

REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

(SOUTH EASTERN CAPE LOCAL DIVISION)

Case No.: 2478/06

In the matter between:

SCRIBANTE CONSTRUCTION (PTY) LTD

Applicant

and

COEGA DEVELOPMENT CORPORATION (PTY) LTD First

Respondent

MICHREAL 101 (PTY) LTD t/a SAKHISIWE

CONSTRUCTION (PTY) LTD

Second

Respondent

GEM EARTHWORKS (PTY) LTD

Third Respondent

BIG EYE INVESTMENTS 210 CC

Fourth

Respondent

DATE HEARD: 19 JULY 2006

DATE DELIVERED: 20 JULY 2006

SUMMARY: *Interdict - tender process - interim*

relief - principles applicable - effect of

first respondent's decision not to

approve

JUDGMENT

CHETTY, J

[1] The iniquities of South Africa's racially divided past permeated every aspect of life. This historical fact was affirmed by the

Constitutional Court in stating *“Race was the basic, all pervading and inescapable criterion for participation by a person in all aspects of political, economic and social life”* – In re Certification of the Constitution of the Republic of South Africa, 1996, 1996(4) SA 744 (CC) at 777C. To eradicate past discriminatory practise and redress the economic imbalance the Constitution paved the way for organs of State to give meaningful effect to the equality clause in the Bill of Rights (s 9) by providing in ss 2 thereof *“Equality includes the full and equal enjoyment of all rights and freedoms. To promote the advancement of equality, legislative and other measures designed to protect or advance persons or categories of persons, disadvantaged by unfair discrimination may be taken.”* In similar vein section 217 provides that:-

“(1) When an organ of state in the national, provincial or local sphere of government, or other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective.

(2) Subsection (1) does not prevent the organs of state or institutions referred to in that subsection from implementing a procurement policy providing for –

- (a) categories of preference in the allocation of contracts; and*
- (b) the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination.*

(3) National legislation must prescribe a framework within which the policy referred to in subsection (2) must be implemented.”

[2] The national legislation envisaged by ss (3) of s 217 spawned the **Preferential Procurement Policy Framework Act 5 of 2000** (the PPFA). S 2, under the rubric – Framework for implementation of preferential procurement policy provides:-

“2 Framework for implementation of preferential procurement policy

(1) An organ of state must determine its preferential procurement policy and implement it within the following framework:

- a) A preference point system must be followed;*
- b) (i) for contracts with a Rand value above the prescribed amount a maximum of 10 points may be allocated for specific goals as contemplated in paragraph (d) provided that the lowest acceptable tender scores 90 points for price;*
- ii) for contracts with a Rand value equal to or*

below a prescribed amount a maximum of 20 points may be allocated for specific goals as contemplated in paragraph (d) provided that the lowest acceptable tender scores 80 points for price;

c) any other acceptable tenders which are higher in price must score fewer points, on a pro rata basis, calculated on their tender prices in relation to the lowest acceptable tender, in accordance with a prescribed formula;

d) the specific goals may include -

(i) contracting with persons, or categories of persons, historically disadvantaged by unfair discrimination on the basis of race, gender or disability;

(ii) implementing the programmes of the Reconstruction and Development Programme as published in Government Gazette 16085 dated 23 November 1994;

(e) any specific goal for which a point may be awarded, must be clearly specified in the invitation to submit a tender;

- (f) *the contract must be awarded to the tenderer who scores the highest points, unless objective criteria in addition to those contemplated in paragraphs (d) and (e) justify the award to another tenderer; and*
- (g) *any contract awarded on account of false information furnished by the tenderer in order to secure preference in terms of the Act, may be cancelled at the sole discretion of the organ of state without prejudice to any other remedies the organ of state may have.*

- (2) *Any goals contemplated in subsection (1) (e) must be measurable, quantifiable, and monitored for compliance.”*

[3] The Coega Development Corporation (Pty) Ltd, the CDC is a private company, wholly owned by the Eastern Cape Development Corporation. It is a multibillion rand initiative consisting of an industrial development zone and a deepwater port on the outskirts of Port Elizabeth. It aims to position the Republic of South Africa as a platform for global manufacturing and export through foreign and local investment. It is an organ of state and the first respondent. It has filed no papers in opposition to this application, being content to

file a “notice of intention to abide by the court’s decision in respect of the relief sought in paragraphs 2 and 3 of the applicant’s Notice of Motion.”

