REPUBLIC OF SOUTH AFRICA

IN THE GAUTENG DIVISION OF THE HIGH COURT, PRETORIA

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ~~YES~~ / NO.
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO.
(3) REVISED.
DATE 5/2/15
SIGNATURE

06/02/2015

CASE NO: A794/2012
DATE HEARD: 10/12/2014

In the matter between:

NEO SIYABONGA CONSTRUCTION AND PLANT HIRE CC First Appellant

MAVIO TRADING ENTERPRISES CC Second Appellant

and

PIET BOK CONSTRUCTION CC First Respondent
MINISTER OF PUBLIC WORKS Second Respondent
CONSTRUCTION INDUSTRY DEVELOPMENT BOARD Third Respondent
MINISTER OF CORRECTIONAL SERVICES Fourth Respondent

JUDGMENT

J W LOUW, J:

[1] On 29 May 2009, the Department of Public Works advertised tender no. H09/052 for the construction, repair, maintenance and operation of waste water treatment works and water purification works at the Losperfontein and Groenpunt prisons. The first and second appellants, acting as a joint venture (the JV), as well as the first respondent submitted tenders. The first respondent's bid was R24 551 046.28 and was the lowest. The JV's bid was R25 703 367.16. It was, however, the highest point scorer, being awarded 91.19 points as against the 91 points awarded to the first respondent. The higher score awarded to the JV was based on its BEE credentials. The Bid Evaluation Committee nevertheless recommended that the tender be awarded to the first respondent. The Special National Bid Adjudication Committee of the Department of Public Works, however, decided to award the tender to the JV, which it did on 2 February 2011.

[2] The first respondent thereafter brought an application to review and set aside the award of the tender to the JV and for an order that the tender forthwith be awarded to the first respondent. The main ground relied upon was that one of the tender conditions had been that tender offers would be evaluated by an evaluation committee based on the stipulated technical and commercial risk criteria, which criteria would be evaluated and be based on reports presented by the Department's professional team, Virtual Consulting Engineers (Pty) Ltd (VCE); that a tender offer would be declared non-responsive and removed from further evaluation if any one criterion was found to present an unacceptable risk to the employer; that one of the technical risks listed is the quality of current and previous work of the tenderer; that the appointed professional team compiled a risk assessment report from which it appeared that only one of the six previous projects on which the members of the JV allegedly worked could be confirmed, which was a project on which the JV was a sub-contractor and which did not consist of construction work; that the conclusion reached by the professional team was that the JV's lack of sufficient appropriate construction experience would pose a risk in completing the scope of work

related to the contract; that the JV's tariffs were unbalanced and contained arithmetical errors; and that, therefore, the technical and commercial risk of appointing the JV was deemed to be extremely high and unacceptable.

[3] The court *a quo* agreed with the first respondent's submissions in this regard and accordingly granted an order reviewing and setting aside the award of the tender to the JV. The court further found that the facts of the present matter justified an order in terms of s 8(1)(c)(ii)(a) of PAJA in terms whereof a court may, in exceptional cases, substitute or vary the administrative action in question. It accordingly ordered the Minister of Public Works (second respondent) to forthwith award the tender to the first respondent. The first and second appellants were ordered, jointly and severally, to pay the first respondent's costs, including the costs of two counsel. The court granted the first and second appellants leave to appeal to the full court.

[4] The period within which the various types of construction and repair work for which the JV was appointed had to be completed varied from 4 months to 10 months. The period within which the maintenance work had to be completed was 36 months. The expiry date of the contract was therefore 1 February 2014. The appeal was set down for 10 August 2014. Shortly before the hearing of the appeal, the first respondent filed an affidavit by Mr. D.R. Veldtman who is a director of VCE and who acted as the project director from the inception of the project. He states in the affidavit, which was deposed to on 9 July 2014, that the work done at the Groenpunt prison accounted, in value, for approximately 20% of the total contract price and that this part of the contract consisted of repair, maintenance and operation work. Construction work was limited to two sludge dams which have been built. This part of the project has therefore been finalized. The contract in respect of Losperfontein has been extended by twelve months, until 1 February 2015, for construction to be completed.

He attached a schedule to his affidavit reflecting the construction work still to be done and the stages of completion thereof.

