



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Case number : 389/07
Reportable

In the matter between :

THE CHAIRMAN OF THE STATE TENDER BOARD
THE MINISTER OF FINANCE

FIRST APPELLANT
SECOND APPELLANT

and

SUPERSONIC TOURS (PTY) LTD

RESPONDENT

CORAM : SCOTT, FARLAM, NUGENT, CLOETE *et* MAYA JJA

HEARD : 9 MAY 2008

DELIVERED : 27 MAY 2008

Summary: State tenders – disqualification of tenderer by State Tender Board from tendering for future State contracts– when competent – interpretation of regulations made under the State Tender Board Act, 68 of 1968 and the Preferential Procurement Policy Framework Act, 5 of 2000 – Procedural fairness as required by the Promotion of Administrative Justice Act (PAJA), 3 of 2000 – Income Tax Act, 58 of 1962 – possible contravention of s 4 – papers sent to the Commissioner, SARS, to enable him to investigate.

Neutral citation: This judgment may be referred to as *Chairman, State Tender Board v Supersonic Tours (Pty) Ltd* (389/07) [2008] ZASCA 56 (27 May 2008).

JUDGMENT

CLOETE JA/

CLOETE JA:

[1] Supersonic Tours (Pty) Ltd ('Supersonic') brought motion proceedings in the Pretoria High Court in terms of a notice of motion dated 11 October 2005. Part of the relief sought was an order setting aside on review a decision of the State Tender Board ('STB') that Supersonic and its directors be restricted for a period of ten years from obtaining business from the State or any organ of state. The chairman of the State Tender Board was cited as the first respondent and the Minister of Finance, in his capacity as head of the National Treasury (being the department under whose control the STB resorts), as the second respondent. The court *a quo* (Pretorius J) granted this relief on 11 May 2007 and subsequently, leave to appeal to this court. The respondents in the court *a quo* are the appellants and Supersonic, the respondent.

[2] Supersonic has for more than 25 years carried on the business of providing management of travel services to, amongst other clients, various government departments and organs of state. In August 2003 the STB called for tenders for the supply of travel and accommodation services to the Department of Defence for a period of two years. Supersonic tendered and was awarded the contract at the end of the following month.

[3] On 28 February 2005 Supersonic received a letter from the Department of Defence dated 26 January 2005. The letter reads, in part:

"The Department of Defence awarded this tender to Supersonic Tours (Pty) Ltd t/a Sure Supersonic Travel (hereinafter referred to as 'your company') based on the information supplied in your tender documents.

However, after the tender had been awarded to your company it came to our attention that there were possible misrepresentations in your tender, specifically with reference to the SARS Tax Clearance Certificate and preference points in equity ownership that you have claimed for your company. We investigated the tender documents submitted and it seems that these allegations require your urgent explanation. Accordingly and without prejudice to the State's rights, you are hereby given 14 days to let us have your detailed explanation regarding the following matters:—

1. Did your company have a Tax Clearance Certificate as was required in the tender? If so, a

copy thereof (dated prior to the tender closure time) must be submitted. You will note that you have submitted a Tax Clearance Certificate for a company by the name of Supersonic Travel (Pty) Ltd, which is clearly not applicable. As was stated in the tender conditions (see ST 5.) failure to comply with this requirement may invalidate your tender.

2. As you are aware the preference points claimed for equity ownership by historically disadvantaged individuals was a material consideration for the award of the tender and we are of the opinion that misrepresentation of a claim in this regard may render the contract void alternatively voidable. With this in mind, you are requested to submit your explanation on the following aspects for the State Tender Board to make a decision regarding the matter [and a number of questions followed].

...

3. As it is clear that the contract was awarded as a result of points claimed by your company, you are required to furnish full documentary proof, to the satisfaction of the State Tender Board that your claims/information in your tender in this regard, were correct. In this regard you are referred to paragraph 14.7(iv) of the ST11.1, that indicates what the State Tender Board may do in addition to any other remedy that it may have, if it is found that your claims were incorrect.'

