REPORTABLE

IN THE KWAZULU-NATAL HIGH COURT, PIETERMARITZBURG

REPUBLIC OF SOUTH AFRICA

Case No. 6056/2009

In the matter between:

COMBINED TRANSPORT SERVICES (PROPRIETARY) LIMITED	First Applicant
KZT BUS SERVICES (PROPRIETARY) LIMITED	Second Applicant
KZT COUNTRY CRUISER (PROPRIETARY) LIMITED	Third Applicant
SOUTH COAST BUS SERVICE (PROPRIETARY) LIMITED	Fourth Applicant
NGOTSHANA BUS SERVICES CC	Fifth Applicant
MASIJABULE TRANSPORT CC	Sixth Applicant
and	
ETHEKWINI MUNICIPALITY	First Respondent
THE MINISTER OF TRANSPORT	Second Respondent
THE MEMBER OF THE EXECUTIVE COUNCIL FOR THE PORTFOLIO OF TRANSPORT IN THE PROVINCE OF KWAZULU/NATAL	Third Respondent
IKHWEZI BUS SERVICE (PROPRIETARY) LIMITED	Fourth Respondent
TANSNAT AFRICA (PROPRIETARY) LIMITED	Fifth Respondent
TANSNAT COACHLINES (PROPRIETARY) LIMITED	Sixth Respondent

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J U D G M E N T

RALL AJ:

[1] The six applicants are bus operators based in the greater Durban area. They launched this application because they are unhappy with the way in which the previous operator of a subsidised bus service in Durban was replaced. Their unhappiness stems from the fact that the statutory procedures which they contend ought to have been followed were not followed. As a result, they ask that the decision to award the contract to the new operator be reviewed and set aside.

[2] The application was brought on an urgent basis. The reason given for the urgency was that the applicants originally sought to interdict the awarding or the implementation of the awarding of the contract pending the finalisation of the application. However, the application was opposed and the applicants elected not to pursue the interim relief. They now seek only a review.

[3] Of the six respondents only the first and third respondents, the Ethekwini Municipality and the Member of the Executive Council (MEC) for Transport for the Province of KwaZulu-Natal respectively, opposed the application. It is common cause on the papers that the contract which the applicants challenge was awarded to the fifth respondent, Tansnat Africa (Pty) Ltd. Despite being served with the application papers, Tansnat Africa did not oppose the application.

[4] After I had reserved judgment, a firm of attorneys representing a company called Tansnat (Pty) Ltd wrote to the Registrar stating that their client "*potentially has an*

interest" in the application, had only recently become aware of it, and might oppose the application. In the event, that company eventually elected not to enter the listings but to abide the decision of the court. The end result of all this is that it delayed my judgment by about two weeks.

[5] The applicants' case is based on the National Land Transport Transition Act 22 of 2000 ("the National Act"). In essence they contend that before the contract was awarded to the fifth respondent the tender process provided for in section 47(2) of that Act ought to have been followed, and because it was not, the contract falls to be set aside. The relevant provisions of section 47 read as follows:

"*47. **Subsidised service contracts-***

(1) After the expiry of any interim contract or current tendered contract or any extension thereof, whether provided for in such contract or negotiated, if the public transport services that had been operated in terms thereof will continue to be subsidised, that service must be operated in terms of a subsidised service contract.

(2) Only a provincial department, a transport authority and a metropolitan municipality may enter into a subsidised service agreement with a public transport operator, and, subject to subsection (3), only if-

(a) the service to be operated in terms thereof, has been put out to public tendering in accordance with a procedure prescribed by or in terms of a law of the province;

(b) the tender has been awarded by the tender authority in accordance with that procedure; and

(c) the contract is entered into with the successful tenderer.

(3) The Minister may in terms of procedures prescribed, in consultation with the MEC and the relevant transport authority, if any, grant exemption from the requirements of subsection (2) and allow that a contract be negotiated with an operator, once only, in respect of a service or part of a service if - ..."

[6] The relevant facts of this case are common cause and can be summarized as follows:

[V2 - P91]

(a) On 1 October 2003 a contract described as "**CONTRACT FOR THE PROVISION OF PUBLIC PASSENGER TRANSPORT SERVICES FOR ALL THE ROUTES SERVICED AS 'DURBAN TRANSPORT'** " was concluded between the third respondent's department, the first respondent and a company known as Remant Alton Land Transport (Pty) Ltd ("the Remant Alton contract").