[4] On 30 January, 4 and 6 February 2006 BKS/ MDC/ MSBA joint venture, the consulting engineers (the agent) appointed by the CDC to design and monitor the infrastructure of zone 2 of Coega invited tenders, by advertisements placed in the national press for the construction of municipal infrastructure for phase 2 of the Coega Industrial zone 2 (electronic and technical cluster). The advertisement advised potential tenders of the locality where the tender documents be obtained, its price and the venue of a compulsory site meeting. Further details pertaining to the completed tender documents were provided and the attention of all tenderers was directed to tender conditions specified as:-

“Tenderers shall take note of the following tender conditions: Tenderers should have a CIDB contractor grading of 8CE or higher * ***7CE potentially emerging enterprises who satisfy criteria stated in the Tender data may also submit proposals*** * ***Late tender submissions shall not be considered*** * ***An approved formal surety shall be required*** * ***Failure to complete all supplementary information will result in tenders being deemed null and void and shall be considered “non-responsive”**** ***Targeted Procurement principles shall apply*** * ***Tenderers are required***

*to be registered for VAT and will have to submit an original SARS Tax Compliance Certificate with their tender in order to be considered **

*Tenders will not be opened in public * Telegraphic, teletexed, facsimiled or e-mailed tenders will not be considered.”*

Upon payment of the requisite fee by the applicant, the first respondent furnished it with the tender documents comprising *inter alia* the tender data including the scope of work (volumes 1 and 2), the standard conditions of tender and a document titled annexure 5 “Targeted Group Participation”, the TGP.

[5] By the deadline for submission of tenders, 14h00 on 7 March 2006, four tenders were received –

[5.1] Scribante Construction (Pty) Ltd, a registered private limited liability company with its principal place of business in Port Elizabeth. It is the applicant in these proceedings and will be referred to as such. It has in terms of chapter J of the **Construction Industry Development Board Act 38 of 2000** (CIDB) been registered in the category 8CE.

[5.2] A consortium of three entities, Michreal 101 (Pty) Ltd, trading as Sakhisiwe Construction (Pty) Ltd, Gem Earthworks (Pty) Ltd and Big Eye Investments 210 CC. These three entities are the second, third and fourth respondents. The second respondent is a Port Elizabeth based company, its shareholders, the

managing director, Macebo William Charles (51%) and his wife, Nothemba Sylvia Charles (49%); the third respondent is a Mpumulanga based civil engineering constructor, its shareholders being Gerhard van Schalkwyk (85%), Irvine Grey (10%) and Theo Jonck (5%); the fourth respondent is a civil engineering contractor in Pretoria, its sole member one Simon Ntuli. The lead partner in the joint venture is Sakhisiwe Construction (Pty) Ltd. It is referred to in the pages as the joint venture will henceforth be referred to as the Sakhisizwe joint venture or as SJV. Sakhisizwe Construction has a CIDB grading of 7CE, registered in 23 September 2005.

[5.3] Newport Construction (Pty) Ltd; and

[5.4] The Ilingilethi joint venture, which was declared non responsive.

[6] It is not in issue that at a compulsory clarification meeting convened by the agent on 13 February 2006, the empowerment and development objectives of the first respondent were discussed and the tenderers attention directed to the first respondent's targeted procurement principles embodied in the document titled – Annexure 5: Targeted Group Participation (TGP). The TGP is a document in two parts – section A - specific conditions of tender and section B -

specific conditions of contract. There are a number of annexures viz – a black equity ownership (BEO) goal disclosure form, Annex A; a tender goal calculation form, annex B; an enterprise declaration affidavit, annex C and a joint venture disclosure form, annex D. The introductory paragraph of Section A provides:-

“The specification, TGP 02:2004: Targeted Group Participation shall form the basis of determining the participation of the following targeted groups during the performance of the Contract:

- *Black Equity Ownership;*
- *Affirmable Business Enterprises;*
- *Affirmable Business Enterprises that are Small, Medium and Micro Enterprises;*
- *Women Equity Ownership Enterprises;*
- *Local Enterprises; and*
- *Historically Disadvantaged Individual management employed to execute the Contract,*

and stipulates that these specific conditions of tender are to be read together with the specific conditions of contract for the engagement of target groups during the performance of a contract. Paragraph A4 of Section 4 deals with the contract goals and in conformity with the PPFA sets out a system of points scoring to achieve the development objectives. It provides:-

“A4 CONTRACT GOALS

A.4.1 In order to achieve the development objectives, the allocation of tender adjudication points has been divided up as follows:

Maximum Points for Technical Price + Technical = 85 points

Maximum Points for Development Objectives = 15

points

Maximum Total Points = 100 points

A.4.2 Points for Development Objectives are divided up into points per target group. The allocation of tender adjudication points in respect of target groups is as follows:

Black Equity Ownership = 6 points
Local Enterprise Participation = 3 points
HDI Management = 6 points

**A.4.3 The minimum (threshold) and maximum (target) participation shall be:
 The threshold and target set per target groups for the Contract are:**

Target Group	Unit of Measurement	Threshold Minimum %	Target Maximum %	Proviso
Black equity ownership [BEO]	Tendered Price (excluding VAT, allowables and contingencies)	30%	85%	The sum of ABE's that are SMME'S Participation may at least be 30% of the Tendered

				<i>Price</i>
<i>Local Enterprise</i>	<i>Tendered Price (excluding VAT, allowables and contingencies)</i>	<i>30%</i>	<i>85%</i>	<i>None</i>
<i>HDI Management</i>	<i>Total Salaried Staff Costs</i>	<i>30%</i>	<i>85%</i>	<i>None</i>

A.4.4 Tenderers may, in support of CDC’S Procurement policy, increase their tendered percentage above the threshold.

A.4.5 Tenderers will qualify for tender adjudication points if their tendered percentage exceeds the minimum (threshold) percentage as indicated above.

A.4.6 Tenderers are to note that should they tender a percentage which exceeds the specified maximum (target) percentage, above which no further adjudication points are to be awarded and should they fail to achieve their tendered percentage for reasons other than those mentioned in Clause B.8 Penalties, the CDC may impose penalties.

A.4.7 The CDC may reject tenders, which do not comply with the minimum (threshold) percentage, set in par. A.4.3 hereto.”

Paragraph A9 stipulated that whilst the responsive tenders would be adjudicated by the first respondent using a system which awards points on the basis of the tendered price, the tendered black equity

ownership, the tendered local enterprise participation goal and the tendered historically disadvantaged individual management goal, the tenderer obtaining the highest points was not guaranteed the contract.

[7] The introductory paragraph of Section B announced that:-

“This specification was developed and adopted by the Coega Development Corporation to ensure that Black Economic Empowerment and the employment of Historically Disadvantaged Individuals, specifically from the Nelson Mandela Metropolitan Municipality area participates meaningfully during the execution of contracts awarded by the CDC for the development of the Coega Industrial Development Zone. This specification for the setting of participation targets during the execution of a Contract, the measurement of key conditions for participation during the tender adjudication stage and the audit of contract compliance during the execution of the Contract.”

and under the rubric, Methods to engage target groups, distinguished between

“B 3.1 Methods to manage targeted enterprises:-

Any one or a combination of the following methods may be used to engage enterprises which have been targeted for participation during

the execution of a contract, unless otherwise specified in the specific conditions of tender.

- A The targeted enterprise contracts as the Prime Contractor*
- B The targeted enterprise is a partner in a Joint Venture at prime contract level. Such a joint venture may consist of a number of targeted enterprises or a combination of targeted and non-targeted enterprises.*
- C The Contractor may sub-contract a joint venture which consists of targeted enterprises.*
- D The Contractor may sub-contract to a single targeted enterprise(s).*
- E The Contractor may purchase may purchase goods from a supplier/manufacturer that is from the target group.*
- F The Contractor may engage a service provider who is from the target group.”*

and

“B.3.2 Methods of HDI Management employment”

It will be gleaned from the foregoing that it was envisaged that any enterprise specified in categories A to F was eligible to be “targeted for participation during the execution of a contract”.

