

FORM A

FILING SHEET FOR EASTERN CAPE HIGH COURT, PORT ELIZABETH JUDGMENT

ECJ:

PARTIES: **VODACOM (PTY) LTD +1**

AND

NELSON MANDELA BAY MUNICIPALITY +3

(a) Registrar: **137/2010**

(b) Magistrate:

(c) High Court: **EASTERN CAPE HIGH COURT, PORT ELIZABETH**

DATE HEARD: **27/05/10**

DATE DELIVERED: **17/06/10**

JUDGE(S): **GROGAN AJ**

LEGAL REPRESENTATIVES –

Appearances:

for the Applicant(s): **ADV: RA Solomon SC**

for the Respondent(s): **ADV: RG Buchanan SC + Ms Z Lallie**

ADV: M Basslian

Instructing attorneys:

2 for the Applicant(s):

for the Respondent(s):

CASE INFORMATION -

(a) *Nature of proceedings* : **INTERDICT**

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE. PORT ELIZABETH)**

REPORTABLE

CASE NO.: 137/10

In the matter between:

VODACOM (PTY) LTD

(Registration no. 1993/003367/07)

First Applicant

MFULENI INVESTMENT CC

and

NELSON MANDELA BAY MUNICIPALITY

Second Applicant

First Respondent

MTN SERVICE PROVIDER (PTY) LTD

Second Respondent

NASHUA MOBILE (PTY) LTD

Third Respondent

3V ICT SOLUTIONS CC

Four Respondent

JUDGMENT

GROGAN AJ:

[1] This matter arises from the disputed award of tender 188 of 2009 for the provision of mobile voice cellular and related services by the First Respondent (“the municipality”) to the Second Respondent (“MTN”). At the outset, this

application was brought on an urgent basis for interim orders interdicting and restraining MTN and the municipality from concluding a contract for the provision of the said services or, if agreement had been reached, restraining them from implementing it. These orders were to be made pending the final determination of further prayers seeking *inter alia* orders reviewing and setting aside the municipality's decision to award the tender (prayer 5), and substituting that decision by an order of this Court or, alternatively, remitting the matter for reconsideration by the municipality (prayer 6).

- [2] An interim order restraining the municipality from concluding a contract was granted by consent on 29 January 2010. Subsequently, the municipality conceded in its answering affidavit that the procedure followed by the tender committee was "inappropriate", and agreed that the award to MTN could not stand. In the light of this concession, MTN agreed, albeit reluctantly, that it found itself in the situation "where it as the successful tenderer is not in a position to oppose the application as initially intended".
- [3] Both the municipality and the applicant ("Vodacom") approached the present hearing on the understanding that the only issue to be determined was whether this Court should substitute for the award to MTN an order that the tender be awarded to Vodacom, or whether the Court should refer the matter back to the municipality for reconsideration, and, if so, on which terms. In oral argument, Mr *Basslian* SC, who appeared for MTN, had second thoughts on that issue. As I understood his submissions, Mr *Basslian* contended that a

further option open to the Court was to uphold the award of the tender to MTN. This would effectively amount to the dismissal of prayer 5, and the upholding of the tender. Since that submission adds a further and considerable dimension to the issues before this Court, it needs to be dealt with at the outset.

- [4] Vodacom contends, correctly, that in advertising for and considering the tenders the municipality was bound by the Constitution, the Promotion of Administrative Justice Act 3 of 2000 (“PAJA”), the Preferential Procurement Process (“PPPFA”), its own tender policy and the common law (see *inter alia Du Toit v Minister of Transport* (2006) 1 SA 297 (CC)). A requirement of the PPPFA is that only “acceptable” tenders may be considered (on the meaning of this term see *Millenium Waste Management (Pty) Ltd v Chairperson, Tender Board: Limpopo Province & others* 2008 (2) SA 481 (SCA) at para. [18-19]; *Chairperson: Standing Committee & others v JFE Sapela Electronics (Pty) Ltd & others* [2005] 4 All SA 487 (SCA) at para. [14]). It is common cause that MTN and the other unsuccessful bidders failed to complete parts of the obligatory questionnaires, and that the bid evaluation committee noticed this before the adjudication process and allowed the bidders concerned to supply the omissions after the closing date for the tenders. In this regard, the acting municipal manager explains in the following terms why the municipality decided not to oppose the “principal relief” sought (i.e. an order reviewing and setting aside the award):

