**IN THE HIGH COURT OF SOUTH AFRICA**
**KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

**CASE NO: AR317/2022**

In the matter between:

**AMADWALA TRADING 73 CC** **APPELLANT**

and

**ETHEKWINI MUNICIPALITY** **RESPONDENT**

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**ORDER**

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**On appeal from:** KwaZulu-Natal Division of the High Court, Durban (Shapiro AJ sitting as court of first instance):

The appeal is dismissed with costs.

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**JUDGMENT**

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**Mathenjwa J (Olsen J et Mpontshana AJ concurring)**

**Introduction**

[1] On 24 February 2017, the respondent, eThekwini Municipality, advertised contracts for refuse collection and street cleaning in Umlazi, Durban for a period of

36 months. The appellant, Amadwala Trading 73 CC, and other tenderers submitted their bids. On 19 and 20 November 2018 the respondent's Bid Evaluation Committee (BEC) convened a meeting, evaluated the bids and submitted its report on the bids that successfully met the compliance criteria to the Bid Adjudication Committee (BAC). On 21 December 2018 the BAC convened a meeting to assess whether bidders had the capacity to perform in terms of the contracts. The BAC took a decision / resolution and supported the award of one of the tenders to the appellant. On 30 January 2019 the respondent's Acting Manager: Tenders and Contracts section, addressed letters to the unsuccessful bidders informing them that their bids had been unsuccessful and that the appellant was the successful tenderer. At that stage the respondent had not informed the appellant whether its tender was successful or not. On 26 February 2019 Kaistor Investments (Pty) Ltd, an unsuccessful bidder appealed the decision of the respondent to the respondent's Tender Appeal Tribunal. On 14 May 2019 the Tribunal considered and dismissed Kaistor Investments appeal.

[2] On 21 June 2019 the respondent's Executive Committee on Human Settlements and Infrastructure (Exco), took a decision to insource all seven Waste Management and Refuse Collection contracts in Umlazi Township. The appellant's tender fell within those contracts. The Exco's request to rescind the decisions to award the waste management tenders was placed before the BAC for consideration. The report to the BAC dated 27 August 2019 recorded that there had been several major service delivery disruptions in Umlazi since December 2017 due to several contractual disputes whereby the residents were left without refuse removal service for weeks; and the disruption had intensified from February 2019 whilst the tender process had already commenced. The reasons for Exco's decision to insource the refuse collection services was to minimize the disruptions and the potential health hazard created by indiscriminate dumping. The report further recorded that the respondent's objective was to provide an efficient world standard service; and the engagement of external contractors in Umlazi had caused negative unintended consequences which impacted negatively on the City's image.

[3] On 17 September 2019 the BAC convened a meeting and took a decision, after considering Exco's report, to support the executive's decision not to proceed with the proposed contracts. On 21 January 2020, the respondent's Manager: Tenders and Contracts Co-ordination addressed a letter to the appellant informing it that no tender was recommended for acceptance. Dissatisfied with the decision of the respondent, the appellant launched an application in the High Court to review and set aside the respondent's decision to cancel the tender and to direct the respondent to implement the award to the appellant.

[4] The court a quo had to consider whether the respondent had actually awarded the tender to the appellant; whether it was entitled to cancel the award of the tender and alternatively whether the tender was cancelled for rational or lawful reasons. Shapiro AJ held that the respondent had not yet awarded the tender to the appellant and therefore it was entitled to cancel the tender in terms of the respondent's Supply Chain Management (SCM) policy.

[5] Two issues were raised by the respondent's counsel for consideration in this appeal. They are:

(a) whether the tender was awarded to the appellant; and

(b) whether there were rational and lawful grounds for cancelation of the tender.

The appellant's counsel in his replying argument before us raised the issue of procedural unfairness based on the respondent's failure to afford the appellant an opportunity to make representations before rescinding the decision of the BAC to support the recommendation to award the tender. The issue was not raised in the appellant's grounds of appeal, and the court invited the parties to submit supplementary heads of argument to address the court on whether the issue of procedural fairness can be raised on appeal. The parties submitted their written submissions as per the court's direction.

