



REPUBLIC OF BOTSWANA

IN THE LAND TRIBUNAL
HELD IN FRANCISTOWN

Case No. FLT LB 016/17

IN THE MATTER BETWEEN

ISAIAH LEKGOKO

APPELLANT

And

TATI LAND BOARD

RESPONDENT

Coram: B. Mokakangwe
G. Tobedza
J. Gabanamotse

APPEARANCES: I. L. Lekgoko (Appellant in person)
G. B. Habana (Respondent's Board Chairman)
M. Nzehengwa (Respondent's Deputy Board Secretary)
S. O. Pitinyane (Respondent's Senior Land Adjudication Officer)

JUDGMENT

B. MOKAKANGWE

1. The Appellant is challenging the Respondent's decision disapproving his application for a farm within the Tati Tribal area under *TENDER FOR THE LEASE OF MATSILOJE / MATOPI COMMERCIAL FARMS IN THE NORTH EAST DISTRICT (TENDER NO. TLB/02/2016)*. The Respondent's ground of rejection was that the Appellant failed to attain the set minimum interview pass mark during the interview.

BACKGROUND

2. The Respondent nationally advertised to the public a tender for lease of Matsiloje/ Matopi commercial farms under Tender Reference No. TLB/02/2016. The Tender issuing date was the 25th April 2016 closing on the 24th May 2016. The tender had categorised the farms into small, medium and large scale farms. The Appellant in this matter had applied for a large scale farm measuring 174ha marked as Farm No. 11.
3. According to the provisions in the Tender Notification, a successful bid had to go through three evaluation stages; 1. Preliminary examination for compliance, 2. Technical evaluation and 3. Oral interview. In order to be considered for grant of the farm, a bidder had to meet the set requirements of each stage. The Respondent had appointed an Evaluation Task Team/ Assessment Team which included representatives from the Ministry of Agriculture tasked with evaluating Stage 2 of the tender evaluation. A bidder who scored 65% and above on

technical evaluation proceeded to the final stage 3, of the process i.e. the Oral Interview. The oral interview which was to be conducted by members of the Respondent contributed 25% of the total score. The tender notification also showed that the basis of award will be that the bidder with the highest score on each plot will be the one deemed successful and that plots will be allocated on equity basis.

4. The Appellant was invited for the third stage part of the evaluation process being the oral interview by the Respondent, after proceeding from the first 2. Thereafter, the Respondent at its sitting of the 21st – 30th November 2016 resolved as follows;

“The Board resolved to reject your application on grounds that you did not attain the set minimum interview marks during the interview”.

Aggrieved thereby, Appellant lodged this appeal.

APPELLANT’S CASE

5. The Appellant informed court that he tendered for a lease of advertised farms in the Matsiloje and Matopi area and that he applied for Farm No. 11 which is in large scale category. He stated that he fully complied with the tender requirements and proceeded to the final stage of the evaluation process i.e. the oral interview. On the 13th January 2017, Appellant however received a correspondence from the Respondent informing him that he has not been successful in the tender. He then

requested a debriefing from the Respondent. The debriefing occurred on the 6th April 2017 whereupon he learnt that during the Oral Interview stage he scored 22 points out of possible maximum of 25. He stated that he had scored the highest marks among all the bidders. He also learnt that 4 of the available farms have already been allocated and 8 are remaining as the bidders failed to meet the set mark. Appellant stated that he was informed that his overall mark was 60% while the Respondent has set the overall mark for a bidder to be allocated a farm at 65.

