

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE LOCAL DIVISION, BHISHO)**

Case No: 535/12

In the matter between:

SIZISA UKHANYO TRADING 389 CC

APPELLANT

and

**DEPARTMENT OF SPORTS, RECREATION,
ARTS AND CULTURE, PROVINCE OF THE
EASTERN CAPE**

RESPONDENT

FULL COURT JUDGMENT

MBENENGE J:

[1] This is an appeal against the judgment of Saba AJ setting aside an award made by the respondent to the appellant of tender SCUM-14-12/13-0013 (the Tender). The appeal is serving before this Court with the leave of the court *a quo*.

[2] The central issue of this matter involves the interpretation of a special condition of the Tender. The respondent successfully contended before the court *a quo* that the special condition is inherently ambiguous and unfair. The appeal was prosecuted principally on the basis that the special condition is not ambiguous.

[3] The salient facts in light of which the issue of this matter is to be determined are largely common cause or, at the very least, not in dispute. There are, throughout the Eastern Cape, a large number of educational, social and cultural groups which require to attend various functions. Most of these groups lack the means to cover the cost of such transport either in whole or in part.

[4] As part of its broader mandate, the respondent itself had been arranging and providing for various groups to be transported throughout and beyond the Eastern Cape Province. Transport operators were engaged to provide transport on an *ad hoc* basis.

[5] The respondent decided to appoint a single coordinating service provider which in turn would be in a position to subcontract to operators holding authorities issued in terms of the National Land Transport Act 5 of 2009. To that end, an invitation for the provision of services to transport athletes/players/participants to various sport and recreation events in and outside of the Eastern Cape was advertised in the local press on 18 May 2012.

[6] The bid specifications set out the background to the Tender and certain specific requirements. There were also “*special conditions*” that formed part of the invitation to tender. One of those conditions, which is at the heart of this appeal, reads:

“The bidder shall be obliged to sub-contact transport service providers in the 8 districts of the province and copies of such agreements must be attached (letters from associations). When possible, the principal must sub-contract to the local transport service providers from where a trip commences.”

[7] Nine tenders, including that of the appellant, were received from various entities and joint ventures. Eight of the nine tenders were eliminated on various grounds, with the respondent’s Bid Evaluation Committee (the BEC) having been of the view that the appellant had submitted a responsive bid.

[8] On the recommendation of the BEC, endorsed by the Bid Adjudication Committee, the Tender was awarded to the appellant, culminating in the conclusion of a Service Level Agreement by and between the respondent and the appellant on 11 July 2012 (the SLA).

[9] In its report recommending the approval of the appellant’s bid as having been compliant with the specification requirements, the BEC stated that the attachment of “*letters of guarantee for cooperation from both (bus and taxi associations) from all districts*” had been one of the criteria adopted to eliminate non-compliant tenderers.

[10] The BEC report further pointed to at least three of the tenderers as having been excluded on the basis that there had been no compliance with the special condition subject to this appeal (the special condition). The appellant’s tender provided a single letter from the Mdantsane East London and District Taxi Association which does not operate in the eight districts comprising the Eastern Cape Province, but in the Mdantsane East London District.

[11] After the appellant had commenced performing certain services pursuant to the SLA, meetings involving the Member of the Executive Council responsible for Sports,

Recreation, Arts and Culture in the Eastern Cape Provincial Government, the Head of the respondent Department and representatives of bus and taxi associations in the Eastern Cape were held on diverse occasions. Subsequent to those meetings, the respondent, having been of the view that the Tender was invalid, penned a letter to the appellant which, in so far as it is relevant hereto, reads:

“...Subsequent to the conclusion of the Service Level Agreement a number of association in the bus and taxi industry have raised queries concerning the Evaluation and Adjudication of the aforesaid tender.

On the instruction of the MEC and HOD of the Department, an urgent investigation was undertaken to evaluate the concerns which were raised. In addition independent legal advice was obtained.

The investigation undertaken by the Department have revealed that one of the “*special conditions*” to the invitation to tender was, at least, ambiguous...

The Department’s investigations has revealed that what in fact was intended were letters of support confirming the co-operation from both bus and taxi associations in all 8 districts.

The intention was that the bus and taxi associations in all of the districts would confirm that the service provider had the necessary support and co-operation from such associations.

On reconsideration of your Company’s tender, it is clear that the aforesaid requirement was not met other than, at best, in respect of one district.

The advice that the Department has received is that ambiguous conditions, which may have resulted in uncertainly, render the entire tender process unfair. The incorporation of ambiguous conditions of tender do not meet the standard required by Section 217 of the Constitution and the PPPFA.

Under the circumstances the Department has decided that the entire tender process should commence afresh...”

[12] The appellant did not accept that the Tender was invalid and recorded its intention to enforce the terms of the SLA. The divergence of views that ensued between the parties hereto resulted in the launch of proceedings before the court *a quo* in which the respondent sought, in the main, an order declaring the award of the Tender unlawful and of no force or effect.