[4] The 'ST11.1' referred to in para 3 of the letter just quoted is form ST11.1, the Preference Points Claim Form: Equity Ownership by Historically Disadvantaged Individuals, which formed part of the tender. The reference in the letter should obviously have been to sub-para (v), not (iv), of that form. Para 14.7 provides:

'I/we, the undersigned, who warrants that he/she is duly authorised to do so on behalf of the firm certify that points claimed, based on owners/shareholders who are actively involved in the day to day management of the enterprise equity ownership, qualifies the firm for the points shown and I/we acknowledge that:

...

(v) If the claims are found to be incorrect, the State Tender Board may, in addition to any other remedy it may have —

- (a) recover all costs, losses or damages it has incurred or suffered as a result of that person's conduct;
- (b) cancel the contract and claim any damages which it has suffered as a result of having to make less favourable arrangements due to such cancellation;
- (c) impose a financial penalty more severe than the theoretical financial preference associated with the claim which was made in the tender; and
- (d) restrict the tenderer/contractor, its shareholders and directors from obtaining business from any organ of state for a period not exceeding 10 years.'

[5] Supersonic wrote a detailed letter dated 11 March 2005 in reply. It then

received a letter dated 21 July 2005 from the National Treasury in terms identical to the letter from the Department of Defence to which it had already responded. It sent a copy of its previous response to the National Treasury under cover of a letter dated 4 August 2005.

[6] On 27 September 2005 the Department of Defence wrote to Supersonic informing it that it had failed adequately to address the discrepancies in its tender to the Department and the National Treasury. On the same day, Supersonic reacted to the letter by writing to the Acting Secretary of Defence requesting a written explanation as to which alleged discrepancies had not been addressed properly. Both the Department and the Acting Secretary took up the attitude that it was for the STB to give the explanation requested by Supersonic. But all of this was an exercise in futility as the STB had already taken its decision on 22 September 2005. The National Treasury sent a telefax to Supersonic on 29 September 2005 which read:

'At a sitting of the State Tender Board on 22 September 2005, the Board found that in awarding of the tender to Supersonic Tours (Pty) Ltd t/a Sure Supersonic Travel, the department relied on a misrepresentation made in your tender, especially with reference to the SARS Tax Clearance Certificate and preference points on ownership that you have claimed for your company. After a lengthy deliberation the Board resolved:

- ❖ The contract be cancelled with immediate effect; and
- ❖ the company and its directors be restricted for a period of 10 years.

The department has been informed accordingly.'

[7] The decision of the STB to cancel the contract with Supersonic has been overtaken by events and is now academic. It is the decision to restrict Supersonic and its directors for a period of ten years – which, it is common cause, operates to prevent them from obtaining business from the State or any organ of state for that period – which is the subject matter of this appeal.

[8] The STB has power to exclude a person to whom it has awarded a contract from being considered for future contracts, both in terms of regulations made under

the State Tender Board Act¹ and under the Preferential Procurement Policy Framework Act.² The regulations on which the appellants rely were referred to in the following passage of the answering affidavit deposed to on behalf of both appellants, which also summarises the appellants' case:

'[Supersonic] does not deny that the Tax Clearance Certificate which accompanied the tender documents did not relate to it. It is clear therefore from the above that [Supersonic] during the tendering process misrepresented itself in relation to the Tax Clearance Certificate and in relation to the Equity Ownership and therefore the points that were claimed in relation thereto were incorrect and should never have been claimed. This constituted a misrepresentation and fraud as envisaged in Regulations 3(5)(a)(iv) and 3(6)(b) to the State Tender Board Act, 1968 (Act No. 86 of 1968) read together with Regulations 15(2)(b) and (d) to the Preferential Procurement Policy Framework Act, 2000 (Act No. 5 of 2000). Accordingly, the [appellants] were entitled in terms of the abovementioned regulations, which form part of the tender conditions, to cancel and restrict [Supersonic] and its directors. It is accordingly submitted that [Supersonic] has acted in respect of the tendering process, in a fraudulent manner or in bad faith, the conduct which was improper in obtaining the contract from the State.'

[9] The relevant regulations under the State Tender Board Act provide as follows:

'3(5)(a) If the Board is of opinion that a person –

...

(iv) who has concluded an agreement referred to in section 4(1)(a) of the Act, has 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, resolve that no offer from the person concerned should be considered during such period as the Board may stipulate.

