IN THE KWAZULU-NATAL HIGH COURT, DURBAN

REPUBLIC OF SOUTH AFRICA

CASE NO. 8110/2010

In the matter between:

VUKUKHANYE PERSONNEL SERVICES CC	APPLICANT
and	
ETHEKWINI MUNICIPALITY	FIRST RESPONDENT
BRIOMHAR CONSULTING CC	SECOND RESPONDENT
DATA WORLD (PTY) LIMITED	THIRD RESPONDENT

JUDGMENT Delivered on 01 December 2010

SWAIN J

[1] The present dispute finds its genesis in a desire by the eThekwini Municipality (the first respondent) to obtain updated account holder information. In order to achieve this objective, the first respondent called for tenders from interested parties to carry out what was in effect a census of existing account holders and in doing so, obtain specified information which was needed to enable the first respondent to introduce a new billing system, known as the Revenue Management System.

[2] The object of the exercise appears to be to ensure the accuracy of the bills generated by the first respondent.

[3] Four responses were received to the invitation to tender by the first respondent, being the applicant, the second respondent, third respondent and Deloitte Consulting. The offer by Deloitte Consulting was deemed by the first respondent to be non-responsive, as they failed to stipulate prices as required. It was therefore excluded from further consideration.

[4] In the light of the conclusion I have reached as to the validity of the decision taken by the first respondent, in awarding the contract jointly to the second and third respondents, to the exclusion of the applicant, it becomes unnecessary to consider the history of precisely how the first respondent went about reaching the conclusion that it did.

[5] It would however be fair to say that the scope of the work defined in the tender, was of such a nature that it created uncertainty in the tenderers, as to how precisely they were to set about achieving the requisite goals of the first respondent. Of significance is that in the tender document, no estimation was furnished by the first respondent of the number of consumers, and yet the price that was required to be quoted was a "rate per consumer" and no differentiated rate was required for "structured" and

"unstructured" addresses. Clearly, these issues were of vital importance to enable tenderers to submit quotes, which were rationally related to the tasks they were being asked to perform.

[6] Be that as it may, the applicant avers that it learned of the rejection of its bid on 29 April 2010 by ordinary mail and as a consequence lodged an appeal and called for reasons for the decision on 07 May 2010. The third respondent however, avers that the notice was sent by registered mail on 08 April 2010 and uplifted by the applicant on 22 April 2010. In the latter event, the appeal noted by the appellant, according to the third respondent, would have been lodged one day late. Mr. Salmon S C, who appeared for the applicant objected to the admission of this evidence in the supplementary answering affidavit of the third respondent, which was delivered late, in terms of the order granted by this Court on 12 October 2010. He also objected on the basis that the applicant denied the averments made by the third respondent, as to the date upon which the applicant received notice of the rejection of its tender.

[7] The significance of all of this lay in the fact that the third respondent alleged as a consequence, that the applicant did not timeously avail itself of the right of appeal, afforded by the first respondent. The applicant had therefore failed to demonstrate that it had exhausted the internal remedies available to it, before launching the present proceedings, as required by Section 7 (2) of the Promotion of Administrative Justice Act No. 3 of 2000 (P A J A).

Again, for reasons which will become apparent later in this Judgment, it becomes unnecessary for me to decide this issue.

[8] The applicant launched the present proceedings on 14 July 2010, after ascertaining that the contract was being implemented notwithstanding the appeal that it had lodged, as well as a request for reasons from the first respondent, as to the decision it had made. The applicant initially sought an interdict restraining the first respondent from engaging the second and third respondents to perform the work in question, pending the furnishing of reasons by the first respondent, the final determination of the applicant's appeal and any review proceedings the applicant may bring.

[9] At the hearing on 22 July 2010, the second and third respondents handed up what was termed a "preliminary answering affidavit", the matter was adjourned *sine die* and the first respondent undertook to furnish the applicant and the second and third respondents, on or before the 19 August 2010 with the following:

[9.1] Written reasons for the rejection of the applicant's tender.

