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**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**



Case number: A87/2017

Date:

DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE: YES/NO
- (2) OF INTEREST TO OTHERS JUDGES: YES/NO
- (3) REVISED

8/3/2018

DATE

SIGNATURE

In the matter between:

ELLIOTT MOBILITY (PTY) LTD

**FIRST APPELLANT
(SECOND RESPONDENT A QUO)**

**NEO THANDO / ELLIOTT MOBILITY (PTY) LTD
JOINT VENTURE**

**SECOND APPELLANT
(THIRD RESPONDENT A QUO)**

And

THE LASER TRANSPORT GROUP (PTY) LTD

**FIRST RESPONDENT
(FIRST APPLICANT A QUO)**

GIN HOLDINGS (PTY) LTD

**SECOND RESPONDENT
(SECOND APPLICANT A QUO)**

JUDGMENT

PRETORIUS J.

- (1) This is an appeal against the judgment and order of van der Westhuizen AJ. The respondents' application to review and set aside the award of tender DIRCO 05/2016/17 ("the tender") by the Minister, Department of International Relations and Cooperation ("DIRCO") in favour of the second appellant, was granted. Furthermore the court *a quo* awarded the tender to the applicants in the court *a quo*. The court *a quo* granted leave to appeal to this court against the whole judgment.

THE PARTIES:

- (2) The parties are referred to in this judgment as they were cited *a quo* for convenience's sake.
- (3) The first applicant is the Laser Transport Group (Pty) Ltd t/a Stuttaford Van Lines. The second applicant is Gin Holdings Proprietary Limited. These applicants are members of a joint venture with the name Laser Transport Group (Pty) Ltd t/a Stuttaford Van Lines and Gin Holdings DIRCO Business Unit Venture ("the Stuttafords Gin Holdings Joint Venture").

- (4) The first respondent in the court *a quo* was the Minister of International Relations and Cooperation ("DIRCO"). The second respondent is Elliott Mobility (Pty) Ltd, one of the present appellants. The third respondent is Neo Thando / Elliott Mobility (Pty) Ltd Joint Venture.
- (5) DIRCO cancelled the first tender and then issued the second tender invitation on 11 August 2015. The second tender's terms of reference were revised in various aspects from those that applied to the first tender.

INTRODUCTION:

- (6) This appeal dealt with a second tender process, where DIRCO granted the tender to the second appellant. The tender was to supply services for the removal, packing, storage and insurance of household goods and vehicles, belonging to DIRCO's transferred officials to and from diplomatic missions abroad and moves locally.
- (7) The applicants and the third respondent were amongst the bidders for both the first and second tenders. On 6 November 2015 the Department informed the applicants that their bid for the second tender had been unsuccessful and the tender had been awarded to the third respondent.

- (8) The applicants set out their reasons for submitting that the tender process was not fair, in the founding affidavit, that the cancellation of the first tender process was unlawful. A consequence of the first tender process was that the total of the applicants' tendered price schedule became common knowledge. According to the applicants, this created an unfair advantage to their competitors in the second tender process as they could tailor their tender to be less than that of their competitors. This rendered the second tender unfair as it had robbed the applicants of any advantage. The second tender was unfair and unlawful as the decision to award it to the third respondents lacked transparency and competitiveness.
- (9) The grounds of appeal by the third respondent was that the applicants themselves did not satisfy the tender bid requirements by furnishing documents and information relating to a subsidiary of the first applicant; the award to the third respondents had been justified and should not have been set aside by the court. Furthermore, according to the third respondent, the order of the Court *a quo* substituting the applicants as the successful tenderers is not justified.

BACKGROUND:

- (10) On 26 March 2015 the bid submission envelopes pertaining to the first tender was opened and the total prices contained in each tender was made public by the supply chain officials of DIRCO in the presence of

the parties. The respective total prices submitted by the applicants were R117 673 286.00 and by the third respondent R215 882 882.00.

- (11) On 2 June 2015 the applicants invited DIRCO's supply chain management officials to attend a presentation and site visit of its facilities. No response was received from DIRCO. On 30 June 2015 the applicants' attorney of record, queried the delay in awarding the tender in an email to DIRCO. DIRCO was warned that the applicants would suffer severe prejudice should the tender be cancelled as their bid price had been known to their competitors, as it had been disclosed publicly on 26 March 2015. DIRCO was reminded that a tender could only be cancelled in very limited circumstances in terms of the provisions of section 8(4) of the Preferential Procurement Regulations of 2011, namely, where there is no longer a need for the services, where there are no longer funds available or no acceptable tenders had been received. Once more DIRCO failed to respond.