[The contract which resulted from the acceptance of the Supersonic tender was clearly an agreement referred to in s 4(1)(a) of the Act.]

...

(c) Any restriction imposed on any person by the Board may at the discretion of the Board also be made applicable to any other enterprise, or to any partner, manager, director or other person, who wholly or partly exercises or exercised or may exercise control over the enterprise of the first-mentioned person, and with which enterprise or person the first-mentioned person is or was in the opinion of the Board actively associated.

...

(e) Where the Board imposes a restriction regarding the consideration of an offer, or varies or

¹86 of 1968.

²5 of 2000.

rescinds such restriction, it shall inform any other tender boards on which it may decide, all Government departments and, where the Board deems it necessary, the Republic's representatives abroad, of any resolution relative to such restrictions or rescindment [sic] or variation, and request the said boards, departments and representatives to take similar steps in respect of the person concerned.

...

(6) If an agreement has been concluded with an contractor on the strength of information furnished by him in respect of which it is after the conclusion of such agreement proved that such information was incorrect the Board may, in addition to any other legal remedy it may have –

(a) recover from the contractor any costs, and any damages incurred or sustained, as the case may be, by the State as a result of the conclusion of the agreement; or

(b) terminate the agreement and recover from the contractor any damages which the State may suffer by having to make less favourable arrangements thereafter; and

(c) impose by written notice directed to the contractor and delivered to him by registered post, a penalty not exceeding 5 per cent of the monetary value of the agreement.'

[10] It is important to contrast the provisions of regulation 3(5)(a)(iv) and 3(6). Regulation 3(6) gives remedies to the STB where information provided by a contractor, on the strength of which the contract was concluded, was 'incorrect'; and those remedies do not include disqualification from consideration for future tenders. The power to disqualify is limited to the circumstances mentioned in regulation 3(5)(a) (iv) which include fraud and acting in bad faith (the two grounds on which the appellants rely).

[11] Regulation 15 made under the Preferential Procurement Policy Framework Act provides:

'(1) An organ of state must, upon detecting that a preference in terms of the Act and these Regulations has been obtained on a fraudulent basis, or any specified goals are not attained in the performance of the contract, act against the person awarded the contract.

(2) An organ of state may, in addition to any other remedy it may have against the person contemplated in subregulation (1) –

(a) recover all costs, losses or damages it has incurred or suffered as a result of that person's conduct;

(b) cancel the contract and claim any damages which it has suffered as a result of

having to make less favourable arrangements due to such cancellation;

(c) impose a financial penalty more severe than the theoretical financial preference associated with the claim which was made in the tender; and

(d) restrict the contractor, its shareholders and directors from obtaining business from any organ of state for a period not exceeding 10 years.'

The only basis upon which this regulation could find application in the present matter is if a preference obtained by Supersonic had been obtained 'on a fraudulent basis' as contemplated in subregulation (1).

[12] Supersonic relies in this court, as it did in the court below, on the provisions of the Promotion of Administrative Justice Act ('PAJA').³ The appellants deny that PAJA applies. I accordingly turn to consider this question.

[13] The insertion of para 14.7 in form ST11.1, which formed part of the contract, does not, as was submitted on behalf of the appellants, have the consequence that contractual rights were conferred on the STB. The paragraph – in terms – amounts to an acknowledgement that the STB has rights; it evinces no intention to confer rights. The right of the STB to disqualify Supersonic is accordingly derived solely from the regulations which are referred to in the answering affidavit and which have been quoted above.

[14] The STB is an 'organ of state' as defined in s 239 of the Constitution, incorporated in the definitions section, s 1, of PAJA. The STB made a 'decision relating to imposing a restriction' as contemplated in para (d) of the definition of

'decision' in s 1 of PAJA. The decision was an exercise of a public power in terms of legislation, viz the regulations quoted above, and that requirement of 'administrative action' as defined in s 1 of PAJA is accordingly fulfilled. The decision had immediate and direct legal

³3 of 2000.

consequences for Supersonic. The decision accordingly constituted an 'administrative action' as defined in s1 of PAJA and the provisions of PAJA are applicable: cf *Grey's Marine Hout Bay (Pty) Ltd v Minister of Public Works*.⁴ The rights of Supersonic were materially and adversely affected by the decision and Supersonic was consequently entitled to procedural fairness in terms of s 3(1) of PAJA.

