IN THE KWAZULU-NATAL HIGH COURT, PIETERMARITZBURG
REPUBLIC OF SOUTH AFRICA

CASE NO. 7102/09

In the matter between:

UBUBELE ALFA CHEMICALS (PTY) LIMITED **APPLICANT**

and

MONDI LIMITED **FIRST RESPONDENT**
SILVIX **SECOND RESPONDENT**

JUDGMENT Delivered on 16 October 2009

SWAIN J

[1] The central issue in this application is whether the applicant has established the conclusion of a tacit "tender agreement" between the applicant and the first respondent, allegedly incorporating the conditions under which the first respondent would consider the submission of tenders, invited by the first respondent, from the applicant and the second respondent, amongst others, for the supply of a certain chemical to the first respondent.

[2] If the existence of such an agreement is established, the applicant complains that the first respondent, in awarding the contract tendered for to the second respondent, acted in breach of this agreement. As a consequence, the applicant seeks as initial relief, an order directing the first respondent to supply the applicant with copies of all documentation supplied by the second respondent to the applicant, in connection with the tender. Combined with this relief, the applicant seeks leave to supplement its founding papers within five days of its receipt of such documentation.

[3] Thereafter, the applicant seeks substantive relief in the form of an order setting aside the contract concluded between the respondents, declaring that the tender submitted by the second respondent did not comply with the conditions of tender, ought not to have been considered by the first respondent and directing the first respondent to consider the tenders submitted without consideration of the second respondent's tender. Certain alternative relief is also sought, which need not be considered at this stage.

[4] It is clear that "the seeking of tenders is no more than an invitation to do business and the tender is an offer which can be accepted or rejected at will".

G & L Builders cc v McCarthy Contractors (Pty) Ltd.
1988 (2) SA 243 (ECLD) at 247 B

[5] In the present case however, what is contended for is the existence of an "underlying contract" ("onderliggende kontrak") between the first respondent and the tenderers.

Wentzel v Gemeenskapsontwikkelingsraad
1981 (3) SA 703 (T) at 708 D – H

or "the creation of a contractual relationship" between the first respondent and the "tenderers prior to acceptance of a specific tender"

G & L Builders supra at pg 248 i

[6] The submission of Mr. Rall, S.C., who appeared for the applicant, was that a tacit "underlying contract" a so-called "tender agreement" was concluded between the first respondent and all the tenderers, in terms of which the first respondent was obliged to deal with the tenders in terms of certain conditions.

[7] Mr. Rall, S.C. disavowed any reliance upon the concept of quasi-mutual assent to establish the existence of such a tender agreement. In other words, it is not the applicant's case that there was no true consensus *ad idem* between the parties, but that the conduct of the first respondent led the applicant to reasonably believe that the first respondent had agreed, so that the first respondent is to be treated as if it had agreed.

Christie : The Law of Contract in South Africa
5th Edition at pg 82

[8] The enquiry to establish the existence of the tacit tender agreement contended for is along the following lines:

…….”the one party says ‘but we truly agreed; our (or my, or his) conduct proves it’, and the enquiry is concerned with the proper inference to be drawn from the proved facts”

Christie supra at pg 82

[9] As I said in

Sewpersadh & another v Dookie
2008 (4) SA 127 (DCLD) at para 26 and 27

as regards the nature of the test to be applied to determine whether an inference may be drawn on the particular facts, that a tacit contract has been concluded, I respectfully agree with the dictum of Comrie J in

Muller v Pam Snyman Eiendomskonsultante (Edms) Beperk
[2000] 4 All SA 412 (C)at 419 b – c

where he stated the following

"The idea of a compelling inference appeals to me; a compelling inference derived from proof on a balance of probabilities of unequivocal conduct usually in a business setting"

[10] Taking this dictum into account, as well as other authorities which are discussed by Christie, (supra at pg 85) the learned author formulates the test as to whether a tacit agreement has been concluded, as follows, with which I respectfully agree

"In order to establish a tacit-contract, it is necessary to prove, by the preponderance of probabilities, conduct in circumstances which are so unequivocal that the parties must have been satisfied that they were in agreement. If the Court concludes on a preponderance of probabilities that the parties reached agreement in that manner, it may find the tacit contract established"

[11] This, in my view, is the nature of the onus which the applicant has to discharge on a preponderance of probabilities. Is there unequivocal conduct of the parties, which compels one to draw the inference, that the first respondent intended to be contractually bound by the requirements it had provided for tenderers, and the applicant likewise in submitting its tender, intended to be contractually bound by such requirements?

[12] The cornerstone of the argument of Mr. Rall, S.C. is the decision of McLaren J in the unreported case of

Logbro Properties cc v Malan N O and others
Case No. 3831/95 13 February 1997

where McLaren J on the facts of that case, came to the conclusion that a tender agreement had been concluded between the parties. Although conceding that the tender in that case was one involving a provincial government body, Mr. Rall, S.C. submitted that the Court had nevertheless dealt with the matter on a purely contractual basis. He submitted that a comparison of the terms contained in the tender documents in that case, should lead to a similar conclusion, namely the conclusion of a tender agreement between the applicant and the first respondent.

