THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Case number: 148/2007

In the matter between:

THE GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA	**APPELLANT**
and	
THABISO CHEMICALS (PTY) LTD	**RESPONDENT**

Neutral citation: *Government of the RSA v Thabiso Chemicals* (148/2007) [2008] ZASCA 112 (25 SEPTEMBER 2008)

CORAM:	**HARMS ADP, BRAND, MAYA JJA, BORUCHOWITZ *et* KGOMO AJJA**
HEARD:	**5 SEPTEMBER 2008**
DELIVERED:	**25 SEPTEMBER 2008**
CORRECTED:	

SUMMARY: Contract arising from tender procedure – cancelled by State Tender Board on behalf of Government on basis that award of tender influenced by incorrect information impliedly furnished by respondent – whether implication relied upon established on facts – relationship between parties governed by law of contract – administrative law no role to play.

ORDER

On appeal from: HIGH COURT, PRETORIA (BOTHA J)
Sitting as court of First Instance.

(1) The respondent's application for condonation of the late filing of its heads of argument, is dismissed with costs.

(2) The respondent's Pretoria attorneys will not be entitled to recover any fees or disbursements from their own client pertaining to the condonation application.

(3) The appeal is upheld with costs, including the costs occasioned by the employment of two counsel.

(4) The order of the court a quo is set aside and the following is substituted in its stead:

'The plaintiff's claim is dismissed with costs.'

JUDGMENT

BRAND JA (Harms ADP, Maya JJA, Boruchowitz *et* Kgomo AJJA concurring)

[1] Preliminary issues in this appeal arose from a condonation application by the respondent for the late filing of its heads of argument, I find it appropriate to deal with these preliminary issues at the end of the judgment. As to the merits, proceedings started when the respondent ('Thabiso') instituted action against the appellant ('the Government') in the Pretoria High Court. According to the particulars of claim, its claim was for damages in the amount of R15 016 846, allegedly arising from the wrongful cancellation by the State Tender Board ('the Tender Board'), representing the Government, of a contract between the parties. In its plea, the Government admitted both the contract and its cancellation by the Tender Board, but denied that the cancellation was wrongful.

[2] At the commencement of the trial, the parties asked the court *a quo* (Botha J) to order a separation of issues. In terms of the separation order, the issues surrounding the wrongfulness of the Tender Board's purported cancellation were decided first, while the quantum of Thabiso's alleged damages stood over for later determination. The preliminary issues were decided in favour of Thabiso. Hence the court declared that the cancellation of the contract by the Tender Board was wrongful and ordered the Government to pay the costs of the preliminary proceedings. The Government's appeal against that judgment is with the leave of the court a quo.

[3] It is common cause that the contract between the parties originated from an invitation by the Tender Board for tenders to deliver cleaning materials to various Government departments. In terms of the invitation, the closing date for tenders was 10 April 2001. Thabiso's tender was submitted in time. In due course it was notified by the Tender Board that its tender had been accepted. In accordance with the invitation, the tender was expressly made subject, firstly, to the Regulations promulgated under the State Tender Board Act 86 of 1968 ('the Regulations'), secondly, to the State Tender Board General Conditions and Procedures (ST36) as published in the State Tender Bulletin on 17 May 1991 ("the General Conditions'), and, thirdly, to certain special conditions pertaining to the specific tender ('the Special Conditions').

[4] From the beginning of November 2001, the contract was implemented in that Thabiso complied with orders placed by Government departments in accordance with the terms of the agreement. However, on 11 January 2002, the Tender Board sought to terminate this contractual relationship by way of a formal letter of cancellation bearing that date. Thabiso regarded the Tender Board's attempt at cancellation as a repudiation in the sense of an anticipatory breach. At first, Thabiso attempted to persuade the Tender Board not to persist in its cancellation. But these attempts proved to be unsuccessful. Consequently, Thabiso accepted what it regarded as a repudiation of the contract, whereupon it instituted the action for damages which led to the present appeal.