- (12) On 6 August 2015 the applicants were informed that the first tender had been cancelled, without DIRCO supplying any reasons for the cancellation. On 11 August 2015 the second tender invitation was issued for the provision of services for the removal, packing, storage (in South Africa only) and insurance of household goods and vehicles belonging to DIRCO's transferred officials to and from diplomatic missions abroad and domestic moves within the Republic of South

Africa.

- (13) Five tenders were received of which three were disqualified as unresponsive, and only the applicants and third respondent's tenders remained for evaluation.
- (14) The tender was awarded to the third respondent on 3 November 2015 and the applicants were informed on 6 November 2015 that their bid had been unsuccessful. On 9 November 2015 the applicants' attorneys addressed a letter to DIRCO setting out their belief that the process followed in the decision to award the second tender had been flawed and would be challenged by the applicants. No response was forthcoming from DIRCO. On 12 November 2015 a further letter of demand was addressed to DIRCO and the requested information was sought in terms of the **Promotion of Access to Information Act**¹ ("PAIA"). The only response received was on 14 November 2015 when DIRCO took issue that the applicants had not formally completed the PAIA form and failed to pay the required R35. This, however, had already been done on 13 November 2015. No response was forthcoming.

LEGAL BACKGROUND AND FRAMEWORK:

¹ Act 2 of 2000

- (15) Section 217(1) of the **Constitution of the Republic of South Africa**² provides:

“(1) When an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective.”

- (16) Section 217(3) provides that *“National legislation must prescribe a framework within which the policy referred to in subsection (2) must be implemented”*.

- (17) Section 195(1)(e), (f), and (g) of the **Constitution** provides:

“(e) People's needs must be responded to, and the public must be encouraged to participate in policy-making.

(f) Public administration must be accountable.

(g) Transparency must be fostered by providing the public with timely, accessible and accurate information.”

- (18) Section 33 of the **Constitution** provides that everyone has the right to administrative action that is lawful, reasonable and procedurally fair.
The legislation that gives effect to this right is the **Promotion of**

² Act 108 of 1996

Administrative Justice Act³ ("PAJA"). According to the applicants the decision violates the provisions of section 33 of the **Constitution** as the decision was not fair, reasonable and lawful administrative action, and that it breached the principles of the rule of law, and subsequently legality.

(19) The **Preferential Procurement Policy Framework Act**⁴ ("the PPPFA") is the national legislation envisaged in section 217(3).

(20) In section 2(1)(f) of the **PPPFA** it is provided that an organ of State must determine its preferential procurement policy as follows:

"(f) the contract must be awarded to the tenderer who scores the highest points, unless objective criteria in addition to those contemplated in paragraphs (d) and (e) justify the award to another tenderer;"

(21) According to the applicants the decision was contrary to section 6(2)(b) of **PAJA** as a mandatory or material procedure prescribed by an empowering provision was not complied with; it was procedurally unfair contrary to the provisions of section 6(2)(c) of **PAJA** and the decision was unreasonable contrary to the provisions of section 6(2)(h) of **PAJA**. Further grounds of review were added after DIRCO had,

³ Act 3 of 2000

⁴ Act 5 of 2000

belatedly filed an incomplete Rule 53 record. Mr Naik, for the applicants filed a supplementary affidavit. It was submitted that the administrative action was taken as irrelevant considerations were taken into account or relevant considerations were not considered contrary to the provisions of section 6(2)(3)(iii) of **PAJA** and that the action contravenes a law in terms of section 6(2)(f)(i) of **PAJA**.

- (22) According to the second tender's terms of reference a five-phase bidding process was contemplated. The **PPPFA** and its regulations prescribe a specific formula to be used to score points to the bidders on the basis of the bid price, which are further scored according to the bidder's BBBEE contributor status level. The bidder scoring the highest points must be awarded the tender, unless objective criteria justify the award to another tenderer.
- (23) The three other bidders for the second tender were disqualified, at the first phase, as their bids were non-responsive. The bids by the applicants and respondents were found to be responsive and proceeded through all the phases of the tender process.
- (24) The bids of both the applicants and the third respondent were found to be responsive by the bid evaluation committee ("BEC"). The bid adjudication committee ("BAC") awarded the tender to the third respondent.

