THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Case No 385/2009

In the matter between:

MOSEME ROAD CONSTRUCTION CC	**First Appellant**
LONEROCK CONSTRUCTION (PTY) LTD	**Second Appellant**
THE MEC FOR THE DEPARTMENT OF PUBLIC TRANSPORT, ROADS AND WORKS OF THE GAUTENG PROVINCIAL GOVERNMENT	**Third Appellant**

and

KING CIVIL ENGINEERING CONTRACTORS (PTY) LTD	**First Respondent**
LUDONGA CONSTRUCTION CC	**Second Respondent**

Neutral citation: *Moseme Road Construction CC v King Civil Engineering CC* (385/2009) [2010] ZASCA 13 (15 March 2010)

Coram: Harms DP, Nugent, Cloete and Lewis JJA and Theron AJA

Heard: 26 February 2010

Delivered: 15 March 2010

Summary: Tender award – setting aside – award of contract by court to unsuccessful tenderer – inappropriate in the circumstances.

ORDER

On appeal from: The South Gauteng High Court (Johannesburg) (Jajbhay J sitting as court of first instance):

1 The appeal is upheld with costs.

2 The order of the court below is set aside and replaced with an order dismissing the application with costs and making no order on the counter-application.

JUDGMENT

HARMS DP (NUGENT, CLOETE and LEWIS JJA concurring):

[1] This appeal concerns the award of a government tender. These awards often give rise to public concern – and they are a fruitful source of litigation. Courts (including this court) are swamped with unsuccessful tenderers that seek to have the award of contracts set aside and for the contracts to be awarded to them. The grounds on which these applications are based are many. Sometimes the award has been tainted with fraud or corruption, but more often it is the result of negligence or incompetence or the failure to comply with one of the myriad rules and regulations that apply to tenders. Sometimes the successful tenderer is to be blamed for the problem but then there are cases where he is innocent. Many cases are bedevilled by delay, whether in launching the application (and also because the facts were not readily available or easily ascertainable) or because of delays and suspensions inherent in the appeal procedure. If the applicant succeeds the contract may have to be stopped in its tracks with possibly devastating consequences for government or the successful tenderer or both. Conversely, if the works are allowed to be completed, the tenderer that should have been awarded the tender would unjustly be deprived of the benefits of the contract. There are also cases where the final judgment issues only after completion of the contract. It is not necessary to

adumbrate further. Tendering has become a risky business and courts are often placed in an invidious position in exercising their administrative law discretion – a discretion that may be academic in a particular case, leaving a wronged tenderer without any effective remedy.[1]

[2] The award of government tenders is governed by s 217(1) of the Constitution. Awards must be made in accordance with a system that is fair, equitable, transparent, competitive and cost-effective. But a procurement system may provide for categories of preference and for the advancement of categories of persons (s 217(2)). National legislation must prescribe the framework for the implementation of any preferential policy (s 217(3)). This is done by the Preferential Procurement Policy Framework Act 5 of 2000. It provides that organs of state must determine their preferential procurement policy based on a points system. The importance of the points system is that contracts must be awarded to the tenderer who scores the highest points unless objective criteria justify the award to another tenderer (s 2(1)(f)).

[3] The Construction Industry Development Board Act 38 of 2000 provides for a national register of contractors. Contractors are categorized 'in a manner that facilitates public sector procurement and promotes contractor development' (s 16(1)). Contractors registered in a particular category are in terms of the regulations under this Act considered to be capable of undertaking a contract in a particular range of tender values.[2]

[4] The essential facts are these. The Gauteng Department of Public Transport, Roads and Works invited tenders for the construction of a section of Beyers Naudé Drive into a dual carriageway. (The Department is represented in this case by the responsible MEC, the third appellant.) The advertised tender invitation specified the classification of tenderers who could tender. It was 8CE PE or 9CE, signifying civil

---

[1] Compare *Sebenza Kahle Trade CC v Emalahleni Local Municipal Council* [2003] 2 All SA 340 (T); *Intertrade Two (Pty) Ltd v The MEC for Road and Public Works & another* 2007 (6) SA 442, [2008] 1 All SA 142 (Ck).

