IN THE SOUTH GAUTENG HIGH COURT

(JOHANNESBURG)

CASE NO: 08/22988

In the matter between:

MENZIES AVIATION SOUTH AFRICA (PTY) LIMITED	Applicant

and

SOUTH AFRICAN AIRWAYS (PTY) LTD	First Respondent
SWISSPORT SOUTH AFRICA (PTY) LTD	Second Respondent
BIDAIR SERVICES (PTY) LTD	Third Respondent
EQUITY AVAITION SERVICES (PTY) LTD	Fourth Respondent
AIRPORTS COMPANY SOUTH AFRICA LTD	Fifth Respondent

J U D G M E N T

BLIEDEN, J:

[1] The Applicant, Menzies Aviation (South Africa) (Pty) Limited (Menzies) is part of an international group of Companies and specialises in ground handling operations at airports. It presently carries on business at 129 airports world wide. Since 2007 it has been involved in providing these

services at some of the major South African airports, having received a license to do so from the Fifth Respondent, Airports Companies South Africa Limited (ACSA). It has been employed by a number of airline companies operating in this country to perform these various functions at local airports, but up and to 11 June 2008 the First Respondent (South African Airways (Pty) Limited) (SAA) was not one of its clients.

[2] SAA is the national airline of South Africa. It is an airline operator on both internal (domestic) and international routes. It flies to and from various airports throughout the country. By far the busiest airport from which it operates is the O.R. Tambo International Airport, near Johannesburg. The scope and size of the operations of SAA can be gauged from the fact that it is estimated that its aircraft make some 58 000 flights per year, both internally and overseas. By far the majority of flights are internal (domestic).

[3] On 11 June 2008 SAA invited four entities, including Menzies, to tender for the provision of ground handling and passenger services for its flights to and from six of South Africa's most important airports for a period of five years. The bids were to be submitted by 11 am on the 1st of July 2008. The four parties invited to submit bids were required to attend a compulsory briefing session on 17 June 2008. In effect those tendering were given nine working days within to prepare their bids.

[4] The other three entities are the second, third and fourth respondents to the present application. The fifth respondent is ACSA which is the company

managing the airports concerned. Other than SAA none of the respondents have opposed the present application although Menzies' founding papers were served on all of them. They have chosen to abide the order of this court. Menzies has not asked for any order of costs to be made against any of these respondents.

[5] The compulsory briefing duly took place and was attended by all four invitees. Certain further information was requested by some of the parties present (not Menzies) and this information was provided on 24 June 2008. The information so provided included *inter alia*, freight flight schedules, incomplete information concerning compulsory equipment purchases from ACSA, and certain requirements for passenger assistance units and average laundry volumes.

[6] The stipulated service level agreements for cleaning, and for the differing service parameters at airports other than O.R. Tambo International (which agreements were stated to be compulsory components of the envisaged contract) were never provided, despite the terms thereof being crucial to the determination of the staffing and equipment capacity needed to avoid the incurrence of penalties for breach of such service levels with resulting impact on profitability.

[7] Ground handling services comprise both ramp and passenger handling services. The former, rendered on airport aprons (where aircraft are parked),

include push back and towing services for aircraft; providing steps for embarking and disembarking; bussing passengers and crew between the airport and aircraft; loading and unloading luggage and cargo; transporting luggage and cargo between terminals and aircrafts; supplying water and toilet services to aircraft; supplying ground power to aircraft as required; manually starting aircraft engines as required. All of these activities require the use of specialist and expensive equipment, nearly all of which is imported.

[8] Passenger services occur primarily within terminal buildings and include operating check-in facilities; baggage handling; providing lost luggage services and providing passenger assistance.

[9] At the time of the bid request, the second and third respondents, being Swissport SA (Pty) Limited (Swissport) and Bidair (Pty) Limited (Bidair) were already providing full services to SAA and had been doing so since January 2008. Swissport did the bulk of the services while Bidair was providing certain transport and cleaning services to SAA.