(b) In terms of that contract, Remant Alton was to provide services on behalf of the other two parties, who were collectively described as "the public body".

(c) The commencement date of the contract was 1 October 2003. In terms of the contract, it was to endure for 5 years but if the National Act was amended to increase the maximum period for a negotiated contract from 5 years to 7 years, then the contract would endure for 7 years. This amendment was in fact effected in 2006. As a result, the contract was due to terminate at the end of September 2010.

(d) By letter dated 1 June 2009 Remant Alton informed the respondents that it was terminating its contract with effect from 30 June 2009 in terms of [V2 - P129] clause 39.6 of the contract. The reason given for this termination was that it was unable to continue providing the services without payment of the subsidies due to it.

[V2 - P129]

(e) The respondents contested Remant Alton's right to rely on clause 39.6 of the contract but accepted that Remant Alton would be released from its contractual obligations.

(f) The respondents, in particular, the third respondent's department, set about finding an alternative bus operator to take over Remant Alton's obligations.

(g) An assessment of various bus operators was carried out by the third respondent's department. This assessment did not involve any notice to or input from bus operators, including the applicants.

[V3 - P241]

(h) In a letter dated 6 July 2009 addressed erroneously to Tans-Africa Holdings (Pty) Ltd the third respondent's department appointed the fifth respondent "*as a Substitute Operator for bus services in the Northern, Southern and Central areas of Ethekwini Municipality for the remainder of Durban Transport Contract, this contract was concluded between Ethekwini Municipality and the KZN Department of Transport (contracting separately) and Remant Alton Land Transport (Pty) Ltd, the contract will expire on the 30th September 2010. The same contract rules, conditions and specifications as amended will be applicable.*" [sic]

(i) The contract awarded to the fifth respondent is a subsidised service contract as defined in the National Act.

(j) No tender process preceded the appointment of the fifth respondent as the so-called substitute operator and the Minister of Transport did not grant any exemption from the requirements of section 47(2) of the National Act.

(k) The fifth respondent is a public transport operator.

[7] The first and third respondents (who will either be referred to as the first and third respondents or simply the respondents) raised two preliminary points and also opposed the application on the merits. The first preliminary point was that the application was not urgent and the second was that the applicants lacked *locus standi*.

[8] I shall deal firstly with the *locus standi* point, which is to the effect that the applicants have not shown that any of their rights have been affected. According to the respondents, all that the applicants have shown is that their financial interests have been affected. The respondents contend that for the applicants to have *locus standi* they must either show that a contractual right was breached or that they were unsuccessful tenderers in a tender process. I understood Mr Choudree, who represented the first respondent, to concede during argument that if there ought to have been a tender process and the applicants would have tendered, the applicants would have had *locus standi*. However, he argued that a tender process was not required and that the applicants had not stated that they would have participated in a tender process.

[9] In my opinion, this point has no merit. The contract with the fifth respondent is for the Durban area. The applicants operate in the greater Durban area. The founding papers reveal that when they heard that Remant Alton's services had been or were about to be terminated, two of the applicants offered to provide some of these services. Furthermore, the applicants' attorneys addressed letters to, amongst others, the first and third respondents pointing out the tender requirements of the National Act and stating that the first and second applicants would be suitable service providers. It is important to bear in mind that when the letters were written the applicants were unaware whether the National Act had been complied with and as a result they requested details of how compliance had taken place, if indeed there had been compliance.

[10] The applicants do not expressly state in their papers that had a tender process been followed they would have tendered. However, this is clearly implied. In fact, in the founding affidavit the following is stated:

> "*53.*
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> **[V1 - P21]**
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> *It is my respectful submission that the first and/or third respondents ought to have followed the process set out in section 47 of the Act. It is manifestly in the interests of transparency that that process be followed.*

54.

[V1 - P21]

It is also my submission that to invite the participation of all bus operators in a structured process as provided for by section 47 would be best for the commuting public of the City of Durban. Indeed, if that process was followed, it might have been the case that the contract could have been awarded to more than a single operator by dividing the city into appropriate regions thereby making for a more efficient transport infrastructure in the city.

