

In the High Court of South Africa
KwaZulu-Natal Division, Pietermaritzburg

Case No : 4329/14

In the matter between :

Sgananda Consulting (Pty) Ltd

Applicant

and

Mnambithi FET College

First Respondent

The Chairperson of the Bid Adjudication Committee
of the Mnambithi FET College

Second Respondent

The Appeal Authority of the Mnambithi FET
College

Third Respondent

The School Governing Body of Estcourt High School

Fourth Respondent

The Chairperson of the School Governing Body of Escourt
High School

Fifth Respondent

The Member of the Executive Council for Education for
the Province of KwaZulu-Natal

Sixth Respondent

Amahle Amahlubi Trading Enterprise CC

Seventh Respondent

Lindiwe Nompumelelo Radebe

Eighth Respondent

Branken Investments CC

Ninth Respondent

Val-U-Lodge Estcourt

Tenth Respondent

Judgment

Lopes J

[1] This is an application to set aside the award of a tender for the provision of accommodation and meals for students attending the Mnambithi FET College ('the college'), the first respondent in this application. The applicant is Sgananda Consulting (Pty) Ltd ('Sgananda'). It was an unsuccessful bidder.

[2] The college is a college for further education operating as a public institution under the Department of Higher Education and Training. It is funded by public funds received from the National Treasury, and student accommodation is paid for from the National Student Financial Aid Scheme. The college offers various courses at its Estcourt campus. It works on strict budgetary controls and applies the provisions of the Public Finance Management Act , 1999.

[3] The history of this application may be summarised as follows :

- (a) once it had established the number of students which it would be required to accommodate during the 2014 academic year, the college published an invitation to tender for the provision of accommodation and for meals for the students, on the 7th January 2014. The tender invitation was compiled by the college's Specification Committee and the advert invited tenders for the accommodation of 300 students and two hostel supervisors. The closing date for tenders was recorded as being 12 noon on the 17th January 2014;
- (b) the entire process was conducted with some urgency and on shortened time limits because the college was only able to determine the number of students who would have to be accommodated once they have received applications to undertake courses for the 2014 academic year;
- (c) the college's Bid Evaluation Committee ('the BEC') opened all the sealed tenders on the 21st January 2014. Five tenders were received, as follows :
 - (i) Sgananda's tender to accommodate 180 students at premises located 15 kilometres from the centre of Estcourt at premises referred to as 'Isaac's Well';
 - (ii) the seventh respondent Amahle Amahlubi Trading Enterprises ('Amahle') CC who tendered to accommodate 200 students at the hostel facilities situated at the Estcourt High School, a government high school in Estcourt;
 - (iii) the ninth respondent Branken Investments CC ('Branken') tendered to provide accommodation at the Sunrise Hotel in Estcourt for 150 students;

(iv) Branken had also tendered for the accommodation of students at Isaac's Well;

(v) the tenth respondent, Val-U-Lodge tendered to accommodate students at its premises in Estcourt;

(d) after the BEC had opened and examined the tenders, the chairperson arranged for inspections to be carried out by its members of the various premises. These inspections took place on the 23rd January 2014;

(e) on the 24th January 2014 the chairperson of the BEC telephoned the representative of Sgananda, Mr Sibusiso David Shezi ('Mr Shezi'), in order to obtain clarification of the pricing structure tendered. This was because in the Sgananda tender the tender price had been reflected as follows :

'Cost per learner : R15 500 (including meals)

Rate per room : R2 573 (per month).'

