THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Case No: 358/08

ESKOM HOLDINGS LIMITED First Appellant
KWANDA FERRO-ALLOY AFRICAN RESOURCES (PTY) LTD Second Appellant

and

THE NEW RECLAMATION GROUP (PTY) LTD Respondent

Neutral citation: *Eskom Holdings Ltd v The New Reclamation Group* (358/08) [2009] ZASCA 8 (13 March 2009).

Coram: HARMS DP, CLOETE, PONNAN, SNYDERS JJA *et* LEACH AJA
Heard: 24 FEBRUARY 2009
Delivered: 13 MARCH 2009
Summary: Promotion of Administrative Justice Act 3 of 2000: review of award of tender by organ of State; principles applicable and appropriate remedy, discussed.

ORDER

On appeal from: High Court, Johannesburg (Blieden J sitting as court of first instance).

The appeal is dismissed. The appellants are ordered to pay the respondent's costs of appeal jointly and severally, the one paying, the other to be absolved.

JUDGMENT

CLOETE JA (HARMS DP, PONNAN, SNYDERS JJA *et* LEACH AJA concurring):

[1] In mid-2007 the first appellant, Eskom Holdings Limited, awarded a tender to the second appellant, Kwanda Ferro-Alloy African Resources (Pty) Ltd. One of the unsuccessful tenderers was the respondent, The New Reclamation Group (Pty) Ltd ('NRG'). At the suit of NRG the court a quo (Blieden J in the Johannesburg High Court) set the award of the tender aside and ordered Eskom and Kwanda to pay NRG's costs jointly and severally. Eskom and Kwanda now appeal with the leave of the court a quo.

[2] It is necessary to deal with the facts in a little detail. During March 2007 Eskom, by way of a request for quotation ('RFQ'), formally invited tenders for the collection and disposal of non-ferrous scrap metals ('material'). The RFQ provided that if a tender was accepted, a contract would come into existence for two years for the removal, as and when required by Eskom, of material (which was owned by Eskom) from various sites in South Africa; the processing of such material; and the payment to Eskom of a price for the quantity of material recovered and processed. The following clauses of the RFQ are relevant for present purposes:

'1.4 Subject to a prospective tenderer meeting all the requirements set out herein as well as the general principles governing the award of the proposed tender, Eskom may in its sole and absolute discretion agree to dispose of such material in their existing condition, as set out in the agreement.'

'1.6 Eskom has the sole and exclusive right to determine to which tenderer the contract will be awarded and in this regard Eskom may in its sole and absolute discretion decide not to award any contract and to invite quotations and tenders afresh. It is specifically recorded that a proposed tenderer will merely make an offer to Eskom for the purchase of the material and that a binding agreement of any nature

whatsoever will only come into existence once a proposed tenderer has been informed in writing of the fact that he is awarded the tender.'

'1.8 All tenderers are obliged to prove in the sole and absolute discretion of Eskom during the evaluation period (being May 2007) that they can comply with the requirements of this enquiry and once a contract has been awarded, to comply with all the terms of the agreement fully and punctually.'

The position was therefore that Eskom had a discretion to award the agreement to any tenderer, or not at all; but it could only do so if the tenderer met all the requirements of the tender; and the decision whether a tenderer could comply with the requirements of the tender, was also a decision to be made in the discretion of Eskom. What is important for present purposes is that included in the RFQ was a 'Financial Evaluation Form' which required signature on behalf of the tenderer and which read:

'In order that **ESKOM** can determine that it is placing business with viable companies, **ESKOM** determines minimum requirements to satisfy itself that it is justified in entering into an **AGREEMENT** with such companies. Accordingly, it is in the interest of the tenderer and strictly required by **ESKOM**, that the tenderer submits audited financial statements for the last two years. This information will be handled with the strictest confidence.'

[3] Kwanda and NRG both submitted tenders. In a covering letter attached by Kwanda to its tender, it said that it:

'[I]s a company formed in partnership with Rappa Holdings to target a niche of steel and foundry customers in Africa which are perceived as risky due to their size, geographical positioning, etc, Rappa Holdings is a holding company of Knightsbridge Copper and Cobalt, Waste Product Utilisation and Three Marias Mines. Rappa Holdings has 50% share in Kwanda and the balance of the 50% is owned by the Luthuli/Buckley Trust.'

