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TENDER LAW BULLETIN

THE UNLUCKY PURCHASE

INTRODUCTION

In 2011 the Passenger Rail Agency of South Africa ("PRASA") decided that the time had come to replace a large number of its outdated locomotives.

Mr B Mtimkulu, the then Executive Manager: Engineering Services of PRASA, submitted a memorandum to the then Group Chief Executive Officer of PRASA, Mr Lucky Montana, recommending that PRASA source 100 new locomotives over a period of six years at a cost of approximately R5bn.

Mr Mtimkulu prepared the specifications for the locomotives despite having no expertise in the field. He had been employed by Mr Montana in 2010 and had a meteoric rise in the ranks at PRASA matched only by his meteoric salary increases. He claimed to have various qualifications including a doctorate in engineering but it was subsequently established that he had no qualifications at all.

The specifications prepared by Mr Mtimkulu were tailored to match those of locomotives manufactured by a Spanish company by the name of Vossloh.

PRASA published a request for proposals in November 2011 based on the Mtimkulu specifications in terms of which PRASA invited tenders for the supply of some 88 locomotives.

The tender document was vague as to the exact quantity of locomotives and also as to whether the locomotives were to be diesel, electric or hybrid locomotives. No proper assessment of actual needs was in fact made by PRASA.

The tender documents were drafted in such a way that the successful tenderer would have to import the locomotives from Vossloh. In addition, the tender process contravened various requirements of the PRASA Procurement Policy. Importantly, no approval from National Treasury as required in terms of the Public Finance Management Act, 1 of 1999, was obtained for the proposed acquisition.

A briefing session was held for potential bidders in December 2011 which was attended by Swifambo Holdings (Pty) Ltd ("Swifambo Holdings").

Early the following year Swifambo Holdings acquired a company known as Mafori Finance Vryheid (Pty) Ltd which later changed its name to Swifambo Rail Leasing (Pty) Ltd ("Swifambo Rail").

Twenty days after Swifambo Holdings had acquired Swifambo Rail, the latter submitted a bid for the supply of the locomotives.

Swifambo Rail's bid was non-compliant in a number of material respects:

- It failed to supply a tax clearance certificate.
- It failed to supply a certificate evidencing registration for VAT.
- Although Swifambo Rail indicated that all locomotives were being manufactured and supplied by Vossloh, it did not supply the necessary tender returnables relating to Vossloh.
- It failed to provide a B-BBEE plan as required.
- The bid did not comply with the local content requirements in the tender documents.
- It, unsurprisingly, provided no evidence of previous experience in the rail industry and/or technical and financial qualifications to provide the locomotives as required.

Despite all of these deficiencies, the PRASA Bid Evaluation Committee in March 2012 recommended that the tender be awarded to Swifambo Rail. Consequently, on 25 March 2013, after PRASA's board approved the recommendation, the tender was awarded to Swifambo Rail.

QUESTIONS ARISE

In 2014 PRASA's board was reconstituted.

The contract award was investigated and it was established that Mr Mtimkulu had been dishonest and fraudulent, *inter alia* in relation to the tender, and disciplinary proceedings were instituted against him in 2015. He resigned and disappeared. In March 2015 Mr Lucky Montana, who had been party to Mr Mtimkulu's conduct, also resigned.

SETTING ASIDE OF THE CONTRACT

The new PRASA board resolved in November 2015 to apply to court to have the contract with Swifambo Rail set aside in view of the fraudulent and apparently corrupt dealings which had culminated in the award of the contract.

Not least among the reasons why PRASA felt moved to have the contract set aside was:

- the fact that manifestly no proper technical evaluation of the Vossloh locomotives had been undertaken because they were found to exceed the maximum height suitable for South African railway lines; and
- what appeared to be a clear fronting relationship between Swifambo Rail and Vossloh.

Swifambo Rail opposed PRASA's application.

Whilst conceding that there had been material irregularities in the bidding process:

- it protested long and loud that it was entirely innocent and not a party to any fraud;
- it disputed that it was guilty of fronting; and
- it complained that PRASA should not be allowed to challenge the contract after a lapse of approximately three years from when the contract was awarded.

This latter complaint was based on the provisions of the Promotion of Access to Administrative Justice Act, 2 of 2000 ("PAJA"), that requires applications for the review and setting aside of contracts in such circumstances to be brought within 180 days of the impugned decision having been taken.