[6] I first deal with the issue of whether the tender was awarded to the appellant. In its founding affidavit the appellant relies on the meeting of the BAC in which a decision was taken to support the BEC's recommendation to award the tender to the appellant for the contract sum of R13 364 104.16 ; the letter addressed by the respondent's Acting Manager: Tenders and Contracts section, to the unsuccessful

bidders informing them that their bids were unsuccessful as the successful tenderer was the appellant; and to the BAC meeting of 17 September 2019 where the BAC supported Exco's decision to rescind its decision to place various contracts for waste collection in Umlazi, including the contract which is the subject of this appeal. In argument before us counsel for the appellant contended that the tender was finally awarded to the appellant; the BAC was authorized by the respondent's SCM policy, depending on its delegation, to either make a final award or a recommendation to the accounting officer to make a final award. Counsel further submitted that the accounting officer ratified the award of the tender by the BAC on 21 December 2018, therefore the BAC had the authority to award the tender to the appellant.

[7] I agree with the court a quo's finding that the respondent had not awarded the tender to the appellant. With regard to ratification of the tender by the accounting officer it is apparent from the minutes where the ratification was penned that the accounting officer was not ratifying the delegation of the award of the tender to the BAC. This is evident below the signature of the accounting officer where it is recorded that the item was approved for recommendation to the accounting officer by the BAC. In any event the accounting officer has no authority to sub-delegate to the BAC and the BAC has no authority to award a tender above R10 million. Regulation 36(1)*(b)* of the SCM policy provides that: 'The accounting officer may: … ratify any minor breaches of the procurement processes by an official or committee acting in terms of delegated powers or duties which are purely of a technical nature'. Regulation 5(2)*(a)* of the policy provides that the accounting officer may not sub-delegate the power to make a final award above R10 million (VAT) included. Upon a proper reading of the provisions of the policy the meaning attributed by the appellant to the ratification of the tender by the accounting officer is untenable. In *Natal Joint Municipal Pension Fund v Endumeni Municipality*[1] the Supreme Court of Appeal laid the principles that applies in interpreting documents. At paragraph 18 the Court stated as follows:

'…Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature

[1] *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA).

of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make a contract for the parties other than the one they in fact made. The "inevitable point of departure is the language of the provision itself", read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.' (Footnotes omitted.)

[8] In its heads of argument the appellant submitted that the BAC made a final award to the appellant for the contract sum of R13 364 103.16 with an amount of R2 004 615.48 exclusive of VAT. In interpreting the words used in the SCM policy and the document ratified by the accounting officer, the conclusion that the accounting officer was sub-delegating the award of the tender to the BAC is not sensible for the following reasons:

(a) firstly, the accounting officer had no authority to sub-delegate to the BAC the award of a tender of over R10 million;

(b) secondly, the policy allows the accounting officer to ratify a minor breach of the procurement process. The total amount of the tender was R15 368 718.64. That could not be a minor breach of the tender process because it is in excess of R10 million; and

(c) thirdly, the accounting officer may ratify a deviation of the BAC's exercise of powers which are purely of a technical nature and the huge amount in excess of R10 million is not of a technical nature.

Therefore, the conclusion that the accounting officer was ratifying the sub-delegation of the award to the BAC would not only be unlawful but is not sensible in the context of the policy.

