IN THE HIGH COURT OF SOUTH AFRICA

(CAPE OF GOODHOPE PROVINCIAL DIVISION)

CASE NO. 17780/2007

In the matter between:

SYNTELL (PTY) LTD	APPLICANT
and	
THE CITY OF CAPE TOWN	1ST RESPONDENT
ACTARIS SOUTH AFRICA (PTY) LTD	2ND RESPONDENT

JUDGMENT DELIVERED ON 13 MARCH 2008

Introduction

1. Section 62 of the Local Government: Municipal Systems Act 32 of 2000 ("the Systems Act") provides a right of internal appeal to 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 of staff member"*.

2. At issue in the present application is the applicability of section 62 of the Systems Act in procurement matters. The issue arose in the following circumstances.

3. The applicant ("Syntell") and the second respondent ("Actaris") both competed (along with three other companies) for a tender invited by the Electricity Services Directorate of the first respondent ("the City") in the last quarter of 2006.

4. The City currently has four different systems for the provision of prepaid electricity to residential and small business consumers. The provision of prepaid electricity involves the operation of computer programme software and the hardware equipment needed to operate such a system.

5. Syntell is currently a service provider to the City in respect of prepaid electricity services in the former Tygerberg and the former Cape Town metropolitan local areas. In these areas the City runs two systems – one for each geographic area – off its own mainframe, using software provided and maintained by Syntell. The City pays Syntell a licence fee.

6. Actaris is the current service provider in the former Blaauwberg local metropolitan area. Actaris provides a complete service in its area and the City's only involvement is the vetting of periodic reports it receives from Actaris, and the receipt of the revenue.

7. Another firm is the service provider in the Oostenberg and Helderberg areas. The City owns both the hardware and software in respect of the service in those areas and the service provider is responsible only for maintenance and support.

8. There is no operational compatibility between the four systems.

9. The City's Electricity Services Directorate, by notice dated 15 September 2006, invited tenders for the supply, delivery and commissioning of an Electricity Prepaid Uniform Vending System under tender number 69E/2006/07.

10. Syntell, Actaris and three other parties submitted tenders in response to the invitation.

11. The respective service providers, including Syntell, had been providing their services in terms of annual contracts, but when the tender process reached an advanced stage, the City changed the contractual arrangements so that the respective agreements could each be terminated on a month's notice. The contracts will be terminated as the single system is introduced.

12. On 15 January 2007, the tender was awarded to Actaris by the City's Supply Chain Management Bid Adjudication Committee ("the Bid Committee").

13. By letter dated 19 January 2007, Actaris was advised by the City that its tender had been accepted. Actaris was, however, also informed in that letter that it should *"please note that the award of this tender is subject to a 21 day appeal period in terms of the Municipal Systems Act and no rights will accrue for 21 days from date of this notification or until any such appeal has been finalized"*.

14. As will become apparent below, this letter is central to the differing contentions between the parties.

15. By letter dated 19 January 2007, Syntell was advised by the City that its tender had been unsuccessful.

16. Syntell, which was the highest-ranked of the unsuccessful tenderers, appealed on 8 February 2007 (within the requisite period) to the City Manager. Syntell supplemented its appeal grounds by letters dated 30 March 2007 and 18 May 2007.

17. Syntell was granted an oral hearing and the appeal was fully argued before the City Manager (Mr. Achmat Ebrahim) on 24 July 2007.

18. Before the appeal was determined, however, a full bench of this Court delivered a judgment in Reader and Another v Ikin and Another (CPD Case No.: A574/05), on 16 August 2007 ("the Reader judgment"). The Reader judgment interpreted the provisions of s 62 of the Systems Act in a manner which resulted in the availability of internal appeals under the provision being much more limited than had been the case in terms of the City's understanding of the provision.

19. On the City's understanding of the Reader judgment when a tender is awarded, the unsuccessful tenderers are "*third parties*" *vis à vis* the successful tenderer, in the sense of that expression as employed by Davis J in the judgment.

20. Accordingly, on 14 September 2007, the City addressed a letter to Syntell's attorneys, advising that

(a) the appeal authority had almost completed its findings when the Reader judgment intervened. According to the City's letter, this Court made the following ruling in that case: *"The Systems Act provides for an appeal for a party aggrieved by the initial decision but does not extend to third parties who contend that their rights or legitimate expectations have been adversely affected by the decision"*;

(b) although the City had appealed that judgment, it was bound by the full bench's interpretation of s 62 of the Systems Act until the appeal was decided;

(c) as soon as the City made the tender award on 15 January 2007 rights were determined and Syntell would be regarded as a third party vis-à-vis the successful tenderer;

(d) in the light of the decision in the Reader judgment, Syntell as a so-called "*third party*" *vis-à-vis* Actaris had no right of internal appeal in respect of the tender award in terms of s 62 of the Systems Act.