Rappa Holdings provided a balance sheet of the 'group' which comprised five major subsidiaries, including Kwanda.

[4] The tenders were evaluated and adjudicated upon in three stages. The outcome of the first stage was that four tenderers, including Kwanda and NRG, were shortlisted. Thereafter, as part of the second stage, the tenders were evaluated by various Eskom bodies, including the Corporate

Management Accounting Department. The report of this latter body in relation to Kwanda's tender, began with the statement:

'Please note that this financial analysis was performed solely for the purpose of deciding whether RAPPA HOLDINGS (PTY) LTD is sound enough financially to be awarded a contract of R29 million for the collection of non-ferrous scrap metal, over a period of two years . . ..'

and the author concluded:

'In my opinion, RAPPA HOLDINGS (PTY) LTD is sound enough financially to be awarded a contract of R29 million for the collection of non-ferrous scrap metal, over a period of two years . . ..'

The report contained no reference whatever to Kwanda.

[5] At the third and final stage a report was put before the Corporate Division R35M Tender Committee. The report said inter alia:

'All short listed companies were found to be financially sound.

. . .

Kwanda Ferro-Alloy African Resources is sufficiently financially sound to be awarded the contract for the collection and disposal of non-ferrous metal.'

The report further contained a recommendation that the contract be awarded to Kwanda because it:

'[S]ubmitted the most favourable offer that is technically, financially and commercially acceptable of the eight offers received.'

NRG was still in contention at that stage of the process ─ indeed, the R35M Tender Committee initially at its meeting on 1 June 2007 pointed out that the price offered by Kwanda, which exceeded NRG's tender by some R2,8 million, might be outweighed by the better ratings scored by NRG in relation to security and site evaluation. However, the committee ultimately approved the award of the contract to Kwanda for the period 11 June 2007 to 31 May 2009.

[6] It is quite apparent from what I have said about Kwanda's tender that Kwanda did not itself have the financial resources to perform the work and that the tender was awarded to it on the basis of the financial position of the Rappa Group. All that Eskom knew about the relationship between the two was that Rappa Holdings was a 50 per cent shareholder in Kwanda and that, according to Kwanda, it had a 'partnership' with Rappa Holdings. The former

relationship did not of itself oblige Rappa to assist Kwanda (indeed, individuals frequently use the vehicle of a company in which they are shareholders to avoid personal liability and to enable them to liquidate the company, should its business prove unprofitable). And there was nothing to show that the latter relationship imposed any such obligation on Rappa Holdings or its subsidiaries in the Rappa Group either. Not even Kwanda said it did. Where the financial ability of a tenderer to perform the contract for which it tenders is a prime consideration in the award of the tender, as will usually be the case (and was here), then the award of a tender based on the financial ability of a third party to perform the tender is illogical ─ unless there is some obligation on the third party to provide the necessary financial assistance to the tenderer. It is not in dispute that Eskom is an organ of State and that the award of the tender constituted administrative action reviewable in terms of the provisions of the Promotion of Administrative Justice Act (PAJA).[1] In the words of that Act, Eskom, in awarding the tender to Kwanda, took into account irrelevant considerations[2] (the financial ability of the Rappa Group to perform the contract) and it did not consider relevant considerations[3] (the financial ability of Kwanda to perform the contract); and the award of the tender was not rationally connected to the information before Eskom.[4]

[7] It was submitted on behalf of Eskom that it was entitled in the exercise of its discretion and in the furtherance of its Black Economic Empowerment policy to take risks in the award of a tender, provided it gave proper consideration to the matter. The short answer to this submission is that there is nothing in the affidavits or the documents annexed to them to show that Eskom appreciated that it was taking any risk. The contrary is the position. Eskom simply equated Kwanda's financial ability to that of the Rappa Group ─ indeed, the R35M Tender Committee which took the final decision to award the contract was not only unaware of Kwanda's financial inability itself to perform the contract; it was positively misled into believing that Kwanda was 'sufficiently financially sound to be awarded the contract'. Nor does the fact

[1] Act 3 of 2000.
[2] s 6(2)(e)(iii).
[3] Ibid.
[4] s 6(2)(f)(ii)(cc).

that the R35M Tender Committee required that the guarantee to be furnished by the successful tenderer be increased from R1 million to R3 million demonstrate, as submitted on behalf of Eskom, that it appreciated that Kwanda might not be able to perform in terms of the contract. The minutes of the meeting of that committee on 1 June 2007 show that the committee required an increased guarantee to be imposed as a condition of the award of the tender (to any tenderer) because it 'would be more realistic'. The decision to award the tender to Kwanda was taken at a later stage. The two decisions were clearly unrelated.