The clarification which was sought by the chairperson of the BEC was whether or not the rate of R15 500 was a reference to the tender price per student per month, or per student per year. According to the chairperson of the BEC and others who were listening to the conversation which was being conducted on a loudspeaker phone, the reply from Mr Shezi was that the tender price was R15 500 per student per month;

(f) the BEC then made a recommendation to the college's Bid Adjudication Committee ('the BAC') and after a meeting of the BAC on the 4th February 2014, the BAC awarded tenders to Amahle (200 students) and Branken (150 students) on the 6th February 2014;

- (g) on the 6th February 2014 the unsuccessful tenderers were notified, and in the letter addressed to Sgananda it was recorded that the closing date for appeals was the 13th February 2014;
- (h) appointment letters were sent to the successful tenderers on the 14th February 2012;
- (i) on the 7th February 2014 Sgananda notified the college of its intention to appeal against the award of the tender and requested reasons for the BAC not awarding the tender to Sgananda;
- (j) as no formal tender appeal committee existed, the college then appointed the third respondent, retired Judge P C Combrinck, sitting alone, as the appeal authority. It is common cause between the parties that no objection was raised to the appointment of Judge Combrinck as the appeal authority, and his powers were those of a common law appeal – i.e. he was required to consider the matter afresh on the papers which served before the BAC;
- (k) pursuant to an order of court which was obtained by Sgananda, the appeal authority was directed to dispose of the matter by not later than the 11th March 2014 and to provide reasons by the 12th March 2014;
- (l) on the 9th March 2014 the appeal authority made a decision dismissing the appeal by Sgananda.

[4] Sgananda then brought this application seeking to set aside the decision of the appeal authority and the BAC. The basis on which the appeal authority's decision is criticised is that the matter was approached incorrectly on the basis that the powers of the appeal authority were limited when that was not in fact the case. It is also alleged that the appeal authority incorrectly interpreted the facts.

[5] Mr *Gajoo* SC who appeared for Sgananda together with Mr *Patel* also submitted that the BEC should have rejected the tenders of Amahle and Branken. He submitted that the appeal authority misdirected itself by regarding its powers as being limited by s 20 of the Preferential Procurement Policy Framework Act, 2000. The decision of the appeal authority indeed based its findings on an examination of the powers bestowed upon a bid appeals tribunal appointed in terms of that Act, to interfere with the decision of a bid adjudication committee. It is not necessary for me to set out those powers. Suffice it to say that the appeal authority found that the BAC had not been guilty of any of the provisions set out in s 20 of the Act.

[6] The appeal authority also recorded that Sgananda had inadvertently tendered a rate which equated to R516,67 per day when the correct rate should have been R42,06 or R43,05 per student per day. The appeal authority took the view that a mistake on the part of a person submitting a tender (in giving the wrong information) cannot amount to an irregularity on the part of the receiver of the bid.

[7] The appeal authority also relied on the fact that the tender called for accommodation in Estcourt, and the proposal in relation to Isaac's Well related to accommodation 15 kilometres outside the centre of Estcourt. It was common cause at the hearing before me, that the bid evaluation committee had inspected the premises and was prepared to accept that Isaac's Well was a suitable premises

despite its distance from the centre of Estcourt. This aspect was no longer an issue between the parties having been abandoned in the papers before me.

[8] Mr *Hartzenberg* SC, who appeared for the college together with Mr *Garland*, conceded that the appeal authority's powers had been misconstrued, and that an incorrect basis was used in order to arrive at the ultimate decision which was made. He nevertheless sought to support the decision with regard to the fact that the mistake was made by the representative of Sgananda in clarifying the tender price. As this was of Sgananda's own making, no criticism could be levied at the BEC or the BAC in accepting the clarification which Mr Shezi gave.

[9] Mr *Gajoo* submitted that National Treasury's Instruction Note, dated 3rd September 2010 was applicable to the function of the BAC and that it should not have accepted the oral clarification of the tender price by Mr Shezi, because clause 4.10 of the Treasury's instruction note provides :

'Requests for clarification and the bidder's responses should be made in writing.'

Mr *Gajoo* submitted that if the clarification had been sought in writing, the error which was made by Mr Shezi would have become glaringly apparent to him once he had committed it to writing. Mr *Gajoo* submitted that the requirement for writing was a salutary one, and designed to obviate any misunderstanding or failure of communication between the parties.