[8] On the 8th of March 2006 the first respondent’s employee one

Luvuyo Matya compiled a detailed procurement verification report in respect of each tenderer (of relevance to this application) and summarised his conclusions in as follows:-

The Applicant

“E Company Summary

Scribante Construction as an independent entity does not comply with Coega Development Corp Procurement Policy, the company only complies with LEP status. However, the company complies (only for this particular tender) due to the engagement of BEE companies at sub-contract level. The concern that Scribante Construction has not transformed into empowerment company was raised, despite the fact that it takes advantage of CDC opportunities.”

The Second Respondent

“Sakhisizwe Construction complies with Coega Development Corporation Procurement Policy in terms of BEO, LEP, HDIM and WEO.”

The Third Respondent

“Gem Earthworks does not comply with CDC Procurement Policy and Procedures in terms BEO, HDIM, LEP, WEO ABE/SMME.”

The Fourth Respondent

“Big Eye does not comply with CDC Procurement Policy and Procedures in terms of LEP and WEO.”

It will be gleaned from the foregoing summary in respect of the applicant that there is a reference to the applicant’s “engagement of black economic empowerment companies at sub contract level”. In table 1 of his report, *Matya* summarised his analysis of the competing tenderers as follows:-

“Table 1

<i>Company Name</i>	<i>Value of</i>	<i>BEO%</i>	<i>LEP%</i>	<i>HDI M%</i>	<i>WEO</i>
	<i>Work</i>				
<i>Scribante</i>	<i>15 521 250.98</i>	<i>0%</i>	<i>100%</i>	<i>38%</i>	<i>0%</i>
<i>Subcontractors</i>					
<i>Roadmarking &</i>	<i>10 000.00</i>	<i>100%</i>	<i>100%</i>	<i>100%</i>	<i>0%</i>
<i>Industrial Paintings</i>					
<i>DF Construction</i>	<i>3 864 002.00</i>	<i>100%</i>	<i>100%</i>	<i>100%</i>	<i>100%</i>
<i>Monolia Thirty One cc</i>	<i>2 686 275.00</i>	<i>100%</i>	<i>100%</i>	<i>100%</i>	<i>100%</i>
<i>Masakheni Construction (Pty) Ltd</i>	<i>1 444 025.00</i>	<i>51%</i>	<i>100%</i>	<i>51%</i>	<i>0%</i>
<i>Amafela Construction (Pty) Ltd</i>	<i>6 195 539.00</i>	<i>52%</i>	<i>100%</i>	<i>50%</i>	<i>0%</i>
<i>Alex Electrical and</i>	<i>3 002 900.00</i>	<i>100%</i>	<i>100%</i>	<i>100%</i>	<i>0%</i>
<i>Maintenance</i>					
<i>SMME Sub Contractors</i>	<i>6 837 391.00</i>	<i>100%</i>	<i>100%</i>	<i>100%</i>	<i>20%</i>

<u>Safety & Environmental</u>	200 000.00	100%	100%	100%	0%
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Total	39 761 382.98
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<i>P&G (Nominated</i>	20 400 000.00
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Electrical)

<i>Tender amount</i>	60 161 382 .98
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(excluding VAT & Contingencies)

Kindly note that the portion of work to be done by a nominated electrical subcontractor is excluded in the calculation of empowerment goals. The reason for this is the fact that tenderers are not involved in the adjudication process of nominated subcontractors and therefore, it would be difficult for them to declare empowerment goals on something they do not have an influence on.”

Similar exercises were done in respect of the other tenderers.

[9] Thereafter *Matya* submitted two tender adjudication reports to the project

manager. In the first report he awarded the applicant a total of 7.49 percentage points for developmental objectives and in the second, none. The agent then compiled a tender report which evaluated the tenderers in relation to financial, technical and quality aspects. It noted that in conformity with clause A4 of the TGP the maximum points awarded for tendered price and technical and quality aspects would amount to 85 and specified that the points scored for development objectives, (15) would be covered in a separate report. It recommended that based on the Financial and Technical/ Quality aspects the tender be awarded to the applicant in the amount of R83 128 995.82 inclusive of VAT, contingencies, contract price adjustment and that the amount tendered a provisional sum of R2 000 000.00 for the electrical subcontract.

