IN THE SOUTH GAUTENG HIGH COURT, JOHANNESBURG

(REPUBLIC OF SOUTH AFRICA)

CASE NUMBER : 08/19424

In the application between

THABO MOGUDI SECURITY SERVICES CC Applicant

and

RANDFONTEIN LOCAL MUNICIPALITY First Respondent

MABOTWANE SECURITY SERVICES CC Second Respondent

JUDGMENT

André Gautschi AJ

Introduction

[1] The applicant, a provider of security services, was the unsuccessful tenderer with regard to the provision of security services and armed reaction for the first respondent, a local municipality, the contract for which was ultimately awarded to the second respondent, another provider of security services.

[2] The applicant sought the following relief :

"1. Extending the time limit of 180 days for the institution of this application to the date of institution thereof.

1A Condoning the applicant's non-compliance with sections 3(1) to (2)(b)(ii) of the Institution of Proceedings against Certain Organs of State Act, 40 of 2002. (*sic*)

2 Reviewing and setting aside the first respondent's decision not to accept the applicant's tender to provide security services and armed reaction ("the services") submitted in response to the first respondent's invitation for bids number 8/2007 ("the applicant's tender").

3. Reviewing and setting aside the first respondent's decision to re-invite tenders for the provision of the services.

4. Reviewing and setting aside the first respondent's decision to accept the second respondent's tender to provide the services.

5. Setting aside the contract between the respondents for the provision of the services with effect from the end of the month immediately following upon the month in which this order is made.

6. Ordering the first respondent to accept the applicant's tender, and enter into a contract with the applicant for the provision of the services for a period of 36 months.

7. Ordering the first respondent to pay the amount of R4 682 913,00 to the applicant in compensation.

8. Ordering the first respondent to pay the applicant's costs of this application.

9. If the second respondent or any other person or persons oppose the application, ordering the second respondent or such other person or persons to pay the applicant's costs of this application jointly and severally with the first respondent, the one paying the other or others to be absolved."

The facts

[3] Any tender process of the first respondent would go through the following steps:

3.1 The bid specification committee, whose function is to compile the specifications for each procurement of goods or services by the first respondent.

3.2 The bid evaluation committee, which has to evaluate the bids received in accordance with the specifications for the procurement of specific services and/or goods. It must submit a report and recommendation regarding the award of the bid and any other related matter to the bid adjudication committee. I shall refer to this committee as "the evaluation committee".

3.3 The bid adjudication committee has to consider the report and recommendations of the evaluation committee and either make a final award or make a recommendation to the municipal manager to make a final award (depending on the power delegated to it), or make another recommendation to the municipal manager on how to proceed with the relevant procurement. I shall refer to this committee as "the adjudication committee".

3.4 The decision would then be taken by the municipal manager, unless the adjudication committee was empowered to and did make the decision.

[4] On 31 May 2007 the first respondent published an advertisement calling for proposals for the provision of security services and armed reaction (henceforth referred to simply as "the services") to the first respondent. The proposed contract period was 12 months. (The contract period was later changed to 36 months.)

[5] The applicant and two others submitted bids.

[6] The task of the evaluation committee was thereafter to ensure that the appointment of the service provider was procedurally correct, was fair and transparent, complied with the supply chain management policy and that the adjudication committee was able to make its report with maximum information, and then to obtain the approval of the adjudication committee.

[7] In its evaluation, the evaluation committee gave the applicant the highest score, and recommended the following :

> "♦ [The applicant] met all the requirements.
>
> ♦ They scored the highest points.
>
> ♦ They had a proposal that responded to the requirements.
>
> ♦ There would be negotiations for the final terms of the contract to be arranged with [the applicant].
>
> ♦ [The applicant] be awarded the bid at a contract price of R9 393 153.12 (VAT Included)."

[8] There is a dispute about whether this is the correct version of the evaluation committee's report. The first respondent attached a copy of "the official report", which was said to be "the correct evaluations report".

The recommendation therein is identical for the first part, but adds the following after "(VAT included)" :

> "• for a period of 36 months.
>
> • The business premises, ammunition, control room, vehicles, protective clothing & other equipment must be inspected prior to the signing of the agreement."

I would be bound to accept the first respondent's version in this regard[1] but I do not believe that the discrepancy is of any moment.