[10] Mr *Gajoo* further submitted that as Mr Shezi was in the business of providing accommodation and meals, he would immediately have become aware of his error, if

he had committed it to writing. Mr *Gajoo* also submitted that because the price which was recorded by the BEC (after speaking to Mr Shezi) was so far out of kilter with the other prices, they should immediately have become aware that there was a possible error, and should have queried it further with Mr Shezi

[11] Mr *Hartzenberg* submitted that the BEC had done nothing unfair in seeking clarification of the tender price from Mr Shezi. Mr *Hartzenberg* referred to the rule in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634 – 635 and submitted that the only correct decision on the papers could be that Mr Shezi had in fact recorded the tender price as stated by the representative of the BEC. In this regard he referred me to *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) at paragraph 26.

[12] Mr *Hartzenberg* accepted that the National Treasury's Instruction Note was applicable but submitted that it only required that clarification 'should' be made in writing. He submitted that this was not a prescriptive direction, but rather a guide to good practice. Mr *Hartzenberg* also pointed to the fact that the entire proceedings were conducted under some pressure on the college, because it could only ascertain the number of students who required accommodation once all the applications for 2014 had been submitted and accepted. It was also clear from the record that students were housed in the hostel accommodation from the 10th February 2014. The BEC was therefore under considerable pressure to place its recommendation before the BAC, and in those circumstances it was unreasonable to expect it to have sent an enquiry in writing to Mr Shezi and to have waited for a reply in writing.

[13] I agree with the submissions of Mr *Hartzenberg*. In my view, on the application papers as they stand, the version of the chairperson and other members of the BEC as to the price which was clarified by Mr Shezi is something I must accept, having applied the rule in *Plascon-Evans*. That it was a mistake on the part of Mr Shezi is not something which can be laid at the door of the BEC or the BAC. Given the tight time constraints, it would have been unreasonable to suggest that the BEC can be faulted for not having made written enquiries. The National Treasury Instruction Note 10.4 is indeed not prescriptive and the circumstances of this matter demonstrate a good reason why that should be so.

[14] In addition I am of the view that there was no obligation on the BEC or the BAC to make further enquiries from the representative of Sgananda once he had clarified the tender price. The fact that that price may have been significantly out of kilter with the other quotes is a function of the statement made by Mr Shezi. It has nothing to do with the deliberations of the BEC or the BAC.

[15] Mr *Gajoo* also submitted that the tender of Sgnananda was based upon the rate used by the National Students Financial Aid Scheme, some R17 000 per student per annum. This alone should have alerted the BEC to the fact that the submission of Sgnananda and the statement by Mr Shezi could only have referred to an annual amount. The basing of his tender price on the rate used by the National Students Financial Aid Scheme is not alleged by Mr Shezi to have been conveyed by

him to the BEC. Once again, however, any confusion in this regard was caused by the wording of Sgananda's tender, and when clarification on that issue was sought from Mr Shezi, the BEC accepted that he had intended to refer to the amount of R15 500 as being an amount per student per month. That the written tender of Sgananda was confusing is clearly so because the cost per learner, expressed as 'R15 500 (including meals)', was immediately above the rate per room which was expressed as 'R2 583 (per month)'. The consequences of the confusion in the written quote coupled with the clarification by Shezi is solely the fault of Mr Shezi.

[16] In the application papers reference is made to the fact that if the amount of R15 500 was an annual amount, the rate per student would have been of the order of R50 per student per day. The suggestion by Mr Shezi is that Sgananda conducted business elsewhere at a similar rate. Accordingly, the BEC could not have adopted the view that this rate was so low and out of kilter with the other tenders, that the accommodation and provision of meals could not be achieved. It is not clear to me on the papers that that was in fact considered by the BEC, but if it was considered and rejected, that was again a consequence of the tender and the incorrect clarification given by Mr Shezi.

[17] I accordingly find that the decision of the BEC, not to award the tender to Sgananda on the basis that its price was too high, cannot be faulted. In addition, no criticism can be laid at the door of the appeal authority for failing to overturn the decision of the BAC on this basis.