- (25) The argument by the applicants is that the third respondent's bid should have been disqualified at the first phase of the tender process as the *"submission of a bank guarantee or guarantee from a reputable third party of ZAR15 million for the duration of the contract"* was not provided.
- (26) It was apparent from the Rule 53 record that the applicant's tender had been submitted by a joint venture, comprising of the first and second applicants. It is common cause that Stuttaford Van Lines (Pty) Ltd was not part of the joint venture or part of the tender. It was submitted by the third respondent that the applicants had used the name Stuttaford Van Lines and Gin Holdings DIRCO Business Unit Joint Venture in their tender, whilst Stuttaford Van Lines (Pty) Ltd was not part of the said joint venture.
- (27) Although some of the documents prescribed, submitted and relied upon for the tender, were the first applicant's documents, other essential documents relied on by the applicants were clearly documents pertaining to Stuttaford Van Lines (Pty) Ltd, which was not a party to the joint venture or to the tender bid.
- (28) The documents referring to Stuttaford Van Lines (Pty) Ltd are:

- i) the Certificate of Membership of the International Association of the British Association of Removers;
- ii) the Certificate of Membership of Latin American and Caribbean International Movers Association;
- iii) the approval by SARS of 25 Axle Drive, Clayville, Midrand as a customs and excise storage warehouse;
- iv) the guarantee by Rand Merchant Bank for an amount of R25 million.

(29) Furthermore, it is abundantly clear that the Laser Transport Group was registered as a company by the Commissioner of Companies and Intellectual Property on 11 November 1963 and that the business start date is reflected as 11 November 1963.

(30) This information does not accord with the bid prepared for DIRCO where the applicants set out the history under the heading "*Stuttaford Van Lines*" starting in 1857. A further misleading statement is found in the bid document where it is stated "*Over 158 years of accumulated experience*". Under "*Quality*" it is stated that "*Stuttaford Van Lines became the first affiliate of FIDI in Africa in 1955*". This cannot refer to the Laser Transport Group, which was only incorporated in 1963, but clearly must refer to Stuttaford Van Lines (Pty) Ltd.

(31) The documents referring to the Laser Transport Group (Pty) Ltd do not

declare that the Laser Transport Group (Pty) Ltd is trading as Stuttaford Van Lines. The Financial Services Board Licence No. 9364, only refers to the Laser Transport Group (Pty) Ltd. The same applies to the Annual Financial Statements of the Laser Transport Group (Pty) Ltd. In these financial statements it is declared that Stuttaford Van Lines (Pty) Ltd is a subsidiary and not a division of the Laser Transport Group (Pty) Ltd.

- (32) There is no basis for the joint venture to assume those accreditations, thereby creating a false perception that Stuttaford Van Lines (Pty) Ltd is part of the joint venture. Regulation 3.2 of the South African National Accreditation System Regulations provides:

“SANAS shall not transfer accreditation/compliance status from one accredited/complaint body to another, or from an accredited/complaint body to a non-accredited body.”

- (33) In the founding affidavit it is stated that the principal place of business of the applicants is 18 Goodenough Avenue, Epping Industria, Cape Town and 87 Hartshorne Street, Rynfield, Benoni. Nowhere is it stated that 23 Axel Drive, Olifantsfontein is the place of business of the Joint Venture. The security service and pest control service certificates, submitted as part of the tender documents, all refer to 23 Axel Drive, Olifantsfontein, which relates to Stuttaford Van Lines (Pty) Ltd and not to the joint venture.

- (34) The BBBEE certificate reflects the physical location as 18 Goodenough Avenue, Epping and 9 Erving Street, Benoni. According to the certificate the black ownership is 100% with 50% black female ownership.
- (35) The share certificate dated 4 December 2001 reflects that Mobilitas SA of Rue Thomas Edison, 92230 Gennevilliers, France is the registered proprietor of 100 ordinary shares in the Laser Transport Group (Pty) Ltd. The BBBEE certificate can therefore not be correct and questions should have been raised in this regard by the bid committee.
- (36) It was required, during the site visit, for the bidder to have an approved weapons/firearms and ammunition storage facility. The applicants averred:

"The Laser Transport Group's current facilities in Midrand feature a dedicated and accredited by the SAPS Firearm and Ammunition Storage room which has a high security vault for up to 300 shotguns and rifles.

