

IN THE NORTH GAUTENG HIGH COURT,
PRETORIA /ES (REPUBLIC OF SOUTH AFRICA)

CASE NO: 70057/2009

Date:17/05/2012

NOT REPORTABLE

IN THE MATTER BETWEEN:

D F S FLEMINGO SA (PTY) LTD

APPLICANT

AND

AIRPORTS COMPANY SOUTH AFRICA LTD

1ST RESPONDENT

BIG FIVE DUTY FREE (PTY) LTD

2nd RESPONDENT

THE TENDER BOARD OF ACSA

3 rd RESPONDENT

JUDGMENT

PHATUDI. J

[1] The applicant seeks to review and set aside:

1.1 the tender for the Operation of the Core Duty and VAT-free Stores in the international department and arrival airside terminals at OR Tambo International Airport, Cape Town international Airport and the new International Airport at La Mercy (north of Durban KZN) bid reference number CDF08.05/2009 (the tender); and/or

1.2 ... the decision of the first and/or third respondent to award the tender to the second respondent¹.

¹ Notice of motion. Review application pi & 2

[2] On the 29 May 2009, the first respondent (ACSA) caused issue of an invitation to bid (ITB) calling upon "proposals from prospective retailers to lease retail space as described in more detail in ... ITB"²

[3] The applicant and the second respondent (Big Five), among others, submitted their tender bids. The tender was awarded to Big Five on 26 August 2009. Big Five, the incumbent since the year 2000 and a successful bidder, entered into a lease agreement on 25 September 2009 with ACSA on terms set out in the pro forma lease agreement (lease agreement).

[4] The applicant succeeded in interdicting ACSA and Big Five from implementing the lease agreement pending the institution and finalisation of this review proceeding.

[5] Big Five continues to operate the core duty and VAT-free retail outlets at OR Tambo International Airport, Cape Town and La Mercy King Shaka International Airport on the terms it had with ACSA since the year 2000. Big Five's proposal to extend its operation by another five years was declined by ACSA. ACSA decided to internationally advertise the tender. The invitation to bid (ITB) was drawn and published.

[6] The ITB³ sets out fully and in great detail the requirements, terms and conditions the prospective bidders are to comply with. The important sections for the purposes of this application are the General Terms (GT) (section II) and Evaluation Procedure 8c Criteria (EPC) (section III). The GT spells out the definition of words and phrases used in the ITB, the manner in which the bids will be handled and how the tender process would be conducted.

² Invitation to Bid - p44, paragraph 11. Cf paragraph 10.1 AA p!3.

³ The concept ITB is annexed as PS1 to AA at pp42-I 17 and Record of Proceedings bundle, volume 1 ppIC-76

[7] It is worth noting that '[b]ids will be evaluated by ACS A in accordance with the procedure and criteria set out in Schedule III (evaluation procedure and criteria)...'⁴ It is further stipulated at clause 10 that '[s]ubject to clause 8.1.1 above, the Tender Board [TB] subject to the approval of the Board of Directors [BD] of ACSA, is the sole body empowered to award any Bid and no other Person or body shall have the power or right to amend a Bid or to make any concession or to conclude any agreement with any person in respect thereof'⁵

[8] The applicant's counsel⁶ submits that the ITB identifies three particular bodies in the evaluation and decision making process. The first, Bid Evaluation Committee (BEC) followed by the Tender Board (TB) and lastly, ACSA Board of Directors (BD).

[9] Section III of ITB stipulate 'the Bid Evaluating Committee and the Tender Board will consider the following criteria. An indication of the maximum points capable of being awarded for each criterion is included.'⁷

[10] The Tender Board (TB), as stipulated in clause 8.3 of ITB, shall be entitled to rely on evaluations, findings or recommendations made ... for this purpose. Clause 10.1 of ITB provides that '[subject to clause 8.1.1 above, the Tender Board, subject to the approval of the Board of Directors of ACSA, is the sole body empowered to award any Bid and no other person or body shall have the power or right to award a Bid or to make any concession or to conclude any agreement with any person in respect thereof.'

4 Clause 8 - Bid Evaluation - ITB at p52 on Record of Proceedings

5 ITB p54 clause 10.1

6 Adv M C Maritz SC

7 Record of Proceedings p2S clause 5 of ITB or p69 RA Vol 1

[11] After evaluation of all bids, BEC recommended the "entity scoring the highest points, Big Five, to be awarded the tender for a ten year period".

The recommendation clause further stipulate-

"Furthermore is [sic] must be noted that Big Five Duty Free (Pty) Ltd offered to pay ACSA a further amount of 12,5% of their after tax profit as additional rental."⁸

[12] The applicant alleges that this "offer by the second respondent has been taken into account in awarding the tender to the second respondent".⁹ The applicant's counsel further submits that this "further 12, 5%" constitutes an additional term unsolicited and outside the parameters of the constraints of the ITB, which renders the second respondent's bid to be disqualified. He refers this "further 12, 5%" as a "sweetener" or "unsolicited extra carrot hanging in front of ACSA". He further submits that this "further 12, 5%" was taken into account in awarding the bid.

