

IN THE KWAZULU-NATAL HIGH COURT
REPUBLIC OF SOUTH AFRICA

Case No: 8422/2011

In the matter between:

THE TOLL COLLECT CONSORTIUM

Applicant

and

**SOUTH AFRICAN NATIONAL
ROADS AGENCY LIMITED**

First Respondent

TOLCON LEHUMO (PROPRIETARY) LIMITED

Second Respondent

JUDGMENT
(Delivered on 27 July 2012)

Vahed J:

INTRODUCTION

[1] The first respondent (SANRAL), subsequent to a tender process initiated by it, awarded a contract for the operation and maintenance of the N2 South Coast Toll Plazas within KwaZulu-Natal to the second respondent. The applicant submitted a bid during that process but was not successful and in the present application challenges that award, contending that it was flawed and falls to be reviewed and set aside. Additional relief is also sought directing the SANRAL to reconsider the award against the backdrop of this judgment and that the SANRAL's officials who adjudicated the award to the second

respondent be precluded from participating in the reconsideration process. This latter aspect was, in terms of Rule 53(4), added to the original relief sought.

THE PARTIES

[2] The applicant describes itself as a consortium consisting of three members, Procon Fisher (Pty) Ltd, ItraMAS and PG Mavundla Engineering (Pty) Ltd, which is says was formed for the specific purpose of submitting the tender which is the subject of this application and, if successful, to carry out the operations pursuant thereto. It records its principal place of business as being at 100 Ridge Road, Musgrave, Durban.

[3] SANRAL was constituted and incorporated as a public company in terms of sections 2 and 3 of the South African National Roads Agency Limited and National Roads Act, 7 of 1998 ("the SANRAL Act"). In terms of section 25 of that Act its main functions are to perform all strategic planning with regard to the South African national roads system, as well as the planning, design, construction, operation, management and rehabilitation of national roads for South Africa. The national road network currently consists of approximately 16 170km of roads and SANRAL currently manages assets with an estimated replacement value in excess of R186 billion. SANRAL opposes the relief sought by the applicant.

[4] The second respondent carries on business as a toll operator and is based in Johannesburg. It does not oppose the relief sought.

BACKGROUND

[5] SANRAL issued the invitation to tender during March 2010. In terms of section 28 of the SANRAL Act it was empowered to enter into agreements with any person to operate, manage and control toll plazas on any toll road and the tender envisaged the conclusion of a contract for that purpose, for a period of either five or eight years, with the successful tenderer.

[6] The invitation to tender was accompanied by detailed conditions and comprehensive specifications and prospective tenderers were expected to comply with these. Prospective tenderers, in terms of the applicable conditions, were allowed to submit alternative tender offers. The closing time and date for tenders was initially stated to be 14h00 on 08 April 2011 but this was extended by SANRAL to 15 April 2011.

[7] It is common cause that the invitation and the tender documents, including the tender conditions, were compiled by Tolplan Operations (Pty) Ltd ("Tolplan") who assisted the first respondent in managing the tender at its request.

[8] The bids were opened at a public meeting, which commenced at 14h00 on 15 April 2011. Four tenderers submitted proposals and in all eight

bids were received by SANRAL. The second respondent submitted a main bid and two alternative bids. An entity known as Intertoll did likewise. The applicant and an entity known as Baobab Consortium (Tollink) each submitted a single bid.

[9] After initial requests for information as to the award of the tender had apparently been ignored the applicant was advised by letter dated 17 June 2001 that it was unsuccessful and that SANRAL had approved an award to the second respondent "... based on their alternative No 2 offer for the 8 year operation service period in the amount of R164 938 096,55 ...".

[10] That prompted the applicant (through its attorneys of record) to write to SANRAL in the following terms:

'Our client has received your letter dated 17 June 2011. Our client is somewhat surprised at the decision to award the contract to Tolcon Lehumo (Pty) Ltd, given that our client's offer on the eight year contract was significantly cheaper than that of the successful tenderer.

It would appear from your letter to our client that your decision was premised on the successful tenderers alternate offer. Our client does not know the full details of this offer but believes the contents of this offer did not comply with the tender specifications. Consequently our client is concerned that it was not given a fair opportunity to consider a bid on the same terms and conditions as the successful tenderer.

Consequently our client wishes to appeal your decision and notifies you accordingly.

Please provide us with details of the appeal process so that we may prosecute it on our client's behalf.

Please also provide us with written reasons for your decision in terms of Section 5 of the Promotion of Administrative Justice Act, No. 3 of 2000 ("PAJA"), such reasons to include the following documents:

1. The tender results.
2. Tender adjudication reports.
3. All documents evidencing the evaluation of tender offers.
4. All other documents which form part of the record of the reasons for the decision, including if necessary, copies of the other tenders, and in particular the successful tenderer's alternate offer.

Although Section 5 of PAJA allows you 90 days to furnish the reasons, we are instructed that the successful tenderer will commence executing services on 1 July 2011 and consequently our client requests that the reasons be provided before then in order that our client can prosecute its appeal timeously.

