

July 2014

## CONSTRUCTION LAW BULLETIN

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### PERSEVERANCE PAYS OR PAY FOR PERSEVERANCE?

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#### Introduction

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At the beginning of this year the Supreme Court of Appeal ("SCA")<sup>1</sup> dealt with a case involving the challenge to a municipal tender award in Limpopo Province.

The award triggered a torturous journey for EsorFranki Pipelines (Pty) Ltd ("EsorFranki"), the aggrieved tenderer who challenged the award.

Whilst EsorFranki's efforts and perseverance were eventually crowned with success, the expression "winning the battle but losing the war" springs to mind.

#### The Facts

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In August 2010 the Mopani District Municipality ("the Municipality") invited tenders for the construction of concrete reservoirs and a welded steel pipeline between the Nandoni Dam in Thohoyandou and the Nsami Water Treatment Works in Giyani.

The works were required to address a severe water shortage in the area which had resulted in the declaration of a local state of disaster.

The Department of Water Affairs, unwisely as it turns out, appointed the Municipality as its implementing agent to arrange construction of the works.

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<sup>1</sup> [Esorfranki Pipelines \(Pty\) Ltd and Another v Mopani District Municipality and Others \(40/13\) \[2014\] ZASCA 21 \(28 March 2014\).](#)

The Municipality awarded the tender to a joint venture comprising Tlong Re Yeng Trading CC ("Tlong Re Yeng") and Base Major Construction (Pty) Ltd ("Base Major") ("the Joint Venture").

EsorFranki and another aggrieved tenderer, Cycad Pipelines (Pty) Ltd ("Cycad"), challenged the award in review proceedings in the Pretoria High Court.

In the face of this challenge, the Municipality agreed to the setting aside of the award and its readjudication because it had in the tender process applied Regulations under the Preferential Procurement Policy Framework Act, 5 of 2000, which had been declared invalid.

In February 2011 the Municipality reawarded the tender to the Joint Venture.

Both EsorFranki and Cycad instituted a second challenge by means of a review application in the Pretoria High Court. At the same time they applied for an interim interdict stopping the implementation of the contract by the Municipality and the Joint Venture. The court granted an interim order. The Municipality applied for leave to appeal against the interim order.

The effect of an application for leave to appeal and the appeal process if leave is granted is to suspend the operation of the court order being appealed against. In other words in this case that meant that the interim order stopping the implementation of the contract was rendered ineffective.

Our Rules of Court in deserving cases allow the beneficiary of a court order that is subject to appeal to apply to court for a court order making the order which is subject to appeal immediately enforceable despite the appeal (a Rule 49(11) application).

EsorFranki made a Rule 49(11) application vis-a-vis the Municipality's application for leave to appeal which resulted in the court granting an order suspending further work pending the outcome of the Municipality's application for leave to appeal.

It is to be noted that an unsuccessful party in High Court proceedings does not have an automatic right of appeal but must get the permission of the court concerned in order to appeal against the court's decision. If the court refuses leave, the applicant can ask the SCA to grant it leave and in appropriate circumstances, if the SCA refuses leave, application can be made to the Constitutional Court.

The Municipality's application for leave to appeal was eventually dismissed. Undeterred, the Municipality filed a petition to the SCA for leave to appeal.

In order to stop the execution of the contract, EsorFranki brought a second Rule 49(11) application to endeavour to ensure that the contract did not proceed while the petition to the SCA was dealt with, which is a process that usually takes approximately three months. In response to this application, the Municipality gave an undertaking to stop further execution of the work which was incorporated into a court order. However, this court order was for some reason discharged at a later date.

This prompted EsorFranki to make a further application for an interim interdict pending the hearing of its second Rule 49(11) application. The court granted this interdict and ordered that the Municipality and the Joint Venture not take any steps to implement the contract.

Subsequent to this, the SCA dismissed the petition for leave to appeal.

The Municipality, not one to take no for an answer, and happily using taxpayers' money to continue the crusade, filed an application with the Constitutional Court for leave to appeal.