Whenever quantity exceeds our storage space, we make use of one of our long-term business partners ARMS (Armour Repairment and Maintenance Services) based in Pretoria. Arms is an expert in gunsmithing..."

The applicants were required to provide a certificate, but failed to do

so. The certificate annexed was that of the ARMS facility and therefore the applicants did not comply with clause 5.3.4.

- (37) The required guarantee by a bank is according to the applicants, the one given on 21 August 2015 which refers to the "*Principal*" as The Laser Transport Group (Pty) Ltd, with no reference to the Joint Venture.
- (38) The applicants used Stuttaford Van Lines (Pty) Ltd to bolster their bid to enable the applicants to ensure that the tender is awarded to them. This whilst Stuttaford Van Lines (Pty) Ltd was clearly not a party to the bid. This is contravening the definition of "*fraudulent practice*" as defined in the General Conditions of Contract, part of the Tender Document. "*Fraudulent practice*" is defined therein as "*a misrepresentation of the facts in order to influence a procurement process or the execution of a contract to the detriment of any bidder*". The actions of the applicants fall squarely within this definition.
- (39) The applicants did not comply with clause 5.2.3.5 of the Terms of Reference by not satisfying the requirement of functionality as they did not have valid proof of membership of a recognised international organisation.

(40) Although the applicants scored the highest points in terms of section 2(1)(f) of the **PPPFA**, there existed problems, unknown to DIRCO, of the facilities inspected, as well as the address of the applicants' business. The applicants scored 95 on the 90:10 points system, whilst the third respondent scored 73.

(41) There was no obligation on DIRCO to appoint any of the bidders, as it was stated in the tender. From the minutes of the BAC held on 16 October 2015 it can be seen that the applicants scored low on site inspection, the pricing was problematic and the BBBEE qualification had not been satisfied. A further problem was the pricing of the tender by the applicants if regard is had to their pricing in the first cancelled tender and the second tender, where they had halved the amount of the tender. The question then arises as to how can they manage to bid for half of the amount of the first tender for the same services.

(42) In **South African Post Office Ltd v Chairperson, Western Cape Provincial Tender Board**⁵ the court held:

"Pickard JP continued at 351G - H in the following terms:

'The task of the tender board has always been and will always be primarily to ensure that government gets the best price and value for that which it pays. If that were not the prime purpose of the tender board and policy considerations were to override

⁵ 2001(2) SA 675 (C) at 686

those considerations, the very purpose of the tender board is defeated and no tender board needs to exist.”

And in **South African Container Stevedores (Pty) Ltd v Transnet Port Terminals and Others**⁶ the court held:

“The purpose of a tender process was described in Cash Paymaster Services (Pty) Ltd v Eastern Cape Province & Others as follows:

“...The very essence of tender procedures may well be described as a procedure intended to ensure that government, before it procures goods or services, or enters into contracts for the procurement thereof, is assured that a proper evaluation is done of what is available, at what price and whether or not that which is procured serves the purposes for which it is intended.”

- (43) The applicants attacked the third respondent for not furnishing a proper bank guarantee, but the third respondent relied on clause 7.1 of the General Conditions of Contract, July 2010 which provides:

“7.1 within thirty days of receipt of the notification of contract award, the successful bidder shall furnish to the purchaser the performance security of the amount specified in SCC.”

- (44) The first applicant, at some stage queried the guarantee furnished by

⁶ (11445/2010) [2011] ZAKZDHC 22 (30 March 2011) at paragraph 49

the third respondent. In **Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer, South African Social Security Agency, and Others**⁷ at paragraphs 32, 38 and 40 the Constitutional Court found:

"[32] The starting point for an evaluation of the proper approach to an assessment of the constitutional validity of outcomes under the state procurement process is thus s 217 of the Constitution:

'(1) When an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective.

And:

[40] Compliance with the requirements for a valid tender process, issued in accordance with the constitutional and legislative procurement framework, is thus legally required."

- (45) In the present circumstances the court cannot find that the principles set out in **Allpay**⁸ have been met. It cannot be said that the appointment of the applicants as the successful bidders, in these circumstances has been *"fair, equitable, transparent, competitive and cost-effective"*.