[2] Regulations in terms of the Construction Industry Development Board Act GG 26427, 9 June 2004, as often amended.

engineering contractors considered capable of performing contracts having a value in excess of R100m. The present respondents, who eventually submitted a joint venture tender, did not qualify in terms of the advertisement. (I shall refer to the joint venture as 'King'.) The first and second appellants, another joint venture and, eventually the successful tenderer (to whom I shall refer as Moseme) did qualify. At the obligatory site meeting that preceded the tender award those present were informed in response to a question put on behalf of King that parties with a lower classification (8CE or 7CE PE – for contracts with a tender value of less than R100m) could also tender. An addendum to the tender documents issued subsequently was to the same effect. King fell within the lower group and tendered. The tenders received went through an evaluation process. King's tender, having scored the highest points, was recommended in the technical evaluation report prepared by the Department's engineer; in the standard submissions prepared by the project manager; and in the minutes of the functional sourcing team.

[5] At the final assessment the Departmental Acquisition Council disqualified King's tender 'on the rule of unfair competition' and awarded the contract to Moseme. According to its minutes it would have been unfair to those 8CE and 7CE PE contractors who had been unaware of the change, which would have permitted them to tender, to award it to King without a notice in the media. King's tender was accordingly disqualified in spite of the amendment of the tender documents because it was not in accordance with the advertisement. In other words, King's tender was disqualified because of an error by the Department. The error was, unbeknown to King, that the information given at the site meeting was wrong and that the Department had failed to change the tender documents.

[6] Dissatisfied, King launched an application for an urgent interim interdict, which was dismissed on the ground of balance of convenience. Undeterred, King launched the present proceedings as a matter of urgency, seeking the review of the decision to award the contract to Moseme, and its setting aside. Additionally, King asked that the court should award the contract to it since its tender was for the lowest price, had scored the highest points, and was recommended during the evaluation process. Moseme adopted a somewhat ambivalent attitude: it did not oppose the review but only the prayer for the award of the contract to King, and by

way of counter-application Moseme sought an order declaring that the contract was to remain extant in spite of the review. The Department, however, opposed King's application in all its aspects.

[7] The grounds for review were many, all attacking the award to Moseme while the real complaint was the disqualification of King. It was for instance said that the award to Moseme was unlawful because it had not scored the most points; and that the award was materially influenced by an error of law, was made on the basis of irrelevant considerations, or arbitrarily or capriciously.

[8] The high court (Jajbhay J) granted the relief sought by King. In relation to the review he found that the decision was taken arbitrarily; that the matter had not been considered properly; and that the Department had taken irrelevant considerations into account. I am prepared to accept for purposes of this judgment that the fact that there may have been 8CE and 7CE PE contractors who could have tendered but had failed to do so because they were unaware of the changed classification was not a ground for disqualifying King's tender. One would have thought that if the Council had concerns about those contractors it would have been a simple matter either to advertise or to revert to the higher classification by issuing another addendum or informing the tenderers of the decision.

[9] Having found that the award was reviewable, the court below held, without more, that it was just and equitable to set the decision aside. It then proceeded to consider whether to remit the matter to the Council for reconsideration or to award the contract to King because it was an exceptional case under PAJA.[3] It adopted the latter option on both a legal and a factual basis. The legal ground was that since King had scored the highest points and had submitted the lowest tender it was a foregone conclusion that the Department was obliged in law to award the contract to King, and that it would have been a waste of time to remit the matter for reconsideration.

[3] Promotion of Administrative Justice Act 3 of 2000 s 8(1)(c).

[10] The court, in exercising its discretion, added the factual consideration that it was not impracticable to set aside the decision because, although the work had begun, it was a 're-measurable' contract which meant that King would not be paid for something it had not done and, presumably, that Moseme would be paid for the work it had completed.