“The decision which has been taken [i.e. not to oppose that prayer] is based upon an acceptance, after careful consideration, that it was inappropriate for the relevant committee of the Municipality to permit [sic] a number of the original tenderers a further opportunity to correct and supplement their tenders to ensure compliance with the original tender conditions. In particular it is now conceded that it was inappropriate to afford the Second, Third and Fourth Respondents an opportunity to complete and rectify essential supporting documentation and information to ensure valid tenders. Although it is accepted that immaterial, unreasonable or unconstitutional tender conditions may be overlooked in the interests of fairness, transparency and competitiveness, it is now conceded on behalf of the First Respondent that fundamentally defective tenders should not be considered for adjudication. To do so would constitute non-compliance with the relevant constitutional and statutory provisions applicable to the processing and consideration of tenders by a local authority ... and would establish an undesirable precedent.”

- [5] In the face of these remarks, it is difficult to conceive of any basis on which the Court could effectively sanction the process by confirming the award of the tender to MTN. Insofar as it may be necessary, I merely observe that the municipality's concession is well made. Authority need not be cited to support the obvious proposition that allowing competing bidders to correct fundamentally defective tender proposals after the date on which tenders have closed is unfair to those competitors who have submitted proper tenders. To do that, as the municipal bid evaluation committee did in this case, was more than “inappropriate”. It rendered the process fundamentally defective and unlawful, and subject to review by a competent court. In the present circumstances, I find and hold that the award to MTN was irregular,

and cannot be confirmed. Even if I am wrong in this regard, it would be highly inappropriate for this Court to foist on the municipality an award which its responsible officer considers irregular.

[6] There is a further reason why the contention that the award to MTN should be confirmed cannot be accepted. This is that MTN has laid no basis in its answering affidavit for such an order. The main concern of the deponent to the answering affidavit (its head, Mr M Magadla) was to dispel allegations of fraud or dishonesty that may be inferred from Vodacom's founding affidavit. Mr Magadla avers that MTN did not realise that there was anything irregular about the process followed by the bid committee, and that "having regard to the wording of certain paragraphs of the policy, it would appear that the [municipality] may well have been entitled to do as it did". Mr Magadla does not refer to the paragraphs of the policy he had in mind.

[7] The high-water mark on the papers of MTN's submissions in this regard are the averments directed at resisting the prayer that the Court should direct the municipality to remit the matter to the municipality. Mr Magadla states in this regard:

"In the light of what the Applicant alleges in its founding affidavit as well as in its supplementary affidavit, Second Respondent envisages that should this happen and should Second Respondent again be awarded the tender, Applicants will then again raise the same complaints in relation to the tender process conducted by the First Respondent. Therefore under the said circumstances, it is the Second Respondent's

humble submission that in the event that the court grant an order to refer the matter back to the First Respondent for evaluation and adjudication and unless such an order is to the effect that the First Respondent must decide the tender on the basis of information or documents currently at its disposal and that such information and or documents are to be regarded as having been properly and completely submitted in accordance with the tender requirements and that there has been no dishonest, fraudulent, irregular behaviour and/or actions on the part of the First and Second Respondents, the alternative to prayer 6 cannot be granted.”

[8] None of this equates, as Mr *Basslian* contended in oral argument (but not in his written heads), to a contention that the Court should dismiss the “main prayer”. Nor in my view does the passage just quoted amount to a *reservatio* that, if the Court does not grant either alternative to prayer 6 (i.e. to determine the matter itself or to remit the matter), MTN’s tender should be confirmed. The passage above certainly does not serve to contradict or qualify the express statement by Mr Magadla at the beginning of his affidavit that “[i]t will be noted from what is recorded hereunder that the Second Respondent’s opposition to the Applicant’s application for the relief sought in part B of its notice of motion *is restricted to the order sought in prayer 6 of Part B....*” (my emphasis). Nothing whatsoever is said in the answering affidavit about prayer 5.

