



## Procurement law update

Client Circular

30 November 2022

*Our Cox Yeats Procurement law team is committed to keeping you informed on pertinent legal issues, as well as developments within our firm.*

### **CAN AN UNSUCCESSFUL TENDERER CLAIM DAMAGES FROM THE STATE – THE FINAL WORD!**

The Constitutional Court handed down judgment on 30 November 2022 in answer to this question.

In a unanimous judgment, the Constitutional Court had to consider whether a tenderer, deprived of success in a tender by the State's intentional misconduct, could claim damages in delict for loss of profit.

The appeal to the Constitutional Court followed a decision of the Supreme Court of Appeal who, by a split majority, found that a contractor was not entitled to recover its lost profits in a delict claim against the State.

#### The Background Facts

The project concerned the emergency procurement of a steel bulk water pipeline to serve residents of the Giyani District during a severe drought.

The Mopani District Municipality invited tenders for the construction of the water pipeline. A Joint Venture (JV) was awarded the tender and the unsuccessful tenderer applied to interdict the implementation of the tender and instituted a review of the award on the basis that the JV did not;

- comply with the mandatory minimum criteria specified in the bid document and should have been disqualified;
- meet the CIDB grading specified in the tender.

The case was settled, by consent between the parties and the Court set aside the award and directed that the tender be re-adjudicated. The bids were re-adjudicated, and the JV was again awarded the tender.

Again the unsuccessful tenderers launched an urgent application interdicting the implementation of the tender pending a review of the second award. They alleged a dubious points allocation and pointed to the fact that the JV's CIDB score had seemingly miraculously been elevated.

The Court granted an interdict restraining implementation of the award and the Municipality applied for leave to appeal, which suspended the operation of the interdict. The Municipality and the Joint Venture refused to give an undertaking that they would suspend operations pending the outcome of the Court case.

The successful tenderers applied for a further order that the interim interdict would continue to operate and this relief was granted and extended until the Municipality's application for leave to appeal was refused.

Notwithstanding this, the Municipality then applied for leave to appeal to the Supreme Court of Appeal, which necessitated the unsuccessful tenderers to bring further Court applications for interim relief. All the while the successful Joint Venture proceeded to implement the contract.

When the Supreme Court of Appeal dismissed the Municipality's application for leave to appeal against the interim order, the Municipality applied for leave to appeal to the Constitutional Court.

#### Review Application – award set aside

In the subsequent review application, the High Court held that the successful Joint Venture had failed to meet the required CIDB grading, had not submitted the necessary documents and had made material misrepresentations in respect of its shareholders' citizenship, its experience in construction, its equity participation rates and its registered information.

The High Court further held that the Municipality's failure to detect these manifest irregularities supported the conclusion that its decision to "*appoint the Joint Venture was vitiated by bias, bad faith and ulterior purpose*".

The High Court set aside the tender and the Municipality was ordered to verify that all work had been completed according to specification and to ensure that the Joint Venture performed all of the necessary work in terms of the agreement.

This formed part of the Court's consideration of just and equitable relief because the work had been partially completed and it was unclear whether the substitution of the successful tenderer would "*serve the purpose of ensuring that water is brought to the destitute communities*".

Undeterred the Municipality appealed again to the Supreme Court of Appeal against this judgment. The Supreme Court of Appeal reversed the High Court's order permitting the implementation of the contract entered into between the Municipality and the successful Joint Venture.

The Supreme Court of Appeal held that "*the parties to the contract had acted dishonestly and unscrupulously and the Joint Venture was not qualified to execute the contract*".

It declared the contract void and ordered the Municipality to approach the Department of Water Affairs to take steps to determine the remedial work needed to complete the pipeline and to issue, evaluate and award a tender for completion of the work.

The Department of Water Affairs subsequently called for tenders to complete work on the pipeline.

It became apparent from this that the initial tender would have cost approximately R200 million if it had been awarded to the unsuccessful tenderer and the new tender was awarded for an approximate amount of R800 million.

#### Claim for Damages

The unsuccessful tenderer claimed damages in delict from both the Municipality and the JV for loss of profit as a result of the award of the tender to the JV.

The High Court dismissed the successful tenderer's action and held that the finding of bad faith, dishonesty and ulterior purpose on the part of the Municipality in the review did not, without more, give rise to delictual liability.

The High Court viewed the re-advertised tender process as affording the unsuccessful tenderer another opportunity to participate in the tender and noted that it was unsuccessful – this affected the establishment of legal causation in the courts view.

### Supreme Court of Appeal Findings

The Supreme Court of Appeal, in a split judgment, dismissed the unsuccessful tenderer's appeal in finding that it had failed to establish wrongfulness and causation. In the majority judgment the Court found that once the tender was set aside the successful tenderer lost the opportunity to bid and thus make a profit.