⁷ 2014 (1) SA 604 (CC)

⁸ *Supra*

SUBSTITUTION:

(46) Section 8(1)(c)(ii)(aa) of **PAJA** provides:

“(1) The court or tribunal, in proceedings for judicial review in terms of section 6 (1), may grant any order that is just and equitable, including orders-

(c) setting aside the administrative action and-

(i) remitting the matter for reconsideration by the administrator, with or without directions; or

(ii) in exceptional cases-

(aa) substituting or varying the administrative action or correcting a defect resulting from the administrative action;”

(47) The first point of departure is that, according to the tender document, the first respondent had no obligation to award the tender in favour of any of the two bidders. In **Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd and Another**⁹ the Constitutional Court held that the following factors has to be taken into account when deciding whether a case is exceptional:

“[47] To my mind, given the doctrine of separation of powers, in conducting this enquiry there are certain factors that should inevitably hold greater weight. The first is whether a court is in as good a position as the administrator to make the decision.

⁹ 2015(5) SA 245 (CC) at paragraph 47 and 48

The second is whether the decision of an administrator is a foregone conclusion. These two factors must be considered cumulatively. Thereafter, a court should still consider other relevant factors. These may include delay, bias or the incompetence of an administrator. The ultimate consideration is whether a substitution order is just and equitable. This will involve a consideration of fairness to all implicated parties. It is prudent to emphasise that the exceptional circumstances enquiry requires an examination of each matter on a case-by-case basis that accounts for all relevant facts and circumstances.

[48] A court will not be in as good a position as the administrator where the application of the administrator's expertise is still required and a court does not have all the pertinent information before it. This would depend on the facts of each case. Generally, a court ought to evaluate the stage at which the administrator's process was situated when the impugned administrative action was taken."

- (48) The court *a quo* awarded the tender to the applicants. It is only in exceptional circumstances that a court may do so. The reason for awarding the tender to the applicants by the court *a quo* was that the court relied on the **Trencon** judgment¹⁰. As a result thereof the court decided that:

¹⁰ *Supra*

"The applicants' bid was extensively assessed and evaluated through a five phase bidding process that found the applicants are able to perform the services at the lowest bid price and were allocated the highest points.

In view of the applicants having submitted the only responsive bid, the award of the tender is a foregone conclusion. If RJV's bid is not regarded as non-responsive, the applicants obtained the highest points and the award remains a foregone conclusion."

(49) It is clear that it is not a foregone conclusion that the applicants will be awarded the tender by DIRCO if it is remitted. DIRCO has the right not to award the tender. DIRCO may issue a new tender in these circumstances. Therefor the court *a quo* overstepped its authority and did not disclose due deference to the executive arm of Government. If a consideration of fairness is involved to all parties, then it would have been fair to remit the matter to DIRCO, to either award the tender, or to issue a new tender.

(50) It has been found by this court that the applicants tried to use Stuttaford Van Lines (Pty) Ltd as a party to the joint venture, when it was decidedly not so. Furthermore, this court cannot find that the court *a quo* was in as good a position as DIRCO to make the award, taking into account the numerous problems both the applicants and the

third respondent had. This court finds no exceptional circumstances which would allow the court to award the tender to the applicants.

(51) In the result the following order is made:

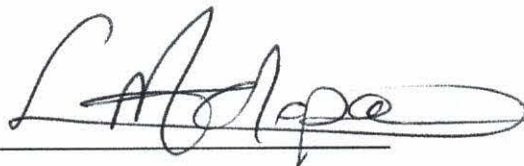
1. The appeal is upheld;
2. The applicants to pay the respondents' costs, including the costs consequent upon the employment of two counsel;
3. The judgment and orders of the court *a quo* are set aside and replaced with the following:

The applicants' application is dismissed with costs.




Judge C Pretorius

I agree



Judge L M Molopa-Sethosa

I agree



Judge N P Mngqibisa-Thusi

Case number : A87/2017

Matter heard on : 14 February 2018

For the Appellants : Adv Subel SC / Adv Nowitz

Instructed by : Nochumsohn & Teper Attorneys

For the Respondent : Adv Duminy SC

Instructed by : Webber Wentzel

Date of Judgment : 8 March 2018