THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 1112/2018

In the matter between:

ZIKHULISE CLEANING MAINTENANCE & TRANSPORT CC **APPELLANT**

and

THE CHAIRMAN OF THE INVESTIGATING COMMITTEE OF THE CONSTRUCTION INDUSTRY DEVELOPMENT BOARD **FIRST RESPONDENT**

TSELISO MAKHETHA NO **SECOND RESPONDENT**

SIYABULELA MAGAGA NO **THIRD RESPONDENT**

WERNER BOUWER NO **FOURTH RESPONDENT**

Neutral citation: *Zikhulise Cleaning Maintenance & Transport CC v The Chairman of the Investigating Committee of the Construction Industry Development Board* (1112/2018) [2019] ZASCA 181 (2 December 2019)

Coram: Leach, Saldulker and Mocumie JJA, Koen and Weiner AJJA
Heard: 11 November 2019
Delivered: 2 December 2019

Summary: Construction Industry – Regulations promulgated under s 33 of Construction Development Board Act 38 of 2000 – inquiry under reg 29 – whether conduct complained of constituted breach of Code of Conduct published under s 5(4) of Act – conduct subject of complaint not relating to construction

procurement process, therefore not constituting breach of Code of Conduct – Regulation 28 and 29 – Failure to comply with investigatory provisions necessary for valid inquiry under reg 29.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Hughes J sitting as court of first instance):

1 The appeal succeeds with costs, including the costs of two counsel.

2 The order of the court a quo is set aside and substituted with the following:

'(a) The application is upheld with costs, including the costs of two counsel.

(b) The order dated 24 July 2014 of the Investigating Committee appointed under reg 29 to inquire into conduct of the Applicant, is set aside and replaced with the following:

"The charges against the applicant are dismissed."'

JUDGMENT

Leach JA (Saldulker, Mocumie JJA and Koen, Weiner AJJA concurring)

[1] The appellant is a close corporation presently registered as a contractor under the Construction Industry Development Board Act 38 of 2000 (the Act). It unsuccessfully applied to the Gauteng Division, Pretoria to review a decision

taken by the first respondent, an investigating committee, not to dismiss certain charges brought against it in an inquiry under reg 29 of the regulations promulgated under the Act. The appeal to this court against that decision is with the leave of the court a quo.

[2] It is necessary to place the dispute between the parties in its statutory setting. The Construction Industry Development Board (the Board) was established under s 2 of the Act, having the objects set out in s 4. These include the determination and establishment of best practice that promotes improved industry stability, improved industry performance, efficiency and effectiveness.[1] Further objectives include promoting best practice and improved performance of both public and private sector clients, contractors and other participants in the construction delivery process,[2] as well as developing projects that promote best practice. [3]

[3] The powers, functions and duties of the Board, set out in s 5 of the Act, are wide-ranging. In terms of s 5(4) it is obliged to promote uniform and ethical standards within the construction industry and, to that end, to 'publish a code of conduct for all construction related procurement and all participants in the procurement process'.[4] Pursuant to this, on 31 October 2003 the Board published a code of conduct in the Government Gazette[5] (the Code).

[4] Chapter 3 of the Act deals with the registration of contractors. Under its heading, the stated purposes of the chapter include the following:

'. . . to establish a public sector register of contractors that will support risk management in the tendering process; reduce the administrative burden associated with the award of contracts; . . .

[1] Section 4*(c)* of the Act.
[2] Section 4*(d)* of the Act.
[3] Section 4*(h)* of the Act.
[4] Section 5(4)*(a)* of the Act.
[5] Board Notice 127, *GG* 25656, 31 October 2003.

assess the performance of contractors in the execution of contracts and thus provide a performance record for contractors; regulate the behaviour and promote minimum standards and best practice of contractors . . .'

[5] With such end in view, Chapter 3 contains various provisions relevant to the registration of contractors. Inter alia, and these were of importance in regard to the decision of the court a quo:

(a) Section 16(1) obliges the Board to establish a national register of contractors 'which categorises contractors in a manner that facilitates public sector procurement and promotes contractor development.

