

789

"BT 3"

5

789

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG LOCAL DIVISION, JOHANNESBURG)

CASE NO:

In the matter between:

PASSENGER RAIL AGENCY OF SOUTH AFRICA

Applicant

and

SWIFAMBO RAIL LEASING (PTY) LTD

Respondent

FOUNDING AFFIDAVIT

I, the undersigned

POPO SIMON MOLEFE

do hereby make oath and state

1. I am an adult businessman. I am currently the chairperson of the board of control of the applicant. I am duly authorised to bring this application and to depose to this affidavit on behalf of the applicant in terms of a resolution of the board of control of the applicant.


PS
SM

converted into a toilet for the operator. A second cab had a cost implication as all the driver controls and displays had to be duplicated. Vossloh's locomotive had two cabs.

54
838

16.4.10. A monocoque structure was specified. Vossloh's locomotive also had a monocoque structure. Monocoque structures are more difficult to service as access to components for maintenance is made more difficult.

16.4.11. A multi traction control with twenty (27) pins was specified. The number of pins is irrelevant. Vossloh's locomotive had twenty seven (27) pins.

16.4.12. The specification repeatedly stipulated the UIC standard. A standard method of measurement published by the International Union of Railways and applied in Europe. In South Africa, the Association of American Railroads standards are applied, not UIC.

16.5. The inclusion of the items above in the specification affected the award of the tender. If those items were excluded, the tender would have been awarded to another bidder, GE South Africa Technology.

BKM
PC
et
QA

- 17.1. The request for proposal ("RFP") was published on 27 and 28 November 2011. The tender collection register reflects eighteen (18) potential bidders collecting tender documents. The attendance register for the compulsory briefing reflects twenty seven (27) potential bidders. I attach copies of the attendance register and collection register as annexures "FA36" and "FA37".
- 17.2. I point out that Swifambo and Vossloh are not mentioned in the tender collection register or on the attendance register for the compulsory briefing. Swifambo Rail Holdings, the holding company of Swifambo, is mentioned in the attendance register. Swifambo was at that stage known as Mafori Finance Vryheid t/a Swifambo Rail Leasing.
- 17.3. The RFP was collected by someone from "S Group". S Group Holdings Company (Pty) Ltd paid for the tender documents using the reference Swifambo. I assume that they did so as an agent for Swifambo.
- 17.4. Although eighteen (18) potential bidders collected tender documents and twenty seven (27) attended the compulsory briefing, only six (6) bids were received. Bids were received from Harvdap Investment Solutions (Pty) Ltd, GE South Africa Technologies, CRM Consortium, RRL Grindrod, Thelo Rolling Stock Leasing and Swifambo.

55

839

Psum

B

A

AA

- 17.5. The RFP envisaged a procurement strategy by way of a lease of locomotives to PRASA by a successful or final bidder. The relevant part of it provides that-

"The Service Provider to be appointed will be required to provide PRASA with locomotives on lease basis for the haulage of passenger trains on various national routes operated by PRASA and shunting of Metrorail rolling stock repair depots

The Service Provider will be required to provide these types of locomotives:

- 88 Hybrid Diesel-electric 25kV ac locomotives;
- Note: In the event a strong feasibility of offer for the hybrid Diesel — 25kV ac locomotives more competitively compared with the 3kV DC and 25kV ac locomotives, preference would be given to the hybrid Diesel — 25kV ac."

- 17.6. The RFP repeatedly underscored a lease procurement strategy in several parts, including paragraphs 5.2, 5.17, 7, 8, 12 and 15.1(b). The bidders were required to submit proposals for a lease. The RFP stipulated two options for different lease periods: a renewable five (5) year lease period as option 1, and a fifteen (15) year lease period with an option to buy, as part of option 2. There is no indication at all in the RFP that bidders were invited to consider and submit their bids with an option that included an outright sale of locomotives to PRASA.

- 17.7. In paragraph 9 of the RFP the bidders were informed that its purpose was to enable PRASA to select a final bidder who was both technically and financially qualified to provide the

56
840

PKM
PS
SA

57

841

locomotives sought by PRASA, had sufficient experience in similar projects, the commitment and resources to provide the services required and could "carry all the obligations of the Contract".

