

SOUTH AFRICA / JUDGMENT

Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd (5668/2015, 5246/2015) [2016] ZAECGHC 55; [2016] 4 All SA 60 (ECG) (29 July 2016)

[2016] ZAECGHC 55

COURT

Eastern Cape High Court, Grahamstown

BEFORE

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CASE / FILE NUMBER

5668/2015, 5246/2015

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IN

THE HIGH COURT OF SOUTH AFRICA

EASTERN

CAPE DIVISION – GRAHAMSTOWN

Case

No: 5668/2015

&

5246/2015

In

the matter between:

BUFFALO
CITY METROPOLITAN MUNICIPALITY
Applicant
and
ASLA
CONSTRUCTION (PTY) LTD
Respondent

JUDGMENT**REVELAS J:**

- [1] This case concerns the award of a contract by the applicant, to the respondent, for internal engineering services that was concluded between the parties on 18 December 2014. The applicant seeks to review and set aside its award of this contract. The contract document is described as contract BCC/DES/PIU/HOUS/1122/2010 (“contract 1122/2010” or “the Reeston contract”) and it pertains to engineering services for certain erven in Reeston Township in the East London area.
- [2] During October 2014, the respondent instituted an action for provisional sentence claiming the amounts of R2,266,172.11, R2,215,848.16 and R2,544,952.34 from the applicant, plus interest thereon and costs. The amounts claimed are premised on three payment certificates issued by the applicant’s duly appointed (according to the respondent) engineers, Messrs Royal Haskoning for engineering services and works completed. When submitted to the applicant’s Chief Operating Officer: Housing, payment was made in respect of the first certificate, but the applicant refused to pay the respondent in respect of the three certificates referred to and submitted for payment of the aforesaid amounts respectively, on 3 June, 4 July and 4 August 2015. The applicant’s defence in the provisional sentence summons is primarily based on the proposition that if the award of the Reeston contract is to be found invalid and set aside, it would follow that the engineer’s payment certificates issued in terms thereof, are also invalid.
- [3] After the provisional sentence summons was served on the applicant, the application for the review and setting aside of the award of contract 1122/2010 was launched by the applicant as a counter application thereto. The applicant also seeks a declaratory order, to the effect that the payment certificates issued in terms of the Reeston contract be declared void ab initio.
- [4] Since the defence to the provisional sentence summons and the grounds for review are so inextricably bound together, both matters were set down to be argued in one hearing as that made sense. If the Reeston contract is declared unlawful and falls to be set aside, the claim for provisional sentence based on the three engineer’s payment certificates cannot succeed.
- [5] The review application is premised on the argument that the Reeston contract is invalid and unlawful since the applicant failed to comply with section 217 of the Constitution and the procurement legislation binding on it, more particularly, in that no competitive tender process was followed prior to the award of the Reeston contract to the respondent. The applicant submits that in circumstances where a public body, such as the applicant is of the view that a decision it took is tainted by illegality, it is duty bound to do something about it[1]. Hence the present application to review and set aside the award.
- [6] The respondent opposes the applicant’s counter application for review on the following grounds:

In Limine

- (a) The application to set aside its own administrative action is brought in terms of section 6(1) of the Promotion of Administration of Justice Act, 3 of 2000 (the PAJA). The respondent contends that the application was not launched “without reasonable delay and not later than 180 days” after the award of the Reeston contract to the respondent as required by section 7(1) of the PAJA. It was also contended in this regard, that the applicant was not entitled to condonation or an extension of the aforesaid period as envisaged in section 9 of the PAJA.
- (b) According to the respondent the deponent to the applicant’s founding affidavit, the then municipal manager, Ms Mbali-Majeng, did not have the necessary authority to depose to the affidavit in question.