(b) Section 16(6) prescribes that a contractor may apply to the Board for registration.

(c) Section 16(4) obliges every organ of state to 'apply the register of contractors to its procurement process.'

(d) Section 17 obliges the Board to keep and maintain a register of those contractors who have been registered with it.

(e) Section 20 prescribes that registration by the Board will be valid for a period of three years.

[6] Section 18 of the Act goes on to provide, inter alia:

'(1) A contractor may not undertake, carry out or complete any construction works or portion thereof for public sector contracts, awarded in terms of competitive tender or quotation, unless he or she is registered with the Board and holds a valid registration certificate issued by the Board.

(2) Any contractor who carries out or attempts to carry out any construction works or portion thereof under a public sector contract and who is not a registered contractor of the Board in terms of this Act, is guilty of an offence and liable, on conviction, to a fine not exceeding ten per cent of the value of the contract so carried out.

(3) A contractor referred to in subsection (2) must, upon receipt of a written notice by the Board served on him or her in the prescribed manner, cease to continue any public sector construction work.'

[7] As appears from all of this, contractors are not obliged to be registered with the Board. However, organs of state may only apply their procurement processes to registered contractors; and unregistered contractors may not carry out or attempt to carry out construction works under public service contracts. This is a very real inducement for contractors to have themselves registered under s 16.

[8] On 9 June 2004, the Minister of Public Works promulgated the Construction Industry Development Regulations under s 33 of the Act[6] (the Regulations). Inter alia, they provide for procedures relating to investigations into complaints concerning contractors and the holding of a formal inquiry into such a complaint if, following such investigations, the Board is satisfied that sufficient grounds exist to do so. I shall deal with these in more detail in due course.

[9] Pursuant to the provisions of s 16 described above, the appellant was registered as a contractor for a period of three years from 1 December 2005 to 30 November 2008 whereupon such registration lapsed under s 20. It was again registered from 31 March 2009 until the end of March 2012 and thereafter again for a further three year period with effect from 19 September 2012.

[10] Shortly after this last registration, the Board served a notice dated 25 April 2013 on the appellant. Signed by the Acting Chief Executive Officer of the Board, it informed the appellant that it had been the subject of an investigation conducted under the Regulations in which evidence had been obtained indicating that it had contravened the Act or the Regulations or the Code. In this regard it particularised 20 charges. It concluded with a statement that the Board would be instituting a formal inquiry into these charges before an investigating committee, and called on the appellant to indicate in writing within 21 days whether it admitted or denied the charges.

[6] Published under GN R692, *GG* 26427, 9 June 2004 as amended from time to time.

[11] The investigating committee the Board appointed to carry out this inquiry consisted of the first respondent as its Chair and two additional members, the second and third respondents (for convenience I shall refer to them simply as the Committee). The fourth respondent, an advocate, was appointed by the Board to act as prosecutor or evidence leader at this inquiry. I should mention that only he appeared on appeal, and the other respondents abide the decision of this court.

[12] Prior to the inquiry before the Committee, the appellant's attorneys formally objected to the charges, contending that they did not disclose any offence, that they were vague and embarrassing and that, in any event, there were no provisions in the Code that could be offended by the conduct allegedly perpetrated. At the outset of the inquiry, the appellant argued its objections before the Committee and asked for the charges to be dismissed. The Committee, however, refused to do so and dismissed the objections. This led to the review proceedings which are the subject of this appeal.

[13] In the court a quo, the appellant's challenge to the ruling of the Committee was based on four separate grounds. First, it alleged the Committee lacked jurisdiction as the conduct which was the subject of the charges allegedly occurred at a time when it was not registered as a contractor in terms of the Act. Second, it contended that the charges did not amount to conduct envisaged by the Code (specifically it was alleged that the Code governed conduct between the parties to the Code and not between contractors such as the appellant and the Board). Third, it alleged the Committee had failed to comply with the requirements of reg 28 (to which I shall return in due course) which, so it was argued, was necessary before a valid inquiry could be held. Finally, it was alleged there had been an undue lapse of time before the inquiry had been instituted and this, coupled with the fact that the inquiry related to conduct which it averred had been condoned by the Committee, rendered the inquiry unfair.

