



Republic of South Africa

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

Case No: 6277/08

"REPORTABLE"

In the matter between:

M5 DEVELOPMENTS (CAPE) (PTY) LTD

Applicant

and

CC GROENEWALD N.O

First Respondent

OVERSTRAND MUNICIPALITY

Second Respondent

ASLA DEVCO (PTY) LIMITED

Third Respondent

BLUE WHALE PROPERTY PROJECTS CC

Fourth Respondent

JUDGMENT: 12 FEBRUARY 2009

Le Grange J:

[1] In this matter the Applicant (M5) seeks an order reviewing and setting aside a decision by First Respondent (Groenewald), the acting municipal manager, that a tender (SC055/2007) of Second Respondent (the Municipality), which was allocated by the Tender Adjudication Committee of Second Respondent to the Applicant, be re-allocated to Third Respondent (Asla).

[2] M5 furthermore seeks a declaratory order that a valid and binding contract came into existence between the Municipality and itself, pursuant to the allocation of the tender to M5, alternatively that Applicant is entitled to enter into such contract, thereby giving effect to the allocation of the tender.

[3] The factual matrix is mainly common cause between the parties in this matter.

[4] The Municipality, in the first quarter of 2007, published an invitation to tender for services that had to be rendered as the implementing agent for housing projects in the Overstrand Municipal Area.

[5] M5 duly submitted its tender documents and from the 16 tender documents that were received by the Municipality, only 5 tenders were regarded as *bona fide*, from *inter alia* M5, Asla and Blue Whale (Fourth Respondent).

[6] The Municipality thereafter appointed an independent consultant firm, namely ICE Group (Pty) Ltd ("ICE"), who recommended that the tender be allocated to M5.

[7] The Municipality's Tender Evaluation Committee, pursuant to the recommendation of ICE, made a formal recommendation that the tender be allocated to M5.

[8] At a subsequent meeting of the Municipality's Tender Adjudication Committee

held in April 2007, a resolution was adopted whereby the tender was allocated to M5 in accordance with the aforementioned recommendation.

[9] M5 was informed of the allocation of the tender to it by means of a letter dated 28 April 2007. The letter records the following relevant information:-

"It is our pleasure to inform you that your tender for the provision of the abovementioned service has successfully complied with the conditions and specifications of the tender as set by the Municipality and that your enterprise has been appointed as the successful tenderer for the provision of abovementioned service.

Upon completion and signature of the formal Contract and upon the issuing of this letter of acceptance by the Municipality a binding contract will be established between your enterprise and the Municipality for the above mentioned service.

You are advised that all the terms and conditions of tender as well as the tender specifications and requirements continue to apply to the contract for the duration thereof, and that any variation or failure to comply with the tender specifications and requirements, will amount to a breach of contract, unless approved in writing by the Municipality.

Please be informed that the unsuccessful tenderers have a right of appeal in terms of Section 62 of the Local Government Municipal Systems Act, 2000 (Act 32 of 2000) against the decision taken by the Tender Committee, which right of appeal must be exercised within 21 days from date of this letter.

After expiry of the appeal period, you will be required to sign the service contract before the implementation date."

[10] Letters were also forwarded to the unsuccessful tenderers, in which it was

stated that they are afforded 21 days in which to lodge appeals in terms of Section 62 of the Local Government: Municipal Systems Act, No 32 of 2000 ("the Systems Act") against the allocation of the tender.

[11] Blue Whale lodged an appeal timeously. Asla failed to lodge an appeal within the prescribed time period, but filed a notice of an appeal after the expiry date. From May 2007 to January 2008, no steps were taken by any official of the Municipality to finalize the appeal. Groenewald, who has been employed by the Municipality in various positions, was the acting municipal manager between the periods 1 November 2007 to 31 March 2008. The previous municipal manager had resigned and a new municipal manager was appointed with effect from 1 April 2008.