The Merits

- (c) The respondent argues that the applicant failed to demonstrate, with reference to permissible evidence, that the requirements of section 217 of the Constitution were flouted. It states that the Reeston contract emanated from a turnkey contract concluded with the applicant. Since the applicant relied on hearsay, the respondent argues that it is not in a position to refute that.
 - (d) In the event that the administrative action in question may be found to be unlawful, the respondent argues that the delay in bringing the application, as well as its prejudice and public interest in the execution of the Reeston contract, validated the impugned administrative action;
- [7] In so far as the lack of authority of Ms Mbali-Majeng is concerned, this point has been disposed of, since the papers were filed from which it is apparent that the council of the applicant specifically authorised the proceedings and ratified steps already taken. It is also appropriate that the acting municipal manager depose to such an affidavit.
- [8] The applicant’s response to the grounds raised by the respondent were the following:
- [9] The applicant submits that it did not fall foul of the provisions of section 7(1) of the PAJA in that it first became aware that the Reeston contract was tainted with illegality and invalidity, when that fact came to light in a forensic investigation report presented by Messrs JGL Forensic Services (Pty) Ltd (“JGL”). That report was only made available to the applicant’s counsel on 28 October 2015 and the counter application for review was launched the following month (after the provisional sentence summons was served). The report was prepared by Ms Rhoda York a forensic investigator employed by JGL. She also deposed to an affidavit attached to the founding affidavit.
- [10] Mr Vincent Pillay, the then Acting City Manager of the applicant, notified the respondent on 4 August 2015 that the award of the Reeston contract was unlawful. The applicant contends that although it was always aware of the award, its illegality only emerged later. Accordingly, actual or presumed knowledge of the award on the part of the various officials involved,

ought not to be imputed to the council of the applicant and therefore the period of 180 days cannot be construed as commencing from the date upon which the award was made, and when the contract ultimately concluded with the respondent, being on 7 August 2014 and 14 January 2015 respectively. On the respondent's case the applicant launched its application for review 278 days after the conclusion of the contract and 456 days after the contract was awarded by Mr Vincent Pillay, purportedly on behalf of the applicant.

- [11] The applicant submits that if the respondent's view prevails nonetheless, the applicant would be entitled to an extension of the 180 day period in terms of section 9 of the PAJA on the basis that it is not in the public interest that unlawful contracts be enforced and on the contrary, they ought to be set aside. The applicant also reiterated that the respondent, as an experienced engineering concern, must have been, or should have been, aware that the award to it of the Reeston contract had never been the subject matter of a compliant procurement process.
- [12] The respondent's challenge to the permissibility of the evidence, upon which the application for review is based, is predicated on the proposition that the report of Ms York primarily consisted hearsay, unsupported by confirmatory affidavits and her own irrelevant opinions which it contends are irrelevant. The applicant submitted that Ms Mbali-Majeng was entitled to rely on Ms York's affidavit since her affidavit relies upon the analysis of and reference to documents in the possession of the applicant that clearly and unambiguously speak for themselves.
- [13] The primary respondent's challenge to Ms York's findings is premised on the argument that it was not necessary for the applicant to follow a procurement process to award the Reeston contract because the Reeston contract was simply an extension of terms of a turnkey contract ("BCMM/COO/HM/1319/2013" or "the turnkey contract") awarded to it by the applicant and which made provision for work in Reeston. It is common cause that on 20 May 2014, the turnkey contract on which the respondent relies was concluded between the applicant and the respondent. The respondent was appointed by the applicant as the implementing agent on a turnkey basis for an urban housing project to address the housing needs of Duncan Village and commenced with executing its obligations in terms of the contract. Proper procurement and bidding procedures were followed in respect of this turnkey contract.
- [14] The applicant does not dispute that the turnkey contract was concluded, but disputes that the turnkey contract could be extended to include the Reeston contract. It was argued that the turnkey contract is also invalid because when the relevant Bid Adjudication Committee recommended the respondent for appointment as the implementing agent on a turnkey basis for the Duncan Village housing project, the committee added the following condition in its recommendation letter:

“It shall be understood from correspondence from the Department of Human Settlements that there will be a funding agreement between the tenderer (the respondent) and the Department of Human Settlements”.

Since no such agreement was reached and the aforesaid condition was suspensive, the turnkey contract was “inchoate” and consequently the Reeston contract could not derive any validity therefrom.

- [15] The applicant contends further that the turnkey agreement applied to houses in Duncan Village only and could not apply indefinitely to projects outside Duncan Village on the basis the respondent relies on. The Reeston contract, says the applicant, was for a separate project and any contract pertaining to that project, had to be awarded pursuant to a competitive tender process.
- [16] The applicant also submitted that the applicant’s officials involved in the award of the contract were acting on a frolic of their own. The City Manager, Mr Fani and the Chief Operations Manager, Mr Matewani were suspended for misconduct and subjected to disciplinary proceedings as a result.
- [17] Relying on the decision in Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer, SASSA, and Others[2] the applicant stressed that once a finding of invalidity under the PAJA grounds of review is made, the affected act or decision must be declared unlawful and a just and equitable order must be made, which in this case, it submits, could only be to set aside the award the Reeston contract.
- [18] The Respondent argued in the alternative that in the event that the contract is found to be invalid and the applicant is granted an extension under section 9 of the PAJA, the declaration of invalidity should be suspended until such time as the Reeston contract has been fully executed[3].
- [19] The question of an extension under section 9 of the PAJA was raised in the applicant’s replying papers. There was also the introduction of new evidence to explain why there were no confirmatory affidavits attached to Ms York’s supporting affidavit and the introduction of new documents to deal with the authority question. The respondent accordingly sought to file a further affidavit (“Duplicate Affidavit”). The applicant objected thereto, but it was allowed as part of the papers, since to exclude it would have deprived the respondent from dealing with new matters raised therein.