- 6.** Appellant complained that the Respondent has changed the marking key without informing the bidders as shown in their grounds of defence at paragraphs “f” and “g”. The paragraphs indicate that upon realizing that at Stage 2 of the evaluation, few bidders had obtained the set pass mark, the Respondent decided to allow top 20 scoring bidders to proceed to oral interview stage abandoning the criteria set in the Tender document. The Appellant argues that he was one of those top 20 bidders and as the highest scorer in the oral interview, he qualifies to be allocated a farm. The Appellant contended that his overall is 63% being the sum of his weighted technical evaluation mark and his oral interview mark.
- 7.** Appellant further told court that the set overall mark of 65% is not acceptable as it was never divulged beforehand. The court

was informed that the change of set criterion by the Respondent is un-procedural in that it was done to favour certain applicants which should never be tolerated. He suggested that the lowering of required marks was done during the evaluation stage in order to benefit certain individuals with ties to the Respondent. The court was further persuaded to make a finding that by being invited to oral interview stage and performing extremely well Appellant had legitimate expectation that he will be allocated the farm. He concluded by praying that if a combined overall mark is to be used, the pass mark be made 60% or only the marks from the oral interview be used.

RESPONDENT'S CASE

8. The Respondent's chairman submitted that, following the advertised tender for a lease of commercial farms in the Matsiloje-Matopi area, the Respondent was charged with a 3-stage evaluation process. The Respondent's position is that for a bidder to be allocated a farm, they had to be successful in all the 3 stages. The Chairman informed court that in order for one to proceed to the final stage of the oral interview they should have passed compliance stage and scored 65% or above in the Technical Evaluation Stage or Stage 2.
9. The court was informed that the Appellant had successfully passed Stage 1 and later scored 38% on the Technical Evaluation (Stage 2). Having realized that few applicants had

failed to qualify for Stage 3, the Respondent decided that for large scale tenderers, the top scoring 20 bidders be allowed to proceed to stage 3. This new arrangement allowed the Appellant to qualify. He was therefore invited for oral interview, and obtained a score of 22%. The pass mark having been later set at 65% he only scored 60% and therefore was rendered ineligible to be granted the large scale category farm he tendered for.

ISSUE FOR DETERMINATION

- 10.** The Land Tribunal is to determine whether the decision taken by the Respondent to conclude that the Appellant's bid for a farm was unsuccessful on the basis of the evaluation procedure adopted was valid.

COURT'S FINDINGS AND DETERMINATIONS

- 11.** In the matter at hand it is common cause that in response to a publicised tender by the Respondent, the Appellant's bid succeeded in the first stage of compliance and scored 38 points in the second stage of technical evaluation. Thereafter, the Appellant was invited to the final stage of oral interview where he scored 22% out of the possible 25%. It is the Appellant's case that his bid's splendid performance in the evaluation stages should have resulted in him being allocated the farm he had applied for. The Appellant averred that his invitation to the oral interview stage which was final created a legitimate expectation

that should he do well at oral interview stage he would be granted a farm. The Appellant was somewhat irked by the apparent change of goal posts by the Respondent in the middle of the game which he argued should not be allowed.

12. It is a long established principle in fair and responsive tendering processes that public bodies or procuring entities must award tenders on the basis of the criteria set forth in the tender solicitation documents. In the matter at hand there are 2 instances in which the Respondent amended the criteria for evaluation of bids without notifying the tenderers which resulted in material impact on the outcome of the tender process. In the first instance, Respondent has unilaterally varied the requirement for procession from Stage 2 to Stage 3 which initially required a pass mark of 65% to an arrangement where top 20 scoring bidders would proceed after realising that very few qualified to proceed. The court observes that the variation even though not admirable in this instance is administratively permissible as it was effected with the aim of benefiting tenderers. The court in assessing the acceptability of this aspect of Respondent's action relied on the principle espoused by Niechers in *Administrative Law* at page 169 where he states that:

“A valid beneficial disposition may be revoked or repealed by its author only if there is express or

necessary implied statutory authorization for revocation or if the revocation would be to the greater advantage of the beneficiary.”

