IN THE HIGH COURT OF SOUTH AFRICA
(EAST LONDON LOCAL CIRCUIT DIVISION)

Case No: EL 861/2011
ECD 1294/2011

In the matter between:-

SLIPKNOT INVESTMENTS 777 (PTY) LTD	First Applicant
GREAT FORCE INVESTMENTS 59 (PTY) LTD	Second Applicant

and

THE EASTERN CAPE LIQUOR BOARD	First Respondent
SANEZE INVESTMENTS (PTY) LTD	Second Respondent
CRANES CREST INVESTMENTS 71 (PTY) LTD	Third Respondent

Coram:	Beyleveld AJ
Date heard:	2 December 2011
Date Delivered:	8 December 2011
Summary:	Review tender process – Evaluation of tender bids – Whether award of tender fair, equitable, transparent, competitive and cost effective – Effect of joint venture bid – Decision to award tender to Third Respondent set aside

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JUDGMENT

BEYLEVELD AJ

1]It is has been stated that the award of public tenders is notoriously subject to influence and manipulation[1] and that an award of Government tenders[2] often give rise to public concern and are a fruitful source of litigation.[3] Our case law is replete with such examples.[4]

2]The following remarks by Froneman J (as he then was) are illustrative of the aforegoing:

> *"Recent case, law makes it abundantly clear that the entity that awards public tenders must act in accordance with its statutory mandate. This means it must act fairly, impartially and independently. (Steenkamp NO v Provincial Tender Board, Eastern Cape 2007 (3) SA 121 (CC) (also reported [2006] JOL 18364 (CC)- Ed.] paragraph [35]). In the local government sphere loss of the attributes of transparency, competitiveness and cost-effectiveness in the tender process will render the process invalid (Metro Projects CC & another v Klerksdorp Local Municipality & others 2004 (1) SA 16 (SCA) [also reported as [2003] JOL 11590 (SCA) – Ed.] at*

1 Minister of Social Development and Others v Phoenix Cash 'n Carry – P & B CC [2007] 3 All SA 115 (SCA)
2 Or tenders awarded by other Organs of State
3 Moseme Road Construction CC & Others v King Civil Engineering Contractors (Pty) Ltd & Another 2010 (4) SA 359 (SCA)
4 See for instance: Metro Projects CC & Another v Klerksdorp Local Municipality & Others 2004 (1) SA 16 (SCA)
Millenium Waste Management (Pty) Ltd v Chairperson, Tender Board : Limpopo Province & Others 2008 (2) SA 481 (SCA)
Logbro Properties CC v Bedderson NO & Others 2003 (2) SA 460 (SCA)
Premier, Free State & Others v Firechem Free State (Pty) Ltd 2000 (4) SA 413 (SCA)

> *21E). The sanction of invalidity does not depend on the individual or particular harshness discernable in a particular case (Eastern Cape Provincial Government & others v Contractprops 25 (Pty) Ltd 2001 (4) SA 142 (SCA) [also reported as [2001] 4 All SA 273 (A) – Ed.] paragraph [9]).*[5]

3]In the present matter, the First and Second Applicants seek an Order reviewing and setting aside the decision of the First Respondent.

4]The decision it seeks to set aside is the decision of the First Respondent to award the bid to a joint venture (it being contended by the Respondents that the Second and Third Respondents submitted a bid as a joint venture) and to conclude an agreement of lease with the Third Respondent.

5]The Applicants seek a further order that the lease agreement purportedly concluded between the First and Third Respondents be declared void and unlawful and that the First Respondent be directed to substitute the First, alternatively the Second Applicants as successful tenderer and to conclude a lease agreement with the First Applicant, alternatively the Second Applicant, in accordance therewith.

6]Besides the relief relating to costs, alternative relief is sought on the basis that the

5 Nelson Mandela Bay Municipality v Afrisec Strategic Solutions (Pty) Ltd & Others 2007 (JOL) 20448 (SE) para 18

matter be referred back to the First Respondent to re-adjudicate the tenders.

7]Since the original application was launched in April 2011 the Applicants have amended their Notice of Motion and various affidavits and supplementary affidavits have been filed on behalf of the parties. To a large extent amendments and supplementary affidavits were filed as a result of the Applicants being placed in possession of documents and information relating to the particular tender process.[6]

8]On 17 August 2011 Roberson J granted an interim order interdicting the Respondents from implementing the lease agreement, pending final argument on the review application. Such interim order related to tender 001/2010 (Lease of Office Space for Eastern Cape Liquor Board).

9]The order was to the effect that the Respondents were interdicted and restrained from implementing and carrying out the terms of the lease agreement concluded between the First and Third Respondents on 14 April 2011, pending finalization of the review and a further order issued interdicting the First Respondent from taking occupation of the premises described in the lease agreement and from paying

6 The critiscism levelled at the Applicants for raising issues in further or supplementary affidavits loses sight of the nature of the review in terms of Rule 53. In any event the principle that it is incumbent to make out a case in the founding papers is not immutable. See: Nkengana v Schnetler [2011] 1 All SA 272 (SCA) p 276 para 10.

rentals to the Third Respondent in terms thereof.

10]Various costs awards, including the costs of the interim application, the costs of the first application for an interdict, the cost of proceedings on 21 July 2011, the costs of the application for joinder and the cost of the application to amend the Notice of Motion were reserved for decision by the Court hearing the review application.

11]Full details of the grounds upon which the Applicants rely for the relief sought and the factual matrix are extensively set out in the Judgment by Roberson J.

12]I do not intend to set out in any detail the factual issues and arguments fully recorded in the Judgment of Roberson J.

13]What ultimately must be determined is whether the Second and Third Respondents' tender[7] was properly evaluated or, conversely, whether the Applicants' tender was properly evaluated and whether or not the Applicants were denied their constitutional right to fair administrative action.

14]It is trite law that tenders by Organs of State, which are governed by Section

7 Assuming there to have been a valid joint tender

217 of the Constitution must be made in accordance with a system that is fair, equitable, transparent, competitive and cost effective.

15]National legislation in terms of the Constitution must prescribe the framework for the implementation of any preferential policy. This is done by the Preferential Procurement Policy Framework Act.[8] It provides that Organs of State must determine their preferential procurement policy based on a points system which emphasizes that contracts must be awarded to the tenderer which scores the highest points, unless objective criteria justify the award to another.

16]The test applied by the Court in granting the interim order is, of course, a different test to be applied in the present circumstances.[9] Even applying the test applicable and appropriate where final relief is sought, I am of the view that, in general terms and for the reasons advanced by Roberson J when the interim order was granted, that final relief should also be granted.

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8 Act 5 of 2000.

9 The traditional test regarding factual disputes is expressed in Plascon-Evants Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A) and there exists a plethora of cases thereafter confirming the Plascon-Evans principle. The approach to be adopted when there are apparent disputes of facts on the papers has been revisited by the Supreme Court of Appeal in Buffalo Freight Systems (Pty) Ltd v Crestleigh Trading (Pty) Ltd & Another 2011 (1) SA 8 (SCA). In the present matter one must also not lose sight of the difficulty the Applicants face in review proceedings in that they are compelled to institute proceedings by way of motion proceedings and more often than not the true facts only emerge after the filing of the record of decision and where the administrative tribunal as required by law furnishes reasons. See for instance: Minister of Environmental Affairs & Tourism & Others v Phambili Fisheries (Pty) Ltd & Another 2003 (6) SA 407 (SCA).

17]I accordingly deem it unnecessary to deal with all the issues raised on the papers and what is comprehensively set out in the Judgment of Roberson J and will restrict myself in dealing with the material issues which I consider to be relevant in concluding that the process was unfair and tainted to such an extent that it should be set aside.

18]**Deregistration of the Second Respondent and the effect thereof**:

18.1]At the time of submission of the tender[10] the Second Respondent was a deregistered company.

18.2]The WinDeed indicates that as a result of a CIPRO search, the Second Respondent was deregistered on 13 November 2009.

18.3]Subsequent to the closing date of the tender, it is recorded in the CIPRO search document[11] that as at 26 May 2010 there was a

"*Cancellation of Deregistration Process*

Annual Return Non-Compliance – Cancellation of Deregistration"

10 16 April 2010
11 Annexure "FA15" to the founding affidavit

18.4]The Respondents simply contend that there was no deregistration and restrict themselves to a generalized statement that there was a process pending which had been terminated.

18.5]I would have expected some detail, particularly from the Second Respondent[12] regarding the background facts as to how it came about that a process of deregistration was even initiated.

18.6]It is apparent from the CIPRO search that deregistration occurred as a result of non-compliance with the provisions of Section 173 of the Company's Act,[13] which provides that a company, shall not later than the end of the month following upon the month which the anniversary of the date of its incorporation occurs, lodge with the Registrar a return in the prescribed form. The prescribed form contain reference to a variety of documents to be furnished to the Registrar, including documents relating to the financial affairs and assets of the particular company.

18.7]Section 73 of the Act provides, *inter alia*, that a company may be

12 It is somewhat unusual, in the present review application that the First Respondent Organ of State joins issue with the Second and Third Respondents and is in fact represented by the same legal representatives, whereas one would expect the tribunal whose decision is being attacked to remain objective and independenet from the litigants.
13 61 of 1973

deregistered if it fails within the prescribed period to lodge the annual return in compliance with Section 173.[14]

18.8]Section 73(1) provides that where the company has so failed to file the return or the Registrar has the belief as previously referred to, the Registrar shall, in accordance with Sub-section 7 send to the company, by registered post, a letter enquiring whether it is carrying on business or is in operation.

18.9]Section 73(5) provides that at the expiration of the period referred to in Section 73(3), and absent good cause to the contrary having been shown, the Registrar may deregister the company and give notice of deregistration and the date thereof in the prescribed manner.

18.10]The date of a company's deregistration is the date of publication of the notice envisaged by Section 73(5) in the prescribed manner. The reference to "prescribed" in this context means prescribed by or under the Act. In terms of Regulation 2A of the Administrative Regulations, such notice must be given by publication on CIPRO Portal.[15]

18.11]Accordingly, the fact that the deregistration date appears on the

14 The other ground is where the Registrar has reasonable cause to believe that the company is not carrying on busines or is not in operation.
15 Meskin - Henochsberg on the Company's Act, Vol 1 p 139

CIPRO Portal, in my view, is indicative of the fact that the Second Respondent was in fact deregistered.

18.12]The terminology which appears on annexure "FA15" and relates to cancellation of deregistration process[16] can be nothing more than incorrect terminology used by the operators of the CIPRO Portal.

18.13]The only reasonable and plausible inference to be made is that subsequent to deregistration and pursuant to the provisions of Section 73(6)A the Registrar, on application by the Second Respondent and on payment of the prescribed fee restored the registration of the company.

18.14]On the probabilities I accordingly come to the conclusion that at the date of submission of tender the Second Respondent was a deregistered company.

18.15]Leaving aside the debate in our law as to the effect of a restoration of registration of a company[17] and the interesting Constitutional debate

16 There is also a reference to cancellation of deregistration
17 Ex Parte : Sengol Investments (Pty) Ltd 1982 (3) SA 474 (T)
Insamcor (Pty) Ltd v Dorbyl Light & General Engineering (Pty) Ltd; Dorbyl Light & General Engineering (Pty) Ltd v Insamcor (Pty) Ltd 2007 (4) SA 467 (SCA)
Berrange NO v Registrar of Companies & Others [2008] JOL 21225 (N)

concerning the constitutionality of Section 73(6)A, the fact that the Second Respondent was not registered at the time of the submission of the tender has material implications in the present matter.

18.16]How the Second Respondent at the time when it was deregistered was able to satisfy the First Respondent that it complied with the tender notice[18] is difficult to imagine.[19]

18.17]More importantly and as argued by Mr. Ford SC (with whom appeared Ms. Beard), deregistration of a company automatically terminates the office of a director.[20]

18.18]Meskin[21] in my view correctly submits that the provisions of Sub-Section 6(a) to not have the effect of automatically restoring a former director to office as such and that it is necessary for the company again to appoint directors. At all relevant times therefore the joint venture, which on the Respondents' version was represented by the director of the Second Respondent, was "rudderless".

19]**Whether or not there existed a proper bid by the Second and Third**

18 Particularly clause 4 relating to taxes being in order
19 See for instance: Minister of Social Development v Phoenix Cash 'n Carry *supra* p 124 para 3
20 Henochsberg *supra* p 144(2)
21 Henochsberg *supra*

Respondents as a joint venture prior to the closing date:[22]

19.1]As is apparent from the Judgment of Roberson J, the letter addressed to the First Respondent,[23] on the face of it, indicates a bid by the Second Respondent only. This is borne out by the attendance at the compulsory briefing session on 14 April 2010.

19.2]It is, however, correct as Mr. Smuts SC, who appeared for the First Respondent and for the Second Respondent together with Mr. Dugmore, pointed out that in the record of proceedings, there exists a document relating to the Triple Point Development which indicates the bidder as the Second and Third Respondents.[24] Such document is, however, undated.

19.3]One would have expected a reference to the joint venture and this document, in the letter of 20 April 2010 addressed to the First Respondent on Second Respondent's letterhead.

19.4]What is, however, of more concern and material to the issue at hand is that nowhere in any documentation is there any indication by the Second

22 21 April 2010
23 The record of decision Vol 2 p 304
24 Record of Decision Vol 3 p 329

and Third Respondents what the nature and content of the so-called joint venture arrangement is. Even in the affidavits, and once the Respondents have been alerted to the suggestion by the Applicants that the Third Respondent is merely a front for the Second Respondent, no details are forthcoming.

19.5]The joint venture bid, however, was awarded the necessary equity points in terms of the criteria based on the ownership of the Second Respondent. It is common cause that the Third Respondent does not qualify for equity preference.

19.6]In view of the fact that the agreement of lease is concluded between the First and Third Respondents, I consider it to have been imperative to have disclosed the relationship between the Second and the Third Respondents and in particular disclosing their respective entitlement which flows from the award of the tender. In this regard, for instance, Regulation 4(7) of the Preferential Procurement Regulations sets out preference procedures for being HDI and/or sub-contracting with a HDI.

19.7]Furthermore, Regulation 13(1) records that preference points stipulated in respect of a tender must include preference points for equity

ownership by HDI's. Of some significance are the provisions of Regulations 13(4), (8) and (12). No information is given as to whether anyone from the Second Respondent is actively involved in the management or business of the landlord to whom the tender was awarded.

19.8]In addition, no indication is given as to the percentage of the contract value managed or executed by the HDI member in the joint venture.

19.9]Lastly, Regulation 13(12) provides that a person awarded a contract as a result of preference for contracting with or providing equity ownership to an HDI may not sub-contract more than 25% of the value of the contract to a person who is not HDI or does not qualify for such preference.

19.10]Once again, the First Respondent in adjudicating the bid clearly had no notion, nor was any disclosed, as to whether there was compliance with any of these Regulations.[25]

19.11]As **Bolton** points out[26] preference points may not be claimed in respect of persons who are not actively involved in the management of an

25 See generally: Phoebe Bolton : The Law of Government Procurement in South Africa pp 284 – further
26 p 285

enterprise or business and who do not exercise control over an enterprise or business commensurate with a degree of ownership. In the present instance such particularity is sorely lacking.

19.12]The Applicant has raised the question of fronting or window-dressing.[27]

19.13]Contrary to the argument advanced by Mr. Smuts SC that the entire tender process was not perfect but flawed in certain respects only, I adopt the opposite view that as a result of the aforegoing factors alone, the process was fatally flawed and tainted beyond repair.

20]<u>Whether the Applicants were excluded from the adjudication process:</u>

20.1]The document authored on the date of the opening of the tender[28] indicates the First and Second Applicants as having tendered the most competitive rate.

20.2]According to the minutes of the meeting of the Bid Committee held on

27 Also referred to as "tokenism" where there is no real meaningful participation by a disadvantaged person or entity and is there simply as a convenient token concession. See: Bolton *supra* p 293
See in particular: Bolton *supra* p 295 where the warning is issued regarding the importance of guarding against the risk of fronting in procurement processes.
28 "FA13"

3 August 2010, 8 bidders were excluded for not complying with Treasury Regulation 32.2.4 and Practice Note 5 of 2006 in that the lease to be concluded with the First Respondent could endure for a maximum of 5 years only.

20.3]The tender in respect of the property known at Tripple Point was one of the bidders that was excluded. The minutes further record that after the exclusion of 8 bidders for the reasons stated, the remaining bidders are Slipknot Group for two buildings. It is categorically stated that they obtained the highest score for their bids, but a rider is added that they have not included their tax clearance certificate in the submission. It is then stated that as they are the current landlord of the Respondent and they have current tax clearance certificate and that the First Respondent knows that their taxes are in order, this does not appear to pose any problem.

20.4]At a later stage, of course, reliance is placed on the fact that the tax clearance certificate was not included in the bid. Besides the dispute as to whether or not in fact it had been included, the Applicants could not have been excluded (nor did Mr. Smuts SC argue otherwise) for this reason.

20.5]The Applicant's bids were, however, not recommended for shortlisting on the non-specific and ethereal grounds that the one property is situated in Chiselhurst, an area greatly populated by government departments, whilst the other property is situated in Beacon Crossing Office Park, in an area next to a township. Rather cryptically and without substance or justification, the following is recorded:

"Both these areas do not reflect the image and ambiance of the ECLB as its core business is to promote entry into the liquor industry and thus servicing prospective business people."

20.6]This, in my view, amounted to a material misdirection. Not only is there no explanation for the exclusion, but no rational reason is advanced why one of the other bidders in a similar area was eventually placed on the short-list.

20.7]Subsequent to this, a decision was taken that a written communication should be addressed to all tenderers[29] (but to the exclusion of the Applicants) to quote *"for five years (prices to include VAT)"* and that they have ten days to respond.

29 Who were previously excluded for the reasons stated

20.8]Contextually and grammatically all tenderers were afforded the opportunity of revising their tenders. This opportunity was not afforded to the Applicants.

20.9]There is no explanation in the papers, nor was any offered during argument, as to why all tenderers could not simply have been informed that Treasury Regulations require that a lease be for five years and ask the tenderers who did not quote for five years to simply confirm in a letter that their bid be evaluated on the basis of five years only.

20.10]The fact that the other tenderers were now aware of the rate per square meter offered by the Applicants is, in my view, of considerable significance. I am not impressed by the belated attempts on behalf of the Respondents to rationalize and explain the change in rate and how it purportedly came about in respect of the tender that was eventually awarded to the Third Respondent and with whom an agreement of lease was concluded.

20.11]Of more importance, however, and having regard to the

documentation, it is self-evident that after those tenderers that were excluded as a result of not complying with Treasury Regulation being afforded a second opportunity, for all purposes the Applicants were excluded.

20.12]Nowhere is this more evident than from the minutes of the Board Management meeting held on 23 November 2010, where there is a short-listing of 4 tenderers, none of which include the Applicants, notwithstanding that at the very least the Applicants price was far more competitive than at least 3 of the 4 tenderers.

20.13]Ultimately it was argued on behalf of the Respondents that none of the deficiencies in the process carry any weight as ultimately the joint venture's bid[30] was the most competitive. Leaving aside that I am not at all satisfied that on the papers it is established that in fact the bid is the most competitive, the simple answer is that where the tender process is materially defective and a fair procedure not having been followed, the decision, as a result of such procedural unfairness could, in any event, be set aside.[31]

30 If it constitutes a proper and valid joint venture bid
31 See the authorities referred to in the Judgment of Roberson J para 44

20.14]The agreement of lease concluded with the Third Respondent falls to be set aside as a result of the deficiencies in the tender process. The principle of legality dictates that this must be done.[32]

20.15]Adopting, as we now must, a culture of justification in a constitutional democracy,[33] I am of the view that the exercise by the First Respondent of its powers to award the tender is not justified and is not, in accordance with a system which is fair, equitable, transparent, competitive and cost effective.

20.16]In the present instance we are not concerned with the leeway to be allowed to Organs of State and eloquently described by Justice Oliver Wendall Holmes as *"a little play in its joints*".[34]

21]I am accordingly of the view that the decision of the First Respondent to award the tender and to conclude an agreement with the Third Respondent stands to be reviewed and set aside.

22]I was invited to direct that the First Applicant, alternatively the Second

32 Municipal Manager : Qaukeni Local Municipality v FV General Trading *supra*
33 Democratic Alliance v President of the RSA & Others (263/11) [2011] ZASCA 241 (1 December 2011) para 67
34 Quoted in Bell Porto School Governing Body & Others v Premier Western Cape & Another 2002 (3) SA 265 (CC) para 154

Applicant be substituted as the successful tenderer. I am not convinced that I am faced with the inevitability of a particular outcome, which will prevent me from remitting the matter back to the designated functionary.[35]

23]In my view the entire process is vitiated and should be set aside. I see no useful purpose (having regard to what I have stated) in the First Respondent adjudicating the bids as they are presently constituted. I am therefore of the view that the tender process should be set aside (including the setting aside of the agreement of lease) and that the tender process should start afresh.

24]Having regard to all the circumstances and in the exercise of my discretion, I see no reason why the Respondents should not pay the Applicants' costs of the application, as well as all costs previously reserved.

25]Accordingly, I make the following order:

25.1]The tender process relating to tender 001/2010 : Lease of Office Space for Eastern Cape Liquor Board is set aside;

25.2]The decision of the First Respondent to award, pursuant to tender

35 Gauteng Gambling Board v Silverstar Development Ltd & Others 2005 (4) SA 67 (SCA) para 39

001/2010 the bid to the Second and Third Respondent is set aside;

25.3]The agreement of lease concluded between the First and Third Respondents is set aside;

25.4]The Respondents jointly and severally, the one paying the others to be absolved, are ordered to pay the Applicants' costs, including all costs previously reserved, such costs to include the costs of two Counsel

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A BEYLEVELD

Acting Judge of the High Court of South Africa

Appearances:

For Applicant: Adv. EAS Ford SC and with him Ms. Beard, instructed by Netteltons Attorneys

For First and Second Respondents: Adv. I J Smuts SC and with him AG Dugmore, instructed by Whitesides Attorneys