- 17.8. In paragraph 15 of the RFP the bidders were informed that they were required to demonstrate previous experience in the design, construction and installation of the railway system sought by PRASA, and of the supply and leasing of locomotives, as well as demonstrate their capacity to handle a project of the magnitude contemplated in the RFP in terms of human resource, financial and equipment capability. The bidders were required to submit letters of references from at least three of their previous clients for whom they had done the type of work mentioned in the RFP.
- 17.9. The RFP required the successful bidder to provide PRASA with an unconditional performance bond that represented 10% of the entire value of the project price offered by the preferred bidder. The performance bond had to be submitted within a period of ten (10) days of the appointment of the preferred bidder (paragraph 16.3). I point out that the performance bond was required from the preferred bidder, the top ranked bidder after evaluation, not the final bidder who would enter into the contract with PRASA.
- 17.10. In paragraph 16.6 of the RFP the bidders were informed that PRASA would prefer to award the contract to a supplier with at least a level four B-BBEE rating.

Pdu ASg
97

58

842

- 17.11. In paragraph 17 of the RFP the bidders were informed that all bids would be equally evaluated. During the evaluation process the bids would be checked for completeness, whether all required documentation and certificates had been provided and for compliance with other formalities. Incomplete bids would be disqualified. The bids would also be checked for compliance with the essential RFP requirements and non-compliant bids would be disqualified. The essential RFP requirements assessed were security screening, bank rating, technical, BBEE and price (paragraph 17.4).
- 17.12. A detailed analysis of the bids would be performed to determine whether the bidders were capable of delivering the project in terms of business and technical requirements. The technical ability of the bidders to deliver the locomotives in accordance with the prescribed specifications was a threshold criteria, and bidders were required to achieve a minimum of 70% in order to qualify for further evaluation. The bidders were informed that those who did not achieve the 70% threshold would be automatically disqualified.
- 17.13. In paragraph 17 of the RFP the bidders were informed that their bank rating would be assessed. In a table containing the Evaluation Criteria, the weighting to be attached to the bidders' bank ratings was marked as compliance. I understand this to mean essential RFP compliance with regards to requirements of bank ratings is required.

Bur
PS
CA
PA

59
843

- 17.14. The responses to the RFP had to be signed by a person duly authorised by *inter alia* each subcontractor to sign on their behalf, which authorisation had to form part of the responses to the RFP as proof of authorisation. The signing of the RFP indicated that the subcontractors considered themselves bound by the terms and conditions of the RFP (paragraph 18.3(h)).
- 17.15. The bidders had to provide sufficient information and detail to enable PRASA to evaluate their responses (paragraph 18.3(j)).
- 17.16. The responses to the RFP were to be kept in safe custody by PRASA until the closing time (paragraph 18.5).
- 17.17. PRASA informed the bidders that it may issue briefing notes from time to time during the RFP process to disseminate further instructions, clarifications, programme changes and information updates (paragraph 18.7). The briefing notes would be incorporated in the RFP and the bidders had to ensure that their responses took into account the briefing notes.
- 17.18. In clause 8 of PRASA's Conditions of Tender it is stipulated that a responsive tender is one which conforms to all the terms, conditions and specifications of the tender documents without material deviation or qualification. A material deviation or qualification is defined as one which, in PRASA's opinion, would:

Jm
P
94

60

844

- 17.18.1. detrimentally affect the scope, quality or performance of the works, services or supply identified in the Contract data;
- 17.18.2. change PRASA's or the tenderers' risks and responsibility under the contract; or
- 17.18.3. affect the competitive position of other tenderers presenting responsive tenders, if it were to be rectified.

18. Swifambo's Bid

- 18.1. Swifambo responded to the tender as Mafori Finance Vrydheid t/a Swifambo Rail Leasing.
- 18.2. Mafori Finance Vrydheid (Pty) Ltd was registered on 22 April 2010 and was acquired by Swifambo Holdings (Pty) Ltd on 7 February 2012. The bid was submitted on 27 February 2012.
- 18.3. The change of the name from Mafori Finance Vrydheid (Pty) Ltd to Swifambo Rail Leasing (Pty) Ltd was registered on 5 May 2012 by CIPC.
- 18.4. The bid submitted by Swifambo did not comply with the requirements set out in the RFP in the following material respects:

P/AM

P
Q
R

61

865

18.4.1. A Tax Clearance Certificate was not submitted for Vossloh. A certificate was required for Vossloh as a member of an association, party to a consortium, partner in a joint venture or subcontractor to Swifambo (clauses 4.7 and 18.8 of the RFP, read with clause 1.1.1 of Form B).