[9] The adjudication committee then considered the matter. At a meeting held by that committee on 6 August 2007, the following is recorded :

> "3. Mr Lethetsa took the panel threw the next report of the security and armed reaction. The chairperson raised a concern about the armed reaction services from the providers from where Mr Lethetsa responded by saying that the armed reaction service is part of the conditions in the document. The chairperson made it very clear that it is essential for the provider to render armed reaction services at all time. Mr Dhlamini then raised a question by asking the location of the company whereby Mr Lethetsa responded by saying that the company is situated in Mohlakeng. The panel then approved that [the applicant] could be appointed subject to the conditions being met according to the agreement." (*sic)"*

[10] Whether as a result of the recommendation in the "correct report", or of its own accord, the adjudication committee requested the director of public safety of the first respondent, a Mr Lethetsa, to conduct an inspection of the applicant's business premises, to determine the suitability and

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1 Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (AD) at 634/5

capacity of the applicant to provide the services. His report is dated 5 September 2007, and recorded the following findings :

> "♦ The company does have a two way radio communication.
>
> ♦ The company does not have a panic button but they claim that it is easy to arrange.
>
> ♦ The company currently has only 3 bakkies but the number can easily be increased should they win the tender.
>
> ♦ The company does not have any firearms but will sub-contract National Force Security Services for this function as was presented in their tender document.
>
> ♦ The company will sub-contract Astek Emergency Response to provide the armed response function.
>
> ♦ The company currently has 41 guards employed and 45 on standby."

The report then continues :

> "Based on the abovementioned findings, [the applicant] were found to be reasonably ready to take on the responsibility of providing a security service to Randfontein local municipality with the very stringent conditions attached to the agreement. The agreement should also be for an initial period of 12 months and not 36 months as initially envisaged."

[11] For some reason which is not made clear in the papers, the acting director of public safety, a Mr Molao[2], furnished a memorandum dated 12 September 2007 directly to the municipal manager, concerning the

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[2] I assume the director was then on leave.

appointment of a security service provider. The purpose of the memorandum appears from the first paragraph thereof, which reads :

> "The purpose of this report is to inform the RLM[3] Municipal Manager about the call for proposal tender for a Security Company to provide security service for the entire RLM Buildings and properties."

The memorandum then refers to the scoring of the three tenderers. It then states the following :

> "The Evaluation Committee recommended the company with the highest points on condition that the following critical aspects are met :
>
> - Radio communication
> - Panic Button system
> - Adequate vehicles
> - Armed response capability
> - Armed guard capability – firearm inventory
> - Staff capacity (guards).
>
> The findings were as follows :
>
> - No panic buttons
> - Only 3 bakkies (vehicles) available (no firearms) No armed response capacity (41 guards employed and 45 standby).
>
> It is therefore against this background that a decision was to be made as to whether [the applicant] meets the condition as a suitable bidder. If not, the most suitable service provider should be preferred.

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[3] Clearly meaning Randfontein Local Municipality.

> The second most suitable service provider Armed Security International met the criteria but the issue was that the company operates from Roodepoort area and had a high price. However, they made a commitment to employ locally and establish an office within RLM if appointed."

[12] The municipal manager rebuffed this direct approach to her in a memorandum dated 17 September 2007 addressed to Mr Molao , which reads :

> "Your memorandum dated 12 September 2007 refers.
>
> A decision was taken by the adjudication committee to conduct site inspections. My concerns were around recommendation issues by your department, given the findings on the said inspection.
>
> In my opinion, it would only make sense to conduct a site inspection for the second preferred company and submit well informed recommendations and motivations to the adjudication committee and not to myself."

[13] Although it was submitted to me by counsel for the applicant that the adjudication committee had made a recommendation, and the municipal manager had made a decision, it appears from a proper reading of the documents that the adjudication committee was still collecting information, and had not yet made a recommendation to the municipal manager, by the time the below mentioned mayoral committee meeting took place.

[14] The mayoral committee meeting of the first respondent was scheduled for 20 September 2007. For purposes of the meeting, Mr Lethetsa prepared a progress report on the rationalisation of the first respondent's security, which included a copy of his report of 5 September 2007. The meeting of

the mayoral committee took place on 20 September 2007 and resumed on 15 October 2007.

[15] Between these two meetings, the municipal manager addressed a confidential memorandum dated 27 September 2007 to the directors of public safety and finance. In view of its importance, I quote it in full :

"**WITHDRAWAL OF TENDER : SECURITY SERVICES**

A tender was issued by the Randfontein Local Municipality through the Directorate Public Safety for acquisition of security services for a period of 3 years. The three year period was a deliberate move from the side of council as we believed that this could put us in a better bargaining position in respect of specialised rates.