[9] It is trite that litigants in motion proceedings are bound by the facts and averments set out in their respective affidavits. In my opinion, MTN’s

answering affidavit, properly construed, suggests that it was content, if somewhat less than enthusiastically, to accept the municipality's stance. It follows again that MTN could not seek after the close of pleadings to revive its opposition to prayer 5. And it also follows that the award of the tender to MTN must be deemed withdrawn.

[10] In the result, and *ex abundant cautela*, I intend confirming that the order sought in prayer 5 has been granted by agreement, and that the award of the tender to MTN falls to be reviewed and set aside.

[11] I turn now to the remaining issue before this Court. As indicated above, this is whether the Court should substitute its own finding for that of the municipality or remit it to the municipality for reconsideration.

[12] As Mr *Solomon SC*, who appears for Vodacom, pointed out, the law relating to whether and when courts of review should substitute their findings for those of administrative functionaries has received judicial consideration in many cases (see *inter alia Johannesburg City Council v Administrator, Transvaal* 1969 (2) SA 72 (T) at 75-76; *Gildenhuis v Parys Liquor Licensing Board & another* 1957 (4) SA 152 (O) at 51; *Vries v Du Plessis N.O.* 1967 (4) SA 469 (SWA); *Maske & Gilbert v Aberdeen Licensing Court* 1930 D 30 at 45; *Norman Anstey & Company v Municipality* 1928 WLD 235 at 242.

[13] The principles to be distilled from these and other cases are now to an extent codified and given statutory expression in the PAJA. Section 8(1) of that Act reads:

“The court or tribunal, in proceedings for judicial review in terms of section 6(1), may grant any order that is just and equitable, including orders:

- (b)
- (c)
- (d) Setting aside the administrative action and—
 - (i) Remitting the matter for reconsideration by the administrator, with or without directions; or
 - (ii) In exceptional cases—
 - (aa) substituting or varying the administrative action or correcting a defect resulting from the administrative action; or
 - (bb) directing the administrator or any other party to the proceedings to pay compensation.”

[14] It is common cause that the municipality is an organ of state and as such bound by the PAJA. It is also well established that the process of adjudicating tender procedures constitutes administrative action (*Du Toit v Minister of Transport* 2006 (1) SA 197 (CC)). It is clear that the courts retain a wide discretion when deciding whether to remit decisions that have been set aside or to substitute, vary or correct the defect. The sole statutory limitation is that it may do the latter only in “exceptional cases”. The Supreme Court of Appeal had occasion to consider the meaning and effect of this limitation in *Gambling*

Board v Silverstar Development Limited & others 2005 (4) SA 67 (SCA).

Heher JA wrote for a unanimous court (at para [28]):

“The power of a court on review to substitute or vary administrative action or correct a defect arising from such action depends upon a determination that a case is 'exceptional': s 8(1)(c)(ii)(aa) of the Promotion of Administrative Justice Act 3 of 2000. Since the normal rule of common law is that an administrative organ on which a power is conferred is the appropriate entity to exercise that power, a case is exceptional when, upon a proper consideration of all the relevant facts, a court is persuaded that a decision to exercise a power should not be left to the designated functionary. How that conclusion is to be reached is not statutorily ordained and will depend on established principles informed by the constitutional imperative that administrative action must be lawful, reasonable and procedurally fair.”

[15] The *Silverstar* court quoted *in extenso* the following extracts from *Commissioner, Competition Commission v General Council of the Bar of South Africa and Others* 2002 (6) SA 606 (SCA):

“[14] . . . (T)he remark in *Johannesburg City Council v Administrator, Transvaal, and Another* 1969 (2) SA 72 (T) at 76D -E ‘that the Court is slow to assume a discretion which has by statute been entrusted to another tribunal or functionary’ does not tell the whole story. For, in order to give full effect to the right which everyone has to lawful, reasonable and procedurally fair administrative action, considerations of fairness also enter the picture. There will accordingly be no remittal to the administrative authority in cases where such a step will operate procedurally unfairly to both parties. As Holmes AJA observed in *Livestock and Meat Industries Control Board v Garda* 1961 (1) SA 342 (A) at 349G

‘ . . . the Court has a discretion, to be exercised judicially upon a consideration of the facts of each case, and . . . although the matter will be sent back if there is no reason for not doing so, in essence it is a question of fairness to both sides.’