[13] In its erudite judgment, the court *a quo*, after referring to excerpts from the report of the BEC reasoned:

“It is clear from the excerpt from the BEC report in paragraph [14] above as well an excerpt from the conditions of the contract and operational requirements referred to above that, in addition to the agreements with sub-contractors, *letters of guarantee for cooperation from taxi and bus associations had to accompany the bid documents*. However, the special conditions which read: ‘*The bidder shall be obliged to sub-contract transport service providers in the 8 districts of the province and copies of such agreements must be attached (letters from association)...*’ do not mention what should be contained in the letters from associations. This condition, in my view, is ambiguous. Failure to indicate that it was mandatory to attach the letters of guarantee from associations in the special conditions, without a doubt, created confusion between the requirements for subcontract agreements to be entered into with licensed operators and the requirements for support from bus and taxi associations. I may add ... that the situation led to a chaotic evaluation process and unfairness between bidders.”

[14] The court *a quo* also made moment of the fact that the appellant had, in its quest to be compliant, submitted together with its bid documents, a letter emanating from one district whereas the relevant conditions of contract and operational requirements required letters of guarantee for cooperation from all 8 districts, as also the fact that the criteria used for eliminating other tenderers namely, failure to attach letters of guarantee for cooperation from bus and taxi associations from all districts, had not been applied to the appellant.

[15] The court *a quo* was of the view that the requirements of section 217 of the Constitution demanding fairness, equity, transparency and competitiveness were not honored when the decision to award the Tender to the appellant was made.

[16] Placing reliance on *Allpay Consolidated Investment Holdings Pty Ltd and Others v The Chief Executive Officer of the South African Social Security Agency and Others*¹, the court *a quo* concluded that the confusion in the bid specification, the ambiguity in the special condition as well as the criteria used in eliminating other bidders rendered the Tender invalid and liable to be set aside.

[17] The appeal was pursued principally on the contention that the court *a quo* misdirected itself on the interpretation of the special condition and should have found that the special condition was not uncertain or ambiguous, but that “*(letters from associations)*” provided an alternative to tenderers who could not conclude

¹ 2014(1) SA 604 (CC), para

agreements with transport service providers and, as such, could not attach copies of such agreements.

[18] There is not the slightest doubt that the special condition is ambiguous. It is discernible, upon reading the special condition, even without having regard to factors outside of its four corners, that it is manifestly ambiguous. It could not be contended that the words within brackets were meant to qualify the statement preceding the brackets; “*agreements*” and “*letters*” mean different things all together. The contention that the words within brackets provided an alternative to tenderers who could not conclude agreements with transport service providers nor attach copies of such agreements implies a reading into the clause without justification therefor. All that need be said is that the ambiguity resulted in confusion. The possibility is great that some interested tenderers might not have tendered realizing that they would not meet the conditions and specifications of the Tender. It is not impossible that such non-participation might have resulted from the very ambiguity contended for by the respondent. Some entities may well have thought that that they could not meet the conditions of tender.

[19] Little wonder, therefore, that the tenderers, including the appellant, did not understand what was required of them and they sought, as demonstrated by the record, to comply with the special condition in different ways, resulting in the inclusion of the appellant and the exclusion of the rest.

[20] An “*acceptable tender*” is defined in section 1 of the Preferential Procurement Policy Framework Act 5 of 2000 as any tender “*which, in all respects, complies with the specifications and conditions of tender as set out in the tender document.*” “*Fairness*” as enshrined in section 217 of the Constitution requires tender conditions to be clear and unambiguous².

² *Allpay (supra)*.

[21] The submission by Mr Buchanan SC, who appeared for the respondent, that the present case is a clear example of the unfairness which immediately arises pursuant to uncertain and ambiguous material tender conditions, must succeed.

[22] None of the other appeal grounds, not persisted in by Mr Paterson SC, who appeared for appellant at the hearing of the appeal, has merit. Regard being had to the ambiguousness of and the inherent unfairness created by the special condition, the court *a quo* did not have to pronounce on whether the appellant's tender was compliant. Also, given that the condition is in and by itself ambiguous, the question of whether the decision to launch the application was prompted by the taxi industry in the award of the tender, is irrelevant. The respondent's review application passed muster in all respects. There is no basis for tampering with the order of the court *a quo*.

[23] In the result, the appeal is dismissed with costs.

S M MBENENGE

JUDGE OF THE HIGH COURT

I agree

Also see *Minister of Social Development v Phoenix Cash and Carry* [2007] 3 All SA 115 (SCA) at 116, where it was held:

“A tender process which depends on uncertain criteria lends itself to the exclusion of meritorious tenders and is opposed to fairness among tenderers, and between tenders and the public body which supposedly promotes the public weal.”

G GOOSEN

JUDGE OF THE HIGH COURT

I agree

I T STRETCH

JUDGE OF THE HIGH COURT

Appellant's Counsel:

Mr T J M Paterson SC

Drake Flemmer Orsmond (EL) Inc

KING WILLIAM'S TOWN

Respondent's Counsel:

Mr R G Buchanan SC

Bhisho State Attorneys

EAST LONDON

C/O Office of the Premier

KING WILLIAM'S TOWN

Heard on: 11 September 2015

Delivered on: 06 October 2015