21. Syntell's attorneys wrote to the City in response and submitted that the Actaris tender award was significantly different from the decision referred to in the Reader case *supra*, not least because the Actaris award, unlike the approval considered in the Reader case, was expressly made conditional upon no appeal being lodged within the stipulated period, or any appeal being dismissed. The City was accordingly requested to finally decide the appeal, and (in accordance with the terms of the decision to award the tender to Actaris) to suspend the implementation of the tender award until it had done so.

22. Syntell's entreaties met with no success. Syntell consequently applied as a matter of urgency in early December 2007 for a *rule nisi* and an interim interdict. In essence what Syntell asked for was an order directing the City Manager to determine the appeal lodged by Syntell and interdicting Actaris from taking steps to implement the tender award pending the determination of the appeal.

23. Both the City and Actaris opposed the application and filed answering affidavits. The parties then agreed that Syntell be granted a *rule nisi*, returnable on Tuesday, 29 January 2008, without any interim interdictory relief. An order was made to that effect by this Court on 12 December 2007. Syntell also indicated in its replying affidavit, filed the next day, that it would also be asking on the return of the *rule nisi* for a declaratory order (declaring that Syntell was entitled to appeal the Actaris tender award) *"in order to ensure that the requisite clarity is*

provided as to the respective rights of Syntell and Actaris (and other tenderers) in the light of the Reader decision and the City's interpretation thereof". A copy of the notice of motion as it was proposed to be amended was appended to the replying papers.

Urgency

24. It is necessary to determine the legal issue at the core of this application as soon as possible, not only to clarify the rights of Actaris and Syntell, but also the *"many other unsuccessful tenderers"* who have been *"turned away or placed on hold"*. The public interest requires that clarity be obtained on the correctness of the City's attitude to appeals in procurement cases as a matter of urgency. It is also in Actaris' interest that its position be clarified as soon as possible, and before it continues to implement the tender any further.

25. The application is also rendered urgent by the fact that Actaris is currently proceeding to implement the tender. Actaris' description of the steps already taken by it in this regard underscore the need for an expeditious determination of this application, before any more costs are incurred, potentially fruitlessly. Actaris has moreover indicated that it will begin the process of removing and replacing Syntell's vending systems "*during approximately April or May 2008*". It is clearly necessary to have a resolution of the matter well before that.

The substantive issues

26. Section 62 of the Systems Act provides a right of internal appeal by a person *"whose rights are affected by a decision"*.

27. The relevant appeal authority - determined in accordance with section 62(4) of the Systems Act - *"must consider the appeal, and confirm, vary or revoke the decision"*, although *"no such variation or revocation of a decision may detract from any rights that may have accrued as a result of the decision"* (section 62(3)). The relevant appeal authority must commence with an appeal within six weeks and decide the appeal within a reasonable period (section 62(5)).

28. Mr Farlam, who together with Ms Norton, appeared for Syntell, pointed out that an internal appeal is an important safeguard against faulty administrative decision-making. He relied on Baxter (Administrative Law, 1984, p.255):

> *"It provides an aggrieved individual with the assurance that the decision will be reconsidered by a second decision-maker. The appellate body is able to exercise a calmer, more objective and reflective judgment. Detached from the 'dust of the arena', as it were, and the immediacy of the initial decision, the second decision-maker is in a better position to discern a faulty reasoning process and, in particular, to evaluate facts".*

29. Mr Farlam submitted that it is therefore in the City's interest, as well as that of all tenderers, and indeed of the public at large, that there be an appeal mechanism available in procurement matters. That was also apparently the intention of the drafters of the Systems Act.

30. It is trite that the conduct and determination of a public tender process amounts to administrative action within the meaning of s 33 of the Constitution of the Republic of South Africa, act 108 of 1996 and the Promotion of Administrative Justice Act, 3 of 2000. Syntell is clearly a party whose rights are affected by the tender award to Actaris. Those rights include, not least, the right to just administrative action (see Transnet Ltd v Goodman Brothers (Pty) Ltd 2001 (1) SA 853 (SCA)).

31. The tender award against which Syntell appealed was a decision made by the Bid Committee, a *"committee of officials"* with the delegated power (under section 165(1) of the City's System of Delegations) to make a final award in respect of the procurement of services where such award exceeds R200 000.00. As a decision of *"staff members"*, the relevant authority to hear an appeal against it was, in terms of section 62(4)(a) of the Systems Act, the municipal manager of the City.

32. In the Reader case, *supra,* a full bench of this Court held that no appeal under section 62 was available to a party aggrieved by the City's approval of another party's building plans. This was because the

second party acquired a right (to erect the structure for which approval had been sought) upon approval of the building plans and the only compelling interpretation of section 62(3) of the Systems Act was, in the Court's view, that: *"once a right accrues as a result of a decision, that decision cannot be reversed on appeal if the reversal take away the right initially granted"*[1]. It is important to note, in this regard, that, according to the judgment in Reader, the approval decision in that case was not made conditional upon being confirmed on appeal or becoming final in the event of no timeous appeals being lodged.