[11] In assessing whether or not the court had erred it is necessary to refer to the *Oudekraal* judgment where this court said the following:[4]

'It will be apparent from that analysis that the substantive validity or invalidity of an administrative act will seldom have relevance in isolation of the consequences that it is said to have produced – the validity of the administrative act might be relevant in relation to some consequences, or even in relation to some persons, and not in relation to others – and for that reason it will generally be inappropriate for a court to pronounce by way of declaration upon the validity or invalidity of such an act in isolation of particular consequences that are said to have been produced.'

[12] A declaration of invalidity of the tender award in this case can also not be considered in isolation. One has to consider the possible consequences. Only two possibilities were canvassed: the one favoured by the high court, namely setting aside the award and awarding the contract to King; and the one proposed by Moseme and the Department, which was to leave the contract extant. Acceptance of the latter alternative would make the review academic. Consequently, it is only necessary to decide whether as a matter of law the Council was obliged to award the contract to King and, if not, whether it was appropriate for the court below to have done so.

[13] King, in support of the court's legal finding, relied on s 2(1)(f) of the Preferential Procurement Policy Framework Act: contracts must be awarded to the tenderer who scores the highest points unless objective criteria justify the award to another tenderer. The first problem with the submission is that it fails to take into account the fact that the invitation to tender stated that tenders were to be awarded on the basis of the principle that work will be distributed amongst contractors or

[4] *Oudekraal Estates (Pty) Ltd v City of Cape Town & others* 2004 (6) SA 222 (SCA); [2004] 3 All SA 1 (SCA) para 38.

entities that have not previously been awarded contracts. This aspect was not considered by the Council – something it would have had to consider if it came to an assessment of King's tender vis-à-vis that of Moseme.

[14] More importantly, the submission ignores the preferential system introduced by the regulations under the Construction Industry Development Board Act. The scheme of things under r 25 is this: In soliciting a tender the employer must stipulate that only tender offers by contractors who are registered in the category of registration required in terms of r 25(3) may be evaluated in relation to that contract. To qualify for evaluation, the contractor grading designation must describe the nature of the works (in this case it is CE for civil engineering); and it must be based on the estimated tender value. On the evidence the estimated tender value at the time of the advertisement and thereafter exceeded R100m and, accordingly, the tender invitation had to refer to the higher classification, which it did. The regulation states further that on receipt of tender offers the employer must determine the final lowest category of registration required for their evaluation and that a tender offer received from a contractor who does not then qualify must be rejected. According to the adjusted tender amounts (including that of King) the tender fell within the higher classification (they varied between R107m and R137m). This means, as I understand the regulations, that King's tender had to be disqualified at that stage – irrespective of what the advertisement or tender documents had said – unless the employer exercised its discretion under reg 25(7A) to award the tender in prescribed circumstances to someone who has tendered outside his range. Whether the Council could or should have exercised its discretion is not the question. The fact is that King was not as a matter of law entitled to the contract and that the court below erred on this aspect.

[15] Something has to be said about the court's approach to the ease with which it considered it possible to replace Moseme with King, an approach supported on appeal on behalf of King. It is useful to begin with a reference to *Sapela.*[5] The high court had found, and this court confirmed, that the award of the tender was 'tainted'.

[5] *Chairperson: Standing Tender Committee & others v JFE Sapela Electronics (Pty) Ltd & others* 2008 (2) SA 638 (SCA); [2005] 4 All SA 487 (SCA).

The high court had set the award aside and referred the matter back to the tender body. But an appeal was lodged, which suspended the order, and the high court refused to uplift the suspension. This court had to consider whether the high court was correct in setting aside the contract and concluded that the high court had erred because, at the time the application was heard in the high court, the contract had been performed in part and the order, if implemented, would not only have been disruptive but would also have given rise to a host of problems not only in relation to a new tender process and also in relation to the work to be performed (para 27). The judgment in *Sapela* concluded (para 29):

'In my view, the circumstances of the present case as outlined above, are such that it falls within the category of those cases where by reason of the effluxion of time (and intervening events) an invalid administrative act must be permitted to stand. While the court *a quo* correctly found that the award of each of the three tenders was invalid when made, it appears not to have appreciated that it had a discretion to decline to set aside those awards.'