Background

Facts

- [20] The facts which gave rise to the present litigation were largely common cause or could not be disputed because they were recorded in various documents and are set out in great detail in the respondent’s answering affidavit and in Ms York’s supporting and replying affidavits.

The greater part of the affidavits focused on the question whether the Reeston contract could have been awarded to the respondent as an extension or by virtue of the turnkey contract. Ms York focused primarily on the procurement and history of all the contracts relating to Reeston and the validity of the turnkey contract. Mr Blaauw, who deposed to the respondent's answering affidavit, gave a detailed account of all documents, correspondence and meetings referring to Reeston and his interpretation hereof, namely that the works and services regulated by the Reeston contract emanated from the turnkey contract. The background facts are set out below:

- [21] The applicant, in about 2003, recognized the need to upgrade Duncan Village with specific prominence placed on the informal settlements of Duncan Village. The Duncan Village Redevelopment Initiative of 2003 ("DVRI") – Local Spatial Development Framework ("LSDF") was drafted, published for public comment in February 2008 and approved by the applicant's council in 2009. It was

envisaged that Duncan Village was intended to represent a fusion of neighbourhoods that provide improved living conditions, from

middle-income suburbs such as Gompo Town to overpopulated informal settlements, such as C-section. The DVRI was extended to permit a broader framework by extending geographically into areas located north and north-west of Duncan Village itself, thus including the new township of Reeston.

- [22] The LSDF for the DVRI provided a two-part framework with a specific geographical focus on a targeted approach for planning efforts on priority areas of Duncan Village and then, also an extended area to focus on the identification of land suitable for development for purposes of accommodating residents that would need to be relocated from Duncan Village to allow for sustainable redevelopment there. The idea was to de-densify two informal settlements in Duncan Village which were prone to fire and flood hazards. To implement this long-term project it was necessary to relocate 1400 willing households from Duncan Village to Reeston (Phases 1, 2 and 3). The inclusion of Reeston as a potential location, to which current residents of Duncan Village may be relocated, had been a strategic consideration since 2009.

- [23] Reeston Phase 3, Stage 2 comprises an area earmarked to provide 2500 erven for housing development. This started in 2007. In 2009 the applicant and the Department of Human Settlements entered into an agreement for the provision of funds for this project.

- [24] The applicant went out on tender for three tenders for initial engineering services and the subsequent construction of housing top structures within the area identified for development of 2500 erven in Reeston. The tenders were issued during the period 2011 – 2014.

- [25] The initial engineering services contract for 2500 houses, in other words, the first Reeston contract, was originally awarded to Khula Nathi Construction (Pty) Ltd on 30 November 2011 (upon completion of the supply chain procedures). The original contract under bid BCC/DES/PIU/HOUS/1122/2010 (the first Reeston contract) covered two areas, Reeston Phase 3, Stage 2 (953 erven), Reeston Phase 3, Stage 2 (1579 erven). On 29 August 2011, the applicant's Bid Evaluation Committee recommended that the scope of work under the aforesaid contract, be reduced in alignment with the available budget. Khula Nathi's bid was accordingly reduced to allow for works in the amount of R56,026,470.05. The capital budget allocation for Reeston Phase 2, Stage 2 – B3 (the first Reeston contract) was R56,045,000.00 and the balance for the 2012 – 2013 period was R22,418,000.00).
- [26] The contract with Kula Nathi was cancelled on 27 February 2013 due to poor work performance with only 253 units completed with the exclusion of roads and storm water.
- [27] The Reeston contract was subsequently awarded to two annual contractors in respect of 953 erven. The work order instructions were not given through a tender process either, but through a direct award, as it occurred in the case of the respondent. These contracts were also cancelled due to poor delivery on certain work orders.
- [28] There were also other bids for engineering services for Reeston. On 12 July 2013 a bid for Reeston Phase 3, Stage 2, for 1579 erven was issued. The contract ("BCMM/DES/PMU/1294/2013" or "contract 1294") was awarded to UMSO Construction (Pty) Ltd. The amount tendered for this contract was R192,674,424.65 and completion expected within two years. The total available funding was R41,415,400.00. The scope of work in this contract was also reduced to accommodate the budget limitations. The bid adjudication committee agreed to a proposal from the department that contract 1294 be executed in two parts, depending on the available funding. This contract was also cancelled in 2014, on the instructions of Mr Fani, the then City Manager.
- [29] The next relevant contract was contract number BCMM/COO/HM/1337/2014 (Contract 1337) for the construction of top structures in Reeston Phase 3, Stage 2. The construction works were to take place on 953 erven. The Bid Evaluation Committee recommended that the contract be awarded to Kamo Constructions (Pty) Ltd at a cost of R95,754,386.74. The budget allocation for this project was R8,307,137.00 in April
2014. The recommendation was reversed in August 2014, due to a lack of funds and the matter was referred back to the applicant's department of Housing.
- [30] The turnkey contract was awarded on 2 May 2014, the scope of work and bid specifications for active independent bids, after the award date of 2 May 2014.