33. It is common cause between Syntell and Actaris that the above-quoted part of the judgment was the ratio of the Court's decision.

34. The respondents contend, however, that in terms of the judgment in Reader, no appeal under section 62 is available to a party aggrieved by the City's award of a tender to another party. As indicated earlier, in its letter of 14 September 2007 the City relied upon the following part of the Reader judgment[2]

> *"The mechanism created by ss62(1) and 62(3) of the Systems Act provides an appeal for a party aggrieved by the initial decision but does not extend to third parties who contend that their rights or legitimate expectations have been adversely affected by the decision. The latter group,*

[1] par 25, p.12 of the judgment
[2] paragraph 32, page 15 of the judgment

however, have a right of access to a court to set aside such a decision".

35. I pause to point out that this finding has far reaching consequences: first, it would seem that only an unsuccessful applicant would have the right to the internal appeal mechanism created by section 62. Any other interested party would not have this remedy available to it as, invariably; it would be argued by the successful applicant that rights had accrued to it. Second, it would result, one would imagine, in an increase in the number of reviews brought before court, a process which is more expensive, time consuming and require a more onerous burden to discharge than does an internal appeal.

36. The question whether Syntell has a right of appeal in terms of section 62 of the Systems Act turns on the interpretation of the judgment in Reader.

37. It is well-established that the interpretation of a court's judgment should follow the principles applicable to the interpretation of documents. In Firestone South Africa (Pty) Ltd v Genticuro AG 1977 (4) SA 298 (A) the Appellate Division said the following at 304D-F:

"The basic principles applicable to construing documents also apply to the construction of a court's judgment or order: the court's intention is to be ascertained primarily from the language of the judgment or order as construed according to the usual, well-known rules...Thus, as in the case of a

document, the judgment or order and the court's reasons for giving it must be read as a whole in order to ascertain its intention". [emphasis added]

(See also Plaaslike Oorgangsraad, Bronkhorstspruit v Senekal 2001 (3) SA 9 (SCA) at par9-11).

38. As Mr Farlam pointed out, reliance accordingly cannot be placed exclusively on the part of the Reader judgment quoted in paragraph 34 above. The relevant part of the judgment is qualified by the words immediately preceding it: *"For these reasons, section 62(1) read with section 62(3) of the Systems Act does not appear to provide any viable internal remedy to an aggrieved party such as appellant in the present dispute"*[3] (emphasis added).

39. In his pursuasive argument, Mr Farlam relied on this point: From a reading of the judgment as a whole, it is clear that the reason for the judgment, evident in paragraph 25 of the judgment[4], was that section 62(3) prohibits a variation or revocation on appeal which detracts from accrued rights and that the mechanism provided by section 62(1) can therefore not be used in cases where reversal on appeal will take away such rights. Interpreting the judgment in accordance with this ratio results in the least possible restriction of the "*safeguard*" represented by the right of appeal in terms of section 62 of the Systems Act, and gives full effect to the plain and unambiguous

[3] Par 32 of the judgment at p 15
[4] At p 11 - 12

meaning of section 62(1) (a subsection which is not indicated in the text as being qualified in any manner).

40. Mr Farlam emphasized that in this case, in notable contrast to the application considered in the Reader case, the City explicitly notified Actaris in its letter of 19 January 2007 that the tender award was subject to a twenty one (21) day appeal period in terms of the Systems Act and that *"no rights will accrue for 21 days from date of this notification or until any such appeal has been finalized"* (emphasis added). This was in accordance with the City's Supply Chain Management Policy (SCMP), in terms of which all tenders must be conducted, which provides that the actual awarding of a tender to the successful tenderer may only take place *"after the satisfactory resolution of any appeals"*.

41. Mr Binns-Ward, who, together with Mr Oliver, appeared for the City, submitted that Syntell's argument proceeds from a misdirected characterisation of the facts, which is premised on the contractual extension by the City to third parties of a right of appeal in terms of s 62 of the Systems Act. That was plainly not the position. Section 62 operates, where it applies, *ex lege* and not *ex contractu*.

42. Syntell's contentions, however, rest throughout on the premise that Syntell had a right of appeal by operation of section 62(1) of the Systems Act, which right was not limited by virtue of the provisions of

section 62(3) of the Act since – as Actaris was explicitly notified – no rights would accrue to it until an appeal had been finalized.

43. Without Actaris having accrued rights which could be affected by a reversal on appeal, the appeal mechanism in section 62(3), on the reasoning in Reader, was available to Syntell and other successful tenderers. Once its appeal was lodged, Syntell was, and still is, entitled to have it considered and decided.