[10] Menzies did not submit a bid by 1 July 2008 and the contract was subsequently awarded to Swissport in part and Bidair in part. It is Menzies' case that the manner in which the request for tenders was formulated as well as the short deadline effectively precluded it from submitting an accurate and competitive tender and therefore from any meaningful participation in the tender process.

[11] Immediately prior to the deadline for the submission of bids Menzies had requested the First Respondent to extend the deadline and also to supply additional information. This was refused by SAA.

[12] The present application is for the review and setting aside of SAA's tender process, including any contracts that might have been concluded pursuant to it. It is Menzies' case that the tender process was fundamentally flawed; thus justifying the relief claimed by it.

[13] It is not in dispute that SAA is an organ of state and is bound to uphold the Constitution and also that as such, it is subject to the provisions of the Promotion of Administrative Justice Act No.3 of 2000 (PAJA). The detailed grounds on which the present application is brought appear in Menzies' founding papers at pages 11 and 12 of the record. They read:

> "*12.1 The applicant's rights to administrative justice in terms of section 33 of the Constitution of the Republic of South Africa Act 108 of 1996 read with section 6(1) of the Promotion of Administrative Justice Act 3 of 2000 have been breached in that the tender process was administrative action which was:*
> *12.1.1 biased or can reasonably be suspected of bias in favour of the bidders who participate therein and against the Applicant;*
> *12.1.2 procedurally unfair;*
> *12.1.3 taken for an ulterior purpose or motive, namely appointing Swissport and / or assisting Swissport in obtaining a ground handling license;*
> *12.1.4 taken in bad faith;*
> *12.1.5 taken arbitrarily or capriciously;*
>
> *12.2 The tender process was otherwise unconstitutional and unlawful in that the following basic values and principles governing public administration in terms of section 195 of the Constitution were contravened:*
> *12.2.1 Efficient, economic and effective use of resources must be promoted;*
> *12.2.2 Public administration must be development-oriented;*

12.2.3 Services must be provided impartially, fairly, equitably and without bias;

12.2.4 Transparency must be fostered by providing the public with timely, accessible and accurate information.

12.3 *The tender process was otherwise unconstitutional and unlawful in that section 217 of the Constitution was not complied with in that the process was not in accordance with a system which is fair, equitable, transparent, competitive and cost-effective."*

Menzies' Case:

[14] This is set out in the affidavit of Forsyth Rutherford Black (Black) a director and its senior vice president-Africa. Black's evidence is that he has five year's of international experience in preparing bids of the size in the present matter or even larger on behalf of Menzies Aviation Plc.

[15] Given the nature and scope of the work to be done, the time given to prepare the tender and the absence of ground schedules at various airports and particularly O.R. Tambo international, was of such a nature that it was impossible to submit an accurate and competitive tender. This was explained to SAA by Menzies when it asked for an extension of the deadline for the tender as well as the provision of certain important information such as the ground schedules. This request, as already has been stated, was summarily refused by SAA.

[16] The other bidders being Swissport and Bidair, and to a limited extent the fourth respondent, Equity Aviation Services (Pty) Ltd (Equity), had all previously performed the SAA work for which the tenders had been requested. In particular Swissport and Bidair had for the six months immediately prior to the request for bids been engaged in exactly this work on

behalf of SAA. They accordingly must have been in possession of all the relevant information relating to the ground schedules and the equipment, the purchase of which formed part of the bid requirements. Equity had done this work for SAA prior to 2007 and accordingly was also possessed of some of the relevant information.

