



**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT**

Case No: 481/2012
Reportable

In the matter between:

CSHELL 271 (PTY) LTD

APPELLANT

and

OUDTSHOORN MUNICIPALITY

RESPONDENT

Neutral citation: *CShell v Oudtshoorn Municipality* (481/2012) [2013]
ZASCA 62 (24 May 2013)

Coram: Navsa, Leach, Petse JJA and Swain and Zondi AJJA

Heard: 2 May 2013

Delivered: 24 May 2013

Summary: Award of tender to a company to be formed – pre-incorporation contract – company never formed – pre-incorporation contract not ratified. Appellant sought order reviewing a decision by the municipality to cancel the award of the tender, alleging that it had acquired rights to the contract. Held that the appellant lacked the necessary locus standi to challenge the decision of the municipality as it was not the entity entitled to adopt the pre-incorporation contract and consequently acquired no rights under that contract.

ORDER

On appeal from: Western Cape High Court, Cape Town (Henney J sitting as court of first instance):

The appeal is dismissed with costs.

JUDGMENT

SWAIN AJA (NAVSA, LEACH AND PETSE JJA AND ZONDI AJA
concurring):

[1] The origin of the present dispute lies in a call for tenders, made by the respondent, the Oudtshoorn Municipality (the municipality) in an advertisement during May 2006, for the purchase and development of a piece of land described as Erf 5366, portion of erf 1 Oudtshoorn, 15 hectares in extent.

[2] The municipality awarded the tender to a company to be formed, variously described in the papers as 'Newco' (ie new company) and 'Newco: S Afrika'. For convenience I intend to refer to it simply as 'Newco'. Its tender submitted to the municipality contained a specified constituent profile of natural persons, who were to be its shareholders. The appellant, CShell 271 (Pty) Ltd (Cshell) sought to enforce the tender. As a result the municipality purported to cancel the award. One of the stated reasons for the cancellation was that CShell did not have the same constituent profile of shareholders as contained in the bid. The significance of this alteration was that the specific black empowerment percentage profile amongst CShell's shareholders was drastically reduced, with the result that the black empowerment composition of the company had changed. The municipality contended that CShell was

accordingly not the same company as that which had to be formed and to whom the tender had been awarded.

[3] This resulted in CShell seeking an order by way of application before the Western Cape High Court (Henney J) to review and set aside this decision, which was dismissed with costs.

[4] In response and by way of a counter-application, the municipality sought an array of orders, two of which were granted by the court a quo, together with an order of costs. It was declared that the municipality had not awarded any tender to CShell and that the tender which had been awarded to Newco, had been lawfully cancelled by the municipality.

[5] CShell was granted leave to appeal, by the court a quo, against the dismissal of the main application as well as the relief granted in terms of the counter-application.

[6] In order to place the dispute in context, it is necessary to briefly set out the salient facts as they appear from the correspondence exchanged between the parties.

[7] The relevant portion of the advertisement calling for tenders read as follows:

‘Kennis geskied hiermee dat die Munisipale Raad van Oudtshoorn voornemens is om ingevolge Artikel 124(2)(a) van Ordonnansie 20 van 1974, Erf 5366, (± 15 ha) te vervreem.

Erf 5366 Oudtshoorn word aangebied vir die doeleindes van enige ontwikkeling, wat versoenbaar is met die omgewing en dus moet tenders ook vergesel word van ontwikkelingsvoorstelle wat volledige detail van die volgende insluit:

(i) Omskrywing van die voorstel, ingesluit:

(a) Profiel/samestelling van die betrokke firma/instansies.’

[8] The tender submitted on behalf of Newco provided in part as follows:

'PROFIEL / SAMESTELLING VAN DIE AANBIEDER / ONTWIKKELAAR

Newco is 'n maatskappy wat spesifiek geregistreer sal word vir die doeleindes van hierdie aanbod en die gepaardgaande ontwikkeling. (My emphasis.)