Please also provide us with your written undertaking by no later than 30 June 2011 that you will not proceed with an award of contract, or alternatively formalise the appointment of the successful tenderer until the final determination of our client's appeal and/or review.'

[11] SANRAL responded on 4 July 2011 as follows:

- '1. Your letter dated 27 June 2011 has reference. We respond as follows.
2. We bring the following matters to your attention which your client should take under consideration before pursuing this further.
3. It seems that your client has made some incorrect assumptions and unfounded assertions, as detailed hereunder.
 - (i) Your client has made an assumption that its pricing was lower than the tender price of the Tolcon Lehumo alternative 2 offer. It is pointed out that your client's tender price as per the schedule of payments/cost matrix for the 8 year contract option was R156 407

020.40 (excluding VAT) as compared to R144 682 540,83 for the Tolcon Lehumo alternative 2 offer. The Tolcon Lehumo tender price was thus lower.

- (ii) Your client asserts that the Tolcon Lehumo alternative 2 offer did not meet the technical specifications, and this with the acknowledgement that they do not know the details of the tender offer. This plainly constitutes a baseless and unfounded assertion.

- 4. We trust that the above is in order and confirm that our rights remain reserved.'

[12] The applicant's attorneys were not satisfied with that response and after further correspondence attorneys representing SANRAL wrote on its behalf on 12 July 2011 in the following terms:

- '1 We refer to the above matter and to your letter dated 11 July 2011.
- 2 In so far as the contents of your letter under reply are concerned, we are instructed that –
- 2.1 the reasons for our client not awarding the tender in the above matter to your client are the following –
- 2.1.1 in terms of the Conditions of Tender, as read with the Tender Data, our client evaluated tenders using the valuation methodology contemplated in Method 4, in terms whereof our client, in the first instance, scored quality, rejecting all tender offers that failed to score the minimum number of points for quality as stated in the Tender Data. Tenders received with scores for quality below 75% were not evaluated further. Your client's tender did not meet the quality thresholds set out in clause F.3.11.3 of the Conditions of Tender, applicable to the first stage of the tender adjudication process, as contained

and detailed in the Conditions of Tender. The basis for your client's tender failing to meet the quality standards is its inexperience in toll operations, more particularly, in the management of toll operations;

2.1.2 consequently and based on the adjudication contemplated in Method 4 and as addressed above, your client's financial offer and which is associated with the costs of providing your client's services, was not evaluated further. Our client has already notified your client that your client's tendered price was, in any event, more expensive than the price offered by the successful tenderer. In this regard we are instructed to confirm the price of the successful tenderer was 8,1% less than the price tendered by your client;

2.2 not all the returnable schedules to be submitted by your client were initially complete: in so far as there was no information concerning insurance cover, banking details, work experience, distribution of the risk between the operating party and the toll system party, valid black economic empowerment verification certificates and copies of preferencing schedules for use of labour and targeted enterprises. Whilst your client did, upon our client's request, furnish the majority of the outstanding information, the black economic empowerment verification certificates were not provided;

2.3 as you have, on behalf of your client, questioned the award based on an alternative tender offer, we draw your client's attention to the provisions of clause F.2.12 of the Conditions of Tender in terms of which our client may accept an alternative offer provided the tenderer also submitted a compliant main tender offer. Our client confirms that the successful tenderer also submitted a compliant main tender offer. All tenderers, including your client, were entitled to submit alternate tender offers;

2.4 there is no urgency in this matter as, on your client's own version, it was asking for details concerning the reason/s for the award of the tender "as far back as 15 June 2011";

- 2.5 with regard to your client having been advised on 17 June 2011 that its tender was not successful and that the contract was awarded on 9 June 2011 to the successful tenderer, we draw your client's attention to the provisions of clause F.3.14 of the Conditions of Tender, which provide that tenderers whose tenders were not accepted will be advised thereof after the successful tenderer has acknowledged "the Employer's", being our client, notice of acceptance. As indicated in our letter to you of 8 July 2011, the contract was awarded on 9 June 2011, with a commencement date of 10 June 2011. The successful tenderer acknowledged their acceptance of the tender on 15 June 2011 and your client was advised of the fact that it was unsuccessful on 17 June 2011. As is apparent to you, this conforms with the requirements of the Conditions of Tender which your client accepted in submitting its tender. It therefore follows that your client's belief relating to the "circumvention" of its rights is unfounded;
- 2.6 there has equally been no "circumvention" of the Conditions of Tender and your client's allegations in this regard are, yet again, unfounded;
- 2.7 your client was advised of the status of the award of the tender in our client's letter dated 17 June 2011 and in our client's letter of 4 July 2011 our client addressed incorrect assumptions contained in your letter dated 27 June 2011. There has not therefore been any "circumvention" of your client's rights. In so far as your client wishes to "complain about the award", then it is free to do so in the ordinary course;
- 2.8 there is no reason why or basis on which our client is not entitled to appoint Tolcon Lehumo (Proprietary) Limited ("Tolcon") as the successful tenderer;
- 2.9 there is/are no basis/es on which our client should validly and lawfully instruct Tolcon to continue operating in terms of its previous contract. In any event, this contract is no longer in force. Tolcon is currently providing services to our client in terms of a current and

enforceable contract and has been doing so unlawfully since 10 June 2011.'