[14] In dismissing the review, the learned judge a quo dealt with the first of these grounds. She concluded that the fact that the appellant may not have been registered as a contractor at the time of the conduct that was the subject of the charges, was no impediment to the inquiry being held. On the strength of this finding alone, she dismissed the review, ignoring the second, third and fourth points, any one of which would in itself, if upheld, have allowed the review to succeed. Why she did so, or whether she merely overlooked these other grounds, is known only unto her. It was raised as a ground of appeal in the appellant's application for leave to appeal to this court, but the learned judge avoided the issue in her judgment on that application, stating that she had dealt with 'as much as that which was relevant' in her judgment. Unfortunately, she had not. Her failure to deal with certain of the grounds of review remains a mystery. Although this cuts across the appellant's constitutional rights of access to the courts,[7] it can be cured by this court considering the other grounds advanced in the court a quo.

[15] Although, as I have said, the court a quo decided the matter merely by finding against the appellant on the first of the grounds challenging the Committee's decision, counsel for the appellant did not seek to impugn the correctness of that decision. Instead he argued that both the second and third points were themselves determinative of the matter, so that even if the court a quo had been correct on the first ground, they would, if upheld, dispose of the appeal in the appellant's favour. Thus, whether the court a quo was correct or not in regard to the first ground, need not detain us.

[16] I therefore turn to consider the argument that the charges did not relate to conduct which was susceptible to an inquiry. As a starting point, it is necessary to remember that s 29(1) of the Act prescribes that the Board may 'for the purposes of enforcing the [Code] convene an inquiry into any breach of the

[7] *Strategic Liquor Services v Mvumbi NO & others* 2010 (2) SA 92 (CC) paras 16-18; [2002] ZASCA 17.

[Code] and must conduct the inquiry in the prescribed manner'. Any conduct that does not constitute a breach of the Code therefore falls beyond the aegis of such an inquiry.

[17] The Code was published by the Board under s 5(4) of the Act to operate as 'a code of conduct for all construction related procurement and all participants in the procurement process'. This clearly limits the Code's operation to such participants and construction related procurement processes. That is also obvious from the terms of the Code itself. It states in its preamble that a code of conduct for all 'participants in the construction procurement process' is a necessary condition for the development of the construction industry. Further stating that it is intentionally widely cast so as to avoid what it refers to as 'the pitfall of detail', it records that it 'applies to the various parties involved in public and private procurement relating to the development, extension, installation, repair, maintenance, renewal, removal, renovation, alteration, dismantling or demolition of a fixed asset including building and engineering infrastructure'. Thereafter, after having described what is meant by an agent, contractor, employee, representative, subcontractor and tenderer, it goes on to prescribe how those parties should deal with each other in construction related procurements (eg by behaving equitably, honestly and transparently and to comply with all applicable legislation and associated regulations), before stating:

'The [Code] serves to establish the broad framework within which an action, or default, by *any party to the procurement process* may be judged. Any action, or default, which conflicts with the Code, is unacceptable.' (My emphasis.)

[18] The remainder of the Code, save in conclusion for a brief exhortation to those working in the construction industry to toe the line upon pain of proceedings under s 29, consists of examples of what constitutes acceptable conduct on the part of various parties in the construction industry. In respect of a contractor it reads:

'**Conduct of the contractor**

The contractor or his employees should:

Undertake the contract with the objective of satisfying the requirements of the employer by observing the spirit as well as complying with the letter of the contract and, in pursuit of this objective, co- operate with all other parties in the procurement process.

Aim to meet all statutory and contractual obligations fully and timeously in regard to conditions of employment, occupational health and safety, training, fiscal matters etc.

Not attempt to influence the judgement, or actions, of agents, employees, or representatives by inducements of any sort.

Employ subcontractors only on the basis of fair, unbiased, written subcontracts.

Not engage in unfair or unethical practices in dealings with subcontractors.

Not make spurious claims for additional payment or time.

Not approach any representative directly in connection with a contract, save for a legitimate purpose.

Not undermine the development objectives of the employer through tokenism or fronting.

Not engage in collusive practices that have direct or indirect adverse impacts on the cost of the project to the employer.'

[19] These examples clearly illustrate what had been set out in writing, namely, that the Code relates to acceptable conduct on the part of various parties in the procurement process in the construction industry. Any doubt about this is expunged by reg 27A. Inserted into the Regulations[8] on 14 November 2008, it provides as follows:

'**27A Application of code of conduct** – The code of conduct applies to all construction-related procurement and all participants involved in the procurement process, from the application for registration as a contractor, through to the tender process and the registration and completion of a project, including participation in the best practice project assessment scheme and the best practice contractor recognition scheme.'

[8] By r 23, GN R1224.

[20] The relationship between participants in the procurement process and the Board, on the other hand, is governed by the Act and Regulations, and is enforced by way of criminal sanction. Thus:

(a) Section18(2) makes it an offence for a contractor who carries out out construction work under a public sector contract, or attempts to do so, if it is not a registered contractor of the Board.

(b) Regulation 28(b) prescribes that a contractor whose registration is downgraded by an investigating committee after an inquiry under reg 29, and who applies thereafter for its original grading or another higher grading but fails to disclose the grade from which it was downgraded, is guilty of an offence.

(c) Regulation 30(1) provides:

'Any person or organ of State who

(a) supplies the Board with false information to mislead the Board;

(b) fails to register a project in terms of these Regulations;

(c) awards a construction works contract contrary to these Regulations; or

(d) fails to comply with these Regulations,

is guilty of an offence and is liable to a fine not exceeding R100 000.00.'

[21] From this analysis, it is clear that relations between the Board and parties to the construction procurement process are solely governed by the Act and the Regulations. On the other hand, good practices between parties to the construction procurement process are governed by the Code.

[22] This is where things start to go wrong for the respondents. As mentioned, the charges in respect of which the inquiry was convened, were contained in the notice of 23 April 2013 addressed to the appellant by the Board. They were the following:

Charges 1 and 2

These related to tax clearance certificates, it being alleged that invalid or false or forged tax clearance certificates were submitted to the Board on behalf of the appellant.

Charges 3 to 5

These related to deficiencies and differing financial figures reflected in various annual financial statements submitted by the appellant to the Board which were either incorrect or did not reflect the true financial position of the appellant.

Charges 6 to 11

These related to the alleged submission of false or inaccurate or forged documentation or information relating to the appellant's qualified professionals which had been submitted on behalf of the appellant to the Board.

Charge 12

It was alleged that the appellant had submitted false or inaccurate information to the Board in regard to construction works performed during a specific contract.

Charges 13 to 17

These related to the failure to disclose to the Board that a particular person involved with the appellant had been convicted on charges of fraud.

Charges 18 to 20

These alleged that the appellant had failed to disclose the criminal conviction of the person mentioned in charges 13 to 17 in three compulsory enterprise questionnaires submitted to the KwaZulu-Natal Department of Public Works.

[23] These charges, if established, may possibly have constituted an offence under the Act or the Regulations (about which I express no views). But, save for the last three, they do not deal with breaches of the Code which governs the management of procurement processes. Rather they relate to dealings between the appellant, as a contractor, and the Board. Only the three last charges can be

seen as in any way involving the appellant and another party to the procurement process (in those cases the Department of Public Works as an employer).

[24] This was glossed over in argument, with both parties seemingly accepting that none of the charges related to conduct falling within the ambit of a procurement process. However, it was incumbent upon the appellant, as applicant in the court a quo, to establish that to have indeed been the case and it really did not help its cause by merely submitting, as it did in its heads of argument (which I should immediately record were not prepared by leading counsel who appeared on its behalf in this court) that charges 18 to 20 are not covered by the Code of Conduct as they 'involve the interaction between the appellant and another department of State'. I see no reason why if a department of State is an employer, as was stated in charges 18 to 20 to have been the case, the relationship between such department and contractor should not be regarded as part of the procurement process in respect of which the Code applies. I am therefore of the view that although the first 17 charges, even if established, do not involve breaches of the Code, the same cannot be said of counts 18 to 20.

[25] Insofar as the first 17 charges are concerned, however, in the light of my conclusion that the conduct to which they refer cannot be construed as breaches of the Code, both the Committee and the court a quo erred in not concluding that they fell beyond the ambit of any conduct into which an inquiry under reg 29 could be held. They ought to have reached the contrary conclusion, and on that basis alone, dismissed those charges for lack of jurisdiction.

[26] In the light of the finding that the final three charges survived the jurisdictional requirement that they constitute breaches of the Code, it becomes necessary to consider the second ground relied upon by the appellant in this appeal, namely, the failure to comply with the prescribed procedures relating to

an inquiry. As indicated, s 29(1) of the Act provides that for the purposes of enforcing the Code, the Board may convene an inquiry into any breach of the Code and 'must conduct the inquiry in the prescribed manner'. The manner so prescribed is that set out in the Regulations, to which I now turn.

[27] Regulation 28 provides for a preliminary investigation pursuant to a complaint having been received by the Board, and the latter having reasonable grounds to suspect that there has been a breach of the Code which requires it to appoint an investigating officer to investigate the complaint or suspicion. Under reg 28(3) the investigating officer is obliged to verify whether the Board has jurisdiction to investigate the complaint or suspicion and that reasonable grounds exist for the complaint or suspicion, before commencing with the preliminary investigation. If satisfied that the necessary criteria have been met, the investigating officer is obliged under reg 28(6) to investigate the matter, and obtain evidence to determine whether the Board may take any action against the implicated person. After the conclusion of such investigation, the investigating officer is obliged under reg 28(8) to submit a report to the Board containing the evidence obtained, his or her conclusions and the reasons therefore; whether in the investigating officer's opinion the person implicated by the complaint or suspicion has breached the Code of Conduct; and, finally, a recommendation regarding the action that the Board should take. After considering this report, reg 28(9) requires the Board to 'act in accordance with the recommendation of the investigating officer if . . . satisfied that sufficient grounds exist for such action'. It is only pursuant to this that a formal inquiry can be held under reg 29(1) if the Board, after due consideration of the report of the investigating officer, is satisfied that one should be held.

[28] Finally, I must mention that if an organ of state other than the Board undertakes an investigation and finds that a person acted contrary to or has

omitted to act in terms of the Code, the procedure is somewhat truncated. In that event, under reg 28(10) the relevant organ of state is to provide the Board with its findings and all other documentation relevant to its investigation. Upon receipt thereof, the Board under reg 28(11) must refer the matter to the investigating officer appointed by the Board under reg 28(1). Thereafter, the investigating officer is obliged under reg 28(12) to submit a report to the Board, containing a statement of whether in his opinion the person implicated has acted contrary to the Code, and a recommendation regarding the action the Board should take.

[29] Bearing these requirements in mind, I turn to the facts of this matter. On 27 August 2010, acting in terms of s 2(1) of the Special Investigating Units and Special Tribunals Act 74 of 1996 (the SIU Act), the State President referred various allegations relating to the affairs of the Department of Public Works in the KwaZulu-Natal Province for investigation.[9] Pursuant to this, a special investigating unit (SIU) approached Mr Moola, a programme manager at the Board, who on 28 June 2012 and 27 September 2012, respectively, provided affidavits in relation to the registration of the applicant as a contractor. In addition to this, a private forensic investigator, Mr Allan Nixon, was engaged by the SIU to conduct an investigation on its behalf into the appellant's dealings with the Board and the KwaZulu-Natal Department of Public Works. A full report was issued by Mr Nixon to the SIU at the conclusion of its investigation. The Board obtained this report and then instructed the fourth respondent to peruse it and draft a notice to the appellant. This he did. The notice he drafted was the document dated 25 April 2013, informing the appellant of the inquiry, setting out the 20 charges and calling on the appellant to indicate whether it admitted or denied such charges.

[9] Proclamation R 43, *GG* 33506, 27 August 2010.

[30] Mr Nixon, who conducted the investigation at the request of the SIU and prepared the report which was provided to the Board, was not appointed by the SIU as required by s 3(2) of the SIU Act. Instead his relationship was stated in his letter of appointment as remaining 'that of a company and an independent contractor'. The investigation was thus not conducted by an organ of state, other than the Board, and the provisions of reg 28(10) to reg 28(12) are therefore of no application.

[31] In these circumstances, at best for the respondents, on receipt of the report the Board was obliged under reg 28(1) to appoint an investigating officer to investigate any complaint against the appellant or suspicion involving it – whereafter the procedure that I have already outlined above in reg 28(2) to reg (28)(8) had to be followed – involving the steps the investigating officer was obliged to take. The investigating officer in the present matter, Mr Makhubu, took no such steps. Instead he merely passed Mr Nixon's report onto the fourth respondent. Moreover he did not submit a report to the Board as required in reg 28(8). Nor did the Board on receipt of such a report (as none was made) decide to act under reg 28(9) in accordance of the recommendation of the investigating officer – as there was no such recommendation. Instead the fourth respondent decided to go ahead and drafted the notice containing the charges on behalf of the Board. And even if the report of Mr Nixon on behalf of the SIU could be regarded as that of an organ of state (which for the reasons I have given it was not), the provisions of reg 28(12) – which required the investigating officer to submit a report to the Board containing a statement and recommendation which the Board was to consider before deciding to hold an inquiry under reg 29 – were in any event not complied with.

[32] It was argued on behalf of the respondents that although the strict procedures outlined in the Regulations were not followed, there had been

substantial compliance. In a case such as this, it is necessary to 'follow a common sense approach by asking the question whether the steps taken by [the respondents] were effective to bring about the exigibility of the claim measured against the intention of the Legislature as ascertained from the language, scope and purpose of the enactment as a whole and the statutory requirement in particular'. See *Weenen Transitional Local Council v Van Dyk* 2002 (4) SA 653 (SCA) para 13 approved by the Constitutional Court in *African Christian Democratic Party v The Electoral Commission & others* 2006 (3) SA 305 (CC) para 25 in which O'Regan J also stated that the issue is whether what was done 'constituted compliance with the statutory provisions viewed in the light of their purpose'. As Froneman J subsequently remarked in *Allpay* '[t]his is not the same as asking whether compliance with the provisions will lead to a different result'.[10]

[33] Adopting such a common sense approach, it seems to me to be clear that the decision to bring the charges in the inquiry was not preceded by the statutory requirements of investigation. The answer to the respondent's contention of substantial compliance is that there had been no compliance at all. The prescribed processes had just not been followed, and it does not help for the fourth respondent to argue, as essentially he did, that if they had, been the charges would in any event have been laid.

[34] The result is that the validity of the reg 29 inquiry fails at the hurdle of legality. In these circumstances, all the charges fail by reason of the procedural irregularity just mentioned, and the first 17 charges fail further by reason of their not amounting to breaches of the Code. For these reasons, all the charges against the appellant should have been dismissed. The Committee erred in not doing so,

[10] *Allpay Consolidated Investment Holdings (Pty) Ltd & others v Chief Executive Officer, South African Social Security Agency & others* 2014 (1) SA 604 (CC) para 29; [2013] ZACC 42.

and the court a quo erred in not upholding the appellant's application for review of the Committee's decision not to do so. The appeal must therefore succeed.

[35] It is therefore ordered:

1 The appeal succeeds with costs, including the costs of two counsel.

2 The order of the court a quo is set aside and substituted with the following:

'(a) The application is upheld with costs, including the costs of two counsel.

(b) The order dated 24 July 2014 of the Investigating Committee appointed under reg 29 to inquire into conduct of the Applicant, is set aside and replaced with the following:

"The charges against the applicant are dismissed."'

_____

L E Leach

Judge of Appeal

Appearances

For the Appellant: J Gauntlett SC QC (with him J E Howse)
Instructed by: Garlicke & Bousfield c/o VDT Attorneys, Pretoria
Symington De Kok, Bloemfontein

For the Respondent: D B du Preez SC
Instructed by: Werner Kruger Attorneys c/o Lombard & Partners, Pretoria
Hill McHardy & Herbst Inc, Bloemfontein