**REPUBLIC OF SOUTH AFRICA**

**SOUTH GAUTENG HIGH COURT, JOHANNESBURG**

**CASE NO: 10/11872**

In the matter between:

**LAMBDA TEST EQUIPMENT CC** Applicant

and

**BROADBAND INFRACO (PTY) LIMITED** First Respondent

**CORAL-I-SOLUTIONS (PTY) LIMITED** Second Respondent

---

# JUDGMENT

---

**VAN EEDEN AJ**:

1. The applicant is a close corporation involved in the sale, supply and support of test equipment used in the telecommunications industry. It supplies equipment used in the testing of fibre optic links and transmission systems used by, *inter alia*, the first respondent. The first respondent is a State-owned private company with the State as its sole shareholder. It is an organ

of state as provided for in Section 239 of the Constitution of the Republic of South Africa, 1996 selling high capacity long distance transmission services to licensed fixed and mobile network operators, internet service providers and other value added network service providers.

2. Mr Rome represented the applicant and Mr Bokaba SC the first respondent. I am indebted to both counsel for comprehensive sets of heads of argument, and the careful argument they presented.

3. The first respondent awarded a tender to the second respondent and subsequently concluded a contract with it for the supply and delivery of 24 off-production equipment sets to carry out optical characterisations of fibre and the testing of SDH and Ethernet services. The applicant is one of six unsuccessful tenderers. It contends that the award of the tender to the second respondent is invalid for a number of reasons, and the first respondent disputes this. The second respondent does not oppose the relief sought. The chronological background of events that culminated in the parties ending up in the special opposed motion court on 9 May 2011 may be summarised as follows:

3.1. On 27 February 2009 the first respondent issued the tender in issue with a closing date of 18 March 2009.

3.2. On 29 April 2009 a so-called clarification meeting was held, seemingly at the request of the first respondent, the purpose of

which was to allow the tenderers to explain the nature of the relevant equipment. It appears that for an undisclosed reason this meeting was not attended by the second respondent.

3.3. On 14 July 2009 the first respondent called upon the applicant to give it a revised quotation on a list of certain of its tendered equipment. The list was prepared by the first respondent and provided for a reduced quantity of the equipment. The applicant was not requested to provide a revised quote in respect of its alternative tender.

3.4. On 6 August 2009 the first respondent's internal committee, established to evaluate the tenders, submitted a request to the procurement committee to approve the second respondent's tender.

3.5. On 4 November 2009 the second respondent was awarded the tender, and on 6 November the applicant was informed that its tender was unsuccessful. The applicant then requested a meeting with the first respondent, which was held on 11 November 2009.

3.6. On 25 November 2009 the applicant, dissatisfied with the outcome of the tender, caused its attorney of record to address a detailed letter to the first respondent. It sets out the applicant's contentions as to why the tender procedure was flawed and at the

hearing of this matter, reliance was still placed on those contentions. In the main these contentions entail that the applicant should have been afforded the opportunity to provide a further quote on its alternative tender, that it and the second respondent had quoted for different products resulting in the quotations not being comparable and complaining that 20 points had been allowed for Broad Based Black Economic Empowerment, whereas Regulation 4 of the Preferential Procurement Policy Framework Act, 5 of 2000 allowed for a maximum of 10 points. (I interpose to mention that it was common cause that 20 points had indeed been allowed, and that the applicant tendered on this basis. All the tenders were thus scored on this basis.) The letter further requested the first respondent to confirm by close of business on 26 November 2009 that it would not execute *"the order pending your response to this letter, (i.e. if you agree to cancel the order) or until the outcome of the review proceedings, should you not agree to cancel the tender"*. It reserved the applicant's right to apply to the High Court for an order interdicting the first respondent if it failed to provide an undertaking not to proceed.

3.7. On 30 November 2009 the first respondent's attorney of record addressed a letter to the applicant's attorney, denying that the tender process was flawed and refusing to cancel the tender process. It also stated that any litigation would be opposed.