I must state my dissatisfaction in the manner in which the entire process was handled. A recommendation was made by the adjudication committee to conduct site inspections as means to determine the capacity of the service providers to deliver on the job at hand. The Director Public Safety made recommendations that were a clear disregard the whole intention of determining the capacity to deliver, and instead recommends an action that is even contrary to the specifications of the tender. This matter has been taken up with the Director.

It was further recommended that another site inspection be conducted as it was clear from the Director's memo that the service provider did not meet the requirements. Kindly note that all my correspondences on the matter were marked confidential, as this was still a pending matter. To my dismay, the very same memo was included in a report on the status of security matters to the mayoral committee. I view this as an act of negligence on the side of the Director Public Safety as I deemed that information to be confidential. It is for this reason that it is proposed that the tender be reversed and re tendering to be looked at as a matter of urgency. The legal implications due to the negligence from the side of the Director Public Safety will be discussed privately in detail with him.

I trust you find the above is order." (*sic*)

[16] At the meeting on 15 October 2007, three members of the adjudication committee (one being the chairperson) were present. During the course

of the meeting various councillors "attacked" (clearly only verbally) the members of the adjudication committee who were present and insisted that the tender should be awarded to the applicant. According to the municipal manager, it was apparent that "various councillors were adamant that the applicant be appointed and the adjudication committee was considered obliged to do so."

[17] The municipal manager considered the conduct of the councillors to be quite improper, by reason of the provisions of section 117 of the Local Government Municipal Finance Management Act, No 56 of 2003 ("the MFMA"), which reads as follows :

> "117 **Councillors barred from serving on municipal tender committees**
>
> No councillor of any municipality may be a member of a municipal bid committee or any other committee evaluating or approving tenders, quotations, contracts, or other bids, nor attend any such meeting as an observer."

The municipal manager took the view, so she says, that the conduct of the councillors at the aforesaid meeting constituted a breach of the provisions of section 117 of the MFMA Act. Accordingly, she decided that the integrity of the tender process had been compromised and that it was prudent to set aside the tender process and to start the process afresh.

[18] This is not what the applicant was told at the time. The applicant received a letter dated 17 October 2007, the relevant part of which reads :

> "Randfontein was unable to make an appointment on the process that was followed and will therefore resumes the process." (*sic*)

There was no mention in that letter or any subsequent correspondence that the process had been compromised.

[19] The tender process then commenced afresh. It was advertised again on 25 October 2007 with a closing date of 15 November 2007. In the aforesaid letter of 17 October 2007 the applicant was invited to participate in this process. It did not do so and in the event the second respondent was awarded the contract. The second respondent had not been part of the first tender process.

[20] The applicant made no effort to interdict the second tender process or the awarding of a contract to the second respondent.

Did the applicant's tender meet the specification?

[21] The first respondent contends that the applicant's tender did not meet the tender requirements as set out in the invitation to tender.

[22] In the first place, it was pointed out that the applicant apparently did not have firearms or an armed response function. The applicant's response is that they had planned to sub-contract these functions, as was advised to Mr Lethetsa and as is recorded in his report dated 5 September 2007. The applicant points out that clause 33 of the special conditions of contract, which would have formed the basis of the contract between them, allowed for the appointment of sub-contractors by successful bidders, as a matter of right. The applicant had also, in its bid, revealed the fact that it would be make use of sub-contractors. I do not believe that this is a valid criticism by the first respondent.

[23] The second criticism is that the applicant changed the specifications, by changing "1 Armed officer" to be placed at each of two venues during the day to "Un 1 armed officer", presumably meaning "1 unarmed officer". It motivated this in its tender as averting a security risk. The applicant submitted that the evaluation committee had obviously accepted this advice because it recommended to the adjudication committee that the applicant's tender be accepted. In my view, the applicant was not entitled to change the specifications but this is seemingly not a material matter, and did not feature in the deliberations or recommendations, or indeed in the first respondent's reasoning after the event, until the point was raised in the answering affidavit. I do not believe that the applicant's tender could be said to be deficient for this reason.

[24] I therefore find that the applicant's bid met the tender requirements.

Did the adjudication committee or municipal manager appoint the applicant?

[25] The applicant contends that the adjudication committee decided at a meeting on 6 August 2007 to award the tender to the applicant. The relevant part of the minute of that meeting has been quoted in paragraph 9 above.

[26] The last sentence ("the panel then approved that [the applicant] could be appointed subject to the conditions being met according to the agreement") may give the impression that the applicant had been approved, but upon a careful reading it is tentative and conditional. It is also a minute of a meeting of the adjudication committee, and not a

decision as conveyed to the municipal manager. It records no more than the internal thoughts of the adjudication committee.