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It is therefore the applicants' contention that the process be halted and the conduct of the first and third respondents in awarding the contract be reviewed and set aside.

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If in the interim the process is allowed to continue that will also have significant consequences for the applicants and other transport operators. It is therefore also imperative that the current process be halted and interdicted. If the award of the contract is allowed to be made the applicants and other bus operators would have no other remedy and will suffer substantial prejudice."

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[11] Why the applicants would want the existing contract to be set aside and the tender process prescribed by section 47 of the National Act to be followed, if not to afford themselves an opportunity of participating in that process, is not apparent. The respondents have certainly not suggested any other reason. I therefore find that the applicants have made out a case that they would have participated in a tender process had it occurred, and so the next question is whether that gives them the right to challenge the contract awarded to the fifth respondent.

[12] The application is based on a contention that peremptory tender procedures were not followed. Assuming that this contention is correct, then much more than financial interests are at stake. Section 217 of the Constitution requires organs of State in all 10
three spheres of government to contract for services in accordance with a system which is fair, equitable, transparent, competitive and cost-effective. Secondly, the right to just administrative action is constitutionally entrenched[1] and government tender processes are administrative acts for purposes of the Constitution[2]. Furthermore, our courts have held that bid or tender processes by organs of State are governed by the Promotion of Administrative Justice Act 3 of 2000 ("PAJA") because it has been held that such processes are administrative action for the purposes of PAJA[3]. Accordingly, participants in such processes are entitled to procedurally fair, lawful and justifiable administrative action in terms of section 3 of PAJA.

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[1] Section 33 of the Constitution
[2] Logbro Properties v Bedderson & Others 2003 (2) SA 460 (SCA) at para [5]
[3] Millenium Waste Management (Pty) Ltd v Chairperson, Tender Board 2008 (2) SA 481 (SCA) at para [4]

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[13] Applying the test in *Grey's Marine Hout Bay (Pty) Ltd and Others v Minister of Public Works and Others* 2005 (6) SA 313 (SCA) at 322 E – 324 D, I am of the opinion that the decision to award a contract to a transport operator to provide public transport which is to be subsidised by an organ of State, is administrative action. It is, as stated at 324A by Nugent JA conduct "*...of the bureaucracy (whoever the bureaucratic functionary might be) in carrying out the daily functions of the State, which necessarily involves the application of policy, usually after its translation into law, with direct and immediate consequences for individuals or groups of individuals.*" In the present case the functionary would be an authorised official in the third respondent's department and the official would be clearly performing a public function in terms of the National Act. There is support for this view in the decision of the Supreme Court of Appeal in the matter of *Municipal Manager : Qaukeni Local Municipality and Another v FV General Trading CC and Another*[4], which involved a contract for the provision of a municipal service. It was held[5] that the awarding of such a contract amounts to administrative action under PAJA.

[14] It is established law that an unsuccessful tenderer has the right to challenge a defective tender process. The right which is affected is the right to lawful and procedurally fair administrative action[6]. Therefore, depending on the degree of non-compliance with the prescribed tender procedure or the extent of deviation from just

[4] [2009] 4 All SA 231 (SCA)
[5] At paragraph [26]
[6] **Transnet Ltd v Goodman Brothers (Pty) Ltd 2001 (1) SA 853 (SCA) at paras [10] and [11].** This judgment dealt with section 33 of the Constitution prior to PAJA being enacted. However, the wording of item 23 of Schedule 6 and section 33 of the Constitution is substantially the same, and so the judgment is also applicable in the post PAJA era.

administrative action, a tender process can be set aside. It is not necessary for the unsuccessful tenderer to show that the tender ought to have been awarded to it. All that it need show is that the award to the successful tenderer should be set aside.

[15] *A fortiori*, where a peremptory tender process has been disregarded completely, a potential tenderer is entitled to challenge the defective process which led to the award of a contract, and hence to challenge the award of the contract itself. Were that not so, the provisions of sections 33 and 217 of the Constitution and of PAJA would be worthless. Those provisions could be circumvented by simply avoiding tender processes entirely.

[16] On the question of urgency, the respondents contended that the only interest which the applicants had in the matter was a financial one and therefore that the only urgency was of a commercial nature. They therefore contended that the notice given of the application for interim relief (one court day) was wholly inadequate and that the application should be dismissed on this ground alone. In the light of my finding that constitutional rights are involved in this case, these contentions are not valid.