[See also *Erf One Six Seven Orchards CC v Greater Johannesburg Metropolitan Council (Johannesburg Administration) and Another* 1999 (1) SA 104 (SCA) at 109F - G.]

[15] I do not accept the submission for the respondents to the effect that the Court *a quo* was in as good a position as the Commission to grant or refuse exemption and that, for this reason alone, the matter was rightly not remitted. Admittedly Baxter *Administrative Law* at 682 - 4 lists a case where the Court is in as good a position to make the decision as the administrator among those in which it will be justified in correcting the decision by substituting its own. However, the author also says at 684:

"The mere fact that a court considers itself as qualified to take the decision as the administrator does not of itself justify usurping that administrator's powers . . . ; sometimes, however, fairness to the applicant may demand that the Court should take such a view."

This, in my view, states the position accurately. All that can be said is that considerations of fairness may in a given case require the court to make the decision itself provided it is able to do so.'

[16] The *Silverstar* court added the following caveat (at para. [29]) before turning to the facts before it:

"An administrative functionary that is vested by statute with the power to consider and approve or reject an application is generally best equipped by the variety of its composition, by experience, and its

access to sources of relevant information and expertise to make the right decision. The court typically has none of these advantages and is required to recognise its own limitations. See *Minister of Environmental Affairs and Tourism and Others v Phambili Fisheries (Pty) Ltd*; *Minister of Environmental Affairs and Tourism and Others v Bato Star Fishing (Pty) Ltd* 2003 (6) SA 407 (SCA) at paras [47] - [50], and *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others* 2004 (4) SA 490 (CC) (2004 (7) BCLR 687) at paras [46] - [49]. That is why remittal is almost always the prudent and proper course.”

[17] However, in *Silverstar* the court was not persuaded that prudence called for remittal. It found on the facts that the board had overlooked an objection of substance by the respondent, and that fairness demanded that the court decide the matter because of the delay caused by the appellant’s misguided opposition to the application (see paras. [38]-[40]).

[18] To summarise: a court, having set aside a defective or unfair administrative act, may take the decision itself only if the circumstances are so exceptional as to warrant departure from the normal practice of remittal and if the applicant has established that it is just and equitable to do so.

[19] It is accordingly necessary to set out the circumstances insofar as they can be established from the papers.

[20] On 2 June 2009 the municipality issued an invitation to tender for the provision of mobile voice and data services. At the time, Vodacom was party to a contract with the municipality for the provision of mobile voice cellular services for 2 138 active lines on various packages. MTN was then providing the municipality with about 560 active data lines on a corporate plan. The tender was for the provision of these combined services. The closing date was 6 August 2009. Vodacom, together with its approved business partner, which trades under the name of Imbicom (the second applicant in this matter) submitted its tender before the closing date. On 8 July 2009 the municipality convened a briefing session, which the applicants attended. In terms of the tender rules bids were to be evaluated on the basis of points allocated for various items, and bidders were required to have at least 30% “HDI” (historically disadvantaged individuals) ownership. In September 2009, the bid evaluation committee discovered that each bid save that of Vodacom was defective or incomplete in various respects. The respective bidders were permitted to correct their tenders, and the adjudication process continued after that was done. The tender was referred to the bid adjudication committee, which awarded the tender to MTN on or about 28 October 2009. The following month, Vodacom objected to the tender, as it was entitled to do under the municipality’s supply chain management policy, and the municipality referred the matter for mediation. The mediator recommended that the matter be referred to the provincial treasury, an option provided for in the municipality’s procurement policy. That recommendation was almost immediately overtaken by this application.

[21] Vodacom contends that the matter should not be remitted for the following reasons: (i) no purpose would be served because the municipality would have to reconsider the bids as they stood before being corrected; (ii) the municipality acted fraudulently and dishonestly and can no longer be trusted to deal with the matter fairly; (iii) it would be just an equitable to award the tender to Vodacom because it was the only bidder to submit a valid tender. I deal with each of these submissions *seriatim*.