44. Mr Binns-Ward contended that the actual position was that the City accepted Actaris's bid, but because it assumed the existence of an appeal in terms of s 62 in the circumstances, it advised Actaris, consistent with the provisions of its supply chain management policy, that the decision would not be effective until the expiry of the appeal period, or the determination of any appeal lodged during the period. The actual incidence of the aforesaid suspension was, however, obviously dependent on the existence of the criterion for the suspension, viz. the existence in law of a right by aggrieved third parties to appeal in terms of s 62. Absent the factual existence of such criterion, there was no suspension with the consequence that the decision was immediately effective and rights accrued in the sense determined in the Reader judgment.

45. It is plain from a general consideration of the Reader judgment that the full bench was persuaded by the argument addressed to it by the

appellant's counsel (Mr Rosenberg, who also appeared for Actaris) that s 62 of the Systems Act was no more than a codification of the common law doctrine of *functus officio*. See the summary of counsel's submissions, made with reference to Baxter, Administrative Law at 372-3, at paragraphs 20 and 21 of the judgment.[5]

46. There is no evidence on record what the thinking was underlying the City's "suspension" of the award. Mr Essop, in the answering affidavit, simply records that the City applied section 211 of the SCMP which, he notes, *"was evidently drawn up on the assumption that unsuccessful tenderers had a right to appeal in terms of section 62 of the Systems Act against the award of a tender contract to another party (emphasis added)"*. The Court cannot conjecture as to the assumptions underlying the City's decision or the provisions of the SCMP. What is clear is that the decision communicated to Actaris was a decision to accept its tender, but to award the tender only if and when no appeal was lodged or a lodged appeal had been determined.

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5 The predecessor of s 62 of the Systems Act in some of the old order provincial legislation pertaining to municipalities was plainly consistent with the common law doctrine of *functus officio*: see s 88(4) of the Natal Local Authorities Ordinance 25 of 1974, which provides:

"Whenever any officer who has been requested by any person to exercise or perform any power, duty or function delegated to such officer in terms of subsection (1) -

(a) fails or refuses to comply with such request; or

(b) in exercising or performing such power, duty or function, does so in a manner which does not accord with such person's request,

such person may, within fourteen days of being notified of such failure or refusal or of the decision of such officer, appeal to the council against such failure, refusal or decision by giving written notice thereof and of his grounds of appeal to the town clerk."

47. Mr Binns-Ward submitted that there is no indication in the Systems Act that local authorities may by making their decisions subject to a right of appeal in terms of s 62 of Systems Act and purporting to suspend the determinative effect of their administrative actions pending the determination of any such appeals invest "*third parties*" with rights of appeal under s 62 which they would otherwise not have had.

48. Mr Farlam's response was that the cart, here, is being put before the horse. On the Reader reasoning, Syntell had a meaningful appeal remedy, provided that no rights had accrued as a result of that decision. The factual situation applicable was that, because of the form in which the decision was communicated, no rights had in fact accrued. The Systems Act accordingly provided a right of appeal on the facts in this case.

49. Mr Binns-Ward pointed out that the Systems Act suggests that the suspension of administrative decisions made by municipal functionaries under delegated authority so as to render them more effectively amenable to internal appeal in terms of s 62 is a competence intended to be subject to regulation by the Minister responsible for local government: see s 72(1)(a)(ii) of the Systems Act. It is important in this respect not to overlook the consideration that any such regulation by the Minister could not lawfully discriminate between the rights of persons to appeal administrative decisions at which they

were aggrieved unless a rational basis for the differentiation could be demonstrated. Reliance was placed on s 9 of the Constitution.

50. Mr Farlam's response was threefold: First, there is no evidence that this was the reason for the "suspension" in question. There are also no regulations in place, which means that the City was entitled to act in terms of its SCMP. Third, section 72(1)(a)(ii) empowers the Minister to make regulations to regulate "the suspension of decisions on appeal", which in itself presupposes that a valid and competent appeal lies and has been lodged against a particular decision (which would not be the case if the respondents' contentions are correct).

51. Mr Binns-Ward developed a further argument along the following lines:

(a) Assuming, but not conceding, that it might be competent for local authorities to exercise powers of suspension in a manner similar to what the Act contemplates by the powers vested in the Minister in terms of s 72, it would, in any event, equally be plainly unconstitutional for a local authority by its own decision to decide to make some of its administrative decisions amenable to internal appeal by aggrieved affected persons in terms of s 62 of the Systems Act and others not. It could not, for example, afford the privilege to aggrieved tenderers, but not to aggrieved

objectors to a building plan application. Section 62 itself does not provide any basis for such discrimination.

