REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 19548/2015

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

3.viii.16

In the matter between:

AIRPORTS COMPANY SOUTH AFRICA **Applicant**

and

TSWELOKGOTSO TRADING ENTERPRISES CC **Respondent**

JUDGMENT

UNTERHALTER J

INTRODUCTION

1. The Airports Company South Africa (ACSA) brings proceedings for judicial review to set aside its own decision to award a tender for grass cutting and vegetation services ("the services") to the respondent, Tswelokgotso Trading Enterprises CC (TTE).

2. The review was originally brought under the provisions of the Promotion of Administrative Justice Act 3 of 2000 (PAJA). In the light of the recent decision of the Constitutional Court in *Gijima,*[1] ACSA pursues its review on the basis of legality review, without objection from TTE.

3. The grounds of review relied upon by ACSA in its founding affidavit and supplementary affidavit are stated to be errors of fact committed by ACSA in awarding the tender to TTE. These errors of fact fall into two categories. First, ACSA says that it disqualified bidders when it should not have done so. Second, ACSA permitted TTE's bid to be considered and ultimately awarded the tender to it, when TTE should have been disqualified from

[1] *State Information Technology Agency SOC Limited v Gijima Holdings (Pty) Limited* 2018 (2) SA 23 (CC).

consideration because, at the time that TTE submitted its bid and had its bid evaluated, ACSA had issued letters of non-performance to TTE in respect of TTE's subsisting agreement with ACSA to render the services.

4. Since ACSA's review is predicated upon the application of the principle of legality, I consider, first, error of fact as a ground of review under the principle of legality. Once, the conceptual scope of error of fact has been determined, I consider whether ACSA has made out its case.

ERROR OF FACT AND THE PRINCIPLE OF LEGALITY

5. Judicial review under the principle of legality has come to assume an ever greater significance in our public law. Originally conceived as a residual and limited form of scrutiny, of application to the exercise of powers that do not constitute administrative action, the principle of legality has been recognized in two ways that have greatly enhanced its centrality.

6. First, the principle of legality is of application to the exercise of all public power. The exercise of a power that is not administrative action falls under the discipline of the principle of legality. Less clear is whether recourse to the principle of legality applies only residually, where an applicant seeks to review administrative action. This position is based on the constitutional primacy that PAJA enjoys and considerations of subsidiarity. The other stance is that the review of administrative action may rely upon the principle of legality, whether or not the PAJA offers a basis for determining

the matter. The Constitutional Court has given different guidance on these issues.[2] But if the principle of legality is of application to the exercise of all public power, without regard to subsidiarity considerations, its reach is cast wide.

7. Second, the range and intensity of review permitted by the principle of legality has enjoyed some expansion by way of judicial interpretation. Central to the principle of legality are the requirements that for a public power to be exercised lawfully it may not be exercised *ultra vires;* the holder of the power must act in good faith and must not have misconstrued the power conferred; nor may the power be exercised arbitrarily or irrationally.[3] It is the requirement of rationality, as an incident of legality, that has given rise to some significant expansion of judicial review under the principle of legality. Rationality has been found to encompass considerations of procedural fairness,[4] the duty to give reasons[5] and to take into account relevant material in reaching a final decision.[6] This broad conception of rationality has meant that the principle of legality covers much territory that is also to be found in the grounds of review specified in

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[2] See *Albutt v Center for the Study of Violence and Reconciliation and Others* 2010 5 BCLR 391 (CC) where the court allowed the case to be determined on the basis of legality review, but in *Minister of Defence and Military Veterans v Motau and Others* 2014 (5) SA 69 (CC) at para 27 ft 28 asserted the priority of PAJA. And now *State Information Technology Agency SOC Limited v Gijima Holdings (Pty) Limited* 2018 (2) SA 23 (CC) brief outline of its position.

[3] *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* 1998 (12) BCLR 1458, *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 1999 (10) BCLR 1059 and *Pharmaceutical Manufacturers Association of South Africa and Another: In re EX Parte President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC).

[4] Ncobo CJ in *Albutt* at para 72.

[5] *Judicial Services Commission and Another v Cape Bar Council and Another* 2013 (1) SA 170 (SCA) at para 51.

[6] *Democratic Alliance v President of South Africa and Others* 2013 (1) SA 248 (CC) at para 39.

PAJA. Whether this concurrence is warranted under the separation of powers is a matter of on-going consideration.

8. In a number of appeal court decisions, mistake of fact has been recognized as a ground of review, both under the principle of legality and in terms of PAJA.[7] In *Pepcor*, the SCA reasoned that a functionary cannot render a proper decision made in ignorance of material facts. But then cautioned that, in order to avoid collapsing the distinction between appeal and review, where the functionary is vested with the power to determine whether facts exist and whether facts are relevant, a court on review could not interfere if the functionary was in error as to these matters.