[22] The substance of Vodacom's objection, now confirmed by the municipality, is that the bid committee erred by permitting the competing bidders who had not completed the tender forms to do so after the closing date. Vodacom submits, in short, that since it was the only bidder to comply with the rules, it was entitled to be awarded the tender, and that, since MTN's bid did not comply with the rules of the tender process, the award of the tender to MTN was unlawful. That Vodacom's bid was the only one which complied with the tender rules is now common cause between it and the municipality. MTN has made some attempt to argue that it was entitled to amend its bid, but concedes that rectification was necessary. I accept, as the municipality has conceded, that it was impermissible to permit bidders to rectify incomplete tenders after the close of tenders.

[23] This Court is now confronted with the following contentions: (i) once the date for the submission of bids had passed, the bid committee was obliged to consider only those (or in this case that) tender which complied with the

tender rules; (ii) the bid committee was entitled to terminate the process and start it afresh. If (i) is correct, it follows that Vodacom should have been awarded the tender and that remittal would be futile because the bids would have to be adjudicated on the tender documents as they stood at the closing date for the tenders. If (ii) is correct, this Court cannot or should not anticipate the results of a fresh tender process by directing the municipality to award the tender to Vodacom because the municipality is merely exercising the right it always had, but inadvertently failed to exercise, to cancel the tender.

[24] Mr *Solomon* argued vigorously in support of the first contention. Both Mr *Basslian* and Mr *Buchanan SC* (who appeared with Ms Lallie on behalf of the municipality) argued equally vigorously in support of the latter. During the debate, the representatives accepted that the matter could be simplified by analogy. This was of a running race in which four of the five competitors were found to have inadvertently taken banned enhancing substances before the start. The issue would then be whether to cancel the race and run it afresh when all the runners were in normal physical condition, or to allow the only runner who was free of steroids to run alone.

[25] Mr *Solomon* contends that the proper course in such a case is to award the victory cup to the runner who ran in accordance with the rules. He also contends that, if the race were to be re-run, it would have to be by the same rules. This would mean that all the runners save the original winner would remain disqualified. There would accordingly be no purpose to a re-run, as the

result would inevitably be the same. Messrs *Buchanan* and *Basslian* argued the contrary. According to them, the purpose of a race is to establish the fastest runner, which can only be done if there are competitors. If the analogy is applied to the present dispute, it would mean that an award of the tender to Vodacom would deprive the municipality of its right and duty to award the tender in a competitive bidding process.

[26] This dispute is not about athletics. But the analogy is apposite. The question is whether the tender rules allowed the municipality to call off the tender process when it was established that four of the five bidders had not complied with the rules. These rules are to be found in the municipality's supply chain policy. That policy requires all services above a transaction value of R200 000.00 to be procured through a competitive bidding process. The procedure is split into the following stages: compilation of bidding documentation; public invitation for bids; briefing sessions; handling of bids; evaluation of bids "as detailed in paragraph 28"; award of contracts. A committee system for the processing of competitive bids is established, consisting of a bid specification committee, a bid evaluation committee and a bid adjudication committee. Paragraph 28 of the policy is pertinent. It reads:

"(1) A bid evaluation committee must—

(a) Evaluate bids in accordance with—

(i) the specifications for a specific procurement;

(ii) the points system set out in paragraph 27(2)(f)

(a) evaluate each bidder's ability to execute the contract;

(b) check in respect of the recommended bidder whether municipal rates and taxes and municipal service charges are not in arrears; and

(c) submit to the adjudication committee a report and recommendations regarding the award of the bid or any other related matter.

(d) In the case of formal tenders being discovered that they have failed [sic] to comply with the tender specification or any general tender requirement, the Evaluation Committee has a right to issue instruction [sic] for retendering.”

[27] The decision to allow correction of the defective tenders was taken in this case by the bid evaluation committee. Whether it was entitled to do so in terms of sub-paragraph (e) need not be decided in view of the municipality’s concession that it could not.¹

[28] But that provision has a bearing on the issue now under consideration. If the bid evaluation committee was indeed entitled to call of the tender process, Vodacom’s contention that remittal would be futile because the bids would have to be evaluated on the respective tenders as they were before correction cannot stand. The municipality now wishes to have the process aborted. The question is whether it is entitled to do so.