[9] With regard to the appellant's contention that the respondent had informed the unsuccessful bidders that the successful tenderer was the appellant, it is appropriate to point out that it was not in dispute in the court a quo and before this court that the respondent had never informed the appellant that its tender was successful. In its answering affidavit the respondent explained that in accordance with its practice, the unsuccessful bidders are first informed of the outcome of their bids, then a time period is allowed for the unsuccessful bidders to appeal to the Tender Appeal Tribunal and only after the internal appeal process has been finalised is the successful bidder appointed or awarded the tender. In this matter the respondent took the decision to cancel the tender after the internal appeal process was finalized but before the appointment of the successful bidder. The appellant's counsel argued that the respondent's practice in this regard was not in accordance with its SCM policy. I am not persuaded by the contention regarding the respondent's practice. Reasons being that reg 20 of the policy makes provision for the process for competitive bidding that includes the compilation of bidding documents and the award and administration of contracts; reg 29(1)*(b)*(i) makes provision for the BAC to either award a contract or make a recommendation to the accounting officer to make the final award. In my view the respondent would not be acting contrary to the policy by setting a practice of informing the bidders of the outcome of their bids provided such practice does not contravene any provisions of the policy. The practice employed by the respondent to appoint the successful bidder only after it has finalised the internal appeal by unsuccessful bidders is a practice used to implement the award of tenders and does not contravene any provision of the policy.

[10] In regard to the question of whether the respondent was entitled to cancel the tender I am in agreement with the court a quo's findings that the tender was lawfully cancelled. At pages 6 to 7 of the judgment the court held that:

'If the municipality decided to insource the refuse removal service, it follows that there was no longer a need for that service to be put out to tender. Circumstances had changed for whatever reason and again on the undisputed facts, the municipality assumed the responsibility for refuse removal instead of appointing contractors to render that service on its behalf. I am satisfied that this constitutes a change in circumstances and a legitimate explanation for the change in need that would permit the municipality to cancel the tender in terms of its policy.'

[11] I have had regard to reg 13(1)*(a)* of the Preferential Procurement Regulations, 2017 which provides that:

'An organ of state, may before the award of a tender cancel a tender invitation if-

(a) due to changed circumstances, there is no longer a need for the goods or services specified in the invitation;'

The provisions of the Preferential Procurement Regulations are further inserted into the respondent's SCM policy. Regulation 52(3)*(a)* of the policy allows the respondent to cancel a tender if due to the changed circumstances there is no longer a need for the services specified in the invitation. The Procurement Regulations and the respondent's SCM policy grant the respondent limited discretion to cancel a tender if there is change of circumstances and the specified services are no longer needed. In *Tshwane City and Others v Nambiti Technologies (Pty) Ltd*[2] the Supreme Court of Appeal grappled in attributing a meaning to the phrase "changed circumstances" in the Procurement Framework Regulations, 2011. The court held that the reg. 10 (4) of the Procurement Framework Regulations ,2011 are couched in permissive, not mandatory terms;[3] it is not intended to be restrictive in regard to an organ of state's power to cancel a tender and therefore, it should not be necessary for an organ of state to demonstrate a change of circumstances in order to cancel a tender for goods or services that it had decided it no longer need.[4]

[12] In the present matter the respondent contended that due to the disruption of services at Umlazi that commenced in 2017, and intensified in 2019, it had taken a decision to provide inhouse waste management services instead of outsourcing the services. For that reason, there was no longer a need for the services specified in the tender. In *Nambiti* the municipality had advertised a tender for SAP support services. After advertisement of the tender the municipality reviewed the tender and concluded that in the light of its need the published tender would no longer meet the needs of the municipality. The tender was cancelled and re-advertised. Dissatisfied with the municipality's decision, Nambiti launched a court application to review and set aside the municipality's decision. The Court held that "until the tender was issued

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[2] T*shwane City and Others v Nambiti Technologies (Pty) Ltd* [2015] ZASCA 167; 2016 (2) SA 494 (SCA).
[3] Ibid para 30.
[4] Ibid para 28.

the City was entirely free to determine for itself what it required by way of SAP support services'.[5] In the present matter there were substantive grounds for the respondent to cancel the tender based on the changed circumstances coupled with its obligations to prevent further disruption of services and to provide sustainable services in Umlazi.

[13] In regard to the issue of the rationality of the decision, the Constitutional Court in *Minister of Justice and Another v SA Restructuring and Insolvency Practitioners Association and Others*,[6] articulated the test for rationality as follows:[7]

'… Rationality does not speak to justification of the action but to a different issue. Rationality seeks to determine the link between the purpose and the means chosen to achieve such purpose. It is a standard lower than arbitrariness. All that is required for rationality to be satisfied is the connection between the means and the purpose. Put differently, the means chosen to achieve a particular purpose must reasonably be capable of accomplishing that purpose. They need not be the best means or the only means through which the purpose may be attained.'