[17] The importance of being in possession of the ground schedules is graphically described by Black at page 484 of the papers, where he makes the following comments in answer to a claim that Flight Schedules had been provided in the tender documents:

> *"….the information contained in SAA's flight schedules is inadequate for the purposes of preparing a detailed submission and costing of the provision of ramp handling services to many aircraft represented in the flight schedule. Unless one can establish which plane is arriving and at what specific time, how long it will remain on the ramp, what services it will require and what its next destination is, any accurate analysis of the number of staff, the nature of the equipment and the time periods required to perform the necessary servicing is little more than conjecture.*
>
> *Given the scope of SAA's operations, it was manifestly unreasonable for SAA to expect any experienced operator to submit a competitive quotation based on such paucity of information. I have no doubt that any bids, other than those of Swissport, for the ramp handling services would of necessity have had to err on the side of dearness. The only party favoured in that scenario is Swissport, who because of their hands-on experience through the preceding months, was in a position to construct an accurate and therefore keenly costed proposal. That such a proposal would give them a huge competitive advantage in a supposedly fair and equal tendering process cannot be gainsaid."*

[18] It is Menzies case that the procurement process followed by SAA in the circumstances of this case, and in the light of the special position of the other bidders, was not fair, equitable, transparent, or competitive and in the result,

cost effective as is required by section 217 of the Constitution, nor was such process procedurally fair as required by PAJA.

SAA's case:

[19] The first defence raised by SAA is that Menzies was not a party to the "*tender process* " having only registered an interest to participate therein. For this reason it has no *locus standi* to bring the present application, so it was submitted.

[20] Additionally, and in the alternative SAA relied on the evidence of Ms. Lee-Ann Swart "*procurement specialist for ground handling*" who was the person who was in charge of the administration of the tender process which is the subject matter of the present application.

[21] It is SAA's case that by furnishing all the bidders with its flight schedules and certain other information this was sufficient to enable each of them to put in bids within the time period given to them. Ms Swart conceded that the ground schedules were not furnished to any of the bidders, but significantly makes no mention of this manifest gap in the information furnished by SAA.

[22] Ms Swart makes the further point that if Menzies required any further information it could have asked for it and this would have been furnished within 24 hours of such request. No such request were made. The other bidders did ask for further information and this was in fact provided to them.

[23] In addition she specifically denied that the tender period was too short or that the bidders, other than Menzies, were in any way advantaged by the fact that they had done and were in the process of doing work which was the subject matter of the tender application relevant to this case.

[24] She also referred to the fact that Ian Michael van Rooyen (van Rooyen) who had been employed by SAA up to December 2007 as head of airport operations, was now a director of Menzies. She said that he was therefore in a position to provide Menzies with all the necessary information in order to put it on an equal level to the other bidders.

An analysis of the cases presented and the consequent legal issues:

[25] The first issue to be decided is whether the "*tender process"* as described in these papers can legally be described as administrative action within the meaning of PAJA.

[26] The various elements forming part of the "*tender process*" are identified. They include SAA's decision which resulted in it inviting persons to bid for "*a joint partner arrangement"* during June 2008 for the rendering of ground handling services to it throughout South Africa. It invited Menzies and the other selected parties to bid on the advertised terms. It set the closing date for the submission of the bids to be 1 July 2008, it included what it regarded as the relevant information as part of the request for bids, it decided not to extend the closing date for bids or to provide further information as

requested by Menzies. In my view these decisions all formed part of the process and constitute individually and collectively the administrative action referred to as the "*tender process*" for ground handling services in terms of the bid document. In the circumstances I am of the view that Menzies, as an invited bidder has *locus standi* to bring the present application.

[27] The fact that SAA has over 58 000 flights a year, both locally and internationally, is ample evidence that the provision of ground services to cater for these flights at South Africa's major airports, is a complex operation. Ms Swart's contention to the contrary must be rejected as being a bald denial in the face of Black's detailed and convincing evidence. There is no answer to Black's statement that to expect anyone to prepare a proper tender even if they were on 17 June given all the information necessary in the time period afforded it, is unrealistic.