[12] In February 2008, Groenewald dismissed the appeal of Blue Whale and in a letter dated 12 February 2008 recorded the reason for the decision as follows: "*I have considered your representations and have to inform you that your appeal had to be rejected as no fault could be found regarding the adjudication process.*"

[13] Groenewald however, whilst considering the appeal lodged by Blue Whale, discovered that there were certain differences between the evaluation done by ICE and the information submitted to the Municipality's Tender Adjudication Committee by the Tender Evaluation Committee. According to Groenewald, in the category (empowerment of workforce/development of human resources), certain points were awarded incorrectly to M5 and Asla. In a letter dated 29 January 2008, M5 was informed about this. The letter also records the rescoring of the points of the category in question and Asla as the bid winner by 0.1 point.

[14] M5 was invited to make written representations to Groenewald regarding all the matters raised in the letter, within a period of one week. M5 was also requested to submit, along with the written representations, further information and documentation, including a confirmatory letter by M5's chartered accountants relating to the points claimed in the category in question in terms of which the tender was evaluated.

[15] In a further letter dated 7 February 2008, Groenewald indicated that if he did not receive anything from M5 by 11 February 2008, he would assume that M5 intends not to avail itself of the opportunity to participate in the appeal process to assist the appeal authority reaching a correct decision.

[16] M5's attorneys responded on 11 February 2008 with a request that M5 be afforded an extension of time as it was advised by its auditors that it would take approximately 14 days from that date, to provide and furnish First Respondent with the relevant information and documentation. M5's attorneys also made reference in the letter that 1 point was awarded under a particular heading "Local Content" to M5, when in fact it qualifies for the full 3 points and the rights of M5 were reserved in that regard.

[17] Groenewald, notwithstanding this requests, informed M5 on 12 February 2008 that as the duly appointed appeal authority, he came to the conclusion that in the category (empowerment of workforce/development of human resources) certain

points were incorrectly scored and are to be awarded to M5 and Asla. As a result of the rescoring, M5 achieved 92.3 points and Asla 92.4 points. Groenewald re-allocated the tender to Asla and informed M5 that its tender was unsuccessful.

[18] Against this background M5, on an urgent basis, launched these proceedings. The founding affidavit filed on behalf of M5 relies upon a number of review grounds. As a result of my view of the matter, I deem it unnecessary to deal with all of these grounds.

[19] The main attack against Groenewald's decision is firstly, the Municipality has failed to adopt and implement a Supply Chain Management Policy, and for that reason Groenewald as appeal authority, was not authorized in terms of the empowering provisions of either the Local Government: Municipal Systems Act 32 of 2000, the Preferential Procurement Policy Framework Act No 5 of 2000: Municipal Finance Management Act No. 56 of 2003 (MFMA), or the Municipal Supply Chain Management Regulations (The Regulations) as published in terms of Section 168 of the MFMA, to make the decision to re-allocate the tender to Asla. Secondly, the appeal of Asla was time barred and therefore Groenewald could not have considered their appeal. Lastly, Groenewald, as appeal authority failed to apply the *audi alteram partem* rule. Moreover, Groenewald became *functus officio* when he advised Blue Whale that its appeal had been dismissed and acted *ultra vires* in re-allocating the tender to Asla.

[20] Mr. J.W. Olivier (SC) assisted by Mr. R.B. Engela appeared on behalf of M5.

Mr. E Fagan appeared for Groenewald and the Municipality and Mr. H.C Schreuder for Asla. Blue Whale did not oppose the Application.

[21] Mr. Olivier and Mr. Fagan addressed me extensively on the relevant legislation pertaining to matters relating to tenders. Reference was also made to decided cases, including Reader and Another v Ikin and Another 2008 (2) SA 582 (C) and Syntell (Pty) Ltd v The City of Cape Town and Another (CPD case no 17780/07). See also: The Municipality of the City of Cape Town v Reader and Another (719/2007) [2008] ZASCA 130 dated 14 November 2008.

