

**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

CASE NO: 2024-004605

BEFORE THE HONOURABLE JUSTICE, AUCAMP AJ

25 March 2024

In the matter between:

**INFINITE BLUE TRADING 29 CC t/a MOTAU
PROJECTS**

Applicant

[Registration no: 2005/137585/23]

and

JOHANNESBURG ROADS AGENCY SOC LIMITED

First Respondent

[Registration no: 2000/028993/30]

AUDITOR GENERAL

Second Respondent

Neutral Citation: Infinite Blue Trading 29 CC t/a Motau Projects v Johannesburg Roads Agency SOC Ltd and Another (2024/004605) [2024] ZAGPJHC (25 March 2024)

Coram: Aucamp S

Heard: 2 February 2024

Delivered: 25 March 2024 – This judgement was handed down electronically by circulation to the parties' representatives by email, by being uploaded to

Caselines. The date and time for hand-down is deemed to be 10:00 on 25 March 2024.

Summary: Repudiation – State Organ terminating private agreement concluded with private entity pursuant to opinion expressed by Auditor General of possible irregularity in the awarding of the tender; opinion expressed not constituting lawful ground to repudiate agreement by State Organ

JUDGEMENT

INTRODUCTION

- [1] The applicant makes application, (a) interdicting and restraining the first respondent, the Johannesburg Roads Agency SOC Ltd (***“the JRA”***). From implementing its repudiation of the agreement: Contract No: JRA/20/63 and (b) directing and ordering the respondent to immediately implement the agreement on the same basis as it did prior to the purported repudiation of the agreement.
- [2] Pursuant to a competitive tender process, the JRA awarded Tender JRA/20/63 to a panel of four service providers. The applicant was one of the aforesaid four service providers. Pursuant to the aforesaid tender award to the applicant, the applicant and the JRA concluded a formal service level agreement in April / May 2021 (***“the agreement”***).
- [3] The parties continuously implemented the agreement until during or about 20 December 2023, when the JRA purported to repudiate the agreement by having issued the applicant with correspondence, recording that due to an alleged irregularity identified by the second respondent, the Auditor General in the previous tender process, the JRA would no longer place any orders with the applicant. The correspondence reads:

"Dear Sir/Madam

Your letter of appointment for the abovementioned contract dated the 23rd April 2021 has reference.

The Johannesburg Roads Agency would like to notify you that it is no longer going to issue any further Purchase Orders from the date of this letter to your company due to some irregularity that was identified by the Auditor General during the regularity audit regarding the evaluation of specialised vehicles submitted in your tender which did not qualify to be awarded points as per the specification.

Furthermore, you indicated that you will subcontract drilling and road marking activity and there was no proof of experience for such services provided in your tender. This resulted in AG not agreeing with the allocated points in the functional evaluation.

The JRA is bound not to continue with your services as this will be deemed irregular expenditure as your contract with JRA is an "as and when required" contract.

For any enquiries and concerns regarding the contract please do not hesitate to call our contract management department number 011 298 5187 (Khangelani Gumbi). Thank you for continuing patronage and support patronages."

[4] The JRA on 17 January 2024 further wrote to the applicant and recorded:

- "3. The JRA wishes to place it on record that its letter dated the 20 December 2023 does not constitute termination, and/or a repudiation of contract and thus refutes any claims that the JRA has terminated the contract with your client.
4. In accordance with our self-explanatory letter of the 20 December 2023, it was JRA's advice to your client that the Auditor General of South Africa (herein referred to as AGSA), identified some irregularities in the bidding process, more so, that your client did not qualify to be awarded points as per the tender specification of the above-mentioned contract.
5. Your client had also indicated that they will subcontract drilling road-making activities and there was no proof of experience for such services provided in their tender and thus AGSA did not agree with the points in your client's functional evaluation.

6. Recognising the responsibility to ensure transparent procurement as required in terms of section 217 of the Constitution, your client was then advised that no new purchase orders shall be issued to them in respect of this contract in line with the findings and recommendations of the AGSA.
7. ...
8. The Act, the applicable circulars and regulations further places an obligation on the accounting officer to put in place measures to prevent the recurrence if irregular expenditure in instances where procurement is declared to be irregular.
9. Therefore, the JRA shall honour the purchase order(s) already allocated to your client, if there are any. Your client is thus required in terms of their contractual obligation, to execute such order. Same shall be in accordance with instruction and mandate in accordance with the contract.
10. Lastly, the JRA is well aware that your client's appointment is due to lapse on the 23rd April 2023, and thus the appointment shall be terminated only by the lapse of the contractual period as stipulated in the appointment letter and contract.”

- [5] In the answering affidavit to this application, the JRA in paragraphs 57 and 70 stated that:

“I confirm that the contract was awarded without any issues or concerns regarding fraud or dishonesty on the part of the applicant.”

And

“Were it not for the Auditor General's findings, the first respondent would have continued to issue purchase orders to all service providers. This is because at no stage did I, as the accounting officer of the first respondent suspect or doubt the integrity of the outcome of the first respondent's BEC.”

- [6] It is therefore abundantly clear, but for the findings and report of the Auditor General, the JRA would not have proceeded to terminate the agreement with the applicant as it did.

