THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable
Case No: 20800/2014

In the matter between:

UMSO CONSTRUCTION (PTY) LTD	**APPELLANT**
and	
THE MEMBER OF THE EXECUTIVE COUNCIL OF THE GOVERNMENT OF THE PROVINCE OF THE EASTERN CAPE RESPONSIBLE FOR ROADS AND TRANSPORT	**FIRST RESPONDENT**
THE HEAD OF THE DEPARTMENT ROADS AND PUBLIC WORKS, THE GOVERNMENT OF THE PROVINCE OF THE EASTERN CAPE	**SECOND RESPONDENT**
TAU PELE CONSTRUCTION (PTY) LTD	**THIRD RESPONDENT**
RUMDEL CONSTRUCTION (CAPE) (PTY) LTD	**FOURTH RESPONDENT**
AMANDLA CTC (PTY) LTD	**FIFTH RESPONDENT**
SIYA HLOBISA (PTY) LTD	**SIXTH RESPONDENT**

Neutral citation: *Umso Construction (Pty) Ltd v MEC for Roads and Public Works Eastern Cape Province* (20800/2014) ZASCA 61 (14 April 2016)

Coram: Maya AP, Cachalia, Pillay and Mbha JJA and Victor AJA

Heard: 10 March 2016

Delivered: 14 April 2016

Summary: Administrative law – validity of decision to award tender – whether successful tenderer had duty to disclose business rescue application – whether tender requirements were met – appropriate remedy in the circumstances – whether exceptional circumstances exist to justify the grant of a substitution order – on the facts, exceptional circumstances established.

ORDER

On appeal from: Eastern Cape Local Division of the High Court, Bhisho (Stretch J sitting as court of first instance):

1. The appeal is upheld with costs, such costs to include the costs of two counsel.
2. The cross-appeals of the first and third respondents are dismissed with costs such costs to include the costs of two counsel. The respondents are to pay the costs of the appeal jointly and severally, the one paying the other to be absolved.
3. The order of the court a quo dated 7 October 2014 is amended by adding the following to paragraph 2:

'The tender/bid SC MU5-12/13-0035 is hereby awarded to the applicant'.

JUDGMENT

Mbha JA (Maya AP, Cachalia and Pillay JJA and Victor AJA concurring):

[1] This appeal concerns the award of a tender (No. SCMU5-12/13-0035) by the Eastern Cape Provincial Department of Roads and Public Works (the department) to the third respondent, Tau Pele Construction (Pty Ltd) (Tau Pele). The tender was for the upgrading into bituminous surface, of a 13.4 kilometres stretch of gravel road between the Elitheni Coal Mine and the R56 road in the Chris Hani district of the Eastern Cape. The Appellant (Umso Construction (Pty) Ltd) (Umso), was one of four unsuccessful tenderers. Aggrieved by the decision, it instituted review proceedings in the Eastern Cape Local Division, Bhisho (Stretch J) to set aside the award of the tender to Tau Pele, and for an order substituting it in place of Tau Pele, as the successful tenderer. The court a quo set aside the decision to award the tender to Tau Pele, but refused to substitute Umso in its place. It is against that decision that Umso appeals to this court with the leave of the court a quo, and in relation to which the department and Tau Pele cross-appeal likewise with the leave of that court.

[2] Umso thus appeals the non-substitution order on the one hand. On the other hand the department cross-appeals the order setting aside its decision to reject Umso's bid as 'non-responsive' to the tender conditions, and Tau Pele cross-appeals the order setting aside the award of the tender to it. The three main issues in this appeal are: first, whether Tau Pele's failure to disclose that it was under business rescue during the adjudication of the tender vitiated the award of the tender to it; secondly, whether the department correctly rejected Umso's bid; and finally, whether Umso is entitled to an order substituting it in place of Tau Pele in the event of this court finding that Umso's bid was incorrectly rejected.