[10] On the 6th of April 2006, an official in the first respondent's infrastructure development unit, one Willie Olivier, presented a

document styled procurement submission to the procurement committee. As a prelude to its recommendation it noted that the procurement business unit had utilised two alternate methods of procurement verification for the applicant. This was no doubt a reference to *Matya's* report where he awarded the applicant 7.49 percentage points and zero percentage points respectively in relation to development objectives and stated that:-

“The CIDB Standard of Uniformity in Construction Procurement states that the tenderer with the highest number of tender evaluation points be recommended for the award of the contract, unless there are compelling and justifiable reasons not to do so. Infrastructure Development takes note of the Procurement verification report stating that Scribante Construction does not comply with CDC's procurement policy. Scribante Construction was however not *declared non responsive and they were scored empowerment/preference scores well above the minimum threshold. Infrastructure Development is therefore obliged to take these scores into consideration and use the CIDB standard of tender evaluation and recommend that the contract be awarded to Scribante Construction as there were no compelling and justifiable reasons tabled not to do so. Scribante Construction is registered with CIDB as an 8CE category contractor.*

The CIDB Standard for Uniformity in Construction Procurement states

that only after the successful tenderer has acknowledged the employer's notice of acceptance, will it constitute the formation of a contract. The possibility exists that Scribante Construction may not acknowledge CDC's notice of acceptance, in which case Infrastructure Development recommends that the contract be awarded to Sakhisizwe JV, but only if they obtain a CIDB grading of 7CE CIDB rating.

If the alternative method of evaluating the Scribante Construction tender is used, then Infrastructure Development must recommend that the contract be awarded to Sakhisizwe JV, but only if they obtain a CIDB grading of 7CE. If Sakhisizwe JV does not obtain a 7CE grading or not acknowledge CDC's notice of acceptance, then Infrastructure Development recommends that the contract be awarded to Basil Read/Newport Construction JV."

It will be gleaned from the last paragraph of the preceding recommendation that the "alternative method" referred to therein is in fact the scenario where the applicant was awarded zero percentage points for development objectives.

[11] The Procurement committee then met on 10 April 2006. The minutes of that meeting (annexure GS11) are of critical importance. One of the matters discussed related to the awarding of contracts to

untransformed companies, in *casu*, the applicant's status as an all white family business. A discussion then ensued on what are termed unintended consequences/ non transformation during the course of which the first respondent's preferential procurement policy surfaced. The minutes then read that the chairperson emphasized that a decision had previously been taken that the CDC's preferential procurement policy would not be made public by reason of the attendant risks. There is thus no evidence whatsoever to show that the CDC's procurement policy complies with s 2 of the PPFA. Notwithstanding, it recommended that the contract be awarded to SJV intimating that it's recommendation could be made to the first respondent's executive management committee (EXMA) on the 19th April 2006.

[12] The minutes of Exma's meeting on 19 April 2000 record *inter alia* that:-

“A decision was taken to accept the recommendation made by BU to the PC, recommending that Scribante be appointed for this contract, however it was mentioned that there was a PC note with an intent that was not considered when PC was looking at this contract;”

It is apparent from the papers that the “PC note” referred to

surfaced for the first time at the meeting. Although dated 10 July 2003, it is unsigned and does not appear to have featured in the adjudication process. Paragraph 1 of that procurement note states that it *“follows from the Board meeting of 25 June 2003.”* Paragraph 6 is styled, Problem Statement: Scoring of Intention in Empowerment and provides as follows:-

*“Our scoring system is currently in such a way that companies which are not, in the view of the CDC, genuinely empowered are nevertheless able to earn **point and therefore be in contention for appointment to do CDC work.** For example, a company which is at prime contractor level purely white can collect even greater empowerment points through the engagement of subcontractors than a company which is empowered at prime level. Because the PPP does not cater for scoring intent or commitment to transformation, a company which is not empowered can be awarded CDC work because technically for other reason it is able to earn points from the current structure of the points system. The points system in the PPP does allow room to make a qualitative assessment of the kind of empowerment involved.*

A further anomaly connected with the points system is that technical ability is not scored. The current structure of 85:15 (or 75:25) is divided between price and empowerment. Two critical factors are not taken into account and therefore not scored, i.e. technical ability and intent towards empowerment. It is proposed that these two issues, which form an integral part of every adjudication and verification exercise, be scored. Not only would this be acknowledging their importance in the

decision making process, but it would also be introducing less subjectivity to the adjudication process.

