

IN THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

In die matter of:

GNH OFFICE AUTOMATION C.C.

First Appellant

NAUGIS INVESTMENTS C.C.

Second Appellant

and

PROVINCIAL TENDER BOARD

EASTERN CAPE

First Respondent

THE PREMIER OF THE EASTERN
CAPE GOVERNMENT

Second

Respondent

CORAM: Smalberger, Eksteen, Olivier, Streicher JJA et Farlam AJA

DATE OF HEARING: 27 February 1998

DATE OF DELIVERY: 26 March 1998

JUDGMENT

/ SMALBERGER JA : . . .

SMALBERGER JA:

In July 1995 the now defunct Transkei Tender Board was requested by the Eastern Cape Department of Education and Culture ("the Department") to invite tenders for the supply of 4000 typewriters and an equivalent number of typists' desks and chairs. The appellants were the successful tenderers. The contract for the supply of the typewriters was awarded to the first appellant and that for the supply of the desks and chairs to the second appellant. Both appellants are close corporations of which the sole member is Mr Shanil Singh.

Following on complaints with regard to alleged irregularities in respect of the award of the tenders, the Department, purporting to act in terms of sec 4(1) of the Provincial Tender Board Act (Eastern Cape) 2 of 1994 ("the Act"), notified the appellants in writing on 15 November 1995 that the first respondent ("the Board"), the legal successor to the Transkei Tender Board, had decided, on 13 November 1995, to suspend

the approval of their respective tenders. On 20 November 1995 the appellants' attorneys wrote to the Department rejecting what they referred to as the "unlawful suspension" of the contracts. The Department responded on 22 November 1995 confirming its attitude and stating that no goods delivered in terms of the suspended contracts would be accepted.

On 1 December 1995 the appellants launched an urgent application in the Transkei Division of the Supreme Court in which they sought inter alia a rule nisi calling upon the present respondents to show cause why they "should not be interdicted and restrained from unlawfully purporting to suspend the contracts" entered into between the appellants and the Province of the Eastern Cape. The rule nisi was granted in the terms sought. (The appellants also sought relief against two other respondents but that issue has been finally determined and no longer features in the matter before us.)

4 After hearing argument on the return day the judge a quo

(Pickering J) discharged the rule nisi and made an appropriate order as to costs. The judgment of the learned judge is reported - see GNH Office

[1996]3 All SA 87 (Tk). The appellants were subsequently granted the required leave to appeal to this Court.

The respondents were not represented at the hearing of the appeal. The State Attorney, Bisho, who acts on their behalf, had previously advised the Registrar of this Court that the respondents would not be filing heads of argument and would abide the decision of the Court. I find this attitude perplexing and regrettable. As will appear later, this appeal involves the interpretation of a provision of the Act which has important practical consequences for the Board and the Province and in respect of which the parties require clarity and certainty. In the circumstances one would have expected the respondents, as responsible

Provincial bodies, to have been anxious to present their views to the Court. Indeed, it is arguable that they were under a duty to do so. Their attitude has precluded this Court from having the benefit of full argument, thereby depriving it of assistance to which it was entitled in the resolution of what remained a live issue between the parties. Their conduct could be construed as an act of discourtesy towards this Court.

The facts and circumstances giving rise to the award of the tenders to the appellants, and the later (purported) suspension of the contracts arising therefrom, are fully set out in the judgment of the court a quo ("the judgment"). It is not necessary to repeat mem. After a careful analysis of the facts Pickering J concluded that the conduct of an official of the Department in relation to the award of the contracts to the appellants was not "impartial, unbiased and fair" (at 106 b). He further held that "the entire tendering process was tainted and fatally flawed by the involvement of Singh therein" (at 106d). While there is undoubtedly

evidence to support these findings it is unnecessary, for the purposes of the present appeal, to decide whether they are correct.

