

January to March 2016 (1)

JQR Public Procurement 2016 (1)

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1. Legislation

No important legislation relating to public procurement was enacted in the period under review.

2. Cases

2.1 Standing to challenge tender awards

In *Secureco (Pty) Ltd v Ethekwini Municipality*² the court dealt with the question of standing to bring a judicial review application of a tender award. In this matter the respondent invited bids to provide it with payroll services, but failed to award the tender before the bids expired and did not request bidders to extend the bid validity periods either. The tender process thus lapsed. The respondent subsequently launched a new tender process for exactly the same services. While the applicant submitted a bid in the first tender process, it did not submit a bid in the second, because it was not aware of the second invitation. The respondent also allowed the bids received in the second tender process to lapse before making an award and attempted to award the bid long after the expiry date, again without requesting bidders to extend the bid validity period.

When the applicant brought an application for the review and setting aside of the tender award in the second tender process, the respondent's sole defence was that the applicant lacked standing. The respondent argued that since the applicant had not submitted a bid in the second tender process, it had no standing to challenge the award in that tender process. As a result, the respondent argued, the court should dismiss the application and let the tender award stand.

The court rejected the defence and found in favour of the applicant. The court held that since the tender award was patently unlawful it was in the public interest to allow the review application to proceed and thus to allow the applicant the standing to bring the review. With reference to the Constitutional Court judgment in *Giant Concerts CC v Rinaldo Investments (Pty) Ltd*,³ the court noted that 'broader concerns of accountability and responsiveness', militate against disposing of cases simply on the basis of standing.⁴ Since the present matter dealt with the lawfulness of an organ of state's award of a public tender, the court was clearly of the view that this is the type of case where such concerns of accountability and responsiveness called for the matter to be heard. The court noted that it would be contrary to

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² Unreported, referred to as [2016] ZAKZDHC 14, 1 April 2016; available online at www.saflii.org/za/cases/ZAKZDHC/2016/14.html.

³ 2013 (3) BCLR 251 (CC).

⁴ At para 15.

public interest if 'such a manifest waste of time and effort by Municipal officials should simply be ignored', which would be the case if the applicant is non-suited on standing alone.⁵

2.2 Condonation in terms of the Institution of Legal Proceedings against Certain Organs of State Act 40 of 2002

In two judgments the courts had to deal with non-compliance with the requirements of the Institution of Legal Proceedings against Certain Organs of State Act 40 of 2002 ('the Institution of Legal Proceedings Act') in the procurement context. In both *Premier Attraction 300 CC t/a Premier Security v City of Cape Town*⁶ and in *Nyumba Mobile Homes & Offices (Pty) Ltd v MEC: Department of Health Free State Province*,⁷ applications were brought for purposes of condonation in terms of s 3(4)(a) of the Institution of Legal Proceedings Act. In both of these cases, the applications for condonation were granted, ie the applicants were allowed to proceed with their respective cases against the contracting authority despite not having complied with the procedural requirements of the Act.

Section 3(1) of the Institution of Legal Proceedings Act prohibits legal proceedings for the recovery of a debt being instituted against an organ of state, save in cases where written notice of a creditor's intention to do so is provided; or where written consent is granted by the organ of state for the institution of the proceedings, either without notice or after receipt of a defective notice. Various requirements are provided in s 3(2). The relevant provisions of s 3(4) of the Institution of Legal Proceedings Act provide as follows:

- '(a) If an organ of state relies on a creditor's failure to serve a notice in terms of subsection (2)(a), the creditor may apply to a court having jurisdiction for condonation of such failure.
- (b) The court may grant an application referred to in paragraph (a) if it is satisfied that—
 - (i) the debt has not been extinguished by prescription;
 - (ii) good cause exists for the failure by the creditor; and
 - (iii) the organ of state was not unreasonably prejudiced by the failure.'

Creditors applying for condonation in terms of s 3 are saddled with the onus of establishing all of the requirements listed in sub-s (4)(b)(i)–(iii).⁸

In *Premier Security* the applicant's case for condonation for its failure to comply with the Act was fairly weak. It struggled to establish good cause for its failure to provide timeous notice. Flimsy contentions were proffered, such as the applicant having been 'under the impression

⁵ At para 13.

⁶ Unreported, referred to as [2016] ZAWCHC 30, 9 March 2016; available online at <http://www.saflii.org/za/cases/ZAWCHC/2016/30.html>.

⁷ Unreported, referred to as [2016] ZAFSHC 44, 17 March 2016; available online at <http://www.saflii.org/za/cases/ZAFSHC/2016/44.html>.

⁸ *Premier Attraction 300 CC t/a Premier Security v City of Cape Town* supra at para 19; *Nyumba Mobile Homes & Offices (Pty) Ltd v MEC: Department of Health Free State Province* supra at para 6.

that compliance with [the Institution of Legal Proceedings Act] would not feature in the litigations'.⁹

In contrast, the respondent raised a number of seemingly cogent points against condonation. Nevertheless, the court held that 'to deny condonation ... would ensure that applicant could not vindicate any rights which it enjoys under s 34 of [the Constitution], the spirit, purport and objects of which should figure in any such application'.¹⁰

The court in *Nyumba Mobile Homes & Offices* employed a purposeful approach to the s 3(4)(b) inquiry. In addition to the explicit requirements provided in the Act, the court had regard to the intention of the applicant as well as the interests of justice. With regards to the latter, the court acknowledged the fact that the applicant provided an important service to the relevant community under the procurement contract at issue. The court concluded in favour of the applicant, using its 'discretion in favour of the applicant and granting it the opportunity to have the claim tested according to the dictates of law and justice'.¹¹

2.3 Internal failures in a procurement process and liability on the basis of estoppel

In *Premier Attraction 300 CC t/a Premier Security v City of Cape Town*¹² the court considered whether a contracting authority could be held liable on the basis of estoppel.

In this matter the applicant sought payment from the respondent for certain additional services rendered in terms of a contract concluded between the applicant and the respondent on the basis of a tender award. However, the additional service requested by the respondent and in turn provided by the applicant was not in terms of an official purchase order, which was required by the respondent's Supply Chain Management Policy as a prerequisite for the respondent's liability. The respondent thus relied on these provisions of the policy as a defence to the applicant's additional claim.

The court relied on a distinction drawn by the SCA in *City of Twshane Metropolitan Municipality v RPM Bricks (Pty) Ltd*¹³ 'between an act beyond or in excess of the legal powers of a public authority ... and the irregular or informal exercise of power granted'. The respondent's defence to the additional claim in *Premier Security* was held to fall under the second category described in this distinction, which meant that the applicant was 'entitled to assume that all the necessary arrangements or formalities [had] indeed been complied with', and was entitled to rely on estoppel in the case of the respondent raising the defence of non-compliance with certain internal formalities, allegedly resulting in the respondent's liability being absolved.¹⁴

3. Literature

De la Harpe, S 'Procurement under the UNCITRAL model law: A Southern Africa perspective *PER/PELJ* (2015) 18(5) 1572

⁹ At para 23.

¹⁰ At para 31.

¹¹ At para 19.

¹² Unreported, referred to as [2016] ZAWCHC 30, 9 March 2016; available online at <http://www.saflii.org/za/cases/ZAWCHC/2016/30.html>.

¹³ 2008 (3) SA 1 (SCA) at para 11.

¹⁴ At para 12.

<<http://www.nwu.ac.za/sites/www.nwu.ac.za/files/files/per/issuepages/2015volume18no5/2015%2818%295DelaHarpe.pdf>>