REPORTABLE
Case number: 451/98

IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

TECMED (PTY) LTD **APPELLANT**

and

EASTERN CAPE PROVINCIAL TENDER BOARD **1st RESPONDENT**

EASTERN CAPE PROVINCIAL GOVERNMENT **2nd RESPONDENT**

EASTERN CAPE PROVINCIAL DEPARTMENT OF FINANCE **3rd RESPONDENT**

S.A. PHILIPS (PTY) LTD **4th RESPONDENT**

CORAM: SMALBERGER, VIVIER, OLIVIER, SCOTT JJA and MPATI AJA

DATE OF HEARING: 14 SEPTEMBER 2000

DELIVERY DATE: 29 SEPTEMBER 2000

Review of Tender Board's decision to award tender - costs.

JUDGMENT

. . . SMALBERGER JA

SMALBERGER JA:

[1] In September 1996 the first respondent ("the Board") invited tenders for the supply of a Bi-Plane Catheterisation Laboratory to the Provincial Hospital, Port Elizabeth. The tender was in due course awarded to the appellant ("Tecmed"). On 28 August 1997 the fourth respondent ("Philips") applied to the High Court, Bisho, for an order, *inter alia*, reviewing and setting aside the Board's decision to award the tender to Tecmed and referring the tender process back to the Board for reconsideration of the tenders received, excluding the tender submitted by Tecmed. The matter eventually came before Pickard JP and Smith AJ. The court granted Philips an order, with costs, essentially in the terms sought by it. It refused Tecmed leave to appeal, but the required leave was subsequently granted by this Court on

application to the Chief Justice.

[2] The Board was established in terms of sec 2 of the Provincial Tender Board Act 2 of 1994 (Eastern Cape) ("the Act"). Being a creation of statute, the Board derives its lawfully authorised power from the terms of the Act and the Tender Board Regulations (Eastern Cape) ("the regulations") promulgated thereunder. It has no powers beyond those conferred upon it expressly or by necessary implication by such legislation. Any action it takes must conform to the substantial and procedural requirements of the empowering legislation. If it fails to act in accordance with them the purported exercise of its powers will be invalid and subject to review, no matter that it may have acted honestly or in good faith or from the best of motives. (See generally Baxter: *Administrative Law* at 384 - 387.)

[3] When tenders were invited both the Act (which commenced on 14 September 1994) and the regulations (which were published on 26 June 1995) were in operation.

The regulations were made pursuant to sec 9(1) of the Act which authorised the "responsible Member" (the member of the Executive Council of the Province responsible for financial matters) to make regulations regarding, *inter alia*,

> "(d) in general, any other matter which the responsible Member may consider it necessary or expedient to prescribe in order to achieve or promote the objects of this Act."

[4] The Board is bound by the provisions of the Act. It is also bound by the regulations save to the extent that the Act authorises a departure from them. I shall assume, without deciding, that the wide wording of sec 4(1)(b) of the Act would permit of such a departure in certain circumstances. Section 4(1)(b) vests the Board with "the sole power to procure supplies and services for the Province" and provides further that, with a view to concluding an agreement in relation to what is required,

> "in any manner it may deem fit, invite offers and determine the manner in which and the conditions subject to which such offers shall be made".

[5] The tender process appears to have been flawed from the outset. Contrary to the peremptory provisions of reg 7(3)(a) which requires that "every notice inviting tenders shall state that all tenders shall be subject to the provisions of the Act and the regulations", the notice calling for tenders did not so provide. Instead the tender conditions stipulated, without qualification, that the tender was subject to "the State Tender Board regulations, made in terms of section 13(1) of the State Tender Board Act, 1960 (Act 86 of 1960), and the general conditions and procedures (ST 36) . . . dated 17 May 1991 and subsequent amendments thereto . . .". The regulations referred to no longer applied, and the directives contained in ST 36 were only to apply, in terms of sec 11 of the Act "*mutatis mutandis* to the Province and be deemed to have been issued under section 4(1)(i) of this Act, until amended or replaced in terms of this Act". They had in fact been replaced, in all respects material to the present appeal, by reg 7 which laid down that tenders "shall be invited in accordance with the

provisions of these regulations for all supplies, services and sales" and went on to prescribe the requirements that had to be complied with. Furthermore, the tender invitation stipulated, again without qualification, that "late . . . . tenders shall not be considered", this despite the fact that reg 7(6)(d) read with reg 3(4)(c) permitted the Board, in its discretion, to entertain a late tender.