[17] Furthermore, as I have mentioned, one of the objects of the application was to obtain interim relief. This relief was aimed at stopping the implementation of the allegedly flawed contract and this is self-evidently urgent. The fact that the applicants elected not to persist with the interim relief does not detract from the urgency of the case. The matter was eventually argued some four months after the application was

launched and by then the respondents had had ample opportunity to respond to the applicants' allegations and to prepare for the hearing.

[18] Finally, there was no question of self-created urgency. The applicants launched the application within a week of being told by the first respondent, not that a contract had been awarded but that "*the appointment is being done by the KZN Department of Transport*" and shortly after reading reports in the press of an imminent appointment of an operator. Significantly, the third respondent's department did not see fit even to respond to the applicants' requests for information about the appointment of an alternative operative.

[19] I accordingly find that the applicants were justified in approaching the court on an urgent basis.

[20] As I have mentioned, it is common cause that the Minister of Transport did not grant an exemption in terms of section 47(3). What I therefore need to decide is whether the third respondent was required to apply the tender procedure referred to in subsection (2) of section 47, and if he was, what the effect of the failure to do so is.

[21] On the face of it, that subsection applies to this case. The contract was concluded between a provincial department and a public transport operator, it was a subsidised service agreement, and the Minister of Transport did not grant an exemption

from the requirements of that subsection. However, the respondents argued that section 47(2) did not apply to this case.

[22] The first argument advanced on behalf of the respondents was that in terms of [V2 - P129] clause 39.3 of the Remant Alton contract, if the contract was terminated in terms of [V2 - P128] clause 39.1 of the contract, namely, where the operator has given notice of inability to execute the contract, the public body may terminate the contract and may employ another operator to complete the contract or any part thereof as its option. This the respondents argued meant that the third respondent could appoint an operator to fulfill the obligations of Remant Alton without having to go to tender. I do not agree. A contract creates only personal rights and obligations between the parties, even if some of the parties are organs of State, and cannot override statutory obligations.

[23] The second argument, if I understood it correctly, was that section 47(2) did not apply because it only applied when a contract had been terminated and a new one was concluded. Mr Padayachee SC, who appeared for the third respondent, suggested that the Remant Alton contract had not actually been terminated but that the fifth respondent had merely been substituted in Remant Alton's place. This argument is not valid. The papers reveal clearly that the Remant Alton contract was terminated and that a fresh contract was concluded with the fifth respondent, albeit for a limited period, namely, the remainder of the Remant Alton contract period. In fact, the record of proceedings in [V3 - P238] terms of Rule 53 contains a submission made by the deponent to the third respondent's answering affidavit, Mr Chamane, in which it is stated that the purpose of the submission

was the appointment of an alternative operator "*as per clause 39.3 of the general conditions...*". [V2 - P129] As I have mentioned, clause 39.3 deals with the termination of a contract under clause 39.1, [V2 - P128] and the opening words of clause 39.3 are "*Where the contract is terminated under clause 39.1,...*". Furthermore, in one of Mr Chamane's own affidavits he stated [V2 - P79] "*The contract, "SC1" hereto provided in clause 39.3 thereof that the Public Body, being our department, retained the power to employ another operator to complete the contract or any part thereof in circumstances where the contract was terminated under clause 39.1 because the previous operator abandoned its obligations under the contract. Remant Alton had done so.*"

[24] The next argument was that section 47(2) did not apply because of the provisions of section 47(1). It was argued that that subsection provided that it was only after the expiry of any interim contract or current tendered contract that a subsidised service had to be operated in terms of the subsidised service contract and therefore that the provisions of section 47(2) applied. The argument went further that because the Remant Alton contract had not expired but instead a replacement operator had been put in the place of Remant Alton, section 47(2) did not apply. Section 47(1) has no application to this case for the simple reason that it deals with the expiry of interim and current tendered contracts which, by definition, exclude subsidised service contracts. In terms of the definitions in section 1 of the National Act, interim and current tendered contracts are contracts concluded before the commencement date of the Act, that is, before 1 December 2000, and as already mentioned, the Remant Alton contract was concluded during 2003.