[27] The power to make decisions had not been delegated to the adjudication committee. This was an allegation made in a supplementary answering affidavit, which could not be refuted in the reply thereto. The adjudication committee could therefore not make the decision itself, but had to make a recommendation to the municipal manager. There is in any event no proof that the adjudication committee purported to make the decision itself and thereafter conveyed that decision to the interested parties.

[28] There is also no proof, and indeed the documents indicate the contrary, that the adjudication committee made any recommendation to the municipal manager. The process was stopped by the municipal manager before that stage was reached.

[29] The applicant also repeatedly contends that the municipal manager made decisions. Her memoranda of 17 and 27 September 2007 are cited in support. However, the memorandum of 17 September 2007 quite properly directs the process back to the adjudication committee, and the memorandum of 27 September 2007 expresses unhappiness with the state of affairs, and foreshadows the events which in fact occurred thereafter. The facts show that the municipal manager made no decision on awarding the tender, and that the only decision she made was to abort the process.

[30] Accordingly, no decision to appoint the applicant was in fact made.

The decision to abort the process

[31] The facts show (despite submissions to the contrary) that the adjudication committee had not yet made its recommendation to the municipal manager at the time when the mayoral committee meeting took place. Accordingly, there was very real interference with the functioning of the adjudication committee by the mayoral committee, which would in my view have vitiated the process had it continued. The municipal manager rightly, in my view, decided to scrap the process, and commence afresh.

[32] Applicant's counsel submitted that this was not the true reason for failing to award the contract to the applicant. In the first place, he submitted, this was never given as a reason to the applicant until the answering affidavit was received. In the second place, it appears from the municipal manager's memorandum dated 27 September 2007 that the decision to reverse the process and call for new tenders had already been made by that date, and it was therefore not the events of 15 October 2007 which triggered the decision. That places too simplistic a gloss on the import of the memorandum of 27 September 2007 and the significance of what happened at the mayoral committee meeting on 15 October 2007. The memorandum of 27 September 2007 records the municipal manager's dissatisfaction with the manner in which the entire process was handled, and in particular that Mr Lethetsa's report of 5 September 2007 was placed before the mayoral committee, since it had no place amongst those documents. She also recorded that the applicant appeared not to have the capacity to deliver, and had recommended "an action that is

even contrary to the specifications of the tender" (I presume she means the question of the unarmed guard instead of the armed guard). The memorandum continues : "... it is proposed that the tender be reversed and retendering to be looked at as a matter of urgency". Accordingly, no decision had been taken but the events of 15 October 2007 were indeed foreshadowed. The importance of the political interference is no afterthought, even if it was not revealed earlier than the answering affidavit. I therefore do not believe that the applicant's complaints in this regard are well founded.

[33] The applicant contended in its replying affidavit that what occurred at the meeting of the mayoral committee on 15 October 2007 was not a contravention of section 117 of the MFMA. It will be remembered that that section prohibits a councillor from being a member of or attending any meeting of any committee relevant to tender adjudication or acceptance. Thus, the applicant contends, the first respondent does not allege that any of the councillors was a member of any of the committees involved, nor that they attended any meeting of those committees. Technically, that is correct. However, the section was clearly enacted in order to ensure that politicians should not interfere in the adjudication, recommendation or acceptance of tenders by a local authority such as the first respondent, in order to maintain the impartiality and integrity of the process. Politicians are by their nature agents for constituencies, and not impartial as officials of an organ of state ought to be. The plain intention of the section is therefore to avoid any involvement of councillors in the process and, by

their actions at the meeting of the mayoral committee, they plainly transgressed section 117.

[34] The municipal manager's decision to abort the process can therefore not be faulted.

Audi alteram partem

[35] Applicant's main argument revolved around the *audi alteram partem* principle. As I understand the argument, the principle was sought to be invoked in two contexts.

[36] The first is that, if the applicant's tender did not meet the specifications in the enquiry document, and for that reason it was not awarded the contract, the applicant had to be afforded a hearing in order for it to explain itself. Such a suggestion places an impossible burden upon any tender adjudication process. In every such process, certain tenders will be found to be inadequate, in respects such as failing to price a particular item, quoting for a substitute item instead of the item specified, or the like, or simply being inferior to the other bids. I have never known it to be required that the tender adjudicator must afford each such tenderer whose bid is rejected a hearing. This aspect is however academic in the light of my finding that the applicant's tender did meet the specifications in the enquiry document.