[8] I therefore conclude that the court a quo was correct in finding that the award of the tender by Eskom to Kwanda was reviewable and liable to be set aside in terms of the provisions of PAJA. I turn to consider the second question, which concerns the decision of the court a quo to grant this relief.

[9] Section 8 of PAJA empowers a court in proceedings for judicial review to grant 'any order which is just and equitable', including the orders specified in the section. It is well established that the court exercises a discretion; and, as was said by this court in *Oudekraal Estates (Pty) Ltd v City of Cape Town*[5]

'It is that discretion that accords to judicial review its essential and pivotal role in administrative law, for it constitutes the indispensable moderating tool for avoiding or minimising injustice when legality and certainty collide.'

The principle of legality would require that an invalid administrative decision be set aside. The desirability of certainty may ─ and I emphasise the word may, because this is not so in every case[6] ─ point in the opposite direction: persons who altered their position on the basis that the administrative act was valid would suffer prejudice if it is set aside, because the effect of such an order is retrospective.[7]

[10] It is not necessary to debate[8] whether the discretion is a wide

[5] 2004 (6) SA 222 (SCA) para 36.
[6] eg *Airoadexpress (Pty) Ltd v Chairman, Local Road Transportation Board, Durban* 1986 (2) SA 663 (A).
[7] *Seale v Van Rooyen NO; Provincial Government, North West Province v Van Rooyen NO* 2008 (4) SA 43 (SCA) para 13 at 50C-D.
[8] But see the approach of this court in *Chairperson, Standing Tender Committee v JFE Sapela Electronics (Pty) Ltd* 2008 (2) SA 638 (SCA) para 29.

discretion (as was submitted on behalf of Kwanda) or a narrow discretion[9] and, if the latter, whether the court a quo misdirected itself. I shall assume that this court can substitute its own decision. That said, I see no good reason for doing so.

[11] Ordinarily, where there has been a reviewable irregularity in the award of the tender, an unsuccessful tenderer would be entitled to call for the award to be set aside. The principal submission made by Kwanda on appeal was that this relief should be denied because NRG did not seek an interdict at an early stage of these proceedings. Counsel for Kwanda relied in particular on the decision of this court in *Olitzki Property Holdings v State Tender Board*.[10] In that case the plaintiff, an unsuccessful tenderer, claimed damages representing the profit it would have made had the tender been awarded to it, on the basis that its right to administrative justice in terms of s 24 of the Interim Constitution[11] had been breached and that such an award would constitute 'appropriate relief' as contemplated in s 7(4)(a) of the Interim Constitution. The latter section read:

'When an infringement of or threat to any right entrenched in this Chapter is alleged, any person . . . shall be entitled to apply to a competent court of law for appropriate relief, which may include a declaration of rights.'

This court held:[12]

'... Counsel correctly conceded that in these circumstances and on the assumptions made the plaintiff would have been entitled to an interdict prohibiting the defendants from continuing the tender process and indeed from allocating the award elsewhere at all.

This in my view has acute consequences for the plaintiff's task in seeking to convince the Court that an award of the profit lost through the non-award of the tender could constitute "appropriate relief". An interdict would not only have anticipated the latter dispute; it would have eliminated the source of loss the plaintiff invokes.'

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[9] For the distinction see *Naylor v Jansen* 2007 (1) SA 16 (SCA) para 14 and cases referred to in the footnotes especially *Giddey NO v J C Barnard and Partners* 2007 (5) SA 525 (CC) para 19.

[10] 2001 (3) SA 1247 (SCA).

[11] Act 200 of 1993.

[12] At 1265F-H. I have had regard to the original signed judgment in the archives of this court and the second sentence of para 38 in the law report omits words. The headnote at 1250J-1251A correctly reflects the judgment.

