Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

Case No: 20766/2008
-REPORTABLE-

In the matter between:

MOHAMMED ZUNADE LOGHDEY	**Applicant**
And	
ADVANCED PARKING SOLUTIONS CC	**First Respondent**
NUMQUE 20 CC	**Second Respondent**
CITY OF CAPE TOWN	**Third Respondent**
MUNICIPAL MANAGER OF THE CITY OF CAPE TOWN	**Fourth Respondent**
ACE PARKING SERVICES (PTY) LTD	**Fifth Respondent**

Matter was heard in Third Division on the 6th of January 2009

Order was delivered on 7 January 2009

Reasons for above order was delivered on: 25 February 2009

Counsel for Applicant : Adv ZF Joubert (SC) and Adv A Bruce-Brand
Attorneys for Applicant : Louw Coetzee & Malan

Counsel for First and Second Respondents: Adv HJ De Waal
Attorney for First and Second Respondents: Nabal Attorneys

Mr A Tovey had a watching brief on behalf of Third and Fourth Respondents.
Fifth Respondent decided to abide by the decision of this Court.

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IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

Case No: 20766/2008
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In the matter between:

MOHAMMED ZUNADE LOGHDEY	**Applicant**
And	
ADVANCED PARKING SOLUTIONS CC	**First Respondent**
NUMQUE 20 CC	**Second Respondent**
CITY OF CAPE TOWN	**Third Respondent**
MUNICIPAL MANAGER OF THE CITY OF CAPE TOWN	**Fourth Respondent**
ACE PARKING SERVICES (PTY) LTD	**Fifth Respondent**

REASONS: 25 FEBRUARY 2009

Le Grange J:

[1] The Applicant in this matter launched an urgent application, seeking an order that First Respondent has no right to appeal against the tender awarded by the Bid Adjudication Committee of the Third Respondent ("the City") on 30 June 2008, in favour of the Applicant.

[2] The matter was heard on 6 January 2009, on an urgent basis, and having

heard counsel for the respective parties, the following order was made without providing reasons:-

> *"1) The First and Second Respondents' Application for postponement is refused with costs. Costs to include the costs of only one counsel.*
>
> *2) The Applicant's application succeeds with costs. Costs to include the costs of two counsel."*

[3] My reasons now follow.

[4] During 2007, the City called for tenders for the provision of kerbside parking management services in tender number 311S/2006/07. Proposals for the tender were submitted by various entities including First Respondent, Fifth Respondent and the Applicant.

[5] Pending the conclusion of this tender procedure, short term contracts have been entered into between the City, Applicant and Second Respondent (Numque 20 CC).

[6] On 15 October 2007, the City announced that Applicant was the preferred bidder, but that this decision was subject to a successful testing process. The testing was duly carried out, and on 30 June 2008, the Bid Adjudication Committee of the municipality decided to award the tender to the Applicant. A notification letter from the City to the Applicant dated 2 July 2008 records the following:-

"RFP/TENDER 311S/2006/07: KERBSIDE PARKING MANAGEMENT SYSTEM

With reference to the abovementioned Request for Proposals, I have pleasure in advising that on 2008-06-30 the Supply Chain Management Bid Adjudication Committee of the City of Cape Town resolved that the contract be awarded to you.

You will be contacted shortly to sign a document of agreement."

[7] On 3 July 2008, the memorandum of agreement between the Applicant and the City for the implementation of a kerbside parking management system was signed between the parties. The implementation date according to the memorandum of agreement was 1 December 2008, but had been postponed on two occasions.

[8] Pursuant to the award of the tender to the Applicant and the signing of the contract between the Applicant and the City, the First Respondent lodged on 25 July 2008 a notice of appeal in terms of section 62 of the Local Government: Municipal Systems Act 32 of 2000 seeking to have the tender award revoked.