[9.2] The report of the Bid Evaluation Committee to the Bid Adjudication Committee (B A C).

[9.3] The minutes of the meeting of the Bid Adjudication

Committee, at which a decision was taken to award the tender.

[9.4] The outcome of the applicant's appeal (in writing).

[9.5] The minutes of the appeal authority.

[9.6] Copies of the second and third respondents' tender submissions.

[9.7] A copy of any Service Level Agreement concluded between the first respondent and the second and third respondents, alternatively, written notice of the date on which such agreement was concluded and the date on which such agreement became effective.

[10] The agreement also reserved to the applicant the right to supplement its affidavits and file an amended notice of motion.

[11] The applicant then filed a supplementary affidavit and an amended notice of motion in which a review of the decision of the Bid Adjudication Committee of the first respondent, on 20 January 2010, was sought as a second order prayed. A further order was sought directing the said Committee to reconsider the tenders of the applicant and the second and third respondents.

[12] At the time of filing of the applicant's supplementary affidavit

on 10 September 2010, it was pointed out that the first respondent , in breach of its undertakings had failed

[12.1] To furnish any reasons for the rejection of the applicant's tender.

[12.2] To furnish the applicant with the outcome of its appeal.

[12.3] To furnish the applicant with the relevant minutes of the appeal authority.

[12.4] To furnish the applicant with a copy of any service level agreement concluded between it and the second and third respondents.

[12.5] To furnish the applicant with the other documents referred to in the agreement, the first respondent having partially complied with its undertaking by furnishing an incomplete bundle of documents on 19 August 2010 and a further bundle on 25 August 2010.

[13] When the matter came before Court on 12 October 2010, an answering affidavit was handed up on behalf of the first respondent, in which the first respondent stated that it had elected not to oppose the matter and to abide the decision of the Court.

[14] The relevant aspects of the first respondent's affidavit are as

follows:

[14.1] The deponent, who is described as a legal advisor to the first respondent, states that there was never an appeal because one Sbu Shezi, who deals with the appeal process, formed the view that the appeal was out of time. No appeal was heard and there was therefore no outcome to an appeal.

[14.2] No service level agreement was concluded between the first respondent and the second and third respondents.

[14.3] Most of the available documents relied upon by the Bid Evaluation Committee and the Bid Adjudication Committee had been provided to the applicant.

[14.4] After the tenders were opened the treasury unit prepared a report which was considered by the Bid Evaluation Committee on 07 June 2009.

[14.5] The report stated that of the four responses received to the tender, only those of the applicant, second respondent and third respondent, stipulated the prices as required.

[14.6] These three tenders were compliant in terms of prices, but contained exclusions, that rendered it difficult to compare them on an equitable basis.

[14.7] It was recommended that these tenders not be accepted

but that authority be given to the Head: Revenue to negotiate with these three parties to supply the services.

[15] In the result, on 24 June 2009, the Bid Adjudication Committee approved a recommendation by the Bid Evaluation Committee, that the Department address a letter to all the companies, requesting them to exclude their exclusions.

[16] This was done, all of these companies responded and interviews were then held with all of them to ensure they understood the task, and to enable their ability to undertake the task to be assessed by the first respondent.

[17] The Treasury Department then prepared raw scores in which the applicant and the second and third respondents were scored. The deponent states

"It was on the strength of the raw scores that the Treasury Department recommended the awarding of the tender in the form it was awarded".

It was also stated that the raw scores were provided to Supply Chain Management, to convert them into the appropriate score sheet but that

"There are some discrepancies on the conversion of the raw scores to the prescribed score sheet and those responsible are unfortunately unable to

explain the reason for this".