Aandeelhouders, Direkteure en belanghebbendes van die aanbieder bestaan uit die volgende persone en instansies:

1. Me Sandra Afrika – 'n plaaslike inwoner en welbekende sakevrou en konstruksiekontrakteur van Oudtshoorn. Me Afrika het geen bekendstelling nodig nie en haar betrokkenheid in die Oudtshoorn sakewêreld asook opheffing en sosio-ekonomiese bydraes in die groter Oudtshoorn is legio.

Me Afrika is die mentor en leier van die Bemagtigingsaandeelhouders van Newco. Sy is ook die persoon wat hierdie aanbod geïnisieer en gedryf het.

2. Mnr Johnny Forbes. Welbekende Suidkaapse sakeman nou woonagtig in Oudtshoorn. Mnr Forbes het gevestigde sakebelange in Oudtshoorn en is 'n bekende in die nasionale kettingwinkelkringe.'

The tender was signed by SA Coetzee 'namens Newco', understandably so as the company was yet to be formed.

[9] The award of the tender dated 8 September 2006 provided in part as follows:

'Hiermee u formeel in kennis te stel dat die Munisipale Raad van Oudtshoorn per Raadsbesluit nommer 71.3/08/06 as volg besluit het.

1. Dat 'n gedeelte van Erf 5366, Oudtshoorn (\pm 15 Ha) vervreem word aan *Newco* ('n *maatskappy wat gestig staan te word*), hierna verwys as die "Ontwikkelaar", @ R5 000 000.00 (BTW ingesluit, maar uitgesluit enige ander koste voortspruitend uit sodanige transaksie.)

2. Dat die ontwikkelaar skriftelik dienooreenkomstig hierdie besluit in kennis gestel word en *daar binne 3 maande vanaf datum van die betrokke skrywe, 'n regspersoon gestig word in wie se naam die grond oorgedra moet word.*

3. Dat Munisipaliteit Oudtshoorn 'n prokureur sal aanstel om op koste van die Ontwikkelaar, *'n koop-ooreenkoms op te stel, wat binne 1 maand vanaf registrasie as maatskappy onderteken moet wees.*

4. Dat daar binne 2 weke vanaf datum van kontrakondertekening 'n bankwaarborg vir die volle verkoopprys (R5 000 000.00 BTW ingesluit) gelewer word aan die Munisipale Bestuurder.' (My emphasis.)

[10] The response to the award of the tender by Coetzee by way of a letter dated 12 October 2006 was, in part, as follows:

'Ons bevestig hiermee dat die voorwaardes soos uitgestip in u skrywe deur die tenderaar aanvaar word.

Ons bevestig voorts dat ons reeds opdrag aan ons ouditeure gegee het om 'n Regspersoon te registreer in wie se naam die grond oorgedra sal word. Ons voorsien u eersdaags van die besonderhede. (My emphasis.)

Ons let daarop dat die Oudtshoorn Munisipaliteit 'n prokureur sal aanstel op die ontwikkelaar se koste om 'n ooreenkoms te boekstaaf. Ons ontvang graag bevestiging van u welke prokureur u aanstel. In die alternatief is die ontwikkelaar bereid om self 'n prokureur aan te stel wat 'n ooreenkoms kan opstel ingevolge u instruksies.'

[11] This was followed by a further letter dated 2 February 2007 from Coetzee in which the municipality was advised as follows:

'Ons bevestig dat ons ouditeure 'n regspersoon gestig het soos in ons skrywe 12 Oktober 2006. (My emphasis.)

Die regspersoon: Cshell 271 (Pty.) LTD

Reg. No. : 2006/002797/07

Let net daarop dat die Oudtshoorn Munisipaliteit 'n prokureur moet aanstel op die ontwikkelaar se koste om 'n ooreenkoms te boekstaaf. Ons ontvang graag bevestiging van welke prokureur u aanstel.'