[5] In the letter of 11 January 2002, the Tender Board's grounds of cancellation – in so far as they were persisted in – were formulated thus:

'When scrutinizing your tender documents for the second time after the award of the above tender, it was found that the correct documents are required by paragraph 7.3 of the [Special Conditions], which reads as follows, had not been submitted with your tender:

"7.3 Where a tender is not a SABS listed company or a permit holder of any of the products that are offered, a SABS report (not older than 12 months) which proves that his manufacturing facilities and quality control systems comply with SABS requirements, should be handed in not later than 10 April 2001."

. . .

In view of the fact that the documents required by the above paragraph 7.3 . . . should have been submitted before 10 April 2001, your tender did not comply with the special tender conditions at the time of tender and therefore the State Tender Board approved on 13 December 2001 that your above contract be cancelled.'

[6] Though the cancellation letter made reference to 'documents', the wording of paragraph 7.3 plainly shows that it requires one document only, ie a favourable report by the SABS on the tenderer's manufacturing facilities and quality control systems. What is more, the furnishing of the report is clearly a provisional requirement only. It need not be complied with if the tenderer is either a SABS listed company or permit holder. Thabiso admitted that it had never obtained a SABS report as contemplated in paragraph 7.3 and that a report of that kind was thus never furnished to the Tender Board. It also admitted that as at 10 April 2001, it was not a SABS permit holder in respect of the cleaning materials referred to in its tender. Its answer to the Tender Board's complaint was essentially that, as at 10 April 2001 it was a SABS listed company and that it was therefore not required to file a SABS report. The Tender Board's response amounted to a denial that Thabiso was in fact a SABS listed company.

[7] In his evidence at the trial, the managing director of Thabiso, Mr Brian Nyezy, persisted in the allegation that Thabiso was indeed a SABS listed company. The Government, on the other hand, relied on the evidence of a senior SABS official, Mrs Sibongile Dlamini, to the effect that it was not.

Although the obscurities surrounding qualification as a SABS listed company may render Mr Nyezy's confusion understandable, I am persuaded that Mrs Dlamini's testimony conclusively proved the Government's point. I therefore agree with the court *a quo's* factual finding that, as at 10 April 2001, Thabiso was neither a SABS listed company, nor a permit holder as envisaged in paragraph 7.3. It follows that, in my view, Thabiso did not comply with the special condition in paragraph 7.3. Nonetheless, on my reading of the tender documents as a whole such non-compliance did not, on its own, constitute a ground for cancellation by the Government.

[8] In its cancellation letter of 11 January 2002, the Tender Board indeed relied on Thabiso's failure to file a SABS report, per se, as its basis for cancellation. That, however, was not the position taken by the Government in the court a quo. There it relied on clause 24.8.2 of the General Conditions (ST 36). This clause provides that:

'24.8 Where a contract has been awarded on the strength of information furnished by the contractor which, after the conclusion of the relevant agreement, is proved to have been incorrect, the [Tender Board] may, in addition to any legal remedy it may have –

24.8.1 . . .

24.8.2 cancel the contract and claim damages which the State may suffer as a result of having to make less favourable arrangements.'

[9] As the factual basis for resorting to the provisions of clause 28.4.2, the Government contended that the tender was awarded on the basis of information furnished by Thabiso to the effect that it was a SABS listed company, which representation subsequently proved to be incorrect. The change of tack by the Government, in relying on a ground for cancellation different from the one referred to in its letter of cancellation, by itself, was not of any consequence. As Nienaber JA said in *Datacolor International (Pty) Ltd v Intamarket (Pty) Ltd* 2001 (2) 284 (SCA) para 28:

'It is settled law that an innocent party, having purported to cancel on inadequate grounds, may afterwards rely on any adequate grounds which existed at . . . the time

(cf *Putco Ltd v TV & Radio Guarantee Co (Pty) Ltd and other Related Cases* 1985 (4) SA 809 (A) at 832C-D).'

