

Short notes on:

DELICTUAL ACTION FOR DAMAGES – CLAIMING FOR LOSS OF PROFIT IN THE CASE OF AN UNSUCCESSFUL TENDER

Introduction

The rules of being awarded a contract by way of a tender process are encapsulated in Section 217(1) of the Constitution, which indicates that when an organ of state contracts for goods and services, it must do so in accordance with principles of fairness, equitability, transparency, competitiveness and cost-effectiveness. On 24 June 2021, the Court delivered a judgment in the case of Esorfranki (Pty) Ltd v Mopani District Municipality [2021] JOL 50619 (SCA) (reportable case no 916/2018, 24-6-2021) (the “Esorfranki case”), which dealt with the claim for delictual damages for loss of profits by an unsuccessful tender applicant.

Case Overview

In August 2010, the Mopani District Municipality (“Respondent”) started the bidding process for tenders to construct concrete reservoirs and a water pipeline between the Nandoni dam in Thohoyandou and Nsami water treatment works based in Giyani in Limpopo. The Respondent awarded the contract to Tlong Re Yeng CC and Base Major Construction (Pty) Ltd (“Joint Venture”) in October of 2010. An unsuccessful tender applicant, Esorfranki (Pty) Ltd (“the Applicant”) and another unsuccessful tender applicant brought an urgent application to the Gauteng Division of the High Court, Pretoria, to interdict the implementation of the contract between Mopani and Joint Venture pending review relief. In January 2011, the Court granted an order having the tender re-adjudicated.

In February 2011, the tender was re-adjudicated, and again the Respondent awarded the contract to Joint Venture that was interdicted again by the Applicant, and an interim order was granted by the Court restraining the Respondent from executing the contract. The Respondent, however, failed to comply with the interim order, the work partially commenced, and the Respondent brought an application to appeal the interim order. What followed was a series of applications to stop the commencement of the work to be done by Joint Venture.

The Supreme Court of Appeal (“SCA”) delivered a judgment on appeal on 28 March 2014, substituting a portion of the order that states:

“Any contract entered into between [Mopani] and the [Joint Venture] pursuant to the award of the tender to the respondents for the construction of a pipeline between the Nandoni dam and the Nsami water treatment works (Nandoni to Giyani Pipe Project; project number LPR018), is declared void ab initio and is set aside.”

Due to the Respondent deliberately manipulating the selection process awarding the tender to Joint Venture who did not meet the tender requirements, the Appellant instituted an action for a damage claim based on loss of profit had the Appellant been awarded the tender.

The issue before the SCA and the Court *a quo* in the granting of this claim for damages was the basis of the claim. The Appellant failed to establish legal causation as a result of *novus actus interveniens*, and based on this, the Appellant was not able to succeed in its claim for damages.

The reason behind *novus actus interveniens* being established is by way of the Appellant participating in the second tender process as an order was granted directing that the tender be re-adjudicated. The Appellant hereby made use of an administrative law remedy and cannot rely on the initial cause of action to claim for the damages for loss of profit.

Conclusion

It is evident in the Esorfranki case that principles of fairness, equitability, transparency, competitiveness and cost-effectiveness as provided by Section 217(1) of the Constitution was upheld. Organs of state are to adhere to the Constitution, especially during the tender process. It is important to make use of the mechanisms in place provided by legislation to remedy an aggrieved party. However, as a tender applicant, it further confirms that a tender applicant cannot claim for loss of profit simply because the tender process was unfair and such Applicant was not successful. There would have to be a stronger relation linking the unfair process to the actual evidenced loss of profit, as any other tender applicant could have been successful. Contact an Attorney at SchoemanLaw for assistance with any of your public or private procurement issues today.

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