[9] The City, on 12 August 2008, in writing informed the First Respondent that it had no internal appeal, as rights were determined and should it wish to pursue the matter an approach should be made to the High Court for judicial review under the Promotion of Administrative Justice Act, Act 3 of 2000. The City also relied on the decided matter of Reader and Another v Ikin and Another 2008 (2) SA 582 (C).

[10] The City also advised the Applicant that there would be no appeal and should

proceed with the preparation for the implementation of the agreement between the parties.

[11] In a letter dated 26 August 2008, First Respondent demanded that its appeal be considered by the municipal manager. The City then decided to co-operate with First Respondent by taking steps which allowed the procedures for the appeal to proceed. On 9 September 2008, Applicant was informed that there would be an appeal and it would be completed within a reasonable period. The appeal was set down for 20 November 2008 and shortly thereafter it was postponed to 5 December 2008. The appeal was again postponed to be heard on 8 January 2009.

[12] On 25 November 2008, the Applicant signed an addendum to the agreement which provides that the implementation date of the agreement would be altered from 1 December 2008 to 1 February 2009.

[13] Against this factual background, the present proceedings were launched by Applicant. It needs to be mentioned that as a result of the further matter pending between the parties, the implementation date had once again been postponed to 1 April 2009.

[14] Mr Z F Joubert, SC assisted by Mr A Bruce-Brand appeared on behalf of the Applicant. Mr H J De Waal appeared on behalf of the First and Second Respondents. Mr A. Tovey had a watching brief on behalf of Third and Fourth Respondents. The Fifth Respondent decided to abide by the decision of this Court.

[15] The nub of Mr Joubert's argument is that vested rights accrued to the Applicant when the Bid Adjudication Committee of the City awarded the tender to the Applicant and the parties pursuant thereto signed a contract, without stipulating in writing that the tender or contract was conditional and subject to an appeal process. Furthermore, in terms of section 62(3) of the Systems Act, rights that have accrued cannot be varied or revoked by the appeal authority.

[16] The principle contention by Mr De Waal is that the Applicant did not come up with a cogent reason why this matter should not firstly be decided by the appeal authority (the city manager). He argued that the Tender Bid document expressly states that the award of the tender contract is subject to a 21 day appeal period. Furthermore the City's Supply Chain Management Policy (SCMP) expressly provides that an award of a tender may only take place after the satisfactory resolution of any appeals and as a result, this application is premature. Reliance was also placed on the dictum in the Syntell matter. Moreover, the city manager has not yet taken a decision on the issue whether there is an appeal and whether an administrative act which is not final in effect be subjected to review proceedings in a court of law.

[17] Counsel for the respective parties also made reference to the following recent decided cases: Syntell (Pty) Ltd v The City of Cape Town and Another (CPD case no 17780/07) and its applicability thereof: Reader and Another v Ikin and Another 2008 (2) SA 582 (C) and The Municipality of the City of Cape Town v Reader and Another (719/2007) [2008] ZASCA 130 dated 14 November 2008.

[18] The First and Second Respondent on the day of the hearing *in limine,* applied

for a postponement of this matter. The substratum of their application is firstly, that the application lacks any degree of urgency as the implementation date of 1 February 2009 had been forwarded to 1 April 2009. Furthermore the Respondents were unaware that the Applicant would bring another application under case number 100/09, on Friday 2 January 2009, for the implementation of the contract between itself and the City. Moreover, the matter of 2 January was postponed to 4 February 2009 and the issues between the matters are inter related and should be heard simultaneously. The Applicant opposed the application as it contended the matter was ripe for hearing.

[19] The main application on 15 of December 2008 was by agreement postponed to 6th January 2009 for hearing. The Respondents agreed to a timetable and the hearing date, which was made an order of this Court. The Respondents have filed detailed answering affidavits. Heads of argument have also been filed by both parties notwithstanding the alleged lack of urgency when the matter first came to this Court on 15 December 2008. There was no suggestion by First or Second Respondent that they are not going to proceed with the main application. The reason now advanced by the Respondents that, at the time of agreeing to the date of the hearing, they were not aware that the Applicant would launch a second application for an order directing the City to implement the agreement, is in my view, no justification to grant a postponement of this matter.

