

**HIGH COURT
(BISHO)**

CASE NO. 103/97

CASH PAYMASTER SERVICES (PTY) LIMITED	APPLICANT
and	
THE PROVINCE OF THE EASTERN CAPE	FIRST RESPONDENT
THE PROVINCIAL TENDER BOARD OF THE	
EASTERN CAPE	SECOND RESPONDENT
PENSECURE (PTY) LIMITED	THIRD RESPONDENT
BALRAZ TECHNOLOGIES (PTY) LIMITED	FOURTH RESPONDENT
THE GOVERNMENT OF THE REPUBLIC OF	
SOUTH AFRICA	FIFTH RESPONDENT
HEATH COMMISSION	SIXTH RESPONDENT

J U D G M E N T

EBRAHIM AJ: In this matter on 6 June 1997 my brother the Judge President, Pickard JP, made an order with which I concurred. I have now had the benefit of reading the comprehensive judgment prepared by him in which he has set out the conclusions he has reached and the reasons for the said order. I confirm that I agree therewith. However, I deem it appropriate that I set out my own views, very briefly, on certain issues which the honourable Judge President has addressed. My comments relate essentially to the approach which the Provincial Tender Board adopted to the Government's Reconstruction and Development Program (usually

referred to as 'RDP'), the 10-Point Plan, which it said it had relied on in awarding these tenders to Third and Fourth Respondents, as well as the issues of economic empowerment and development. I now proceed to do so.

The Reconstruction and Development Program ('RDP')

It is a matter of public record that the Reconstruction and Development Program encapsulates the South African Government's economic guidelines to drive the process of redressing the imbalances which have been caused by the system of Apartheid. The primary purpose of the 'RDP', as I understand it, is to ensure that public projects are implemented in such a manner that the benefits arising from these are enjoyed by all, but more particularly the least privileged members of society. The intention is also to create the opportunities for a greater number of people to share in any future financial benefits that may flow from such projects.

The 'RDP' is directed towards addressing the grave problems of unemployment, malnutrition, lack of adequate housing, education, health care, social welfare and pension, to name merely some of the most pressing socio-economic issues that confront South Africa. Unless the projects, which have as their goal the transformation of society, effectively address these crucial issues the prospects of creating the necessary conditions for a peaceful, stable and prosperous society will remain a distant dream. It is not my intention, nor is it my function, to engage in a philosophical debate as to whether the 'RDP' is capable of attaining these goals or not. Suffice to say though that whatever differences of opinion there may be in this regard there cannot be any criticism of the objectives that the 'RDP' is

designed to achieve.

I consider it vital that the policies which drive the Reconstruction and Development Programme manifest themselves in the manner in which administrative bodies such as the Provincial Tender Board and other tribunals exercise their functions. Unless the National and Provincial Governments ensure that these structures, through which they execute various governmental functions, apply the principles of the 'RDP' properly it will result in the attainment of the objectives of the programme becoming increasingly more difficult.

It follows that institutions of government, such as quasi-judicial bodies and tribunals, must reflect the standards that non-governmental organisations should seek to emulate. Once this occurs the vital process of transforming South African society will progress far more effectively and at the same time ensure that democratic practices become more firmly entrenched and flourish.

A body such as the Provincial Tender Board has the responsibility to conduct its affairs and arrive at its decisions in a unbiased and economically responsible manner. It must be acutely aware of its duty to administer the financial resources of the province for the benefit of all its residents. It must ensure that the limited finances that are available are spent as beneficially as possible. It cannot allow the determining factors in awarding contracts to be the skin colour of the directors and because it considers that, since the address of the tendering company is within this province, it is thus a locally based company.

It should be obvious to all that the amount of funds available for any 'RDP' project is, of necessity, not unlimited. Further, the funds that are available have to be spent in the most beneficial manner so that its primary recipients are those members of society who economically and socially are in the greatest need of assistance. To my mind, it is an incorrect application, and misrepresentation, of the objectives of the 'RDP' to create increased opportunities for those who already occupy a privileged position instead of first giving precedence to improving the standard of living of the least privileged members of our society.