[3] The background facts in this matter are not in dispute. On 27 July 2012 the department advertised the tender in the Eastern Cape Province Tender Bulletin. The tender notice was advertised in the *Daily Dispatch* and the Eastern Province *Herald* on 7 July 2012. The closing date for the submission of tender documents was initially 18 July 2012 but was later extended to 8 August 2012. The tender notice provided, inter alia, that only tenderers complying with the requirements specified in the conditions of tender would be considered and that tenders would be evaluated according to the preferred procurement model in the Preferential Procurement Policy Framework Act 5 of 2000 (PPPFA Act) and its regulations,[1] as well as the Supply Chain Management Policy of the Department of Roads and Public Works. It also stated that tenderers had to prove that they had completed a similar project in the seven years prior to the invitation to tender.

[4] All the bidders, including Umso and Tau Pele, attended a compulsory site inspection and briefing by the department on 24 July 2012, and thereafter completed and submitted bid documents to it. Umso submitted a bid in the sum of R200 567 052.33 on 8 August 2012 whereas Tau Pele's bidding price was R220 350 000.

[5] Once the bids were received, the department commenced its evaluation. The first phase of this process involved a pre-check evaluation analysis of all bids received and it

[1] Preferential Procurement Policy Regulations, GN R501, *GG* 34350, 8 June 2011; and the Exemption from the application of the Preferential Procurement Regulations, GN R1027, *GG* 34832, 7 December 2011.

was conducted by Mr P Swartz (Swartz), an official within the department. He thereafter compiled a pre-qualification report in which he recorded that:

(a) Only Tau Pele and the fourth respondent, Rumdel Construction (Cape) (Pty) Ltd (Rumdel Construction), were found to be responsive.

(b) Umso, the fifth and sixth respondents' (ie Amandla CTC (Pty) Ltd and Siya Hlobisa (Pty) Ltd respectively) bids were found to be non-responsive.

In relation to Umso, its grading of 8CE in terms of the Construction Industry Development Board Act 38 of 2000 (CIDB) and the regulations,[2] was found to be inadequate and did not conform to the stipulated tender requirements. Swartz also concluded that Umso had not performed a similar project in compliance with the tender conditions.

[6] Swartz's conclusions *vis-à-vis* Umso were endorsed by the department's Bid Evaluation Committee (BEC) at its meeting on 16 August 2012. In the minutes of that meeting, it was recorded: 'Umso Construction (Pty) Ltd JV: non-responsive, lower CIDB grade'. This conclusion was however incorrect as Umso had provided clear proof of its CIDB grade as being 8CE. As a result, this was corrected at a subsequent meeting of the BEC on 6 December 2012, and the BEC elevated Umso's bid to 'responsive' based on a correct assessment of its CIDB rating. At the same time however, the BEC

[2] Regulation 17 of the Construction Industry Development Regulations, GN 629, *GG* 26427, 9 June 2004 (as amended) promulgated in terms of s 33 of the Construction Industry Development Board Act 38 of 2000, tabulates the different categories from 1 to 9 in relation to the respective tender value. Category 8 is for tender value for construction works worth up to R130 million, while 'CE' is the designation for Civil Engineering works in terms of Schedule 3 of the regulations on the classes of construction works. The department's tender data which contains Standard Conditions of Tender provides that only those tenderers who are registered with the CIBD, or are capable of being so registered prior to the evaluation of submissions, in a contractor grading designation equal to or higher than a contractor grading designation determined in accordance with the sum tendered for a 9CE, 8CE class of construction work, are eligible to submit tenders.

determined and declared Umso's bid to be unresponsive for lack of compliance with the experience criteria set out in the conditions of tender, in that it had not performed a similar project in the preceding seven years. This confirmed the department's earlier finding on 16 August 2012. The correctness of this finding has now become one of the main issues in this appeal.

[7] Umso was accordingly non-suited and the tender evaluation process continued through its normal stages with the department's Bid Adjudication Committee (BAC) meeting on 27 February 2013 in respect of the bids of Tau Pele and Rumdel Construction only. Following this meeting, the BAC made a recommendation to the department to approve Tau Pele's bid as supplier of the services and goods contemplated in the tender for the sum of R220 350 000.