[29] Paragraph 28(1)(e) may not be a model of legal drafting. On one possible reading, that provision appears to support MTN’s contention that the

¹ This was the basis for Mr *Basslian*’s belated contention, considered above, that the municipality may have been entitled to allow correction of the defective bids as and when it did.

evaluation committee was entitled to permit correction of the defective tenders. On the other possible reading, in my view the more plausible, the phrase “has a right to issue an instruction for retendering” signifies that in the event of it being discovered that a bidder or bidders have failed to comply with a tender specification or any general requirement, the only permissible “instruction” can be to commence the process afresh. That meaning is supported by paragraph 36 of the policy, which empowers the accounting officer (the municipal manager) to “ratify any minor breaches of the procurement processes by an official or committee acting in terms of the delegated powers which are of a purely technical nature”. The municipality accepts that the defects in the bids of MTN and the other bidders in this case were not minor or of a technical nature, which is presumably why section 36 was not invoked.

- [30] The municipality now contends that the bid evaluation committee could at any stage have aborted the tender process and issued an instruction to commence the process afresh, or declined to award any tender. In either case, the bidders could have corrected their bids and all could have retendered. The municipality would then have had before it a competitive tender. That being the case, so the argument now goes, this Court should cure the irregularity of the disputed process by simply remitting it to the municipality to issue a fresh invitation for tenders, as the municipality now says it should have done in the first place.

[31] I accept that the municipality was entitled to abort the tender process when the bid evaluation committee established that there was only one compliant bidder. Vodacom's submission to the contrary is based on the premise that, in every tender, a bidder which happens to be the only one to comply with the tender provisions and specifications is entitled to be awarded the tender once the date for the submission of tenders is passed. This is not as I understand the law. If the municipality was entitled to abort the process, the mere fact that it proceeded to award a tender to an unqualified bidder cannot deprive it of its right to call for fresh tenders after deciding to reverse the award. Still less does it entitle the only compliant bidder to be awarded the tender. It follows that the submission that remittal is inappropriate because it would inevitably result in the award of the tender to Vodacom cannot be sustained.

[32] It is appropriate in this context to deal briefly with MTN's submission, quoted above, that the only basis on which the matter can be remitted is a direction to the municipality to reconsider the tenders on the information currently at its disposal as reflected in documents already submitted, coupled with a declaration that the previous process was not tainted by irregular or dishonest conduct on the part of either the responsible municipal officials or MTN. Apart from the fact that this suggestion begs questions considered below, upon which the Court must make findings, such an order would be tantamount to condoning a process which the responsible official has categorised as unlawful. This a court cannot do.

[33] The finding that the municipality was entitled to abort the tender process and call for fresh tenders also disposes of the ancillary reason that Vodacom advances against remittal: that the Court is in as good a position as the municipality to decide the matter in Vodacom's favour. Once it is accepted that, as a matter of law, Vodacom was not entitled to the award simply because it was "the last man standing" (to borrow Mr *Buchanan's* expression), it must follow that the Court would have to decide the matter on the merits of the respective bids. In my view, there is insufficient information on the papers before the Court to enable it to take that step. It may well be that the municipality does not aver in terms that Vodacom is incapable of providing the services, or that its bid was in other respects unacceptable. It may also be that Vodacom currently provides some of the services to the municipality. But it is also clear that the municipality is of the view that it should be given the opportunity to assess a range of bids. I am of the view that the municipality's acknowledged errors should not disentitle it to its right (and duty) to entertain a competitive bid.

[34] I accordingly find that the mere facts that the rival tenders were found to be flawed after the close of the date of tenders and that the award was erroneously made to an unqualified bidder does not in itself constitute an exceptional circumstance that warrants an order that the tender be awarded to Vodacom.