[6] In inviting tenders in the manner in which it did the Board (or its responsible officials) appear, initially at any rate, inadvertently to have overlooked the provisions of the Act and regulations in terms of which it was required to function. It has never claimed that it acted as it did in the exercise of its discretion in terms of sec 4(1)(b) (assuming, again, that any discretion it had would have permitted it to do so). In any event the probabilities are, in my view, wholly against it having so acted. It is inconceivable that a responsible Board would have consciously chosen to depart from the prescribed regulations governing tenders in this regard. There were therefore

significant departures from authorised tendering requirements from the inception of the tendering process. The court *a quo* seemingly failed to appreciate this. That caused it to err in concluding that the Board had exercised a discretion not to accept late tenders and was thereby precluded from considering such a tender, let alone accept it.

[7] The closing time and date for the submission of tenders was 11:00 on 10 October 1996. A number of tenders were received before then, including that of Philips. It appears from the record that Tecmed's tender document was collected in Johannesburg by a courier service on 9 October 1996 for express delivery to East London where arrangements had been made for it to be delivered to the Board. Commencing on the evening of 9 October all flights which would normally have conveyed air freight between Johannesburg and East London were cancelled as a result of unforeseen industrial action on the part of employees of South African Airways.

Consequently the tender document could not be conveyed as consigned. It was eventually delivered to the Board on 10 October 1996, but only after 11:00. It was therefore late. The Board's officials were, however, informed in advance of Tecmed's predicament and the fact that its tender would be late. Tecmed did not secure any unfair advantage over its competitors on account of its tender being late. **[8]** It is unnecessary to traverse the events that took place at the time of, and immediately after, the expiry of the deadline. Suffice it to say that the Board's secretariat submitted the tenders received, including that of Tecmed, to the Board for its consideration. Its officials appear simply to have regarded Tecmed's tender as a facsimile tender, which it was not. It is common cause that the Board was never informed that Tecmed's tender had been late. After extensive deliberations the Board decided to award the tender to Tecmed. Its decision was finally reached on 16 May 1997, and the order for the supply of the Bi-Plane Catheterisation Laboratory was placed with Tecmed on 2

June 1997. This gave rise to the proceedings initiated in the court below in August 1997.

[9] Although reg 7(6)(d) provides that any tender received after closing hour shall be returned to the tenderer, it is subject to certain provisos, one of which is that

> "the secretariat may refer to the Board for its decision any late tender which has been delayed through no fault of the tenderer."

Regulation 7(6)(d) read with reg 3(4)(c) permits the Board to allow a late tender in the exercise of its discretion. But before it can exercise such a discretion it must be alerted to the fact that the tender was late, and be informed of the circumstances concerning its lateness, in order to satisfy itself that the delay was not caused through any fault of the tenderer. The Board was not apprised of these facts. This is apparent from the affidavit of the chairman of the Board, Mr Finca, who stated that "it [the Board] was never informed thereof [the relevant facts] by its secretariat before

adjudicating upon the matter and had it been so informed it would have laid the matter before the members of the Tender Board for discussion and appropriate action." Being ignorant of these facts the Board was precluded from applying its mind to whether or not it should exercise a discretion in Tecmed's favour. This was a necessary prerequisite for the consideration and acceptance of Tecmed's tender, which would otherwise have been excluded. Because the Board (albeit through no fault of its own) failed to apply its mind to the relevant issue of whether Tecmed's late tender should be allowed and considered, its decision to award the tender to Tecmed fell to be reviewed (*Johannesburg Stock Exchange and Another v Witwatersrand Nigel Ltd and Another* 1988(3) SA 132 (A) at 152 A-B). Counsel for Tecmed, Mr Lane, accepted that to be the case.