It is proposed that the points system in future be structured in the following way.

<i>Scoring</i>	<i>Price</i>	<i>Tech Ability</i>	<i>Empowermen t</i>	<i>Intent</i>
<i>85:15</i>	<i>70</i>	<i>15</i>	<i>10</i>	<i>5</i>
<i>75:25</i>	<i>65</i>	<i>10</i>	<i>15</i>	<i>10</i>

The infrastructure development ??? 20 April 2006 submitted a revised evaluation to the procurement committee containing three alternative evaluation methods viz the two as per the original submission and the additional one as per the PC note. It made three recommendations –

- 1) where the preferencing was second in accordance with the TGP, - the applicant;
- 2) On *Matya's* analysis awarding the applicant zero percentage points on an entity based assessment on empowerment – the second respondent and
- 3) Where the preferencing was done in accordance with the PC note – the second respondent.

The eventual outcome was the awarding of the contract to SJV, a decision the applicant seeks to review.

[13] The relief sought as a matter of urgency is an order (i) interdicting and restraining the first respondent from permitting SJV or any other contractor from executing the whole or any portion of

the contract and the SJV from performing the contract awarded to it pending the application to review the CDC's decision. It also seeks a costs order against the respondents. The requirements for the relief sought is succinctly articulated by Nicholson J in **Ladychin Investments v South African National Road Agency** 2001 (3) SA 344 (N) at p353D-354C. It encapsulates the legal position and provides:-

“Principles Governing interim relief

The principles established by the cases where an interim interdict is sought where there are conflicts of fact are as follows:

1. *The requirements for a final interdict were well established and require the applicant to show:*

- (a) *A clear right;*
- (b) *A well grounded apprehension of irreparable injury;*
- (c) *The absence of any other ordinary remedy.*

If an applicant can prove the above requirements he will also, obviously be entitled to an interim interdict.

2. *Where the applicant cannot show a clear right then she has to show a right which, though prima facie established, is open some doubt. In that event the applicant will have to show that the balance of convenience favours him. The test for the grant of relief involves a consideration of the prospectus of success*

and the balance of convenience – the stronger the prospectus of success, the less need for such balance to favour the applicant; the weaker the prospectus of such success the greater the need for the balance of convenience to favour him. By balance of convenience is meant the prejudice to the applicant if the interdict be refused, weighed against the prejudice to the respondent if it is granted.

3. *Even if there are material conflicts of fact the Courts will still grant interim relief. The proper approach is to take the facts set out by the applicant, together with any facts set out by the respondent, which the applicant cannot dispute, and to consider whether, having regard to the inherent probabilities, the applicant should on those facts obtain final relief at a trial.*
4. *The facts set up in contradiction by the respondent should then be considered. If serious doubt is thrown on the case of the applicant he should not succeed in obtaining temporary relief, for his right, prima facie established, may only be open to ‘some doubt’.*
5. *If there is mere contradiction, or unconvincing explanation, the matter should be left to trial and the right be protected in the mean time, subject of course to the respective prejudice in grant or refusal of interim relief.*
6. *Although the grant of a temporary interdict interference with a*

right which is apparently possessed by the respondent, the position of the respondent is protected because, although the applicant sets up a case which prima facie establishes that the respondent has not the right apparently exercised by him, the test whether or not temporary relief is to be granted is the harm which will be done.

7. *And in a proper case it might well be that no relief would be granted to the applicant except on conditions which would compensate the respondent for interference with his right, should the applicant fail to show at the trial that he was entitled to interfere.”*

[14] It is immediately apparent that there is a fundamental difference between the present application and matters such as *Ladychin (supra)*. The applicant’s contention that the first respondent misdirected itself in its evaluation of the points system, that it’s decision was biased and *mala fide*, and its conduct arbitrary and capricious, is unanswered. The first respondent consciously chose not to oppose the relief sought.