[8] On 21 May 2013 the department approved the award of the tender to Tau Pele. Its approval was conveyed to the department's supply chain contract manager on 27 May 2013, and on the same date an appointment letter in Tau Pele's favour was issued. The letter stipulated that a service level agreement had to be concluded by not later than 25 June 2013 and that the validity of the bid would expire on 6 December 2013.

[9] Upon learning that the tender had been awarded to Tau Pele, Umso launched review proceedings in August 2013 seeking an order setting aside the decisions that Umso's bid was not responsive to the tender criteria and to award the tender to Tau Pele. It sought a declaration of invalidity in respect of the rules and tender conditions in

the tender notice relating to experience criteria expected of tenderers on the basis that these were unlawful, arbitrary, irrational and capable of manipulation. It also sought an order that the tender be awarded to it, alternatively, that the department be directed to re-consider, re-evaluate and re-adjudicate upon all bids submitted in response to the bid invitation relating to the tender. The application was in terms of s 6 of the Promotion of Administrative Justice Act (PAJA),[3] read with s 217 of the Constitution, the Preferential Procurement Policy Framework Act 5 of 2000 (PPPFA), the Public Finance Management Act 1 of 1999 (PFMA) and the supply chain management policies of the department.

[10] After Umso had instituted review proceedings, it discovered that Tau Pele had applied to be placed under business rescue on 17 September 2012, and had been so placed from 21 September 2012 until 21 May 2013, when the process was terminated, a fact that was not disclosed to the department, and of which the department was not aware. So it filed a supplementary affidavit in which it set out this issue as a further ground for impugning the award of the tender to Tau Pele. The department adopted the stance that the tender must be set aside because of Tau Pele's failure to disclose that it had applied for, and been placed under, business rescue after it had submitted its bid. Tau Pele maintains that it had no legal duty to disclose this fact to the department. The remaining respondents – the other unsuccessful bidders – do no oppose any of the relief claimed and have no interest in these proceedings.

[3] Promotion of Administrative Justice Act 3 of 2000.

[11] These then were the issues that came before the high court. In her judgment, Stretch J found that when Tau Pele tendered for the job it knew that it was already financially distressed, that it had a duty to disclose this to the department, and that this non-disclosure was material. She referred to the department's tender data which provides that the department will only consider tenders from tenderers who can satisfactorily prove that they have the necessary financial resources to undertake and complete the works. On that basis she said it was incumbent on Tau Pele to have disclosed this either at the time of its commencement in participating in the bidding process, or at the very latest when it entered into business rescue.

[12] Stretch J accepted that the department only became aware about Tau Pele's material non-disclosure of business rescue after Umso had launched the application, specifically when Umso filed its supplementary affidavit. In her view the department's approach in supporting Umso's application to set aside the tender to Tau Pele on the basis of the irregularity of non-disclosure of a material fact, was logical and acceptable, other than launching a counter application on the basis of the principles enumerated in *Oudekraal Estates (Pty) Ltd v City of Cape Town & others*.[4]

[13] The learned judge rejected Umso's contention that the pre-qualification criteria that was imposed by the department, namely that tenderers must prove previous experience in the construction of a road of at least 10 kilometres length with a minimum construction value of R 100 million in the previous seven years was unlawful, arbitrary and irrational. During argument before us Umso abandoned this contention. It also

[4] *Oudekraal Estates (Pty) Ltd v City of Cape Town & others* [2004] ZASCA 48; 2004 (6) SA 222 SCA.

abandoned any reliance on the high court's finding that the adjudication process was confusing and contradictory, had prejudiced it, and was therefore unlawful. Nothing further need be said about these matters.