[28] Van Rooyen's evidence that it would be ridiculous to expect him to remember the details required to formulate a bid must be correct. This is factually supported by a perusal of the ground schedules for one week which were provided in terms of rule 35(12). This schedule constitutes 89 pages of detailed information. Black's evidence as to precisely what is entailed in calculating the bid to be made, has not in any way been contradicted. In this regard had SAA disagreed with Black's evidence on this issue, one would have expected it to lead evidence in this regard. More significantly there was no contrary evidence by anyone on behalf of Swissport or Bidair, who are the

parties who must have been and were at all times in possession of such information and who have a real interest in gainsaying Black's evidence.

[29] Despite Ms Swart's protestations that a request for further information by Menzies would have resulted in such information being furnished to it within 24 hours, it was not in issue between the parties that the applications brought by Menzies in terms of Rules 35(12) and 53 have not resulted in the production of the ground schedules requested. As has already been mentioned to the date on which this matter was argued in court, the ground schedule for only one week has been furnished by SAA. This is hardly enough for Menzies to meaningfully tender. In addition, as is pointed out by Black, if any further information had been given to any of the other bidders as claimed by Ms Swart, this should also have to been given to Menzies. This was one of the conditions of the tender process. The information which was furnished has been described, and it plainly shows that such information was totally inadequate for a bid to be made by a party such as Menzies.

[30] Menzies' contentions regarding the other bidders being in an advantageous position compared to it in furnishing tenders within the very short period given, has not in any way been contradicted, save for bald denials by Ms Swart. She is plainly not a person with the expertise to meaningfully deal with Menzies' detailed allegations in this regard. It is again significant that no person better qualified than her has deposed an affidavit on behalf of the SAA on this extremely important issue. Again the people who

would be best able to deal with this issue, namely employees of Swissport and Bidair, have not said anything, save that they abide the order of this court.

[31] In answer to the submission by SAA that Menzies is unable to point to any particular natural person who acted in bad faith or has done anything arbitrarily or capriciously, or that the tender was not done within the ambit of sections 195 and 217 of the Constitution, Menzies' reaction is that the facts speak for themselves. This is not a matter where the acts of any particular natural person is put in question. It is the conduct of SAA, as an entity, that is being attacked. It is beyond doubt that:

1. by the request for a bid being cast in the terms it was regarding time periods and with the failure by SAA to furnish ground schedules, Menzies was severally handicapped in its bid compared to the other bidders. In effect the only parties who could meaningfully put in bids were those who already had the necessary information and would need no time to make any further enquiries or do any further research. These two parties were Swissport and Bidair, who as has already been mentioned, were doing the relevant work at the time of the tender.
2. The attitude adopted by SAA in refusing to extend the tender time period without consulting any of the other bidders when it was informed of Menzies' difficulties is evidence that it was not really interested in obtaining a bid from Menzies. It had been told that Menzies' Chief Executive Officer, Black, had been out of the country for most of the nine working days from 17 June to 1 July, that a decision would have to be made by Menzies' board in London and without the ground

schedules it was physically impossible for Menzies to submit a proper bid. It, however, ignored these considerations when it refused Menzies' application for an extension of time, and for further information to be furnished.

[32] When all the facts are looked at one is forced to the inescapable conclusion, as submitted by Menzies counsel, that the whole tender process was a sham to legitimise the current situation of Swissport and Bidair continuing to perform the services they were at that time doing. In other words maintaining the status quo.

The legal position:

[32] As I have already found the decision of SAA to put the contract out to tender and the process followed in doing so constitutes administrative action as defined in PAJA. **Transnet Limited v Goodman Brothers (Pty) Ltd 2001 (1) SA 853 SCA. Furthertrade Two (Pty) Ltd v MEC for Roads and Public Works, Eastern Cape 2007 (6) SA 442 (CKHC).**

[33] It is a decision taken by an organ of state exercising a power in terms of the Constitution or performing a public function in terms of legislation.

[34] The action of SAA affected the rights and legitimate expectations of Menzies and had a direct, external effect - a contract was concluded with Swissport and Bidair as a result of the "*bid process*" and not with Menzies.

