CONSTRUCTION INDUSTRY DEVELOPMENT BOARD ("CIDB")

CASE SUMMARIES AND ANALYSES

APRIL 2012 – JUNE 2012

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CASE SUMMARY: APRIL 2012

Esor Africa (Pty) Ltd / Frankl Africa (Pty) Ltd Joint Venture v Bombela Civils Joint Venture (Pty) Ltd

South Gauteng High Court, Johannesburg

(38844/11) [2012] ZAGPJHC 54 (decided on 11 April 2012)

FACTS: This case deals with the position of a contractor who applies for provisional sentence based on an undisputed payment certificate but is nonetheless not availed relief on the basis of a disputed counterclaim by the employer.

The plaintiff sued for provisional sentence based on two Engineers Progress Certificates for the amounts of R868 090,32 and R278 338,16 respectively, pursuant to two agreements concluded between the parties in regard to the Gautrain Project: the first for the design and construction of piling earth retaining structures and construction of piling understructures, and the second, for the provision of Sandton station car park piling.

The defendant did not dispute the validity of the two certificates relied upon by the plaintiff but opposed the application by way of a counterclaim based on an Engineer's Progress Certificate issued pursuant to a third agreement concluded between the parties on the same project, reflecting a negative amount to be paid by the plaintiff in the sum of R1 577 244, 96, which is in excess of the amounts claimed by the plaintiff. The plaintiff disputed the counterclaim and it was common cause that the dispute, in terms of the third agreement, must first be referred to the Dispute Adjudication Board for adjudication before litigation could be instituted.

The defendant contended that the determination of the plaintiff's claims ought to be suspended pending the determination of the defendant's counterclaim.

The court took note of the fact that there was authority for the proposition that that the court is vested with a discretion to either refuse or postpone provisional sentence where the liquid document upon which an action for provisional sentence is based forms part of a larger transaction between the

parties and where the probabilities in the principal case favour the defendant or they are approximately evenly balanced.

Van Oosten J held that, while whilst the three agreements in issue were entirely separate and the plaintiff's claims under the first two agreements were undisputed, it was important to note that all three contracts regulated the contractual relationship between the parties regarding construction works in the same project. While the defendant's counterclaim was disputed, it *prima facie* appeared to him to be *bona fide* and it would accordingly result in an injustice should provisional sentence be granted in the absence of the defendant's counterclaim.

The learned judge accordingly exercised his discretion in favour of the defendant and made an order postponing the action for provisional sentence pending finalisation of the proceedings before the Dispute Adjudication Board or arbitration proceedings for the adjudication of the defendant's counterclaim.

ANALYSIS: Unjustified delays 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 the court may decline to grant relief to a party suing for provisional sentence (which is a quicker and cheaper remedy) on a liquid document (such as a payment certificate) even where the liquid document itself is not disputed.

CONSTRUCTION INDUSTRY DEVELOPMENT BOARD

CASE SUMMARY: APRIL 2012

MACP Construction (Pty) Ltd v Greater Tzaneen Municipality and Another

North Gauteng High Court, Pretoria

(5906/2012) [2012] ZAGPPHC 55 (decided on 12 April 2012)

FACTS: This case deals with a tenderer whose bid was disqualified on price on the basis that its tendered price, in relation to the average price of the other tenders received, was so low as to pose the risk of it being unable to complete the work.

The first respondent municipality had invited bids for the upgrading of a road in its jurisdiction. It received 15 bids. Because of previous difficulties encountered by the Municipality, it appointed to the Bid Evaluation Committee a consulting engineer in private practice to evaluate the bids.

The consulting engineer analysed the bids and recommended the elimination of six tenderers on the grounds of various deficiencies in their tenders which were non-responsive. He then, using his professional experience, estimated the cost of construction, which he concluded was R33 956 379, 06. He then added up the sums tendered by the fifteen tenderers (including in this sum the tenders of the six tenders already recommended for elimination) and divided the sum of the fifteen tenderers by fifteen, thereby arriving at an arithmetical average price of R33 490 740,66. He then compared the tendered prices of the remaining nine tenderers with both his estimated price and the arithmetical average.

Using this data, the consulting engineer concluded that the applicant's tendered price deviated from the estimated price by 30% and from the average price by 29%, while that of the eventual successful bidder, Makgetsi, deviated by 2% from the estimated price and 1% from the average price. Given the large variance between the applicant's tendered price, on the one hand, and the estimated price and average price, on the other, the consulting engineer decided that the applicant's price was so lowly priced as to pose the risk of it being unable to complete the work. The applicant's tender was disqualified on account of its price being unacceptable and, in

the event, Makgetsi's tender was accepted. Hence the applicant's review application was launched.

In its application, the applicant attacked the use of the arithmetical average as a yardstick as being irrational. In response, the Municipality contended that the acceptance of tenders which are so low that the successful tenderer is unable to complete the work at the tendered price had in the past caused many problems for the Municipality, hence the present stratagem.

In his judgment, Tuchten J condemned the use of the arithmetical average, saying:

> "In my view the arithmetical average calculation is both unscientific and irrational. Firstly, it takes no account of the possibility that one or more of the tenderers might, by legitimate methods have lower costs of production relative to its competitors. Secondly, it takes no account of the possibility that some of the tenderers might, in the knowledge that the arithmetical average was to be employed as a yardstick, have deliberately tendered high in order to have their lower priced competitors eliminated. Thirdly, it raises to the level of objective reliability the tendered price of each of the tenderers and takes no account of the possibility that some of the tenderers might not be proven participants in the market in which the tenders were made."

However, the learned judge proceeded to indicate that he could see no legitimate objection against the employment of a duly qualified and impartial expert in order to advise the Municipality or the employment by such an expert in the evaluation process of his or her own expert estimate of a reasonable price for the work or commodity concerned. In addition, he was of the view that the Municipality was entitled to eliminate from consideration any tenderer whose tender has been determined by objective, market related criteria to be so low that if its tender were accepted, the Municipality would run the risks of substandard work or a demand for additional funds.

In the event, the court reviewed and set aside the decision to award the tender to Makgetsi and remitted the matter back to the Municipality for reconsideration without the impugned arithmetical average.

ANALYSIS: This case is relevant to the cidb and the construction industry at large. The principle in this case is that, while an employer is entitled to eliminate from consideration any tenderer whose tender is so low that if its tender were accepted, the employer would run the risks of substandard work or a demand for additional funds at a later stage, such a determination must be made according to objective and market related criteria.

CONSTRUCTION INDUSTRY DEVELOPMENT BOARD

CASE SUMMARY: MAY 2012

D F S Flemingo SA (Pty) Ltd v Airports Company South Africa Ltd and Others

North Gauteng High Court, Pretoria

(70057/2009) [2012] ZAGPPHC 66 (17 May 2012)

FACTS: This case deals with the effect of an employer considering additional unsolicited offers made by a bidder which are not sanctioned by the bid document without disclosing such additional offers to the other bidders on the integrity of the bid process.

The first respondent, the Airports Company South Africa ("*ACSA*"), had invited bids from interested retailers to submit proposals to lease core duty and VAT-free retail space in the international department and arrival airside terminals at three of its international airports. The bid document made it clear that the bid would be evaluated strictly according to the evaluation procedure and criteria set out in its section III.

The applicant and the eventual successful bidder, Big Five, both submitted bids. After evaluation of all bids, ACSA's Bid Evaluation Committee ("*the BEC*") recommended that Big Five, as the entity scoring the highest points, be awarded the tender. However, the recommendation also drew attention to the fact that Big Five had offered to pay ACSA a further amount of 12,5% of its after tax profit as additional rental.

This raised the ire of the applicant, who complained in its review application that this further 12, 5% constituted an additional term unsolicited and outside the parameters of the constraints of the tender invitation, which rendered Big Five's bid liable to be disqualified.

In his judgment, Phatudi J accepted that the BEC had not taken this 12, 5% into consideration in assessing and evaluating the bids but that it had played a role in the final recommendation and the awarding of the tender to Big Five and thus should have been disclosed to the other bidders. Failure to disclose the offer to the applicant and other bidders rendered the process unfair.

In the event, the learned judge ruled that consideration by ACSA of the further 12, 5% offer was not in accordance with a procurement system that is fair and transparent with other bidders and thus the tender stood to be set aside.

ANALYSIS: This case is relevant to the cidb and the construction industry at large, in that it establishes the principle that an employer may not consider additional unsolicited offers made by a bidder which are not sanctioned by the bid document without disclosing such additional offer to the other bidders.

CONSTRUCTION INDUSTRY DEVELOPMENT BOARD

CASE SUMMARY: MAY 2012

Zikhulise Cleaning Maintenance and Transport CC v Commissioner for South African Revenue Services and Another

North Gauteng High Court, Pretoria

(28084/2012) [2012] ZAGPPHC 91 (29 May 2012)

FACTS: This case considers the question whether SARS may withdraw a tax clearance certificate without affording the taxpayer an opportunity to make representations.

The applicant was a close corporation that was in the business of constructing affordable housing through government tenders, for which it required a tax clearance certificate issued by SARS to be able to conduct its business. SARS had, on 17 January 2012, issued such a certificate valid for the ensuing year.

However, on 16 March 2012, SARS wrote to the applicant, stating that the certificate had – for reasons mentioned in the letter – been rendered inactive from the date of the letter. Upon receipt of the letter, the applicant queried SARS. On 26 April SARS replied, setting out various legislative provisions, stating that it was in the process of considering whether to withdraw the certificate, and inviting the applicant to make representations by 11 May if the applicant disputes the contention that its tax affairs were not in order. An application to court was the sequel.

In his judgment, Wright AJ made short work of the case, concluding that the words, 'rendered inactive', 'withdraw' and 'cancel' were different labels for the same thing. He held that, by 16 March, SARS had clearly taken a decision on reasons it deemed valid and that to afford the applicant a belated opportunity to change the stance of SARS is not competent in law. SARS exercises a public function and its decision, taken on 16 March, impacts the applicant and was reviewable. He thus granted an order that SARS' decision was of no force and effect.

ANALYSIS: This case is relevant to the cidb and the construction industry at large, in so far it considers the procedure that SARS must comply with before

withdrawing a tax clearance certificate which is a mandatory requirement for participating in government procurement.

CONSTRUCTION INDUSTRY DEVELOPMENT BOARD

CASE SUMMARY: JUNE 2012

Alexander Maintenance and Electrical Services CC and Another v Nyandeni Local Municipality and Another

Eastern Cape High Court, Mthatha

(2896/11) [2012] ZAECMHC 10 (21 June 2012)

FACTS: This case concerns the question whether, in the absence of a specific provision to that effect in the court order setting aside a tender award and remitting it to the employer for reconsideration, the employer may exclude the scope of work already performed from the original scope of work for purposes of reconsidering the award.

In late 2010, the first respondent municipality called for tenders for the construction of a road within its jurisdiction. Competing bids, including bids by the applicants and the second and third respondents, were submitted. On 14 January 2011, and after ten bidders had been considered, the Municipality awarded the contract to the second and third respondents ("*the successful bidders*") at the sum of R5 480 647,76. Aggrieved by such outcome the applicants applied for a review of that decision. In February 2011, the court granted the review and remitted the award of the contract back to the Municipality for reconsideration.

In reconsidering the bids, the Municipality was somewhat on the horns of a dilemma: prior to the review and setting aside of the initial award, the successful bidders had completed some 31% of the work. It thus quantified the scope of work already performed prior to 18 February 2011 and deducted this from the original scope of work to ascertain the available budget. It also excluded that work from the respective bidders' tendered prices in order to determine new prices of the said tenders. This having been done, the Municipality reconsidered the bids and again awarded the contract to the second and third respondents.

The applicants demurred, alleging in their new review application that the Municipality had erred by excluding the work already done from the scope

as advertised and effectively considering a revised scope of the contract. For its part, the Municipality contended that it could not simply ignore the work already completed by the second and third respondents, the fact that payments were made, and that only a portion of the original budget was available.

Nhlangulela J disagreed, holding that the initial court order of February 2011 had set aside the award of the entire tender and therefore that the contract under which the 31% of the work had been done had no legal provenance. The Municipality was thus bound to reconsider the tender contract in its original and full scope of works as if no part of it has been performed. In any event, the problem of double payment anticipated by the municipality did not arise as one of the terms of the contract was that a successful tenderer can only be entitled to be paid for work performed which has been properly approved by the engineer and calculated on the basis of the schedule of quantities.

ANALYSIS: This case is relevant to the cidb and the construction industry at large, in so far it considers how a partially performed tender is to be reconsidered if its award is later set aside on review.