[37] Secondly, it was suggested that when the municipal manager decided to abort the tender process and call for tenders afresh, she had to afford the applicant a hearing, which she failed to do. Counsel for the applicant

sought to tie this aspect in with the municipal manager's view that the applicant's tender had not met the specifications in the enquiry document. I do not however find in the papers any suggestion that the one aspect could be linked to the other. The perceived interference by the mayoral committee was in my view unacceptable, regardless of whether the applicant would otherwise have been awarded the tender or not.

[38] I nevertheless proceed to consider whether the applicant should have been afforded a hearing before the municipal manager decided to abort the tender process and call for tenders afresh. It is well recognised that the right to *audi alteram partem* is dependent upon the circumstances. It is "contextual and relative"[4]. The right to make representations will usually arise where a person may be adversely affected by a decision[5]. It is also no answer to say that the person who would be adversely affected by a decision may have little or nothing to urge in regard thereto, or that a fair hearing could have made no difference to the result[6]. This is however not so much a case where nothing would be achieved by affording the applicant a hearing on the basis that the applicant could not conceivably have contributed anything, but a case where the circumstances dictate that the applicant should not be afforded any opportunity to make representations. Although the decision to abort the process would

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4 Chairman, Board on Tariffs and Trade, and Others v Brenco Inc and Others 2001 (4) SA 511 (SCA) at [19]

5 Chairman, Board on Tariffs and Trade v Brenco Inc *supra* at [13]

6 Administrator, Transvaal, and Others v Zenzile and Others 1991 (1) SA 21 (AD) at 37C-F; Logbro Properties CC v Bedderson NO and Others 2003 (2) SA 460 (SCA) at [24]

adversely affect the applicant, it did not have a right to be awarded the contract. In terms of the written rules of bidding, which the applicant initialled :

> "11.6 Randfontein Local Municipality is not bound to accept any of the bids submitted."

If the first respondent decided not to accept any of the tenders, and not to continue with that particular tender process, but to commence the tender process afresh, it was entitled to do so and did not thereby adversely affect any rights which the applicant had. Applicant's counsel also did not attempt to persuade me that the decision to abort the tender process *per se*, divorced from the decision that the applicant had failed to meet the tender requirements, merited a hearing. This is no doubt because the applicant was free to participate in the second tender process[7]. This latter consideration renders the decision in Logbro Properties[8] distinguishable. Whilst the decision to commence the tender process afresh is the prime reason why I believe that tenderers were not obliged to be afforded the right to make representations, there is the added consideration that the first respondent had no choice but to cancel the process in the circumstances of this matter. Such circumstances are also entirely internal to the first respondent, and, as it is not suggested that any of the tenderers played any part in the events which led to the process being aborted, the views of the tenderers are in my opinion irrelevant.

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7 Albeit with the disadvantage which that entails, dealt with in paragraph [49] below

8 Logbro Properties v Bedderson *supra.* See also Milnerton Lagoon Mouth Development (Pty) Ltd v Municipality of George and Others [2005] JOL 13628 (C), quoted in Thebe ya Bophelo Healthcare Administrators (Pty) Ltd and Others v National Bargaining Council for the Road Freight Industry and Another 2009 (3) SA 187 (W) at [29]

[39] The applicant also relies on the case of Du Bois v Stompdrift-Kamanassie Besproeiingsraad[9]. In that case the applicant had hired a picnic and camping site from the respondent for a period of two years, on which it carried on business as Meiringspoort Avonture. When the lease approached its end, the applicant proposed to enter into a long-term lease with the respondent. However, the respondent put the lease out to tender. The applicant and two others tendered. The respondent decided not to accept any of the tenders on account of a report on a site inspection, which was critical of the applicant's management of the site, and a water report, which was dated two years prior to the decision and contained many complaints regarding the applicant's management of the site. The applicant was not informed of these adverse reports. The applicant took the respondent on review. The court set aside the respondent's decision not to accept the applicant's tender on the basis that the respondent had failed to inform the applicant of the adverse reports and its intention to rely thereon against the applicant, and had failed to give the applicant an opportunity to respond to that adverse information prior to its decision.