[12] A delay of some two years then followed during which period CShell instead of Newco was engaged in obtaining the necessary environmental authorisation. By letter dated 26 May 2009 one Van Rensburg stated the following:

'Please find below details of the registered Company as requested in clause 2 of your letter dated 8 September 2006, Ref. ISAZISI 5366 MOSSELBAAI DRIEHOEK, and as per our confirmation of registration dated 12 October 2006. (My emphasis.)

Registered: C Shell 271 (Pty) Ltd

Reg No 2006/002797/07

Vat No 4360251252

Shareholders

25% Troban Property Holdings & Investments (Pty) Ltd

25% Sandra Africa

25% 57 Victoria Street George (Pty) Ltd

25% The Manors Trust.'

[13] The next relevant step in the proceedings was a letter written by Van Rensburg on behalf of CShell dated 12 May 2010 in which the following was stated:

'As discussed we would like the council to grant written consent for Cshell 271 (Pty) LTD. Reg. no 2006/002797/07 to change the legal entity registered with council to a new entity to be nominated.

Reasons: When we started this project we anticipated a development of approximately 8000 sqm. which is considered to be a small development. *To fulfil the tender requirements we registered a shelf company, **Cshell 271 (Pty) LTD.** as legal entity with the local authority.* The shelf company having no assets or substance could or would never have been able to provide the necessary surety for a large development. . . . As a consequence we were forced to increase the development to a 25 000 sqm. building, which clearly requires a lot more financial investment. In order to meet the financial requirements we obtained the interest of a large fund management comp. with whom we are having discussions. And express requirement of this company is that the development be undertaken in a development comp. with assets and security to secure a loan suitable for this type of project.' (My emphasis.)

[14] The reply of the municipality dated 14 June 2010 reads as follows:

'Die administrasie is van mening dat die Raad onder geen omstandighede 'n ooreenkoms met C SHELL 271 (Pty) Ltd kan sluit nie. Regstegnies moet ons op hierdie stadium die vraag beantwoord of die Raad die tender aan C SHELL sou toeken soos die status van laasgenoemde nou daarna uitsien. Die tender is aan Newco: S Afrika toegeken op gronde van wat die maatskappy op daardie stadium getender het, asook

die status van die maatskappy. Ons is van mening dat die status van C SHELL en Newco: S Afrika wesenlik verskil.'

[15] In reply, Van Rensburg, on behalf of CShell by way of a letter dated 17 June 2010, stated the following:

'It is therefore alarming to see that the municipality now do not acknowledge CShell 271 (Pty) LTD. *when it is was called for in the tender evaluation that a registered legal entity must be formed to transfer the property into and to act as developer.* (My emphasis.)

The tender evaluation did not call for Newco to be used.

...

I notice that you refer to the tender being awarded to "Newco: S Afrika" but the award document has no reference to that specifically. If the tender called for a specific composition we were unaware of this position as the pre tender, award and tender evaluation documents did not make mention of this requirement.'

[16] In an e-mail dated 26 August 2010 the said Van Rensburg stated the following:

'Dit blyk dat die vraag of ons die regspersoon kan verander 'n onnodige vertraging geskep het en dat ons soos voorheen die aansoek onttrek en wil voortgaan met die CShell 271 (Pty) LTD.'

[17] Attorneys for CShell by way of a letter dated 22 November 2010 reiterated that:

'As remarked above, *CHELL 271 (Pty) Ltd was incorporated pursuant to the award of the abovementioned tender as the envisaged Newco and legally therefore constitutes the successful tenderer to which the development property must now be transferred.*

...

It has now come to our client's attention that your Council is of intent to revisit its previous resolution to award the abovementioned tender to our client. Apparently your Council has taken legal advice from counsel to this effect and that a Council's meeting has been scheduled for this purpose for 23 November 2010. The advice of your counsel is apparently based on alleged procedural irregularities to the tender process.