[14] With regard to the department's decision that Umso's tender was unresponsive because it had not completed a similar project within the previous seven years, the learned judge accepted the department's submission that even though Umso had participated in two projects, namely the Gauteng Freeway Improvement Package (Stages A-R and E) (the Gauteng Freeway Improvement Project) totalling R109 600 000 and which involved the construction of a 36.8 kilometres stretch of road, and that its financial portions in both projects were R60 million and R49.6 million respectively, it had in fact been the minority partner in the joint venture project which therefore did not qualify as a single similar project, exceeding R100 million in value as the tender conditions stipulated. Umso contends that the learned judge erred in upholding the department's contention in this regard.

[15] I now turn to consider the question whether the court a quo was correct in its finding that Umso's bid was non-responsive for non-compliance with the department's criteria of previous experience and performance. Under the provisions dealing with the test for responsiveness of bidders, the department's tender notice states that:

'[t]he tenderers will be required to prove that they have undertaken at least one similar project in the seven years, failing which, the tenderer will be rejected. A similar project is the upgrading of a gravel road to surfaced standards with least 10 kilometres length and a minimum construction value of R100 million.'

And the tender data provides that:

'In order for a tenderer to be considered, the tenderer must be able to demonstrate the completion of at least one similar project in the past seven years. A similar project shall be defined as the construction of a minimum of 10 kilometres of a similar type of gravel to surfaced road upgrade that includes mass earthworks. . . and all the ancillary works normally included in a project of this nature. . . . [f]ailure to submit proof of having completed at least one similar project will render the tender non-responsive (pre-evaluation).'

[16] In support of its contention that it satisfied the department's test for responsiveness in relation to the specific criteria of involvement in a project of no less than R100 million, Umso has provided proof of its involvement, albeit as a joint venture partner, in the Gauteng Freeway Project valued at R1.5 billion in total, which involved the construction of a road 36.8 kilometres in length, and included two stages. Its contribution, in value terms came to R60 million and R49.6 million respectively and in total to R109.6 million, excluding value added tax. It submits this was a single project, which commenced in November 2010 and endured for 18 months. And the fact that it included two stages does not detract from the fact that this was a single project. Moreover, the tender conditions did not require the tenderer to show that it was the sole contractor. So the department's contention that Umso's failure to provide proof that it was the sole contractor does not pass muster either. Significantly, in the department's answering affidavit it is not disputed that Umso was involved in a single project the value of which exceeded R100 million. Instead the department merely stated that: 'The mere fact that a project (in respect of which they were a minority joint venture partner) exceeds R100 million does not justify the conclusion that the applicant's involvement in

such project met the minimum standards for prior experience.' The evidence establishes that the value of Umso's involvement of R109.6 million also complies with the department's specification of the average cost of construction of between R10 million and R15 million per kilometre.

[17] In my view, Umso's disqualification on the ground that it had not been involved in a single project with a construction value exceeding R100 million, as a test for responsiveness, was incorrect. And the order setting aside the department's decision is therefore correct. But I differ in the reasons for coming to this conclusion.

[18] I now turn to deal with Tau Pele's cross-appeal. As mentioned earlier, after the closure of the bids on 8 August 2012, Tau Pele was placed under business rescue on 21 September 2012 and the business rescue was successfully implemented and completed on 21 May 2013. As the business rescue plan was implemented after the tender process had closed and before the contract was awarded to Tau Pele, its cross-appeal raises the important discrete question whether the failure to disclose the business rescue process vitiates the award.

[19] Although Tau Pele did not press the issue before us, it contended in the court a quo that it was not competent for the department to support Umso in seeking to have the award of the tender set aside in the absence of a substantive application by the department seeking this relief. It will be recalled that the department elected to support Umso's part of the application to set aside the award to Tau Pele but did not seek direct

relief by way of application against Tau Pele, opting instead to piggy-back on Umso's application to achieve this result.

[20] The learned judge found that it was not necessary for the department to have instituted its own proceedings against Tau Pele, and in my view she was correct.[5] It must be remembered that the department only became aware of Tau Pele's business rescue status after Umso had filed its supplementary affidavit. So, as the court quo explained, whilst ordinarily the department would have to apply to court to have its own unlawful decision set aside, it would be impractical and unduly formalistic to have required it to do so in the circumstances of this case. This is not a case where the department was attempting to circumvent the provisions of PAJA.