3.8. On 10 December 2009 the applicant's attorney addressed a further letter to the first respondent's attorney. It recorded that it had received instructions to commence review proceedings and stated that it expected to be in a position to serve the review towards the end of January 2010. It also warned that, in view of the pending review application, any contract between the first and the second respondents would be at risk should the review be successful.

3.9. On 16 February 2010 the first and second respondents concluded the contract pursuant to the latter having been awarded the tender. The applicant was not advised of the conclusion of the contract.

3.10. On 29 March 2010 the applicant launched the present application. It received the record pursuant to the provisions of Uniform Rule 53 on 5 May 2010, and filed two supplementary affidavits, the first on 28 June 2010 and the second on 17 August 2010.

3.11. On 23 September 2010 the first respondent filed its answering affidavit. This was filed in response to the founding affidavit and the two supplementary affidavits.

3.12. On 29 October 2010 the applicant's replying affidavit was filed.

3.13. On 6 December 2010 the applicant's attorney of record addressed a letter to the Deputy Judge President in terms of Section 9.13 of this Division's Practice Manual. It applied for a special allocation of the matter, and advised that argument was expected to be at least one day. It called for an allocation in the week of 14 to 18 February 2011. The next day the Deputy Judge President personally advised that the matter could proceed as requested.[1]

3.14. On 28 January 2011 the applicant's attorney of record again wrote to the Deputy Judge President, this time advising that counsel was not available on 14 April 2011, and requesting that the matter be heard on 9 May 2011. On the very same day the Deputy Judge President advised the applicant's attorney that the matter could be enrolled as requested.[2]

---

1 The matter was allocated for 14 and not 11 April 2010, but nothing turns on this.

2 I draw attention to the prompt response from the Office of the Deputy Judge President for this reason. In Millennium Waste Management (Pty) Ltd v Chairperson, Tender Board: Limpopo Province & Others 2008 (2) SA 481 (SCA) the Supreme Court of Appeal grappled with the difficulty presented by invalid administrative acts when they have already been acted upon by the time that they are brought under review. Jafta JA explained that a decision to accept a tender is almost always acted upon immediately by the conclusion of a contract with the tenderer, and that it is often immediately followed by further contracts concluded by the tenderer in executing the contract. To set aside the decision to accept the tender, with the effect that the contract is rendered void from the outset, could have catastrophic consequences for an innocent tenderer, and adverse consequences for the public at large. He explained that those interests must be carefully weighed against those of the disappointed tenderer if an order is to be made that is just and equitable. Jafta JA further stated that it appeared that in some cases applicants for review would approach the High Court promptly for relief, but that their cases were not expeditiously heard and as a result by the time that the matter was finally determined, practical problems militating against the setting-aside of the challenged decision would have arisen. Consequently the scope of granting effective relief to vindicate the infringed rights was drastically reduced. He stated that it may help if the High Court gives priority to such matters. It is accordingly gratifying to note the promptness with which the applicant's requests for judicial assistance were dealt with.

4. Against this background the applicant seeks orders, some portions of which I have emphasised, in the following terms:

> *"1.1 The award of the tender for portable testing fibre optic equipment made by the first respondent in favour of the second respondent* ***during November 2009*** *under first respondent's tender number INFTEN0025 ("the tender") is hereby reviewed and set aside.*
>
> *1.2 The award of the tender to the second respondent is declared to have been unlawful and unfair.*
>
> *1.3 The first respondent is* ***directed to reconsider the competing tenders of the applicant and the second respondent (and all other parties who submitted tenders*** *to the applicant in the respect of the said equipment, and in response to applicant's invitation to tender in respect of first respondent's tender number INFTEN0025) in accordance with all applicable laws, regulations and in accordance with the requirements of s217 of the Constitution."*