[13] The first and third respondents' response to the applicant's allegation is that 'the Bid Evaluation Committee did not take into consideration, for purposes of assessing and evaluating the bids, the statement "Furthermore it must be noted that Big Five Duty Free (Pty) Ltd offered to pay ACSA a further amount of 12. 5% of their after tax profit as additional rental."¹⁰ It is further placed on record that '...no considerations other than those set out in the ITB were taken into account in the evaluation and assessment of the submissions made by the bidders'.¹¹

⁸ Tender Evaluation Report, Record of Proceedings p628 paragraph 5, (p304 5FA para 6.1)

⁹ Supp FA p304 para 6.2

¹⁰ First and second respondents' AA pi 142 para 83.2 First and second respondent's AA pi 142 para 83.3

¹¹ Adv K D Moroka SC

[14] I enquired from first and third respondents' counsel¹² to "unpack" the "furthermore" statement appearing in clause 5 of the recommendation. Counsel submits that the "further 12, 5%" did not influence the outcome of the recommendation as it appears nowhere in considering the scoring. I further enquired as to where does this "further 12, 5%" come from or how did it come about that ACSA or Tender Board make mention of it in their recommendation. Counsel submits that there is no evidence on record as to how this "offer" came to the recommendation.

[15] Second respondent's counsel begged leave to address this "further 12, 5% rental." He submits that he realizes that the first and third respondents' counsel is at pains in "unpacking" the last sentence in the recommendation. He submits that that did not play a role in influencing the scoring.

[16] Section 6(2) provides that "[a] court or tribunal has the power to judicially review an administrative action if

(a) ...

(b) a mandatory and material procedure or condition prescribed by an empowering provision was not complied with;

(c) the action was procedurally unfair;

(d) ...

(e) the action was taken (i)

(ii) ...

(iii) because irrelevant considerations were taken into account or relevant considerations were not considered."

¹² Adv K D Moroka SC

[17] In my evaluation of the evidence tendered and submissions made, it is clear that the second respondent offered to pay ACSA a further amount of 12, 5% of their after tax profit as an additional rental. It is further clear from first and third respondents' submission that BEC did not take this 12, 5% into consideration in assessing and evaluating the bids. Counsel for first and third respondents was indeed at pains to address me as to how this 12, 5% came into the recommendation clause. It is not clear from the record as to how either ACSA or TB came to the recommendation especially the "furthermore" clause.

[18] In my view, this "further 12, 5% offer" by the second respondent should have been disclosed to the other bidders. It is further in my view that this "sweetener" did play a role in the final recommendation and the awarding of the tender to the second respondent. It was improper or irregular on the part of the first and/or third respondents to consider the "sweetener" without an indication on the record of proceedings as to how either ACSA or TB dealt with it. The decision taken by ACSA or TB was due to irrelevant considerations taken into account'. Failure to disclose the offer made by the second respondent to the applicant and other bidders is unfair.

[19] In CEO, SASSA v Cash Paymaster 2012 (1) SA 216 Tshiqi, JA dealt with the "mandatory and material procedure or condition prescribed by an empowering provision" requirement as worded in s 6(2) (b) of PAJA. The court held, following the principle set out in Nokeng Tsa Taemane Local Municipality v Dinokeng Property Owners Association, that "[i]t 's important to mention that the mere failure to comply with one or other administrative provision does not mean that the whole procedure is necessarily void. It depends in the first instance on whether the Act contemplated that the relevant failure should be visited with nullity and in the second

instance on its materiality." The court further referred to a decision in *Moseme Road Construction CC & Others v King Civil Engineering Contractors (Pty) Ltd & Another* 2010 (4) SA 359 (SCA) where it was held that "not every slip in the administration of tenders is necessarily to be visited by judicial sanction". The court held that consideration of public interest, pragmatism and practicality should inform the exercise of a judicial discretion whether to set aside administration or not"¹³

[20] Considering the decisions and the provisions relied on as falling within section 6(2) (b) of PAJA, I am of the view that the applicant's point is not fatal. What is fatal is the consideration of an undisclosed "sweetener" offer outside the ITB in making further recommendations.

[21] Section 217 of the Constitution of the Republic of South Africa provides that-
"When an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost effective."

[22] Consideration of "a further 12, 5%" by ACSA or TB was not in accordance with the system that is fair and transparent with other bidders and, in my view, on this leg alone, the tender stands to be set aside. The second respondent was and still is the incumbent. The services have not been and will not be interrupted by the setting aside of the tender.

[23] It is trite that costs follow the event. The applicant succeeds with the application and is entitled to the costs, such costs to include the costs of two counsel.

[24] In the result, I make the following order.

ORDER

The decision of the first and/or third respondent to award the tender for the Operation of the Core Duty and VAT-free Stores in the International Departures and arrival airside terminals at OR Tambo International Airport, Cape Town International Airport and the new International Airport at La Mercy (north of Durban KZN) bid reference number CDF08.05/2009 to the second respondent is set aside with costs, such costs to include the costs of two counsel.

AML PHATUDI

Judge of the High Court

Heard on: 16 and 17 April 2012

For the Appellant: Adv MC Maritz SC

: Adv EC Labuschagne SC Instructed by: Messrs: Savage, Jooste & Adams Incorporated

For the First and Third Respondent: Adv KD Moroka SC

: Adv L Gcabashe

: Adv Jara

Instructed by: Messrs: Mkhabela Huntley Adekeye Incorporated

For the Second Respondent: Adv Wim Trengove SC

: Adv John Peter SC

Instructed by: Messrs: Fluxmans Incorporated

Date of Judgment: 17 May 2012