[40] In the Stompdrift decision, Griesel J relied on two cases in support of the approach which he took in that matter. The first was Nisec (Pty) Ltd v Western Cape Provincial Tender Board & Others[10]. That case however dealt with the cancellation of a contract on the basis of fraud by the

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9 2002 (5) SA 186 (C) (Griesel J)

10 1998 (3) SA 228 (C)

tenderer, and is therefore distinguishable from the present case as well as the Du Bois case. Clearly, in such a case, the tenderer must be given an opportunity to be heard. The second case on which he relied was National & Overseas Modular Construction (Pty) Ltd v Tender Board, Free State Provincial Government & Another[11], in which the tender board declined to award one of three tenders to the applicant because it was of the opinion that awarding all three tenders to one tenderer may overload the contractor with work, but it did not advise the applicant of this opinion or give it an opportunity to deal therewith. The case is therefore support for the finding which Griesel J made.

[41] Griesel J came to his conclusion notwithstanding submissions made to him that his approach would make the tender process "onhanteerbaar en onuitvoerbaar". He rejected those submissions on the basis that the application of the *audi alteram partem* in considering tenders would not unduly bog down the process, because the requirements for procedural fairness are contextual and relative, and every situation does not call for a full blown hearing.

[42] Imposing a burden on the person or entity calling for tenders, to afford a tenderer an opportunity to be heard whenever some adverse consideration is to be taken into account against that tenderer, would indeed in my view bog down the process unnecessarily, and, in context, is not in my view required. The point can be illustrated with reference to the facts of this case. There were, in the first tender process, three tenderers.

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[11] 1999 (1) SA 701 (O)

Their bids were examined by the evaluation committee, which subjected each bid to a points scoring system, and ultimately arrived at a total mark for each bid. That process in itself involves a value judgment, where one tenderer is rated, on a number of aspects, and is ultimately found to be better or worse than another tenderer. Wherever it scores a lower mark, it is adversely affected thereby, i.e. by the product of a value judgment, yet no-one could reasonably suggest that the lower scoring tenderers ought to be heard on the evaluation process. Then the matter served before the adjudication committee, whose function, as we have seen, was to consider the report and recommendations of the evaluation committee and either make a final award, or recommend to the municipal manager to make the final award, or make another recommendation to the municipal manager. In that process of necessity the adjudication committee too will consider one tenderer to be inferior to another. That is the nature of adjudicating tenders. Again, no-one would suggest that the lower rated tenderer should be given an opportunity to be heard on this value judgment. Does the position then change where the adjudication committee investigates a tenderer more thoroughly? I think not.

[43] That is not to say that an unsuccessful tenderer is remediless. It may well be able to show that the decision is not rationally connected with the reasons. But affording an unsuccessful tenderer a remedy based on that ground does not involve affording it a remedy based on breach of the *audi alteram partem* principle. In my view, a tender process is ordinarily a process which would not demand that the *audi alteram partem* principle be applied.

[44] Can these principles be reconciled with the findings and conclusions reached in the Stompdrift and National & Overseas Modular Construction cases? It seems to me that those cases are distinguishable, in that in each case a factor outside of the tender specifications and bid details was taken into account. In the Stompdrift case it seems as if the site inspection report and the water report were extraneous to the information which the tenderer would have expected to be in front of those adjudicating his bid. The National & Overseas Modular Construction case also involved the tender board taking into account, as I read it, an extraneous factor, namely the ability of the tenderer to cope with all the work for which it tendered. However, if I am wrong that these cases are distinguishable, then I respectfully disagree with them, and decline to follow them.

[45] Accordingly, to relate these principles back to the facts of the present case, had the applicant's tender failed to meet the specifications in the enquiry document, that is not a matter on which I would have upheld the applicability of the *audi* principle. In regard to the decision to abort the tender process, the *audi* principle is also not applicable, for reasons already stated.

The powers of the municipal manager

[46] Applicant's counsel placed before me elaborate submissions concerning the separation and interaction of functions of the various committees and the municipal manager, leading to the concluding submission that the municipal manager does not retain a residual power to make a final award

in respect of a tender which is not preferred by the evaluation and adjudication committees, or to reject a tender which is preferred by those committees. He submitted that if the municipal manager disagrees with any of the decisions of either of those committees, his or her powers are limited to referring the matter back to those committees for reconsideration.

[47] It is unnecessary that I enter into this interesting debate, because, as I have already found, the municipal manager made no decision (save to abort the process), she therefore did not purport to override any recommendation or decision of the evaluation or adjudication committees, and the point sought to be made simply does not arise.

Review of the second tender process

[48] I include under this head both the reasonableness of the decision to re-invite tenders, and the second tender process itself, because I perceive these to be part and parcel of the same point.

[49] The applicant contends that putting it to a second tender process was prejudicial to it, specifically because its original tender price would be known to its competitors, who could thereafter easily have undercut that tender price. There is much merit in this point. The first respondent's policy provides for bids to be opened in public and for tender prices to be made known. Even if the tender price was not read at the bid opening stage, any competitor would easily be able to obtain that information[12].