9. This demarcation of the ambit of review for mistake of fact is not without difficulty. It rests on the proposition that a functionary may not lawfully make a decision based upon an error as to the material facts unless the functionary enjoys the power to establish those facts, in which event such an error is not reviewable.

10. In *Dumani,*[8] the SCA returned to the ambit of review for mistake of fact. Citing the cautionary remarks in *Pepcor,* to which I have referred, the Court held that where the functionary enjoys the power to make findings of

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[7] *Pepcor Retirement Fund and Another v Financial Services Board and Another* 2003 (6) SA 38 (SCA) at paras 47 and 48; *Chairpersons Association v Minister of Arts and Culture* 2007 (5) SA 236 (SCA) at para 48; *Government Employees Pension Fund Provincial Government of Gauteng v Buitendag and Others* 2007 (4) SA 2 (SCA) at para 12; *Chairman, State Tender Board v Digital Voice Processing (Pty) Ltd; Chairman, State Tender Board v Sneller Digital (Pty) Ltd and Others* 2012 (2) SA 16 (SCA) at para 34 and *Dumani v Nair* and Another 2013 (2) SA 274 (SCA) at paras 32 and 33

[8] Loc cit.

fact, mistake of fact as a ground of review is confined, following English law, to situations in which a mistake is made as to an existing material fact, established in the sense of being uncontentious and objectively verifiable.[9]

11. *Dumani*, in my view, enlarges the ambit of review on the grounds of mistake of fact. Even where the functionary enjoys competence as the finder of facts, an error made as to a material fact that was established, in the requisite sense, is reviewable. The qualification in *Pepcor* ousted review for mistake of fact, even if material, where the functionary enjoyed the power to determine the relevant facts. In *Dumani,* a functionary, though empowered as a finder of fact, who renders a decision mistaken as to a material fact which was established as uncontentious and objectively verifiable, has made a reviewable error.

12. In sum, a court may interfere where a functionary exercises a competence to decide facts but in doing so fails to get the facts right in rendering a decision, provided the facts are material, were established, and meet a threshold of objective verifiability. That is to say, an error as to material facts that are not objectively contestable is a reviewable error. The exercise of judgment by the functionary in considering the facts, such as the assessment of contested evidence or the weighing of evidence, is not reviewable, even if the court would have reached a different view on these matters were it vested with original competence to find the facts.

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[9] This formulation follows the adoption of the test in English law for review on the grounds of mistake of fact in *E v Secretary of State for Home Department* [2004] EWCA Civ. 49 (2 February 2004).

13. This test fits tolerably well with the conception of rationality that has been laid down by the Constitutional Court in *Democratic Alliance.*[10] In that case, Yacoob ADCJ held that a failure to take into account relevant material is a failure constituting part of the means to achieve the purpose for which the power was conferred. Rationality is determined under a three part test.

> "*The first is whether the factors ignored are relevant; the second requires us to consider whether the failure to consider the material concerned (the means) is rationally related to the purpose for which the power was conferred; and the third, which arises only if the answer to the second stage of the enquiry is negative, is whether ignoring relevant facts is of a kind that colours the entire process with irrationality and thus renders the final decision irrational.*"

14. The articulation of mistake of fact as a ground of review in *Pepcor* and *Dumani* is rather more exacting as to what kind of facts a functionary would have to be mistaken about in order to give rise to reviewable error. The approach in *Democratic Alliance* focuses on the impact of the error on achieving the purpose for which the power was conferred so as to render a rational final decision. However, these approaches are likely to yield similar outcomes because it is hard to conceive of how a failure to take account of a material incontestable fact would nevertheless permit of a rational final decision consistent with the purpose for which a power has been conferred.

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[10] See in particular the consideration of rationality and ignoring relevant factors at [38] and [39].

15. There remain conceptual issues of considerable complexity that the courts will have to determine in this area of law. First, should the principle of legality be interpreted so expansively that many grounds of review are practically co-extensive with the grounds of review under PAJA, given the application of the principle to all public powers and the respect that is due to the constitutional value of the separation of powers? Second, is error of fact, as a ground of review, now cast so broadly, under all articulations of the applicable test, that it breaches the distinction between rationality and reasonableness review? And finally, since error of fact permits a court to interfere on the basis that a decision must meet a standard of correctness, does judicial review now trespass upon the domain of appeals?

16. I am of course bound to apply the law as it has been developed by the Constitutional Court and the Supreme Court of Appeal. And I do so. I have set out my understanding of the law on error of fact because the law has been subject to some development and this is the ground of review upon which ACSA relies in this review.