[20] The Applicant, in his founding affidavit, mentioned his reasons, *inter alia,* to

protect and enforce his rights under the agreement between himself and the City, for launching the main application. The urgent need to expedite the preparations for implementing the agreement was also dealt with and that the continuous delay is causing him substantial prejudice and financial loss. The Respondents' further contention that the second application launched by Applicant was postponed, including the implementation date of the agreement, which caused any urgency that may have existed to disappear, is also without substance.

[21] Our law is replete with authority as to the requirements of urgency in applications. In terms of Rule 6 (12)(b) of the Uniform Rules of Court, two requirements must be set forth, namely the circumstances relating to urgency which have to be explicitly set out and secondly, the reasons why the Applicant in a matter cannot be afforded substantial redress at a hearing in due course. Whether an Applicant has succeeded in satisfying the requirements for urgency, must be determined by the contents of the founding affidavit. In this regard see IL&B Marcow Caterers v Greatermans SA 1981 (4) SA 108 (C) at 111A. There are also degrees of urgency, and urgency of commercial interests may also justify the invocation of the sub rule. See Erasmus: Superior Court Practice: at B1 – 55. In my view, the Applicant has established sufficient reasons in his founding affidavit why this matter is sufficiently urgent to be heard. It follows that the application for a postponement cannot succeed.

[22] Returning to the main application. The fundamental issue for determination in

this matter is whether the City in awarding the tender in favour of the Applicant, together with the signed agreement, both of which took place before the appeal by First Respondent was launched, conferred on the Applicant accrued rights which fall within the ambit of section 62(3) of the Systems Act.

[23] The Answering Affidavit on behalf of First and Second Respondents traverses mainly factual issues underlying the merits of the award which forms the subject matter of the pending appeal. This includes comments criticising the manner in which the Applicant operated, particularly in 2006, under an interim agreement for operating the kerbside parking system. These factual issues, in my view, are not relevant to the present application.

[24] Section 62 of the Systems Act provides as follows:-

> "*"(1) A person whose rights are affected by a decision taken by a political structure, political office bearer, councillor or staff member of a municipality in terms of a power or duty delegated or sub delegated by a delegating authority to the political structure, political office bearer, councillor or staff member, may appeal against that decision by giving written notice of the appeal and reasons to the municipal manager within 21 days of the date of the notification of the decision.*
>
> *(2) The municipal manager must promptly submit the appeal to the appropriate appeal authority mentioned in subsection (4).*
>
> *(3) The appeal authority must consider the appeal and confirm, vary or revoke*

the decision, but no such variation or revocation of a decision may detract from any rights that may have accrued as a result of the decision."

[25] With regard to the interpretation of section 62(3), the following dictum in Reader and Another v Ikin and Another 2008 (2) SA 582 (C) held at page 588I, is in my view instructive.

"…once a right accrues as a result of a decision, that decision cannot be reversed on appeal if the reversal takes away the right initially granted."

[26] This judgment was recently confirmed on appeal. See The Municipality of the City of Cape Town v Reader and Another, *supra* at paragraph 36 where majority held that: "*In my view, the entire reasoning and approach of the full court should be affirmed*". In paragraph 10 of a minority judgment, the flowing was also stated: "*The Full Court held that in terms of s 62 (3) once a right had accrued as a result of the impugned decision, that 'decision cannot be reversed on an appeal if the reversal takes away the right initially granted*.'"

[27] The Respondents contends that the present matter is on all fours with the Syntell matter. In the Syntell matter, an award of a tender was appealed against. The City of Cape Town advised a successful tenderer, in writing that its tender had been accepted. The City also clearly stipulated in the written notification that the award was subject to a 21 day appeal period in terms of the Municipal Systems Act and no rights would accrue from the date of the notification or until any such appeal had been finalized.

