

July 2020

CONSTRUCTION LAW BULLETIN

CONTRACTOR ESCAPES CIDB SANCTION

INTRODUCTION

The Construction Industry Development Board (“the Board”) was established in terms of the Construction Industry Development Board Act, 38 of 2000 (“the Act”).

The Board has the obligation to promote uniform and ethical standards in the construction industry and to publish a Code of Conduct (“the Code”) for all construction related procurement and all participants in the procurement process.

The Board is also obliged to establish a National Register of Contractors to facilitate public sector procurement and promote contractor development.

Contractors may apply to the Board for registration which remains valid for a period of three years.

Every organ of State has to apply the Register of Contractors in its procurement processes.

Unregistered contractors are not permitted to undertake public sector construction work.

CIDB INVESTIGATIONS

Regulations promulgated under the Act provide for procedures relating to investigations into complaints concerning contractors and the holding of formal enquiries into such complaints.

This procedure entails:

Partners: Alastair Hay B.Com. LL.B. • Michael Jackson B.Com. LL.B. LL.M. (Cambridge) Dip. Environ. Law • Peter Feuillerade B.A. (Hons) LL.B. Dip. Insolv Law TEP • Richard Hoal B.Soc.Sc. LL.B. Dip. Maritime Law • Andrew Clark B.Com. LL.B. • Helen Jackson B.A. LL.B. • Robin Westley B.Soc.Sc. LL.B. • Tina Halstead B.A. LL.B. • Lazelle Paola B.Com. LL. B. • Thys Scheepers B.Proc. LL.B. • Jonathan Batho B.Proc. LL.B. • Gary Pritchard B.A. LL.B. • Emili Souris B.A. LL.B. • Callyn Wilkinson LL.B. • Randhir Naicker B.A. LL.B. LL.M. • David Vlcek LL.B. • Peter Barnard LL.B. • Jason Goodison B.Soc.Sc. LL.B. • Carol McDonald LL.B. BCL (Oxford) • Jenna Padoa LL.B. LL.M. • Thabo Vilakazi LL.B. LL.M. • Tamryn Simpson LL.B. LL.M. • Sunil Hansjee LL.B. • Kim Edwards LL.B. • Wade Ogilvie LL.B. • Laura Maitre B.A. LL.B. • Petrina Naicker B.Com. LL.B. • Tasmiya Patel LL.B. LL.M. **Associates:** Jenna Cubitt LL.B. • Nicholas Cura LL.B. • Chantal da Silva B.Soc.Sc. LL.B. • Benjamin Meadows B.Com. LL.B. • Arnold Mbeje LL.B. • Claudelle Pretorius LL.B. • Carla Bishop LL.B. • Marikah Calo LL.B. • Aideen Ross LL.B. LL.M. • Phillip Cronje B.A. LL.B. **Consultants:** Graham Cox B.Com. LL.B. • Michael Posemann B.A. LL.B. • Roger Green B.Com. LL.B. • Alexander Rocher LL.B. • Philip Thompson LL.B. • Charles van Staden B.Com. LL.B. LL.M.

- Appointment by the Board of an investigating officer to do a preliminary investigation to:
 - verify whether the Board has jurisdiction;
 - ascertain whether reasonable grounds exist for the complaint;
 - collect relevant evidence; and
 - submit a report to the Board dealing with the evidence and the investigating officer's conclusions and containing a recommendation as to further action.
- After considering the report, the Board can pursue a formal enquiry into the matter.

THE ZIKHULISE CASE

A contractor of some notoriety in KwaZulu, Zikhulise Cleaning Maintenance and Transport CC ("Zikhulise"), registered with the Board as a contractor for various periods between December 2005 and September 2015.

In April 2013 the Board notified Zikhulise that it had been the subject of an investigation and that it had in a number of instances contravened the Act and the Code.

The Board's notice particularised twenty charges against Zikhulise.

The notice went on to inform Zikhulise that the Board intended to institute a formal enquiry.