The High Court found that the nearly three year delay in bringing the application was unreasonable, but that, given the public interest in State owned entities not being corrupt and the enormous wastage that would arise if the contract was not set aside, it took the view that the delay should be condoned.

The High Court was, as were the parties, under the misapprehension that the 180 day PAJA time limit was applicable.

The Court went on to uphold all of the grounds relied on by PRASA in the application and set aside the contract.

By this stage 13 of the locomotives had already been delivered, all of which were entirely unfit for purpose and found to be unsafe for operation on the country's railway lines due *inter alia* to the fact that:

- the side clearance and height of the locomotives exceeded that of the Transnet gauge for locomotives; and
- the height of the locomotives exceeded Vossloh's own specifications.

SUPREME COURT OF APPEAL

Swifambo Rail appealed the High Court decision to the Supreme Court of Appeal ("SCA").[1]

The grounds of appeal were:

- the decision of the High Court was based on hearsay evidence advanced in the affidavit of Mr Popo Molefe, the reconstituted board chairman;
- it was not guilty of fronting;

[1] Swifambo Rail Leasing v PRASA [2018] ZASCA 167 (30 November 2018).

- the High Court judgment implied that Swifambo Rail was not an innocent tenderer; and
- the delay in bringing the application was unreasonable and should not be condoned.

DELAY

The ground of opposition based on delay was dismissed by the SCA which pointed out that where the State or an organ of State, such as PRASA, seeks to review its own decision, PAJA is not applicable.[2] Instead, such review applications must be brought within a reasonable period or without unreasonable delay.

It found that in all the circumstances the delay was not unreasonably long.

HEARSAY EVIDENCE

Mr Molefe's affidavit was perforce based on documents and what he had been able to glean from the investigation that had been conducted into the contract, not unsurprisingly having regard to the fact that those directly involved had since fled the coop and would in any event have not been willing to confirm the truth. As such it was strictly speaking hearsay.

Despite its complaint that the evidence was hearsay, Swifambo Rail did not place any of the facts alleged by Mr Molefe in dispute. It did not dispute the fact that the contract was tainted by corruption but merely that it was innocent of involvement in that corruption.

Our law of evidence permits a court to take into account hearsay evidence in appropriate circumstances, and the SCA found that this was an appropriate case.

The evidence relied on by PRASA was accordingly accepted as valid by the SCA.

FRONTING

Swifambo Rail took issue with PRASA's contention that it had acted as a front for Vossloh.

Fronting is a practice which is defined and prohibited in terms of the Broad-Based Black Economic Empowerment Act, 53 of 2003 ("the B-BBEE Act"). It includes entering into a legal relationship with a black person for the purpose of achieving a certain level of B-BBEE compliance without granting that black person the economic benefits that would reasonably be expected to be associated with the status or position held by that black person. A contravention of the B-BBEE Act in this respect is an offence.

The SCA found that Vossloh was the intended behind the scenes bidder all along and would not have been able to directly bid because it did not have any B-BBEE rating. It had to use a conduit in order to benefit from a contract for the supply of its locomotives.

The contractual position was that Swifambo Rail's only obligation was to accept delivery of locomotives from Vossloh and procure their handing over to PRASA without more.

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[2] State Information Technology Agency SOC Ltd v Gijima Holdings (Pty) Ltd 2018(2) 23 CC.

The Court found that there was absolutely no benefit as envisaged by the B-BBEE Act in so far as the transfer of capital and skills to black people is concerned and that the arrangement between Vossloh and Swifambo Rail was a fronting practice and moreover that Swifambo Rail could not claim to be an innocent tenderer.

Swifambo Rail also argued against the setting aside of the contract on the grounds that it had been partly performed and it was in a position to continue with performance. In the circumstances a bizarre argument, which was in any event unsupported by any affidavit or evidence from Vossloh that it was in a position to deliver more locomotives.

The SCA, whilst conceding that PRASA's current locomotives were old and needed replacement, commented that it would assist no one to spend public money on new locomotives that were not fit for purpose.

In conclusion, the SCA found that it would be unacceptable to allow a contract concluded in a corrupt process to stand. It consequently upheld the High Court's decision and on 30 November 2018 dismissed Swifambo Rail's appeal.

CONCLUSION

Thank goodness for our courts which in this case prevented an unconscionable further waste of taxpayers' money.

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