The cart before the horse? An award of tender contracts before legal compliance?

Diggers Development (Pty) Ltd v City of Matlosana and Isago@N12 (Pty) Ltd (47201/09) [2010] ZAGPPHC 15

In March 2007, the City of Matlosana in the North West awarded Isago@N12 a contract to develop land. The applicants in this case, Diggers Development (Pty) Ltd, did not participate in the tender process for the contract. The City awarded the contract to Isago@N12 and the sale agreement the City concluded with them was conditional on the City's compliance with all applicable laws.

The City later published a notice of intention to enter into a contract with Isago@N12 that would impose financial obligations upon the City beyond three years. As such, it had to invite public comments on the contract. It was at this stage that Diggers Development contested the sale agreement's legality. The City later wrote to government departments informing them of the sale and inviting them to advise the City. The then Department of Provincial and Local Government (DPLG) replied, indicating that its views should have been solicited *before* the City signed the agreement.

Notwithstanding the argument raised by DPLG, the City issued another public notice calling for public comments. Diggers Development and the City exchanged several letters, in which Diggers Development claimed that the contract was illegal. Despite these claims, the municipal manager, believing that the contract was legal, signed the certificate of compliance, which was later approved by the council.

Diggers Development went to court, arguing that there had been no compliance with the Local Government Ordinance of 1939, the Municipal Systems Act or the Municipal Finance Management Act. They further argued that the decision amounted to an administrative action, which was procedurally unfair and could thus be reviewed under the Promotion of Administrative Justice Act. The City stated that it had followed the applicable laws and procedures.

The Court questioned whether a municipal council's disposal of land to an individual by means of a resolution should be considered an administrative or executive action. It questioned whether a council resolution, passed by a majority of its members, that adopts or ratifies the municipal manager's conduct is an executive or administrative act. This is significant as executive actions are not subjective to review. In the end, the Court did not base its decision on this distinction but treated the decision as an administrative act, which was thus subject to review. In reviewing the decision, however, the Court held that all the applicable laws had been followed and the signing of the sale agreement did not affect the council's independence in approving or rejecting the sale. It noted that there was no difference between a draft agreement and a signed agreement whose operation was suspended until approval, as the council still had discretion. Interestingly, the Court also felt that the Municipal Supply Chain Management Regulations only applied to goods and services and *not* immoveable property such as land.

Equitable treatment does not mean identical treatment in a tariff policy

White v City of Cape Town (13035/2009) [2010] ZAWCHC 79 (31 March 2010)

The City of Cape Town was recently challenged for adopting different water consumption and refuse removal tariffs for different residents. The tariff policy distinguished between single residential dwellers and residents of flats. In terms of this policy, 'single residence dwellers' would pay stepped tariffs ranging from nothing to R18.85 per kilolitre for their water consumption. 'Flat dwellers' on the other hand, would pay a fixed rate of R7.83 for each kilolitre used in excess of the 6 kl of free basic water supplied by the City. In respect of refuse removal, it was determined that flat dwellers would be charged for a minimum number of containers designated for refuse in the complex, equivalent to one-third of the number of living units. Residential properties, in turn, would be billed for a basic 240-litre container used by each household. The policy provided that both flat dwellers and single residence dwellers would pay whether or not they made use of the refuse removal service.

Desmond White, a concerned citizen, approached the High Court for an order declaring the tariff policy null and void on the basis that it unfairly discriminated against flat dwellers. He also maintained that the tariff policy was inequitable to flat dwellers in that the tariffs required individual flat dwellers to pay an amount for water services that was not proportionate to their use of the service. Moreover, he argued that the City was imposing unfairly discriminatory tariffs for solid refuse removal against flat dwellers by disregarding the actual number of containers used and whether or not the containers were actually used.

The City argued that the sliding scale for single residence

dwellers was linked to the policy rationale of facilitating financial sustainability of water services, being pro-poor and discouraging excessive water usage. It further maintained that indigent households would benefit from the free and low tariffs and that flat dwellers did not, in the normal course, fall within the definition of 'indigent'. Residents in properties with the potential for high water usage were discouraged from excessive consumption through a punitive sliding scale. The City further argued that the sliding scale would not be effective in reducing water wastage by flat dwellers as consumption by individual units could not be measured.