18.4.2. The Tax Clearance Certificate submitted by Swifambo did not contain a VAT number.

18.4.3. A B-BBEE plan for procurement of goods and services for the duration of the project was not submitted, as required in terms of clause 16.7 of the RFP.

18.4.4. The bid did not comply with the local content requirement as the locomotives were to be designed and manufactured in Spain.

18.4.5. The bid did not contain evidence to support Swifambo's claims that it and its shareholders had previous experience in the rail industry, as required in terms of clause 9 of the RFP and in terms of which the final bidder selected pursuant to the RFP was required to:

18.4.5.1. be technically and financially qualified to provide the solution sought by PRASA;

PRASA
97

62

866

- 18.4.5.2. have sufficient experience in similar projects;
- 18.4.5.3. have the commitment and resources to provide the services required in the project; and
- 18.4.5.4. be able to carry out all of the obligations of the contract.
- 18.4.6. Swifambo also failed to comply with clause 15.1 of the RFP that dealt with the experience and competency of the bidder, and, in particular, required bidders to demonstrate the following in their bids:
- 18.4.6.1. previous experience of supply and leasing of locomotives, including attaching letters of referral from at least three clients for which they had done this work; and
- 18.4.6.2. the capacity to handle a project of the magnitude involved in terms of human resource, financials and equipment.
- 18.4.7. In relation to the requirement for previous experience in the rail industry, Swifambo submitted five letters of satisfaction as part of its

PSM A&D

DA

bid. However all of them related to Vossloh. I attach copies of the letters as annexures "FA38" to "FA42".

18.4.8. The bid indicated that Swifambo would rely solely on the experience and technical capabilities of Vossloh Espana S.A. to fulfil its obligations. However, at the time the bid was submitted, Vossloh Espana S.A. was not a (co)bidder as defined in the RFP and Swifambo had not concluded a sub-contract with Vossloh. There was no legal relationship between Swifambo and Vossloh Espana S.A., and therefore no indication that Swifambo could perform.

18.4.9. Furthermore, the bid indicated that Swifambo intended to enter into a joint venture with Vossloh Southern Africa. There is reference to Vossloh Southern Africa Holdings (Pty) Ltd, which was incorporated as Main Street 951 (Pty) Ltd on 29 November 2011, as a shelf company. On 16 March 2012, James Sanders became a director, who appears to be an employee of Vossloh. On 17 May 2012 the company's name changed to Vossloh Southern Africa Holdings (Pty) Ltd. I attach the CIPC certificate as annexure "FA43".

18.4.10. As a result, there was non-compliance with Form F of the RFP in terms of which the joint venture

BM
PSA
9A

60 64

was required to be in place by the time the bid was submitted. In any event, Swifambo never entered into a joint venture with Vossloh Southern Africa. It entered into a subcontracting agreement with the Spanish entity, Vossloh España.

848

18.4.11. In addition, Swifambo's financial standing was unsatisfactory.

18.4.11.1. A letter from Van Wyk Auditors, dated 24 February 2012, submitted with the bid confirmed that Mafori Finance Vrydheid (Pty) t/a Swifambo Rail Leasing was a new company and had not traded before. A copy of this letter is attached as "FA44".

18.4.11.2. Another letter from Standard Bank, dated 27 February 2012, stated that the Mafori Finance bank account had recently been opened and it was provided a code "F" rating. The "F" rating from Standard Bank indicated that Swifambo had no financial history which the bank could use to evaluate its financial viability. A copy of this letter is attached as "FA45".

Handwritten signatures and initials:
Kum
BQ
JA

18.4.11.3. Although a "non-committal expression of interest" from the Industrial Development Corporation ("the IDC") to provide funding was submitted, the document is unsigned, the terms on which the funding would be provided are not set out, and the identity of the party to whom the funding would be provided are vague. The document indicates that the IDC had expressed an interest to provide funding to the "Swifambo Rail Services Consortium", not "Swifambo Leasing".