[18] The deponent then goes on to state the following:

"16

The Treasury Department made the recommendation that the award be in the form it did as it was perceived to be the most cost effective to the first respondent. The tender prices (after all parties had confirmed that their tender prices would include the exclusions and each of the parties had been interviewed) were taken into consideration when the raw scores were ascertained by the Treasury Department. The raw scores were then given to Supply Chain Management to formalise.

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It appears that the incorrect schedule was attached to the signed report that was placed before the Bid Adjudication Committee, but it has been impossible to obtain clarification from the persons responsible as to the reason why this happened. It has also been impossible to ascertain the methodology applied to ascertain the scores reflected on the score sheet that ought to have been attached to the signed report dated 22 October 2009 (B19]. The score sheets that ought to have been attached to the signed report are attached to the unsigned report of even date [B29].

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The recommendation of the Treasury Department to award the tender in the form that it was awarded to the second and third respondent was supported by the Bid Evaluation Committee and eventually approved by the Bid Adjudication Committee".

[19] The unsigned report to the Bid Adjudication Committee dated 22 October 2009 with the schedule containing the scores appears at pages 261 – 268 of the papers. The signed report with the schedule containing the scores appears at pages 269 – 277 of the papers.

[20] What can be extracted from this maze of confusion is the following:

[20.1] The Treasury Department recommended the award of the tender on the basis of raw scores which it prepared. None of these raw scores have been produced, as these raw scores were converted into the "appropriate score sheet" by Supply Chain Management. There are discrepancies in the conversion of the raw scores to "the prescribed score sheet" but nobody is able to explain the reason for this. It appears that the prescribed score sheets are the documents which are annexed to the signed and unsigned reports to the Bid Adjudication Committee.

[20.2] The scores reflected on the prescribed score sheets annexed to the signed and unsigned reports to the Bid Adjudication Committee differ dramatically. A few examples will suffice. In the first prescribed score sheet annexed to the unsigned report the "grand total" of scores awarded respectively to the parties out of a possible 100 points are as follows:

Applicant	Second Respondent	Third Respondent
(49.09)	80	5.67

The comparable scores awarded to the parties on the prescribed score sheet annexed to the signed report are as follows:

Applicant	Second Respondent	Third Respondent
89.75	-	-

[20.3] According to the deponent to the first respondent's affidavit, the scores that should have been placed before the Bid Adjudication Committee were the scores annexed to the unsigned report. This reflected the applicant as receiving a score of (49.09) which presumably indicates a negative score, with the second respondent receiving a score of 80 and the third respondent a score of 5.67. However, on the score sheets which were in fact placed before the Bid Adjudication Committee (albeit erroneously according to the first respondent) the applicant achieved a grand total score of 89.75 and the second and third respondents received no scores at all.

[20.4] The confusion is deepened by the fact that two additional "prescribed score sheets" are annexed to the unsigned report which contain differing scores.

[21] Regard being had to all of the aforegoing the inference is irresistible that the Bid Adjudication Committee, which is the Body within the first respondent vested with the power to decide upon the

award of the contract;

[21.1] Failed to apply its mind properly to the matter before it, because the recommendation to award the contract to the second and third respondents, based as it was upon how "they were rated in terms of the attached criteria and scored accordingly" was not borne out by the scores which were in fact placed before the Bid Adjudication Committee.

[21.2] The decision of the Bid Adjudication Committee was caused by the "unwarranted dictates of another person or Body" because the recommendation must have been accepted without any reference to the scores which were placed before it

Promotion of Administrative Justice Act
Section 6 (2) (e) (iv)

In the circumstances it cannot be said that the Bid Adjudication Committee merely relied upon the guidance and advice of the Bid Evaluation Committee in taking the decision it did

Lissoos v National Supplies Control Board 1943 TPD 109

[21.3] The decision was *mala fide* in the sense of a serious dereliction of duty, even if committed in good faith

LAWSA – Vol 1 Administrative Law para 133
Section 6 (2) (e) (v) P A J A

I find it incomprehensible that the Bid Adjudication Committee could have accepted the recommendation to award the contract to the second and third respondents, when on the basis of the scores supplied to it the applicant had a grand total score of 89.75, whereas the second and third respondents received no scores at all.

