship between employer and preferred tenderer as employers often make tender awards which are subject to certain conditions.

Indiza Airport Management (Pty) Ltd v Msunduzi Municipality

KwaZulu-Natal High Court, Pietermaritzburg

(374/12) [2012] ZAKZPHC 74 (16 November 2012)

FACTS: This case deals with the reasons for which an organ of state may cancel a bid after bids have been received and initiate a new bid process.

In December 2010, the respondent municipality invited tenders for the provision of management services for Pietermaritzburg Airport ("*the 2011 tender*"). Of the original six bids received, only two bids (those of the applicant and a Joint Venture) qualified for the second stage of evaluation. The Joint Venture was declared to be the preferred bidder, causing the applicant to file an objection against the award.

After the hearing of the objection on 16 February 2011, the applicant's objection was upheld, it being conceded that the Joint Venture's bid had been incorrectly scored and that on a proper scoring the applicant should have been declared the preferred bidder. The Objection Hearing directed that the tender was to be referred back to the Bid Evaluation Committee ("*the BEC*") and Bid Adjudication Committee for correcting whereafter – in accordance with the law – the final decision would be made by the Municipal Manager.

The BEC then concluded that the Joint Venture's bid had been non-compliant and recommended that the tender be awarded to the applicant. Instead, the respondent's acting Municipal Manager at the time decided on 7 September 2011 not to award the tender to the applicant but to cancel it and re-advertise a new tender for the same services on 12 January 2012 ("*the 2012 tender*") with tender documents were substantially the same as the 2011 documents, prompting the applicant to launch the present review application.

The reasons proffered by the respondent municipality for the cancellation of the 2011 tender were:

- The bid had to be cancelled in terms of Preferential Procurement Regulation 10(4)(c) as no acceptable bids were received. This reason the

court considered to be farcical given that of the six bids received, the applicant's was the only one that was fully compliant;

- The bid specifications were not presented to the bid specification committee for compilation and not presented to the Municipal Manager for approval before publication. This reason did not impress the court either, which held that tenderers expend huge amounts of money in preparing their tender proposals and in making presentations, if required to do so, and are therefore entitled to expect that all internal processes have been complied with;

- The cancellation was justified because of a breach of confidentiality. The breach referred to was that the applicant's (now deceased) airport manager had requested one of the respondent's employees prior to the advertisement of the tender for suggestions as to what should be included in the tender documents. The court concluded that the respondent's airport manager, through lack of experience in dealing with tenders of this nature, was merely seeking advice and guidance on what could be included in the specifications and this could not be held to amount to a breach of confidentiality;

The court accordingly concluded that the reasons advanced by the respondent municipality for cancelling the 2011 tender and its decision to re-advertise it could not be justified in light of all the information that was before it at the time. The reasons were therefore not rationally connected to all the information that was at the disposal of the respondent when the decision was taken. The decision thus had to be reviewed and set aside.

Additionally, the court concluded that, as the applicant was the only tenderer whose bid was compliant, it would serve no purpose to remit the tender to the respondent municipality for reconsideration. Accordingly, the respondent municipality was ordered to award the 2011 tender to the applicant.

ANALYSIS: This case is relevant to the *cidb* and the construction industry at large as it considers the circumstances under which an employer may not decide to cancel a bid and call for new tenders without taking into account other considerations.

Axton Matrix Construction CC v Metsimaholo Local Municipality and Others

Free State High Court, Bloemfontein

(2778/2011) [2012] ZAFSHC 196 (24 October 2012)

FACTS: This case restates the principle that certificate of payment issued by the project engineer acting as the employer's agent is a liquid document amounting to an acknowledgement of debt signed by the employer in favour of the contractor and thus can only be contested by the employer on limited grounds.

The respondent municipality had contracted with the applicant in terms of the general conditions of contract ("*the GCC*") for the latter to construct sewer reticulation in its municipal area. The respondent municipality had also appointed an engineer to administer the contract between it and the applicant in terms of the GCC, which provided, *inter alia*, for the appointment of an engineer as the respondent's agent, as well as for certification by the engineer of interim payment to the applicant.

