

The Press Freedom Commission has invited members of the public to submit their views about Press Freedom and about the Regulation of the print media.

This invitation is published in various newspapers under the heading:

NOW IS THE TIME TO VOICE YOUR OPINION.

This invitation was attractive enough to inspire me to write this submission – based entirely on my personal experience with the print media. It is important at this stage to clarify that I do not consider myself to be an expert on the topic, my opinion derive from what I consider to be unmitigated abuse of the power of the pen by those who have access to this power. In this regard, I have come to a conclusion that Press Freedom is integral to democracy. There can be no guarantee for democratic governance without rhobust and free media. Free media is the ultimate test of true democracy. There is however a problem with the press in South Africa, there is a problem particularly with print media. Based on my personal experience, I have narrowed the problem to three basic issues:

- **too much reliance on anonymous sources;**
- **speculation that masquerades as journalism, and**
- **lack of accountability.**

In dealing with these matters, I do hope the Press Freedom Commission will introduce the following remedies:

- the Press Council to establish and publish a list (register) of person accredited to practice as journalists;
- limit the number of anonymous sources in reporting;
- insist on verification of facts, and
- there be consequences for biased, misleading and inaccurate reporting – such consequences to be much more than a meaningless apology, rather to draw lessons from other professions such as the attorneys who can be deregistered by the Law Society and say, engineers who can also be deregistered by the Engineering Council. The issue here for me is not whether this is regulation by peers or by the state, the issue is that there has to be consequences – otherwise, the impunity with which journalists operate will continue unabated. **Repeat offenders have to face consequences such as being deregistered from the published list of accredited journalists.**

1. **BACKGROUND**

In the period between October and December 2008, I lodged 2 (two) complaints City Press with the Press Ombudsman for publishing inaccurate, false and misleading articles against the Gauteng Department of Public Transport, Roads and Works("the Department") in the preceding 6 (six) weeks.

In this submission, I will provide a sequential account of events in an attempt to provide the Press Freedom Commission (the Commission) with a thorough contextual background that I hope will elucidate the gravamen of my complaints against City Press. The questions and the responses thereto will be restated as framed originally and there will be no attempt at revisionism.

The submission is bifurcated into four parts:

- Questions from City Press;
- My response;
- Articles published, where applicable; and
- My commentary on the articles published.

15 August 2008

QUESTIONS FROM CITY PRESS

I received the following questions from City Press:

1. Why was the building of the hospital not completed in May 2008 as per the contract?
2. How much has been paid to the Joint Venture - Ilima, Motheo, Yikusasa and TTR for the project?
3. How much of the work has been completed on site?
4. Are you aware that the three smaller partners on the joint venture have withdrawn their participation in the project, leaving Ilima Projects?
5. Why was the contract not cancelled or sent back for retendering after the joint venture fell apart?

6. Why were the members of the joint venture not penalized for failing to meet their contractual obligation to complete the building on time?
7. Why did you, as head of department, take a decision to reappoint Ilima with another company, Tau Pride, at an escalated cost of R692-million for the job which was supposed to be completed already?
8. What was the recommendation of the department's acquisition committee (DAC) about reappointing Ilima with other partners on the contract and at a higher price than was original budgeted?
9. Why did you not follow the DAC's advice?
10. What guarantee is there that Ilima will now be able to complete the building of the hospital on time, if they had failed in the past?

15 August 2008

I provided my responses within hours of having the questions from City Press.

RESPONSES

1. The construction of the hospital was not completed in May 2008 as per contract because of the failure to perform by the contractor (JV consisting of Ilima, Motheo, Yikusasa and TTR) – essentially, the JV proved to be unstable from the very beginning. Various components of this JV had been in constant loggerheads over the spoils of the contract, regrettably to the detriment of the project – this is the primary reason for the failure of this project to be completed on time.
2. A correction to your figure is as follows. Your quoted figure of R692 million is incorrect. The original contract value was R335 million. The true adjusted project cost is R480 million, and this adjusted figure of R480 million is inclusive of contract adjustments, inflation linked escalations and VAT. While the contractor JV has been unstable, the project professional team of architects, construction project managers (CPM), engineers etc under the capable

leadership of Tshiya Project Management Resource Group, has never been a problem, the CPM and other professionals have managed to keep the contractor JV on a very tight leash and thus the risk of fruitless expenditure has been completely eliminated. To date, a total amount of R55 million has been paid to the contractor JV. This expenditure can be linked to specific auditable deliverables.