5. The chronology reflects that by no later than 25 November 2009 the applicant, when its attorney addressed a letter to the first respondent, was sufficiently appraised of the facts surrounding the tender to take steps to safeguard its position. In fact, it threatened an urgent application if its demands were not met. That notwithstanding, it first approached the High Court more than a year later, i.e. on 6 December 2010, when it wrote to the Deputy Judge President to secure a date for the hearing of the matter. As

already stated, the applicant's letter was answered the very next day but even then it later declined the April dates offered for the hearing of the matter, instead opting for a hearing on 9 May 2011. The end result is that the application comes before Court some sixteen months after the applicant first had sufficient knowledge of the facts to have approached a Court for relief. Mr Rome submitted that any application for interim relief would have been opposed, and that it may very well have been unsuccessful. That submission only puts up skittles to knock them down. The court must pronounce judgment on the factual position as it prevails today.

6. The conditions of tender stipulated that the final contract document would be issued to the successful tenderer within one week of acceptance of the tender, and for the agreement to be signed within two weeks of such acceptance. The first respondent stated in its answering affidavit that the equipment has been supplied and delivered to its satisfaction and that same is currently been used by it for the purpose for which it was acquired. It is evident that the contract concluded pursuant to the award of the tender was executed and is complete, and it is therefore not surprising that this is common cause. The applicant's attitude, however, is that *"it is irrelevant if the tender has already been awarded and executed to its conclusion. The issue for the court to determine is whether the tender process was flawed or not"*[3] and that irrespective of whether the second respondent *"has been paid for the production*

[3] Page 750 para 112.

*test equipment and the equipment delivered to* [the first respondent] *(which is denied) the tender still falls to be set aside as the tender process was flawed".*[4]

7. When an unsuccessful tenderer launches a review application, a Court is almost always placed in an unenviable position. On the one hand the contract may be stopped with possible devastating consequences for Government and the successful tenderer. On the other hand, if the works are allowed to be completed, the tenderer that should have been awarded the tender would unjustly be deprived of the benefits of the contract. This has led the Supreme Court of Appeal to state that tendering has become a risky business and that Courts are often placed in an invidious position in exercising the administrative law discretion – a discretion that may be academic in a particular case, leaving a wronged tenderer without any effective remedy.[5] The Supreme Court of Appeal referred to **Sebenza's** case,[6] in which the contract concluded pursuant to the award of the tender had been completed, as in this matter. In that matter Kirk-Cohen J held that an order reviewing and setting aside the decision to accept the tender would be meaningless and have no practical effect, for the simple reason that the contract in question had not only been awarded but completed. The conclusion in **Sebenza's** case was reached by following a long line of cases to the effect that Courts will not adjudicate upon abstract, hypothetical or academic issues.[7] If the

---

4 Page 735 para 50.

5 Harms DP in Moseme Road Construction CC & Others v King Civil Engineering Contractors (Pty) Ltd & Another 2010 (4) SA 359 (SCA) [1].

6 Sebenza Kahle Trade CC v Emalahleni Local Municipal Council & Another [2003] 2 All SA 340 (T).

7 JT Publishing (Pty) Ltd & Another v Minister of Safety and Security & Others 1997 (3) SA 514 (CC) 524-525.

order sought will have no practical effect, a Court will decline to issue an order.[8]

8. It is not every long delay that will result in a refusal to set aside invalid administrative actions, and this is particularly so when the result thereof can still be undone, for example when unlawful permission granted can still be revoked.[9] In appropriate circumstances the Court will decline, in the exercise of its discretion, to set aside an invalid administrative act.[10] It has been held that that discretion plays an essential and pivotal role in administrative law, for it constitutes the indispensible moderating tool for avoiding or minimising injustice when legality and certainty collide. It has also been pointed out that where an aggrieved party fails to institute review proceedings within a reasonable time, the effect of the delay is to validate what would otherwise be a nullity. In such matters a Court will allow an invalid administrative act to stand because of the effluxion of time.[11] It follows that I disagree with the applicant's contentions quoted hereabove.