[21] Tau Pele's contention that there was no duty to disclose its business rescue status on the grounds, inter alia, that it had no legal relationship with the department at the time it went into business rescue and that such duty, if it exists, could undermine the purpose of business rescue, must also fail.

[22] The duty to disclose the financial status of a tenderer is found in paragraph F.2.2 of the department's tender data which expressly provides that the employer will only consider tenders from tenderers who can prove to its satisfaction that they have the necessary financial resources to undertake and complete the work. It can hardly be

[5]See in this regards *MEC for Health, Eastern Cape & another v Kirland Investments (Pty) Ltd t/a Eye & Lazer Institute* [2014] ZACC 6; 2014 (3) SA 481 (CC) para 64 of the majority judgment; compare with para 39 of the minority judgment.

disputed that an entity that applies to be placed under business rescue because it is financially distressed would fall outside of this tender condition.

[23] It is also trite that silence and failure to disclose a material fact may in certain circumstances amount to a misrepresentation. There is no general rule in our law of contract that all material facts must be disclosed and that non-disclosure therefore amounts to misrepresentation by silence. But in certain circumstances this is undoubtedly the rule.[6] There has, however, been a steady progression in our law towards developing a general test applicable to cases outside of special cases as in insurance and agency for deciding whether in a particular case silence amounts to a misrepresentation. Thus in *Pretorius & another v Natal South Sea Investment Trust Ltd (under Judicial Management)*,[7] Vieyra J, held on the particular facts of that case which concerned a contract that:

'an involuntary reliance of the one party on the frank disclosure of certain facts necessarily lying within the exclusive knowledge of the other such that, in fair dealing, the former's right to have such information communicated to him would be mutually recognised by honest men in the circumstances'.[8]

The test of involuntary reliance that was expounded by Vieyra J underlying the requirement of disclosure of material facts in contracts of insurance where the insured must disclose all material facts because the insurer involuntarily relies on him for information is, in my view, comparable to the tenderer's duty to disclose information of its financial resources to the department.

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[6] R H Christie & G B Bradfield *Christie's the Law of Contract in South Africa* 6 ed at 287.
[7] *Pretorius & another v Natal South Sea Investment Trust Ltd (under Judicial Management)* 1965 (3) SA 410 (W) at 418E-F.
[8] Quoting M A Millner 'Fraudulent Non-disclosure' (1957) 74 *SALJ* 177 at 189.

[24] Disclosure of material facts in contracts other than in insurance is required not because they are contracts *uberrimae fidei* but because they are contracts in which a situation of involuntary reliance has necessarily arisen from the particular circumstances of a case. If, in the circumstances, it would be wrong to keep silent, then silence amounts to a misrepresentation. The position was aptly summed up by Conradie JA in *Absa Bank Ltd v Fouche*,[9] in which this court considered whether the appellant had been guilty of fraudulent or negligent non-disclosure that induced the respondent to enter into a contract for the hire of a safe-deposit box when, he said the following in para 5:

'The policy considerations appertaining to the unlawfulness of a failure to speak in a contractual context – a non-disclosure – have been synthesised into general test for liability. The test takes account of the fact that it is not the norm that one contracting party need tell the other all he knows about anything that may be material (*Speight v Glass & another* 1961 (1) SA 778 (D) at 781H-783B). That accords with the general rule that where conduct takes the form of an omission, such conduct is prima facie unlawful (*BOE Bank Ltd v Ries* 2002 (2) SA 39 (SCA) at 46G-H). A party is expected to speak when the information he has to impart falls within his exclusive knowledge (so that in a practical business sense the other party has him as his only source) and the information, moreover, is such that the right to have it communicated to him "would be mutually recognised by honest men in the circumstances" (*Pretorius & another v Natal South Sea Investment Trust Ltd* (under Judicial Management) 1965 (3) SA 410 (W) at 418E-F).'

[9] *Absa Bank Ltd v Fouche* [2002] ZASCA 111; 2003 (1) SA 176 (SCA).