18.5. Although not required to do so in terms of the RFP, Swifambo included in its bid an option for PRASA to purchase the eighty eight (88) locomotives in a price range from R3.6 billion to R4.3 billion, depending on the type of locomotives chosen.

19. The SCM

19.1. In terms of the procurement policy, the SCM had the responsibility, authority and accountability for the management and co-ordination of the SCM function, initiation and preparation of RFPs and the initiation and management of the BEC (paragraph 9.1).

19.2. There is no documentary evidence identifying the persons initially responsible for the compliance assessment of the bid

PC
PC
JA

84
868

the number of locomotives required by PRASA. The fluctuation in the number of locomotives appears to be entirely arbitrary.

25.6. In terms of the procurement policy, the FCIP was responsible for considering the recommendations made by the GCEO and the procedures followed by other committees involved in the procurement process, taking into account the substance and value for money, and condoning or rejecting a submission for non-compliance with the procurement policy (paragraph 9.2).

25.7. There is no indication from the minutes of the FCIP meeting that the procedures that were followed by the BEC, BAC, CTPC or the GCEO were properly considered. If the FCIP members had done so, they would have identified the issues relating to the lack of a compliance assessment by the SCM and BEC, the irrational process of scoring followed by the BEC, the fact that the CTPC was convened before the BAC, and the conflicting recommendations of the CTPC and the BAC. There is no indication from the report that it had identified any issues of that or a similar nature.

25.8. There is also no indication from the minutes of the FCIP meeting that any non-compliance with the procurement policy was condoned.

26.

The board

Plm

*B.
A
M*

85
869

- 26.1. The board is appointed by national government and is vested with the power and authority to lead, control, manage and conduct the business of PRASA.
- 26.2. The board was tasked with approving the preferred bidder in the tender in issue because, in terms of the board charter, power to approve capital expenditure in excess of the discretionary power delegated to the GCEO was reserved for the board (paragraph 15.6).
- 26.3. The board met on 24 July 2012. A copy of the minutes of the meeting is attached as annexure "FA68". The members of the board in attendance at the meeting were Sfiso Buthelezi, Gasa, Nkosinathi Khena, Marissa Moore, Ntebo Nkoenyane, Mfanyana Salanje and Montana. Other non-members who attended the meeting were Lindikaya Zide, Goggi Ngakane, Gastin and Sebola.
- 26.4. Swifambo's bid was discussed by the members of the board under the item "diesel-electric locomotives" (paragraph 8.20).
- 26.5. It is recorded in the minutes that "the tender was issued in December 2011 for one hundred and forty (140) dual electric and diesel-electric locomotives". Furthermore, "that the market responded with availability of only eighty eight (88) locomotives." The facts and figures set out in the minute are incorrect. The RFP identified eighty eight (88) locomotives for procurement, not one hundred and forty (140). There is also

P. S. M. R. H.
H.

no document to suggest that "the market responded" with eighty eight (88) locomotives.

26.6. In the minute it was also noted that the FCIP recommended that the board appoint Swifambo as the value of R3.5 billion.

26.7. No further details were given in regard to the Swifambo bid.

26.8. The board, after considering the incorrect information about the Swifambo bid, approved Swifambo as the preferred bidder. The decision was irrational, arbitrary and in breach of the board's obligations.

26.9. In terms of the code of conduct attached to the board charter, the board is under a legal duty to act in a faithful manner towards and on behalf of PRASA and as such commits itself to the highest standards of behavior (paragraph 5). To that end, the members of the board are required to take all steps to satisfy themselves that they are in a position to take informed decisions, including steps to secure – in a timely manner – all information necessary to assist in making informed decisions (paragraph 5.7). It is clear from the minute that the board was not in an informed position to make a decision.

26.10. The decision of the board to award the tender to Swifambo in the absence of detailed and accurate information, and taking into consideration the fact that the value of the tender was R3.5 billion, was astounding.