In my view, therefore, the Tender Board completely misdirected itself in respect of what the objectives are of the 'RDP' and how they should be attained. To merely enquire whether a company was locally based or whether its directors were 'black' and on that basis to determine that it deserved to be the successful tenderer is a misinterpretation of the entire purpose and objectives of the 'RDP'. It also demonstrates that the Board failed to appreciate what the relevant factors were that it had to take into account in arriving at a decision.

It would certainly not reflect well on the political changes that have taken place in South Africa were we to return to a situation where the colour of a person's skin is virtually the only determining factor in regard to competence. In any event, such an approach does not accord with the objectives of the 'RDP'.

It is trite that one of the crucial factors in the awarding of a tender is the question of costs. While the Tender Board is not necessarily obliged to accept the lowest

tender, it is required, where it rejects such a tender, to provide adequate and cogent reasons for its decision based on the relevant facts before it. Not only did the Board fail to properly apply its mind to the information at its disposal but its approach in determining which tenderers should be awarded the contracts was fundamentally flawed.

The reasons furnished by the Board for its decision are clearly unconvincing. The decision is completely at variance to the recommendations of the Technical Committee. Moreover, the Board has failed to lay any basis for the rejection of the committee's reasoned and properly arrived at decision to recommend that one of the other tenderers should be awarded the contract.

Transparency and Accountability

South Africa has progressed from a political era where transparency and accountability on the part of the Government and governmental Institutions were the exception and by no means the norm. One of the fundamental requirements of a democracy is that the affairs of Government be open to public scrutiny and that it may be held accountable for its actions.

I am fully aware that it is not possible to transform all the administrative tribunals and government institutions overnight. However, it is important that where the process of transformation in these bodies has already been set into motion that its members recognize the need for transparency. They need to be aware, too, that they will be accountable for their actions.

We cannot permit the manner in which the Government and its tribunals operated in the previous political dispensation to be carried over into the present era of Constitutional Government. The constitutional imperatives are explicit and cannot be disregarded. The Government is enjoined to exercise all its functions within the parameters of the Constitution. Quasi-judicial bodies, tribunals and administrative bodies are bound equally by the Constitution and thus the Provincial Tender Board cannot escape the prescriptions contained in the Constitution.

The Board consists of members of the public whom, I would assume, have been chosen because of their integrity and their ability to act in an unbiased manner for the benefit of every resident of the Eastern Cape Province. I am aware that the members of the Board are drawn from a wide cross-section of the population and from various organisations. I am mindful, too, of the fact that in their discussions members of the Board will undoubtedly draw on their own personal experiences and those of the organisations of which they are members, whether it is the sphere of religion, civic affairs or labour.

However, what the members of the Board have to recognise is that in drawing upon such experiences they cannot permit these to override every other consideration that has to be taken into account in regard to the awarding of tenders. It is clear to me that certain members of the board failed to appreciate the nature of their responsibilities in this respect.

10-Point Plan

One of the main purposes of the 10-Point Plan is to set out the extent to which certain aspects of the Reconstruction and Development Program are to be taken into account when considering and deciding upon tenders. Clearly, however, the 10-Point Plan is directed at tenders which do not exceed a contract of R100 000 and consequently it cannot be argued that the directives contained therein are applicable in the awarding of these tenders.

Moreover, it is common cause that the 10-Point Plan consists merely of draft proposals which had not yet become binding on any State Tender Board. Notwithstanding this, however, even if it could be argued that the Board was entitled to apply the directives contained therein, it completely misdirected itself in this respect.