SAA was constrained to exercise its public power in compliance with the Constitution, which is the supreme law. In particular section 217 of the Constitution and section 3 of PAJA are of importance. See **Pharmaceutical Manufacturers Association of South Africa and Another : In Re Ex Parte President of the South Africa and Others 2000 (2) SA 674 (CC)** at para 27, 45 and 51. **Logbro Properties CC v Bedderson NO and Others 2003(2) SA 460 (SCA)** par 5 at 465 F – 466C.

[35] In the Logbro Properties case, supra at paras 8 and 9 at 466 H – 467 C Cameron JA referred to the "*ever flexible duty to act fairly*" that rested, in that case, on a provincial tender committee. The same principles apply here. In my view the fair procedure is not a matter of secondary importance, it goes to the very heart of the administrative process. As stated by Wade and Forsyth, Administrative Law, 7th edition "*Procedural fairness and regulatory conduct are the indispensible essence of Liberty*". The same authors make the point that a violation of natural justice makes the decision concerned void (See pages 491 -516).

[36] It is a principle of administrative law in this country that tender procedures are vital to the very essence of effective government procurement policies. These procedures may well be described as intended to ensure that government, and therefore SAA, before it procures goods or services, or enters into contracts for the procurement thereof, has ensured that a proper evaluation is done of what is available, at what price and whether or not that which is procured serves the purposes for which it is intended. It has as its

duty the obligation to ensure that SAA gets the best price and value for that which it pays.

Conclusion:

[37] The shortcomings in the tender process as described above, were so serious as to make the "*tender process"* flawed and justifies intervention by this court. An important bidder was excluded from properly participating in a multi-million rand tender for a five year contract with weighty national and international ramifications.

[38] Fairness entails a consideration not only of the interests of the excluded tenderer (Menzies) but also the interests of all the constituents who are effected thereby. These include the State as the sole shareholder of SAA, the taxpayer who's taxes to a large extent fund the operations of SAA and the public who have to rely on the ground handling services provided by the service providers such as Menzies at the airports in question.

[39] Menzies was ostensibly invited to tender and certainly wished and, accordingly to the affidavits filed on its behalf, continues to wish to do so. It was prevented from submitting a tender because of the manifest insufficiency of time to formulate a bid and the paucity of reasonably required information which had to be supplied to it for this purpose.

[40] I agree with Menzies' counsel's submission that the extremely short time constraints under which Menzies was required to prepare a tender is in

itself strongly suggestive of procedural unfairness. The reason for such a tight deadline has not been adequately explained – the process itself was a selective tendering process where only a few licensed ground handlers were invited to bid. This would in itself have expedited matters.

[41] It must have been plain to SAA that Menzies was not possessed of the information which the other tenderers had. This enabled them to make their bids timeously. Notwithstanding this fact it insisted that Menzies complied with the requirements of the tender, despite its protestations.

[42] In all the circumstances I am of the view that the review should succeed and that a final order should be issued in terms of paragraph 1.1. of Menzies' notice of motion, and that any contract concluded with SAA pursuant to the present tender provisions should be set aside. What has been stated in this judgment is to be taken into account by SAA if it is minded to call for new tenders for its ground handling services at airports in South Africa.

[43] Counsel were agreed that this is a matter which justified the employment of two counsel by each party. It is also necessary to mention that the costs awarded should include those reserved on 27 May 2009 when this matter was postponed by agreement.

[44] The following order is made:

1. The tender process for ground handling services in terms of the bid document with reference number GSM029/08RFB, including

any contract that might have been concluded with any respondent pursuant thereto, is reviewed and set aside.

2. The first respondent is ordered to pay the costs of this application, such costs are to include the costs of two counsel and are also to include the wasted costs reserved as a result of the postponement of 27 May 2009.

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P BLIEDEN
JUDGE OF THE HIGH COURT

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