

SOUTH AFRICA / JUDGMENT

Inventiva Power Minerals (Pty) Limited and Another v Eskom Holdings SOC Limited and Another (16202/19) [2020] ZAGPPHC 180 (25 May 2020)

[2020] ZAGPPHC 180

COURT

North Gauteng High Court, Pretoria

BEFORE

N M Mavundla

CASE / FILE NUMBER

16202/19

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IN THE NORTH GAUTENG HIGH COURT, PRETORIA
[REPUBLIC OF SOUTH AFRICA]

Case No:

16202/19
22/5/2020
In the

matter between:

INVENTIVA
POWER MINERALS
FIRST APPLICANT
(PTY) LIMITED
INVENTIVA (PTY)
LIMITED
SECOND
APPLICANT
And
ESKOM HOLDINGS SOC
LIMITED
FIRST RESPONDENT
ESKOM
ROTEX INDUSTRIES
SECOND RESPONDENT
SOC
LIMITED

JUDGMENT

MAVUNDLA, J.

- [1] The applicants seek an order compelling the respondents to furnish either or both of them with a contract relating to the provision of services advertised by the Respondents which form part of the tender number

MPDXC0033999 ("The tender").

- [2] It is common cause that on 16 March 2016, the first respondent ("Eskom")

called for tenders to be submitted for the provision of fly ash selling opportunity at Kendal Power Station. From the description of the tender, it can immediately be seen that the successful tenderer would give an offer to buy fly ash from Eskom and sell it to others. Fly ash produced as a by-product of burnt coal is a commodity useable in making products such as concrete, bricks, building walls and useable on road surfaces.

- [3] It is also common cause that on 25 November 2016[1] Eskom, through its Assistant Officer Procurement Group Commercial Tactical Sourcing, Mr Christa Strydom, informed the second applicant

per Letter of Intent that:

" an agreement has been reached between Eskom Holdings SOC Ltd, to award a contract to Inventiva (Pty) Ltd. For the provision of fly ash bunker 3, to design, finance, procure, construct and operate the fly facility at Kendal Power Station and to dispose

the fly ash at a legally authorised destination plant."

- [4] It is common cause that the first applicant submitted a responsive tender documents, participated in the tender process and was the successful tenderer. This as much is confirmed by the fact that Eskom informed Inventiva

Power Minerals (Pty) Ltd per Letter of Acceptance dated 6 April 2017 and marked annexure 'FA4'[2], that:

"This serves that a Service Level Agreement ASH2016KEND between Eskom Holdings SOC Ltd and Inventiva Power Minerals (Pty) Ltd for the provision of Fly Ash Bunker 3, to design, finance, procure, construct and operate fly ash facility and to dispose the fly ash at a legally authorised destination plant.".

- [5] Any doubt as to who the tender was awarded to, is dispelled by the admission made by Eskom in its answering affidavit that the tender was erroneously awarded to the first applicant, an entity that did not meet the minimum requirements of the tender and did not comply fully with the terms and conditions of the Letter of Acceptance dated 6 April 2017, communicated to the applicants and to be subject to the Service Level Agreement

ASH2016KEND, as well as the presentation/ recommendation made by Strydom and Thamsanqa Koetle to the Eskom Procurement Tender Committee(The revised date July

2019) stating that:

"In accordance with the latest revision of Eskom's procurement and Supply Chain Management Procurement Procedure 32-1034, a mandate is requested to negotiate and conclude a contract with Inventiva for Fly Ash Bunker 3, to design, finance, procure, construct and operate the fly ash facility and to dispose as a legally authorized destination.

The contract will be for a five (5) period, with an option to extend for 5 years. It is anticipated that the contract will commence on 1 October 2016, or as soon as negotiations are concluded."

It was RESOLVED ;

1. THAT, the submission is approved subject to changes."[3]

[6] Subsequent to this Letter of Acceptance , various communications between the applicants and the officials of Eskom ensued. The applicants were inquiring about the Service Level Agreement. The respondents, in one of these correspondence, stated through Christa Strydom that, the latter official was "busy typing the Service Level Agreement,

hopefully" he "will finish the Service Level Agreement by" the following day.[4]

[7] In spite of various inquiries and promises on the part of the Eskom, through its officials and effluxion of two years, the Service Level Agreement was still not forthcoming. This prompted the applicants to approach this court seeking the following relief, that:

7.1 the respondents be directed within 5 days of the court order, to furnish the first and or second applicant with the contract contemplated in the first respondent's letter of intent, dated 25 November 2016, and its signed SLA Acceptance letter, dated 6 April 2017;

7.2 Ordering that the costs of this application be borne by the respondents, in the event the application

is opposed.