Handwritten signatures:
Rum AS el
SA

27. The Cover Up

- 27.1. It appears from the emails obtained during the investigation, that problems with the procurement process were identified by other employees within PRASA and brought to Montana's attention before the board approved Swifambo as the preferred bidder.
- 27.2. On 21 June 2012, Fenton Gastin ("Gastin") sent an email to Montana regarding an audit status report. The email related *inter alia*, to the Swifambo bid. The email is attached as annexure "FA69".
- 27.3. In the email, Gastin stated that the "SCM findings are quite serious and Chris has been advised to resolve the findings and provide sufficient audit evidence to the auditors on Monday 25 May. Issues in SCM include, contracts not signed, copies of supplier tax clearance certificates not on tender files, tender minutes not signed, tender documentation not signed, confinement documentation not signed, tender adverts not availed to the auditors. (Chief this is a major risk and we have to get Chris and his team to resolve these issues by providing the relevant supporting documentation and explanations otherwise it will just give other elements a chance to chastise PRASA – They have only till Sunday to resolve these issues)."
- 27.4. I emphasize that these issues were brought to Montana's attention three days before the board approved the Swifambo

ABW
RSD
SA

88

872

bid. Montana attended the board meeting on 24 July 2012 and refrained from pointing out any irregularities in the procurement process. The inference is that Montana was determined to proceed with the process that would result in the appointment of Swifambo as the preferred bidder. Montana's motive for this is unclear and the investigations are still on going.

- 27.5. On 6 November 2012, Bridgette Gasa ("Gasa") sent an email to *inter alia* Sfiso Buthelezi (the erstwhile chairman) and Montana in which she said, "I have just received intelligence information about Swifambo Rail Leasing ... Failure to follow this up, would sink the organization (sic). Should the intelligence report prove true, we need immediate intervention as the Board." A copy of the email is attached as annexure "FA70".
- 27.6. On 20 November 2012, Gasa wrote another email this time to Mbatha. Gasa was, as she put it, "once again making an attempt to extract more information from you and the Procurement team on the above-mentioned matter ... There are concerns that have been raised around this particular entity and the FCIP is needing you to confirm that indeed a capacity check was properly done in relation to this contract and that you have satisfied yourselves that the necessary checks and balances have been done." A copy of the email is attached as annexure "FA71".

P/S

P/S

P/S

89

873

27.7. Gasa emphasised that time was of the essence as it would be "an anomaly to proceed to conclude contract negotiations in light of the seriousness of the matters we'd raised for which we have not received a response from you". Despite those concerns, Montana allowed the negotiations to proceed.

28. The Contract

28.1. On 27 July 2012, PRASA notified Swifambo of its appointment as a preferred bidder for the provision of the "diesel-electric (hybrid) locomotives". A copy of the letter is attached as annexure "FA72".

28.2. On 25 March 2013, PRASA and Swifambo concluded the main contract on the terms set out therein. The contract was signed by Montana. The contract was for the purchase of twenty (20) Euro 4000 locomotives and fifty (50) EuroDual locomotives, with a contract value of R3.5 billion (including VAT). I attach a copy of the contract as annexure "FA73".

28.3. The main contract materially deviated from the terms of the RFP. The RFP required a lease of locomotives. The main contract provided for a purchase of locomotives.

28.3.1. The main contract inexplicably states that the RFP invited proposals for three options, and one of them was the outright sale of locomotives to PRASA (clause 1.2). That statement is incorrect.

DLA
A
A
DA

90

874

There was no option for the outright purchase of locomotives provided for in the RFP.

28.3.2. The main contract states that PRASA decided to procure locomotives through an outright sale, after "evaluating all the bids received". The statement is disingenuous to the extent that it suggests that all the bids were for an outright sale (clause 1.3).

28.3.3. The competing bidders were not afforded an opportunity to bid on an outright sale as one of the options. This change in procurement strategy is fundamentally flawed and unlawful.

28.4. The award of the tender to Swifambo and the conclusion of the main contract without the contractual involvement of Vossloh constituted a material irregularity.

28.4.1. Swifambo had no technical capacity, and Vossloh had no contractual obligation to design, manufacture and deliver the locomotives in terms of the main contract. The risk to PRASA was palpable.

28.4.2. The risk was exacerbated by the fact that Swifambo did not provide the requisite performance bond within the period of ten (10) days prescribed in clause 16.4.1 of the RFP. PRASA nevertheless concluded the contract.