(b) It is difficult for example to conceive of a rational basis for a local authority to act discriminately by generally suspending the determinative effect of its administrative decisions awarding a tender contract so as to afford a right to aggrieved unsuccessful tenderers to appeal while not affording an equivalent privilege to objectors to the approval by its officials of building plan applications. The legal character of the interest of the unsuccessful tenderer in the decision made to award the tender to a competing tenderer is indistinguishable from that which the objector to the building plan application has when it the application is approved notwithstanding its objection.

(c) The nature of the unsuccessful tenderer's right and interest in the circumstances has been expressly described by the SCA in Transnet v Goodman Bros, supra, at paragraph [11].[6] The right that falls to be protected is the right to administrative action that is lawful, reasonable and

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6 The references to paragraphs (a),(b) and (c) at para 11 of Goodman Bros are to those paragraphs in item 23 of schedule 6 to the Constitution, which applied pending the enactment of PAJA. The item provided as follows:

"Every person has the right to -

(a) lawful administrative action where any of their rights or interests is affected or threatened;

(b) procedurally fair administrative action where any of their rights or legitimate expectations is affected or threatened;

(c) be furnished with reasons in writing for administrative action which affects any of their rights or interests unless the reasons for that action have been public; and

(d) administrative action which is justifiable in relation to the reasons given for it where any of their rights is affected or threatened."

procedurally fair. It is precisely the same legal right that an objector to a building plan application has: cf. Erf One Six Seven Orchards CC v Greater Johannesburg Metropolitan Council (Johannesburg Administration) and Another 1999 (1) SA 104 (SCA) (more particularly the reference to the approval of building plans as administrative action and the acknowledgment of the court of first instance recorded by the appeal court, without demur from the appeal court, that a neighbour had a right to be heard in the process); and Muller NO and Others v City of Cape Town 2006 (5) SA 415 (C) at paragraph [76].

(d) This all goes to buttress the cogency of the contention that the City did not intend to purport contractually to extend rights of appeal to Syntell that it did not enjoy automatically in terms of s 62; and that it did not intend that the effectiveness of its decision to accept the bid of Actaris should be suspended if there were in fact no right of appeal by third parties in terms of s 62.

52. Mr Farlam responded that if the City has acted unconstitutionally, this is a point to be taken by parties whose constitutional rights might have been infringed. In any event, there is no reason to be pessimistic about the constitutional implications of distinguishing between different kinds of decisions and appeals. First, one is not dealing with a

"suspect category" as referred to in section 9(3) of the Constitution, so the reference to "discrimination" is inapposite. One is simply concerned with a case of "differentiation", and a differentiation will only be set aside if there is no rational connection between the action and the purpose it is intended to achieve. One can think of many reason why it would be rational to permit existing suppliers to the City who are tendered for a consolidated contract to have a right of appeal against a decision refusing their tenders, and yet not to grant a right of appeal to a home-owner aggrieved by a decision to approve a building application submitted by a neighbour. I agree with these submissions.

53. Mr Binns-Ward submitted that

(a) it is plain on the facts of the current matter that the indication that the award of the tender was suspended pending the expiry of the period of appeal permitted in terms of s 62 of the Systems Act and, in the event of any appeal being lodged during that period, pending determination of the appeal, was predicated on the assumption of the existence of a right of appeal. The content of clause 211 of the City's supply chain management policy is predicated on the same assumption. The City's supply chain management policy obviously cannot trump the provisions of national legislation and to the extent that it would on an acceptance of the Reader

judgment appear to have been premised on an incorrect construction of the national legislation, it falls to be treated as *pro non scripto*.

(b) The provision of the supply chain management policy and the content of the administrative decision contemplated in the City's acceptance of tender letter to Actaris, dated 19 January 2007, contemplate and refer to two administrative decisions; viz. (i) an acceptance of a tender and (ii) the award of a contract pursuant to such acceptance. The policy and the acceptance letter do not purport to suspend the effect of the first decision; they rather make any implementation of the contemplated second action - which would essentially be an availment of rights under the first decision, - dependent upon the outcome of any appeal that might be made in terms of s 62 of the Systems Act. What decision is the contemplated appeal in terms of s 62 to be directed at in the circumstances? It can only be the decision that has been effectively and completely made i.e. the decision to accept the tender. Certainly it is not possible on any basis to conceive of an appeal in terms of s 62 if no determination of rights has been made.

54. Mr Farlam's response was this: Davis J held that when a licence is granted and later revoked, the applicant is deprived of an existing right since the decision to grant approval is a determination of the rights of the applicant and *"a favourable determination results in an accrual of a right to first respondent"*. In this matter, however, any determination of Actaris' rights was subject to the outcome of the contemplated appeal and accordingly did not result in any accrual of rights (as was explicitly communicated to Actaris).