[21.4] The decision of the Bid Adjudication Committee was accordingly not rationally connected to the information which was placed before it

Section 6 (2) (f) (ii) (cc) P A J A

[21.5] When regard is had to the inability of any of the representatives of the first respondent, to explain the apparent discrepancies between the conversion of the raw scores to the prescribed score sheet, and their inability to explain how the incorrect scores were annexed to the recommendation to the Bid Adjudication Committee, it cannot be said that such an administrative action was reasonable, as required by Section 33 of the Constitution. This is particularly so when no explanation has been advanced by the first respondent, to explain why there is such a vast difference between the scores attached to the signed and unsigned recommendations.

[22] Consequently there exists cogent reasons to review and set aside the decision of the Bid Adjudication Committee on the 20 January 2010 to award the contract in question to the second and

third respondents.

[23] At the hearing of this matter I held the *prima facie* view that the setting aside of the decision was the appropriate relief to grant in this matter but Mr. Suhr, who appeared for the third respondent, argued strenuously that the effect of setting aside what is a substantial project and which is already underway, would have devastating effects, not only for the second and third respondents, but also the first respondent and the ratepayers of the eThekwini Municipality.

[24] He called in aid of his argument, a number of decisions which illustrate the principle that in appropriate circumstances a court will decline, in the exercise of its discretion, to set aside an invalid administrative act.

Chairperson S T C v J F E Sapela Electronics
2008 (2) SA 638 (SCA) at 649 J

As stated in

Oudekraal Estates (Pty) Ltd. v City of Cape Town
2004 (6) SA 222 (SCA) at 246 D

"It is that discretion that accords to judicial review its essential and pivotal role in administrative law, for it constitutes the indispensible moderating tool for avoiding or minimising injustice when legality and certainty collide"

[25] The difficulty that is presented by invalid administrative acts is that they have often been acted upon by the time they are brought under review.

Millenium Waste Management v Chairperson Tender Board 2008 (2) SA 481 at 490 C

"That difficulty is particularly acute when a decision is taken to accept a tender. A decision to accept a tender is almost always acted upon immediately by the conclusion of a contract with the tenderer, and that is often immediately followed by further contracts concluded by the tenderer in executing the contract . To set aside the decision to accept the tender, with the effect that the contract is rendered void from the outset, can have catastrophic consequences for an innocent tenderer, and adverse consequences for the public at large in whose interests the administrative body or official purported to act. Those interests must be carefully weighed against those of the disappointed tenderer if an order is to be made that is just and equitable".

[26] What has to be considered is whether the present case is one where because of the effluxion of time and intervening events, an invalid administrative act must be permitted to stand. "Considerations of pragmatism and practicality" are relevant in the exercise of the discretion.

Sapela Electronics *supra at 650 D - F*

[27] In terms of Section 8 of P A J A, any order which the Court may grant must be just and equitable.

"This guideline involves a process of striking a balance between the applicant's interests, on the one hand, and the interests of the respondents, on the other. It is impermissible for the court to confine itself, as the court below did, to the interests of the one side only".

Millenium Waste Management *supra* at pg 490 A – B

[28] Consequently, the interests of the respondents must also be considered when deciding whether to set aside the decision.

[29] According to the first respondent

[29.1] The publicity component of the project is at an advanced stage, advertisements have been placed in the press and letters have been sent to all customers of the first respondent, to raise public awareness of the need to provide relevant information in the prescribed way.

[29.2] Documents have been sent to all the account holders of the first respondent, with forms to be completed and requesting a copy of their identity document.

[29.3] No house visits, nor follow-up visits, have been undertaken.

[29.4] The interests of ratepayers and city residents will be prejudiced if the matter is delayed.