This necessitated EsorFranki instituting a third Rule 49(11) application to again ensure that the interim interdict granted in its favour continued to operate pending the outcome of the Constitutional Court application.

The Municipality opposed this application and lodged its own counterapplication for an order setting aside the interim order, the operation of which was in any event suspended because of its application to the Constitutional Court. The Municipality in due course abandoned this ill conceived counterapplication.

No decision was made by the court with regard to the third Rule 49(11) application because the real case, namely the application for the review and setting aside of the award itself, eventually came before the court.

In the meantime the Municipality was allowing if not encouraging the Joint Venture to beaver away at the contract works.

The Pretoria High Court in the review application gave the tender award short shrift and set it aside because:

- The Joint Venture's tender did not comply with the bid specifications.
- The Joint Venture was guilty of fronting.
- The Municipality's decision to award the tender was motivated by bias and bad faith.
- The Joint Venture did not have the required CIDB grading.
- The members of the Joint Venture had made false representations in their tender submission. Tlong Re Yeng falsely claimed to be conducting business from a given address and to have been in business for three years. Base Major falsely represented that its sole shareholder, although foreign born, had obtained South African citizenship. Tlong Re Yeng also claimed to have experience in the construction industry which it obviously did not.

Bizarrely the Pretoria High Court, notwithstanding declaring the award illegal and invalid and setting it aside, nonetheless ordered that the Joint Venture repair all its defective work and proceed to complete the work, with each party ordered to pay its own costs!

In the face of this Alice in Wonderland outcome to all its efforts and no doubt having spent in legal costs something approaching Swaziland's gross national product, EsorFranki decided to appeal the judgment.

The Municipality, happy in the knowledge that it still had some taxpayers' money to spend, opposed the appeal.

The Municipality's bull point on appeal was that the appeal would have no practical effect because the contract works would, by the time the appeal was concluded, have been completed.

After finding this to be factually incorrect on the papers before it, the SCA dealt briefly with the correct approach to cases where administrative action is unlawful and invalid but where it should nonetheless be allowed to stand. Bear in mind that a declaration of invalidity operates from inception.

Unlawful administrative action will be allowed to stand where adverse consequences will flow from an order declaring the administrative action unlawful and setting it aside. For example:

- third parties may have altered their position and may suffer prejudice if the administrative action is declared invalid; and
- a contractor who has not been guilty of any wrongdoing who has wrongly been awarded a tender may have entered into any number of subcontracts and incurred commitments to suppliers which it will be bound by but without having any recourse against the municipality or other organ of State that incorrectly awarded it the main contract.

The court exercises a discretion taking into account considerations of pragmatism and practicality and the desirability of achieving certainty in legal matters.

In deciding whether to set aside an invalid tender, a court must have regard to:

- the logistical legal and financial viability of doing so;
- the extent to which a contract has been completed;
- the ownership of materials;
- where a contract has been partially completed, whether the balance of the contract is legally and factually separable and could be put out to tender.

The SCA found that the Pretoria High Court had been wrong to allow an unscrupulous tenderer such as the Joint Venture to be rewarded with an entitlement to continue with a contract wrongly and unlawfully obtained.

The SCA stressed that the invalidity of the tender award was not merely the result of negligence or incompetence on the part of the Municipality and Joint Venture but was tainted by dishonesty and fraud.

It concluded that the only appropriate order in the circumstances was to set aside the tender award.

It accordingly upheld EsorFranki's appeal and ordered the Municipality to request the Department of Water Affairs to take over responsibility for the contract, to assess what remedial work was required and what work was required to complete the contract and to put that out to tender.

## Conclusion

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What did EsorFranki have to show for its perseverance and its very significant investment in legal costs? Very little it seems. A chance to bid for the completion of the contract works with no guarantee of success and for probably a less than meaningful profit margin.

What would EsorFranki have learnt from this experience? Quite a lot about civil procedure, appeal proceedings and the whereabouts of the Pretoria High Court.

EsorFranki has to be lauded for its perseverance and for not allowing blatantly fraudulent behaviour to go unchallenged. Unfortunately quixotic crusades can come at painful cost.

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