

**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

Case Number: A356/2016

A4157/2016

Before the Hon. Mr Bozalek, Ms Baartman and Mr Nuku

Hearing: 28 October and 11 November 2016

Judgment Delivered: 6 December 2016

In the matter between:

Afriline Civils (Pty) Ltd

Appellant

And

**Minister of Rural Development &
Land Reform**

First Respondent

**Exeo Khokela Civil Engineering
Construction (Pty) Ltd (Registration
Number:2004/012859/07)**

Second Respondent

And in the matter between:

Case Number 5222/16

Asla Construction (Pty) Ltd

Appellant

And

**Head of the Department of Rural
Development and Land Reform**

First Respondent

**Exeo Khokela Civil Engineering
Construction (Pty) Ltd (Registration No:
2004/012859/07)**

Second Respondent

JUDGMENT

BAARTMAN, J

- [1] On 23 June 2014, this court per Dlodlo J, dismissed the review applications by Afriline Civils (Pty) Ltd (Afriline) and Asla Construction (Pty) Ltd (Asla) against the decision of the minister of Rural Development and Land Reform (the first respondent) to award tender no. SSC WC 36/2015 DRDLR: Construction of the Ebenhaeser Bulk Irrigation Revitalisation Project, Western Cape (the Irrigation Project) to Exeo Khokela Civil Engineering Construction (Pty) Ltd (the second respondent). This is an appeal against the dismissal by Afriline and Asla (the appellants).

BACKGROUND

- [2] The two applications were consolidated and heard together. The second respondent withdrew its opposition to the applications and by agreement between the parties no costs order was sought against it. It follows that only the first respondent pursued its opposition. The facts leading to this litigation are largely common cause.
- [3] The first respondent invited bids for the construction of the Irrigation Project. The tender exceeded R5 million, which meant the Department's National Bid Adjudication Committee (NBAC) was required to make the award. The mandatory process starts with the

Bid Evaluation Committee (BEC), based in Cape Town, making an initial assessment and a recommendation on which bids should be considered: 'whether they can be regarded as responsive.' The Provincial Bid Adjudication Committee (PBAC) then considers the BEC's recommendation and makes a further recommendation. The recommendations are forwarded to the NBAC, which after due consideration awards the tender. This is the three-tier process that was followed in this matter.

- [4] Initially, the closing date for submissions was 12 October 2015; that date was later extended to 23 October 2015. Afriline, Asla, the second respondent and two others responded to the invitation. The following mandatory tender requirements are relevant to this judgment: they appear from the tender notice:

'1. It is estimated that tenderers should have a CIDB contractor grading of 8CE.

2. Preferences are offered to tenderers who have a CIDB grading of 8CE or Higher.

3. Only tenderers who attended a Compulsory Briefing session (with written confirmation of attendance at compulsory site clarification meeting) (Form D in the Tender Document), have an Original and Valid Tax clearance Certificate. Have a C or higher bank Rating, and have not 'Tempered' (sic) with the Tender Document are eligible to submit: tenders....'

- [5] On 1 October 2015, the compulsory site meeting was held. Mr Muthabo (Muthabo), a senior supply chain practitioner in the employ of the first respondent, and who also served 'as part of the secretariat of the Bid Specification and Evaluation Committee and the Provincial Bid Adjudication Committee', addressed the attendees. It was common cause that the appellants were represented at the meeting.

- [6] It is apparent from the meeting minutes that Muthabo emphasised the following:

'...Tenderers must have at least a 8CE or higher CIDB grade...

An original Valid Tax Clearance Certificate must be submitted with the tender. ...

Bidders should note, that in accordance with legislation, no contract may be awarded to a/an person/entity who has failed to submit an Original Valid Tax Clearance Certificate from the South African Revenue Service (SARS), certifying that the taxes of that person/entity are in order or that suitable arrangements have been made with SARS. In bids where a consortia/Joint Venture/Sub-Contractors are involved each party must submit a separate Original Valid Tax Clearance Certificate.' (my emphasis)

- [7] Afriline, Asla and the second respondent included TT Innovations among the sub-contractors they intended to use. The second respondent linked TT Innovations to Martin & East (Pty) Ltd by including its name in brackets beneath TT Innovation's name. All three, however, submitted tax clearance certificates for Martin & East (Pty) Ltd rather than for TT Innovations. As none of the bidders fully complied with the requirement to submit tax clearance certificates for all their sub-contractors, Muthabo sought and obtained permission to request the outstanding certificates. He addressed letters to all the bidders indicating which certificates were outstanding and gave each until 23 December 2015 to comply. In response, the second respondent provided a tax clearance certificate for TT Innovations (Pty) Ltd.