[30] According to the third respondent

[30.1] It has incurred liabilities at this stage in excess of R7M.

[30.2] Of approximately nine hundred thousand records contemplated by the exercise, in excess of two hundred and five thousand have been received by the third respondent, of which some sixty one thousand five hundred have already been completed.

[30.3] In excess of sixty people have been engaged to execute the work.

[30.4] If the project were to be halted, most of the people working on the project would have to be laid off and the third respondent would be exposed to potentially devastating cash flow disruptions in its business.

[31] As regards the financial liabilities of the third respondent, Mr. Suhr correctly draws attention to the fact that the applicant estimated that its project start up costs would be R7,862,100.00 and that consequently there is no reason to doubt the third respondent's averment that its present financial exposure is in excess of R7M.

[32] It appears that the contract is not readily divisible, involving as it does the collection of information, its verification and presentation to the first respondent, in a form compatible with the new billing

system, known as the Revenue Management System. It seems to me that this is an ongoing process, not readily divisible into defined categories, such as to lend to the whole process the characteristics of an indivisible contract. This is an important factor in deciding whether to halt the process at this stage, by reviewing and setting aside the award of the contract to the second and third respondents.

[33] Considering all of the above, I reluctantly conclude in the exercise of my discretion, that although the award of the contract to the second and third respondents was invalid when made, I should decline to set aside the award. To do so at this stage, would be highly prejudicial to the second and third respondents, as well as the ratepayers of the first respondent. The second and third respondents are not guilty of any wrongdoing, and the applicant does not allege that the award was tainted by fraud or corruption. I am enjoined by the Supreme Court of Appeal to exercise my discretion in a case such as the present, pragmatically and practically. To set aside the award at this stage of events would satisfy neither of these criteria.

[34] As regards the issue of costs, the second respondent also indicated that it abided the decision of this Court. The third respondent however opposed the relief sought. In the light of my refusal to accede to the applicant's request to set aside the first respondent's decision, it may be argued that the applicant should be ordered to pay the costs of the third respondent. In my view

however, there are special circumstances, as was found by Scott J A in Sapela Electronics *supra* at paragraph 30, to justify an order that the first respondent be ordered to pay the costs of the applicant, as well as the second and third respondents. These circumstances are as follows:

[34.1] The first respondent breached the undertakings it had given to the applicant in the respects set out in paragraph 12 above, read together with paragraph 9 above.

[34.2] It was only at a very late stage of these proceedings, namely 12 October 2010, that the first respondent revealed the serious deficiencies in the decision making process of the Bid Adjudication Committee. If this had been investigated timeously by the first respondent, this application may have been rendered unnecessary and the project could have been stopped at a sufficiently early stage, to allow reconsideration of the award of the contract.

[34.3] It is unacceptable that the first respondent is simply unable to advance any explanation for the shortcomings in the decision making process, particularly the discrepancies in the important area of converting the raw scores to the prescribed score sheets, the placing of the incorrect prescribed score sheets before the Bid Adjudication Committee and the failure to explain the glaring differences between the prescribed score sheets, annexed to the unsigned report.

[34.4] The applicant, as well as the second and third respondents, have all been prejudiced by the conduct of the first respondent, as set out in paragraph 34.2 above.

[35] Such conduct on the part of the first respondent, in connection with the award of an extremely important and expensive project, I regard as deplorable.

In the result the order I make is the following:

a) The application is dismissed.

b) The first respondent is ordered to pay the costs of the applicant, the second respondent and the third respondent.

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K. Swain J

Appearances: /

Appearances:

For the Applicants	**:**	Mr. R. J. Salmon S C
Instructed by	**:**	Thorpe & Hands Inc. Durban
For 3rd Respondent	**:**	Mr. R. A. Suhr
Instructed by	**:**	V O Connell Attorneys Durban
Date of Hearing	**:**	23 November 2010
Date of Filing of Judgment	**:**	01 December 2010