3. My understanding is that what has been completed on site is about 20% of the total project.
4. Yes I am aware. I did receive their letters of withdrawal from the project. These letters of withdrawal are available for your inspection.
5. From the onset, it is important to note that we operate within the framework of the Construction Industry Development Board (CIDB). The CIDB has a grading system for contractors. The lowest grading is level 1 and the highest grading is level 9. Most of black contractors are found in level 1 and very few are above level 5. This particular contract is a level 9 contract. It is also important to note that the department has taken an aggressive drive to achieve high BBBEE targets that we have set for ourselves. In this particular instance, this JV was chosen because it represented the best chance to give these few black contractors to move up the grading ladder. At the time of this tender being awarded, iLima was the only black contractor in the whole country that was at level 8. The other JV partners were at levels 6 and 7. All JV partners combined did have enough points to add up to the required level 9 grading. At the time of the collapse of the JV, the same reason and drive for empowerment had not changed. So, having applied my mind as the HOD, I decided to continue with the project with the remaining level 8 contract in order to achieve that desire to have black level 9 contractors. Besides, as also stated in your question, this project was to have been completed in May 2008. The advice that I gave was that going out on a new tender would have lead to further delays in the project. As you may be aware, any delay in a project of this nature does give rise to additional costs to the state as a result of escalations. So, re-tendering would have not only meant the postponement of the delivery of a hospital to the people of Soweto, but would also have had additional cost implications.

6. Nobody will just walk away from this project without facing the consequences of non-delivery. The penalties are coming. I have appointed an investigations team that is looking at all aspects of this project and the appropriate allocation of the penalties you are referring to. This is work in progress. I expect to have a full report in this regard by the end of August 2008. Having said this, it is also important for you to appreciate that when it comes to empowerment, our approach is not punitive, rather, we are developmental. Even at the point of implementing penalties, we will consider mitigating circumstances.

7. The DAC had taken a decision to re-tender this project. But for reasons already stated above, I decided to vary the DAC decision. Sections 38 to 44 of the Public Finance Management Act (PFMA) does allow me in my capacity as the Accounting Officer of the department to amend and vary any decision taken by any of the employees and structures of the department. This decision was communicated through DAC to reconsider their decision based on the above facts, it is therefore not correct that the HOD decision was bulldozed to DAC. With regard to the adjustment of the project cost, it emerged at DAC that after careful consideration of the contract that the JV had under-costed the project in the first instance. It was the DAC decision to reconsider the facts after the collapse of the JV. This is very common among black contractors, in their endeavors to be the lowest bidders, they tend to price themselves too low. Which means that even if there were no problems in the JV, they would not have been able to complete the project. In this regard, I relied on the work of independent Quantity Surveyors (QS). A comparable project of the same size in Germiston was awarded at R490 million. I do invite the City Press to send their own (QS) and I promise to provide them with all the information at my disposal – I have no doubt that they will also come to the same figure. In order to minimize further risks of non-delivery, I then suggested that the Lead PMRG (project management resource group) by the name of TauPride to assist iLima in all aspects of construction management and cost control, more specifically to be the joint signatory for all payments. This was done to ensure full accountability in the project. It should also be noted that tau Pride has not been appointed solely for this project, as they are one of the Department's Resource Group to assist in the management of major projects. TauPride was appointed on the basis of an open tender process. Their appointment has got no bearing with the project cost. I also need to state at this point that it is my intention to disclose this decision (upon receiving the above

mentioned investigation report) to the DAC, Provincial Treasury and the Office of the Auditor General. This will be done before the end of September 2008.