[13] McLaren J however, at page 10 of the Judgment, had the following to say

"Before I examine the provisions in the documents which the applicant completed I draw attention to the following factors which, in my view, demonstrate the desirability, and hence the probability, of the conclusion of tender agreements between the committee and the tenderers.

1.1 All the properties offered for sale belonged to the State. The policy of the committee in disposing of business sites is to sell them "to the public by public tender or auction with a reserve price." Furthermore, "all cases of alienation of immovable State property without cost or at a payment lower than the market value thereof must be submitted to the Treasury for approval." These provisions are clearly laid down to ensure good, clean government and to avoid corruption. Suitable terms in a tender agreement could also serve to achieve these objects.

1.2 Generally, an invitation to tender is simply a request that offers should be submitted to the other party which may, for instance, decide to construct the buildings for which tenders were submitted by using a different manner of construction than that which was envisaged in the invitation **(G & L Builders 249 D)** or to sell a property by private treaty to a tenderer **(Wentzel 707 C-D)**. Such flexibility in its position as seller would hold no attraction for the committee which may only sell its properties in accordance with the prescribed policy. A tender agreement may prevent a party who calls for offers from dealing with them as it pleases."

[14] The learned Judge at page 15 of the Judgment, after examining the terms of the tender documents, had the following to say:

"I considered the terms of the documents set out above in the light of the undisputed facts and the probabilities (to the extent that they can be determined from the said facts and the background circumstances) and I came to the conclusion that the applicant and the committee concluded a tender agreement."

[15] It is therefore clear that the learned Judge in examining the probabilities as to whether a tender agreement had been concluded, placed a great deal of weight upon the desirability of the existence of a tender agreement, because:

[15.1] The property belonged to the State and had to be sold to the public by public auction with a reserve price. Alienation of immovable State property without cost, or at a payment lower than market value, had to be submitted to the Treasury for approval. The

object was to ensure good, clean government and to avoid corruption.

[15.2] The flexibility afforded to the committee by the common law rule that an invitation to tender was simply a request for offers, held no attraction for the committee, which could only sell its properties in accordance with the prescribed policy. A tender agreement therefore fulfilled the desirable objective of preventing the committee from dealing with the offers it called for, how it pleased.

[16] In this regard Mr. Rall, S.C. submitted that the first respondent is a public listed company, which has just as much an interest as a government department in maintaining good and clean governance and to avoid corruption. This is undoubtedly so, but the all important distinction, in my view, lies in the concept of flexibility referred to by McLaren J.

[17] It is this aspect which was emphasised by Mr. Voormolen, who appeared for the first respondent, in advancing his argument that no tender agreement was concluded. He submitted that the first respondent wished to keep its position flexible and referred to various provisions in the tender documents in support of this contention:

[17.1] By reference to the letter in which the first respondent invited tenders, he drew attention to the provisions that the request for tenders "is not an offer to contract" and that "contract negotiation" was envisaged. It was also stipulated that "we reserve the right to reject any and all proposals received".

[17.2] The tender documents contained the provision that "It is Mondi's intention to make a decision regarding the successful tenderer by the end of April 2009". He submitted that this was not a promise, but a statement of intention.

[17.3] It was specified that "Mondi hereby request (*sic*) tenderers to provide us with a quotation" and "Mondi expects to enter into a one year agreement" which he submitted indicated that the first respondent wished to keep its position as flexible as possible.

[18] However, the argument of Mr. Rall, S.C. was that the covering letter by the first respondent inviting tenders, had as its object the main agreement and not any tender agreement. By reference to other conditions in the tender documents, he submitted that there would be no point in stipulating these conditions, if the first respondent was not going to be bound by them.

[19] I find it unnecessary however to examine each of these "conditions" referred to by Mr. Rall, S.C. in turn, nor to examine the extent to which identical, or similar provisions in the Logbro case,

led McLaren J to find that the existence of a tender agreement had been established, for the following reasons:

[19.1] The version of the first respondent is that in terms of the covering letter, the first respondent did not undertake any obligations in favour of the tenderers. The first respondent "expected to" enter into a one year agreement with a successful service provider and that "contract negotiation" was envisaged. In order to succeed a tenderer would have to satisfy the first respondent that the offer contained in its tender, would meet the requirements of the first respondent.

[19.2] No good reason emerges on the papers to explain why the first respondent would sacrifice the flexibility it enjoyed to contract with any tenderer it pleased, on whatever terms it chose. An attitude on the part of the first respondent that, in order to succeed, a tenderer's offer would have to meet the first respondent's requirements, does not mean that the first respondent is contractually bound to adhere to these requirements in accepting any offer.