9. In the instant matter the applicant knew that the first respondent had refused to cancel the tender process. The conditions of tender are clear that a contract would be concluded within a short period after the tender was awarded. I can find no reason to hold that the applicant was unaware that the contract would be concluded and executed to finality during the sixteen

---

8 Eagles Landing Body Corporate v Molewa NO & Others 2003 (1) SA 412 (T).
9 Oudekraal Estates (Pty) Ltd v City of Cape Town & Others 2010 (1) SA 333 (SCA).
10 Oudekraal Estate (Pty) Ltd v City of Cape Town 2004 (6) SA 222 (SCA) [36].
11 Chairperson, Standing Tender Committee & Others v JFE Sapela Electronics (Pty) Ltd & Others 2008 (2) SA 638 (SCA) [28] and [29].

month period that it proceeded to Court at its chosen leisurely pace. The failure of the first respondent to notify the applicant of the conclusion of the contract was probably by design, but that would change nothing. Nobody but the applicant can be blamed that the contract was completed before it arrived at court. To issue the order sought by the applicant would be impractical, since it would require the first respondent to revert back to its position in late 2009 or early 2010 when the tender was called for and awarded. Due to the effluxion of time and the needs of the first respondent not being static, the position that prevailed in 2009 and 2010 can practically not again be attained. A new tender for further equipment has even been called for, and the suggestion that it is the result of the second respondent's inferior equipment, is no more than speculation. Besides, it is evident that the first respondent used the equipment for testing, and that can also not be undone. It follows that I disagree with Mr Rome's submission that there was no evidence that the 2009/2010 position cannot be reverted to. Mr Rome also submitted that since one is dealing with a contract for the supply of movables, it can easily be unravelled by returning the goods in issue. He used the example of a horse, and submitted that the return of the equipment would be no different from returning any other thing, such as a horse. In respect of the use of the equipment he submitted that the second respondent, upon repaying the monies received in terms of the contract, would have a claim based on unjustified enrichment against the first respondent. To my mind the very answers demonstrate the uncertainty that would be created by such an order: - why should the second respondent be compelled to take back used goods after such a long period, will the equipment still be worth anything to the

second respondent, what value should be placed on the use of the equipment and why should the second respondent be forced into possible litigation when it has not committed any wrong in receiving the tender? Mr Rome conceded that it was not clear whether the other tenderers would still be interested in having their tenders reconsidered. They were not cited as respondents, and there is nothing to indicate that they were given notice of this application. These considerations constitute yet a further reason why the orders sought are impractical. In the final analysis it seems clear to me that the result of the administrative action cannot realistically be undone. The horse has bolted, and a court order cannot change that.

10. It must be obvious that I have approached the matter on the assumption that there was unlawful administrative action that could be set aside. For the reasons given, I am however persuaded that this is an instance where unlawful administrative action, if such is indeed the case, must be allowed to stand in the interests of certainty.

11. Although I have assumed that there was unlawful administrative action, I am by no means convinced that an analysis of the grounds relied upon will bear out the assumption. Mr Rome submitted that the first respondent was bound by Section 2(b)(i) of the Procurement Act[12] as read with Section 4 of GN R725, which provides that a maximum of ten points should be awarded to a tenderer being a historically disadvantaged individual for contracts in excess of R500 0000.00. It was common cause that the first respondent had

[12] Preferential Procurement Policy Framework Act No 5 of 2000.

allocated twenty points to this consideration, and that the applicant had tendered on this basis. But Mr Rome also submitted that the first respondent is not an organ of state in terms of the Procurement Act. According to Section 1 of the Procurement Act, an organ of state would include an *"organ of state"* in Section 239 of the Constitution if it was also recognised by the Minister by notice in the Government Gazette as an institution to which the Procurement Act applies. Accepting that the first respondent is an organ of state for purposes of Section 239 of the Constitution, there is nothing before me to indicate that the Minister also recognised the first respondent by notice in the Government Gazette. Mr Bokaba SC submitted that there was no such government notice and Mr Rome did not take issue with it. The first respondent is, however, listed in Schedule 2 of the Public Finance Management Act,[13] and as such it is presumably bound by the provisions of this latter Act. The learned authors Patrick Lane SC and Corrie Moll[14] conclude that a public entity such as the first respondent is bound by the Public Finance Management Act and the regulations promulgated thereunder. It may very well be that this Act or Treasury regulations bind the first respondent to the provisions of the Procurement Act, but since it was not argued and given the conclusion that I have already reached, I do not propose to investigate this issue on my own. I should, however, point out that it appears to be generally accepted that the Procurement Act gives effect to Section 217(2) of the Constitution, which requires the State, when contracting