8. Same as point 7 above
9. Same as point 7 above.
10. By ensuring additional controls in the form of lead project resource group TauPride PMRG, I have no doubt that the risk of non-delivery has been adequately mitigated.

17 August 2008

City Press published the following articles:

"Improved healthcare put on ice until 2010"

COMMENTARY

In this article, City Press published only a fraction of my responses and failed to report accurately on many aspects of these responses.

Apart from a jejune statement to the effect that the Department was intent on minimizing risks of delivery, City Press did not publish the full reasons for the Department's rationale for not re-issuing a tender.

It did not mention that the Departmental Acquisition Committee("DAC") had been fully briefed of the reasons for not re-issuing a tender. It must be noted that the accounting officer of a department is allowed in certain circumstances to vary DAC decisions. This is the law of the country that is applicable to all accounting officers in government precisely because the legislature did foresee that it would not be feasible in all circumstances to issue tenders.

Cynically, however, Press created an impression in its articles that there was something amiss

in the Department having varied the DAC decision.

It did not also state that the Department had informed it that the office of the Auditor General and the Provincial Treasury were also going to be informed of the decision as required by Treasury Regulations.

This is an important disclosure by the Department as it indicates in unambiguous terms that the decision to vary the DAC decision was taken in good faith and was also legally irreproachable.

All these issues were completely ignored in the said article and our contention is that it is not unreasonable to conclude that they were so ignored because they stood in the way of City Press' headline.

I was appalled at this unethical behavior and violation of the South African Press Code.

"Company gets R358 more for late hospital"

COMMENTARY

This article makes references to the fact that Ilima was benefitting from the Gautrain, the construction of a 2010 Football World Cup stadium etc. The question is: Why are these facts relevant to a discourse about the construction of the Jabulani hospital?

The purpose of including such information in an article on Jabulani Hospital seems to be a coded appeal to the reader's hostility when reading the rest of the article.

The fundamental point of this article is that Ilima Projects was paid R358 million more than the R334 that government set aside two years ago to build the Jabulani hospital.

This inaccurate figure was published despite me having responded that Ilima would not be paid the amount stated above.

I even went to the extent of providing a Bill of Quantities to the journalists from City Press but they still in their infinite wisdom deemed it appropriate to publish an incorrect figure.

Accordingly, City Press did not report truthfully, accurately and fairly. This is another violation of the South African Press Code.

21 August 2008

QUESTIONS FROM CITY PRESS

The HOD receives the following questions from City Press:

1. How much is Tsiya Developments, as construction project managers, getting paid on the Jabulani hospital project?
2. How much is Tau Pride being paid for its services on the project?
3. Is the department paying additional professional fees, beside the ones mentioned above? Please provide details and cost.
4. Why was it necessary to have the project operational by January 2009 for inauguration by the Premier before the 2009 municipal elections?
5. Why did the department engage in a public participation process following the non-completion of the hospital on time?
6. Why was the department concerned about the erosion of socio-political confidence and support to the project?

22 August 2008

RESPONSES

1. Standard CPM fees as prescribed in terms of the Project and Construction Management Professions Act, 2000 (Act No. 48 of 2000)

2. TauPride fees for the purpose of this project will be covered within the overall project cost of R480m specifically for work done (to be certified by the CPM) as a standard practice in construction.
3. There are no extra fees professional fees. The total cost of the project is in the contract, this being R480m.
4. This project was scheduled for completion in May 2008. The project will now be completed in August 2010. Phase 1 of the project, being a Gateway Clinic and all outbuildings, is scheduled for completion in April 2009. This is a critical project milestone. I am not aware of any MUNICIPAL elections in 2009
5. It is standard practice for the department to consult with the community in all our projects. In this particular case the purpose of the public participation is to explain to the community the underlying reasons for the delays in the project. I don't think consulting the community at every step of the project can be such a bad thing, on the contrary, I place great value in public participation
6. In all our projects, we believe that the ongoing support of the community is essential, whenever there is a situation that could erode the confidence of the community in the project, we take all steps to build the confidence of the community. For us delivery is not just about bricks and mortar, community ownership of any project is an essential ingredient of delivery. In this regard, the Jabulani Hospital is no different

22 August 2008

FURTHER QUESTIONS FROM CITY PRESS

1. When was Ilima Projects given an extended contract to finish building of the hospital?
2. Why was the Zola District Hospital Preliminary Program document signed only at the end of July and beginning of August way after Ilima Projects had been granted a new contract?
3. Are you aware of a departmental memorandum sent to the DAC in June 2008 requesting approval to revise the appointment of Ilima Projects for the hospital?