- [8] An Afriline employee, Mr Morne Marais, responded in a letter dated 18 December 2015. He explained:

'...We would like to clarify that TT Innovations is a division of Martin and East (Pty) Ltd and not a legal entity in its own right.

As a result of the above we have submitted a valid original tax clearance certificate of Martin and East (Pty) Ltd at tender stage, as you have acknowledged in your letter ...'

- [9] In response Asla submitted a letter dated 14 January 2016 signed by Mr Winfield, a TT Innovations employee, in which he made similar claims. The following appears from its letter:

'1. In terms of Section 44 of the Income Tax Act the directors and shareholders of Martin and East (Pty) Ltd and TT innovations (Pty) Ltd resolved on 1 March 2014 to the merger of the two Businesses. In terms of this resolution, TT innovations became an operating division of Martin & East (Pty) Ltd.

2. For Tenders submitted after 1 September 2014, Martin & East (Pty) Ltd will assume all legal and contractual responsibilities, obligations and liabilities for TT Innovations (Pty) Ltd. As a result, TT Innovations will contract as an operating division of Martin & East (Pty) Ltd CIDB Certificate (9CE and 8SB) as well as Martin & East (Pty) Ltd [BEE] Scorecard (currently Level 3)....

4. For tenders which were submitted before 1 September 2014, TT Innovations (Pty) Ltd will continue to discharge its contractual obligations on behalf of Martin & East (Pty) Ltd under an Agency-Agreement using seconded staff and equipment ...'

- [10] On 18 February 2016, the BEC, after taking legal advice from Mr Fonk, a departmental legal adviser, and in line therewith, considered the letters referred to above. 'The two companies were then not disqualified on the basis of non-submission of the original and valid Tax Clearance Certificates.' On 19 February 2016, that recommendation was submitted to the PBAC who referred the matter back to the BEC. The PBAC disagreed with the recommendation on the basis that '...the letters submitted from both bidders instead of valid

and original Tax Clearance Certificates of the subcontractors must not be considered.'

[11] On 21 February 2016, the BEC reconvened 'and re-evaluated all the proposals' but ignored the letters explaining the relationship between TT Innovations and Martin & East (Pty) Ltd. Unsurprisingly, it disqualified Afriline and Asla based on their failure to submit tax clearance certificates for TT Innovations and recommended the second respondent as the successful bidder. The PBAC accepted that recommendation and also proposed the second respondent's appointment to the NBAC. It is common cause that the NBAC awarded the tender to the second respondent. It rejected the explanation that TT Innovations was a division of Martin & East (Pty) Ltd because the second respondent had submitted a return which indicated that the South African Revenue Service regarded TT Innovations as a separate entity.

[12] Afriline was also excluded because its CIDB grade certificate had expired before the award was made. I do not intend to deal with this ground of exclusion because this matter can be disposed of in respect of the tax clearance certificate issue, which affects both appellants. However, in the circumstances of this matter, it is appropriate to make some observations on this issue. The tender specifications required that: *'Tenderers must have at least a 8CE or higher CIDB grade.'* Afriline had the necessary grade on submission of its bid but it lapsed on 15 January 2016, before the tender was awarded. It would have been expedient for potential bidders to have had attention drawn to fact that an award could only be made to a bidder whose CIDB grading was still valid at the date of award.¹

¹ Regulation 25(9)(a) of the CIDB Regulations and Section 18(1)&(2) of the Construction Industry Development Board Act 38 of 2000

Tax clearance certificates for TT Innovations

[13] Mr De Waal, counsel for Afriline, correctly submitted that the only question to determine was whether in the circumstances of this matter the first respondent had 'committed a reviewable irregularity' by excluding the appellants and awarding the tender to the second respondent.