[10] The real issue to be decided by the court a quo therefore fell within a narrow ambit, namely, whether the facts relied on by the Government could sustain a cancellation under clause 24.8.2. Botha J found that it could not. His reasons for this finding appear from the following admirably succinct statement:

'Clause 24.8.2 of ST 36 gives the Tender Board the right to cancel a tender if it has been awarded on the strength of information which, after the conclusion of the agreement, has been proved to have been incorrect. In view of the fact that the plaintiff [Thabiso] never alleged that it was SABS listed, the defendant [the Government] cannot rely on Clause 24.8.2 for its cancellation of the contract.'

[11] In this court the Government found further support for its case in reg 3(6)(b) of the Regulations promulgated under the State Tender Board Act on 20 May 1988, which were in operation at the time, though subsequently replaced by Regulations published on 5 December 2003. The relevant part of reg 3(6)(b) provides:

'(6) If an agreement has been concluded with any contractor on the strength of information furnished by him in respect of which it is after the conclusion of such agreement proved that such information was incorrect the Board may, in addition to any legal remedy it may have –

(a) . . .

(b) terminate the agreement and recover from the contractor any damages which the State may suffer by having to make less favourable arrangements thereafter.'

[12] I do not believe that reg 3(6)(b) takes the matter any further. It is virtually identical in its wording to clause 24.8.2. Any interpretation or implementation which is good for the one must therefore be good for the other. The essential element of both is the furnishing of information, ie a representation by the tenderer, which influenced the award of a tender in his or her favour, but which subsequently turned out to be incorrect. Fraud or even negligence is not required. For purpose of both provisions, even an innocent misrepresentation on the part of the tenderer will suffice.

[13] The only incorrect information furnished – or misrepresentation – by Thabiso contended for by the Government, in this court and in the court a quo, is that it held itself out to be a SABS listed company, which it was not. No one suggests that a representation to this effect would be of no consequence in the award of the tender. Shorn of unnecessary frills appended in evidence and in argument, the outcome of the dispute therefore turns on one simple issue of fact: did Thabiso, at any time prior to the award of the tender in its favour furnish incorrect information by holding itself out as a SABS listed company, or not? As I said earlier, Botha J, in the court a quo held that it did not. On this narrow basis he therefore decided the matter against the Government. In the event, the only question we have to decide is whether we agree with that factual finding.

[14] From Botha J's reasoning, it is apparent in my view, that he only considered the possibility of presenting information by express words. If this was indeed the only possibility to be considered, the learned judge was obviously correct. Nowhere in the tender documents did Thabiso make the express statement that it was a SABS listed company. The fact that it subsequently tried to justify its failure to furnish a report on that basis, is of no consequence. But on my reading of clause 24.8.2 – and, for that matter, reg 3(6)(b) – I can see no reason to limit the enquiry to the furnishing of incorrect information by way of express statements. It is a generally accepted principle that the effect of an implied misrepresentation by conduct is equivalent to a misrepresentation by express words. I think that this general principle should also find application in an enquiry under clause 24(8)(2) and reg 3(6)(b). Thus understood, information conveyed impliedly by conduct would, for the purposes of these provisions, be the equivalent of furnishing information by express words. In the event, the enquiry would then be, as in all cases where reliance is placed on an implied representation by conduct, whether the implication can be said to be justified (see eg *Standard Bank of South Africa Ltd v Coetsee* 1981 (1) SA 1131 (A) at 1135E).

[15] Reverting to the facts of this case, Thabiso submitted a tender without the SABS report contemplated by the special condition in paragraph 7.3.

Read in the context of this special condition as a whole, Thabiso's conduct is capable of only three possible inferences: firstly, that Thabiso is a SABS listed company, secondly, that it is a SABS permit holder with reference to any of the products offered in the tender and, thirdly, that its failure to furnish the report was due to an oversight. The second of the possible inferences referred to, can be disregarded. It was clear from the tender documents that Thabiso was not the holder of a SABS permit.