Our client strongly disputes any such irregularities and has in any event been advised that it will legally be impossible for your Council to revisit its award of the tender. Your Council is what is known in administrative law terms, *functus officio* with regard to the award of the abovementioned tender.'

...

Our client therefore takes the view that your Council is legally bound by the award of the tender to the Newco, now known as CSHELL 271 (Pty) Ltd.' (My emphasis.)

[18] The reply of the municipality dated 1 December 2010 was as follows:

'Hiermee wens ons om op rekord te plaas dat die Raad per Raadsbesluit (nr.63.42/11/10) 'n besluit geneem het dat die grond nie aan Newco vervreem gaan word. Daar is egter verder besluit dat hierdie grond heradverteer word vir enige ontwikkelingsvoorstelle.

Die redes hiervoor is reeds op 'n vorige geleentheid skriftelik en mondelings aan u kliënt oorgedra.'

[19] A request by CShell's attorneys for written reasons for the decision resulted in the following reply from the municipality:

'As regards to your request for reasons in the above regard I will gladly oblige, but before doing so I need to direct your attention to some misconceptions.

Firstly, the purported decision by the Municipal Council, i.e. number 71.3/08/06, conveyed per letter dated 8 September 2006, was adopted, not by the Municipal Council, but in fact by the erstwhile *Tender Committee* on 14 August 2006;

Secondly, the "decision" to award the tender 16 of 2006 was taken in terms of section 124(2)(a) of the *Municipal Ordinance* No. 20 of 1974 (the *Municipal Ordinance*), despite it being impliedly repealed by section 14 of the *Local Government: Municipal Finance Management Act*, No. 56 of 2003 (the *MFMA*).

The "decision" by the Tender Committee was *ab initio* unlawful as –

(a) it was founded upon the provisions of an impliedly repealed *Municipal Ordinance*;

(b) the Tender Committee lacked the necessary authority to alienate immovable property and even if it had been conferred delegated authority it would nevertheless have been unlawful as the power to alienate such assets is incapable of being delegated; and

(c) the peremptory provisions of section 14 of the MFMA were not complied with.

In addition, even if the *Tender Committee's* decision had been lawful, your client nevertheless failed to comply with all the conditions of the "award". Your client has only complied with the condition pertaining to environmental impact assessment. The decision by the Municipal Council to repudiate the "award" was furthermore occasioned by the fact that any claims that your client may have had against the Municipality would in all probability have prescribed.'

[20] As is apparent from the exchange of correspondence between the parties, the response by the municipality to CShell's contention that the municipality was legally bound by the award of the tender to Newco 'now known as CShell 271 (Pty) Ltd' encompassed a number of legal standpoints. It was initially stated that the municipality would not conclude any agreement for the sale of land with CShell. The municipality then alleged that the council of the municipality had resolved not to alienate the land to CShell. When reasons were furnished by the municipality for this decision, it was stated that the municipality had decided to repudiate the award. A copy of the relevant resolution was however not included in the papers. The municipality in its affidavit variously stated that the decision had been to 'cancel the tender', there was a 'repudiation of the award of the tender' and the award was 'cancelled'. The confusion was compounded by the municipality's reply to CShell's allegation that the decision 'to cancel the applicant's tender was unlawful and unconstitutional'. The municipality stated that:

'What the municipality purported to do was to cancel the existing agreement with Newco: S Afrika. In the alternative for an order reviewing and setting aside the award of the tender. In relation to the latter the municipality accepts a court order is required.'

The following added to the confusion:

'For purposes of cancelling the award of the tender as a consequence of non-compliance, the municipality is not obliged to do so solely by way of court proceedings.'