[15] The crux of this appeal is that Supersonic was at no time advised that it was suspected of fraud or of having acted in bad faith, or that the STB was considering disqualifying it for either of these two reasons. Section 3(2)(b) of PAJA required the STB to give Supersonic 'adequate notice of the nature and purpose of the proposed administrative action' and 'a reasonable opportunity to make representations'. Para 1 of the letters from the Department of Defence and the STB (dated 26 January and 21 July 2005 respectively, and quoted in para 3 above) suggests that failure to comply with the requirement that a tax clearance certificate be provided 'may invalidate your tender'. Para 2 of the letters says that 'we are of the opinion that misrepresentation of a claim [in regard to equity ownership by historically disadvantaged individuals] may render the contract void alternatively voidable.' There is no suggestion that a finding of fraud or bad faith leading to disqualification might be made. Nor can the reference in para 3 of the letters to para 14.7(v) of form ST11.1 (quoted in para 4 above) avail the appellants. Paragraph 14.7(v) says that the STB may exercise the powers to which it refers 'if the claims are found to be incorrect' and had Supersonic referred to the paragraph, its provisions would not have sufficed to alert Supersonic to the fact that it was being investigated for fraud or that it was suspected of having acted in bad faith. I should emphasise that paragraph 14.7(v) is a mistaken statement of the powers given to the STB in terms of regulation 15 made under the Preferential Procurement Policy Framework Act, quoted in para 11 above.

⁴2005 (6) SA 313 (SCA) paras 23, 24 and 28.

Because subregulation (2) refers back to subregulation (1), the requirements of subregulation (1) – ie either that the preference was obtained on a fraudulent basis, or that there was non-attainment of specific goals in the performance of the contract – must be satisfied before the provisions of sub regulation (2) can become operative; and an 'incorrect' claim for preference does not, without more, enable an organ of state to act under any of the paragraphs of subregulation (2). The decision of the STB was therefore procedurally unfair as contemplated in s 6(2)(c), and falls to be set aside in terms of s 8(1), of PAJA.

[16] Before the appropriate order is made, there is a disquieting feature which appears from the record which requires comment. A firm of attorneys was instructed by the Department of Defence to investigate the correctness of the information supplied by Supersonic in form ST11.1. In a memorandum dated 13 May 2004, sent to the Department of Defence, a partner of the firm said:

'1.4 I started preparing this Memorandum on April 20, 2004 but as a result of further instructions received from Col Dirk Louw (paragraph 1.3 above) I reported on April 28, 2004 to Mr Peter Rabie C/o Chief Financial Officer, Department of Defence, Pretoria that the completion of my Memorandum would now be delayed. I further explained that it would not be meaningful to attend at [Supersonic's] offices and expect it to disclose to ourselves the number of its employees and their duties. A more meaningful way would be to obtain access to the records of South African Revenue Services and the Unemployment Insurance Commissioner ("U.I.F.") in order to determine the number of, and identity of each employee from whose salaries income tax and contributions to the U.I.F. are deducted monthly and paid over. However, the South African Revenue Services by virtue of the provisions of Section 4 of the Income Tax Act 58 of 1962, is prohibited from disclosing any information at its disposal and therefore such information should be collected in an "unofficial" manner. This necessitated a delay in preparing and finalising this Memorandum.

...

13.2 Staff Complement:

...

13.2.3 as indicated, we are employing "unofficial" means of obtaining the information from South African Revenue Services. As at the point in time when this Memorandum is

being signed, such information is not yet available but we trust to have same available when we will shortly meet.'

In view of these statements I consider it necessary to request the Registrar of this court to send a copy of the memorandum and of this judgment to the Commissioner, South African Revenue Services, drawing attention to this paragraph of the judgment, in order to alert him to the fact that there may have been a contravention of s 4 of the Income Tax Act and to enable him to take such steps as he may deem expedient including, if he considers such a step to be warranted, a referral to the appropriate law society which has jurisdiction over the firm of attorneys concerned.

[17] The appeal is dismissed with costs, including the costs of two counsel.

T D CLOETE
JUDGE OF APPEAL

Concur: Scott JA
Farlam JA
Nugent JA
Maya JA