[22] The principal submissions by Mr. Olivier are firstly, that the purported exercise of the power in terms of the provisions of section 62 of the Systems Act, was unlawful and illegitimate as the decision *in casu*, was not taken by a staff member in terms of a power or duty delegated in terms of section 59 of Part 3 of the Systems Act, but by the Bid Adjudication Committee in accordance with a committee system and accordingly there was no right of appeal for Blue Whale. Moreover, Second Respondent's failure to comply with the express provisions of the MFM Act and the prescribed regulatory framework could not have provided Groenewald with an appeal authority in terms of the Systems Act. Secondly, even if Groenewald was vested with an appeal authority, he failed to apply the *audi alterem partem* rule and the decision to re-allocate the tender to Asla was irrational as he dismissed the appeal of Blue Whale that was before him and became *functus officio*.

[23] The submissions by Mr. Fagan, briefly stated, are that the Acting Municipal

Manager was the relevant appeal authority in terms of the provisions of section 62 (4) of the Systems Act, and therefore had the necessary authority to hear an appeal and did not act *ultra vires*. He also contended that there is no validity in the argument that Groenewald should have applied the Supplied Chain Management Policy as the provisions of section 62 of the Systems Act makes adequate provisions for Groenewald to hear an appeal, which process is separate from the tender evaluation and adjudication process. The legal validity thereof must, according to Mr. Fagan, be judged on its own terms. With regard to the attack by M5 on the procedural fairness of the process, it was argued on behalf of Groenewald and Asla that M5 was given an opportunity to be heard, but did not avail itself of such opportunity. It was also argued that Groenewald was not *functus officio* when he advised Blue Whale that its appeal had been dismissed. Furthermore, the appeal process had not come to an end and Groenewald was within his rights to re-allocate the tender to Asla, as no rights accrued to M5.

[24] Mr H.C Schreuder agreed mainly with the submissions made by Mr. Fagan, and contended that unless there are certain objective criteria that justify the award to another tenderer, the contract should be awarded to the tenderer who scored the highest point, which was Asla.

[25] It is a fundamental principle of the Rule of Law that the exercise of a public power is only legitimate where it is lawful. It is central to our constitutional order that the legislature and the executive are in every sphere constrained by the principle that they may exercise no power and perform no function beyond those

conferred on them by law. In this regard see Fedsure Life Assurance v Greater Johannesburg TMC 1999(1) SA 374 (CC) at para's 56 and 58 and Minister of Local Government, Housing and Traditional Affairs, Kwazulu-Natal v Umlambo Trading 29 CC and Others 2008 (1) SA 396 (SCA) at 401 H.

[26] Section 217 (1) of the Constitution provides that when an organ of state, in the local sphere of government, in contracts for goods or services, it must be done in accordance with a system which is fair, equitable, transparent, competitive and cost effective. National legislation has to prescribe a framework in which the policy, referred to in section 217 of the Constitution, must be implemented. See also: Darson Construction (Pty) Ltd v City of Cape Town 2007 (4) SA 488 (C) at page 498 D-E.

[27] This principle is confirmed in section 112(1) of the Local Government: Municipal Finance Management Act, No. 56 of 2003 (the MFM Act) which, *inter alia*, provides that the supply chain policy of a municipality or municipal entity must be fair, equitable, transparent, competitive and cost-effective and comply with a prescribed regulatory framework for municipal supply chain management.

[28] The MFM Act mainly deals with the financial affairs of municipalities and other institutions in the local spheres of government to secure sound and sustainable management. Section 3 (2) thereof provides that in the event of any inconsistency between a provision of the MFM Act and any other legislation in force, then the MFM Act takes effect, and which regulates any aspect of the physical and financial affairs

of municipalities or municipal entities, a provision of the MFM Act prevails.

[29] Part 1 of chapter 11 of the MFM Act deals with Supply Chain Management with regard to the procurement of goods and services. In terms of Section 111, each municipality must have, and implement a Supply Chain Management Policy which gives effect to the provisions of Part 1.