[10] Mr Lane argued, however, that Tecmed's situation was saved by reg 3(4)(c) which reads:

> "[T]he Board may, if it is in the interests of the Provincial Government, accept any offer notwithstanding the fact that the offer was not made in response to any particular tender invitation, or does not comply with the tender conditions set out in any specific tender invitation in respect of which the offer has been made."

It does not, however, provide an answer. Like reg 7(6)(d), reg 3(4)(c) also requires the exercise of a discretion by the Board. Knowledge that Tecmed did not comply with the tender requirements, because its tender was late, was also a prerequisite for the exercise of such discretion. In relation to its powers under reg 3(4)(c) the Board did not exercise any discretion in favour of Tecmed. Without the exercise of such discretion it could not have allowed and accepted Tecmed's tender.

[11] In all the circumstances, and given the need for administrative fairness, judicial interference was justified and the award of the tender to Tecmed had to be set aside. It is not necessary to consider Mr Lane's argument, relying on a passage in *Napolitano v Commissioner of Child Welfare, Johannesburg and Others* 1965(1) SA

742 (A) at 745 H, that prejudice to Philips was an essential requirement for reviewing and setting aside the Board's decision to award the tender to Tecmed. Assuming that to be so, there was clearly prejudice or potential prejudice to Philips arising from the Board's lack of knowledge and the failure to exercise its discretion which, notionally at any rate, it may have exercised against Tecmed, leaving Philips as the possible successful tenderer. Nor is there substance in Mr Lane's reliance on the decision in *National and Overseas Distributors Corporation (Pty) Ltd v Potato Board* 1958(2) SA 473 (A) which dealt with a situation significantly different from the present.

[12] The court *a quo* made the following order:

> "(a) The decision of the [Board] to award tender no. PT B3-96/97-404 for the provision of a Bi-Plane catheterisation laboratory to the Port Elizabeth Provincial Hospital to [Tecmed] on [16 May 1997] is hereby reviewed and set aside;
>
> (b) The matter is referred back to the [Board] to consider afresh tenders submitted in respect of the tender;

(c) The [Board] is interdicted and restrained from considering the tender purportedly submitted on behalf of [Tecmed];

(d) The [Board] is to pay the costs (including costs of two counsel) of the application on an unopposed basis;

(e) [Tecmed] is to pay the costs of the application occasioned by its opposition. These costs to include the costs of two counsel."

[13] For the reasons given in this judgment it was correct in making order (a). It was, however, not justified in making orders (b) and (c). They were premised on the false argument that the Board was either not entitled to have regard to a late tender, or had lawfully precluded itself from doing so. The court should simply have granted order (a) and have left it to the Board to decide how to deal further with the matter. (That is the effect which this judgment will have.) But once it decided that the tenders submitted should be considered afresh by the Board there was no justification for excluding Tecmed's tender from the process. It remained open to the Board to

consider whether Tecmed's tender was late through no fault on its part and, if it found that to be the case, to exercise its discretion whether to entertain it. The court was not entitled to deny the Board the authority and power to do so conferred upon it by the regulations.

[14] It follows that the appeal must succeed to the extent that orders (b) and (c) are to be set aside. There remains to be considered the costs of appeal. It is also open to us, in the light of our findings, to reconsider the costs order made by the court *a quo*. We have a wide discretion as to costs, to be exercised judicially on a proper consideration of all relevant circumstances.

[15] Orders (a), (b) and (c) were made in the precise terms asked for by Philips in the notice of motion. Philips did not only seek to have the tender award set aside, it was bent on having Tecmed eliminated from any future tender process, hence the relief it sought. There were therefore essentially two issues before the court *a quo* - the

review of the Board's decision to award the tender to Tecmed ("the first issue") and the exclusion of Tecmed from the further process ("the second issue"). As I have held, Philips was entitled to succeed on the first issue but not on the second.