- [31] The applicant's case is that in circumstances where three contracts for Reeston (Phase 3, Stage 2) projects were cancelled (one through poor delivery, and the other two for a lack of available funding), it was entirely inappropriate for the relevant officials of the applicant to seek to advance the Reeston development without following a fresh and legitimate procurement process.

Contract BCMM/COO/HM/1319/2013 ("the turnkey contract")

- [32] On 8 October 2013 the applicant advertised a tender for the appointment of an Implementing Agent on a turnkey basis for an urban housing project to address the housing needs of Duncan Village was advertised. On 18 October 2013 a compulsory briefing session was held. The scope of work included consultation with the stakeholders, land acquisition, a layout or settlement plan, environmental impact assessments, geotechnical investigations, subsidy administration preparation for funding and feasibility addresses, designs for internal services, foundations, house plans and certification. The applicant emphasized that under clause 3.5 of the bid documents the location for the performance is given as "Duncan Village".
- [33] Three tenders were considered functional, and on 11 March 2014 the Bid Evaluation Committee recommended that the respondent be awarded the turnkey contract to the value of the Provincial Human Settlement subsidy quantum rates for the work of between 3000 and 5000 houses.
- [34] On 2 May 2014, the General Manager Supply Chain Management of the applicant sent a letter to the City Manager confirming that the letter of award for the tender in respect of the turnkey contract had gone through the supply chain office and acknowledged that communication was in accordance with the recommendation made by the Bid Adjudication Committee on 26 April
2014. The respondent was advised that it had to conclude a funding agreement with the Department of Human Settlement in respect of the financing of the turnkey project.
- [35] The respondent was further advised that the "value of the product (price)" would be determined by the Department of Human Settlements depending on the Housing Quantum and the number of houses (between 3000 and 5000). The agreement between the applicant and the respondent would be based on the General Conditions of Contract (SAICE) and the JBCC Principal Building Agreement. (These agreements are also attached to the respondent's provisional sentence summons.) The respondent accepted all the conditions on 8 May 2014.
- [36] On 30 May 2014 an agreement of understanding regarding the turnkey contract was concluded between the applicant and the respondent. (In its provisional sentence summons this agreement attached to the respondent's summons, was referred to as "ASLA 1".) It is not in dispute that all the correct procurement procedures were followed and the turnkey agreement was reached in consequence thereof.

- [37] Ms York points out in this regard to the conclusion of a funding agreement, that on 17 June 2014, the Department of Human Settlements advised that they had not yet received communication from the applicant pertaining to the award and that financial matters would be dealt with between the applicant and the Department of Human Settlements. No funding was made available by the Department of Human Settlements for the scope of works envisaged in the turnkey contract. Accordingly, the respondent submitted that the turnkey contract was inchoate.
- [38] The respondent's answering affidavit was a prolix document and not all the events referred to therein are referred to herein. The following are some of facts that were stressed by Mr Blaauw:
- [39] The turnkey contract was widely advertised in several newspapers. At the compulsory briefing meeting of 11 October 2013 the applicant's representative repeated the intention of the applicant to develop and construct 3000 – 5000 houses on portions of land "in and around" Duncan Village. According to Mr Blaauw, Reeston Township was always regarded as an integral part of the turnkey contract.
- [40] Mr Blaauw stated that the scope of work in the tender application was for a development which formed part of the "overall Sustainable Development Plan for the Urban Functional Areas of the Buffalo City Metropolitan Municipality" which included Reeston. Also, that the applicant's objectives which were made clear in the tender application for the turnkey contract were concentrated "in and around" Duncan Village and not limited to the geographical borders of Duncan Village itself. Furthermore, he pointed out the implementing agent to be appointed on a turnkey basis would be responsible not only for the design and installation processes, but also for construction and handover of services, top-structures and tenure.
- [41] The respondent emphasized the appointment of an implementing agent as advertised on 8 October 2013, that the applicant's invitation clearly indicated on the diagram in respect of the Duncan Village Local Spatial Development framework, that the turnkey contract pertained to "Reeston Phases 1, 2, 3 (Stage 1) and Phase 3 (Stage 2 – 5)".
- [42] Ms York stated that this diagram was a locality plan and did not render Reeston part of the bidding specifications. In fact, Reeston never formed part of the bidding process in relation to the turnkey contract.
- [43] Mr Blaauw, in support of the extension argument, relied on clause 2(b) of the Memorandum of Agreement which relates to the express flexibility incorporated into the agreement for purposes of "emerging" needs and constraints. The respondent submits that the flexibility allowed for the inclusion of the Reeston contract.