[30] It is not in dispute that the Municipality did not adopt and implement a Supply Chain Management Policy at the time that Groenewald took the decision to re-allocate the tender to Asla.

[31] Section 112 of the MFMA likewise provides that the Supply Chain Management Policy of a municipality or a municipal entity must be fair, equitable, transparent, competitive, cost- effective and comply with the prescribed regulatory framework for Municipal Supply Chain Management. In terms of the provisions of section 83 and 85 of the Municipal Systems Act, 32 of 2000, detailed requirements are stipulated for the procurement of services through agreements with non-public sector providers. The purpose of the prescribed regulatory framework is to ensure a fair and transparent service to avoid corruption and fraud within the system and to preserve ethics to any service that is delivered by the Municipality. It also highlights oversight and accountability and ensures that municipal managers abide by these ethical rules.

[32] Returning to the undisputed facts of this matter, the decision by the

Municipality to award the tender to M5 was made by its Tender Adjudication Committee. The members of this committee were the Chief Financial Officer (the Chairperson), the Director of Infrastructure, the Director of Community Services, the Director of Economic Development and the Head of Management Services. These persons are all staff members of the Municipality and three members constitute a quorum. From the composition of this committee, all of whom are staff members, it is evident that the decision on the tender was taken by staff members other than the municipal manager.

[33] The argument that the Tender Adjudication Committee lacked the necessary written delegation as it did not form part of the record provided to M5 by Groenewald and the Municipality, is in my view without merit. This issue was raised for the first time by M5 in its replying papers. According to the answering affidavit filed by Groenewald, the composition of the Tender Adjudication Committee had been determined by the council of the Municipality. There is therefore no basis to come to the conclusion that the Committee lacked the necessary written delegation. The argument therefore that the decision in question was not taken by a staff member in terms of a power or duty delegated by section 59 of Part 3 of the Systems Act is therefore without substance. I am satisfied that, in terms of the provisions of section 62 (4) of the Systems Act, the municipal manager is the appeal authority.

[34] It is further common cause that the Municipal Supply Chain Policy was not officially implemented, although the policy was applied in the process of this matter.

Groenewald, however, relied on the provisions of the Systems Act to consider the appeal of Blue Whale. The contention on behalf of M5 that Groenewald acted *ultra vires* as the legislator could never have intended a further general appeal procedure in terms of section 62 of the Systems Act if a specific appeal procedure has been set out in regulation 49 and 15 of the Supply Chain Management System, is misconceived.

[35] Despite the provisions of Section 111 of the MFMA which stipulates that each municipality must have and implement a supply chain management policy, the legislature clearly envisage a period, after the enactment of the MFMA, that municipalities will not have a supply chain management policy in place. It will be untenable in law, that during these periods no internal appeals could be heard. Section 62 of the Systems Act, is therefore in my view, the operative provision.

[36] In *casu*, the tender was awarded to M5 on condition that the unsuccessful tenderers have a right of appeal against the decision taken by the tender committee, which must be exercised within 21 days. Blue Whale exercised its rights and Asla filed a notice of appeal outside the 21-day time limit.

[37] Groenewald, in my view, correctly considered the appeal of Blue Whale as the tender awarded to M5 by the Municipality, was conditional and subject to a 21-day appeal process. See also Syntell *supra* at paragraph 58.

[38] The issue that needs closer scrutiny is whether Groenewald acted within his authority as outlined in the Municipal Systems Act and complied with lawful administrative action when he dismissed the Blue Whale's appeal, and *mero muto*, revoked the decision to allocate the tender to M5 and re-allocate it to Asla. In this regard see Logbo Properties CC v Bedderson N.O in and Others 2003 (2) SA 460 (SCA) at 465 F; Transnet LTD v Goodman Brothers (PTY) LTD 2001 (1) SA 853 (SCA); Metro Projects CC v Klerksdorp Local Municipalities 2004 (1) SA 16 (SCA) at 21 B-D and Promotion of Administrative Justice Act of 2000, section 6 (2)(a)(i) and 6 (2)(i).