On 26 July 2010 the engineer issued certificate no. 11 in favour of the applicant for payment of an amount of R463 837,13. When the respondent municipality did not pay, the applicant invoked the dispute resolution mechanisms in the GCC. When these had no effect, it notified the respondent municipality of its intention to cancel the contract and demanded payment of both the outstanding amount as certified and the balance of retention monies with regard to the defect liability period agreed upon by the parties.

In the resultant proceedings, the respondent municipality contested the validity of the interim certificate of payment upon which the applicant relied for payment, contending that there was fraud involved and that the engineer had exceeded its mandate. It also disputed the applicant's entitlement to the release of the balance of retention monies in that, in terms of GCC, such monies were to be released only 14 days after the expiry of the defects liability period.

The court held that:

- The engineer appointed in terms of the GCC is the employer's agent and his acts and omissions are binding on the employer, in the position of the respondent, as if they are the latter's own deeds. However, the employer is not bound by the acts of the engineer as its agent where fraud is involved;
- A certificate of payment issued by the engineer, final or interim, is treated as a liquid document with the result that it amounts to an acknowledgement of debt signed by the employer in favour of the contractor;
- Such a certificate is not open to attack on grounds that it was based on erroneous reports of the agent of an employer or the negligence of the engineer and such negligence on the part of the engineer cannot provide a basis for cancellation or withdrawal of the certificate by the employer;
- Such a certificate constitutes a separate and self-supporting cause of action which can only be challenged on limited grounds;
- Clause 54.4 of GCC is to the effect that in circumstances where the contractor, in the shoes of the applicant, cancels the contract because of, *inter alia*, the employer's failure to pay in accordance with any payment certificate, the contractor shall be paid by the employer for all measured work executed prior to the date of cancellation the amount (without retention) payable in terms of the contract.

The court held that the respondent municipality had proven no fraud or that the engineer had exceeded its authority in certifying the interim payment. In addition, the applicant became entitled to the balance of the retention monies when it cancelled the contract because the cancellation of the contract by the applicant was a direct result of the respondent municipality's failure to pay the applicant the amount due in terms of the relevant certificate as contemplated in clause 56.1.1.2 of GCC. Accordingly, the applicant had to succeed.

ANALYSIS: Payment certificates are the lifeblood of the construction industry. This case is relevant to the *cidb* and the construction industry at large because it restates the legal status of a payment certificate and delineates the circumstances in which such a certificate can be contested by the employer.

Stefanutti Stocks Civils, A Division of Stefanutti Stocks (Pty) Ltd and Others v Trans Caledon Tunnel Authority and Another

North Gauteng High Court, Pretoria

(26396/05) [2012] ZAGPPHC 238 (31 October 2012)

FACTS: This case deals with the need for a disappointed tenderer who institutes legal action seeking a review and setting aside of a tender award to cite as a respondent and serve papers on every other bidder who has a direct and substantial interest in the proceedings.

On 16 February 2012, the first respondent, the Trans Caledon Tunnel Authority ("TCTA") awarded to the second respondent, Basil Read (Pty) Ltd ("*Basil Read*"), a tender for the construction of a wielded steel bulk water pipeline. TCTA also decided that Group Five would be the reserve bidder.

Disappointed by the award, the applicants launched an application to have the award reviewed and set aside, citing only TCTA and Basil Read as respondents.

TCTA took the point *in limine* that Group Five, as the reserve bidder, had a direct and substantial interest in the proceedings and that it should thus have been cited as a respondent in the proceedings.

The court agreed, reasoning that the applicants contended in their papers that Group Five ought to have been disqualified in the adjudication of the tender. The implication of the order sought by the applicants was that the court should hold that TCTA, in finding Group Five to be the reserve bidder, had misdirected itself. If such a finding was made, it stood to reason that the decision that Group Five was to be the reserve bidder also had to be set aside, which would upset the positive finding made by TCTA in favour of Group Five without hearing Group Five. Accordingly, the applicants should have cited Group Five as a party to the proceedings as it had a direct and substantial interest in the outcome thereof.

ANALYSIS: It is an undeniable truism that award of government tenders has become a fruitful source of litigation. Courts are swamped with unsuccessful tenderers that seek to have the award of contracts set aside and for the contracts to be awarded to them. This case is relevant to the *cidb* and the construction industry in so far it considers the circumstances in which an

unsuccessful tenderer who institutes litigation to set aside the tender award should cite other fellow tenderers as respondents.