- [44] Mr Blaauw, in so far as the funding and contract price (which the applicant alleges was wanting for the turnkey contract) was concerned, relied on clause 6 of the turnkey contract which stipulates that the respondent would be compensated in an amount equal to the approved housing subsidy, adjusted from time to time and the compensation would be for all “external, bulk, collector, link, temporary, rudimentary and electrical infrastructure and other services” as certified by the engineer’s appointed in terms of the agreement.
- [45] When, on 30 May 2014, the applicant and the respondent concluded the turnkey agreement, the respondent was to compile an “Integrated Residential Development Program” and “identify and demarcate land to be incorporated in the Program and future extensions”. The bulk of the work consisted of design, construction and installation of the items listed previously as part of the scope of the project. The agreement also provided for a program of flexibility in order to respond to emerging “needs and/or constraints” that may materialise. This meant, the respondent argued, that Reeston, as a future project formed part of the scope of the turnkey contract.
- [46] On 5 June 2014 the representatives of both parties met in view of the respondent’s need to gather information to complete a Project Implementation Plan. According to the respondent’s notes of the meeting, the representative of the Department of Human Settlement, presented its financial projections for the 2014/2015 financial year in respect of the DVRI, and that Reeston Phase 3, Stage 2 (2500 houses) and Reeston Phase 3 Stage 3 (1137 top structures) formed part of the DVRI projects. From the allocation of these projects the respondent inferred that the Provincial Government and the Municipality regarded Reeston as Part of the DVRI which the applicant presented for public comment in respect of the LSDF in February 2008, referred to earlier.
- [47] The respondent prepared its Project Implementation Plan and both parties, according to Mr Blaauw, recognized that Reeston was critical to the de-densification of Duncan Village. Mr Blaauw strongly relied on a meeting held on 15 July 2014 between the parties where funding for the projects was discussed. Mr Blaauw was assured that funding was no problem. The minutes of the meeting reflect the following at point 2 thereof:
- “a. Status regarding service providers: MV [Mr M Velamani] indicated that the implantation of Reeston Ph 3, Stage 2 consisting of two projects namely 953 and 1579 has been reconsidered by BCMM in the light of its critical role in as far as the de-densification of Duncan Village is concerned. BCMM is dealing with the supply chain processes that may have commenced. It is anticipated that ASLA will get involved in both projects as mentioned; the scope of such involvement will be communicated formally.”*
- [48] The 953 and 1579 units referred to in the minutes relate to the works in Reeston which went out on tender in contract 1337 and contract 1294 respectively, for engineering services and top structures, which contracts were (“purportedly”, according to Ms York) cancelled due to a lack of funds. The significance of the aforesaid is, that the applicant’s

officials were clearly intent on cancelling the aforesaid contracts (1337 and 1294) to enable contracting with the respondent without

going through the normal applicable procurement procedures. It is also important to note that contracts 1294 and 1337 were cancelled

shortly after the July meetings and in August and September 2014 the scope of work provided for in these contracts, and which have gone through a proper procurement process, were awarded to the respondent under the (second) Reeston contract and written instructions (the latest in January 2015) for the construction of 550 and 452 top structures.

[49] The aforesaid is fortified by the following: On 4 September 2014, Mr Vincent Pillay, who was the recently appointed City Manager wrote to Mr Blaauw:

“Subsequent to an abortive procurement process due to budget challenges for this project (Reeston Phase 3 Stage 2 relating to the 2550 housing project – thus the Reeston contract) the metro has cancelled the tender and in this regard would advise ASLA to continue with the implementation of 550 top structures on their appointment of 953 erven, of upgrading from level B services to level A services.