[13] Thereafter further correspondence was exchanged, the applicant insisting on being supplied with further information and documents (including the second respondent's tender documents and the tender adjudication reports and evaluation documents), with the first respondent remaining steadfast in its assertion that the applicant was not entitled to those documents.

[14] Those facts then set the backdrop against which the present application was launched on 28 July 2011. In terms of Rule 53 the applicant called upon the first respondent to lodge the record of the proceedings sought to be set aside and additionally called upon it to furnish " . . . such reasons which it may desire to give . . . ".

[15] On 18 August 2011 the applicant delivered its additional affidavit in terms of Rule 53(4). That affidavit disclosed the follow further interactions that had occurred subsequent to the launching of the application.

- a. Prior to lodging the record the first respondent required that the applicant sign a detailed confidentiality undertaking prepared by it.
- b. The applicant declined to do so but instead indicated that it would undertake to confine the use of the information provided in the record to the context of these proceedings.

- c. Thereafter the first respondent delivered 11 lever arch files of documents, which it contended formed the record. The applicant's affidavit delivered in terms of Rule 53(4) reveals that those files contained
- i. The Project Document prepared by the first respondent;
 - ii. The unsuccessful tenders submitted by Intertoll Africa;
 - iii. The tender submitted by the applicant;
 - iv. A 'so-called' 'adjudication document'.
- d. The applicant went on to maintain that the files did not contain any " . . . adjudication or evaluation reports or any documentation of any nature stating the reasons for the First Respondent's decision in respect this matter . . .".

[16] On 14 August 2011 the applicant's attorneys indicated to the first respondent's attorneys that the record was deficient in that it did not contain, *inter alia*, the second respondent's tender, the evaluation reports, the adjudication reports, Tolplan's recommendations and other documents evidencing reasons for the decision and called for immediate delivery of those documents.

[17] During a subsequent telephone conversation between the respective attorneys on 15 August 2011 the first respondent's attorney advised that legible copies of the evaluation and adjudication reports were being sourced and would be forwarded by the morning of 16 August 2011.

The applicant's attorney was also advised that the first respondent's tender documents would not be forthcoming unless the original confidentiality undertaking sought was furnished and that the applicant's attorneys undertook not to disclose the contents of the first respondent's tender documents to the applicant.

[18] Later the same day the first respondent's attorneys wrote to the applicant's attorneys indicating that no further documents would be delivered until that undertaking was furnished.

[19] On 24 August 2011 the first respondent delivered two reports to the applicant. These have been styled and dealt with in these proceedings as the 'Evaluation Report' and the 'Adjudication Report'. The Evaluation Report was compiled by Tolplan and signed off by it on 16 May 2011. The Adjudication Report was prepared by the first respondent and is dated 8 June 2011.

[20] On 16 September 2011 the applicant delivered a supplementary affidavit in terms of Rule 53(4) dealing with the contents of those reports.

[21] Thereafter the answering and replying affidavits were delivered on or about 10 October 2011 and 4 November 2011 respectively. On or about 17 February 2012 the first respondent delivered a supplementary affidavit the purpose of which was essentially to complain about new material in the replying affidavit and to contend that such new material ought to be struck out. It was suggested that this would be done at the hearing of the application.

[22] The matter was argued before me as an opposed motion on 6 and 7 March 2012. At the hearing, the suggested application to strike out was not persisted in by the first respondent.

LOCUS STANDI & JURISDICTION

[23] In their heads of argument Mr *Leech* SC who together with Mr *Boulle* appeared for the first respondent raised two preliminary points. At the opposed hearing these points were not argued separately. They were dealt with as part of the main argument delivered on the behalf of the first respondent. However it is convenient to deal with them now.

[24] The first preliminary point related to the standing of the applicant. It was contended that the applicant lacked *locus standi* on two footings, firstly as a consortium it for that very reason did not have standing and secondly, because the applicant could not demonstrate a cognisable legal interest in the application and its outcome it, for that reason too, lacked *locus standi*.

[25] In my view the founding affidavit clearly described the applicant with sufficient reference to its three members and clearly identified a business address in Durban. In addition it stated that those three members associated themselves as the applicant for the specific purpose of submitting the proposal and, if successful to carry out the operations envisaged. In simple terms it is nothing more than a partnership for the limited purpose. There is nothing wrong in law with that.