[14] In respect of the only ground for excluding the appellants dealt with in this judgment, Dlodlo J said at paragraph 33:

'...Afriline and Asla themselves made a fundamental error in not submitting a Tax Clearance Certificate of an entity they proposed would be their sub-contractor. The fact is that when it evaluated Afriline's, Asla's and Exeo's [second respondent] tenders, clearly the National Bid Adjudicating Committee (on objective information at its disposal) reasonably concluded that the sub-contractor they intended to use would be TT innovations as registered with SARS as a taxpayer which was in "good Standing" and which as certified by SARS, was a taxpayer which "has complied with the requirements as set out in Section 256 (3) of the Tax Administration Act. These two Applicants actually disqualified themselves in respect of the sub-contractor's Tax Clearance certificate. It is only convenient now for them to apportion blame to the Department.'

[15] The first respondent was obliged to award the tender in a manner which is 'fair, equitable, transparent, competitive and cost-effective.'² Doing so would have complied with the applicable legislation.³ The first indication that TT Innovations was connected to Martin & East (Pty) Ltd appears from the second respondent's bid where it indicated TT

² *Metro Projects CC v Klerksdorp Local Municipality* 2004 (1) SA 16 (SCA) at para 11

³ Section 217(1) of the Constitution, Act 108 of 1996, Preferential Procurement Policy Framework Act 5 of 2000.

Innovations as one of its proposed sub-contractors – but then in brackets referred to Martin & East (Pty) Ltd. Unfortunately, the second respondent was not required to explain that reference. The second respondent added by submitting an original tax clearance certificate for Martin & East (Pty) Ltd. The second indicator of a connection between the two came from the letters both appellants submitted in response to the letters requesting their intended sub-contractors' tax clearance certificates.

- [16] The first respondent was faced with a peculiar set of facts and allegations. Whether it acted fairly, at each stage of the process, must be evaluated in light of those circumstances. Conradie JA makes the point as follows:⁴

'[13] In the Logbro Properties case supra ...Cameron JA referred to the "ever-flexible duty to act fairly" that rested on a provincial tender committee. Fairness must be decided on the circumstances of each case. It may in given circumstances be fair to ask a tenderer to explain an ambiguity in its tender; it may be fair to allow a tenderer to correct an obvious mistake; it may, particularly in a complex tender, be fair to ask for clarification or details required for its proper evaluation. Whatever is done may not cause the process to lose the attribute of fairness or, in the local government sphere, the attributes of transparency, competitiveness and cost-effectiveness.'

- [17] From inception, there was an indication that the appellants and the second respondent intended to use TT Innovations, which had some connection with Martin & East Pty (Ltd). This is borne out by their submission of Martin & East (Pty) Ltd's original tax clearance certificate as well as the second respondent's reference to it. The connection was incontrovertible once the appellants had submitted the

⁴ Page 21 para 13 of the Metro Projects matter.

letters referred to above in response to a request for TT Innovations' tax clearance certificate. The certificate submitted by second respondent should not have surprised the first respondent because it was clear from Asla's letter that TT Innovations (Pty) Ltd existed and was operating. It was therefore also unsurprising that the BEC sought legal advice which led to its acceptance of the letters and their content. The PBAC, however, instructed the BEC to ignore the letters without any justification for doing so.

[18] The BEC, contrary to the legal advice received, decided to follow the PBAC's instruction to ignore the letters' content. The inevitable result was the recommendation that the appellants be excluded for failure to comply with the mandatory requirement to submit original tax clearance certificates for TT innovations. The result of acting contrary to its own legal advice was serious. Mr Jacobs SC, who appeared, together with Mr Solomon, for the first respondent submitted that the BEC's role was merely advisory and so its involvement was not crucial to the outcome as the NBAC made the award. I disagree.

[19] The first respondent referred to the process as 'a three-tier process.' It would be deplorable if this lengthy process, at tax payer's expense, was an exercise in futility, which it would be if the recommendations from the BEC and the PBAC had no persuasive value. A process was in place that culminated in the award of this tender to the second respondent. For the result to be fair, the entire process ought to have been fair. It was not.