[35] I turn now to the submission that the matter should not be remitted because the municipality has exhibited bias and cannot be trusted to consider the matter afresh. Vodacom's submissions in this regard go further than allegations of mere bias. They include allegations of fraud and corruption on the part of the municipal officials concerned (thereby by implication tainting the conduct of MTN). Vodacom alleges in this regard that the process was flawed in a number of respects beside the procedural defect just discussed. Some of these alleged flaws are listed in the founding affidavit in support of the contention that the award should be set aside. But a number remain relevant to the issue presently under consideration—i.e. whether the matter should be remitted to the municipality for reconsideration. Mr Jarana, Vodacom's executive director, alleges in the founding and supplementary affidavits that the process was tainted because the members of the bid evaluation committee accepted gift packs from MTN. Each consisted of a T-shirt, a scarf, a vuvuzela, a ballpoint pen a folder and a soccer ball. Mr Jarana says the impression of bias created by the giving and acceptance of these gifts is aggravated by the irrational manner in which points were allotted by the committee members, which he alleges indicates further bias towards MTN. In the supplementary affidavit, Mr Jarana makes more serious allegations. He says that MTN was fraudulently permitted to supplement its bid papers after the close of bidding, that the committee resolved to delete the entry recording receipt of the aforementioned gifts, and that MTN was awarded a high score for its HDI partnership when it had submitted proof thereof only after the close of bidding.

[36] Whether these alleged irregularities would independently or cumulatively warrant setting aside the award to MTN is one question. Whether they are sufficient to prove that the municipality is so biased towards MTN that it cannot be trusted to impartially reconsider the tenders is quite another. I accept that it was imprudent for the bid evaluation committee members to accept gift packs from MTN. However, the code of conduct for the municipality's supply chain management practitioners prohibits acceptance of rewards in excess of R350.00. The value of the gift packs is not stated. But since they were apparently part of leftover stock from last year's COSAFU tournament, MTN's averment that they were below that value must be accepted. But the point here is not whether the members of the bid committee were entitled to accept the gift packs; it is whether their receipt was such as to warrant the inference that the officials concerned have become so favourably disposed to MTN that they cannot be trusted to apply their minds fairly to a fresh tender. I hesitate to draw that conclusion, still more to attribute such favouritism to every official in the municipality's corporate structure.

[37] As far as the scoring is concerned, the municipality states that the committee members were properly impressed by the greater flexibility of rebate structures offered by MTN. Both the municipality and MTN claim that, since MTN was already fully "HDI compliant", it was not required to attach documents proving that subcontract work to the value of 30% of the total contract value would be awarded by MTN. The late submission of the documents by MTN does not *per se* indicate fraud; the late changes are consistent with the municipality's concession and explained as a well

intentioned if misguided attempt to avoid the delay and inconvenience that would have been occasioned by aborting the process and calling for fresh tenders.

[38] I do not deem it necessary for present purposes to choose between these conflicting views on what may be inferred from the bid evaluation committee's actions. What matters, to my mind, is that the municipality has shown its *bona fides* by acknowledging that the process was flawed, and by undertaking to reopen the tenders. Should it prove that the municipality is not *bona fide*, Vodacom's right to challenge the outcome of the fresh process internally or by a further application to court will remain intact. In short, I am not convinced that the applicants have shown that the municipality was biased in favour of MTN for reasons that would in law preclude remittal.

[39] This brings me to the applicants' submission that justice and equity favours an order that the tender be awarded to Vodacom. While the PAJA requires the courts to make "any order that is just and equitable", section 8(1)(c) clearly indicates that remittal is the favoured remedy, and that substitution is permissible only in "exceptional circumstances". Considerations of justice and equity cannot override that limitation. I have already found that the circumstances are not so exceptional in this case as to warrant substitution. Furthermore, the power of the court to remit with such directives as it deems fit is plainly designed to ameliorate concerns that the decision maker may be disposed to simply confirm the contested decision without genuine

consideration. As will be seen, I have attempted to forestall any such possibility with appropriate directions.

[40] A further consideration is that the administrative act at issue in this case is a tender for a commercial contract. While the constitutional guarantee of fair and lawful administrative action may give rise to substantive rights, a procedural lapse such as that at issue in this case need not necessarily do so. Vodacom was entitled to have its bid fairly adjudicated. But that does not confer upon Vodacom an automatic right to the tender. At most, Vodacom is entitled to take part in a fair bidding process. An order that the municipality call for fresh tenders and adhere strictly to the terms of the relevant legislation and guidelines will vindicate that right.