[26] The second leg to the argument on standing is inextricably linked to the main argument relating to why the applicant failed in its bid. Because it failed, so the argument went, it had no real interest (described as a cognisable legal interest) in the tender and therefore in the outcome of the application. Because then it had no interest to protect or pursue it was argued that it had no standing. The argument is a circular one and contains in it the seeds of its own weakness. Either the applicant has a right to challenge the non-award of the tender to it or not. In my view it has that right.

[27] Accordingly the challenge to standing must fail.

[28] The second preliminary point concerned jurisdiction. It was argued that this court does not have jurisdiction because the applicant's contention that the adverse effect of the decision is one that will be felt within the area of this court's jurisdiction is incorrect. I do not agree. Firstly, the applicant has indicated, and this is not challenged, that for the purposes of conducting its business it has selected an address in Durban. That that address coincidentally happens to be also the address of one of its members is of no moment. Secondly, all of the work to be performed and envisaged by the tender is work that will be performed within the area of this court's jurisdiction. Thirdly, all income generated and earned by that work will be income generated and earned within the area of this court's jurisdiction.

[29] So too the challenge relating jurisdiction must also fail.

THE PRINCIPAL ISSUES AND SOME PRELIMINARY OBSERVATIONS

[30] Mr *Olsen* SC, who together with Mr *Voormolen* appeared for the applicant delivered an argument that marginally flirted with the applicant's heads of argument. After initially complaining about this approach Mr *Leech* elected to proceed with the first respondent's argument and that approach resulted in the matter spilling over into a second day of argument. Mr *Olsen's* fresh approach to the applicant's argument is also partially the reason for the delay in the delivery of this judgment (an intervening six week busy criminal circuit also not assisting) but I mention that not as an excuse but as an indicator more of the need for me to properly grasp the import of those new submissions.

[31] In evaluating the issues in this matter it is convenient to commence with section 217 of the Constitution. It provides:

'217 Procurement

- (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.
- (2) Subsection (1) does not prevent the organs of state or institutions referred to in that subsection from implementing a procurement policy providing for-
 - (a) categories of preference in the allocation of contracts; and
 - (b) the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination.
- (3) National legislation must prescribe a framework within which the policy referred to in subsection (2) must be implemented.'

[32] The national legislation referred to in sub-section (3) is the Preferential Procurement Policy Framework Act, 5 of 2000 ("the PPPF Act"). Section 2 of the PPPF Act provides as follows:

'2 Framework for implementation of preferential procurement policy

- (1) An organ of state must determine its preferential procurement policy and implement it within the following framework:
 - (a) A preference point system must be followed;
 - (b)
 - (i) for contracts with a Rand value above a prescribed amount a maximum of 10 points may be allocated for specific goals as contemplated in paragraph (d) provided that the lowest acceptable tender scores 90 points for price;
 - (ii) for contracts with a Rand value equal to or below a prescribed amount a maximum of 20 points may be allocated for specific goals as contemplated in paragraph (d) provided that the lowest acceptable tender scores 80 points for price;
 - (c) any other acceptable tenders which are higher in price must score fewer points, on a *pro rata* basis, calculated on their tender prices in relation to the lowest acceptable tender, in accordance with a prescribed formula;
 - (d) the specific goals may include-
 - (i) contracting with persons, or categories of persons, historically disadvantaged by unfair discrimination on the basis of race, gender or disability;
 - (ii) implementing the programmes of the Reconstruction and Development Programme as published in *Government Gazette* 16085 dated 23 November 1994;
 - (e) any specific goal for which a point may be awarded, must be clearly specified in the invitation to submit a tender;
 - (f) the contract must be awarded to the tenderer who scores the highest points, unless objective criteria in addition to those contemplated in paragraphs (d) and (e) justify the award to another tenderer; and
 - (g) any contract awarded on account of false information furnished by the tenderer in order to secure preference in terms of this Act, may be

cancelled at the sole discretion of the organ of state without prejudice to any other remedies the organ of state may have.

- (2) Any goals contemplated in subsection 1(e) must be measurable, quantifiable and monitored for compliance.'

[33] A constant theme that underpinned the applicant's argument was the link forged between section 217 of the Constitution and section 2(1)(f) of the PPPF Act, the submission being that that link was not a marriage of convenience and one that was not evident in the first respondent's evaluation of the tenders received.

[34] Before proceeding I need to dispose of a preliminary complaint made by the applicant. That complaint related to what was described as a distinct reluctance on the part of the first respondent to assist the applicant in the adjudication and challenge processes and focussed on the first respondent's delay in furnishing the relevant documents and its refusal to make the second respondent's bid document available for scrutiny and comparison. I have much sympathy for the submission that absent the second respondent's tender documents the applicant (and indeed the court) is significantly hamstrung in making an objective assessment of the tender process. It was also submitted that it may turn out that I would be unable to properly assess if the applicant had fairly failed in its bid.

