

Zikhulise Cleaning Maintenance and Transport CC v The Chairman of the Investigating Committee of the Construction Industry Development Board [2010] ZASCA 181 (2 December 2019)

Introduction

The Construction Industry Development Board (**CIDB**) was established in terms of the Construction Industry Development Board Act, No. 38 of 2000 (**the Act**).

The CIDB has the obligation to promote uniform and ethical standards in the construction industry and to publish a Code of Conduct (**the Code**) for all construction related procurement and all participants in the procurement process.

The CIDB is also obliged to establish a National Register of Contractors to facilitate public sector procurement and promote contractor development.

Contractors may apply to the CIDB for registration which remains valid for a period of three years.

Every organ of State has to apply the Register of Contractors in its procurement processes.

Unregistered contractors are not permitted to undertake public sector construction work.

CIDB investigations

Regulations promulgated under the Act provide for procedures relating to investigations into complaints concerning contractors and the holding of formal enquiries into such complaints.

This procedure entails:

- a. Appointment by the CIDB of an investigating officer to do a preliminary investigation to:
 - (i) verify whether the CIDB has jurisdiction;
 - (ii) ascertain whether reasonable grounds exist for the complaint;
 - (iii) collect relevant evidence; and
 - (iv) submit a report to the CIDB dealing with the evidence and the investigating officer's conclusions and containing a recommendation as to further action.
- b. After considering the report, the CIDB can pursue a formal enquiry into the matter.

The *Zikhulise* case

A contractor of some notoriety in KwaZulu-Natal, Zikhulise Cleaning Maintenance and Transport CC (**Zikhulise**), registered with the CIDB as a contractor for various periods between December 2005 and September 2015.

In April 2013, the CIDB notified Zikhulise that it had been the subject of an investigation and that it had in a number of instances contravened the Act and the Code.

The CIDB's notice particularised twenty (20) charges against Zikhulise.

Such notice went on to inform Zikhulise that the CIDB intended to institute a formal enquiry.

Zikhulise challenged the threatened formal enquiry on the grounds that:

- a. the CIDB lacked jurisdiction because Zikhulise was not a registered contractor at the time that the complaints arose;
- b. the charges were not covered by the Code since it related to conduct between parties to the Code and not between contractors and the CIDB; and
- c. the CIDB had in any event failed to comply with the requirements for instituting a formal enquiry as described above.

Zikhulise applied to the Gauteng Division of the High Court, Pretoria, for an order reviewing and setting aside the CIDB's decision to proceed with a formal enquiry.

The judge rejected Zikhulise's argument that, because it was not registered as a contractor with the CIDB at the time the complaints arose, the latter could not pursue charges against it.

Without considering Zikhulise's other grounds, the court refused to set aside the CIDB's decision.

Zikhulise appealed to the Supreme Court of Appeal (**SCA**) in Bloemfontein.

On appeal to the SCA, Zikhulise did not challenge the earlier High Court ruling that a contractor could not escape being charged in terms of a formal enquiry on the grounds that it was not a registered contractor at the relevant time. On this basis the SCA did not devote any attention to the point nor make any finding on it.

The SCA focused on the other grounds raised by Zikhulise in challenging the CIDB's right to proceed with a formal enquiry.

In this regard, the SCA found that:

- a. The Code relates to what is acceptable conduct on the part of various parties in the procurement process in the construction industry. It prescribes how those parties should deal with each other in construction related procurement, which requires of them that they must behave equitably, honestly, transparently and comply with all applicable legislation; and
- b. The relationship between participants in the procurement process, such as contractors on the one hand, and the CIDB, on the other hand, is governed by the Act and Regulations and enforced by way of criminal sanction – and not through the Code.

The SCA then examined the various charges levelled against Zikhulise.

Of the twenty (20) charges, seventeen (17) of them related to Zikhulise having submitted false or fraudulent information and certificates and financial information to the CIDB relevant to its registration as a contractor.

One charge related to its failure to disclose the fact that one of the persons involved with Zikhulise had been convicted on charges of fraud. The two remaining charges related to the failure by Zikhulise to have disclosed criminal convictions of the same person in three compulsory enterprise questionnaires submitted by it to the KwaZulu-Natal Department of Public Works relating to a tender.

The SCA ruled that the seventeen (17) charges relating to Zikhulise's alleged fraudulent and dishonest conduct fell outside the ambit of the Code. The conduct concerned related to untoward conduct as between Zikhulise and the CIDB, as opposed to conduct between participants in the procurement process.

What the CIDB should have done was to institute a criminal prosecution of Zikhulise as the conduct complained of fell fairly and squarely within conduct that is prohibited in terms of the Regulations published in terms of the Act.

The SCA found that the last three charges were amenable to a formal enquiry by the CIDB as contraventions of the Code, because they related to alleged dishonest conduct by Zikhulise in the procurement process with another participant in that process, namely the KwaZulu-Natal Department of Public Works.

The SCA went on to analyse whether the CIDB had followed the procedures required before instituting a formal enquiry and found that the CIDB had fallen woefully short in that regard.

The investigating officer appointed by the CIDB did not carry out the preliminary investigation envisaged, nor did he report to the CIDB with his recommendations. The CIDB had accordingly prematurely decided to proceed with a formal enquiry before having followed the correct procedures.

The CIDB attempted to address its failure by asserting that it had substantially complied with the requirements and that had it complied with the procedures relating to the KwaZulu-Natal Department of Public Works' complaint, as well as that it would in any event have laid criminal charges. The SCA's answer to this was to find that there had been no compliance at all, let alone substantial compliance.

The upshot was that the SCA held that the charges against Zikhulise be dismissed.

Conclusion

The CIDB's failure to adopt the correct procedure, first by instituting a criminal prosecution in relation to the alleged unlawful conduct of Zikhulise in submitting fraudulent documentation and

information to it and, second, in not adhering to the required procedure for enquiries under the Code, resulted in serious matters not being given the proper attention so that a proper finding on the merits could not be made.

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