[18] Mr *Gajoo* submitted that in the event that I were to find that the BAC was correct in awarding the tender to Sgananda, the successful tenders should in any event be set aside. His submissions in this regard were as follows :

- (a) the award of the tender to Amahle was flawed because the School Governing Body of Estcourt High School ('the Governing Body') had concluded a contract for the lease of the school hostel for the period concerned, but that lease had been concluded with the sole member of Amahle, one Lindiwe Nompumelelo Radebe, the eighth respondent. This was evident from a copy of the lease agreement which was an annexure to the papers. A precedent had clearly been used for this because it was dated the 1st January 2009 (as typed) but clearly referred to a lease for the 2014 year;
- (b) that the lease agreement was in any event invalid because the amount of the rental was to be decided by the Governing Body. No rental was therefore stipulated in the lease and it was at the discretion of the landlord. In this regard Mr *Gajoo* referred me to *Benlou Properties (Pty) Ltd v Vector Graphics (Pty) Ltd* 1993 (1) SA 179 (A) at page 186 C – D;
- (c) that the Governing Body and the chairperson of the Governing Body (the fifth respondent) were constrained by the provisions of the Public Finance Management Act, 1999 and were required to follow a public procurement process, which had not been done;
- (d) although the Governing Body and Amahle had purported to conclude a further lease agreement on the 11th February 2014 which cured the problem of the Governing Body setting the amount of the lease payments, that was done after the closing date of the tenders and cannot assist Amahle;

- (e) the public procurement process had also not been followed in the conclusion of the second lease. A shortage of funds, as alleged by the chairperson of the Governing Body as justification for the conclusion of the leases, cannot override the requirements for compliance with a proper procurement process;
- (f) the fact that the BEC had raised questions at its meeting regarding the lease of State property from a third party. The suggestion here was that as the college was funded by the National Government, as was the Estcourt High School, the intervention of a third party for profit seemed inappropriate in circumstances where the college could have hired the hostel directly from the Estcourt High School.

[19] Mr *Hartzenberg* conceded that the initial lease concluded between the eighth respondent and the Governing Body was invalid, in accordance with the dicta in *Benlou*, and he conceded that the lack of procurement procedures with regard to the subsequent lease were problematic. He also conceded that I could not take into account what had transpired between the Governing Body and Amahle after the award of the tenders.

[20] I am in agreement with the submissions of both Mr *Gajoo* and the concessions made by Mr *Hartzenberg*. Accordingly, I find that the Amahle tender was wrongly awarded by the BAC.

[21] Mr *Gajoo* further submitted that the award by the BAC of the tender to Branken was invalid because in its tender document Branken had stipulated the following :

‘Please note that this proposal is based on a minimum three year contract with a 10 % annual increment.’

[22] Mr *Gajoo* submitted that the acceptance of such a tender was improper because the tender itself was not in accordance with the conditions laid down in the invitation. The effect of the acceptance of such a tender was to submit a counter-proposal to Branken. This undermined the entire tender process. Mr *Hartzenberg* submitted that this could be dealt with in a spirit of practicality. According to the invitation to tender, it was never contemplated that the agreement would be for anything more than the current academic year. The evidence was that this extended from February to the end of November, a period of ten months. Mr *Gajoo* referred me to *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2006 (3) SA 151 at paragraph 51 with regard to the concept of a counter-proposal.

[23] In my view it was improper for the BAC to have accepted the tender of Branken in circumstances where that would have involved the conclusion of a three year agreement with a 10% escalation clause. To do so would be wrong for no other reason than that it would be unfair to the other tenderers. Accordingly, I find that the Branken tender was wrongly awarded by the BAC.

[24] Mr *Hartzenberg* submitted that if I were to consider finding that the award of the tenders to Amahle and Branken were to be set aside, that Sgananda had no locus standi to apply for such an order. This is because it was an unsuccessful tenderer who had not succeeded in persuading the court that its own tender should have been accepted. He recorded that he was unable to find any authority for the proposition that where an applicant is unsuccessful he may secure the setting aside of other successful tenders.