[14] It is appropriate to point out that the respondent has obligations imposed by the Constitution to "provide democratic and accountable government for local communities" and "to ensure the provision of services to communities in a sustainable manner".[8] The decision to cancel the tender and insource the waste management services, is linked to the above mentioned purpose. Accordingly, the respondent's decision is rationally connected to the constitutional obligations to provide accountable government and sustainable services.

[15] This brings me to the question of whether the issue of procedural fairness which was not raised in the appellant's heads of argument should be considered in this appeal, and if so, whether the respondent was required to afford the appellant an opportunity to make representations before cancelling the tender. Respondent's counsel conceded that since the order granting leave to appeal does not exclude the issue of procedural fairness, this court is not precluded from considering the issue on

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[5] Ibid para 31.
[6] *Minister of Justice and Another v SA Restructuring and Insolvency Practitioners Association and Others*, 2018 (5) SA 349 (CC).
[7] Ibid para 55.
[8] Section 152(1)(*a)-(b)* of the Constitution.

appeal. The appellant's counsel contends that since the issue of procedural fairness was pertinently raised by the appellant in its supplementary affidavit in the review application, the court is entitled to consider it on appeal. The appellant's counsel referred this court to *Logbro Properties CC v Bedderson NO and Others*,[9] wherein the appellant's counsel had raised an entirely new point on appeal which was not raised in its affidavits nor argued in the court a quo, regarding the contention that the tender committee should have afforded the appellant an opportunity to make representations before taking the decision to cancel the tender. The Constitutional Court allowed the issue to be raised on appeal, reasons being that the facts before the court were clear and neither party wished to adduce further evidence relating to that issue. In this case the appellant had raised the issue of procedural fairness in its supplementary affidavit; it was argued in the court a quo and the acting judge made a finding that the provisions of the Promotion of Administrative Justice Act[10] (PAJA) were not applicable because the decision to cancel the tender was not an administrative action. Except for the argument that the issue of procedural fairness was not raised in the grounds of leave to appeal all the relevant facts before us to consider on the issue were ventilated in the court a quo and there is no suggestion that to consider the issue would prejudice the appellant. For these reasons the court will consider the issue even though it was not raised in the grounds of appeal.

[16] In regard to the issue of whether the appellant should have been afforded an opportunity to make representations before the decision was taken to cancel the tender, the court a quo correctly found that the decision to cancel the tender was an executive decision, not administrative action and therefore the provisions of the PAJA did not apply to it. The appellant's counsel relied on *Logbro* in contending that procedural fairness applied and the respondent should have afforded the appellant an opportunity to make representations before cancelling the tender. In *Logbro* the respondent had advertised a tender for sale of a property approved for development in Richards bay; the appellant had tendered but its tender was unsuccessful. Dissatisfied with the outcome the appellant launched an application in the High Court seeking an order for the award of the tender to the other tenderer to be declared

[9] *Logbro Properties CC V Bedderson NO and Others* [2002] ZASCA 135 (SCA); 2003 (2) SA 460 (SCA).
[10] Promotion of Administrative Justice Act 3 of 2000.

unlawful and set aside. The court found that the award of the tender was unlawful and it was set aside. The court directed the respondent to re-advertise the tender and reconsider the appellant and other tenderers that complied with the tender conditions. The tender was re-advertised. The appellant submitted its bid and its tender was now the highest, but the committee decided not to accept any tenders, instead it recommended a call for fresh tenders in view of the increase in the property values in Richards bay in the intervening two years. The tender was subsequently cancelled and re-advertised. The Supreme Court of Appeal held that the tender process constituted administrative action that entitled the appellant to lawful and procedural fairness and the principles of administrative justice.[11] The court held that procedural fairness demanded that the respondent "in reconsidering the tenders would afford the compliant tenderers an opportunity to make representations …on any factor that might lead the committee not to award the tender at all".[12] The respondent's counsel relied on *Nambiti* where the court held that a decision not to procure services does not have any direct external legal effect and no rights are infringed thereby.[13]