[8] Indeed the application is opposed by the respondents . In a nut shell, the respondents contend that:

8.1 the letter of intent does not give contractual rights in favour of any of the applicants, the agreement mentioned in the letter is void since it refers to an entity that did not submit a tender offer, and the letter is thereof invalid. therefore, no intent can be carried through a void agreement and conveyed through an invalid letter;

8.2 the purported award of tender through a letter of acceptance addressed to POWER Minerals is unlawful because, although Power Minerals submitted a tender offer, its submissions do not meet the requirements of tender;

8.3 Given that the applicants failed to identify the entity with an alleged right to enter a contract, no right can be established in circumstances where the identity of the alleged holder of a right is not known or doubt exists in respect of the identity of such alleged holder;

8.4 There is no basis in law, and none has been alleged, to compel Eskom to enter into an agreement for the provision of services , the so-called mandamus;

8.5 the evaluation of the offer submitted by Power Minerals was riddled with irregularities.

Power Minerals to tender submission should have been disqualified for its failure to comply with the requirements of the tender;

8.6 None of the documents upon which the applicants rely for the relief sought create any obligation

on the part of Eskom to enter into a service contract with any of the applicants.

[9] It was submitted on behalf of the applicants that the Letter of Acceptance was addressed to the correct person, Ms Lebeola, who is a director in both the first applicant and the second applicant. At all relevant times correspondence was directed to her. But the fact of the matter is that the respondent confirmed and conceded in their answering

affidavit that the tender was awarded to the first applicant. That being the case there is no merit in the contention that the tender was awarded to a person who did not make a tender offer.

[10] It was further submitted that there is also no merit in the alleged erroneous award, because there was no review process launched to set aside the alleged erroneous tender award.

[11] Relying on the authority of the matter of Command Protection Services (Gauteng) v SA Post Office[5] Adv Mpofu SC, submitted that the award was subject to concluding of a Service Level Agreement ASH2016KEND to be concluded. It was submitted that the respondent has since signed the SLA, but is now stalling in providing. the relevant agreement, which they are obliged to. It was further submitted that the applicants have been severely prejudiced by the delay itself, and the substantial expenses they have expended in preparation to execute the award. Adv Mpofu further submitted that the circumstances in casu lend themselves to the second scenario mentioned in the Command[6] matter in that the SLA was signed by Eskom.

[12] On behalf of the respondent, it was submitted that respondent has already indicated that they are not going to sign the contract. A proper process must be followed. The award must be set aside because it was premised on numerous irregularities . The tender Board did not apply its mind in awarding the tender. The respondent is still investigating the process that led to the award to be given to the first applicant. It was further submitted that the award

was subject to a service level agreement being concluded, which was not going to be concluded, relying on the authority of *Cape Metropolitan Council v Metro Inspection Services CC*[7] as such no rights accrued to the applicants.

[13] It cannot be gainsaid that Eskom is an organ of the State and in calling for tenders and taking final decisions in the award of the tender to the successful bidder, it executed an administrative decision. In this regard, in *Millennium Waste Management (Pty) Ltd v Chairperson Tender Board: Limpopo Province*[8] Jafta J held that adjudication of tenders constitutes an administrative action as intended in s217 of the Constitution and Promotion of Administrative Justice Act 3 of 2000.

[14]

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In so far as the contention of the respondents that the award was riddled with numerous errors, and non-compliances, and even suggesting that there was some corruption, although no specifics for such allegation were provided, it is apposite to refer to the well-known authority of *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others*[9]. and subsequent decisions *MEG for Health, Eastern Cape v Kirland Investments (Pty) Ltd*[10] that until set aside, an administrative decision improperly taken, remains binding.