55. In its argument in the Reader case, the City (represented by Mr Binns-Ward) submitted that the word "*accrued*" in s 62(3) fell to be construed in a manner that denoted a right that had not only been acquired, but also availed of. In other words that an accrued right for the purposes of s 62(3) would be an availed of right and that the effectiveness of a decision upholding an appeal in terms of s 62(1) and setting the original decision aside or varying it would not reverse what had already been done in terms of the right originally afforded. Such a construction of the word "*accrue*" is not without precedent. In Mahomed NO v Union Government (Minister of Interior) 1911 AD 1 at p.10, Innes JA cited the decision of the Privy Council in Abbott v The Minister for Lands [1895] AC 425 (PC), stating as follows: '*It was laid down by the Privy Council in Abbott v Minister of Lands (A.C., 1895, p. 425), that the mere right existing in the members of the community or any class of them to take advantage of an enactment without any act done by an individual towards availing himself of that right, cannot*

properly be deemed a "right accrued" within the meaning of the enactment.' Such an interpretation would also render sensible the regulatory power afforded to the Minister in terms of s 72(1)(a)(ii) of the Systems Act. It was this argument that is the "*purposive construction*" referred to by Davis J at paragraph 24 of the Reader judgment.[7] However that argument was rejected in the Reader judgment with reference to the so-called "*determination and deprivation theory*".

56. What Davis J meant when he referred to a determination and deprivation theory appears plainly from the content of paragraph 28 of the judgment, in which the learned judge pronounced "*As Baxter Administrative Law at 353 notes, administrative action has automatic consequences; lawful administrative action may create a right, a privilege, a power, a liability or a duty or it may remove any of these.*" Davis J went further to illustrate this concept, pointing out that "*when a*

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7 The argument was formulated as follows in the City's heads of argument before the full court:

"22. *If a decision by a functionary that would be amenable to revocation in terms of either s 59(3) or s 62(3) were to be beyond the reach of either of those sections merely because it gave rise to a right in favour of any person even if such right had not 'accrued' in the sense of having been exercised, the provisions would be in large measure dead letters. That cannot have been the intention of the legislature.*

23 *It is submitted that the construction of s 62(3) contended for by the Second Respondent is supported by a consideration of s 62(1). The right of appeal granted in terms of s 62(1) is not restricted in any way. It is only the effect of the determination of an appeal that may be restricted by reason of the qualification to the effect of the appellate authority's decision in terms of s 62(3). Section 62(3) does not restrict the appellate authority's power to confirm, vary or revoke the decision appealed against; it merely limits the effect of such confirmation, variation or revocation. If the intention were to exclude an appeal in any case where the decision had the consequence of merely granting a right instead, as it is submitted it was intended, merely to limit the effect of an appeal decision in a case where a decision had granted a right that been availed of, the appropriate place to impose the limitation would have been in s 62(1)."*

person applies for a license, her rights to a licence are determined. ... A favourable determination therefore results in an accrual of a right".[8]

57. Accordingly, it was submitted that rights did accrue to Actaris when the first decision was made. The nature of those rights was such that the City was not at liberty to accept the bid of any other tenderer. In regard to the acceptance of the bid submitted by Syntell it was *functus officio* on the basis of the determination theory.

58. I disagree. If Actaris was expressly advised that the tender award was subject to an appeal process, then it must follow that rights did not accrue to it in the sense as is contemplated by the Reader judgment. It matters not that the City may have been under a misapprehension as to the applicability of appeal process to the award of tenders. Factually the City did not intend rights to accrue to Actaris until the appeal process had been finalised.

59. Moreover, once the appeal process has been embarked upon it would seem to me that Syntell is entitled to demand that it be concluded.

60. The tender award may furthermore not legally be implemented at this stage. In terms of the tender award letter, no rights would accrue to Actaris until any appeal in terms of the Systems Act had been finalized. The word "*finalized*" in the tender award clearly

8 Reader judgment, page 14, par 29

contemplated a final determination or decision on the merits of the appeal by the relevant appeal authority and not, as is contended for by Actaris, a decision by a different functionary that no appeal was available. The very condition to which the accrual of rights pursuant to the tender was made subject presupposed that unsuccessful tenderers did have a right of appeal. It is no answer for the City now to suggest that, in the light of the Reader judgment, the condition must be regarded as having been based on a wrong premise (unless the City is successful in its appeal against that decision). The City is bound by its own decisions (even if flawed) unless and until they are set aside (Oudekraal Estates (Pty) Ltd v City of Cape Town and Others 2004 (6) SA 222 (SCA) at paras 26-37). The City also cannot depart from the SCMP, even if any of its provisions appear to have been inserted on the basis of a wrong interpretation of a law. In the absence of any final decision on the merits of Syntell's appeal, no rights in relation to the tender can thus have accrued to Actaris.

