

IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

In the matter between

The Premier of the Free State Provincial Government  
Appellant

First

The Director-General of the Free State Provincial  
Government

Second

Appellant

The Member of the Executive Council for the  
Department of Finance, Expenditure and  
Economic Affairs of the Free State Provincial  
Government

Third Appellant

The Chairman of the Free State Provincial  
Tender Board

Fourth Appellant

and

Firechem Free State (Pty) Limited

Respondent

BEFORE: HEFER, HARMS, SCHUTZ JJA, FARLAM and  
MPATI AJJA

HEARD: 16 MAY 2000

DELIVERED: 29 MAY 2000

Tender boards - proper tender procedures - interpretation of contracts -  
presumption of legality - agreements to agree - severance - fictional  
fulfilment - record - costs of disallowed - practice note - part of counsel's  
fees disallowed.

W P SCHUTZ

SCHUTZ JA:

[1] “As I said I was not trying to outwork the Tender Board I was trying  
to do it through the Tender Board in a different way.” These words were

spoken in evidence by Mr McNaught, the chairman of the respondent, Firechem (Pty) Ltd (“Firechem”). The question arises whether there is room for the “different way” adopted, in the light of the peremptory terms of s 4 (1) of the Tender Board Act 2 of 1994 of the Free State (“the Act”), which states that the Tender Board “shall have the sole power to procure supplies and services for the Province.” Despite this provision, the Tender Board, so runs Firechem’s argument, was permitted to and did allow others to conclude a procurement contract which contradicted a contract already established by the Board’s acceptance of a tender. The sustainability of this argument is the main question in the appeal. The appellants are the Premier, the Director-General, the MEC for Finance, Expenditure and Economic Affairs and the chairman of the Provincial Tender Board of the Free State. They were the unsuccessful defendants in an action heard by Edeling J in the OPD. Leave to appeal was granted on petition to the Chief Justice.

[2] Mr McNaught was an experienced marketer of cleaning materials. His sales were supported by the training of staff in the use of these materials. Late in 1994 he conceived a plan to obtain a contract for the supply of all the Free State Province’s cleaning material needs by negotiating a contract without going through tender procedures. Having obtained an introduction to Dr Setai, the Director General, he was given permission to conduct a

survey of the Province's needs. This entailed visiting numerous hospitals, schools and the like, which, together with preparing a detailed report, cost Firechem a large sum of money. When the report was presented it was accompanied by a draft contract. The vicissitudes of this contract form an important part of the story as it unfolds. Attached to the draft was an annexure C. This set out details of the proposed supplies of particular items, department by department, and month by month. The draft proposed that the Province would be obliged to take those quantities. The term was to be seven years.

[3] Firechem's proposal contained important attractions. Instead of importing materials, it would set up a factory to make them in the Free State, which would employ local staff for the great majority of jobs. Firechem would also help to establish supporting businesses for previously disadvantaged entrepreneurs, in fields such as transport and palette making. Moreover, provincial staff would be regularly motivated and trained in the use of cleaning materials.

[4] The presentation of Firechem's detailed proposals took place at a further meeting with Dr Setai in March 1995 at which Mr Hendriks of the Department of Finance was present. The Tender Board fell under the Finance Ministry and Mr McNaught gathered that Mr Hendriks had been asked to attend as he was the link between the Department and the Board. Mr Hendriks made it quite clear that there could be no contract without the normal tender procedures being followed. This was a disappointment to Mr McNaught, but he did not give up. In May 1995 he requested a meeting with the Premier, Mr Lekota, on the subject of "new investment and RDP in the Free State." The Premier's response was that this subject was the responsibility of Mr Magashule, the MEC for Economic Affairs. It was in this way that a department other than the Finance Department became involved. Mr McNaught had several meetings with Mr Magashule and made a presentation to the Tender Board. Eventually, on 15 August 1995, he met the Premier. The latter gave his support in principle to the award of a provincial contract to Firechem along the lines of the proposal and the annexed draft contract, but indicated that the Executive Council would have to make the decision. Mr McNaught was to be given the opportunity to make a presentation to that body. A document headed Motivation was submitted for the use of the Council. It concluded by saying that "Firechem is however open to negotiation relating to the terms, period and conditions of proposed contract."

[5] In the meantime Mr Hendriks reported to Mr Magashule that to comply with the Interim Constitution (requiring fairness, publicity and

competitive procedures) any proposed contract should be put out to tender and would have to be approved by the Tender Board, which had the sole power to procure supplies and services. A suitable contract could be formulated with the assistance of Firechem and other interested parties. The contract would make provision for building a factory in the Free State, employing a certain minimum of local workers and so on. Tenderers would be requested to tender on the basis that they would comply with these conditions. If matters were ordered in this way no one would have reason to be dissatisfied. Mr Hendriks commented critically on Firechem's existing draft contract saying that a term of seven years was abnormally long for a contract of exclusive supply. The contents of this memo were not known to Mr McNaught at the time. However, Mr Hendriks's points had gone home and on 20 September 1995 the Executive Council passed a resolution to the effect that legislative requirements with regard to tenders must be followed. Further, the Tender Board was to review, and if necessary revise the tender documents in relation to cleaning materials.

[6] In consequence, on 22 September 1995 the Executive Council instructed the Tender Board that an existing invitation to tender should be cancelled. Before a new advertisement was published a new set of tender documents was to be prepared and considered by the Departments of Finance and Economic Affairs.