[21] The legal position is as follows. The advertisement placed by the municipality inviting tenders for the purchase of the land constituted an offer. The submission of the tender by Coetzee 'namens Newco', a company to be

registered specifically for the purposes of the tender and the subsequent development, in response to the invitation, constituted the acceptance of the offer to enter into an option contract. By submitting the tender, an option contract was concluded between Coetzee 'namens Newco', and the municipality. The subsequent award of the tender to 'Newco ('n maatskappy wat gestig staan te word)' constituted the exercise of the option by the municipality. On the award of the tender the relationship of the parties was that of ordinary contracting parties. See *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2006 (3) SA 151 (SCA) at 158C-E and 171B-C.

[22] The award of the tender by the municipality to Newco, a company to be registered, provided that within three months 'a regs persoon gestig word in wie se naam die grond oorgedra moet word' and within one month of its registration, the company would be obliged to sign the agreement for the sale of the land. Coetzee confirmed that a company was being registered into whose name the land would be transferred and that details of this company would be furnished to the municipality in due course. As pointed out by Harms JA in *Steenkamp* at 169H-I:

'a company is, prior to incorporation, not yet in existence and cannot perform a juristic act such as submitting a tender, and . . . no one can at that stage act as its agent because one cannot act as the agent of a non-existent principal unless a pre-incorporation agreement is concluded, which is later ratified . . .'

[23] The award of the tender to Newco was clearly a pre-incorporation contract which was to be ratified by the company after its registration. Of special significance in this case was that the company to be incorporated had to have a specific black empowerment percentage profile amongst its shareholders, which the bid contemplated. Afrika was described in the bid as the mentor and leader of the controlling shareholders and it was stated that Afrika had initiated and driven the bid. It was common cause that Afrika was a historically disadvantaged individual and that at the time of the submission of the bid she held an 80 per cent share in the company to be formed. This percentage shareholding was relied upon by the municipality when the tender was awarded.

It was also common cause that by May 2009 this shareholding had been dramatically reduced to 25 per cent.

[24] Purporting to comply with the requirement that a company be registered, Coetzee, writing on behalf of B C Design (the architects and project managers for the development) advised the municipality by way of the letter dated 2 February 2007 that their auditors had established the requisite legal entity, details of which were provided. The details were those of CShell. Although Van Rensburg in the letter dated 12 May 2010 referred to CShell as 'a shelf company', in the letter dated 17 June 2010 he confirmed that the tender required 'that a registered legal entity must be formed to transfer the property into and to act as developer'. That CShell understood what was required in this regard is made clear by the letter dated 22 November 2010 from CShell's attorneys where the following is stated: ' . . . CSHELL 271 (Pty) Ltd was incorporated pursuant to the award of the abovementioned tender as the envisaged Newco and legally therefore constitutes the successful tenderer. . . '

[25] CShell in its founding affidavit confirmed the information conveyed by Coetzee in the letter dated 2 February 2007 in the following words: ' . . . B C Design advised the municipality that its auditors had established the applicant to operate as Newco for the purposes of the tender.' This information was false. Afrika in her affidavit filed in answer to the municipality's counter-application, belatedly disclosed for the first time that CShell had been registered on 31 January 2006, as a shelf company and was acquired by Coetzee, at some time before 31 May 2006. CShell was accordingly in existence at the time of the submission of the tender and its award and was never incorporated pursuant to the award of the tender, as the envisaged 'Newco'.

[26] The attempts by Afrika in her affidavit to alter the clear meaning of the words describing the entity in the pre-incorporation contract concluded as a consequence of the award of the tender, are without merit. She stated that together with Coetzee and Forbes they had decided that 'the bid . . . should be presented on behalf of a vehicle or entity to be nominated or established in due

course, which for convenience we described as Newco'. Although acknowledging that the bid indicated that Newco was a company to be established, she sought to explain that what they understood and intended was that 'the development would be undertaken by an appropriately established special purpose vehicle, which we foresaw as being a company'. She added that 'it was of no consequence to us whether the "establishment" of such company was in the form of the acquisition of a suitable shelf company or by the incorporation and registration of a company'.

