148/87

381/86/AV

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

WED (PROPRIETARY) LIMITED	Appellant
AND	
CITY COUNCIL OF PRETORIA	1st Respondent
VOLKSKASSTIGTING	2nd Respondent
VOLKSKAS BEPERK	3rd Respondent

CORAM: RABIE, ACJ, BOTHA, VAN HEERDEN, GROSSKOPF, JJA et NICHOLAS, AJA

HEARD: 5 November 1987

DELIVERED: 30 November 1987

J U D G M E N T

GROSSKOPF, JA

This .....

This appeal concerns two adjacent buildings of historical importance in Church Street, Pretoria, viz., the Sammy Marks Building (also known as the Gundelfinger Building) and the Kynoch Building. These buildings were expropriated on 1 September 1965 by the City Council of Pretoria ("the Council"), which is the first respondent in this matter. At the time of expropriation the Council intended redeveloping the area in which the buildings are situated. A number of redevelopment schemes were considered during the ensuing years but no finality was reached and the future of the buildings remained unresolved until the 1980's. On 30 November 1983 the Council decided not to demolish the buildings but to approach interested persons and bodies to

assist with the restoration of the buildings and with their incorporation into a proposed Hendrik Verwoerd square in that area. This resolution was subject to the proviso that if the Council could not, before the end of 1985, find somebody who was prepared to restore the buildings at his own expense, or at least to make a major contribution to the costs of restoration, the future of the buildings might have to be reconsidered.

In 1983 the appellant and an associated company, Continental Trading Company (Pty) Ltd., occupied parts of the Sammy Marks Building. For present purposes we may assume that they did so pursuant to leases with the Council. These leases were due to expire on 31 December 1985. On

16 June 1983 the appellant's sole shareholder, Mr. C.D.S. Thomaz, wrote to the Council requesting a renewal of the leases beyond 31 December 1985. On 12 January 1984 the Council wrote to him informing him of the resolution adopted by the Council on 30 November 1983. Further correspondence followed between the parties, in the course of which the appellant intimated that it was interested in restoring the buildings. Later a firm of architects, acting on behalf of the appellant, submitted proposals for the restoration of the buildings to the Council. Proposals were also submitted by the third respondent on behalf of the second respondent. In the result the Council resolved on 13 November 1984 to enter into a contract with the second respondent.

This .....

This resolution was confirmed,with certain amendments, on 28 March 1985. I shall deal later in more detail with the third respondent's proposals and with the contract decided upon by the Council.

After the Council had decided to contract with the second respondent, it notified the appellant that its proposals for the restoration of the buildings had not been accepted, and that its lease would terminate on 31 December 1985. (Continental Trading was then no longer in the picture, having been deregistered in 1983).

The appellant was dissatisfied with the Council's decision because, so it was contended, the Council had failed to comply with section 35(1) of the Local Government Ordinance, No 17 of 1939 (Transvaal),before deciding to

contract with the second respondent. This section provides, inter alia, that "before a council enters into any contract for the execution of any works" it should (with certain exceptions) give notice in a prescribed manner of its intention to do so, and should ask for tenders. The appellant consequently applied on notice of motion to the Transvaal Provincial Division for an order

> "that the decision of the First Respondent to contract with the Second Respondent for the restoration of the Sammy Marks and Kynoch Buildings be reviewed and set aside."

The matter came before FLEMMING J. At the hearing in the court a quo, as also on appeal, it was common cause that the Council had not complied with section 35(1) of the Ordinance. The Council's contention was that it was

not .....

not obliged to do so because its proposed contract with the second respondent was not a contract "for the execution of ... works" within the meaning of the section. FLEMMING J decided in favour of the Council, and dismissed the application with costs. With leave granted pursuant to a petition to the Chief Justice the appellant now appeals to this Court.