The Appeal Court also pointed to their ability to participate in the re-advertised tender process and on the issue of factual causation the Court found that being the highest point scorer would not necessarily mean that the tender would have been awarded to them.

The minority judgment found that deliberate dishonest conduct on the part of the State, as evidenced in this case, could attract delictual liability. They felt that the evidence established that the Municipality had intentionally and unlawfully acted to deprive the unsuccessful tenderer of success.

### The Final Word

The Constitutional Court had to decide whether delictual liability attached to an intentional breach of Section 33 and 217 of the Constitution. Section 33 provides for a right to just administrative action and Section 217 deals with the requirement that procurement in the Government's sphere is fair, equitable, transparent, competitive and cost effective.

The Constitutional Court found that the judgment in the Steenkamp case left open the question as to whether an administrative decision tainted by intentional misconduct may attract delictual liability.

The Constitutional Court had to decide whether the provisions of the Constitution, properly interpreted, allowed for the Municipality's intentional misconduct to be actionable in delict.

The Court considered the sections of the Constitution and the provisions of the Preferential Procurement Policy Framework Act and found that Section 217 was designed primarily to protect the public interest and this militated against the imposition of delictual liability.

The Constitutional Court also considered the decision in the Gore case, which found that the State was vicariously liable for the fraudulent misconduct of its officials in a tender process which had caused economic loss.

The Constitutional Court found that the Municipality's conduct was reprehensible and deserving of sanction. The Municipality had acted at every turn to ensure that the award was implemented and as a result, an entity plainly unsuited to implement the award squandered vast of taxpayers' money, a project which should have cost approximately R200 million ended up costing the fiscus approximately R800 million.

The Court noted that the Municipality's unconscionable conduct harmed the rights and interests of the residents it was duty bound to protect and violated the unsuccessful tenderers right to just administrative action and prejudiced the country generally, by squandering taxpayer money.

The Constitutional Court pointed to the provisions of PAJA and in particular, Section 33. On the principle of subsidiarity, the Court found that given the provisions of PAJA the unsuccessful tenderer had a remedy and that it was not necessary to develop the common law and in this way give rise to "two parallel systems of law".

The Court pointed to the provisions of Section 8 (1) of PAJA, which provided that a Court in proceedings for judicial review may give any order that is just and equitable, including directing the administrator or any party to the proceedings to pay compensation.

In considering the just and equitable relief under Section 8 of PAJA, a Court would have to balance the interests of the public over the private interests of an unsuccessful tenderer to loss of profits. The Court would have to consider what just and equitable relief to grant, including setting aside the award, aside from a determination of the loss of profits.

The Constitutional Court confirmed that the Supreme Court of Appeal's reasoning that once the tender was set aside, the unsuccessful tenderer lost the opportunity to bid and thus make a profit – which had the effect of that an unsuccessful tenderer can never sustain loss in the form of loss of profit through a breach of the principles of administrative justice - was incorrect.

They confirmed that Section 8(1)(c)(ii)(bb) of PAJA allows for compensation in exceptional circumstances and that a loss of profit could be recovered under this section, particularly where a decision/award is not set aside or corrected.

The Court upheld the findings in Steenkamp that considerations of public policy meant that negligent but honest administrative failures will now allow for a claim of compensation.

However, where the State's misconduct is deliberate and dishonest and where substitution or remittal are not viable forms of relief, circumstances may exceptionally require compensatory relief to ensure a just and equitable result.

In summary therefore, an unsuccessful tenderer may claim compensation under Section 8 of PAJA where the circumstances make this just and equitable.

**Should you require advice or assistance, please contact:**



**Richard Hoal**

**Partner**

**Procurement, Construction, Engineering, and Infrastructure Law**

Tel: 031 536 8511

Cell: 079 496 1799



Visit us at: [www.coxyeats.co.za](http://www.coxyeats.co.za)

**DURBAN OFFICE:**

Tel: 031 536 8500 | Fax: 031 536 8088 | Address: 8<sup>th</sup> Floor, Ncondo Chambers, 45 Vuna Close, Umhlanga Ridge, Durban, 4320

**JOHANNESBURG OFFICE:**

Tel: 010 0155 800 | Address: 4 Sandown Valley Crescent, Sandton, 2196

**CAPE TOWN OFFICE:**

Tel: 021 8792 516 | Address: Unit 16, Pepper Street Chambers, Cape Town, 8000



*Disclaimer: The information contained herein is for general guidance only and is not intended as legal advice. Should readers require legal advice on any relevant issue, they are requested to consult a Cox Yeats professional.*