4. The document was also signed by top officials within your department, including one of your deputies. This document gives a detailed breakdown of the costs involved in the projects, such as R2.8m for additional capacity on standby generator, R500 000 for additional solar heating system and another R500 000 for additional telephone and data installation. Why were these costs excluded on the new bill of quantities signed on August 1, 2008?
5. Is the department going to get another contractor to fulfill these duties that have not been added on the new bill of quantities?
6. Am I correct to point that the total amount of R480m to be paid to Ilima Projects for building the hospital does not include the following amounts:
 - * R60 million already paid to the company since the project started in 2006.
 - * R90.4 million the department will pay for professional fees on the project.

RESPONSES

1. The revised contract was finalized and signed by the department on 30th July 2008 and by the Contractor on the 1st August 2008 – the contract became effective from the 1st August 2008.
2. I flatly deny the suggestion (if not allegation) that the contract was signed “... way after iLima Projects had been granted a new contract.” The fact of the matter is that the final revised contract was only finalized on the 1st of August 2008 and the Contractor moved back to site on Monday 4th August 2008.
3. Yes I am aware of this memo and I am also aware of the DAC decision in this regard. It is the same DAC decision you were inquiring about last week – in fact, your newspaper report even went on to extensively quote the email I had written in this regard. That email was responding to this DAC decision. You may not have been aware last week that the issues you were inquiring about are all current and ongoing work in progress. If you care to remember, I actually did state in my responses last week that the contract was only finalized and became effective on the 1st August 2008.

4. The department in implementing project relating to additional standby generator capacity and alternative energy for all public facilities in the province, this included schools, clinics, offices and hospitals, including this particular hospital. These costs are not in the bill of quantities because these relate to a different programme
5. Yes sir, a different contractor will be appointed to implement the energy programme.
6. Yes sir, you are correct. I have already stated last week that the amounts already paid for this project have been certified by the professional team and that these are linked to auditable deliverables. The Best Practice in the construction industry is to always separate the professional team (engineers, architects, quantity surveyors, project managers etc) from the contractor. The professional team is always on the ground to ensure the contractor performs in terms of the contract.
7. The professional team is NEVER part of the contractor team, unless the project has been awarded on a TURNKEY basis, which is not on this particular occasion. I have tried last week, yesterday and today to respond to all your questions in as detailed as possible manner. I have also went on to give you access to the basic documents governing the implementation of this project. I am still available to respond to any further questions.

I have noticed though that your questions suggest that you may be battling to understand some of the nuances of this project. If at all this will add value, I have proceeded with the narrative below to try to put everything into its proper context.

It is well known that the Zola Hospital project was approved by the DOH, the National Department of Health and National Treasury. The location of the Jabulani Site was identified for the development of the hospital which was to provide for 300 beds, a gateway clinic and service buildings (“the project”).

The contract was awarded on 15 May 2006 to a Joint Venture (“JV”) for the construction of the Zola Hospital at the Jabulani Site. The JV consisted of iLima Projects (Pty) (Ltd) (“iLima”) and three other contractors.

The date originally set for the project to be completed no longer applies as the project had experienced various delays

The delays resulted in iLima taking the lead role in the project, however it became clear that it would not be possible for iLima to achieve the targets set and meet its obligations in terms of the JV contract as it did not, on their own, have the necessary capacity.

In May 2008, the Department terminated the JV contract and it was decided that the best way to proceed was for a new contract to be concluded between the Department and iLima

In order to engage in a new project implementation strategy and programme the Department appointed the TauPride/Moteko JV as the managing agent of the project on behalf of the Department. In furtherance of this, a management agreement between the TauPride/Moteko JV and iLima was signed.