In other words, 'considerations of pragmatism and practicality' were relevant in the exercise of the discretion (para 28).

[16] The facts in *Eskom Holdings* were different, as was the result.[6] The contract involved ad hoc removal of material and its subsequent processing and sale. It was not an indivisible contract such as an engineering contract. The high court awarded the contract to the innocent tenderer. The order was suspended pending the appeal. When the appeal was heard the contract had just three months to run. Relying on *Sapela,* the argument was that it was impracticable at that stage to terminate the contract and award it to the innocent tenderer. This Court found that it was not impracticable in view of the nature of the particular contract (para 16).

[17] Two further comments should be made. The first is that the successful tenderer in *Eskom Holdings* was, at least in part, to blame for the tainted award because its tender was flawed (at para 14). That is not the position here. The second comment flows from an argument by Moseme that the contract was now near completion and that, because of the intervening facts, the order below should

[6] *Eskom Holdings Ltd & another v New Reclamation Group (Pty) Ltd* [2009] ZASCA 8; 2009 (4) SA 628 (SCA).

be set aside. There is a conceptual problem with the submission. The issue on appeal is whether the order granted by the court below was correct at the time it issued. Supervening events cannot affect the answer although they might conceivably affect enforceability on the ground of supervening impossibility.

[18] Then there is *Millennium Waste.*[7] This court said (at para 22):

'This guideline involves a process of striking a balance between the applicant's interests, on the one hand, and the interests of the respondents, on the other. It is impermissible for the court to confine itself, as the court below did, to the interests of the one side only.'

That contract, which was divisible, related to the provision of services, and this court did not, on finding a defect in the award, set the contract aside but crafted an order with care to suit the occasion.

[19] The judgment in *Millennium Waste* pointed out that the difficulty that is presented by invalid administrative acts is that they have often been acted upon by the time they are brought under review (at para 23):

'That difficulty is particularly acute when a decision is taken to accept a tender. A decision to accept a tender is almost always acted upon immediately by the conclusion of a contract with the tenderer, and that is often immediately followed by further contracts concluded by the tenderer in executing the contract. To set aside the decision to accept the tender, with the effect that the contract is rendered void from the outset, can have catastrophic consequences for an innocent tenderer, and adverse consequences for the public at large in whose interests the administrative body or official purported to act.'

[20] Against that background I proceed to consider the appropriateness of the learned judge's premise that it was not impracticable to set aside the decision because, although the work had begun, it was a 're-measurable' contract which meant that King would not be paid for something it had not done and, presumably, that Moseme would be paid for the work it had completed. I believe that the high court did not consider fully the implications of the order in the context of a contract that has to be measured.[8] First, each tenderer will weight and price different items

---

[7] *Millennium Waste Management (Pty) Ltd v Chairperson of the Tender Board: Limpopo Province & others* [2007] ZASCA 165; [2008] 2 All SA 145; 2008 (5) BCLR 508; 2008 (2) SA 481 (SCA).

[8] Compare *Darson Construction (Pty) Ltd v City of Cape Town* 2007 (4) SA 488 (C), [2007] 1 All SA 393 (C).

differently. Any particular costed item will as a matter of course differ from tender to tender. Then there are items, such as preliminaries and establishment, which in themselves provide no value for the employer and for which each contractor would in principle be entitled. But it goes further. The setting aside of a contract has a number of consequences. The first contractor may not be able to claim under the revoked contract and be left with an enrichment claim, and the employer may not have a claim for defective workmanship. The second contractor may even have a claim for damages against the employer in respect of loss of profit on the executed part of the contract because it has now become contractually entitled to the whole contract.

[21] These problems may not be of any consequence in the case of corruption or fraud or where the successful tenderer was complicit in the irregularity.[9] But, as said, that is not the case. The learned judge, in reaching his conclusion, failed to have any regard to the position of the innocent Moseme. He also did not consider the degree of the irregularity. He assumed incorrectly that King was entitled to the contract and he underestimated the adverse consequences of the order. I therefore conclude that he erred in the exercise of his discretion. This means that King, in spite of the imperfect administrative process, is not entitled to any relief. Not every slip in the administration of tenders is necessarily to be visited by judicial sanction.

