

IN THE NORTH GAUTENG HIGH COURT, PRETORIA
(REPUBLIC OF SOUTH AFRICA)

CASE NO: **51614/2011**

In the matter between:

5/10/2012

KOPM LOGISTICS (PTY) LTD

and

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES/NO.	Applicant: YES/NO.
(2) OF INTEREST TO OTHER JUDGES: YES/NO.	Judge: YES/NO.
(3) REVISED. ✓	
31/10/2012	<i>J. Ranger</i>
DATE	SIGNATURE

THE PREMIER, GAUTENG PROVINCE

1st Respondent

THE MEMBER OF THE EXECUTIVE COUNCIL,

DEPARTMENT OF HEALT & SOCIAL DEVELOPMENT,

GAUTENG PROVINCE

2nd Respondent

DEPARTMENT OF HEALTH & SOCIAL DEVELOPMENT,

GAUTENG PROVINCE

3rd Respondent

GAUTENG SHARED SERVICE CENTRE

4th Respondent

JUDGMENT

[1] During 2007 the fourth respondent, in conjunction with the first respondent, called for tenders to be submitted to implement a so-called "*smart card system*" for the third respondent. In short, the "*smart card system*" entails the designing of software and the issuing

of a card, similar to a credit card, where all the details, history, treatment and all other information relating to a specific patient can be recorded on the card. As and when the patient presents himself / herself at the hospitals or clinics run by the third respondent, the patient will produce the card, whereby the amount of administration, paperwork and waiting time will be drastically reduced. Another obvious advantage is that should the patient attend at another hospital or clinic where he/she received treatment in the past, the history will immediately be available to the healthcare practitioner to treat the patient.

[2] On or about 15 August 2007 the applicant submitted a tender to the third and/or fourth respondents. On or about 6 December 2007 the fourth respondent notified the applicant that the tender has been awarded to the applicant, subject to the following two conditions:

- The successful negotiation of the pilot phase of the smartcard system; and
- The conclusion of a mutually acceptable agreement between the applicant and the third respondent;

[3] Early in April 2008 the third respondent and the applicant committed themselves to the pilot phase in terms of a so-called "*Project Charter*". The

pilot phase was successfully implemented and terminated on or about 9 February 2009. However, the second condition referred to supra i.e. the conclusion of a mutually acceptable agreement, proved to be a bone of contention. The upshot was that applicant issued an application in this court, seeking relief to the effect that the failure and/or refusal of the third respondent to continue negotiations with the applicant to conclude a mutually acceptable agreement pursuant to the award of the tender be reviewed and set aside. The relief also entails;

- That an order will issue in terms of section 8(1)(c)(ii)(aa) of the Promotion of Administrative Justice Act, Act No.3 of 2000, against the third respondent in terms whereof the third respondent is ordered to recommence and continue the *bona fide* negotiations with the applicant in order to conclude a mutually acceptable agreement in respect of the award of the tender aforesaid until such time as a mutually acceptable agreement has been concluded or, alternatively, the negotiations break down due to the parties' inability to agree on essential terms of such agreement;
- That third respondent be ordered to conduct the negotiations with the applicant in accordance to the terms and conditions of the said tender;

- That third respondent be ordered to pay the applicant's costs and that any other respondent who opposes the application be ordered to pay applicant's costs jointly and severally with third respondent.

I refer to the lastmentioned as the "*main application*".

[4] The application currently before me is interlocutory to the main application. The applicant seeks the following relief:

- That first, second and third respondents be ordered to file the record of proceedings as contemplated in Rule 53(1)(b) containing all documentation relating to all and any negotiations and other steps taken to negotiate with the applicant to conclude an agreement pursuant to the award of the tender, which documentation shall include but not be limited to:
 - o Minutes of all meetings of representatives of the third respondent pertaining to this matter;
 - o Any correspondence and/or memoranda exchanged within the third respondent relating to this matter;

- Any agreements prepared in draft format by the third respondent.

[5] Applicant contends that pursuant to having been awarded the tender, the envisaged negotiations commenced and progressed to an advanced stage whereupon the third respondent failed and/or refused to continue with the negotiations. Applicant therefore submits that it is entitled to the record (i.e. for purposes of the main application), which record consists of all documentation from the date when the tender was awarded to the applicant i.e. 19 December 2007 until the third respondent refused to continue with the negotiations i.e. during April or May 2011. On 31 October 2011 the State Attorney served on applicant's attorney a filing notice purporting to be the record in terms of rule 53, accompanied by a lever arch file containing documentation. However, applicant alleges that all the documentation so made available only included documentation leading up to the award of the tender and not any documentation pursuant thereto. Accordingly applicant's attorney returned such documentation to the State Attorney, pointing out the aforesaid facts by way of a letter dated 4 November 2011. Pursuant thereto and on 15 November 2011 the State Attorney, once again, served a record of proceedings in terms of rule 53 on the applicant's attorney, under a copy of an index. Applicant contends that the index, consisting of nine items, referred to the same irrelevant

documents previously returned to the State Attorney on 31 October 2011. In addition, the record so provided by the State Attorney and attached to the index in any event pertained to a different matter. The upshot simply is that the respondents have not provided the applicant with the required record of proceedings.