- [7] The applicant, as far as the Auditor General is concerns, submits that:

- 7.1. the Auditor General conducts an audit of the processes of the JRA and as part of this duty it performed an audit on the manner in which certain tenders were evaluated by the JRA including the tender awarded to the applicant;
- 7.2. it was the exercise of this audit that resulted in the Auditor General having arrived at its conclusions that the BEC incorrectly scored the applicant of functionality;

7.3. the Auditor General, with reference to the registration papers of certain vehicles relevant to the tender, did not confirm that the said vehicles in fact met the required qualities for purposes of performing the activities for which they were required;

7.4. the JRA provided the Auditor General with the following response to the said findings of the Auditor General:

“Proof of existing vehicles: Management evaluated the attached documents as per the bidder’s submission and the registration papers indicating elevating unit/flat deck/platform deck was submitted. The description of the vehicle means that it is a tower wagon. Refer to annexure “18” of the bid document.”

7.5. the Auditor General did not give the applicant an opportunity to respond to its intended findings which is indicative of the fact that the Auditor General did not intend to express any opinion on the validity and/or enforceability of the existing agreement between the applicant and the JRA.

THE ISSUES FOR CONSIDERATION

[8] The issue for consideration is whether the communication from the JRA that it will no longer provide the applicant with orders amount to a repudiation of the agreement?

REPUDIATION

[9] In *Discovery Life Ltd v Hogan and Another* 2021 (5) SA 466 (SCA) at 16 and 17 the following was stated:

"[16] As Corbett JA stated in NASH v Golden Dumps (Pty) Ltd:

'Where one party to a contract, without lawful grounds, indicates to the other party in words or by conduct a deliberate and unequivocal intention no longer to be bound by the contract, he is said to repudiate the contract ... Where that happens, the other party to the contract may elect to accept the repudiation and rescind the contract. If it does so, the contract comes to an end upon communication of his acceptance of repudiation and rescission to the party who has repudiated ...

[17] This court has consistently said that the test for repudiation is not subjective but objective. The emphasis is not on the repudiating party's state of mind, on what she subjectively intended, but on what she subjectively intended, but on what someone in the position of the innocent party would think she intended to do, repudiation is accordingly not a matter of intention, it is a matter of perception. The perception is that of a reasonable person placed on the position of the aggrieved party. The test is whether such a notional reasonable person would conclude that proper performance (in terms of a true interpretation of the agreement) will not be forthcoming. The inferred intention as manifested by objective external conduct accordingly serves as the criterion for determining the nature of the threatened actual breach."

[10] I have little doubt that but for the existence of lawful grounds to have issued the termination notice, that the said notice constitutes a repudiation of the agreement.

[11] The JRA is of the view that the effect of the findings of the Auditor General constitute the required lawful grounds upon which the termination notice was predicated upon.

- [12] I am in agreement with Mr Els acting for the applicant, that the findings, to the extent that the opinions expressed by the Auditor General can indeed be classified as “findings” and I am not convinced that it indeed constitutes findings, that the Auditor General did not make findings binding on the JRA and which findings could be used to summarily terminate the agreement with the applicant. Instead, the opinions of the Auditor General in this instance did not more than prescribing to the JRA on how certain expenses had to be recorded in its financial statements.
- [13] When an organ of state procures goods and services, it generally, does so through a competitive bidding process, a process that is administrative of nature. When the organ of state proceeds to conclude an agreement with the successful bidder, the relationship, no longer is governed by public law but instead by private law. See: - **Trencon Construction (Pty) Ltd v Industrial Development Cooperation of South Africa Ltd and Another** 2015 (5) SA 245 (CC at [75]). The distinction is relevant because when an organ of state in a private contractual relationship with a private entity is desirous to terminate the contractual relationship, it can only do so with reference to with the applicable principles of contract law. When an organ of state realises that there has been an irregularity in a tender process, such an organ of state is obliged to approach a court of law by way of a self-review. See: - **MEC for Health, Eastern Cape and another v Kirkland Investments (Pty) Ltd t/a Eye and Laser Institute** 2014 (3) SA 481 (CC) at [82].

[14] It would seem rather drastic and draconian of a state organ, on the say so of an opinion expressed by the Auditor General of possible irregularities would entitled and in fact oblige the said organ of state to terminate the contractual arrangement with the private contract party without having allowed for the irregularity to be tested through due process which *inter alia* afford the private contracting party an opportunity to test the alleged irregularity.

[15] As a consequence, I am persuaded that the termination notice issued by the JRA on [insert date] constituted a repudiation of the agreement for which no lawful basis existed.

[16] Mr Els continues to submit, relying on **State Information Technology Agency SOC Ltd v Gijima Holdings (Pty) Ltd** 2018 (2) SA 23 (CC) that the proper approach in instances such as the present one is that only a court of law has the authority and the power, in terms of section 172(1) of the Constitution to set aside an agreement concluded pursuant to a competitive tender process.

[17] For the very same reasons, I find the submission made on behalf of the JRA that because the agreement does not guarantee orders being issued to the applicant but only on the basis as and when required, that the termination issue does not constitute a repudiation of the agreement, unconvincing.

CONCLUSION

[18] Consequently, I make the following order:

18.1. The first respondent is interdicted and restrained from implementing its repudiation of the agreement: Contract No. JRA/20/63 ("***the Agreement***").

18.2. The first respondent is ordered to immediately implement the agreement on the same basis as it did prior to 20 December 2023.

18.3. The first respondent is ordered to pay the applicant's costs, such costs to include the services of two counsels where so employed.

S AUCAMP

ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

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DATE OF HEARING: 2 FEBRUARY 2024

DATE OF JUDGEMENT: 25 March 2024

APPEARANCES:

COUNSEL FOR THE APPLICANT: ADV APJ ELS

ATTORNEYS FOR THE APPLICANT: ALBERT HIBBERT ATTORNEYS

COUNSEL FOR THE FIRST

RESPONDENT: ADV T SEBOKO

ATTORNEYS FOR THE FIRST

RESPONDENT: SMM ATTORNEYS INC