Hence, after further setbacks, due to lack of manpower, materials and funding, it is now anticipated that the date for practical completion and first delivery of the project is 31 July 2010 and the date for total completion and final delivery is December 2010.

Work Plan of the Project

Milestones

The project is phased in two milestones which are:

The gateway clinic and outbuildings are set to be handed over by 1 December 2008. Thereafter, service commencement at the gateway clinic is set for 31 March 2009 and service commencement at the outbuildings is set for 20 April 2009; and

Delivery of the balance of the works, that being the main hospital building, after a period of 24 months from signature date of the JBCC

Funding

The contract sum is R480,000,000 and professional fees amount to R103,085,699, therefore the total building cost amounts to R583,085,700.

24 August 2008

City Press published an article titled:

“Evidence refutes claims that hospital will only cost R480m”

COMMENTARY

The title of this article itself is misleading. In the article published on 17 August 2008, City Press had reported that Ilima was going to be paid “R358 million more for late hospital”, notwithstanding the correct amount communicated to the journalists previously.

In this article, focus is now shifted and City Press implies that I had created the impression that the hospital would cost R480 million, when in fact I had stated that this was the contract amount excluding professional fees and that this was standard industry norm.

This information was not published precisely because it was not the kind of information that City Press wanted, in my view, as it would derogate from the sensationalism sought.

29 August 2008

QUESTIONS FROM CITY PRESS

1. Is the department aware that Ilima has not submitted Tax returns since 2004?
2. How was Ilima awarded tenders without tax clearance certificates?

3. Did Ilima Projects submit valid tax clearances when it tendered for the Zola/Jabulani Hospital and Sterkfontein Hospital projects?
4. Is a tax clearance certificate not a prerequisite for a company to be considered for a tender?
5. What is the standard procedure when companies submit tenders without current tax clearances?
6. How many contracts has Ilima Projects been awarded by the Department of Public Transport, Roads and Works since 2004?
7. What is the total value of these projects? Please provide a breakdown of these projects and costs involved.
8. What action is the department going to take in light of these new revelations? Is Ilima Projects still on site or have the company been suspended?
9. Will action be taken against officials of the department, including yourself as the accounting officer for the appointment of Ilima Projects on these projects without valid important tax clearance?
10. As the accounting officer for the department, will you take responsibility for the decisions taken to appoint Ilima Projects for these projects?
11. Why is the Sterkfontein Hospital project not yet complete? How much was paid to Ilima Projects to complete this project?
12. What is going to happen to the unfinished projects which Ilima had already started working on?

RESPONSE

1. The department is in possession of an original Tax Clearance Certificates from iLima Projects for both periods – at the time of tender award in May 2006 and as of July 2008 – these are attached herein for ease of your perusal.

2. A tax clearance certificate is a prerequisite for any company to be considered for any contract award. Any company that does not possess current tax clearances is automatically disqualified.
3. As far as my records are concerned, there are only two (2) contracts that were awarded to iLima, these being Sterkfontein and Jabulani hospitals
4. Sterkfontein was R25 million including VAT and Professional fees
5. The Jabulani Hospital contract sum is R480,000,000 and professional fees amount to R103,085,699, therefore the total building cost amounts to R583,085,700.
6. Appropriate action will be taken once the ongoing investigation has been finalized.
7. The assumption that there was wrong doing on the part of the department is mischievous in the absence of concrete findings which will be provided by the investigation that is currently underway. As at today, I have up to date tax clearance certificates from the company concerned. Appropriate and stern action will be taken against anyone found to have wronged the department or undermined procurement procedures. I am not above the law and there are structures in place to address my conduct should I have erred in any way.
8. All contracts are awarded after consideration by the DAC. As Accounting Officer, I appoint the DAC, I expect the DAC, especially its Chairperson, to take all appropriate steps to protect the interest of the department at all times. At the end of the day, the buck stops with me, as such, I do take ultimate responsibility for the decisions of any official or structure of the department.
9. The contractor was given an extension to the 30 November 2008, after the recommendation of the professional team on the project. The department will not incur any additional cost as the result of the extension
10. There are no unfinished projects as they are on course to complete Sterkfontein as per the revised date. The decision on Jabulani will be taken after the submission of the investigation report on Monday.