[15] It is a longstanding rule that courts have the power, as part of their inherent jurisdiction, if the aggrieved party had been guilty of unreasonable delay in initiating the proceedings. The effect is that, in a sense, delay

would "validate" the invalid administrative action (see *Oudekraal matter supra*; *Estates (Pty) Ltd v City of Cape Town and Others*[11]. The *raison d'être* of the rule is said to be two fold. First, the failure to bring a review within reasonable time may cause prejudice

to the other party. Secondly, there is a public interest element in the finality of administrative decisions and the exercise of

administrative functions (see eg *Wolgroeiërs Afslaeers (Edms) Bpk v Munisipaliteit van Kaapsta* .

[12]

[16] In casu, more than two years has gone by that the award was made. Respondent has not as yet approached the court to set aside the alleged erroneously made award. In the matter of *Viking Pony Africa Pumps (Pty) Ltd /a Tricom Africa, and Another v Hidro-Tech Systems (PTY) Ltd*[13] the Supreme Court of Appeal held that the duty of State organ upon detection of fraud, must act against successful tenderer when

detecting that preference obtained on fraudulent basis-duty of State to act, not merely investigate . The State must be proactive in responding to reasonable possibility that preference was obtained fraudulently. In casu the delay of more than two years is unpardonable. It also need to be borne in mind that at no stage did the respondent inform the applicants that it was

investigating alleged irregularities or fraud. On the contrary, the correspondence, and discussions between the parties, reveals an intent to conclude the relevant contract. This lead the applicant to continue incurring expenses in preparation to execute the award, as the result of the promises of the respondent who kept informing the applicant that it was preparing the SLA. This has been prejudicial to the applicant. If the court dismisses this application, the applicants stands to suffer exponential financial loss.

[17] In the matter of Chairperson: Standing Tender Committee and Others v JFE Sapela Electronics (Pty) Ltd and Others[14] it was held that:

The definition of 'acceptable tender' in the Preferential Act must be construed against the background of the system envisaged by section 217(1) of the Constitution, namely one which is 'fair, equitable, transparent, competitive and cost-effective' In other words, whether 'the tender in all respects complies with the specifications and conditions set out in the contract documents must be judged against these values '.

[18] It needs mentioning that the first applicant is a wholly Black Owned entity, consisting of two African women, each owning 40% interest, and two African male each owning 10% interest. [15] The first applicant was found by the Tender Board to be responsive tenderer, whose decision has not been set aside. For the respondent

to arrogate itself a review board status and conclude that the award ought not to have been awarded to the first applicant, is in my view, not a just and fair process. Neither can this court embark on indirect review process on behalf of the respondent.

[19] In my view, the applicants have made a case for the relief sought and I propose to make the following order.

1. That the respondents are directed to, within 10 days of service of this order, to furnish the first applicant with the contract contemplated in the first respondent's Letter of Intent dated 25 November 2016, and its signed SLA acceptance letter dated 6 April 2017;
2. That the respondents are, jointly and severally, the one paying the other to be absolved, ordered to pay the costs of this application, which costs to include the costs of engaging senior counsel.

N M MAVUNDLA

JUDGE OF THE HIGH COURT

DATE OF JUDGMENT : 22/05/2020

APPLICANT'S ADV : ADV MPOFU S.C. WITH ADV K PILLAY

INSTRUCTED BY : BUTHELEZI VILAKAZI ATTORNEYS INC

RESPONDENTS' ADV : KHAYA MNINYANDU

INSTRUCTED BY : MOTHLE JOOMA SABADIA INC

[1]

[2] Vide paginated page 71

1. [3] 3 Vide paginated page 388.

[4] Vide annexure "FAS" at paginated page73.

[5] 2013 (2) SA 133 (SCA),

[6] supra at pl38 E par [10]

[7] 2001 (3) SA 1013 (SCA) at para [18].

[8] 2008 (2) SA 481 (SCA) p489 at par [21]

[9] 2004 (6) SA 222 (SCA) 242B-H

[10] 2014 (3) SA 481 at 500H-501A-B at pars [64] - [65].

[11] Supra.

[12] 1978 (1) SA 13 (A) at 418 -H.

[13] 20101 (3) SA 365 (SCA)

[14] 2005 (4) ALL SA 487 (SCA) at para 14

[15] Vide paginated page 477 of annexure RAra2 "12" .

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