[35] However the applicant had available remedies to insist upon the production of the second respondent's bid documents and chose to persist in the application without exhausting all those remedies. If it fails in the

application for that reason alone then it only has itself to blame. Before leaving this point I must add that it was singularly unhelpful of the first respondent to have suggested (in correspondence) that the applicant, if it wanted access to the first respondent's bid documents, ought to have employed the remedies provided for in the Promotion of Access to Information Act, 2 of 2000 (although recourse to that Act was first suggested by the applicant) or that it ought to have provided the confidentiality undertakings sought. The first respondent had a constitutional obligation to conduct its operations transparently and accountably. In *Transnet Ltd & Ano v SA Metal Machinery Co (Pty) Ltd* 2006 (6) SA 285 (SCA) similar points were dealt with by *Howie P* thus:

[53] The submission of the appellant on this aspect was that disclosure of the rates, being components of the tender price, would breach the confidentiality clause and expose the appellant to an action by Inter Waste either for damages or at least for cancellation of the contract.

[54] The respondent's contention was that only the tender price itself was referred to in the confidentiality clause and as Inter Waste had (as was indeed the case) consented to disclosure of the tender price, the clause was no longer a bar to disclosure of that sum. The clause therefore never had any bearing on the schedule of prices and quantities. In any event, so the contention went, any action for breach of the clause would need to entail proof of a material breach with or without proof of damages. For the same reason for contending in respect of s 36(1)(c) that there was no probable harm reasonably to be expected, and more importantly because there was no appeal against the Court's finding that no harm was likely in respect of s 36(1)(b), disclosure could not realistically expose the appellant to an adverse judgment for contractual relief.

[55] To my mind the overriding consideration here is that the appellant, being an organ of State, is bound by a constitutional obligation to conduct its operations

transparently and accountably. Once it enters into a commercial agreement of a public character like the one in issue (disclosure of the details of which does not involve any risk, for example, to State security or the safety of the public) the imperative of transparency and accountability entitles members of the public, in whose interest an organ of State operates, to know what expenditure such an agreement entails. I therefore fail to see how the confidentiality clause could validly protect the successful tenderer's tender price from disclosure after the contract has been awarded. Accepting a need for confidentiality in the pre-award phase, it seems to me that the intention of the drafter of the notice was no more than that a tenderer should not be able to know a competing tenderer's price in that period, hence the reference to 'other tendered prices'. In the context of the notice the tender price contemplated as protected by confidentiality was the total price without component details. It follows that once the contract was awarded the confidentiality clause, certainly insofar as the successful tenderer was concerned, was a spent force and offered Inter Waste no further protection from disclosure as regards its tender price. (I refrain from considering the question whether the clause continued to protect the unsuccessful tenderers.)

[56] Moreover, the agreement, in incorporating the tender documentation also incorporates the schedule of prices and quantities. The agreement is not Inter Waste's document. It is a contract document to which the appellant, a public body, is a party. What applies to public entitlement to know the contract price applies equally, on the facts of this case, to the agreement itself. What is more, the tender documentation included the agreement in draft. Inter Waste must have known in advance that its schedule of prices and quantities would, if it secured the contract, become part of the agreement and therefore exposed to public scrutiny. Accordingly, even if 'tender price' in the notice included the schedule, the parties' intention could never have been to maintain confidentiality in respect of the rates after the award. Parties cannot circumvent the terms of the Act by resorting to a confidentiality clause.'

PRICE

[36] It was common cause that the first respondent is an organ of State and as such section 2 of the PPPF Act read with section 217 of the

Constitution applies to its procurement endeavours. The contract in question in this application is of a value that attracts the application of section 2(1)(b)(i) of the PPPF Act. It was argued that whilst sections 2(1)(d) and (e) are important, it was vital to observe the provisions of section 2(1)(f) of the PPPF Act. Thus, before paying attention the criteria set out in sections 2(1)(d) and (e) and other **objective criteria** it was important to first determine the role played by price alone in ranking competing tenderers.

[37] The tender document was designed such that in that portion of the document which contained the contractual offer to be made by a prospective tenderer ("Form of Offer") the contract price was required to be expressed in a Rand amount inclusive of Value Added Tax ("VAT"). Elsewhere in the tender documents, in the section styled *Schedule of Payments/Cost Matrix* ("the cost matrix") the items there were required to be expressed exclusive of VAT. The total of the items in the applicant's cost matrix, ie. the price arrived at, was identical to the figure included in the Form of Offer.

[38] An assessment as to whether the applicant or the second respondent submitted the cheaper bid turns exclusively on the manner in which the evaluation and recommendation by Tolplan and the adjudication by the first respondent assessed the applicant's treatment of price in its bid documents. In other words, did the applicant's price include VAT or not?

[39] In their evaluation Tolplan treated it thus:

'There were Vat calculation Errors (sic) on the Form of Offer if compared to the Schedule of Payments/Cost for the . . . Tender Offers submitted.