Before dealing with the legal issues in this appeal it is convenient first to describe the roles of the second and third respondents in more detail. On 22 February 1983 the third respondent wrote to the Council offering to restore ("op te knap") the Sammy Marks Building as part of the celebrations of the third respondent's fiftieth anniversary in 1984. This offer fell away because the tenants could not

be .....

be evicted in time. The third respondent nevertheless retained an interest in the project. On 9 January 1984 the Council wrote to the third respondent to inform it of the Council's decision of 30 November 1983 concerning the future of the Sammy Marks and Kynoch Buildings. The letter to the third respondent was to the same effect as that addressed to the appellant on 12 January 1984. During July 1984 the third respondent submitted a long document to the Council entitled "Voorgestelde Restourasie van die Sammy Marks- en Kynochgeboue". This document contained a historical survey of the two buildings, proposals by the third respondent for their restoration, estimates of the cost of these proposals, a cash flow projection and sketch plans to illustrate the pro-

posed restoration. In this document the third respondent proposed to form an association not for gain in terms of sec. 21 of the Companies Act which it would provide with finance to enable it to restore the buildings along the lines suggested in the document. In return for this the Council would be required to grant the new association (which was later formed and is the second respondent) a 99-year lease at a nominal rental for the first fifteen years or so.

After the submission of this comprehensive document, negotiations took place between the parties. In the course of these negotiations the third respondent's proposals were varied in certain respects, as will be seen.

By November 1984 the appellant and the third

respondent .....

respondent were the only persons who evinced an interest in restoring the buildings. On 29 November 1984 the Council considered the whole matter and, as I have mentioned above, decided to accept the third respondent's proposals as modified. It is not necessary to consider its reasons for doing so - the appellant did not suggest any irregularity in the grounds upon which the Council took its decision.

I turn now to the contents of the proposed a-greement between the Council and the second respondent. The main provisions, as amended on 28 March 1985, were as follows. The Council was to grant the second respondent a lease of the buildings for fifty years as from 1 January 1986 (not ninety-nine years, as had originally been contemplated).

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At the termination of this period preference would be given to the second respondent to renew the lease, and it would have a right of first refusal. The rental was to be R4294,72 per month at the commencement of the lease, being the amount of rental which the Council was receiving at the time. This amount was to escalate at 5 percent per year. The lessee was also to be responsible for municipal rates and costs of municipal services. After the Council approved the details of the planned restoration, the second respondent would be required to proceed with the work (which was expected to cost approximately R3 million) in accordance with specifications stipulated in the resolution. After completion of the work, the second respondent would be entitled to sub-let the accommodation in the buildings at market related rentals. The

proposed

proposed contract contemplated that the third respondent would advance the money for the restoration, and that the second respondent would repay the loan from the surplus received from sub-letting the buildings. Once the second respondent had repaid the loan with interest (which was expected to be after twelve years) its rental obligations would change. Thereafter it would pay a proportion of the surplus received by it. This was calculated according to a formula which was to change over the period of the lease. Thus the second respondent would initially pay the whole surplus but the ratio would be reduced until it reached the ratio of 1:2,333 by the 42 nd year.

I turn now to a more detailed examination of

section .....

section 35 of the Ordinance. This section deals with "any contract for the execution of any works for or on behalf of the council" and with any contract for "the purchase or sale of any goods by the council" (subject to a minimum price). We are not concerned with the latter category of contracts and in what follows I shall ignore provisions which relate specifically to it. Regarding contracts for the execution of works, the section provides that the council is to give notice in a newspaper circulating within the municipality and on a notice board at the council's office, of its intention to enter into such a contract, expressing the purpose thereof and inviting any person willing to enter into such a contract to submit a tender for that purpose to the council.

There .....

There are certain exceptional cases in which these provisions do not apply, and I return to them later.

Once tenders have been invited, the council is not entitled to consider any tender or conclude the proposed contract until full and identical particulars have been supplied to every person applying therefor within a certain period (sub-sec. 2). Subject to certain provisions whereby tender prices are brought to a "comparative level" (in Afrikaans, "vergelykbare vlak") which appear to apply mainly, if not solely, to tenders for the supply of goods, the council must, in terms of sub-sec. 3 (c), accept the lowest tender, or, "if it is satisfied that acceptance of the lowest tender would not be in the public interest", it may "accept any

other tender which appears to be the most advantageous" (subject, in certain cases, to an obligation to give reasons for its decision). The council may also, of course, reject all the tenders (ibid.).