[5] Before any argument was heard on behalf of the parties on 10 August 2014, we enquired from them how far the work had been completed. The only evidence before us at that stage was the affidavit of Mr. Veldtman. Counsel for the appellants requested an opportunity to provide updated information. The appeal was, as a result, postponed to a date to be arranged and an order was made that the affidavit by Mr. Veldtman be admitted, that the appellants and the second respondent may file an answering affidavit on or before 27 August 2014 and that the first respondent may file a reply on or before 10 September 2014. The appellants filed their answering affidavit on 28 August 2014 and the second respondent's answering affidavit was filed on 2 September 2014. The first respondent's replying affidavit was filed on 10 September 2014. The date of 10 December 2014 was allocated by the Judge President for the hearing of the appeal.

[6] What emerges from the affidavits which have been filed is the following. According to Mr. Veldtman's affidavit, the total contract value escalated to approximately R30 million and the value of the work which still had to be done as at 12 June 2014 was approximately R9 million. This constituted 13,3% of the value of all the work.

[7] The appellants commissioned independent engineers, GKB Design Associates (Pty) Ltd, to assess the status of the construction phase of the project. Their report, which is dated 11 August 2014, is attached to the answering affidavit filed on behalf of the appellants. According to the report, 49,2% of the construction aspect of the work had been completed and the cost of the outstanding work in respect thereof was R2 650 850.00, which constitutes 12% of the entire remaining works, excluding

the amount of R115 850,00 per month for the maintenance and operations part of the project.

[8] According to the answering affidavit filed on behalf of the second respondent, which was deposed to on 26 August 2014, the status of the construction work at Losperfontein as at that date was 60% despite challenges faced by the contractor due to heavy rains which contributed to the delays. According to a certificate provided by VCE on 11 August 2014, the total value of the construction work at Losperfontein was R6 307 586.00. If 60% of the construction had been completed as at 26 August 2014, the amount outstanding in respect thereof amounted to R3,784 million.

[9] The first respondent's replying affidavit was deposed by Mr. P.I.L. Pretorius, a member of the first respondent and a qualified civil engineer. He states that the outstanding value of the construction work still to be done as at 15 August 2014 is the sum of R4 093 366.30, excluding maintenance and operations costs. Bearing in mind that this affidavit was deposed to on 15 August 2014 and that of the second respondent on 26 August 2014, the small difference between the two figures is probably due to further work having been done between those two dates.

[10] All the evidence indicates that, as at August 2014, a relatively small amount remained payable in respect of the construction work at Losperfontein. It is reasonable to assume that as at the date of the hearing of the appeal on 10 December 2014, further construction work had been done and that the outstanding value of the construction at that date would, as a result, have been less than the amounts estimated in August 2014. As previously mentioned, the completion date of the project was extended to 1 February 2015. We do not know whether the construction work was, as a fact completed by that date. If not, any outstanding amount due in respect of the construction work must be small in relation to

the total value of the contract. As far as the maintenance, repair and operation aspects of the contract are concerned, that came to an end on 1 February 2015.

[11] In *Chairperson, Standing Tender Committee and Others v JFE Sapela Electronics (Pty) Ltd*[1] the following was said:

In appropriate circumstances a court will decline, in the exercise of its discretion, to set aside an invalid administrative act. As was observed in *Oudekraal Estates (Pty) Ltd v City of Cape Town* 2004 (6) SA 222 (SCA) para 36 at 246D:

> It is that discretion that accords to judicial review its essential and pivotal role in administrative law, for it constitutes the indispensable moderating tool for avoiding or minimising injustice when legality and certainty collide.

A typical example would be the case where an aggrieved party fails to institute review proceedings within a reasonable time. See eg *Wolgroeiers Afslaers (Edms) Bpk v Munisipaliteit van Kaapstad* 1978 (1) SA 13 (A); see also s 7(1) of PAJA which gives statutory recognition to the rule. In a sense, therefore, the effect of the delay is to 'validate' what would otherwise be a nullity. See *Oudekraal Estates (Pty) Ltd*, (supra) para 27 at 242E-F. In the present case, as I have found, there was no culpable delay on the part of the respondents. But the object of the rule is not to punish the party seeking the review. Its *raison d'être* was said by Brand JA in *Associated Institutions Pension Fund and Others v Van Zyl and Others* 2005 (2) SA 302 (SCA) ([2004] 4 All SA 133) in para 46 to be twofold:

> First, the failure to bring a review within a reasonable time may cause prejudice to the respondent. Secondly, there is a public interest element in the finality of administrative decisions and the exercise of administrative functions.