[15] The right to joint administrative action is entrenched in s 33 of the Constitution and provides:-

“Just Administration action

- 1) *Everyone has the right of access to-*
 - a) *any information held by the state; and*
 - b) *any information that is held by another person and that is required for the exercise or protection of any rights.*
- 2) *National legislation must be enacted to give effect to this right, and may provide for reasonable measures to alleviate the administrative and financial burden on the state.”*

Consequently a decision of an organ of state may be set aside where it is shown that it failed to apply its mind to the relevant issues in accordance with the behests of the applicable legal provisions and the tenets of central justice. See *Johannesburg Stock Exchange v Witwatersrand Nigel Ltd* 1988 (3) SA 132 (A) at 152B.

[16] The first respondent’s reason for awarding the contract to SJV reads:-

“The Board of the Coega Development Corporation (Pty) Ltd (“CDC”) approved the award of contract CDC/02/06: (Municipal infrastructure of Zone 2, Phase 2) to the Sakhisizwe Joint Venture for the reasons set out in the CDC’s Procurement Committee’s report to its Executive Management Committee (“EXMA”), dated 25 April 2006, more specifically clauses 2, 4 and 5 thereof, as read with the annexures thereto, including the report submitted to the Procurement Committee

by the CDC's Infrastructure Development Team of 24 April 2006; and which was approved by EXMA on 25 April for submission to the CDC board for its approval.

Copies of the CDC document referred to above is already in the possession of Scribante Construction (Pty) Ltd, having been delivered to it by CDC on 30 June 2006."

It is apparent therefrom that it based its decision on a revised submission which included three points scoring evaluation methods in conformity with the procurement note which it had hitherto not applied. The status of that note is as adverted to earlier unclear. The points system which it proposed viz "intention in empowerment" had never hitherto been applied not was this requirement ever communicated to potential tenderers. The tender data provided for an evaluation method which the CDC clearly did not follow in awarding the tender to the Sakhisizwe joint venture. It thus applied a method of evaluation contrary to the terms of the TGP and on a basis not communicated to the applicant. In such circumstances and in the absence of controverting evidence emanating from the first respondent, the applicant's allegations that it was unfairly treated must be upheld. The balance of convenience moreover favours the applicant. It is for these reasons that I made the orders on 20 July 2006.

**D. CHETTY
JUDGE OF THE HIGH COURT**

Obo the Applicant: **Adv H.J Nelson / Adv J. D Huisamen**

(instructed by Joubert Galpin & Searle: W Parker)

Obo the 2nd to 4th Respondent: **Adv H Van Der Linde / Adv P.**

E Jooste

(instructed by Friedman Scheckter: R De Vos)

First Respondent abided by the decision of the Court

(obo the 1st respondent: Ketse Nonkwelo Attorneys: T.N
Nonkwelso)

IN THE HIGH COURT OF SOUTH AFRICA
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PORT ELIZABETH on Thursday the 20th day of July 2006

BEFORE The Honourable Mr Justice CHETTY

In the matter between:

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HAVING heard Advocate Nelson and Advocate Huisamen, counsel for the Applicant and Advocate Van der Linde and Advocate Jooste, counsel for the second, third and fourth respondent:

IT IS ORDERED:

- 4) That the first respondent be and is hereby interdicted and restrained from permitting the joint venture comprising the second, third and fourth respondents or any other contractor from executing the whole or any portion of the contract for the construction of municipal infrastructure for the Coega Industrial Zone 2 (Electronic and Technical Cluster) – Phase 2.
- 5) That the joint venture comprising the second, third and fourth respondents be and hereby interdicted and restrained from implementing the whole or any portion of the aforestated contract.
- 6) That the applicant file its application to review the first respondent's decision not to award it the tender for the aforestated contract by no later than noon on 26 July 2006.
- 7) That the costs of this application are reserved for decision by the court hearing the review application.

BY ORDER OF THE COURT

F. T FINI
JGS

REGISTRAR