11. The average value of contracts awarded by the Public Works Branch of the department is in the region of one billion per annum.
12. The details of these contracts are listed in the Annual Budget Statement 2 and Annual Budget Statement 3 published by Treasury at the beginning of the financial year, the performance thereof is published in the departmental Annual Reports circulated in September of every year.
13. These are publicly available publications that can be accessed by any member of the public, including journalists.

29 August

Letter to the Editor of City Press

On 29 August 2008, following the publishing of the said articles, the Department, through its legal representatives addressed a letter to the Editor of City Press demanding an apology and retraction of the said statements.

30 August 2008

I inform City Press that I had appointed an interim investigator to investigate Ilima and that and that a final report would be submitted on 31 August 2008.

07 September 2008

City press published an article titled:

“R1.2 bn tender scandal”

The essence of the story was that City Press had uncovered a scandal that indicated that Ilima did not have a valid tax clearance certificate.

City Press did not mention that in fact this so-called *“R1.2 bn tender scandal”* was discovered by the Department’s own internal investigation, the results of which were procured by City Press through stealthy means and then passed off as the outcome of an investigation by City Press.

In this story, reference was made to the fact that Ilima had secured tenders in other provinces despite its financial position not being in order. Surely, the Department cannot be held accountable to what transpired in other provinces. The article lumped together different provinces and published an article which created an impression that the Department was party to a R1.2bn scandal. This is a distortion of the worst variety but even more galling is the fact that Ilima's financial position was unearthed by the Department's own investigation.

12 September 2008

City Press through its attorneys informs the Department that it will neither retract nor apologize for the stories, despite the Department's efforts to explain that the material published was inaccurate.

14 September

City Press published another article, titled:

"Blacklisted company is handed R692m tender".

COMMENTARY

In this article, City Press claims that the Department cancelled its contract with Ilima following a City Press investigation that found the company had submitted a fraudulent tax clearance certificate.

Again, City Press misled the public by passing off the results of the Department's investigation as its own. The Department also ran an advertorial on the same day in the City Press to set the record straight, informing the public that there had been no City Press investigation into Ilima and that the findings of the so-called investigation were in fact stolen information from the Department's forensic report.

2. CONCLUSION

It is submitted that the wilful publishing of the above articles was a violation of basic journalistic standards and accordingly unethical.

All the above stories - written nearly every other week since the 16th of August 2008 – have sought to portray me as a corrupt leader and City Press should be ashamed that it has abused its purported powers and has stooped so low in publishing staggering falsehoods.

Whilst I support and respect freedom of the press, I nevertheless believe that City Press cannot and should not be allowed to publish unbridled falsehoods with impunity.

It is a sad day for journalism when newspapers of City Press' pedigree consistently violate the Press Code with impunity. Such nefarious activities and practices by a newspaper of City Press' calibre undermine efforts to build a society based on respect for truth and justice for all, the very fibre of our democratic ethos and political bloodstream. What a crying shame!

It is in this regard that I am proposing to the Press Freedom Commission will introduce the following remedies:

- the Press Council to establish and publish a list (register) of person accredited to practice as journalists;
- limit the number of anonymous sources in reporting;
- insist on verification of facts, and
- there be consequences for biased, misleading and inaccurate reporting – such consequences to be much more than a meaningless apology, rather to draw lessons from other professions such as the attorneys who can be deregistered by the Law Society and say, engineers who can also be deregistered by the Engineering Council. The issue here for me is not whether this is regulation by peers or by the state, the issue is that there has to be consequences – otherwise, the impunity with which journalists operate will continue unabated. **Repeat offenders have to face consequences such as being deregistered from the published list of accredited journalists.**