Also to take over the management of Brayelen (sic) Extension 10 under their turnkey approach.”

This letter, in my view, further demonstrates that it had been decided by the applicant’s officials that the Reeston project would be contracted out without any preceding procurement process.

[50] The award of the turnkey contract occurred on 7 August 2014. It made provision for “construction related activities, the cost of which will be based on the relevant appointed service providers, the subsidy quantum, including any allowed variances and top-up funding, as may be required”. The respondent was accordingly advised in the letter of 7 August 2014, that since Reeston was critical to the development project in question, and the respondent had been appointed as the implementing agent for the Duncan Village project, it was decided that the layouts for the project had to be revisited since they had been done a long time ago. The respondent was further instructed to perform implementation work (roads storm water) in respect of 953 units.

[51] On 13 November 2014, at a meeting of the DVRI steering committee, the respondent provided a written report, from which Mr Blaauw says, it is apparent that all concerned regarded the development of Reeston Phase 3, Stage 2 as forming part of the respondent’s stage implementation of DVRI. Mr Velamani of the Department of Human Settlements provided Mr Blaauw with an existing funding agreement between the applicant and the Eastern Cape Department of Human Settlements. This agreement was concluded in 2009 and referred to earlier. The applicant disputes that this agreement could be relied on in lieu of an agreement between the respondent and the aforesaid department regarding funds for this particular contract as envisaged by the Bid Adjudication Committee.

[52] In January 2015, Mr Fani instructed the respondent to proceed with the implementation of upgrading (from level B services to level A services) of 953 erven in Reeston Phase 3, Stage 2.

[53] The respondent was requested to draft a revised business plan based on this change and the development in Reeston Phase 3, Stage 2 and submit the plan to the applicant and the Department of Human Settlements. The respondent contends that this instruction was legitimate by virtue of the nature of the turnkey contract. The Reeston contract had been concluded and operations began.

[54] The respondent emphasized the role of a turnkey implementing agent as described in paragraph 3 of the Integrated Residential Development Program (Part 3 of the National Housing Code) as follows:

“Through the turnkey contracting strategy, a turnkey contractor is appointed by the developer through a public tender to do all the work related to the successful completion of the project. This includes, inter alia, the planning of the approved land, the township establishment process, the design and installation of internal reticulation services to the

construction of houses. The developer has a contract with only the successful tenderer and no separate contracts with any of the other participants in the development process. The

successful tenderer is at risk for any financial overruns which are not provided for in the contract and concludes agreements in own right with all the required providers of housing goods and service.”

The respondent submits that the aforesaid turnkey contracting strategy, is applicable to the turnkey contract in question, permitted the inclusion of Reeston in its scope of work.

[54] According to applicant, the Department of Human Settlements no longer funds broad and unlimited turnkey projects of the kind under consideration, as both the provincial and national policy are of the current view that only carefully defined projects for defined areas, and with defined deliverables will be funded. Thus the respondent’s reliance on paragraph 3 in the National Code is misplaced and no longer applies.

Discussion

[55] The requirement that a funding agreement must be reached between the respondent and the Department of Human Settlements was indeed envisaged as essential to the turnkey contract. At the relevant time the applicant’s officials did not regard it as a suspensive condition and contracted with the respondent as if funds were available, particularly if one has regard to the meetings of 5 June and 15 July 2015. Until the point when the applicant regarded the Reeston contract as invalid, as I understood it, a phased approach was to be adopted with payment dependent on delivery, and the parties were guided by the existing 2009 contract between the applicant and the Department of Human Settlements until it emerged that no funding will be made available after all.

- [56] If the aforesaid change in policy has occurred after the conclusion of the turnkey contract, the applicant's case for invalidity or inchoateness of the turnkey contract may rest on tenuous grounds. However, I do not believe that it is necessary for present purposes and in these proceedings to make any determination whether the turnkey contract was invalid or not. More evidence would be required to make a proper decision in that regard.
- [57] The crucial question in this matter is whether the award of the Reeston contract was a legitimate consequence of the turnkey contract. The applicant has no quarrel with the fact that Reeston indeed formed an integral part of the strategy to address the housing needs of Duncan Village as envisaged in the DVRI – LSDF strategy document published in February 2008. However, as Ms York points out, it is neither a procurement document and nor does it have a procurement function.
- [58] Reeston was also not referred to in the listing of temporary "Relocation Areas" under "Land Use Proposals" in section 4.4 of the DVRI draft. Therefore, the fact that Reeston featured in the attached diagram to the turnkey, is of no consequence. Reeston did not form part of the bidding specifications under the turnkey contract. The respondent also cannot dispute this very important fact, particularly as the relevant work formed the subject of other bids under different procurement procedures that

predated the award of the turnkey contract and the Reeston contract. If the turnkey contract made provision for the work covered by the Reeston contract to be executed by the respondent in no uncertain terms, as the respondent would have it, the question rises why the second Reeston contract was formally concluded at all. Also why the same bid number of the first Reeston contract was allocated to it.