Under the rubric of the second I would add considerations of pragmatism and practicality.

[12] In my view, this is a case where, by reason of the effluxion of time, considerations of pragmatism and practicality dictate that, even if the findings of the court a quo were correct, the decision of the second

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[1] 2008 (2) SA 638 (SCA) para [28]

respondent to award the tender to the appellants should not be set aside. The contract in respect of repair, maintenance and operation has expired. The construction work at Groenpunt has been completed and at Losperfontein it has either been completed or, if not, the value of the outstanding work is small in relation to the total value of the work. If the tender were to be awarded to the first respondent at this stage, the completion of the last small portion of the construction work at Losperfontein will be disrupted. The first respondent will also probably not be interested in establishing itself on site just for the purpose of completing that small outstanding portion of the work.

[13] I come to the question of costs. I am in respectful agreement with the findings of the court *a quo.* The tender should not have been awarded to the appellants for the reasons stated in the judgment of the court. The decision to award the tender to the appellants was therefore correctly reviewed and set aside by the court. For that reason, it would be appropriate that the appellants and the first respondents be ordered to pay the first respondent's costs both in the court *a quo* and in this court.

[14] I propose that the following order be made:

(1) The appeal is upheld.

(2) The first and second appellants and the second respondent are ordered to pay the first respondent's costs of the appeal jointly and severally, the one paying the other to be absolved, including-

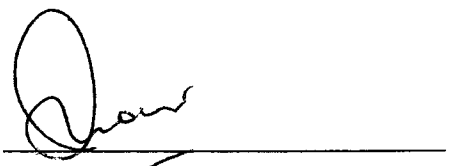
  (a) the costs of 30 July 2014;

  (b) the costs of two counsel.

(3) The order of the court *a quo* is set aside and substituted with the following order-

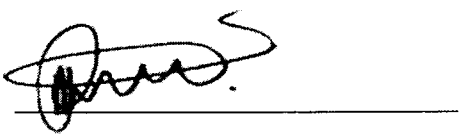
  '(i) The application is dismissed.

(ii) The first, second and third respondents are ordered to pay the applicant's costs of the application jointly and severally, the one paying the other to be absolved, such costs to include the costs of two counsel.'



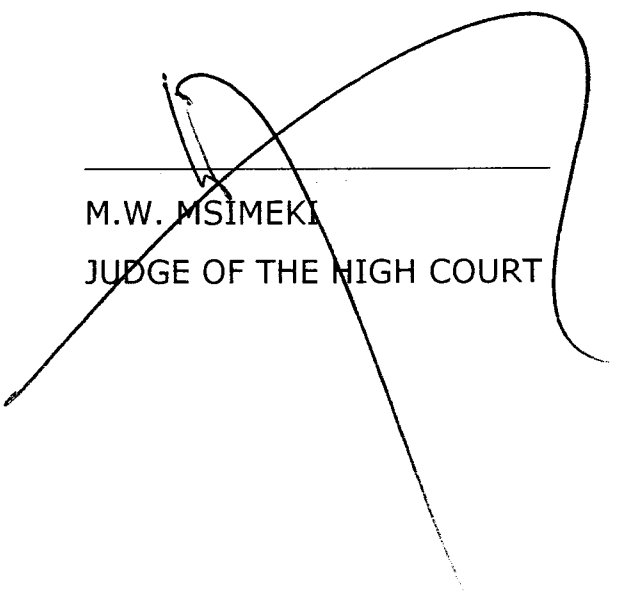
J.W. LOUW
JUDGE OF THE HIGH COURT

I agree:



T.V. RATSHIBVUMO
ACTING JUDGE OF THE HIGH COURT

I agree, and it is so ordered:



M.W. MSIMEKI
JUDGE OF THE HIGH COURT