[16] Philips's attitude in bringing its application was basically that as Tecmed's tender was late it should have been, and had to be, excluded from the tender process. In doing so it sought to rely (wrongly) on directives that had been replaced by the regulations. To that extent the application was ill-conceived. In resisting the application Tecmed (correctly) relied upon the regulations which would have permitted the Board to exercise its discretion in its favour. At that stage Tecmed had no means of knowing whether the Board had exercised a discretion in its favour or not, but in my view it was entitled to assume from the fact that it had been awarded the tender that the Board had done so.

[17] The Board, through Mr Finca, only filed an affidavit at a very late stage of the

proceedings when all the answering and replying affidavits had been filed. It only then came to light that the Board had never been called upon to make a decision, as it should have done, concerning Tecmed's late tender. It is arguable that at that stage Tecmed should have had the good sense to concede prayer (a). Be that as it may, it was still fully entitled to resist an order in terms of prayers (b) and (c). The fact that the Board had not previously applied its mind to the lateness of Tecmed's tender would not legally have precluded it from doing so if the tenders received had to be considered afresh. It must be borne in mind that Tecmed had not been guilty of any improper conduct in relation to the tender. While it may have left the submission of its tender to the last moment, ultimately the fact that the tender was late was due to circumstances beyond its control. Legally (and morally) there was no valid basis for excluding its further participation in the tender process.

[18] In the result, while Philips in the court *a quo* rightly succeeded on what I have

designated the first issue, it should have failed on the second issue, an issue it had raised and vigorously pursued. Had Philips so failed, Tecmed would have achieved a significant degree of success in the court below as a result of its successful opposition to orders (b) and (c). They had the effect, in terms of the court's order, of eliminating Tecmed (wrongly) from any participation in the further conduct of the tender. To protect and maintain its interest in the tender Tecmed was obliged to appeal. It could have limited its appeal to orders (b) and (c) and the costs order; by the same taken Philips could have abandoned orders (b) and (c) to which it was not entitled. Neither party can really be blamed for pressing on in the hope of achieving overall success. In the end result Tecmed on appeal will have failed on the first issue but succeeded on the second. Again this amounts to significant success on its part.

[19] The Board's secretariat is mainly to blame for the situation which arose in the present matter because of its failure to inform the Board of the lateness of Tecmed's

tender and the circumstances pertaining thereto. The Board, wisely, elected not to oppose the matter. Because of the secretariat's conduct, which is attributable to the Board, the court *a quo* made order (b). Although Philips did not include a prayer for costs against Tecmed in its notice of motion, once the issues crystalised it must have been obvious to Tecmed that a costs' order would be sought against it if the circumstances justified it. In ordering Tecmed to pay the costs occasioned by its opposition the court *a quo* held that "notwithstanding the fact that it became aware of the true facts after having been served with the founding papers, [it] nevertheless decided to oppose the matter." This is not quite correct. The "true facts" cardinal to a proper decision in this matter only emerged when Mr Finca's affidavit was filed.

[20] I am of the view, having regard to all the relevant circumstances, and the extent of the success achieved by each party in this Court and the court below, that fairness dictates that the costs burden (other than in relation to order (d)) should as far as

possible be shared equally between Philips and Tecmed. The best way to achieve this would be to order, in relation to the costs not covered by order (d), that each party pay its own costs.

[21] The following order is made:

(1) The appeal against order (a) of the court *a quo* is dismissed;

(2) The appeal against orders (b) and (c) of the court *a quo* succeeds and they are set aside;

(3) Order (d) made by the court *a quo* remains unaltered;

(4) The appeal against order (e) of the court *a quo* succeeds. The order is set aside and there is substituted in its stead the following:

"Subject to order (d) above each party is to pay its own costs."