Leave to appeal was sought and granted on a number of grounds. However, because of the view I take of the matter, it is only necessary to consider one of them. It relates to whether the Board had the power to suspend the contracts which had been concluded between the appellants and the Province. This is the primary issue which the parties seek to have resolved. The essence of the appellants' complaint, which gave rise to the proceedings in the court a quo, was that the Board, in purporting to suspend the contracts, exceeded its administrative powers. While there may have been other remedies available to the appellants for the enforcement of their contractual rights, no objection was raised in the court a quo to the way they went about challenging the Board's decision. Having regard to the peculiar circumstances of the present matter it was in my view permissible for them to have followed

the course they did, as there was a need for an authoritative determination of the validity of the Board's action (cf Baxter, *Administrative Law* (Second Impression 1994) at 359-360).

The power of the Board to terminate a contract entered into with the Province after tenders have been called for derives from the Act and the Tender Board Regulations, 1995 (Eastern Cape) ("the Regulations") made in terms of sec 9 of the Act.

Sec 4(1)(a) of the Act provides (to the extent relevant):

"(1) Within the framework of the principles set out in the guidelines, the Board shall have the sole power to procure supplies and services for the Province . . . and may for that purpose –

(a) on behalf of the Province conclude an agreement, which shall be in writing, with a person within or outside the Republic for the furnishing of supplies and services to the Province . . ."

In terms of sec 4(f) the Board may

"on behalf of the Province, resile from any agreement concluded under this section and, in an appropriate case, claim damages".

It is apparent from these provisions that the Board acts as a statutory agent for the Province both in concluding and, where appropriate, resiling from any agreement falling within the scope of sec 4(1)(a). While sec 4(1)(f) authorises the Board to resile from an agreement it does not expressly confer a power to suspend such agreement, nor could such a power be inferred simply from the wording of the section. To hold otherwise would mean that the notion of suspension must always be implicit in the concept of "resile" or "cancel", which can clearly not be so.

The relevant portion of regulation 3(2)(a) provides as follows:

"3 (2)(a) If the Board is of the opinion that a person –

(i) ...

(ii)

(iii) fails or has failed to comply with any of the conditions of an agreement, or performs or has performed unsatisfactorily under an agreement; or

(iv) who has concluded an agreement referred to in section 4(1)(a) of the Act, has in respect of the agreement promised, offered or given a bribe, or has acted in respect thereof in a fraudulent manner or in bad faith or in any other improper manner,

the Board may, in addition to any other legal remedies it may have, restrict the person by resolving that no offer from the person should be considered during such period as the Board may stipulate, and, in the case contemplated in subparagraph (iii) or (iv), cancel any contracts with that person."

Regulation 3(2)(a) is an elaboration of the powers conferred upon the Board by sec 4(1) of the Act. It empowers the Board, where it is of the opinion that the conduct of a person with whom it has contracted on behalf of the Province falls within the provisions of regulation 3(2)(a)(iii) or (iv), to "cancel any contracts with that person". In doing so it acts in its capacity as statutory agent. Forming the prescribed opinion is a necessary pre-requisite to the exercise of the power to cancel. It is the jurisdictional fact that must exist before there can be a

cancellation (South African Defence and Aid Fund and Another v Minister of Justice 1967 (1)SA31 (C) at 34F-H). As it is clear from the record that the Board had not yet formed any opinion with regard to the matters referred to in regulation 3(2)(a)(iii) and (iv) when it decided to act against the appellants, it could not lawfully have cancelled the contracts with the appellants in terms of the regulation. The Board's "other legal remedies" (which would encompass both statutory and common law remedies) did not empower it to suspend the contracts. There exists no express statutory provision entitling it to do so. Nor does the common law recognise a power or right to suspend the operation of a contract. At most a party can temporarily suspend his or her own performance in appropriate circumstances (Moodley and Another v Moodley and Another 1990 (1) SA 427 (D & CLD) at 431 E). This is not the situation that applies in the present matter.

It follows that for the Board to have the power to suspend a

contract, such power must have been impliedly conferred by regulation 3(2)(a) read with sec 4(l)(f) of the Act. Baxter supra at 404-5 (quoted in the judgment at 102 h-i) states the position thus:

"Powers may be presumed to have been impliedly conferred because they constitute a logical or necessary consequence of the powers which have been expressly conferred, because they are reasonably required in order to exercise the powers expressly conferred, or because they are ancillary or incidental to those expressly conferred."