The 10-Point Plan explicitly details the criteria to be employed in assessing how tenders are to be selected. Consequently, it stipulates that out of 100 points, 88 points are to be allocated for the cost of the works, 10 points for the equity owned in the tenderer by disadvantaged members of society and 2 points for the equity owned by women. This much is perfectly clear. The consideration which the Board has to give in regard to the involvement of disadvantaged persons and women in the share-holding of a tenderer cannot, therefore, overshadow the other factors which are to be considered. It is quite apparent why this is so since the primary purpose of the Tender Board is to procure the services of a tenderer at the least possible cost to the Province after giving proper weight to any other relevant considerations.

Economic Empowerment/Development

The aim of the Tender Board was to award the contract to a tenderer that would be committed to the economic empowerment and development of the Eastern Cape and this is certainly a most laudable objective. It is clearly linked to the objectives of the 'RDP'. But, in seeking to attain these laudable goals the Tender Board misdirected itself both in regard to how this would be achieved and which of the tenderers was the most suitable one to ensure that this occurred.

I have much difficulty with the Board's reasoning in this respect. The approach which the Tender Board adopted is not merely simplistic but, with due respect to its members, naïve. In my view, true economic empowerment requires far more than a company simply being locally based and that its directors be 'black'. Economic development and empowerment is not achieved by the mere creation of job opportunities. Empowerment entails equipping people with the necessary skills to enable them to be active participants in the determination of their own future development.

The approach which the Board adopted would have the inevitable effect that a handful of individuals, who already enjoy an economically privileged position, would be empowered even further at the expense of providing much needed opportunities for a far greater number of people to become economically empowered.

I wish to caution against the implementation of any economic approach that has the effect of perpetuating the imbalances of the past. There are divergent opinions

concerning the social and economic restructuring of South Africa. What is patently clear, however, is that unless urgent steps are taken to uplift the standard of living of the majority of the population then the changes that have taken place in the political sphere will not translate into lasting economic benefits for most people. The need for economic empowerment and development to take place on this basis as quickly as possible cannot be over-emphasised.

Conclusion

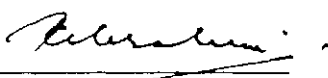
It is manifestly clear that the reconstruction of South African society is a task of enormous magnitude and will tax the financial resources of the country to its limits. Whatever funds are available must be allocated prudently and utilised in such a manner that it results in the greatest number of people reaping the maximum possible benefits from it. Those in public office, at every level, must constantly be aware of their responsibilities in this regard. Public funds cannot be spent as if it is in endless supply. Nor, can the attitude be adopted that to mis-spend millions of rands is of little or no consequence.

Tender Boards, more than any other government tribunals, have a particular responsibility in this regard. The value of annual contracts nationally probably run into billions of rands. If Tender Boards do not recognize that their primary task is the procurement of the services of tenderers at the least possible cost to the State, mindful of the need to honour the demands of the 'RDP', the ability of the government to balance its budget is greatly undermined.

Economic and political policies determined by the National Government and in respect of certain defined areas by the Provincial Government. The Board is required to operate within the parameters of certain financial constraints and cannot ignore these in whichever way it chooses. The Board is bound by these and cannot re-determine either the economic nor the political parameters no matter how noble its intentions may be.

In my view, the Board failed to recognised this and considered that it was free to do as it saw fit without regard for any negative financial consequences that would flow from its decision. In the ultimate analysis the perceived benefits that would accrue to the disadvantaged members of this province was totally disproportionate to the additional cost involved in awarding the tenders to Third and Fourth Respondents.

At the end of the day the Board, in awarding these tenders, was in effect spending an additional amount of over R220 million in the mere hope that it would result in economic empowerment and development for the Eastern Cape. Clearly it had no valid basis for such a decision. In arriving at this tenuous conclusion the Board has misdirected itself in numerous respects as has been so amply demonstrated in the judgment of my brother the honourable Judge President.


Y EBRAHIM
ACTING JUDGE OF THE HIGH COURT
BISHO

Date: 13 June 1997