With regard to the alleged discrimination, the City argued that the type of residence occupied by a person was neither a ground of discrimination listed in section 9(3) of the Constitution (the equality clause) nor a biological attribute, nor an intellectual, expressive or religious dimension of humanity, and it therefore could not be the basis of impairing a person's fundamental dignity. Moreover, the Court held that equitable treatment did not mean identical treatment.

The City contended that individual residents could not be allowed to opt out of municipal refuse removal services, as that would create a risk of corruption, illegal refuse dumping, increased cost of refuse removal and administrative inconvenience for the City. The Court agreed with the City's arguments and refused the application.

This case reaffirms the principle formulated by the Constitutional Court in *Harksen v Lane & Others,* 1998(1) SA 300(CC) that differentiation, when backed by legitimate policy rationales, does not amount to unfair discrimination.

Treasury's Procurement Regulations not strict enough

Sizabonke Civils CC t/a Pilcon Projects vs Zululand District Municipality and Others (10878/2009) [2010] ZAKZPHC 23 (12 March 2010)

The Zululand District Municipality awarded a contract to NRB Construction & Hire CC. Sizabonke Civils CC t/a Pilcon Projects, an unsuccessful tenderer, sought to set aside the award, arguing that the regulations in terms of which the award was granted were inconsistent with section 2(1)(b) of the Preferential Procurement Policy Framework Act (Act 5 of 2000) (the Act), to which they were meant to give effect. The Act requires the regulations to be implemented within a framework in terms of which:

> *for contracts with a rand value over the prescribed amount a maximum of 10 points may be allocated for specific goals ... [including] contracting with persons, or categories of persons, historically disadvantaged by unfair discrimination on the basis of race, gender or disability … provided that the lowest acceptable tender scores 90 points for price …*

Regulation 8 of the Treasury regulations issued in terms of the Act, in turn, provides that for tenders with a value greater than R500 000, the total combined points allowed for functionality *and* price may not exceed 90 points.

Empowered by Regulation 8, the Zululand District Municipality prepared tender documents in which maximums of 70 points for price and 20 points for functionality were allocated. Sizabonke Civils sought to declare Regulation 8 inconsistent with the Act and to invalidate the awarding of the contract to NRB Construction & Hire CC. The latter opposed the application in its entirety, whereas the Minister of Finance opposed it on the narrow ground that no order relating to the legality of the regulation should be granted.

The issue before the Court was whether it was permissible to split the 90 points allocated for 'price' by the Act between 'price' *and* 'functionality'. If it was not, given that the contract awarded to NRB Construction & Hire CC had been granted in terms of Regulation 8, the Court then had to decide whether the contract should be reviewed and set aside.

The Court held that the word 'price' in the Act could not be construed to include 'functionality'. If it could be construed as such, there would be no need to mention functionality in the regulations at all. On the plain grammatical meaning of the words, 'price' did not include 'functionality'. The Court concluded that given that the Act required a minimum allocation of 90 points for price and Regulation 8 gave organs of state the discretion to allocate fewer than 90 points for price, the regulation was inconsistent with the Act. The Court further held that the contract between the municipality and NRB Construction & Hire CC had been awarded as a result of an invalid tender process and, as such, had to be reviewed and set aside.

Comment

This decision emphasises the fact that when there is an Act with regulations governing the procurement process, the validity of a municipality's tendering procedure is not governed solely by the regulations issued under the Act. Municipalities must ensure that their tendering process complies with requirements specified by the Act itself. Contracts awarded under regulations deemed to be inconsistent with the Act are likely to be reviewed and set aside. Thus, municipalities must review their procurement policies and practices to ensure compliance with the Act, not simply with the regulations. Furthermore, the National Treasury needs to revisit its regulations.

Doctoral interns Zemelak Ayale, Conrad Bosire and Phindile Ntliziywana (Managing Editor)