The Offer amounts in the Form of Offer was (sic) the same amount as their Schedule of Payments/Cost Matrix which excludes VAT for their . . . Tender Offers submitted. Therefore VAT was excluded from their Form of Offer, hence the difference between the Tendered Amount and the Corrected Amount'

And in their adjudication of Tolplan's evaluation and recommendations the first respondent dealt with it thus:

'The corrections made to the tender offers received from . . . Toll Collection (sic) Consortium was to include VAT on the Form of Offer which they omitted to include from the Schedule of Payments/Cost Matrix which was exclusive of VAT.'

[40] The result was that the applicant's tendered price of R156 407 020,40 as contained in its Form of Offer was treated as being a VAT exclusive 'Corrected Amount' for the purposes of comparison with the second respondent's VAT exclusive tender price of R144 682 546,82.

[41] The applicant's case is that its price was confirmed at the tender opening meeting as being VAT inclusive but nevertheless argues that it was illogical, irrational and unsustainable for the first respondent to simply correct what it regarded as being the incorrect figure. Instead it ought to have approached the applicant because the situation cried out for clarity.

[42] In *Logbro Properties CC v Bedderson NO & Ors* 2003 (2) SA 460 (SCA) Cameron JA said:

[8] 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.

[9] Counsel's invocation of . . . [*Cape Metropolitan Council v Metro Inspection Services (Western Cape)* & Ors 2001 (3) SA 1013 (SCA)] . . . as authority to the contrary is mistaken. There it was held that a local authority's cancellation of an agreement was not 'administrative action' under the Constitution entitling the other contractant to procedural fairness before termination. Although the public authority derived its power to conclude the contract from statute, it was held that the same could not necessarily be said about its power to cancel. But the *Cape Metropolitan* case turned on its own facts, and this Court was careful to delineate them. In the first place, the tender cases were expressly distinguished. Second, the employment cases (where a public authority's express statutory power to dismiss public sector workers was held bound by public duties of fairness notwithstanding that a corresponding right existed at common law or that such a right might also have been contained in a contract) were also distinguished. Third and most importantly, the Court in *Cape Metropolitan* did not purport to provide a general answer to the question whether a public authority in exercising powers derived from a contract is in all circumstances subject to a public duty to act fairly. That question was left open. Instead, the Court's judgment makes it plain that the answer depends on all the circumstances. The critical passage in the reasoning of Streicher JA is this:

"Those terms [ie entitling the public authority to cancel the contract] were not prescribed by statute and could not be dictated by the [public authority] by virtue of its position as a public authority. They were agreed to by the first respondent, a very substantial commercial undertaking. The [public authority], when it concluded the contract, was therefore not acting from a position of superiority or authority by virtue of its being a public authority and, in respect of the cancellation, did not, by virtue of its being a public authority, find itself in a stronger position than the position would have been had it been a private institution. When it purported to cancel the contract it was not performing a public duty or implementing legislation; it was purporting to exercise a contractual right founded on the consensus of the parties in respect of a commercial contract. In all these circumstances it cannot be said that the [public authority] was exercising a public power."

[10] 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.

[11] 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*, 'acting from a position of superiority or authority by virtue of its 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.'

[43] That was treated with approval in *Metro Projects CC & Ano v Klerksdorp Local Municipality & Ors* 2004 (1) SA 16 SCA in the following fashion:

'[13] In the *Logbro Properties* case . . . , paras [8] and [9] at 466H - 467C, Cameron JA referred to the 'ever-flexible duty to act fairly' that rested on a provincial tender committee. Fairness must be decided on the circumstances of each case. It may in given circumstances be fair to ask a tenderer to explain an ambiguity in its tender; it may be fair to allow a tenderer to correct an obvious mistake; it may, particularly in a complex tender, be fair to ask for clarification or details required for its proper evaluation. Whatever is done may not cause the process to lose the attribute of fairness or, in the local government sphere, the attributes of transparency, competitiveness and cost-effectiveness.'

and in *Minister of Social Development & Ors v Phoenix Cash & carry – PMB CC* [2007] 3 All SA 115 (SCA), thus:

'[19] I have quoted clauses 17.2, 17.6 and 17.7 of the Terms of Reference because they are relevant to a proper understanding of clause 17.10. The first affords the

Department the flexibility of investigating the financial substance of a service provider. When the applicant submitted its tender every supporting document from the bank and its suppliers invited the bid committee to contact the writer should any further information be required. The opportunity properly to evaluate a bid which was on the face of it markedly superior to the tenders of the respondents was however spurned. The remarks of Conradie JA in *Metro Projects CC v Klerksdorp Local Municipality* 2004 (1) SA 16 (SCA) at paragraph 13 bear repeating:

"In the *Logbro Properties* case *supra*, paras [8] and [9] at 466H–467C, Cameron JA referred to the 'ever-flexible duty to act fairly' that rested on a provincial tender committee. Fairness must be decided on the circumstances of each case. It may in given circumstances be fair to ask a tenderer to explain an ambiguity in its tender; it may be fair to allow a tenderer to correct an obvious mistake; it may, particularly in a complex tender, be fair to ask for clarification or details required for its proper evaluation. Whatever is done may not cause the process to lose the attribute of fairness or, in the local government sphere, the attributes of transparency, competitiveness and cost-effectiveness."