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[12] *Cf* Steenkamp NO v Provincial Tender Board, Eastern Cape 2007 (3) SA 121 (CC) at [49]

[50] As against that prejudice must be weighed the need for the first tender process to be aborted and a new tender process to be entered into. Once it is accepted that the first tender process was compromised and simply could not be allowed to continue or to stand, then the only avenue open to the first respondent was to initiate a fresh tender process.

[51] In that situation, I do not believe that the applicant's prejudice is a factor, but if it is, then in the balancing process it pales into insignificance.

[52] The first respondent contends that the applicant does not point to any flaw in the second tender process, and that it therefore cannot attack that process or set the contract awarded to the second respondent aside.

[53] If the municipal manager's decision to abort the first tender process, and to embark upon a second one, cannot be faulted, then there is no justifiable attack at all on the second process, and it must stand. However, had there been merit in the attack on the first process, then the second process ought never to have happened, and it must in my view fall in the resultant domino effect.

The length of contract if the applicant were successful

[54] The applicant submitted that, should it be successful, I should order the first respondent to conclude a contract with it for a period of 36 months commencing from the date of my order.

[55] I believe that such an order would be grossly inequitable and quite wrong. The first respondent advertised for an agreement which was to commence

on 1 July 2007 and (in its amended form) would endure for a period of three years. By the time of the hearing before me, more than two and a half years thereof had elapsed. To order a further contract for a period of three years would mean that the first respondent would be saddled with a contract for effectively five and a half years instead of three. The first respondent is no doubt subject to budgetary constraints, and it would not be for a court to impose upon it a contract for a longer period than it itself wanted and budgeted for. I believe that it would be quite wrong to impose a fresh contract upon the first respondent, rather than to allow the applicant simply to complete the last part of the existing contract. The case of Eskom Holdings[13] is an example where a contract had less than three months to run, and the SCA upheld the High Court's order that the award of the tender be set aside. In his reasoning, Cloete JA referred to the fact that the contract had less than three months to run[14]. He did not postulate a contract being awarded afresh, but plainly envisaged that at best the respondent would be able to complete the last few months of the contract.

The delay in launching the application

[56] Prior to the enactment of the Promotion of Administrative Justice Act, No 3 of 2000 ("PAJA"), judicial review at common law was required to be instituted within a reasonable time of the impugned administrative conduct. The reason for requiring such a limitation was to ensure finality

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13 Eskom Holdings Ltd and Another v New Reclamation Group (Pty) Ltd 2009 (4) SA 628 (SCA)

14 At [15]

in any decision-making process, and to limit any prejudice to the respondent in review proceedings due to unreasonable effluxion of time. The common law limitation however provided for the exercise of judicial discretion[15]. The application of the rule that a judicial review must be brought within a reasonable time, requires consideration of two questions, namely :

(a) was there an unreasonable delay?

(b) if so, should the delay in all the circumstances be condoned?[16]

In regard to the second question, the incidence of prejudice to the respondent and the extent thereof are relevant factors[17]. As to whether the applicant's prospects of success are to be taken into account in a consideration of whether condonation would be granted, the position has been made clear by the majority judgment in Gqwetha's case[18]. The approach is not simply to consider what are the prospects of the challenged decision being set aside, but to evaluate what the consequences of setting the decision aside are likely to be. But that does not, in my view, preclude a court from having regard simply to the prospect of the challenged decision being set aside for, as the minority in

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15 Wolgroeiers Afslaers (Edms) Bpk v Munisipaliteit van Kaapstad 1978 (1) SA 13 (A) at 39A-C, 41B and 42A-D; Harnaker v Minister of the Interior 1965 (1) SA 372 (C) at 380C-E; Yuen v Minister of Home Affairs & Another 1998 (1) SA 958 (C) at 968J-969A

16 Gqwetha v Transkei Development Corporation Ltd and Others 2006 92) SA 603 (SCA) at 607A-B; Associated Institutions Pension Fund and Others v Van Zyl and Others 2005 (2) SA 302 (SCA) AT 321E-F

17 Gqwetha v Transkei Development Corporation Ltd *supra* at 609H-I

18 Gqwetha v Transkei Development Corporation Ltd *supra* at 614J-615F

Gqwetha's case pointed out[19], if there are no prospects of the administrative decision being set aside, there is no reason why a court should still have to embark on an enquiry as to what meaningful consequences there would be were it to be set aside.