[41] Vodacom has proved, and the municipality has accepted, that the award to MTN cannot stand. In the meantime, both parties continue to provide their services in terms of the existing contracts. Consideration of the possible disastrous consequences of setting aside a confirmed tender and restarting the process, referred to in *Millenium Waste Management supra* at para. [23], does not arise in this matter. As is stated at paragraph [22] of that judgment:

“[E]xercising its discretion the court below dismissed the application with costs. In so doing the court overlooked the provisions of s 8 of the PAJA which requires that any order granted in matters such as this be just and equitable. This guideline involves a process of striking a balance between the applicant’s interests, on the one hand and the interests of the respondents, on the other. Furthermore, the section

lists a range of remedies from which the court may choose a suitable one upon consideration of all relevant facts.”

[42] The range of remedies referred to by the Court include, apart from an order that the decision be remitted for reconsideration “with or without directions”, those set out in section 8(2) of the PAJA, to wit:

“[A]ny order that is just and equitable, including orders—

(d) directing the taking of the decision;

(e) declaring the rights of the parties in taking the decision;

(f) directing any of the parties to do, or to refrain from doing, any act of thing the doing, or the refraining from doing, of which the court ... considers necessary to justice between the parties.” (Section 8(2)).

These discretionary remedies are clearly designed to empower the court, when remitting a matter, to ensure a fair outcome and, as far as is possible, to allay fears of bias. I accordingly find that an order in terms of section 8(1)(c)(i) of the PAJA is appropriate.

[43] There remains the question of costs. The municipality has conceded as well that the applicants should be awarded costs relating to the relief sought in Prayer 5—i.e the setting aside of the award. That concession is also well made. As to the costs of the subsequent proceedings—i.e. those relating to Prayer 6—I am of the view that justice and equity should properly be taken into account. The present application would have been unnecessary had the municipality conducted the tender process properly. The issue of remittal or

substitution was part and parcel of the proceedings initiated by the original application. While the municipality acknowledged that the procedure was “inappropriate”, the applicants were nevertheless compelled to seek judicial determination of the consequences of that concession. MTN was inevitably drawn into that process. Vodacom has not obtained the relief sought at this stage of the proceedings, and the municipality has in a sense succeeded. MTN, similarly, has failed in its endeavours to persuade the Court that the matter should be remitted with the conditions it suggested. MTN is also the “loser” in a technical sense. The setting aside of the award has been confirmed in these proceedings. It is therefore impossible to disentangle the costs relating to that order from those relating to the relief finally granted. I am of the view that in these circumstances the municipality should pay the costs incurred by the applicant in the entire proceedings, and that MTN should carry its own costs. Since the third and fourth respondents have not entered appearance, they need not be considered in this regard.

[44] The following order is accordingly issued:

1. The award to the second respondent of tender 188 of 2009 is reviewed and set aside.
2. The tender is remitted to the first respondent for reconsideration on the following conditions:
 - 2.1 the tender shall be re-advertised in accordance with paragraphs 19, 20, 21, 22 and 27 of the municipality’s Supply Change Management Policy;

- 2.2 the tenders shall not be restricted to parties who previously bid for tender 188, and those parties who previously bid may do so again;
- 2.3 tender documents previously submitted by bidders for tender 188 shall be disregarded;
- 2.4 in considering the fresh tenders, the first respondent shall comply strictly with the provisions of paragraphs 21, 23, 26, 28 (as interpreted in this judgment), 29 and 48 of the aforesaid policy;
- 2.5 the accounting officer shall, in accordance with paragraph 26(3) of the policy, appoint a neutral and independent observer agreed to by the bidders to attend all committee meetings concerned with this tender;
- 2.6 should the parties not agree on the choice of the aforesaid neutral and independent observer, they may approach the Court for a directive in that regard.
3. The above orders shall not be deemed to derogate from the rights of bidders under section 50 of the aforesaid policy.
4. The first respondent shall pay the first applicant's costs, such costs to include the taxed fees of two counsel, when utilised.

J G GROGAN

ACTING JUDGE OF THE HIGH COURT

Date Heard: 27 May 2010

Date issued: