IN THE HIGH COURT OF SOUTH AFRICA

(EAST LONDON CIRCUIT LOCAL DIVISION)

Case No.: EL667/08
ECD1967/08
Date heard: 24 August 2010
Date delivered: 11 March 2011

In the matter between:

IZINGWE PROPERTIES (PTY) LIMITED	Applicant
and	
BUFFALO CITY DEVELOPMENT AGENCY	First Respondent
NEPAD DEVELOPMENT CONSORTIUM PTY LTD	Second Respondent
CROLABU JOINT VENTURE	Third Respondent
BUFFALO CITY MUNICIPALITY	Fourth Respondent

J U D G M E N T

TSHIKI, J:

A) INTRODUCTION

1]On 28 August 2008 applicant herein filed the present application seeking an order in the following terms:

[1.1] Reviewing and setting aside of the decision of the first respondent to award the tender for the purchase and development of Portion of Erven 16225, 16226 and 27304, East London, also known as the Marina Glen site, to the second

respondent.

[1.2] Directing that the tender for the purchase and development of Portion of Erven 16225, 16226 and 27304 East London be awarded to the applicant.

[1.3] Directing that the first respondent pay the costs of the application for review.

[1.4] Directing that the second respondent, only in the event of the second respondent opposing the application for review, pay the costs thereof, jointly and severally with the first respondent, the one paying the other to be absolved.

2]At the time of the argument of the application, applicant had abandoned prayer 1.2 above.

3]At the initial stage of the proceedings there were only three respondents and for obvious reasons there was no order sought against the fourth respondent. The fourth respondent (Buffalo City Municipality) [BCM] was later joined in the proceedings albeit in the application wherein the third respondent herein applied *inter alia*, for an interdict against fourth respondent.

4]On the date of argument of the main application *Mr Cole* appeared for the applicant and *Mr Ford SC* for the second respondent.

5]Before the argument could commence on the main application it transpired that in the second application brought by Crolabu Joint Venture no heads of argument were filed by the applicant (Crolabu Joint Venture) and there was also no appearance for third respondent either. *Mr W.R. Mokhere SC* with *Miss M.P. Mdalana* appeared for first and fourth respondent in the second application referred to above. I then granted an order dismissing the application by Crolabu Joint Venture with costs which costs included costs occasioned by the appointment of two counsel. There will therefore be no reason for me to give a detailed judgment in respect of the application by Crolabu Joint Venture.

6]Applicant, second and third respondents as well as others had tendered for the purchase and development of the Marine Glen site referred to above in Erven 16225, 16226 and 27304 and the tender was ultimately awarded to the second respondent. Applicant's complaint is that it scored the highest points in the bidding process and this entitled it to be awarded the tender in terms of section 2(1)(f) of the Preferential Procurement Policy Framework Act 5 of 2000 (hereinafter referred to as "the PPPF Act"). It is the contention of the applicant that in awarding the tender to the second respondent, first respondent acted unlawfully and unconstitutionally in that it took cognisance of irrelevant considerations. It therefore launched the present proceedings.

7]All the respondents have opposed the application doing so on similar grounds which are:

[7.1] That the applicant has unreasonably delayed in filing the application for review and for that reason the application should be dismissed.

[7.2] That applicant has not proved that it has authorised any of the persons, including its deponent to the founding affidavit, to institute the present proceedings on its behalf.

[7.3] That the decision of the first respondent attracts judicial deference.

[7.4] On the merits all respondents filed answering affidavits which effectively deny all the allegations by the applicant particularly those which are germane to the applicant's complaint against the first to third respondents. Most importantly respondents have put in issue that the scores awarded during interviews, as alleged by applicant, were correct and their contention is that applicant has misunderstood the way the marks were scored during the interview. Respondents have annexed copies of the score sheets which show how the second respondent obtained his highest marks and that on individual scoring two panellists scored the third respondent the highest whereas three scored second respondent highest and therefore second respondent obtained the highest marks hence it was awarded the tender.

8]The issues raised and averments contained in affidavits by the respondents are in contrast with those alleged by the applicant and therefore there is a genuine and material dispute of fact. However, the parties in particular the applicant has allowed the matter to proceed without availing itself of the remedies resorted to in the case of a material and genuine dispute of fact. In that regard the Court will apply the well established rule of practise in **Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd**[1] where at 634 H – I the following dictum was stated by Corbett JA:

> ". . . where in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant's affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order."

9]It therefore follows that if I have to consider the factual situation with regard to the scoring by the panellists during the interviews I would consider the facts which have been alleged by the respondents herein if such facts are in contrast with those alleged by applicant.

10]However respondents have attacked the applicant's case from all fronts which include the raising of the points *in limine*. I refer here to the delay, lack of *locus standi* and the decision which is alleged by applicant to have been made by the first respondent when in fact respondents contend that it was made by the fourth respondent. If any of the points *in limine* which I will first deal with is successful then the applicant's case may crumble to an end even at that stage. I shall first deal with the alleged unreasonable delay.

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1 1984 (3) SA 623 (A).

B) UNREASONABLE DELAY

11]Applicant's review has been filed in terms of s 6(1) of the Promotion of Administration of Justice Act[2] (PAJA). However, section 7 of PAJA provides:

> "(1) Any proceedings for judicial review in terms of section 6 (1) must be instituted without unreasonable delay and not later than 180 days after the date-
> *(a)* subject to subsection (2) *(c)* , on which any proceedings instituted in terms of internal remedies as contemplated in subsection (2) *(a)* have been concluded; or
> *(b)* where no such remedies exist, on which the person concerned was informed of the administrative action, became aware of the action and the reasons for it or might reasonably have been expected to have become aware of the action and the reasons."

Section 9 of PAJA provides:

> "(1) The period of-
> *(a)* . . .
> *(b)* 90 days or 180 days referred to in sections 5 and 7 may be extended for a fixed period,
> by agreement between the parties or, failing such agreement, by a court or tribunal on application by the person or administrator concerned.
>
> (2) The court or tribunal may grant an application in terms of subsection (1) where the interests of justice so require."

12]Applicant having been informed by first respondent of his unsuccessful bid to develop the Marine Glen site it wrote a letter to the first respondent's Chief Executive Officer requesting full reasons for the rejection of the bid and that letter was dated 22 June 2007. It is clear though that the score sheets for the interviews were received by the applicant on or about October 2007. Although, according to the applicant, the score sheets upon which the adjudication of the tender was based are replete with errors and have led to a distorted result in the award of the tender, applicant received them as early as October 2007. It is the applicant's contention that the scoring by the first

2 Act 3 of 2000.

respondent's panel during the interview is, *inter alia*, the basis upon which he has sought the review of the first respondent's decision. It was therefore, even at that stage, aware or ought to have been aware of the nature of its case against first respondent and could therefore, on the information available at that stage, have been able to file proper papers in Court for the relief sought in these proceedings. That the second respondent had not yet paid the purchase price of R34,500,000.00 was also known by the applicant even at that stage. The salient facts which form the basis of applicant's case is that it scored the highest points, that the adjudication of the tender process particularly the interviews was flawed, the decision by second respondent to award the tender to second respondent as well as the latter's failure to pay the purchase price of the site were known by applicant at the latest in October 2007 alternatively in March 2008.

13]In **Gqwetha v Transkei Development Corporation Ltd and Others**[3] Nugent JA, writing for the minority judgment, stated as follows regarding the delay in instituting review proceedings:

> "It is important for the efficient functioning of public bodies (I include the first respondent) that a challenge to the validity of their decisions by proceedings for judicial review should be initiated without undue delay. The rationale for that longstanding rule - reiterated most recently by Brand JA in *Associated Institutions Pension Fund and Others v Van Zyl and Others* 2005 (2) SA 302 (SCA) at 321 - is twofold: First, the failure to bring a review within a reasonable time may cause prejudice to the respondent. Secondly, and in my view more importantly, there is a public interest element in the finality of administrative decisions and the exercise of administrative functions. As pointed out by Miller JA in *Wolgroeiers Afslaers (Edms) Bpk v Munisipaliteit van Kaapstad* 1978 (1) SA 13 (A) at 41E - F (my translation):
>
> > 'It is desirable and important that finality should be arrived at within a reasonable time in relation to judicial and administrative decisions or acts. It can be contrary to the administration of justice and the public interest to allow such decisions or acts to be set aside after an unreasonably long period of time has elapsed - *interest reipublicae ut sit finis litium* . . . . Considerations of this kind undoubtedly constitute part of the underlying reasons for the existence of this rule.' "

3 2006 (2) SA 603 (SCA) at 612 para 22.

14]In the present case the challenged decision was the decision to award the tender to purchase and develop a vast area of land which decision was taken a year and one month before the present proceedings were instituted. What matters most is not only that the challenge against further bodies must be initiated without undue delay but that the prejudice which the Fourth Respondent and most importantly the second respondent, the company which was given the tender, would or is likely to suffer if the decision to award the tender is set aside. It should be noted that a deed of sale between the fourth respondent and the second respondent was signed a few weeks after the tender was awarded to the second respondent and that first respondent's attorneys were instructed there and then to transfer the land in question to the second respondent. In the meantime from the date of the award of the tender up to the date of service of the application papers a lot must have taken place between the applicant and the Buffalo City Municipality towards the realization of the project, and most importantly, expenses must surely have been incurred. The project sought to be achieved by the fourth respondent is in the interests of the general public as the intended development will obviously create jobs for the benefit of the general public in that area. I say so assuming that the applicant has a good case against the respondents. Should it transpire in my evaluation of the evidence that in any event the applicant's case is for any reason not strong that would sound a death knell to the applicant's case.

15]Applicant in his founding affidavit, has not given any reasons why he has

delayed in the institution of the review proceedings except for alleging that first respondent delayed the institution of the application by failing to provide information pertaining to the evaluation of the tenders and by failing to provide the address of first and third respondents. This alleged failure on the part of the first respondent could not have delayed the institution of the present proceedings for the simple reason that the information was furnished at the earliest in October 2007 and at the latest in March 2008. In my view the information furnished to the applicant in October 2007 annexures MWG 16-19 was sufficient for the applicant to have to institute review proceedings against all the respondents. What the applicant does not explain is how the further information sought from the first respondent's attorneys was to advance its case for the purposes of instituting the present proceedings. Any documents, even if they were necessary, could have been sought by the applicants during the process of exchange of affidavits or at least by way of a request for the record of the interview proceedings.

16]Section 33 of the Constitution guarantees to everyone "the right to administrative action that, is unlawful, reasonable and procedurally fair". PAJA upon whose procedure the review of all administrative action must be based, is in substance a codification of the procedure to enforce the rights contained in section 33 of the Constitution.[4] This was emphasized in **Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others**[5] at para 25 as follows:

"The provisions of s 6 divulge a clear purpose to codify the grounds of judicial review

4 Republic of South Africa Constitution Act 108 of 1996.
5 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 at para 25.

> of administrative action as defined in PAJA. The cause of action for the judicial review of administrative action now ordinarily arises from PAJA, not from the common law as in the past. And the authority of PAJA to ground such causes of action rests squarely on the Constitution. It is not necessary to consider here causes of action for judicial review of administrative action that do not fall within the scope of PAJA. As PAJA gives effect to s 33 of the Constitution, matters relating to the interpretation and application of PAJA will of course be constitutional matters."

17]The above dictum underscores what I have said above and the consequence of the enactment of PAJA is that every application for review of administrative action must be brought within the provisions of PAJA. In the present case the applicant, despite its delay in taking action against the respondents after the expiry of the period of 180 days as provided for by PAJA[6], it has failed to comply with the provisions of PAJA in applying for the condonation of the late filing of the application. Without the application for condonation in terms of PAJA, whose provisions in this regard appear to be peremptory, the Court cannot be justified in entertaining the application for review. If it does so it would be acting contrary to the clear intention of the provisions of the statute (PAJA) and therefore would be acting illegally.

18]In fairness to the applicant, before I can pronounce my final decision based on the delay rule it would be appropriate for me to deal exhaustively with the merits of the application. Has the applicant satisfied the requirements for the granting of the order in its favour? In other words has applicant proved that the first respondent when awarding the tender to the second respondent:

[18.1] Acted unreasonably in that, during the adjudication procedure, irrelevant considerations were taken into account and failed to consider relevant consideration thereby rendering the ultimate

6 Section 7(1) of PAJA.

decision irrational, incorrect and consequently unconstitutional?

[18.2] In this regard applicant rely on the fact that the individual officials who compiled the combined score sheets failed to apply their minds properly to the transposition of scores from the individual score sheets, which led to the distorted mathematical outcome.

19]It is common cause that the applicant did not join the Buffalo City Municipality (BCM) the fourth respondent as a party to the proceedings. Its refusal to do so was that there was never any necessity to join the fourth respondent as a party to the proceedings. The fourth respondent having been successfully joined at the instance of the third respondent it is now a party to the present proceedings and not at the instance of the applicant. It is also important to note that even at this stage and contrary to the view expressed by the Court which granted the joinder of the fourth respondent, that the applicant still insists that there is no place for the fourth respondent as a party to the present proceedings. It seems to me that this contention by the applicant is based on ill-conceived considerations and does not take into account the totality of the contents of the tender documents as a whole including the contents of the draft Deed of Sale.

20]The following paragraphs taken from the conditions contained in the tender documents titled “INFORMATION AND INSTRUCTION FOR TENDERS” are important to note.

"1. General

1.1 The Buffalo City Development Agency hereby invites tenders for the purchase and development of certain development areas located along the East London beachfront.

1.2 In doing so, the Buffalo City Development Agency (BCDA) acts on behalf of the Buffalo City Municipality and shall be responsible for the administration of the tender."

21] The effect of the underlined portion above is that the BCDA was the agent of the BCM and therefore any legal proceedings concerning the tender procedure unless specifically stated otherwise, would be instituted against the known principal and not against the agent. Where an agent, as in the present case, has disclosed that he or she acts for a principal and has acted within the scope of the express or implied authority conferred, a transaction effected by the agent with a third party, or which affects the rights of the third party is binding as between the principal and the third person.[7] In such a case no benefit or liability under the transaction attaches to the agent and liability under transaction or contract is imposed directly on the principal who may also be sued by the third party.[8]

22]Still on the same tender documents which were issued to all the tenderers including the applicant under the heading "SPECIAL CONDITIONS OF CONTRACT" under definitions a contract is defined as:

"Means the agreement concluded between the Buffalo City Municipality and the

7 1909 TS 890 at 899, see also **SWA Amalgameerde Afslaers (Edms) Bpk v Louw** 1956 (1) SA 346 (A).

8 Wille Principles of South African Law, 9th Edition by Francois du Bois *et al* at page 998.

Myburgh v Walters NO 2001 (2) SA 127 (C).

> successful tenderer with regard to the tender advertised by the Buffalo City Development Agency for the purchase and development of the land."

In the same document on page 7 the tender documents include the following:

> "Information and Instructions for Tenderers, Tender Notice, Special Conditions of Contract, Specifications, Deed of Sale, Evaluation and Adjudication Criteria, General Conditions of Contract, Buffalo City Municipality's Procurement Policy, as amended. December 2001 . . ."

23]It is also important to state that under "23 AWARD OF TENDER, AND FORMATION OF CONTRACT" it has been specifically stipulated as follows:

> "23.1 The BCM **shall award the tender** upon the basis of the evaluation and adjudication criteria contained in the tender document . . ." [9]

24]It follows from the wording of the above conditions of tender that the award of the tender could only be effected by the BCM and not the first respondent as the applicant has stubbornly suggested in both the papers and in argument. If that is so and that the only decision which the applicant seeks to be reviewed being the award of the tender for the purchase and development of Portion of Erven 16225, 16226 and 27304, East London, known as Marine Glen, to the second respondent, an act bestowed on the BCM, I can see no legal reason why the applicant failed to join the fourth respondent in the first place. Fourth Respondent having been joined as a party, applicant failed to amend its papers with a view to seek an order against the fourth respondent, and not against first respondent, for the setting aside of the award of the tender in the manner stated in prayer one of the notice of motion. In the absence of such amendment and in view of the fact that only the fourth

9 See page 79 of the record and page 17 of the tender documents.

respondent should have made the decision to award the tender aforesaid to the second respondent there is no decision which this Court could practically interfere with.

25]I have also observed that according to item 36 of the tender documents under the heading “DISPUTES”, the following appears:

> “36. DISPUTES
> 36.1 Any dispute arising from the evaluation, adjudication or award of the tender shall be settled by means of mutual consultation, mediation or when unsuccessful, in a South African Court of law.”

26]There is no allegation in the applicant’s founding affidavit that the applicant has complied with this requirement and neither does it appear elsewhere in the papers that there was ever an attempt to settle the dispute by way of either mutual consultation or mediation.

27]It is clear from the facts of the case that in order to have acted on behalf of its principal in the awarding of the tender and therefore to be sued the agent (first respondent) should have proved that it has actual authority from the principal (BCM) to make the decision to award the tender to the successful bidder. Obviously in view of the fact that there was no such authority shown there was therefore no powers on the first respondent to make the award and therefore it was imperative for the applicant to join and seek the order against the principal which it has failed to do.

28]The case of the applicant crumbles even on the issue of non-joinder of the BCM because there is no order sought by the applicant against the BCM to

have the order of awarding tender set aside. There is no evidence from the papers that such a decision was made by the first respondent, on the contrary, the contention by the respondents is unanimous that the award of the tender to the second respondent was made by the fourth respondent.

29]However, for the sake of completeness, I will deal with the allegation by applicant that the scoring was wrong or that it was manufactured. I agree with the respondents that there is no evidence to substantiate the contention of the applicant. On the strength of the **Plascon-Evans** decision I will accept and am legally and procedurally bound to do so that the fourth respondent made the award. Ordinarily I would not have to go further than this point because there is no order of the fourth respondent which is sought to be reviewed. However, I need to show the applicant that it would have no valid case even if the award was made by the first respondent. The respondents' affidavits raise a material dispute of fact.

30]Applicant contends that on receipt of the score sheets its attorneys immediately attempted to analyse them with a view to make sense out of what is contained therein. It is its contention that much confusion appears to exist when the score sheets are closely analysed. This resulted in queries raised with the first respondent's attorneys in a letter annexed and marked "MWG17". On receipt of the explanation from first respondent's attorneys it appeared that the scores of Mr J Eyles, Miss Nkonki and Mr L Roodt appeared to have been correctly transposed from their individual score sheets. On the other hand the score sheets of Mr Craig Sam, Mr Gaster

Sharpley and Mrs Sokupe bear no resemblance to the figures transposed under their names on the combined score sheet. If the example made in support thereof is that on annexure “MWG19”, Mr Craig Sam scored 16 out of 40 for Thaba Construction, but a score of 14 appears on Annexure “MWG25”, similarly, according to applicant, he scored 20 for the second respondent but a score of 25 appears on annexure “MWG25”. Applicant also found similar anomalies in respect of entries of Messrs Sharpley and Sokupe. Consequently applicant comes up with the average score for the applicant of 35, 16 whereas the average score for the second respondent is 30, 16. This ultimately concludes that applicant should have scored 93, 16 and second respondent 89, 16 thus affording the applicant a clear margin as the tenderer with the highest number of points.

31]In response to these allegations by applicant first respondent contends that the applicant did not score the highest points during the adjudication of the tender and that the applicant was not recommended for appointment as a successful tenderer either. He then refers to the affidavit of Mr Louis Roodt who has given more details about the scoring. In his affidavit he states categorically that various procedures were followed that *“during the final evaluation process the tenderers were evaluated afresh by each of the panellists without regard to the points which they allocated during the initial evaluation stage. He goes on to suggest that during the final evaluation stage, the tenderers were evaluated on the basis of price (50 points), functionality (40 points) and HDI (10 points). Accordingly, at the final stage, the prices tendered by the respective tenderers played a more significant roll*

[role] than during the initial stage". His conclusion is that, based on the scores awarded, the applicant did not score the highest points on final evaluation. His view is that Mr Goduka's confusion was caused by his attempt to reconcile first round scores with the combined score sheet which related to the final evaluation stage. His ultimate conclusion is that the panel based its final evaluation and recommendation on the unweighed average scores awarded in respect of the four shortlisted tenderers and that the applicant did not score the highest points on the basis of this evaluation.

32]The above response does not support the applicant's allegation and instead creates a material dispute of fact on the scoring of points and the manner of evaluation. This should have sounded alarm bells to the applicant so as to weigh its options. I will therefore decide the matter on the evidence which, in the circumstances, I am legally allowed to accept for the purposes of arriving at a final decision.[10]

33]Finally the question of the failure by second respondent to provide the guarantee of R34,500,000.00, I must say though that this requirement has never been a condition suspensive or otherwise contained in the tender documents. It cannot therefore be used by applicant for the purposes of seeking an order of review of the proceedings in issue. There is also no such condition in the draft Deed of Sale which, if not complied with, would result in the automatic cancellation of the contract of sale.

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10 See **Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd** *supra* (see footnote no. 1)

34]In the circumstances I am convinced that even on the merits applicant has not presented evidence which would persuade the Court to find in its favour. He has not applied for condonation of the late filing of the application and neither has he provided valid reasons for not doing so.

35]In the result I am of the view that the applicant has not complied with the provisions of section 7 (1) and 9 of PAJA and therefore for that reason he is not properly before Court. In the event that I am wrong in this regard there is no acceptable evidence on the merits to substantiate the applicant's case for the appropriate order sought.

36]In the result I make the following order:

> The application is dismissed with costs, such costs to include, where applicable, the costs occasioned by the employment of two counsel.

_____
P.W. TSHIKI
JUDGE OF THE HIGH COURT

Appearances:

For the applicant:
Mr S.H. Cole instructed by ABDO & ABDO of East London

For the first and fourth respondent:
Adv W.R. Mokhare SC and Adv M.P. Mdalana instructed by Ranamane & Phungo Inc of East London.

For the second respondent and third respondent:
Adv E.A.S. Ford SC and Adv S. Rugunanan instructed by Bax Kaplan Inc of East London.