During argument it was common cause that the use of the word "any" in the phrase "any contract for the execution of any works" did not affect the meaning of the expression (cf. Peter Gordon Afslaers v. Stadsraad van die Munisipaliteit van Kroonstad 1974(1) SA 499 (A) at p. 505 F-H). The question for decision then is whether the contract in the present case is one for the execution of works within the meaning of the section.

For the purposes of this case it may be assumed

that the activities which the second respondent will perform in restoring the buildings will amount to the carrying out of "works" within the ordinary meaning of the word. See Schneier v. City Council of Johannesburg and Another 1946(1) PH D 19 per RAMSBOTTOM J. These activities will, however, form only one facet of a composite contract which will also sanction the occupation of the buildings by the second respondent for at least fifty years and will contain the financial arrangements between the parties consisting in part of the payment of rent by the second respondent and in part of the sharing of profits. The contract as a whole is therefore clearly something more than a mere contract for the execution of works.

If one considers sec. 35 in its totality a

further .....

further factor emerges. The whole purpose of the section is to ensure that competitive tenders are obtained for the execution of works. It is essential for the obtaining of tenders that the works which the council wishes to have executed should be defined in such a manner that the tender prices can be directly compared. When asked how it would be possible to tender for the contract in the present case, Mr. Zeiss answered that tenderers could be asked to submit tenders for the rental payable to the Council. As a matter of language, the rental payable in the present case can hardly be described as a "tender price" (see sec. 35 (3c)) for "the execution of works" (sec. 35(1)). But the matter goes further than that. The rental is not the only possible

variable in the contemplated contract. All the main features of the proposed contract form a unique and indivisible whole. The nature of the work to be done by the second respondent differs from that proposed by the appellant. The period of the lease and the rental or share of profits payable by the second respondent are obviously determined in the light of the nature and cost of the restoration to be effected. With a composite arrangement of this type in which it is the contractor who indicates what work is to be done and where the Council is not to spend any money, it is clearly impossible for the Council to ask for tenders and to compare prices.

It may possibly be suggested that one of the

provisos .....

provisos to sec. 35(1), which I mentioned earlier, might apply to the present case. In particular there is a provision that the section does not apply to "a special case of necessity" for which "the calling of tenders should be dispensed with" (in Afrikaans, "waar daar afgesien behoort te word van die vra van tenders"). The wording of the proviso indicates to me that it was intended to cover cases where the calling for tenders would in principle be possible, but where there was some strong reason why a different procedure should be followed. This is, I think, the effect of the words "should be dispensed with" and "afgesien behoort te word" - words which connote a desirable course rather than an inevitable one. The existence of this proviso consequently

does .....

does not, in my view, suggest that sec. 35(1) of the Ordinance was intended to cover contracts which were by their very nature incapable of being the subject of competitive tenders.

My conclusion consequently is that sec. 35 of the Ordinance, read as a whole, is intended to apply only to contracts to which the procedures laid down in the section are capable of being applied. For present purposes it must accordingly be limited to contracts for the execution of works in return for a money consideration. The present is not such a contract and is for that reason, in my view, not struck by sec. 35(1). It is also not suggested that the present contract is a simulated transaction which takes the form which

it does in order to avoid the incidence of sec. 35(1).

There is one last matter which I should consider. The appellant's prayer, which I have quoted above, asks for an order setting aside the Council's decision to contract with the second respondent "for the restoration" of the buildings. Realising that this prayer might not be adequate to describe the proposed contract, which is indivisible and includes matters other than restoration, Mr. Zeiss applied for an amendment to this prayer to include a reference to the proposed lease between the parties. Despite the narrowness of the original prayer I have dealt with the proposed contract as a whole in deciding whether it requires compliance with sec. 35(1) and have reached the conclusion

that .....

that it does not. It follows that the proposed amendment would serve no purpose and the application is refused.

To sum up: In my view the proposed contract between the Council and the second respondent is not covered by sec. 35(1) of the Local Government Ordinance, No 17 of 1939 (Transvaal), and the appellant's application was rightly dismissed by the Court a quo.

In the result the appeal is dismissed with costs, including the costs of two counsel.

E M GROSSKOPF, JA

RABIE, ACJ
BOTHA, JA
VAN HEERDEN, JA
NICHOLAS, AJA
} Concur