[39] The relevant provisions of section 62 of the Systems Act provide 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.

(4) When the appeal is against a decision taken by-

(a) a staff member other than the municipal manager, the municipal manager is the appeal authority;

(b).....

(c).....

(5).....

6) The provisions of this section do not detract from any appropriate appeal procedure provided for in any other applicable law."

[40] It is common cause on the papers filed, that Groenewald only considered the appeal of Blue Whale and after due consideration dismissed it on the basis that no fault could be found regarding the adjudication process. The contention by Mr Fagan that Asla was essentially the unintended beneficiary of the appeal, lodged timeously by Blue Whale, is in my view misconceived.

[41] I am in agreement with counsel for the respective parties that an appeal in terms of section 62 of the Systems Act is a wide appeal. But the re-hearing and or fresh determination by the appeal authority must rationally be relevant to the subject of the appeal. See Dewille, Judicial Review of Administrative Actions in South Africa, Lexis Nexis Butterworths, 2003, at pages 384 – 389; Baxter, Administrative Law, Juta & Co Limited 1984 at page 256 and Tikly and Others v Johannesburg N.O and Others 1963 (2) SA 588 (T) at 591 G. Moreover, it can only be the parties involved in

the appeal that can adduce new or further evidence and no one else. The following dictum in the matter of The Municipality of the City of Cape Town v Reader and Another (719/2007 [2008] ZASCA 130 (14 November 2008) at para 31, is in my view instructive:-

"[31]..... the purpose of section 62 as a whole is to give to the dissatisfied applicant for permission – and to no one else – an opportunity for the matter to be reheard by a higher authority within the municipality."

[42] The contention that Groenewald was in law obliged to, upon discovering an alleged scoring error whilst considering Blue Whale's appeal, make a decision on the correct scoring and re-allocate the tender to Asla, is misconceived.

[43] The dissatisfied entity was Blue Whale who lodged its appeal timeously. The subject of the appeal which had to be considered was whether a correct decision was taken by the Municipality not to award the tender to Blue Whale. Section 62(3) clearly stipulates that the appeal authority must consider the appeal and confirm, vary or revoke the decision, on condition that no such variation or revocation may detract from any rights that may have accrued as a result of the decision.

[44] In considering the decision not to award the tender to Blue Whale, and coming to the conclusion that the appeal should be dismissed, the authority of Groenewald in terms of the provisions of section 62 was complete and his decision final. The contention that Groenewald was not *functus officio*, as he informed the relevant parties on the same day of his decision, is without merit.

The letter to Blue Whale dated 12 February 2008, records the following:

"....I have considered your representations and have to inform you that your appeal had to be rejected as no fault could be found regarding the adjudication process. Regarding your questions, I have to advise that all the tenders were evaluated on the same basis. In terms of this evaluation, (my underlining) the tender was awarded to the bidder with the highest points which was far higher than your tender, even with preferential points awarded to you..."

[45] The facts speak for itself, Groenewald could only have dismissed Blue Whale's appeal first before re-allocating the tender to Asla.

[46] Groenewald, in my view, erred and committed a serious misdirection to re-allocate the tender to Asla. There was no valid appeal before him from Asla. Once the appeal was dismissed, Groenewald's authority in terms of the provisions of section 62 had lapsed and he became *funtus officio*. Moreover, pursuant to the lapse of the 21 days appeal period and in the absence of a successful appeal, rights in my view, accrued to M5 and Groenewald was incapable of varying or revoking a decision as provided in terms of s 62(3).

[47] Even if Groenewald was entitled to re-allocate the tender to Asla when dismissing the appeal of Blue Whale, the administrative process followed, was in my view grossly unfair and fundamentally flawed. On that basis alone, the decision of Groenewald needs to be set aside.