[25] The third argument was that in terms of the treasury regulations issued in terms of the Public Finance Management Act 1 of 1999 a provincial department was entitled to deviate from the general requirement that competitive bids should be invited when goods or services are procured. The regulation in question, regulation 16A 6.4 reads "*If in a specific case it is impractical to invite competitive bids, the accounting officer...may procure the required goods or services by other means, provided that the reasons for deviating from inviting competitive bids must be recorded and approved by the accounting officer...*". Whilst it is clear from the papers that the respondents were faced with a crisis of sorts when Remant Alton abandoned its obligations to the respondents, and the respondents were required to act expeditiously to ensure the provision of bus transport services in the Durban area, I do not agree that the third respondent was entitled to deviate from the requirements of section 47(2) of the National Act.

[26] The subsection is phrased in peremptory terms. This is clear from the use of the words "*only if*". Secondly, section 3(a) of the National Act provides that chapter 2 thereof, into which section 47 falls, applies "to the exclusion of any other law that is in force in any province or in the Republic as a whole and which is inconsistent with that chapter". In my opinion, this means that the peremptory requirement of section 47(2)(a) that the service to be operated in terms of a subsidised service agreement must be put out to public tendering, overrides treasury regulation 16A 6.4.

[27] As pointed out by Mr Vahed SC in his comprehensive and capable argument on behalf of the applicants, section 47(2)(a) lays down the general requirement that there must a public tendering process but does not lay down the details of that process. Instead, it provides that the public tendering must be in accordance with a procedure prescribed by or in terms of a law of the province. This means that the details of the process must be found in the applicable legislation in the province concerned. However, it does not detract from the overriding requirement that there must be public tendering.

[28] Finally, section 47 itself makes provision for exceptions to the rule laid down in subsection (2), namely, in subsection (3). No reason has been advanced on the papers or in argument why that alternative could not have been utilized in this case.

[29] It was also argued by Mr Padayachee SC on behalf of the third respondent that section 3 of the KwaZulu-Natal Public Transport Act 3 of 2005 ("the Provincial Act") authorised a deviation from the requirements of section 47(2) of the National Act. Section 3 of the Provincial Act requires the MEC for Transport to take measures to promote public transport. Its subsection (2) empowers the MEC to take any action required to pursue the objectives of that act. However, even if section 3 could be read as suggested by the third respondent's counsel (an issue which is not necessary for me to decide), as pointed out above, section 3 of the National Act provides that section 47 of that Act applies to the exclusion of any other acts, which would include the Provincial Act.

[30] I therefore conclude that the provisions of section 47(2) of the National Act apply to this case. There was no semblance of compliance with this subsection. The respondents did not suggest in argument that if this subsection did apply, the contract with the fifth respondent could survive. In terms of section 6(2)(b) of PAJA a court has the power to review administrative action if a mandatory and material procedure or condition prescribed by an empowering provision was not complied with. Section 6(2)(f)(i) empowers a court to review administrative action where the act itself contravenes a law or is not authorized by the empowering provision. In my opinion both paragraphs apply to this case.

[31] Our courts have emphasised the importance of compliance with legislation requiring organs of State to utilize tender processes[7]. In the *Qaukeni Municipality* case it was held that where a contract for the provision of a municipal service was awarded without utilizing the prescribed competitive bidding process, the contract was invalid[8]. Given the requirements of section 217 of the Constitution and the peremptory nature of section 47(2) itself, where there has been no compliance with the requirement of going to public tender, a contract which resulted from such a process must inevitably be set aside, if challenged.

[32] As far as costs are concerned, none of the parties suggested that they should not follow the result of the application, and I see no reason from deviating from this general rule.

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[7] See for example **Eastern Cape Provincial Government v Contractprops 25 (Pty) Ltd 2001 (4) SA 142 (SCA)** and the **Qaukeni** case.
[8] At paragraph [16]

[33] In the result, I make the following order:

1. The award by the third respondent's department of the contract for the operation of the bus service within the area of jurisdiction of the first respondent as a consequence of the termination of the transport services formally conducted by Remant Alton Land Transport (Pty) Ltd, to the fifth respondent, is hereby reviewed and set aside.

2. The first and third respondents are ordered, jointly and severally, to pay the applicants' costs.

A.J. RALL, AJ

Date of Hearing : 12 November 2009

Date of Judgment : 18 December 2009

Appearances

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