[16] Of the other two inferences, I think that, objectively speaking, the first mentioned is by far the most likely one. Why should it be inferred that Thabiso, whose tender included all other documents required, would suffer from an oversight in this single respect? From a subjective point of view, the inference that Thabiso was a SABS listed company was clearly the one drawn by the Tender Board. What is more, that was the very inference Thabiso intended to convey. We know as a fact that the reason why it had failed to furnish the SABS report was that it was under the mistaken impression that it was a listed company. In the circumstances it hardly lies Thabiso in the mouth to say that the Tender Board should not have drawn the inference which it did.

[17] I believe this is the end of the matter. The Government had established the furnishing of incorrect information on which it relied. It follows that I do not agree with the court a quo's finding that clause 24.8.2 was not applicable. The inevitable result, in my view, is that the appeal must succeed.

[18] What remains are observations originating from comments by the court a quo which seem to support the notion that the contractual relationship between the parties may somehow be affected by the principles of administrative law. These comments gave rise to arguments on appeal, for example, as to whether the cancellation process was procedurally fair and whether Thabiso was granted a proper opportunity to address the Tender Board in accordance with the *audi alteram partem* rule prior to the cancellation. Lest I be understood to agree with these comments by the court a quo, let me clarify: I do not believe that the principles of administrative law have any role to play in the outcome of the dispute. After the tender had been

awarded, the relationship between the parties in this case was governed by the principles of contract law (see eg *Cape Metropolitan Council v Metro Inspection Services CC* 2001 (3) SA 1013 (SCA) para 18; *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2006 (3) SA 151 (SCA) paras 11 and 12). The fact that the Tender Board relied on authority derived from a statutory provision (ie s 4(1) (eA) of the State Tender Board Act) to cancel the contract on behalf of the Government, does not detract from this principle. Nor does the fact that the grounds of cancellation on which the Tender Board relied were, inter alia, reflected in a regulation. All that happened, in my view, is that the provisions of the Regulations – like the provisions of ST36 – became part of the contract through incorporation by reference.

[19] Finally, there are the preliminary issues pertaining to Thabiso's condonation application, necessitated by the late filing of its heads of argument. Both the condonation application and the heads of argument were filed, way out of time, only one week before the hearing of the appeal. The resulting inconvenience for this court and the appellant, is self-evident. The explanations advanced for this flagrant non-compliance of the rules, clearly indicate that Thabiso's Pretoria attorneys are solely to blame. The excuses proferred by the attorneys are so flimsy in nature that they do not warrant a detailed account. Suffice it to say, in my view, that these excuses do not even come close to justifying condonation. But, because I hold the view that the appeal would in any event have been successful, the dismissal of the condonation application will be of little consequence, save for issues of costs. The order I therefore propose to make is that the condonation application be dismissed with costs and that Thabiso's Pretoria attorneys will not be entitled to recover any fees or disbursements from their own client pertaining to the unsuccessful condonation application.

[20] For these reasons it is ordered that:

(1) The respondent's application for condonation of the late filing of its heads of argument, is dismissed with costs.

(2) The respondent's Pretoria attorneys will not be entitled to recover any fees or disbursements from their own client pertaining to the condonation application.

(3) The appeal is upheld with costs, including the costs occasioned by the employment of two counsel.

(4) The order of the court a quo is set aside and the following is substituted in its stead:

'The plaintiff's claim is dismissed with costs.'

...……..
F D J BRAND
JUDGE OF APPEAL

Appearances:

For Appellant:	B R Tokota SC N A R Nqoepe Instructed by The State Attorney, Pretoria The State Attorney, Bloemfontein
For Respondent:	M M Ripp SC P J Vermeulen Instructed by Ramothwala Lenyai Inc, Pretoria Mosiu Attorneys, Bloemfontein