[48] The provisions of PAJA provide that fair administrative procedure depends on the circumstance of each case. Section 3(3) of PAJA stipulates that in order to give effect to the right to procedurally fair administrative action, an administrator may, in his or her discretion, also give a person an opportunity to obtain assistance and, in serious or complex cases, legal representations, present and dispute information and arguments and appear in person. Procedural fairness in terms of our common law also demands that the rules of natural justice, which embodies two fundamental principles, the right to be heard (*audi alteram partem*) and the rule against bias (*nemo iudex in sua causa*), should be adhered to. The right to be heard on appeal is not only consonant with the fundamental right to lawful and fair administrative action as entrenched in s 217 of the

Constitution, but also accorded with the common principles of natural justice, fairness and reasonableness. See further: Logbo Properties CC, *supra* at 472 B.

[49] The contention that Groenewald regarded it as important to determine the appeal as soon as reasonably possible and his decision not to afford M5 a further extension of time, to furnish him with the relevant information, was not procedurally unfair, is misconceived.

[50] M5 was alerted by Groenewald on 29 January 2008, by letter, of his concerns and sought the further information as requested. M5 immediately responded stating that legal advice was sought and its attorneys would make formal representations on their behalf. On Wednesday 6 February 2008, M5's attorneys responded and raised

their clients concerns. Groenewald replied the next day stating *inter alia*, that the appeal was not time-barred as the unsuccessful tenderer lodged its appeal timeously. M5 was also urged to participate in the appeal process failing which it would be assumed by close of business on the Monday (11 February 2008), that M5 did not want to avail itself of this opportunity. On Monday, before close of business, M5 requested a further extension of time for 14 days. They also mentioned their concerns with regard to the particular heading "*Local Content*". According to M5 it qualified for the full 3 points instead of the 1 point that was awarded to it and their rights are reserved in this regard.

[51] The request for an extension of time by M5 cannot be regarded as unreasonable having regard to the time frame in which the appeal was dealt with. Procedural fairness, on the facts of this case, demanded that Groenewald at least granted M5 the extension of time within which to furnish the necessary documentation, especially as the chartered accountants of M5 needed to confirm some of the information requested. There could also have been no prejudice suffered by the respective parties if an extension of time was granted. Moreover, M5 alerted Groenewald of a particular heading in which they disputed the points allocated to them. Groenewald, re-hearing the matter, should have at least allowed M5 to provide him with the necessary information or evidence as to their complaint. His failure to do so is in my view a gross irregularity.

[52] Inasmuch as Groenewald was of the view that the decision to award the tender to M5 was flawed, in dismissing the appeal of Blue Whale, the Municipality is

bound by its decision to award the tender to M5 unless and until they are set aside by a court of law. See: Oudekraal Estates (Pty) Ltd v City of Cape Town and Others 2004 (6) SA 222 at paragraph 26.

[53] For the reasons stated I am satisfied that the First Respondent's decision falls to be set aside.

[54] In the Result the following order is made:

1. The First Respondent's decision to re-allocate the tender is reviewed and set aside. The Applicant is entitled to enter into a contract with Second Respondent pursuant to the allocation of tender SC055/2007.
2. The costs of this application be paid by First, Second and Third Respondents jointly and severally. The costs include the costs of two counsel.

—
LE GRANGE, J

Republic of South Africa

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CC GROENEWALD N.O	First
Respondent	
OVERSTRAND MUNICIPALITY	Second
Respondent	
ASLA DEVCO (PTY) LIMITED	Third
Respondent	
BLUE WHALE PROPERTY PROJECTS CC	Fourth
Respondent	

Matter was heard on the 30th of October 2008 and judgment was reserved on this date.

Counsel for Applicant:	Adv JW Olivier(SC) & Adv RB Engela
Attorneys for Applicant:	Malan Laas Inc c/o De Klerk & Van
Gend	

Counsel for First and Second Respondents:	Adv E Fagan
Attorneys for First and Second Respondents:	Fairbridges Attorneys

Counsel for Third Respondent:	Adv HC Schreuder
Attorneys for Third Respondent:	Louw Du Plessis Inc

Judgment was delivered on 12 February 2009.