(5) Each party is ordered to pay its own costs of appeal.

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J W SMALBERGER
JUDGE OF APPEAL

SCOTT JA)Concur
MPATI AJA)

OLIVIER JA

OLIVIER JA

[1] I have read the judgment of my colleague Smalberger. On some issues we agree, on some not. The differences do lead, unfortunately, to divergent outcomes.

[2] The invitation issued by the Board required tenders to be submitted "... *on or before the closing date 10 October 1996 not later than 11:00*". Tecmed did not comply with this requirement. The Board nevertheless considered its tender. Mr Ndlebe, the Board's representative, erroneously and notwithstanding immediate objections by Philips, never informed the Board that Tecmed's tender was late.

The Board had a discretion to consider late tenders. Regulation 7(6)(d) reads as follows:

> "*(d) Any tender received after the closing hour shall be returned to the tenderer: Provided that* --
>
> *(i)* ...
>
> *(ii)* *the secretariat may refer to the Board for its decision any late tender which has been delayed through no fault of the tenderer."*

[3] Due to the misconception on the part of Ndlebe, the Board never exercised the said discretion. Philips was not at fault at any stage. The fact is that Tecmed failed to ensure that its tender would reach the Board timeously. Philips was entitled to have the award of the tender to Tecmed set aside. Philips's main prayer was rightly granted by the Court *a quo.* Nevertheless, Tecmed pursued an appeal to this Court, and by far the largest part of the time spent on the hearing of this case was used by Techmed's counsel in an endeavour to convince us that the main prayer should have been refused. He failed to do so.

[4] Having set the Board's award of the tender to Tecmed aside, the Court *a quo*, at the behest of Philips, made the following orders:

> "(b) The matter is referred back to the First Respondent [the Board] to consider afresh tenders submitted in respect of the tender;
>
> (c) The First Respondent [the Board] is interdicted and restrained from considering the tender purportedly submitted on behalf of the Fourth Respondent [Tecmed];
>
> (d) ...
>
> (e) Tecmed to pay the costs of the application occasioned by its opposition. These costs to include the costs of two counsel."

Philips was entitled to the relief sought in paras (b) and (e). In this Court counsel for Tecmed submitted that the correct order of the Court *a quo* should have been to refer the matter back to the Board to exercise its discretion whether to allow and consider Tecmed's late tender.

[6] I do not find any mention in the judgment of the Court *a quo* that Tecmed there also adopted its present attitude to the ancillary prayers.

[7] In its application to the Court *a quo* for leave to appeal to this Court,

Tecmed mainly dealt with the main prayer. Its approach to the ancillary prayers is interesting. I quote from the relevant notice:

> "13 The learned Judges, in concluding that the Tender Board would be precluded from considering late tenders if the matter was referred back to it for reconsideration, erred in not giving effect to the provisions of Regulation 3(4)(c) and 7(7)."
>
> 14 The learned Judges failed to take cognisance of the fact that all the tenders had lapsed and that, accordingly, there was nothing that the Tender Board could reconsider."

These two paragraphs were repeated as paragraphs 14 and 15 of the Notice of Appeal filed by Tecmed after this Court granted it leave to appeal.

[8] If the tenders had lapsed, as Tecmed said , there was in fact nothing that the Tender Board could consider again. But then it is impossible to understand why it now takes up the attitude that the matter should have been referred back to the Board in order to exercise its discretion to allow and consider its late tender. According to its own present view, Tecmed's opposition to para (b) of the

ancillary orders was misplaced. In any event, it never offered to abandon its opposition to the main prayer if Philips abandoned the ancillary orders. It persisted, to the very last, in opposing the main prayer.

[9] Philips, in my view, certainly achieved substantial success in its application and in its opposition to the appeal. Although it was not entitled to the relief sought in para (c) of the order that was of less importance and has by now become academic as completely new tenders will have to be invited.

[10] I would dismiss the appeal with costs.

P J J OLIVIER JA

I CONCUR

VIVIER JA