The second- and third-mentioned clauses illustrate that the process was intended to encourage bidders with little or no financial history. But the process followed by the committee treated each item of evidence mentioned in clause 17 as peremptory and the whole as excluding reliance on any not specifically mentioned. By doing so it failed to appreciate that audited financial statements might reasonably be inapplicable to a small business only beginning to find its feet or to a consortium without a previous history. Thereby it potentially shut out or discouraged the very interests which clauses 17.6 and 17.7 were intended to attract.'

[44] The applicant's *Form of Offer* (which is an integral portion of the bid) assumes a particular significance when considering the treatment given to *price* by the first respondent. That document is clear in its terms that the price stated therein is VAT inclusive. It is addressed to the first respondent and in addition to offering to perform the contract at a VAT inclusive price of R156 407 020,40 also indicated that the first respondent:

'... may accept [the] Offer by signing and returning to the [applicant] one copy of the acceptance part of the Forms of Offer and Acceptance before the end of the period of validity stated in the Tender Data, (or at the end of any agreed extension thereof)

whereupon the [applicant] becomes the party named as the contractor in the conditions of contract identified in the contract data.'

[45] The whole tenor of the *Form of Offer* document suggests that it is a firm promise and that upon acceptance becomes a binding contract.

BEE VERIFICATION

[46] In its letter of 12 July 2011 the first respondent indicated that one of the reasons for the tender not being awarded to the applicant was its failure to comply with the tender requirement of furnishing appropriate verification certificates relating to Black Economic Empowerment ("BEE") milestones. Such certificates that were provided were from an agency that had not been accredited at the time of submission.

[47] It has been pointed out by the applicant that tender condition F.3.11.4(i)(e) provided that ". . . if a tenderer . . . failed to submit an acceptable Verification Certificate, a period of 24 hours [would] be granted to re-submit a valid Verification Certificate." It claimed that it was not afforded that opportunity.

[48] In its adjudication report however, after recording the applicant's failure to submit appropriate BEE Verification Certificates, the first respondent concluded that the ". . . required information was subsequently provided and the initial omission . . . was not considered material". In addition, and in its answering affidavit the first respondent indicated that the issue of BEE scoring

was irrelevant to the decision to exclude the applicant. Nothing more needs saying on this score.

QUALITY OR FUNCTIONALITY

[49] The principal thrust of the first respondent's defence was that the applicant did not score the minimum of 75% when assessed for quality.

[50] In dealing with the question of quality in the evaluation and adjudication reports Tolplan and the first respondent assessed this under a number of separate elements, which in turn were broken down into a number of further sub-elements. The three principal elements were *Toll Operations* which was allocated a score of 45 points, *Toll System* which was allocated a score of 50 points and *Electrical and Mechanical Systems* which was allocated a score of 5 points. *Toll Operations* was split into *Organisational Structure* (20 points) and *Operations Management* (25 points). *Toll System* was split into *Organisational Structure* (5 points) and *Risk Management* (45 points).

[51] The 20 points for *Organisational Structure* was assessed in three further sub-categories with 5 points being allocated for *Proposed Route Organogram*, 5 points for *Quality of Key Personnel* and 10 points for *Staff Salaries*. The 25 points for *Operations Management* was assessed in six further sub-categories with 5 points being allocated for *Financial Management*, 5 points for *Traffic Management*, 5 points for *Risk*

Management, 5 points for *QA Management*, 2,5 points for *Environmental Management* and 2.5 points for *Safety and Security*. The 45 points for the *Risk Management* portion of *Toll System* was assessed in six further sub-categories with 4 points being allocated for *Risk Management*, 3 points for *Quality Assurance*, 1 point for *Environmental Management*, 5 points for *Past Performance*, 2 points for *Toll System Rollout Programme* and 30 points for *Other: Toll System Technical Analysis*.

[52] In the tender document prospective tenderers were told of the three principal elements but not of the further sub-elements and their sub-categories.

A FAIR AND OBJECTIVE AWARD – DISCUSSION AND CONCLUSIONS

[53] As an organ of State the first respondent was obliged to comply with the provisions of section 217 of the Constitution read with section 2 of the PPPF Act. In doing so it was, in my view, incumbent upon it to first look at price and award the tender on the basis of price being the dominant factor (ie. 90%) unless **objective criteria** and **clearly identified specific goals** justifies the award to a more expensive tenderer.

[54] When dealing with the applicant's price it is difficult to understand why the first respondent chose unilaterally to do what it did and why it did not seek clarity as to whether the price stated in the Form of Offer did indeed include VAT instead of simply assuming that it did not.