In this regard the court a quo held (at 103 d-e) that "the power to suspend a contract pending an investigation into the allegations is in my view a logical and necessary consequence of the powers conferred upon the Board".

I am in respectful disagreement. I see no logical reason why the Board's power to cancel a contract after it has formed an opinion about a certain state of affairs should imply a power to suspend the contract before such opinion is formed. Cancellation and suspension are

2 distinct juridical concepts with differing consequences.

Cancellation

means "To destroy the force, effectiveness, or validity of. To annul or abrogate". Suspension is "A temporary step, a temporary delay, interruption or cessation" (Black's Law Dictionary, 5th Edition at 187, 1297). The one (suspension) is not a logical component of the other (cancellation). The power to suspend is not reasonably necessary for the purposes of cancellation. Nor is it necessary to give effect to the power to cancel; the effective exercise of the power to cancel is not thwarted by the denial of a power to suspend. It may be useful or convenient to have a power to suspend, but that is not the test (*Lekhari v Johannesburg City Council* 1956 (1) SA 552 (A) at 567 B). As cancellation and suspension are unrelated concepts this is not a case, as found by the court a quo (at 103 e), of the greater including the lesser.

Furthermore, any such implied power must inevitably give rise to uncertainty in regard to matters such as when and under what

circumstances the power may be exercised, what considerations are to govern its exercise and the duration of any suspension. Apart from the attendant uncertainty, suspension could lead to delays in performance, prejudice to a tenderer and resultant financial loss. These considerations militate against the existence of an implied power. In my view, if the law maker had intended the Board to have the power to suspend it would have expressly conferred such power on the Board and have prescribed the parameters within which such power could be exercised - as has been done in regulation 3(2)(a) in respect of the power to cancel.

There is a further consideration. Regulation 3(2)(a) is cast in very wide terms. It permits of cancellation inter alia where a party "has performed unsatisfactorily under an agreement" or has acted in an "improper manner". These terms are sufficiently wide to allow grounds for cancellation over and above those recognised by the common law. This can have far-reaching consequences. To the extent that the

4 regulation departs from the common law a restrictive interpretation is called for. This too would militate against a power to suspend being implied - for the conferral of an implied power would extend rather than restrict the operation of regulation 3(2)(a).

A final observation. As previously observed, sec 4 of the Act, which governs the powers of the Board, confers upon the Board (in subsec (1)(f)) the power to resile from any agreement. I have already expressed the view that tins provision does not impliedly confer a power to suspend. If that is so, the principal Act, in terms of which the Regulations were framed, does not authorise the suspension of a contract. Any empowering provision to that effect in the Regulations, whether expressly or impliedly conferred, would consequently be ultra vires.

In my view, therefore, the Board acted beyond its powers in suspending the contracts with the appellants. The suspension was accordingly a nullity. The appellants sought relief in the form of a final

5 interdict. A more appropriate form of relief, and one which gives formal

effect to this judgment and obviates uncertainty, would be an order setting aside the suspension of the contracts, even though such an order may not strictly be necessary.

This judgment does not preclude the Board from exercising such powers as it might have under the Act and Regulations to cancel the contracts with the appellants, subject to any valid defences the appellants may raise.

In the result the following order is made:

- (1) The appeal is allowed, with costs;
- (2) Paragraphs 1 and 2 of the order made by the court a quo, insofar as they relate to the present respondents, are set aside, and there is substituted in their stead the following:

"1. The purported suspension by the first respondent of the contract entered into between the first applicant

and the Province of the Eastern Cape in relation to the supply of 4000 typewriters, and the contract between second applicant and the Province of the Eastern Cape in relation to the supply of 4000 typists' desks and chairs, is set aside;

2. The first and second respondents are ordered, jointly and severally, the one paying the other to be absolved, to pay the costs of the applicants."

J W SMALBERGER

EKSTEEN, JA)
OLIVIER, JA) Concur
STREICHER, JA)
FARLAM, AJA)