[25] Mr *Gajoo* submitted that Sgananda as a fellow tenderer had a direct and substantial interest in the outcome of the award of the tenders. Mr *Gajoo* also referred me to the wide rights of standing given to parties in terms of the Promotion of Administrative Justice Act, 2000. There was some debate before me as to whether that Act was in any event applicable in these proceedings. However, even if the rights of Sgananda to apply for the setting aside of the tenders is not covered by that Act, in my view the direct and substantial interest of Sgananda in the proceedings is enough to afford it locus standi for the relief which it seeks. Its interest in the proceedings does not cease, as Mr *Hartzenberg* contended, when this court finds that the tender of Sgananda was correctly not awarded by the BAC.

[26] Having found that Sgananda was not entitled to be awarded a tender, and that the tenders awarded to Amahle and Branken were incorrectly awarded, I must now consider the relief which was sought by Sgananda. In addition to an order setting aside the award of the tenders, Sgananda sought an order awarding the tender for the accommodation of 180 students to itself. It also sought an order

declaring the lease agreement dated the 1st January 2009 concluded between the Governing Body of Estcourt High School and Amahle to be null and void, and costs.

[27] As I intend to make an order setting aside the award of the tender to Amahle, there is no point in making any declaratory order regarding the lease agreement which was concluded on the 1st January 2009.

[28] The following problems however present themselves in the making of any order setting aside the award of the tenders :

(a) In the absence of updated information as to the availability of accommodation by the various tenderers and the other problems referred to above in the tenders which were incorrectly awarded, I am of the view that the tender process will have to be re-visited in its entirety. In order to attempt to ensure that this is timeously concluded, I have set out in my order the dates by which the various functions have to be performed. Hopefully all the parties will have been alerted by my judgment to the possible problems which they could encounter. It does not, of course, cover all possibilities and no doubt unknown factors will arise in the future tender process. That, however, is for the BEC and the BAC to sort out;

(b) the college has apparently concluded what it has described as 'temporary agreements' with both Amahle and Branken for the accommodation of students until the resolution of this application. I have been informed by the parties that the college closes its doors for the mid-year break on the 27th

June 2014 and re-opens on the 15th July 2014. Accordingly any re-tendering process will have to be finalised well before the re-opening date in order to ensure the continued accommodation of the students;

- (c) I am anxious not to make any order which would interfere with the accommodation of the students in the short-term, particularly as many of them will have mid-year exams looming and any re-housing of them will provide an unnecessary distraction from their studies;
- (d) In arriving at a conclusion not to award Sgananda a tender and to set aside the tenders awarded to Amahle and Branken, I have kept in mind the requirement that I should not conflate the merits of the various parties' contentions with the remedy to be applied. In this regard I refer to the dicta in *All Pay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer, South African Social Security Agency and Others* 2014 (1) 604 (CC).

[29] With regard to the question of costs, although Sgananda was unsuccessful in the principal relief which it sought being the award to itself of the tender for the accommodation of students for the 2014 year, it has been substantially successful in obtaining an order setting aside the award of the tenders to Amahle and Branken. In those circumstances is just and equitable that Sgananda should be awarded the costs of the application. As the fault in improperly awarding the tenders to Amahle and Branken lies with the college, it is just and equitable were it to pay the costs of Sgananda. I do not intend to make any order for costs in relation to the third to tenth respondents.

[30] In the circumstances I make the following order :

1. The awards by the first respondent of tenders to the seventh and ninth respondents for the accommodation of students of the first respondent on the 6th February 2014 are set aside;
2. The first respondent is directed to advertise for tenders to provide accommodation and meals for students of the first respondent for the second half of the 2014 academic year, such invitation to be published by no later than the 30th May 2014;
3. The closing date for tenders is to be no later than the 17th June 2014;
4. The award of tenders is to be made by the Bid Adjudication Committee by no later than the 27th June 2014;
5. The first respondent is directed to pay the applicant's costs of the application, such costs to include those consequent upon the employment of two counsel.

Date of hearing : 5th May 2014

Date of judgment : 20th May 2014

Counsel for the Applicant : V I Gajoo SC with I J Patel (instructed by Ndwandwe and Associates)

Counsel for the Respondents : C J Hartzenberg SC with R Garland (instructed by Christopher, Walton and Tatham)