The court concluded:[13]

'It is, however, not necessary to decide that a lost profit can never be claimed as constitutional damages. Certainly the question of out-of-pocket expenses is not before us. But in all the circumstances of this particular case, including the availability to the plaintiff of alternative remedies ─ by way of interdict before the award of the impugned tender and, thereafter, for at least a time, by way of review ─ I conclude that the lost profit the plaintiff claims would not be an appropriate constitutional remedy.'

The case is distinguishable on the facts. There, it was specifically found that the plaintiff would have been entitled to an interdict. Here, there is no guarantee that an application for an interdict would have been granted. It would undoubtedly have been opposed. The conclusion of the contract with Kwanda could not have been interdicted because NRG, through no fault of its own, only came to know of the award of the tender to Kwanda after the contract had been concluded. Given that the contract was already in existence, the balance of convenience would have been a major issue; and it appears from the papers that Eskom required removal of the material fairly urgently as the previous contract had lapsed at the end of April 2007, and the R35M Tender Committee expressed concern at its meeting on 1 June that Eskom might be facing the threat of a backlog building up.

[12] Nor does the decision in *Darson Construction (Pty) Ltd v City of Cape Town*,[14] also relied on by counsel, assist Kwanda. There the applicant, also an unsuccessful tenderer, brought a claim for damages in terms of s 8(1)(c)(ii)(bb) of PAJA[15] for loss of profit, contending that such an award would be just and equitable. The court in considering this question emphasised that an interdict could have been sought much earlier. It said: [16]

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[13] At 1267D-F.

[14] 2007 (4) SA 488 (C).

[15] '8(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 ─

. . .

(ii) in exceptional cases ─

. . .

(bb) directing the administrator or any other party to the proceedings to pay compensation.'

[16] At 506F-H.

'In any event, when applicant became aware that second respondent [the successful tenderer] was on site and had begun work in terms of the contract, it could immediately have approached the Court to interdict second respondent pending the outcome of its appeal [in terms of the Local Government: Municipal Systems Act].[17] By that time it was clear that first respondent [the City of Cape Town] was going ahead and allowing second respondent to execute the contract despite applicant's appeal. An application for an interdict would, in all probability, have brought to the fore that the decision of 17 December 2004 [to award the tender to second respondent] was invalid and would have prevented the loss which applicant seeks to recover had applicant, in addition, been able to show its entitlement to the contract.'

Interdict proceedings in the present matter may have 'brought to the fore' NRG's attack on the validity of Eskom's decision to award the tender to Kwanda (although the full facts only became known after review proceedings had been launched and the record produced by Eskom pursuant to uniform rule of court 53); but even had it done so, that would have made no difference. Neither Eskom nor Kwanda would have thrown in the towel and accepted that the award of the tender was irregular, as their opposition in this court and the court a quo amply demonstrates.

[13] In any event, the claims in *Olitzki* and *Darson Construction* were for damages and it is trite that a person claiming damages must mitigate its loss. That principle finds no application in the present matter. And finally on this point, I have difficulty in understanding how it lies in the mouth of either Eskom or Kwanda to assert that the trial court should not have set the award of the tender aside because NRG did not attempt to protect them against themselves by bringing interdict proceedings that might have mitigated the prejudice they would suffer by the conduct that they were wrongly intent on pursuing. The boot was on the other foot. The position in which they found themselves before the court a quo was not due to NRG's inaction; it was due to their persistence in asserting the validity of the award of the tender in the face of the valid challenge by NRG.

[14] It was submitted that Kwanda was in the position of an innocent bystander. That is not correct. Although no mala fides has been sought to be

[17] Act 32 of 2000.

attributed to Kwanda[18] it has only itself to thank for the position in which it finds itself: it submitted a flawed tender to Eskom and it can hardly be heard to complain when Eskom did what it wanted by awarding the contract to it on the basis of that tender. In the circumstances, even if the fact that Kwanda incurred considerable expenditure to enable it to perform the contract could operate in its favour, it cannot do so in this case.

[15] Nor does the lapse of time redound to Kwanda's advantage. It is true that the contract has less than three months to run, but that is because Kwanda (and Eskom, with whom it made common cause) appealed against the decision of the court a quo ─ which will be upheld by this court ─ which was given in June last year. The consequent delay is therefore of its own making. It has in fact had the benefit of the contract which should not have been awarded to it in the first place.