61. Mr Binns-Ward submitted that Syntell's contingent reliance on Oudekraal Estates case in the alternative is also misplaced. What Syntell seeks in this matter is a *mandamus* directing the City to hear an appeal in terms of s 62 of the Systems Act where no such right of appeal exists in law. It is seeking an order from the Court enjoining the City to do what it is not permitted in law to do in terms of the Reader judgment's construction of the statutory provision. What the judgment in Oudekraal determined was that it was impermissible to

mount collateral challenges to administrative decisions other than defensively. It did not decide that a court was required to enforce an invalid administrative decision unless and until it was set aside on review. On the contrary, notwithstanding its impeachment of the former City of Cape Town's collateral challenge to the unlawful decision of the Administrator to proclaim a township at Oudekraal, the SCA refused to grant the appellant an order requiring the City to comply with the requirements of the administrative decision in question despite it not having been set aside on judicial review.

62. Again, I disagree. The right to an appeal would exist, also in terms of the Reader judgment, if rights had not accrued to Actaris. The moment it is found that there does indeed exist a right of appeal, it must follow that Syntell would be entitled to the *mandamus* is seeks.

63. Mr Rosenberg, who appeared on behalf of Actaris, essentially advanced two arguments on the merits

(a) The first proceeds as follows

(i) A final decision was purportedly taken by the Bid Committee that the tender of Actaris be accepted, and that decision was not conditional (nor, allegedly, could it legally be)

(ii) The City's notification letter did not purport to insert conditions into the award of the tender: it was simply *"purporting to point out what the City regarded as being the prevailing legal position, namely that tender awards were ... subject to a s 62 appeal. This being so, implementation of the award was suspended pending any s 62 appeal"*;

(iii) That letter could not confer a right of appeal on Syntell, because no such right can be conferred (either *ex lege* or *ex contractu*) by an incorrect assumption by the City communicated to Actaris.

(iv) And thus no appeal can lie against it in terms of section 62(3) of the Systems Act.

64. This argument, as Mr Farlam pointed out, fails to give due recognition to the fact that, irrespective of what the Bid Committee may have decided, no rights could vest with Actaris until it had been told in unequivocal terms of an unconditional right to implement the contract. That plainly did not happen, as the City's letter of 19 January 2007 made clear. There is therefore no question of section 62(3) having been implicated, or any right to appeal having been qualified or rendered meaningless.

65. The argument also overlooks that section 62(1) of the Systems Act entitles Syntell to appeal: Section 62(3) is concerned with remedies, and stipulates in this regard that an appellant is precluded from obtaining any reversal of a decision if vested rights have accrued. It is thus not a question of the City's notification letter conferring on Syntell a right which it did not have. That right already existed (*ex lege*) by virtue of section 62(1). The notification letter merely ensured that there was no question of the s 62(3) proviso coming into play, and effectively rendering the appeal nugatory.

66. I agree with both these submissions made by Mr Farlam.

67. Actaris' second argument has the following components:

(a) While the award of the tender to Actaris involved an administrative decision, the relationship of the parties is that of ordinarily contracting parties;

(b) In the circumstances, notwithstanding the City's earlier communication that the tender was not to be implemented pending the appeal process, the City and Actaris (as contracting parties) could subsequently agree that the City should commence work;

(c) This is supposedly *"exactly what has happened"*, by virtue of the City's letter to Actaris dated 21 September 2007 (par 31), after the City had *"[r]ightly or wrongly,... concluded that the appeal process could be taken no further"*;

(d) Pursuant thereto, *"the parties proceeded to implement the contract"* and rights *"clearly accrued"*;

(e) There can accordingly *"no longer be any talk of a suspension of the award"*, while even if Reader was not previously of application, *"it certainly is now by virtue of the City's later decision to implement"*.

68. When considering this argument, it must again be appreciated, that it is not a question of a right to appeal having to be bestowed on Syntell: the right existed through section 62(1). Section 62(3) merely deals with remedies, and is concerned with what relief can be awarded to appellants.

69. In any event, there can, on this alternative submission of Actaris, be no question of section 62(3) having been implicated prior to 21 September 2007 (well after Syntell's appeal was lodged, amplified and comprehensively argued before the City Manager). The allegedly disqualifying circumstance only, on Actaris' version, occurred on or about 21 September 2007. That can accordingly not diminish Syntell's

right to the declaratory order outlined in paragraph 2 of the amended notice of motion – in terms of which Syntell has asked for an order *"[d]eclaring that [Syntell] was entitled to appeal on 8 February 2007 in terms of section 62 of the [Systems Act] against the tender award..."* (emphasis added).

70. Moreover, if Actaris' alternative submission is correct, what this means is that Syntell could appeal and set aside the tender award to Actaris from 19 January 2007 to 21 September 2007, but from then onwards was precluded from obtaining any meaningful relief in an appeal. In other words, the City could have finalized its appeal in the middle of September 2007, when it abandoned that process, but after erroneously concluding that there was no appeal remedy for Syntell in the light of Reader, was able to scupper it.