PRASA *PRASA*
PR

28.4.3. The conclusion of the main contract without the submission of an unconditional performance bond by Swifambo within the time period prescribed in the RFP was irregular.

875

28.5. In terms of the main contract, the first twenty (20) locomotives to be delivered were the Euro 4000 locomotives. The specifications of the Euro 4000 locomotives are attached to the contract setting out the technical specifications for that type of locomotive. The Euro 4000 does not comply with the specification as set out in the RFP, in the following material respects:

28.5.1. The Euro 4000 can only operate at a maximum altitude of 800m above sea level (paragraph 2.10 of Euro 4000 specifications). The RFP specifications required a fleet that must be able to operate 1800m above sea level (paragraph 9.4 of the RFP specifications). The Euro 4000 was designed for the European rail network, not South Africa.

28.5.2. The Euro 4000 is not compliant with the vehicle gauge specifications designed to ensure that the locomotives are able to operate on the rail networks safely and effectively. The Euro 4000 has an overall vehicle gauge height of 4,140mm. The RFP specifications required locomotives to be compliant with the drawings BE 83-252, BE 82-12

PSM PSL

91

92

876

and BE 82-11. Those drawings clearly show that the maximum vehicle gauge height requirement is 3,965mm. On 23 September 2015, Transnet Engineering compiled a report on the outside dimensional verification of the Euro 4000, referred to as the 'Afro 4000' (which is a 1,067mm Cape Gauge version of the Euro 4000). The concluding remarks in the report state that the locomotive height exceeds the Transnet diesel locomotive gauge and is not compliant with the gauge specifications. I attach a copy of the report as annexure "FA74".

28.5.3. It will not be possible for Vossloh to reduce the height of the Euro 4000 locomotive. In this regard I attach a report submitted by Vossloh to Swifambo, specifically dealing with the locomotive height issue and Vossloh's inability to reduce the locomotive height, as annexure "FA75".

28.5.4. The consequence of the material deviation from the locomotive gauge specification in terms of the RFP, is that PRASA is saddled with locomotives that are not fit for purpose and unsafe to operate on the South African rail network.

28.6. The main contract was subject to the delivery by Swifambo of performance bonds, on or before the long stop date (clause 6.1). The suspensive condition was not capable of being

Rhu

AS
SA

94

93

877

waived. The following three addenda were agreed to in respect of *inter alia* Swifambo's obligation to deliver the performance bonds:

- 28.6.1. The first addendum, dated 3 May 2013. I attach a copy of that addendum as annexure "FA76". The intention of the first addendum is *inter alia* to extend the long stop date for the provision of the performance bond to 6 May 2013.
- 28.6.2. The second first addendum, dated 28 May 2013. I attach a copy of that addendum as annexure "FA77". The intention of the second first addendum was *inter alia* to extend the long stop date to 31 May 2013 and to insert a new clause 16.5 specifying that Swifambo was to supply and deliver seventy (70) locomotives to PRASA.
- 28.6.3. The second addendum, dated 18 September 2013. I attach a copy of the addendum as annexure "FA78". The intention of the second addendum was *inter alia* to extend the long stop date from 31 May 2013 to 31 August 2013.
- 28.7. As can be seen from the addenda, there are significant gaps between the extended long stop date in terms of the first addendum and the conclusion of the second first addendum, and between the extended long stop date in terms of the second first addendum and the conclusion of the second

PS
PS
AA

addendum. The effect of this is that the condition precedent failed, if the performance bonds were not delivered on or before 6 May 2013. The performance bonds were delivered to PRASA after that date.