ACSA's GROUNDS OF REVIEW AND THE ERRORS RELIED UPON

17. ACSA relies upon two broad grounds of review. In the first place, ACSA says that the tender originally required compliance with a standard – ISO 9001. ACSA sought to replace this requirement, obliging bidders rather to submit their own Quality Management System. This amendment was effected by an addendum. ACSA required the addendum to be signed and

returned by bidders with their bids. ACSA avers that it failed to inform bidders that their failure to sign and return the addendum would result in disqualification. One class of bidders was disqualified because they failed to sign and return the addendum. But, says ACSA, this class of bidders was not informed that their failure would result in their disqualification. A second class of bidders, ACSA avers, did sign and return the addendum, but were nevertheless wrongly disqualified. I shall refer to this ground of review as the complaint of disqualification invalidity.

18. The second ground of review advanced by ACSA is this. ACSA prescribed that as at the date of bid specification, advertisement, evaluation or adjudication, no letter of non-conformance or non-performance should be in effect in respect of a bidder. If this prescription was not met, a bidder was disqualified from consideration. There were three non-conformance letters issued by ACSA against TTE at the relevant dates. TTE should have been disqualified. But its bid was evaluated and the tender was awarded to it. This, it is said, is a reviewable error. I shall refer to this ground of review as non-conformance invalidity.

19. It is of some importance clearly to identify the errors of fact upon which ACSA relies. The complaint of disqualification invalidity comprises two kinds of error. The first is that bidders were disqualified without being informed of the consequence of non-compliance. But what existing fact was ACSA mistaken about? Not as to non-compliance with the requirement to sign and return the addendum since these bidders did fail to meet this requirement. The issue is rather that the bidders were not

informed of the consequence of non-compliance. This, as *All Pay*[11] recognizes, might give rise to a want of fairness, but it is not an error of fact.

20. The second kind of error in respect of the complaint of disqualification invalidity references bidders who did sign and return the addendum but were nevertheless disqualified. Here ACSA was in error, on the case put up by it, because it considered these bidders to be non-compliant when they were indeed compliant. The issue for me to determine is whether this error has been established and meets the requirements of error of fact as a ground of review.

21. I mention briefly an issue related to the complaint of disqualification invalidity. In its papers, ACSA does appear to rely upon the contention that although ISO 9001 was no longer a requirement of the tender, and bidders were informed of this change, ACSA says that reference to ISO 9001 was not entirely removed from the tender documents and this may have caused confusion.

22. At the hearing of this matter, counsel for ACSA clarified ACSA's case. The lingering references to ISO 9001 was not relied upon as a ground of review but simply as background information relevant to the change that gave rise to the addendum. That clarification is well made. There is no error of fact, much less a material one on this score. Nor even is there

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[11] *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others* 2014 (1) SA 604 (CC).

unfairness (a ground of review not advanced) because bidders were informed that ISO 9001 was not a functionality requirement of the bid and there is no showing that any bidder detrimentally relied on the unexpurgated references to ISO 9001.

23. I turn then to the error of fact relevant to the ground of review based upon non-conformance invalidity. The error relied upon by ACSA is that certain members of the Bid Evaluation Committee (BEC), including the chairperson, were not aware that non-conformance letters had been issued and were in effect in respect of TTE so as to disqualify it from consideration. The difficulty for ACSA, in the first place, is that one member of the BEC, Mr Tladi, did know of the non-conformance letters issued to TTE but failed to bring them to the attention of the chairman because he thought they had been withdrawn. ACSA disputes the correctness of Mr Tladi's understanding of the matter. ACSA's case is that it proceeded in error to consider TTE's bid when it should have been disqualified because the members of the BEC were ignorant of the letters of non-conformance, save for Mr Tladi, who was mistaken as to the fact that the letters had been withdrawn.

24. I proceed to consider whether these errors of fact give rise to supportable grounds of review.

DISQUALIFICATION INVALIDITY

25. I recall that to make out a case on review on the basis of mistake of fact, an applicant must show that the decision was vitiated by error as to a material fact that is uncontentious and objectively verifiable.

26. The disqualification of 13 bidders on the basis that they signed but did not complete the addendum is said to be irregular. But as I have already indicated, the irregularity relied upon by ACSA is not that these bids were in fact compliant but rather that these bidders were not informed of the consequence of non-compliance.

27. That is not an irregularity concerning an error of fact but a complaint of unfairness. The pleaded ground of review by ACSA is error of fact. Accordingly, this irregularity cannot be sustained because unfairness is something different from error of fact.

28. But in any event, this irregularity cannot succeed even if a case of unfairness had been made out. The unfairness, if any, is done to the excluded bidders. They do not complain of their exclusion. It is not unfair to ACSA. The exclusion of these bidders only affects ACSA if it skewed the competitive bidding so as to impact the outcome of the tender. No such case is made by ACSA.