[7] On 3 October 1995 the MEC for Finance, Mr Makgoe, communicated

the

Council's decision in the following recorded terms:

- 1 That the project was accepted *in principle*;
- 2 But that it had to go out on general tender to ensure 'transparency and not to contravene the law (Interim Constitution)'
- 3 . . .
- 4 That existing tender contracts be extended for three months;
- 5 That specifications along the lines of Firechem's proposal be drawn up by Tender Board, and
- 6 Be advertised within . . . three months . . .
- 7 Any company in the field could tender . . .
- 8 Terms like duration of the contract, SMME [Small Micro

Medium Enterprises] Development, Social Responsibility, Affirmative Action, actual investment, cost incurred by Government, etc to be negotiated with tenderers in the final stages of the decision - making process before contract is awarded (was not very clear on this).

- 9 No preferences granted to Firechem on the following grounds:
- \* Firechem is not a 'Free State Company';
  - \* 'Playing field to be levelled';

. . .”

[8] In his evidence in chief Mr McNaught said with reference to par 8

just quoted:

“My understanding of that was that once the successful tenderer or tenderers had been given their tender award that they would be able to make additions or to put other inputs into the contract that were not necessarily specified in the tender document, the reason for that being that the tender document although it was more comprehensive than the previous tender that had been withdrawn, it still was lacking in certain points that it could have had in.”

[9] As will become apparent as the story unfolds, this proposition is vital to Firechem’s case. I shall come back to it, so will confine myself to two comments at this stage. First, par 8 speaks of negotiations before contract award. McNaught contemplates negotiations after award. As will become apparent there were negotiations both before and after award. Secondly, McNaught speaks of additions where something was “not necessarily specified in the tender document.” As will further become apparent he has

to face difficulties arising out of making additions where something was so specified.

[10] To revert to the narrative, the invitation to tender was published on 29 December 1995. The document commences:

“Tender VT 20132/96 For Disinfectants and Cleansing Agents:  
Province Free State: Bloemfontein

1 In terms of a notice published in the Provincial Gazette of 1995/12/29 and in accordance with the Provincial Tender Board Regulations promulgated under Provincial Notice no 12 of 14 September 1994 tenders are invited for the supply of the above for the period 1996/03/01 till 2000/02/28 [ie a period of four years].”

Further relevant terms are:

“4 Prices must hold good for 90 days and will thereafter be binding on the successful tenderer.

5 . . .

6 The following documents are attached hereto and tenderers must assure [sic] that all the relevant documents are returned.

(i) Tender forms

(ii) Conditions of Contract

(iii) Specifications (Quantity lists).

7 . . .

8 The conditions contained in the VST 36 (General Conditions and Procedures) and the attached VST 6 and VST 8 [the tender form], as well as any other conditions accompanying this request, are applicable.”

Certain “Important Conditions” which were attached require mention:

“1 Tenders are scheduled mechanically in this Office of the Tender Board. The tender forms have consequently been drawn up so that certain essential information is to be furnished in a specific

manner. Any additional particulars shall be furnished in the enclosed questionnaire or in a separate annexure.

- 2 The tender forms should not be retyped or redrafted . . .
- 11 Orders shall be placed directly by the Provincial Departments and other approved instances
- 15 These conditions form part of the tender and failure to comply therewith may invalidate the tender.”

Certain “Additional Important Conditions” also require mention:

“1 Background

1.1 The tender will be divided into five regions as indicated on attached map.

. . .

1.6 The tenderer intends to manufacture, market and distribute its products to the Purchaser.

1.7 The tenderer will provide Training officers in the selection, use and application of the products as described in the above-mentioned clause.

. . .

1.9 The tenderer will promote hygiene and cleanliness through direct training methods, and supply products *on order* to the Purchaser.

2 Successful Tenderer’s Obligations.

2.1 The tenderer agrees that it will during the term hereof

2.2 *receive orders* from the purchaser for *products as listed in the tender documents.*

2.3 deliver such products . . .

2.4 provide at no additional cost to the Purchaser, Training Officers, for:

2.4.1 training of new personnel as Training Officers;

2.4.2 training designated staff . . . in the choice, use, demonstration and application of the products; and

2.4.3 assisting staff . . . in use and application of the products.

2.5 employ a minimum of 95% . . . of its staff for administration, training, transport, factory operations, managers and storemen from Free State residents.

2.6 furthermore, will also whenever practicable, assist

emerging business by offering contracts to them in support of the principles of Reconstruction and Development Program to, for example supply of transport, paper products, other goods and services.

4 Price

4.1 The price of the product/s will be as tendered.

5 Duration

5.1 This contract shall endure for the initial term, as stated in the tender documents;

5.2 Thereafter, this contract may be extended for periods of 3 . . . months at a time when the need therefor arises.

6 Purchase Orders

6.1 The Purchaser will ensure that proper order are furnished for products to be supplied by the Tenderer.

7 Delivery

7.1 The tenderer will *deliver the products ordered in terms as tendered*

. . .

7.3 The tenderer will *deliver the goods, ordered by the departments . . .*

(Own emphasis.)

[11] It will be observed that these “Additional Important Conditions”

introduce into the conditions of tender the kind of special inducements that

Firechem had offered initially and which the Executive Council had decided

other applicants should be given the opportunity to match.

[12] Firechem’s tender, which was signed on 22 January 1996, was on the

prescribed form, which reads in part:

1 “I/We hereby *tender to supply all or any of the supplies as and/or to render all or any of the services described in the attached documents to the Provincial Legislature on the terms*



*and conditions and in accordance with the specification stipulated in the tender documents (and which shall be taken as part of, and incorporated into, this tender) at the prices and on the terms regarding time for delivery and/or execution inserted therein.*

- 2 I/We agree that -
  - (a) . . .
  - (b) this tender and its acceptance shall be subject to the terms and conditions contained in the General Conditions and Procedures (VST 36) . . .