[27] The wording of the contract concluded as a result of the award of the tender is clear. A company was to be registered which would in law have to ratify and adopt the pre-incorporation contract concluded by Coetzee on behalf of Newco. This, however, was never done. Furthermore, the company to be incorporated would have the specific black empowerment percentage profile amongst its shareholders, in accordance with the bid and its award. The percentage shareholding of CShell as reflected in the letter of 26 May 2009 did not meet these criteria.

[28] Coetzee in concluding the pre-incorporation contract quite clearly did not act as the agent for CShell, which was in existence at the time. In addition, Coetzee did not act as a principal, as he acted at all times as the agent for the company to be formed. There can accordingly be no basis for any argument that CShell acquired any rights to the contract, by way of a stipulatio alteri, in its favour. See J A Kunst et al (eds), *Henochsberg on the Companies Act* service issue 28, at 61. It is also clear by reference to the express terms of the contract, that Coetzee never acquired the right to sue personally for specific performance of the contract. See *Nine Hundred Umgeni Road (Pty) Ltd v Bali* 1986 (1) SA 1 (A) at 6D-E.

[29] In this regard counsel, who appeared for CShell, submitted in his heads of argument that 'Newco was merely an entity to be identified or nominated, which duly took place with the nomination of CShell'. For the reasons set out above, this submission is without foundation. No provision is made in the pre-

incorporation contract for the nomination by Coetzee of any entity to acquire any rights under the contract and in any event, in order to do so he would have to have acted as a principal, which he never did. In addition as pointed out above, the specific black empowerment percentage profile amongst CShell's shareholders differed dramatically from that which was presented in respect of the company to be formed, at the time of the bid and its award. It was only after a delay of some 2½ years that the altered percentage shareholding was belatedly revealed.

[30] CShell accordingly never acquired any rights in the contract concluded as a result of the award of the tender. The inevitable consequence of this conclusion is that the whole legal basis for CShell's claim, based as it is upon a valid and binding award of the tender to CShell, does not exist. CShell quite clearly did not possess locus standi to seek a review of the municipality's decision to cancel 'the award' of the tender. The refusal of the relief sought by CShell in the court a quo, albeit on different grounds, was accordingly correct.

[31] As regards the relief granted by the court a quo in the counter-application, it granted an order declaring that the municipality did not award the tender to CShell, on the basis that it was awarded to 'Newco: S Afrika'. The basis for the grant of this order was that the black empowerment percentage profile of the shareholders in CShell had changed. It is clear that the court a quo erred in finding that the tender had been awarded to 'Newco: S Afrika'. Newco was never a legal entity to which the tender could be awarded, the name simply describing what was intended by the parties, namely that a 'new company' would be registered. Afrika never sought the award of the tender in her personal capacity. The confusion in the reasoning of the court a quo was caused by a failure to appreciate the legal basis upon which the tender was awarded. Consequently, the order declaring that the tender was not awarded to CShell, albeit partly granted for the wrong reasons, was correctly made.

[32] A further order was granted by the court a quo in the counter-application, declaring that the municipality lawfully cancelled the award of the

tender. By virtue of the finding that CShell acquired no rights in the contract concluded as a result of the award of the tender, it lacked locus standi to seek a review of the decision of the municipality to cancel the award of the tender. The municipality sought to do so on the grounds that the specific black empowerment percentage profile amongst CShell's shareholders had been altered, and that the award of the tender had not been made in accordance with s 14 of the Local Government: Municipal Finance Management Act 56 of 2003. It is therefore unnecessary to decide whether this order should have been granted by the court a quo.

[33] A number of other issues were argued before the court a quo and dealt with in its judgment, including the relevance of the decision in *Oudekraal*¹, some of which were debated on appeal. It is unnecessary to deal with these further issues for the reasons set out above.

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

The appeal is dismissed with costs.

K G B SWAIN
ACTING JUDGE OF APPEAL

¹ *Oudekraal Estates (Pty) Ltd v City of Cape Town & others* 2004 (6) SA 222 (SCA).

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