- [6] In its founding papers in the main application the applicant referred to various documents which, so it contends, must exist and which will, *inter alia*, constitute part of the record that the applicant seeks. In this regard reference was *inter alia* made to a meeting between the representatives of the applicant and relevant officials of the third respondent which took place on 9 March 2009 at the latter's attorneys. Applicant requests to be put in possession of the minutes of this meeting. Applicant refers to the fact that minutes do exist pertaining to a second negotiation meeting which was conducted during March 2009 and argues that, similarly, ^{minutes} ~~meetings~~ regarding the first meeting should also exist. Another example referred to by the applicant pertains to a "*revised contract*" which has been referred to in correspondence and which would have been forwarded by the Gauteng Department of Health to the applicant, for the latter's review and response. Applicant submits that it is entitled to the "*revised contract*" in all its relevant phases and that such contract forms part of the record sought by the applicant through these

proceedings. In short, it is highly improbable that no records which pertain to the negotiation phase, do exist.

[7] The deponent on behalf of the third respondent states that the "record" which was filed on 31 October 2011 contains the only documents that the respondents have in their possession; that the applicant had been informed by the Head of the Department that *"none of the meetings were minuted and that the respondents have no documents in their possession other than what was filed as the record or what is attached to the founding affidavit"*; and that *"a diligent search has been conducted by officials within the third respondent ...and I am informed that no further documents or tape recordings exist. The respondents therefore have no documents to file in terms of rule 53"*.

[8] It is against this background that the application must be adjudicated. The third respondent is a department of a Provincial Government. As such it is a creature of statute and an organ of state. In general terms, therefore, it derives its power to enter into contractual relationships from statute, as do other bodies or persons empowered by it to enter into contractual relationships on its behalf. Hence, it exercises a public power when entering into contractual relationships.

- [9] Section 217 of the Constitution, under the heading "Procurement" provides in subsection (1):

"When an organ of state in the National, Provincial or Local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective."

Clearly, section 217 accords with the founding principles encapsulated in section 1 of the Constitution, and in particular the reference in the latter section to the "democratic government" based on "accountability, responsiveness and openness."

- [10] In **Steenkamp N.O. v Provincial Tender Board, Eastern Cape 2006 (3) SA 151 (SCA) at 158D – E, par.[12]**, the Court reiterated that the evaluation of a tender is a process governed by administrative law. **Harms JA**, speaking on behalf of the court, stated:

"Once the tender is awarded, the relationship of the parties is that of ordinary contracting parties, although in particular circumstances the requirements of administrative justice may have an impact on the contractual relationship." (my emphasis)

In the current instance it is common cause that the acceptance of the applicant's tender did not give rise to the simultaneous coming into being of a contract. In this regard the letter of acceptance under the hand of the Deputy General Manager: Procurement, Gauteng Shared Service Centre, dated 6 December 2007, clearly states that *"...your bid in respect of the abovementioned tender has been successful, subject to the provisions of paragraph 2."* The latter paragraph then reads: *"This award is subject to the successful negotiation of the pilot phase and conclusion of a mutually acceptable agreement between your company and the Gauteng Department of Health. This office will be in contact with you shortly to commence the contractual matters"*.

- [11] Based on the last mentioned letter it was argued on behalf of the respondents that the acceptance of the tender read with the said letter amounts to *"an agreement to agree, to contract on terms still be agreed upon."* Therefore (so the argument goes), the process pursuant to the acceptance and awarding of the tender is governed by the normal civil law of contract or the common law, that it does not constitute administrative action and is therefore not subject to review. Such an agreement to agree in future is not binding. (See: **Van Aardt v Galway 2012 (2) SA 312 (SCA); Kerr, The Principles of the Law of Contract (6ed) p.80**).

Suffice it to say that respondents' attitude in this regard is inherently unfair. One glimpse at the tender documentation presented by the applicant is sufficient to make one realise the amount of time, effort and cost which applicant must have put into the tender. The question remains, however, whether respondents' attitude is legally justifiable?

- [12] The underlined remarks by the court in **Steenkamp** supra (i.e. to the requirements of administrative justice which may have an impact on the contractual relationship in particular circumstances), referred back to the earlier judgment by the Supreme Court of Appeal in **Logbro Properties CC v Bedderson N.O. & Others 2003 (2) SA 460 (SCA)**. With reference to certain conditions which applied to a tender offer **Cameron JA** (as he then was) speaking for the court in **Logbro** said the following at 466F – G:

"Even if the conditions constituted a contract (a finding not in issue before us and on which I express no opinion), its provisions did not exhaust the province's duties towards the tenderers. Principles of administrative justice continued to govern the relationship, and the province in exercising its contractual rights in the tender process was obliged to act lawfully, procedurally and fairly. In consequence, some of its contractual rights – such as the entitlement to give no reasons

– would necessarily yield before its public duties under the Constitution and any applicable legislation.”