[20] When the BEC ignored the letters indicating that TT Innovations was a division of another entity, it ignored the fact that a division is not a 'legal persona' in our law.⁵ The BEC's reconsidering must be

⁵ *Volkskas Bank v ('n Divisie van ABSA Bank BPK) v Pietersen* 1993(1) SA 312 CPD at 314 A-B '...ek ernstig sou oorweeg het om die aansoek van die hand te wys op grond

evaluated 'in light of the principles of administrative fairness.'⁶ Ignoring the letters without any further enquiry and against legal advice violated the principles of administrative fairness. Without the letter, the appellants' bids would of necessity have been non-compliant with a mandatory requirement. The NBAC, in this case however, made an irrational finding that TT Innovations was not a division as alleged in the letters the appellants submitted. Those letters explain why the existing valid tax clearance certificate for TT Innovations (Pty) Ltd should not be used for new bids. Paragraph 4 of the letter dated 18 December 2016 bears repeating:

'4. For tenders which were submitted before 1 September 2014, TT Innovations (Pty) Ltd will continue to discharge its contractual obligations on behalf of Martin & East (Pty) Ltd under an Agency-Agreement using seconded staff and equipment ...'

[21] In light of the above, the NBAC irrationally committed a material error of fact. The appellants were entitled to rely upon that error as a basis for their review application. To ensure procedural fairness, it was necessary to give the appellants and the second respondent an opportunity to clarify TT Innovations' status – their proposed sub-contractor. The failure to do so meant that the process contravened the provisions of section 3(2)(a) of the Promotion of Administrative Justice Act 3 of 2000 which requires any tender process to be procedurally fair and justifiable. On this basis alone, the award stands to be reviewed and set aside.

[22] There is no explanation for the suppression of the BEC recommendation and so it must taint the entire process. The BEC had fairly resolved the apparent anomaly in respect of the sub-contractor,

daarvan dat daar in ons reg geen regspersoon soos 'n divisie bestaan nie. ...' and *ABSA Bank Ltd v Blignault and Another and Four Similar Cases* 1996(4) SA 100 (O)

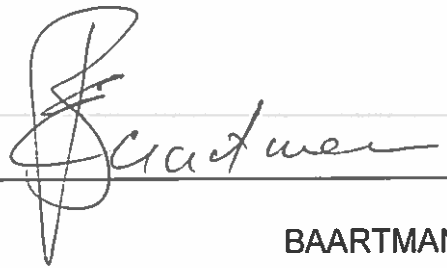
⁶ *Logbro Properties CC v Bedderson NO and Others* 2003(2) SA 460 SCA at para [15]

TT Innovations. It opted to seek legal advice rather than to seek clarification from the bidders after receiving their apparently contradictory responses to its first query.


- [23] The legal advice received, if accepted, would not have prejudiced any of the three bidders. However, the NBAC rejected the legal advice and in effect required the BEC to do likewise and reverse its position. Nor did the PBAC seek any further clarification of the position regarding the true identity of the sub-contractors vis-à-vis the tax certification requirement. Thus, rather than the NBAC being presented with an informed position reflecting the views of the BEC and the PBAC it received instead a contrived agreement between those two bodies. It was, in addition, irregular for the PBAC to usurp the discretion vested in the BEC and equally inappropriate for the BEC to have allowed it. Each tier in the three tier process had to act independently or risk, as happened in this matter, stripping the process of the necessary procedural fairness.

Conclusion

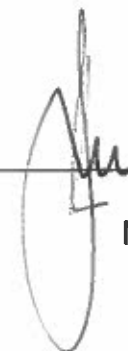
- [24] In light of the above, the appeal succeeds with costs against the first respondent. The order of the court *a quo* is set aside and replaced with the following:
- (a) The first respondent's award of tender no. SSC WC 36/2015 DRDLR: Construction of the Ebenhaeser Bulk Irrigation Revitalisation Project, Western Cape to the second respondent is reviewed and set aside.
 - (b) The matter is remitted to the first respondent to consider the appropriate way forward.
 - (c) The appellants are awarded costs of the application against the first respondent.


BAARTMAN J

I concur.


BOZAEK J

I concur.


NUKU J