- 28.8. Banco Santander S.A. issued nine (9) performance bonds only on 1 August 2013 in the total amount of R307,017,550.00, which bonds expire at different times commencing from 31 December 2014 to 31 March 2017.
- 28.9. Accordingly, the suspensive conditions were not fulfilled timeously and the contract has lapsed and has no effect.
- 28.10. On 11 April 2014, Mtinkulu sent a memorandum to Montana in which he requested a variation to the contract to include certain systems. The variation was required, according to Mtinkulu, because "the systems that came with the locomotives per the Swifambo proposal to PRASA were rudimentary and therefore needed to be upgraded to ensure that the locomotives are fitted and assembled with the latest technology." The additional cost to PRASA was R335,000,000.00 (three hundred and thirty five million rand). The request was recommended by Dr Josephat Phungula ("Phungula") and approved by Montana on 11 April 2014, who had no authority to do so. I attach a copy of the memorandum as annexure "FA79".
- 28.11. The suggestion that the proposal was rudimentary is nonsensical. The locomotives offered by Swifambo were state

Phungula *PS*
PA

of the art, and the systems mentioned in the memorandum were standard features.

879

29. Grounds of Review

29.1. On the basis of the facts set out above, and in view of the relevant legal framework, PRASA submits that the decisions to award the tender to Swifambo and to conclude the contract with Swifambo should be reviewed and set aside for procedural and substantive reasons.

29.2. PRASA's primary grounds of review arise from the principle of legality and the provisions of the Promotion of Administrative Justice Act, 3 of 2000 ("PAJA").

30. Common Law Grounds of Review

30.1. I submit that section 1(c) of the Constitution of South Africa, 1996, entrenches the constitutional principle of legality, which governs the use of all public power.

30.2. As set out further above, PRASA is a public entity and a national government business enterprise in terms of the PFMA. I submit that PRASA's decisions constitute an exercise of public power by a statutory body.

30.3. For those reasons, I am advised and submit that PRASA's decisions should be reviewed under the principle of legality, as an alternative to PAJA.

Handwritten signatures and initials: "P. Sw", "R", "A", "M".

"BT4"

49B

Tracy Erasmus

From: Bridgette Gasas <bridgette.gasa@theelilox.com>
Sent: 06 November 2012 19:25
To: sifiso@makana.co.za; Lucky Montana (PRASA CORP)
Subject: Urgent.
Attachments: SWIFAMBO RAIL LEASING.DOCX; Mpumalangaa.docx

Colleagues,

I know you are both in Cape Town trying to rescue our organization from being hijacked. I appreciate your efforts and can only hope the 'plot' will be successfully arrested.

Unfortunately, I am not a bearer of good news. I have just received **intelligence information** about **Swifambo Rail Leasing**, the company the PRASA Board approved R3bn worth of work over 15 years. With all these platforms not being safe, I would like to request that you **allow me to dig a little bit deeper**. Failure to follow this up, would sink the organization. Should the intelligence report prove true, **we need an immediate intervention as the Board.**

Dr. Bridgette Gasas

MD: The Elilox Group Pty Ltd.

041 5825072

082 9055434

"BIS"

494

Jeremy Gobetz

From: Bridgette Gasa <bridgette.gasa@theeliox.com>
Sent: 20 November 2012 10:38
To: Chris Mbatha (PRASA CORP)
Cc: Lindikaya Zide; Sfiso@makana.co.za
Subject: Follow-up on the Swifambo Rail Leasing

Dear Chris,

I am once again making an attempt to extract more information from you and the Procurement team on the above-mentioned matter (as per our initial discussions of the 8th of November). It is imperative that PRASA as an organization appoints adequately capable entities to undertake the work under all of its programmes. Moreover, when our contracts are high in value and are linked to the strategy of creating new industrialists in the rail sector.

There are concerns that have been raised around this particular entity and the FCIP is needing you to confirm that indeed a capacity check was properly done in relation to this contract and that you have satisfied yourselves that the necessary checks and balances have been done. Please proceed to provide me with the information I'd requested from you as time is of the essence and it would be an anomaly to proceed to conclude contract negotiations in light of the seriousness of the matters we'd raised for which we have not received a response from you on.

Kind Regards

Dr. Zanele Bridgette Gasa
Managing Director

IMG [Picture_x0020_1]

The Ellox Group Pty Ltd
Office: +27 (0)41 582 5072 & middot Fax: +27 (0)86 549 1909
Mobile: +27 (0)82 905 5434 & middot Website: www.theelioxgroup.com [http://www.theelioxgroup.com/]
Postal Address: PO Box 612088 & middot Bluewater Bay, Port Elizabeth, 6210

IMG [Picture_x0020_2]



Image001.jpg



Image002.jpg

PC
A