[28] In my view, upon a proper reading of the Syntell judgment, the Court correctly held that no rights accrued to the successful tenderer as the City expressly stated in its notification letter that no rights will accrue until any appeal in terms of the Systems Act had been finalized. Moreover, the notification letter ensured that there was no question of the provisions in section 62(3) coming into existence which would effectively render an appeal nugatory. See: Syntell *supra* at paragraph 60 and 65.

[29] Mr De Waal correctly conceded that the signing of the contract between the Applicant and the City resulted in legal rights accruing to the Applicant. His further contention however that despite the vested rights accruing to the Applicant, the Syntell matter is still applicable as the Tender Bid Document expressly provides that the award of the tender contract is subject to a 21 day appeal period and that the appeal authority can consider the appeal of the Respondents, is misconceived.

[30] The undisputed facts in this matter are significantly different from that of the Syntell case. It is correct that the Tender Bid Document stipulates that the award of the tender contract is subject to a 21 day appeal period. This information can only be regarded as informative. The tender in this matter was subject to the City's Supply Chain Management Policy (SCMP). The relevant regulation of the SCMP provides as follows:-

"Notification of Decision and Award of Contract:

210. If the Bid Adjudication Committee, City Manager or other delegated official has resolved that a bid be accepted, the

successful and unsuccessful bidders shall (my underlining) be notified in writing of this decision.

211. The written notification referred to in clause 210 shall (my underlining) inform the parties: of their right to appeal such decision within 21 days of the written notification of that decision in terms of Section 62 of the Systems Act; of their right to request reasons for the decision in terms of the Promotion of Administrative Justice Act, 3 of 2000."

[31] The SCMP, in my view, does not provide in itself a right of an appeal but merely stipulates that it is obligatory that relevant parties be notified of any such right which exists in terms of the Systems Act.

[32] In *casu*, on 15 October 2007, the Applicant was announced to be the preferred bidder. On 30 June 2008, the City awarded the tender to the Applicant. On 3 July 2008, the Applicant and the City signed a contract for the implementation of a kerbside parking management system. The tender award and the contract between Applicant and the City were not made conditional or subject to any appeal. The City also confirmed in its written response to First Respondent's Notice of Appeal that the First Respondent had no right of appeal in terms of section 62 of the Systems Act. It is clear from the written notification of the tender award to both the Applicant and First Respondent that the City did not consider the award of the tender to be subject to an appeal. In fact the City failed to comply with the provisions of its own SCMP. The approach adopted by the City in the Syntell case,

with regard to the manner and form of the written notification to the successful tenderer differs significantly from the approach adopted in the instant matter. Accordingly, the Syntell case is clearly distinguishable.

[33] In my view, the decision by the City in granting the tender award to the Applicant and upon signing the contract for the implementation of the tender, without imposing any conditions or suspending the operation thereof in any way clearly created legal rights that accrued to the Applicant. In terms of the provisions of section 62(3) once rights accrued, as in this instance, the appeal authority cannot vary or revoke that decision on appeal which, in my view, effectively rendering the appeal nugatory. See Syntell *supra* at para 65. The fact that an appeal may have been lodged and pending before the City Manager for hearing, as in this case, does not alter the position that rights accrued to the Applicant that cannot be varied or revoked by the appeal authority.

[34] Even if the City acted incorrectly in not notifying the relevant parties of a right of appeal, and the signing of the contract with the Applicant was legally flawed, unless and until the agreement is set aside by a court of law, it remains valid and enforceable. In this regard see Oudekraal Estates (Pty) Ltd v City of Cape Town and Others 2004 (6) SA 222 at page 241 [26].

[35] For these reasons, in my view, the application should succeed.

–

LE GRANGE, J