[16] The present case is entirely distinguishable from *Chairperson, Standing Tender Committee v JFE Sapela Electronics (Pty) Ltd*,[19] relied upon by Kwanda. It is important to emphasize that that was an exceptional case. There, the court refused to set the invalid award of a tender aside because work had been performed between the launching of the proceedings and the judgment in the court a quo, and it was impractical to start the tender process over again for the completion of the remaining work. Here, the work involved ad hoc collections of material, its subsequent processing and sale. The terms of the contract to be entered into by the successful tenderer as contained in the FAQ provided that each instruction given by Eskom to the contractor to collect the material would 'constitute a separate independent disposal agreement incorporating the terms of [this] agreement'. Any contractor with the necessary resources could do that, even at this stage.

[17] There are no public policy considerations which militate against setting aside the award of the tender. The submission that NRG had delayed in instituting review proceedings within a reasonable time[20] or did not do so

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[18] cf *Millennium Waste Management (Pty) Ltd v Chairperson, Tender Board: Limpopo Province* 2008 (2) SA 481 (SCA) para 26.
[19] Above, n8.
[20] See eg *Wolgroeiers Afslaers (Edms) Bpk v Munisipaliteit van Kaapstad* 1978 (1) SA 13 (A)

without reasonable delay[21] was correctly abandoned by Kwanda as it had not been raised on the papers and such delay as there was, was not such as to require an explanation.[22] *Millennium Waste Management (Pty) Ltd v Chairperson, Tender Board: Limpopo Province*,[23] a case relied upon by Kwanda, is distinguishable. There, loss to the public purse and disruption of the service for removal, treatment and disposal of hospital waste were considered as factors by this court in the exercise of its discretion. Here, potential loss to the public purse because Kwanda's tender was the highest is outweighed by the fact that Kwanda did not demonstrate that it could perform the contract; and it was not Eskom's case on the papers that disruption would have any significant consequences for it or the public generally. The arguments advanced in this latter regard ─ that if the material were not removed in terms of the contract, it would constitute an environmental hazard; landowners where it was situated would be inconvenienced; and it might be stolen ─ were not specifically raised, and therefore not dealt with, by NRG. They cannot be raised now. As was said by this court in *Minister of Land Affairs and Agriculture v D & F Wevell Trust*:[24]

'It is not proper for a party in motion proceedings to base an argument on passages in documents which have been annexed to the papers when the conclusions sought to be drawn from such passages have not been canvassed in the affidavits. The reason is manifest ─ the other party may well be prejudiced because evidence may have been available to it to refute the new case on the facts. The position is worse where the arguments are advanced for the first time on appeal. In motion proceedings, the affidavits constitute both the pleadings and the evidence: *Transnet Ltd v Rubenstein*,[25] and the issues and averments in support of the parties' cases should appear clearly therefrom. A party cannot be expected to trawl through lengthy annexures to the opponent's affidavit and to speculate on the possible relevance of facts therein contained. Trial by ambush cannot be permitted.'

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at 41; *Associated Institutions Pension Fund v Van Zyl* 2005 (2) SA 302 (SCA).

[21] Section 7(1) of PAJA.

[22] *Mamabolo v Rustenburg Regional Local Council* 2001 (1) SA 135 (SCA) at 141F-G; *Scott v Hanekom* 1980 (3) SA 1182 (C) at 1192E-1193G.

[23] Above, n 18.

[24] 2008 (2) SA 184 (SCA) para 43.

[25] 2006 (1) SA 591 (SCA) para 28.

[18] The position is that the award of the tender to Kwanda was fatally flawed. An order setting the award aside would accord with what Moseneke DCJ said in *Steenkamp NO v Provincial Tender Board, Eastern Cape*:[26]

'Ultimately the purpose of a public remedy is to afford the prejudiced party administrative justice, to advance efficient and effective public administration compelled by constitutional precepts and at a broader level, to entrench the rule of law.'

On the other hand, the order sought by Kwanda should the review be upheld ─ namely, a declaratory order that the award of the tender was invalid, suspended until the contract had run its course ─ would not fulfil any of these purposes.

[19] The following order is made:

The appeal is dismissed. The appellants are ordered to pay the respondent's costs of appeal jointly and severally, the one paying, the other to be absolved.

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T D CLOETE
JUDGE OF APPEAL

[26] 2007 (3) SA 121 (CC) para 29.

Appearances:

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