At 466H – 467A **Cameron JA** continued:

“This is not to say that the conditions for which the province stipulated in putting out the tender were irrelevant to its subsequent powers. As will appear, such stipulations might bear on the exact ambit of the ever-flexible duty to act fairly that rested on the province. The principles of administrative justice nevertheless framed the parties’ contractual relationship, and continued in particular to govern the province’s exercise of the rights it derived from the contract.”

With reference to the judgment in **Cape Metropolitan Council v Metro Inspection Services (Western Cape) CC & Others 2001 (3) SA 1013 (SCA)**, **Cameron JA** stated:

“The case is thus not authority for the general proposition that a public authority empowered by statute to contract may exercise its contractual rights without regard to public duties of fairness. On the contrary: the case establishes the proposition that a public authority’s invocation of a power of cancellation in a contract

concluded on equal terms with a major commercial undertaking, without any element of superiority or authority deriving from its public position, does not amount to an exercise of public power.” (at 467H – 468A)

At 468B – C **Cameron JA** continued:

*“In the present case, it is evident that the province itself dictated the tender conditions, which McLaren J held constituted a contract once the tenderers had agreed to them. The province was thus undoubtedly, in the words of Streicher JA in **Cape Metropolitan supra** ‘acting from a position of superiority by virtue of it being a public authority’ in specifying those terms. The Province was therefore burdened with its public duties of fairness in exercising the powers it derived from the terms of the contract.”*

Clearly, then, the Court distinguished **Cape Metro** on the basis that in **Logbro** the administrator was acting from a position of superiority. Hence, the decision to call for new tenders was administrative even if it were sourced in contract.

[13] In the current instance the stage of entering into a contractual relationship has not yet been reached. In view of the remarks by

Cameron JA particularly with regard to public duties of fairness when exercising the powers deriving from the terms of (an already established) contract, there seems to be no good reason why the ongoing process (i.e. negotiations post acceptance of the tender but preceding the establishment of a contract), should not also be subject to the Province's public duties of fairness and openness. In addition, if in particular circumstances the requirements of administrative justice may have an impact on the contractual relationship itself (Steenkamp supra) the nature of the process under consideration can only be that of administrative law.

- [14] In **President of the Republic of South Africa v South African Rugby Football Union 2000 (1) SA 1 (CC)** it was held that whether conduct constituted administrative action can better be decided on a case-by-case basis. Relevant considerations in the diagnosis may include: the source of the power, the nature of the power, its subject matter, whether it involves the exercise of a public duty and how closely it is related to policy matters – which are not administrative – or the implementation of legislation, which is characteristic of administrative action. Applying these criteria to the current facts it is evident that the latter are on all fours with the approach followed in Logbro: the ongoing, post-tender process still derives from the implementation of legislative powers. Moreover, it is not closely related to policy matters and constitutes the exercise of a

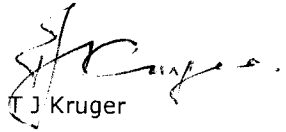
public power. Procedural fairness apply and, hence, the requisites of openness, transparency and bona fide negotiations are applicable. Therefore, the ongoing process is clearly distinguishable from the common law position where an agreement to agree does not have binding force. The considerations here are different. The nature of the relationship is determined by constitutional considerations and imperatives: the ongoing process falls within the parameters of administrative action which may materially and adversely affect the rights or legitimate expectation of the applicant. At the very least the process must be procedurally fair (section 3(1) of the Promotion of Administrative Justice Act, Act No.3 of 2000) and must accord with the constitutional norms of fairness and openness.

[14] On the facts of the matter it is highly improbable that third respondent and/or parties under its control and/or acting on its behalf, possess no documentation which may be relevant for purposes of the main application and the relief sought therein. The denials made on behalf of third respondent in this regard are unconvincing, generalised in nature, not well substantiated and bold. I do not accept them. The duty to negotiate in good faith inter alia implies that respondents must keep proper records of all relevant documentation. The probability of the existence of, at the very least, minutes of meetings and draft agreements is overwhelming. In any

event, no basis has been laid to claim privilege to any of the documentation which are probably still in its possession.

The following order is made:

1. First, second and third respondents are ordered to file the record of proceedings as contemplated in Rule 53(1)(b) containing all documentation relating to all and any negotiations and other steps taken to negotiate with the applicant to conclude an agreement pursuant to the award of the tender, number RFPGT/GDH/103/2007 to the applicant, commencing on 19 December 2007 to the date hereof, which documentation shall include but not be limited to:
 - 1.1 Minutes of all meetings of representatives of third respondent pertaining to this matter;
 - 1.2 Any correspondence and/or memoranda exchanged within the third respondent relating to this matter;
 - 1.3 Any agreements prepared in draft format by the third respondent;
 2. The third respondent is ordered to pay the costs of the application which costs shall include the costs occasioned by the employment of two counsel.
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T J Kruger

Acting Judge of the High Court.