---

13 Public Finance Management Act No 1 of 1999.

14 Legislative Economic Equality - 2005 International Construction Law Review published by T & F Informa UK Limited.

for goods and services, to do so in accordance with a system that is fair, equitable, transparent, competitive and cost-effective.[15]

12. Mr Rome was undoubtedly correct that the equipment identified in the second respondent's tender did not precisely meet all the specifications stipulated. But there are degrees of compliance with any standard and it is notoriously difficult to assess whether less than perfect compliance falls on one side or the other of the validity divide.[16] The first respondent openly pointed out that on technical issues the second respondent scored the lowest. It was nevertheless granted the tender because overall it scored the highest.

13. The last main ground of review upon which the applicant relied, was that it was unfairly not given the opportunity to adjust its alternative tender when circumstances changed. Mr Rome fairly conceded that this point in itself would not carry the day for the applicant. In my view if the applicant seriously wanted to pursue the alternative tender, it should have done so when it provided the first respondent with the further information requested in respect of the main tender. At the very least, it should then have clarified the future of the alternative tender.

14. In a number of matters the unsuccessful aggrieved party was allowed some of its costs and this prompted Mr Rome to submit that if the application should be unsuccessful, the applicant should be awarded costs at least until

---

15 Cf The Quest for Clarity: An Examination of the Law Governing Public Contracts, Calli Ferreira The South African Law Journal Vol 128 Part 1 page 172.

16 RMR Commodity Enterprise CC t/a Rass Blankets v Chairman, Bid Adjudication Committee & Others [2009] 3 All SA 41 (SCA) [11].

filing of the answering affidavit.[17] The submission was based on the contention that it was only then when it was established when the contract was concluded. The presence of special circumstances, such as that a party's attempts to finalise the review as quickly as possible were frustrated by the other's refusal to let him have the necessary information and documentation, may give rise to such an order. Those special circumstances do not apply in the instant matter and it does not follow automatically that an unsuccessful litigant becomes entitled to the costs simply because there has been unlawful administrative action. The latter point was clearly illustrated by the matter of **Moseme Road Construction**.[18] In that matter there was a dissenting view that the unsuccessful aggrieved party should be awarded costs, but the majority of the Court held that costs should follow the result. In the circumstances of this matter, it appears to me that I should follow the same approach.

---

17 E.g. Sebenza Kahle Trade CC v Emalahleni Local Municipal Council & Another [2003] 2 All SA 340 (T); Chairperson, Standing Tender Committee & Others v JFE Sapela Electronics (Pty) Ltd & Others 2008 (2) SA 638 (SCA) [28] and [29]; Darson Construction (Pty) (Ltd) v City of Cape Town and Another 2007 (4) SA 488 (C).

18 Moseme Road Construction CC & Others v King Civil Engineering Contractors (Pty) Ltd & Another 2010 (4) SA 359 (SCA) [1].

15. In the circumstances I make the following order:

The application is dismissed with costs.

_____
**H VAN EEDEN**
**ACTING JUDGE OF THE HIGH COURT**

Counsel for applicant: Adv G B Rome
Instructed by: Eversheds

Counsel for First Respondent: Adv T J B Bokaba SC
Instructed by: Mkhabela Huntley Adekeye Inc

Counsel for the Second Respondent: No appearance

Date of hearing: 9 May 2011
Date of judgment: 13 May 2011