13. The Respondent further introduced another variation in the tender evaluation process where the basis of award was deviated from. It originally stated “*the tender will be awarded to the bidder with the highest score on each plot*” to the set overall pass mark of 70% which was further lowered to 65% for large scale farms. The departure from the publicized basis of award of the tender to the one of the set pass mark by the Respondent has attracted justifiable attack. The decision has evidently unfairly disenfranchised a number of bidders and this was unprocedural. The Land Tribunal therefore faults the Respondent in this regard.
14. New Zealand court in a matter between **Problem Gambling Foundation of New Zealand and the Attorney General CIV-2014-404-1219[2015] NHHC 1701**, held that introducing new sub-criteria for evaluation and changing weightings after the responses were received or introducing a new process or moderation into the evaluation without notifying bidders can result in the tender decision being set aside. It is clear from the case that public bodies are legally not permitted to introduce new criteria; or score responses based on information that they haven’t directly asked for and cannot introduce new sub-

processes that have not been fully described in the tender documents.

15. In the matter at hand, Appellant has argued albeit not rigorously that a legitimate expectation for award was established when he was invited to the Oral interview stage and he performed well there. In order to assess the validity of this claim reference is made to the case of **Controller of Customs v Terminals (NZ) Ltd the Court of Appeal** where legitimate expectation was discussed as follows:

“Establishing a legitimate expectation in administrative law is not dependent on the existence of a legal right to the benefit or relief sought. The expectation might be engendered by promises that a particular authority will act in a certain way or by the adoption of a settled practice or policy which the claimant can reasonably expect to continue.

A promise of the kind alleged may be express or implied.

Legitimate expectation is to be distinguished from a mere hope that a cause of action will be pursued or a particular outcome gained. To amount to a legitimate expectation, it must, in

the circumstances (including the nature of the decision-making power and of the affected interest) be reasonable for the affected person to rely on the expectation.”

16. The Court set out a three step test as follows:

“Where legitimate expectation is raised, the inquiry generally has three steps. The first is to establish the nature of the commitment made by the public authority whether by a promise or settled practice or policy. This is a question of fact to be determined by reference to all the surrounding circumstances. A promise or practice that is ambiguous in nature is unlikely to be treated as giving rise to a legitimate expectation in administrative law terms.

The second is to determine whether the plaintiff’s reliance on the promise or practice in question is legitimate. This involves an inquiry as to whether any such reliance was reasonable in the context in which it was given.

The third, and often most difficult part of the inquiry, is to decide what remedy, if any, should

be provided if a legitimate expectation is established.”

- 17.** In the matter at hand it was expressly stated that the highest scoring bidder will be awarded a farm as publicized in the tender solicitation documents. The Appellant’s legitimate expectation would be established if he had scored the highest mark for an available farm he had applied for. It is not alleged by the Appellant that he was the highest bidder in this matter. It is not clear either in the court’s record or in evidence led whether he was the highest bidder or not. In light of the above the Appellant only hoped to be awarded but he could not have legitimately expected to be awarded. Legitimate expectation was not induced that he will win and the court so finds. It is against this backdrop that the Land Tribunal finds that the resolution of the Respondent lacks merit and should be set aside and accordingly orders as follows:

(a) The appeal **PARTIALLY SUCCEEDS**.

(b) The Respondent is directed to re-evaluate all the applicants who attended the oral interview stage but were not awarded farms for possible award of remaining farms taking into consideration both the technical score and oral interview scores, in line with the initial set basis of award i.e;

- (i) The tender to be awarded to the bidder with the highest score on each plot.
- (ii) The plots are to be allocated on equity basis. Bidders who have been allocated an arable plot in the past and such plot is still undeveloped will be disqualified. Furthermore, no applicant will be awarded more than one plot from this tender.

(c) No order as to cost is made.

The parties are informed of their right to appeal to the High Court within eight (8) weeks of delivery of this judgment if any feels aggrieved.

Delivered in Francistown this **15th** day of **September 2017**.

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B. MOKAKANGWE
PRESIDENT OF THE LAND TRIBUNAL