[57] Section 7(1) of PAJA has attempted to curb the uncertainty of the common law position by placing a time limit on the period within which judicial review proceedings must be instituted. Section 7(1) reads as follows :

> "7. **Procedure for judicial review**
>
> (1) Any proceedings for judicial review in terms of section 6(1) must be instituted without unreasonable delay and not later than 180 days after the date-
>
> (a) subject to subsection (2)(c), on which any proceedings instituted in terms of internal remedies as contemplated in subsection (2)(a) have been concluded; or
>
> (b) where no such remedies exist, on which the person concerned was informed of the administrative action, became aware of the action and the reasons for it or might reasonably have been expected to have become aware of the action and the reasons. "

[58] Section 9 of PAJA is also relevant in this regard. It reads :

> **"**9. **Variation of time**
>
> (1) The period of-
>
> (a) 90 days referred to in section 5 may be reduced; or

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19 At 611I-J

(b) 90 days or 180 days referred to in sections 5 and 7 may be extended for a fixed period,

by agreement between the parties or, failing such agreement, by a court or tribunal on application by the person or administrator concerned.

(2) The court or tribunal may grant an application in terms of subsection (1) where the interests of justice so require. "

[59] Section 7(1) requires that the proceedings for judicial review must be instituted "without unreasonable delay and not later than 180 days ...". This entails a twofold enquiry. The first is whether the proceedings were instituted "without unreasonable delay". If they were not, then the enquiry ends there, without having regard to whether such proceedings were instituted within a period of 180 days. In other words, a period less than 180 days could be found by the court to constitute unreasonable delay. It is only if a delay of 180 days is not unreasonable that the time limit of 180 days becomes relevant.

[60] On a narrow reading of section 9(1), it is only the period of 180 days that may be extended under that section, and not any lesser (unreasonable) period. However I do not believe that to be the intention of section 9(1), and such a narrow reading would give rise to an anomaly and an absurdity. There would be no reason to differentiate between 180 days and a shorter period in deciding whether to grant a court the power to extend the period, and to allow a court the power to extend the period of 180 days but not to allow it the power to extend a lesser unreasonable period. The period of 180 days (or any shorter period) may therefore in

my view be extended (assuming no agreement) by the court "where the interests of justice so require". In such a case :

> ". . . the party seeking [an extension of time] must furnish a full and reasonable explanation for the delay which covers the entire duration thereof and relevant factors include the nature of the relief sought, the extent and cause of the delay, its effect on the administration of justice and other litigants, the importance of the issue to be raised in the intended proceedings and the prospects of success."[20]

[61] The application for a review was launched some two months after the 180 days had expired. The explanation is thin, to say the least. In essence it amounts to the fact that the applicant was badly advised by an inexperienced counsel[21] and it was only at about the time the 180 days expired that present counsel for the applicant was engaged. The application then took a further period of time to be finalised.

[62] As has been seen above, the question of prejudice is a relevant consideration. The first respondent attacks the adequacy of the explanation furnished, but does not point to any prejudice that it has suffered by reason of the delay. It appears from the scant information placed before me that it is not the applicant that was blameworthy but its legal representatives. In the end result, I may have been inclined to grant condonation (more properly an extension of time in terms of section 9 of PAJA) if there were prospects of the challenged decision being set aside and, with such setting aside, a prospect of something meaningfully being

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20 Camps Bay Rate Payers' and Residents' Association & Another v Harrison & Another (560/08) [2010] ZA SCA 3 (17 February 2010) at para [54]

21 Not counsel who argued the matter before me.

achieved[22]. However, as appears from what I have said above, there is no prospect of success, and condonation should for that reason in my view be refused.

The issue of compensation and the Institution of Proceedings against Certain Organs of State Act

[63] The issue of compensation does not arise in this matter in view of the conclusions I come to.

[64] The defence raised by the first respondent regarding the applicability of the Institution of Proceedings against Certain Organs of State Act, No 40 of 2002, relates only to the claim for compensation. Once it becomes unnecessary that I deal with the issue of compensation, this issue also falls away.

Conclusion

[65] The application is accordingly dismissed with costs.

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ANDRÉ GAUTSCHI
ACTING JUDGE OF THE HIGH COURT

Date of hearing 11 and 12 February 2010

Date of judgement 7 May 2010

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22 Gqwetha v Transkei Development Corporation Ltd *supra* at 614J-615C

For applicant	Adv H H Steyn (instructed Frans Mphatswe Attorneys)
For first respondent	Adv G Hulley (instructed by Maserumule Attorneys)

No appearance for second respondent