[22] It follows that the appeal must be upheld with costs. Costs of two counsel cannot be justified. The order as granted in favour of King has to be set aside. Moseme's counter-application that the contract should have remained extant, which was dismissed, consequently becomes academic. It was in any event unnecessary and did not cause any additional costs.

[23] The following order issues:

1 The appeal is upheld with costs.

2 The order of the court below is set aside and replaced with an order dismissing the application with costs, and making no order on the counter-application.

---

[9] *Millennium Waste* para 26 and compare *Minister of Finance & others v Gore NO* 2007 (1) SA 111 (SCA); [2007] 1 All SA 309 (SCA).

_____

L T C Harms

Deputy President

THERON AJA:

[24] I have had the benefit of reading the judgment of my colleague, Harms DP. I concur with the reasoning and the order in respect of the merits, but I do not agree with the costs order.

[25] The legislative framework for aggrieved parties to protect their rights in relation to tender procurement has been comprehensively set out by Harms DP. However, as this case demonstrates, it is often extremely difficult for aggrieved parties, such as King, to enforce their rights in our courts. The practical difficulties faced by an aggrieved tenderer were recognised by this court in *Millennium Waste*[10] where Jafta JA said the following:

'In conclusion there is one further matter that needs to be mentioned. It appears that in some cases applicants for review approach the High Court promptly for relief but their cases are not expeditiously heard and as a result by the time the matter is finally determined, practical problems militating against the setting-aside of the challenged decision would have arisen. Consequently the scope of granting an effective relief to vindicate the infringed rights becomes drastically reduced. It may help if the High Court, to the extent possible, gives priority to these matters.'

[10] *Millennium Waste Management (Pty) Ltd v Chairperson, Tender Board: Limpopo Province & others* 2008 (2) SA 481 (SCA) para 34.

In appropriate circumstances, a court should be innovative and use its discretion as a tool 'for avoiding or minimising injustice'.[11] Courts should not shy away from carefully fashioning orders which meet the demands of justice and equity. In terms of s 8 of the Promotion of Administrative Justice Act 3 of 2000 a court, in proceedings for judicial review, is empowered to grant 'any order that is just and equitable'.

[26] King was entitled to participate in a procurement process that was fair, equitable, transparent, competitive and cost-effective.[12] I accept, as does Harms DP, for purposes of this judgment, that it was the Department's negligence and unjustified disqualification of King's tender that resulted in the latter approaching the high court for relief. King approached the court expeditiously in order to protect a legitimate interest but it has not, in my view, received effective protection or relief. I am further of the view that there are special circumstances, as was found by Scott JA in *Sapela Electronics*,[13] why the Department should pay King's, as well as Moseme's, costs in the court below.

_____

L Theron

Acting Judge of Appeal

[11] *Oudekraal Estates (Pty) Ltd v City of Cape Town & others* 2004 (6) SA 222 (SCA) para 36.

[12] Section 217(1) of the Constitution.

[13] *Chairperson, Standing Tender Committee & others v JFE Sapela Electronics (Pty) Ltd & others* [2005] ZASCA 90, 2008 (2) SA 638 (SCA), [2005] 4 All SA 487 (SCA) para 30.

APPEARANCES:

FIRST & SECOND APPELLANT:	J G Wasserman SC Instructed by Van der Meer & Schoonbee Attorneys, Bedfordview Lovius Block Attorneys, Bloemfontein
THIRD APPELLANT:	M G Khoza SC A P S Nxumalo Instructed by: The State Attorney, Johannesburg The State Attorney, Bloemfontein
FIRST AND SECOND RESPONDENTS:	S du Toit SC Q G Leech Instructed by Earle Friedman & Associates, Johannesburg Claude Reid Incorporated Bloemfontein