- [59] The work under the Reeston contract was, as illustrated by Ms York, the subject of three previous tenders which were cancelled. A new tender process was to be followed in respect thereof. In my view, section 217 of the Constitution does not permit that the work in such contracts, concluded in pursuance of a proper procurement process, could simply be handed over to a different contractor through the existence of an open-ended turnkey contract. That would clearly offend the basic tenets of section 217.
- [60] Section 217 of the Constitution lays down minimum requirements for a fair tendering system, a valid tender process and the contracts entered into following an award of tender to a successful tenderer. The tender process preceding the conclusion of contracts for the supply of goods and services must be "fair, equitable, transparent, competitive and cost effective". This requirement is to be understood "together with the constitutional precepts of administrative justice in section 33" of the Constitution and "basic values governing public administration in section 195(1)"[4].
- [61] The competitiveness requirement in section 217 "is not served by only one or some of the tenderers knowing what is the true subject of the tender"[5]and it envisages that competitors must be treated equally. Otherwise the public will be deprived of the benefit of open

competitiveness.

“Compliance with the requirements for a valid tender process, issued in accordance with the constitutional and legislative procurement

framework, is thus legally required. These requirements are not merely internal prescripts that [the applicant] may disregard at whim.”[6]

- [62] The procurement in respect of the Reeston contract was not “legal and regular” as the respondent submits, nor was the award of the Reeston contract a legitimate consequence of the respondent’s appointment as turnkey implementing agent for the housing needs of Duncan Village. The “turnkey contracting strategy” cannot mean that an entire procurement process for different work projects can be dealt with in one contract, excluding all competition from other contractors. The argument that the provision for “emerging needs” in the turnkey contract would encompass work (550 and 452 top structures) in Reeston previously procured (under contracts 1122 and 1337) is with respect, unsustainable.
- [63] The aforesaid considerations, compel me to conclude that the award of the Reeston contract was invalid and falls to be set aside. My next obligation is to make an order that is just and equitable in the circumstances of the case.
- [64] The respondent submitted that should I find that the award of the Reeston contract was invalid, which I do, it would be just and equitable that an order be made in terms of section 172 of the constitution and suspend the declaration of invalidity of the Reeston contract pending its finalization.
- [65] Given the approach of the courts adopted in respect of procedural irregularities in a tender process, referred to above, it stands to reason that where a tender process was bypassed completely, as in the present case, a very serious contravention of the Constitutional precepts has occurred and would be regarded with stricter censure than irregularities in the procurement process itself. Whether it would be just and equitable to suspend the finding of invalidity, would depend on the circumstances of every case.
- [66] The following factors are important in this determination: According to the respondent a total of R767,213.77 excluding VAT had been paid to workers from the community by the respondent since the execution of the project. R843,161.78 was spent in respect of permanent labour employed on the Reeston contract by the respondent. Until the end of October 2015 the respondent states, it has spent an amount of R4,234,483.35 in respect of suppliers and service providers based in East London and R1,804,005.14 on suppliers and service providers in the Eastern Cape. It cannot be disputed that the respondent incurred substantial expenses by carrying out the applicant’s instruction to proceed with the execution of the Reeston contract.
- [67] The indivisibility generally, of engineering contracts and the fact that the respondent has commenced with construction must also be considered. Mr Ncunyana (deponent to the applicant’s replying affidavit) contends that there were no “deliverables” in terms of it yet.

The greatest volume of the papers deal with future work envisaged in terms of the contracts. It is not clear how much construction work has been done so far in terms of the contract, The contract price was just over R74 million and so far about R7 million has been claimed for work done. It has to be accepted that the Reeston contract is not near completion.

[68] As can be seen from the minutes of meetings, several of the applicant's high-ranking officials were instrumental in awarding the Reeston contract to the respondent. If it were not for their determination and enthusiasm to find a suitable contractor to bring houses to the community at more competitive prices than its predecessors, the respondent would probably not have found itself in the present unenviable position. I have given the matter careful thought and have to conclude that however convenient, practical and laudable the considerations behind awarding the Reeston contract to the respondent were, the applicant's officials were not entitled to "contract out" of the Constitution on behalf of the applicant. To suspend the invalidity finding until such time as the Reeston contract has been executed would give efficacy to an unlawful and invalid contract. I could not find justification for condoning and validating the disregard for the procurement procedures laid down in the Constitution in the circumstances of this case.