Zikhulise challenged the threatened formal enquiry on the grounds that:

- the Board lacked jurisdiction because Zikhulise was not a registered contractor at the time that the complaints arose;
- the charges were not covered by the Code as the Code related to conduct between parties to the Code and not between contractors and the Board; and
- the Board had in any event failed to comply with the requirements for instituting a formal enquiry as described above.

Zikhulise applied to the Pretoria High Court for an order reviewing and setting aside the Board's decision to proceed with a formal enquiry.

The judge rejected Zikhulise's argument that, because it was not registered as a contractor with the Board at the time the complaints arose, the Board could not pursue charges against it.

Without considering Zikhulise's other grounds, the court refused to set aside the Board's decision.

Zikhulise appealed to the Supreme Court of Appeal in Bloemfontein.¹

¹ Zikhulise Cleaning Maintenance and Transport CC v The Chairman of the Investigating Committee of the Construction Industry Development Board [2010] ZASCA 181 (2 December 2019).

On appeal, Zikhulise did not challenge the court's ruling that a contractor could not escape being charged in terms of a formal enquiry on the grounds that it was not a registered contractor at the relevant time. On this basis the SCA did not devote any attention to the point nor make any finding on it.

The SCA focused on the other grounds raised by Zikhulise in challenging the Board's right to proceed with a formal enquiry.

It found that:

- The Code relates to what is acceptable conduct on the part of various parties in the procurement process in the construction industry. It prescribes how those parties should deal with each other in construction related procurement whereby they must behave equitably, honestly, transparently and comply with all applicable legislation.
- The relationship between participants in the procurement process such as contractors on the one hand and the Board on the other hand is governed by the Act and Regulations and enforced by way of criminal sanction and not through the Code.

The court then examined the various charges being levelled at Zikhulise.

Seventeen of the twenty charges related to Zikhulise having submitted false or fraudulent information and certificates and financial information to the Board relevant to its registration as a contractor.

One charge related to its failure to disclose the fact that one of the persons involved with Zikhulise had been convicted on charges of fraud. The two remaining charges related to the failure by Zikhulise to have disclosed criminal convictions of the same person in three compulsory enterprise questionnaires submitted by it to the KwaZulu-Natal Department of Public Works relating to a tender.

The court ruled that the seventeen charges relating to Zikhulise's alleged fraudulent and dishonest conduct fell outside the ambit of the Code. The conduct concerned related to untoward conduct as between Zikhulise and the Board as opposed to conduct between participants in the procurement process.

What the Board should have done is to institute a criminal prosecution of Zikhulise as the conduct complained of fell fairly and squarely within conduct which is prohibited in terms of the Regulations published in terms of the Act.

The court found that the last three charges were amenable to a formal enquiry by the Board as contraventions of the Code because they related to alleged dishonest conduct by Zikhulise in the procurement process with another participant in that process, namely the KwaZulu-Natal Department of Public Works.

It went on to analyse whether the Board had followed the procedures required before instituting a formal enquiry and found that the Board had fallen woefully short in that regard.

The investigating officer appointed by the Board did not carry out the preliminary investigation envisaged, nor did he report to the Board with his recommendations. The Board had accordingly prematurely decided to proceed with a formal enquiry before having followed the correct procedures.

The Board attempted to address its failure by saying that it had substantially complied with the requirements and that had it complied with the procedures relating to the KwaZulu-Natal Department

of Public Works' complaint, it would in any event have laid those charges. The court's answer was to say that there had been no compliance at all, let alone substantial compliance.

The upshot was that the court ruled that the charges against Zikhulise be dismissed.

CONCLUSION

The Board's failure to adopt the correct procedure, firstly by instituting a criminal prosecution in relation to the alleged unlawful conduct of Zikhulise in submitting fraudulent documentation and information to it and secondly in not adhering to the required procedure for enquiries under the Code, resulted in serious matters not being given the proper attention so that a proper finding on the merits was made.



ALASTAIR HAY

Partner

COX YEATS

Direct Tel: 031 - 536 8508

E-mail: ahay@coxyeats.co.za