71. It is difficult to see how that argument assists Actaris. The City would plainly have acted administratively unfairly if and when it pulled the rug out of the tender process by conferring rights on Actaris. The City's actions would therefore be clearly reviewable, while Actaris and the City could also be interdicted in the meanwhile from acting in terms of their patently wrong decision. In any event, it is submitted that section 62(3) must refer to the position when the appeal is lodged and the rights conferred at that time. Moreover, inasmuch as any communication to Actaris in late September 2007 about there purportedly not being any internal appeal was made in a contractual

context, it would be void as a result of being premised on a mistaken assumption by the City (and presumably Actaris).

72. Syntell asks that the City's appeal authority (in this case, the City Manager) determine its appeal. In addition, it seeks to interdict Actaris from implementing the tender award pending the determination of Syntell's appeal.

73. The requirements for a final interdict (as crystallized in Setlogelo v Setlogelo 1914 AD 221 at 227) are satisfied on the papers.

74. Syntell alleges a clear right to have its appeal determined by the City and an infringement of that right is established by the City's undisputed refusal to determine the appeal.

75. Moreover, contrary to Actaris' assertions, neither review nor a damages claim is suitable alternative remedies available to Syntell. Review of the City's decision to award the tender to Actaris is no alternative to determination of an internal appeal which has already been prosecuted and argued. Review grounds are in any event narrower, and therefore not comparable with appeal grounds.

Declaratory relief sought

76. In its proposed amended notice of motion Syntell seeks an order declaring that it was entitled to appeal in terms of section 62 of the Systems Act. No basis for objecting to the proposed amendment was advanced, and it is granted.

77. Section 19(1)(a)(iii) of the Supreme Court Act 59 of 1959 empowers this Court *"in its discretion, and at the instance of any interested person, to enquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon the determination"*.

78. The right which the Court is being asked to investigate and determine clearly relates to an existing, legally enforceable right. Declaratory relief is furthermore appropriate and desirable in circumstances where, as in this case, an issue of significant public interest is in dispute. It is reiterated, in this regard, that, as the City has acknowledged, *"the application raises a matter of importance for the City's administration of procurement matters. If, contrary to the City's understanding, the Applicant is indeed entitled to an appeal..., so are many other unsuccessful tenderers whose appeal have also been turned away or placed on hold pending the determination of the Supreme Court of Appeal in the Reader case"*.

79. A case in point is Ex parte Chief Immigration Officer, Zimbabwe 1994 (1) SA 370 (ZS). In that case, the parties contested the validity of a judgment determining the legal position of "*aliens*" under Zimbabwean immigration legislation. The Court exercised its discretion to grant declaratory relief, pointing out at 377E-F:

> *"A powerfully persuasive factor for the exercise of the discretion in favour of the applicant is that the issue concerning the judgment of this Court is anything but abstract or purely intellectual. It is very much alive and if not resolved in these proceedings will inevitable come before this Court in the near future. It affects the applicant...and doubtless many other aliens similarly positioned to the [immigrants concerned]. The raising of it in legal circles has caused uncertainty and anxiety in the minds of immigration officers. It is only right and proper, therefore, that this Court should declare...upon the validity or otherwise of its judgment".*

80. Similar considerations warrant a declaratory order in this case.

Conclusion

81. In the circumstances I am not persuaded by the argument that the tender had been finally awarded; that the letter could not detract from the finality of the award – and hence that rights had accrued.

82. In the premises I uphold the contentions made by Syntell that the matter of its appeal is distinguishable from the facts in the Reader case and that the ratio in that case was accordingly not applicable to Syntell's internal appeal since the tender award was explicitly made subject to an appeal period and the City had notified Actaris in express terms that no rights would accrue to it until any appeal process had been finalized.

83. I also uphold the Syntell contention that there were therefore no accrued rights which would be affected by a variation or revocation of the tender award on appeal. Accordingly, the internal appeal provided by section 62(1) of the Systems Act was still available to Syntell.

84. In the premises I make the following order

(a) Declaring that the applicant was entitled to appeal on 8 February 2007 in terms of section 62 of the Local Government Municipal Systems Act 32 of 2000 ("the appeal" against the tender award 69E/2006/07 made by the first respondent's supply chain management committee on 17 January 2007 ("the tender award");

(b) Directing the first respondent to determine the appeal against the tender award;

(c) Interdicting the first and second respondents from taking any steps whatsoever to implement the tender award, alternatively to further implement the tender award, pending the determination of the appeal;

(d) Directing that the costs of this application be paid by the first and second respondents jointly and severally. The costs include the costs of two counsel.

Sven Olivier