[17] In *SAAB Grintek Defence (Pty) Ltd v South African Police Services and Others*[14] the Supreme Court of Appeal drew a distinction between *Logbro* and *Nambiti*. The court held that:[15]

'The distinction between *Logbro* and *Nambiti* is this: In *Logbro* there was a tender process that had progressed to the stage where a decision had to be made whether to award the tender. In *Nambiti* there was a decision that the services reflected in the tender were no longer required and the tender process was terminated.'

The court further reaffirmed the principle in *Logbro* that when an organ of state took the decision to procure goods and later cancelled the tender it does so in the exercise of executive authority and its decision to cancel the tender was not susceptible to review in terms of PAJA.[16] Even though the exercise of executive authority to cancel a tender is not reviewable in terms of PAJA, it is still reviewable in

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[11] *Logbro* para 5.
[12] *Logbro* para 25.
[13] *Tshwane City and Others v Nambiti Technologies (Pty) Ltd* [2015] ZASCA 167 (SCA); 2016 (2) SA 494 (SCA) para 32.
[14] *SAAB Grintek Defence (Pty) Ltd v South African Police Services and Others* [2016] ZASCA 104 (SCA); [2016] 3 ALL SA 669 (SCA).
[15] Ibid para 18.
[16] Ibid para 21.

terms of the principle of legality, and therefore the principles of procedural fairness would still apply. The court further explained the difference between PAJA and the principle of legality as grounds of review. Mpati P stated as follows:[17]

'…The two differ, firstly, because the circumstances in which the principle of legality will demand procedural fairness in the decision-making process - in the sense of the rationality of the process by which the decision is made - are not the same as under PAJA. Secondly, the level of scrutiny for irrationality under the principle of legality is a low hurdle requiring only a rational connection between the action and the reasons given for it, while unreasonableness under PAJA requires that the decision be one that a reasonable decision-maker could not reach...' (Footnotes omitted.)

The court decided that a rational decision-making process did not demand that SAAB be afforded a hearing because the decision was an executive decision involving the internal operational workings of SAPS and the areas on which SAAB contended that it wished to make representations on were the decision, the effect of the decision on it and the extent to which SAAB could meet SAPS requirements. The court held that SAAB had not shown that a rational decision-making process would be lacking if it was not afforded a hearing.[18]

[18] I have pointed out in paragraph 12 above that there was no need for the advertised tender because the respondent had taken the decision to render the services inhouse in order to apply its strategy to provide sustainable services. In regard to substantive requirements I have found that the respondent's decision to cancel the tender was permissible in terms of its own SCM policy and the Procurement Regulations and therefore the cancellation of the tender was lawful. Further, the decision to cancel the tender was rationally connected to the purpose of the respondent's constitutional obligations to provide sustainable services. With regard to the issue of whether the appellant should have been given an opportunity to make representations I have had regard to the nature of the decision taken. Firstly, it was a policy decision taken by the respondent on the issues of governance about the manner of delivering services to the community. This case is distinguishable from *Logbro* judgment where the tender was cancelled and re-advertised for reason of increased rates to property. The representations sought to

[17] Ibid para 22.
[18] Ibid para 34.

be made by the appellant would be on issues that fell within the sole discretion of the respondent on the manner in which to provide services to the community. Thus, considering the nature of the decision taken by the respondent, its failure to afford the appellant an opportunity to make representations does not violate procedural fairness in the tender process.

[19] In the result, the appeal is dismissed with costs.

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**Mathenjwa J**

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**Olsen J**

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**Mpontshana AJ**

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| Date of hearing: | 16 February 2024 |
| Date of judgment: | 28 March 2024 |
| | |
| Appearances: | |
| Appellant's counsel: | G O Van Niekerk SC |
| Assisted by: | NSV Mfeka |
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