[19.3] In my view, the express provision in the covering letter that the first respondent reserved the right "to reject any and all proposals received" is an indication that the first respondent wished to make it clear that its ability to contract freely, was not compromised. This is precisely because it was unnecessary to expressly state such a reservation by virtue of the common law rule to this effect. The fact that it was, I regard as an indication that the first

respondent did not want to compromise its right to contract freely. In the Logbro case, McLaren J regarded a provision that the highest tender would not necessarily be accepted, as indicative of the existence of a tender agreement, because it was unnecessary and inappropriate to specify this by virtue of the common law rule. The learned Judge then concluded however, that the parties to a tender agreement may wish to make it clear that the highest offer would not necessarily be accepted. In other words, an indication that the parties intended to conclude a tender agreement. This conclusion must however be considered in the context of the learned Judge's remarks, that a tender agreement may prevent a party from dealing with offers as it pleases. Precisely because of the absence of such freedom on the part of the committee in that case, this was not an important consideration in coming to the conclusion that the learned Judge did.

[19.4] Consequently, a distinguishing feature of the Logbro case, which renders a direct comparison of the terms in that case with those in the present case, a misleading exercise, is that the question to be asked in the present case, namely why the first respondent would sacrifice the flexibility it enjoyed to contract with whoever it pleased, did not need to be asked in the Logbro case.

[19.5] Furthermore, in my view, of decisive importance in the Logbro case was the provision that "Tenders which do not comply with the requirements set out below shall not be considered". In this regard, McLaren J had the following to say:

"Because the committee was offering State land for sale by public tender, there is every reason to believe that it would try to implement good tendering practice by the rejection of tenders which do not comply with a tender agreement, and thereby to 'maintain the level playing field which other tenderers expect'. ……..It is exactly the kind of clause which I would expect to find in a tender agreement regulating the tender procedure of State land by public tender".

This highlights what I regard as a basic distinction between a call for private tenders in the commercial arena and that of a call for tenders by organs of State. In the latter case Section 217 of the Constitution provides that they must procure for goods or services in accordance with a system which is fair, equitable, transparent, cost effective and competitive. As pointed out by Mr. Voormolen, because their adjudication is "administrative action" the provisions of Section 33 of the Constitution and the provisions of the Promotion of Administrative Justice Act No. 3 of 2000 apply to the decisions of "organs of State". Consequently, such decisions are subject to judicial review and may be tested for administrative fairness by this Court.

Logbro Properties cc v Bedderson N O & Others
2003 (2) SA 460 (SCA) at paras 5 - 11

No such considerations apply in the present case. There was no obligation upon the first respondent to "maintain a level playing field" between the various tenderers, as the object of the whole exercise was for the first respondent to conclude the best deal that it was able to, amongst those who tendered for the supply of the specific chemical.

[19.6] Accepting the absence of such a clause in the present case, Mr. Rall, S.C. sought to draw a similar inference from the following provision:

"Mondi's requirement is minimum level 4 B E E contributor and the tenderer must provide proof of its B E E status".

The argument was that the use of peremptory language was an indication that the first respondent was obliged to reject non-compliant tenderers. I do not regard compliance by any tenderer with this requirement as a pre-requisite for consideration of the tender. It is nothing more, nor less, than what it is described as, namely a "requirement". The question has again to be asked – why would the first respondent wish to restrict its ability to accept an offer which met all of its other requirements, purely because of a failure to comply with this particular requirement? No cogent reason is suggested on the papers for such an intention.

[20] When all of the above is considered, I am satisfied that the applicant has failed to discharge the onus of proving on a balance of probabilities unequivocal conduct of the parties, which compels me to draw the inference that the first respondent intended to be contractually bound by the requirements it had provided for tenderers and the applicant, in submitting its tender, intended to be contractually bound by such requirements. As pointed out above, this is not a case where the applicant accepts there was no true consensus *ad idem* between the parties, but seeks to hold the first respondent to such an agreement, on the basis that the first

respondent, by its conduct, led the applicant to believe that it had agreed to the terms of the alleged tender agreement, and the first respondent must be treated as if it had agreed.

[21] Regarding the issue of costs. Mr. Voormolen submitted that costs on the attorney and client scale were justified, as the applicant had unjustifiably alleged *mala fides* on the part of the first respondent. The applicant alleged that the first respondent was using the tender process as a sham to create the impression it was utilising an open and fair tender process, when it intended all along to retain the second respondent as its supplier. The response of Mr. Rall, S.C. was that considering all of the evidence there was justification for the allegation. I am not satisfied that this is a case where in the exercise of my discretion, I should order the applicant to pay the costs on a punitive scale, for the reason that the applicant's belief that it had not been dealt with fairly by the first respondent, is not entirely without merit. The applicant should however pay the costs of the adjourned hearing, which were reserved.

The order I make is the following:

1. The application is dismissed.

2. The applicant is ordered to pay the costs of the first and second respondents, such costs to

include the costs of the hearing on 03 September 2009.

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SWAIN J.

Appearances: /

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For the Applicant	:	Mr. A. J. Rall, S.C.
Instructed by	:	Grimbeek Van Rooyen & Partners C/o Stowell & Company Pietermaritzburg
For 1st Respondent	:	Mr. V. Voormolen
Instructed by	:	Shepstone & Wylie Pietermaritzburg
For 2nd Respondent	:	Mr. C. J. Pammenter, S.C.
Instructed by	:	Fluxman's Attorneys C/o Shepstone & Wylie Pietermaritzburg
Date of Hearing	:	13 September 2009
Date of Filing of Judgment	:	16 October 2009