29. Furthermore, although the e-mail from ACSA to the bidders that contained the addendum[12] warns bidders that a failure to return the addendum will

[12] Annexure BM5 read with BM6.

result in the bidder being disqualified, the e-mail also states plainly that the addendum forms part of the tender and must be submitted with the tender document. No reasonable reader of this e-mail, read together with what was required to be completed on T2.2 of the addendum, would have been in any doubt that a failure to sign, complete and return the addendum would result in disqualification.

30. It follows that the exclusion of the 13 bidders for failure to complete the addendum was in any event permissible.

31. ACSA then raises the fate of three bidders who, it is said, the BEC excluded even though they had signed and completed the addendum. The difficulty that ACSA faces on this aspect of the matter is that its averments do not meet the standard for reviewable errors of fact. What is said in the founding affidavit and supplementary founding affidavit is that the three bidders signed and completed the addendum. It is not said that the addendum was returned to ACSA. Nor is any explanation offered as to how the BEC came to fall into error on this score, given that the chairman of the BEC, Mr Rapulana, whose unsworn statement is attached to the founding affidavit, states that:

"we disqualified bidders who did not acknowledge receipt of the addendum on page T2.2 record of addenda (Annexure 3) in the tender document."

32. TTE in its answering affidavit disputes that ACSA has made a proper case to demonstrate the error it relies upon. I agree. In the founding affidavit ACSA failed to put up the BEC Report, though it promised to do so. It failed to reference the documents which would bear out the contention that the three excluded bidders did indeed return the addenda, duly completed and signed. The documents in the record that do reflect signed addenda are not correlated with the named bidders who were excluded. Nor is there any explanation given as to how the error was made by the BEC. ACSA has simply failed to make a case on the basis of facts that are uncontentious and verifiable. Accordingly, if the BEC did fall into error, that error is not shown to be based on material facts that meet the required standard.

33. Some reliance is also placed upon the exclusion of a bidder who signed the addendum but did not complete it. It is not clear why this bidder stands apart from the excluded 13, but, for the reasons given, exclusion for non-completion and a failure to return the addendum was permissible.

34. Finally, something is said in the founding affidavit as to the inconsistent treatment of bidders in respect of disqualification and qualification. This is not relied upon as an articulated ground of review. But even if it was, the alleged inconsistency rests upon errors of fact, a case for which has not been made out.

35. Accordingly this ground of review must fail.

NON-CONFORMANCE INVALIDITY

36. ACSA's second ground of review is that TTE's bid ought to have been disqualified on the basis that three non-conformance letters had been issued against TTE before it submitted its bid.

37. Considerable effort was devoted by counsel for the parties in making their submissions on this aspect of the matter. The issues included the following: were the letters issued in conformity with ACSA's non-conformance policy; did the official who issued the letters act with an improper motive; and were the letters in effect at the time that the bid was submitted?

38. The answering affidavit of TTE traverses these issues in some detail in order to substantiate why it is that no letters of non-conformance were in effect at the time that its bid was submitted.

39. It is unnecessary for me to resolve the disputes of fact between the parties on this score. It suffices to observe that the disputes are thorough going. There is no need to have recourse to the rule in *Plascon Evans* to resolve these disputes because it is quite apparent that ACSA cannot on the affidavits before me meet the standard that is of application in a review based upon an error of fact. ACSA simply cannot establish the facts that show TTE had three (or indeed any) letters of non-conformance issued against it and operative at the time TTE submitted its bid or thereafter. The

evidence as to the issues concerning the non-conformance letters issued against TTE is contentious, and very far from being objectively verifiable.

40. This case illustrates the limitations of a review predicated upon error of fact. If the applicant cannot establish the facts, as to which an error was made, to the standard required, the review must fail. ACSA has clearly failed to establish uncontentious and objectively verifiable facts that demonstrate that valid letters of non-conformance were issued against TTE and were in effect at the relevant time.

41. ACSA's review on the basis of non-conformance invalidity must accordingly fail.

CONCLUSION AND REMEDY

42. ACSA sought condonation for the late filing of its replying affidavit. This was opposed. I find it unnecessary to determine this issue, given the basis upon which I have concluded that ACSA's review cannot succeed. Further averments in the replying affidavit would, if anything, only compound the difficulty for ACSA in making out a case for reviewable error of fact. There was some attempt in the replying affidavit to expand the grounds of review beyond mistake of fact. But no justification was provided for this. Even if the late filing of the replying affidavit could have been condoned (upon which I venture no view), there was no warrant to entertain a case on new

grounds not traversed in the founding affidavit and supplementary founding affidavit.

43. In the result the application is dismissed with costs, such costs to include the costs of two counsel, where two counsel were employed.

David Unterhalter

Judge of the High Court

Gauteng Local Division: Johannesburg.

Date of Hearing: 7 June 2018

Judgment Delivered: 22 June 2018

Appearances:

Advocate for the Applicant: Adv E Mokutu instructed by SGV Attorneys

Advocate for the Respondent: Adv D Watson instructed by Beder-Friedland Inc.