[25] Once one accepts, as we must, that where the tender document explicitly imposed a duty on a tenderer to disclose that it had the necessary financial resources to execute a project of this magnitude when it submitted its bid, it can hardly be contended that this duty did not endure thereafter, during the adjudication process. In my view it did. Once Tau Pele's financial position had changed materially after it had submitted its bid it bore the duty to disclose that material fact.

[26] The adjudication process would be seriously undermined and the department prejudiced if the public procurement process did not recognise such a duty. This is underpinned by the fact that a tendering process, involving huge amounts of public money, is clearly a matter in which the public has an interest. For these reasons, the learned judge in the court a quo was correct to set aside the contract awarding the tender to Tau Pele. Tau Pele's cross-appeal must accordingly fail.

[27] What now remains to be decided is whether there are exceptional circumstances in this case that justify a substitution order to award the tender to Umso in the place of Tau Pele, in terms of s 8(1)*(c)*(ii)*(aa)* of PAJA.[10] I need to point out at the onset that this court was advised by both counsel that it was common cause that had Umso's bid not been ruled non-responsive it would have scored the highest points and would have been the successful tenderer.

[10] Section 8(1)*(c)*(ii)*(aa)* of PAJA provides, amongst the number of remedies in proceedings for judicial review, that: 'The court or tribunal, in proceedings for judicial review in terms of s 6(1), may grant any order that is just and equitable, including orders – setting aside the administrative action and – in exceptional cases – substituting or varying the administrative action or correcting a defect resulting from the administrative action.'

[28] The relevant factors that a court must consider when deciding whether to make an order of substitution have been highlighted by the Constitutional Court in *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd & another*.[11] There are two primary questions that must be answered namely: first, whether a court is in as good a position as the department to enable it to make the order; and secondly, whether or not the decision of an administrator can be said to be a foregone conclusion, for example, that a party, in this case, Umso, would have been the successful tenderer.[12] These factors must be considered cumulatively with other relevant factors such as bias or the incompetence of the administrator. Ultimately, it is a question of fairness and equitability. This court must therefore determine those two questions.

[29] There is no issue with the latter requirement as parties are agreed that Umso would have been the successful party. With regards to the first requirement, the court has at its disposal all the material facts and documentation pertaining to the tender. Tau Pele having been found to have been wrongly awarded the tender, it is only Umso that has been shown to be capable of executing the project.

[30] The tender was for a six month period and there has been a considerable delay in commencing with the project. No purpose will be served by delaying it any further and re-running the entire bid process. It bears mentioning that the prime reason for the upgrading of the road is to facilitate coal mining in the relevant area and invariably to

[11] *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd & another* [2015] ZACC 22; 2015 (5) SA 245 (CC) para 47.
[12] Ibid para 49, where 'a foregone conclusion' is explained.

keep the mine operating and to save many jobs. There is also no evidence to suggest that a service level agreement had been signed between the government and Tau Pele, nor is there evidence showing that execution of the project has commenced nor that the government is indebted to Tau Pele.

[31] I accordingly make an order as follows:

1. The appeal is upheld with costs, such costs to include the costs of two counsel.
2. The cross-appeals of the first and third respondents are dismissed with costs such costs to include the costs of two counsel. The respondents are to pay the costs of the appeal jointly and severally, the one paying the other to be absolved.
3. The order of the court a quo dated 7 October 2014 is amended by adding the following to paragraph 2:
‘The tender/bid SC MU5-12/13-0035 is hereby awarded to the applicant’.

_____

B H Mbha

Judge of Appeal

APPEARANCES:

For Appellant:	R P Quinn SC (with him N C F Schultz)
Instructed by:	Smith Tabata, East London
	Webbers Attorneys, Bloemfontein
For First Respondent:	R G Buchanan SC
Instructed by:	The State Attorney, King William's Town.
	The State Attorney, Bloemfontein
For Third Respondent:	S J Reinders
Instructed by:	Honey Attorneys, Bloemfontein