[69] I now return to the question of the delay by the applicant, as alleged by the respondent, in bringing the review application.

[70] Section 7(1) of the PAJA reads as follows:

"(1) Any proceedings for judicial review in terms of section 6(1) must be instituted without unreasonable delay and not later than 180 days after the date-

(a) Subject to subsection (2)(c), on which any proceedings instituted in terms of internal remedies as contemplated in subsection (2)(a) have been concluded;

or

(b) Where no such remedies exist, on which the person concerned was informed of the administrative action, became aware of the action and the reasons for it or might reasonably have been expected to have become aware of the action and the reasons."

[72] In my view, the applicant ought to have become aware much sooner than it did, (even prior to, and without the benefit of an independent investigation), that its employees awarded the Reeston contract without going through a procurement process. The respondent clearly incurred financial losses as a result of the delay and this could have been ameliorated by timeous action on the part of the applicant.

[73] In support of its contentions in this regard, the respondent relied on the judgment in *Aurecon South Africa (Pty) Ltd v Cape Town City*[7], where the consequences of a delay in bringing its application for review was regarded by the court as sufficiently prejudicial to the respondent, that it justified validation of an invalid decision which was set aside as a result. The facts of the present matter are distinguishable from the *Aurecon* matter. In that matter

the delay was far more substantial and the impugned contract close to completion. Since the merits of the review application are also relevant in this enquiry, it must be pointed out that the irregularities complained of in Aurecon were not remotely as serious as in the present case. In this matter the provisions of the Constitution were deliberately

avoided for considerations of expedition and convenience.

[74] In view of the serious breach of section 217 of the Constitution and the other interlocking statutory instruments that regulate procurement in the context of local government, it would be in the interest of justice that the applicant be granted an extension in terms of section 9 of the PAJA. Accordingly, the invalidity of the decision to award the Reeston contract to the respondent cannot be validated.

[75] It follows that the certificates upon which the respondent relies on in its provisional sentence action (as plaintiff) are unenforceable and that action has to be dismissed with costs. The respondent indeed incurred financial losses due to the disregard for legal process as exhibited by the applicant's officials. However, provisional sentence was not the applicable remedy. The respondent is not without a remedy though. An action for unjust enrichment, which is the appropriate remedy, has not yet prescribed.

Costs of the Application for Review

[76] The respondent opposed the matter on the grounds that the Reeston contract derived its validity from the turnkey contract and a misguided and incorrect view that no procurement process was necessary. That view was encouraged by the applicant's employees and in my view, it would be unfair that the respondent should bear the applicant's costs because of its opposition. Accordingly, there is no reason why costs should follow the result. Each party should bear its own costs.

[77] In the circumstances, the following order is made:

1. The award by the applicant of contract BCC/DES/PIU/HOUS/1122/2010, for the provision of internal engineering services for Reeston Phase 3 B is hereby declared invalid and set aside.
2. The payment certificates issued by Messrs Royal Haskoning in terms of the aforesaid contract, are declared void, ab initio.
3. The plaintiff's/respondent's action for provisional sentence is dismissed with costs.

E REVELAS

Judge of the High Court

Appearances:

For the applicant, Adv R Buchanan SC instructed by Neville Borman & Botha, Grahamstown

For the respondent, Adv J W Olivier SC and Adv H C Schreuder instructed by VVH Attorneys,
Stellenbosch c/o Wheeldon Rushmere & Cole, Grahamstown

Date heard: 17 March 2016

Date delivered: 29 July 2016

- [1] See *Khumalo and Another v MEC for Education KwaZulu-Natal* 2014
- (5) SA 579 (CC) para [35]; *Pepkor Retirement Fund and Another v Financial Services Board and Another* 2003 (6) SA 38 (SCA) para [10].
- [2] 2014 (1) SA 604 (CC) at para [56].
- [3] Such an order can be made under section 8 of the PAJA and section 172 of the Constitution on the grounds that it is just and equitable to do so in the circumstances.
- [4] *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007
- (3) SA 121 (CC) in para [33].
- [5] *Premier, Free State, and Others v Firechem Free State (Pty) Ltd* 2000
- (4) SA 413 (SCA) at para [30].
- [6] Allpay at para [39].
- [7] 2016 (2) SA 199 (SCA).

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