[55] In making that assumption the first respondent did not act rationally. I agree with the submission that a rational decision maker would have applied the terms contained in the Form of Offer (they resulted in a binding contract) taking into account the oral confirmation of the fact that the price included VAT. Alternatively, the situation demanded that clarity be sought. In seeking such clarity, and based on the authorities referred to above where *price* is discussed, the first respondent would have been observing its "... ever-flexible duty to act fairly. . .".

[56] In unilaterally altering (correcting) the applicant's price the first respondent embarked on administrative action that was not rationally connected with the information before it and thus also offended section 217 of the Constitution.

[57] Had the applicant's price been properly treated and accorded the prominence due to it the applicant, as the lowest tenderer, would have achieved a score of 90 points for price alone.

[58] On this limited ground the award of the tender to the second respondent falls to be reviewed and set aside.

[59] I turn now to consider the first respondent's actions insofar as Quality or Functionality are concerned.

[60] I have observed that the tender documents did not disclose the details as to how the divers criteria (and their respective sub-categories) could be achieved by prospective tenderers. Not only were the criteria and sub-categories not disclosed, more importantly the weightings to be attached to each were unknown.

[61] I indicated earlier that the question of price was almost all important unless **objective criteria** and **clearly identified specific goals** justifies the award to a more expensive tenderer. In my view that observation is a natural conclusion drawn from an analysis of section 217 of the Constitution read with section 2 of the PPPF Act. It follows therefore that the first respondent had to clearly identify and specify those objective criteria and goals. That had to be done in a manner that left no doubt or room for debate as to whether the criteria and the assessment of the specified goals were objective in nature.

[62] In my view it was incumbent upon the first respondent to set out all the benchmarks up front. In other words, a tenderer must know how to achieve the predetermined scoring. See *Benlou Properties (Pty) Ltd v Vector Graphics (Pty) Ltd* 1993 (1) SA 179 (A) at 189 E-H.

[63] In dealing with this aspect Mr *Leech* relied on the following passage in *Minister of Environmental Affairs and Tourism & Ano v Scenematic Fourteen (Pty) Ltd* 2005 (6) SA 182 (SCA):

[17] A related contention, and one that found favour with the Court *a quo*, was that the adoption of a set of criteria for each group and a system of scoring for the

assessment of the criteria had the effect of precluding the decision-maker from properly exercising his discretion. Counsel for the respondent relied in this regard on s 6(2)(c), (d) and (f) of PAJA and a number of decisions in support of the proposition that, while a functionary may have regard for guidance to a predetermined rule of which it approves, it would not be exercising its discretion if it treated the rule as a hard and fast one to be applied as a matter of course in every case. (See *Johannesburg Town Council v Norman Anstey & Co* 1928 AD 335 at 340; *Computer Investors Group Inc and Another v Minister of Finance* 1979 (1) SA 879 (T) at 898D - E; *Hofmeyr v Minister of Justice and Another* 1992 (3) SA 108 (C) at 117F - H.) The position must necessarily be somewhat different where the decision-maker is faced with a large volume of competing applications and the need for consistency becomes an imperative requirement for fairness. The *Bato Star Fishing* case *supra* was concerned with the same allocation process as the present, but in relation to the *quantum* of the quotas granted in the hake deep-sea trawling sector. After quoting a passage in the judgment of Human J in *Computer Investors Group Inc and Another v Minister of Finance* (*supra* at 898C - E) in which the learned Judge reformulated the proposition referred to above in relation to the adherence to hard and fast rules, O'Regan J said the following (at para [57]):

"In circumstances such as these, moreover, where the decision-maker is seeking to evaluate a large number of applications against similar criteria, the *dictum* in the *Computer Investors Group* case [at 898C - E] is not relevant. In cases such as the present, it will be permissible, and indeed will often be desirable, for administrative decision-makers to adopt and apply general criteria evenly to each application in order to ensure that the decision subsequently made is fair and consistent."

As previously indicated, a feature of the method adopted was in any event the provision for adjustment in circumstances where the criteria and weighting were for any reason inappropriate. It follows that, in my view, the adoption of a set of criteria and a system of scoring for their assessment cannot be faulted. On the contrary, the method strikes me as one which was objective, rational and practical in the circumstances.

[18] A further point made by the respondent was that the applicants for fishing rights ought to have been told in advance of the procedure to be adopted, involving as it did the streaming of the applications into two groups and the use of a scoring system applied to predetermined criteria. It was argued that the failure on the part of the DDG properly to advise applicants rendered the allocation process procedurally

unfair. Section 3(2)(a) of PAJA expressly provides that what is procedurally fair depends on the circumstances of each case. In the present case the applicants for fishing rights were required to complete a detailed application form which indicated precisely what information was required. It was accompanied by instructions on how to complete the form and guidelines setting out in broad terms the considerations which the decision-maker regarded as material for the purpose of making the allocations. An applicant would therefore have been fully aware of the information that was required and on which the allocations were to be made. In these circumstances, the decision-maker, in my view, was not required to explain in advance exactly how the applications would be processed. As Baxter *Administrative Law* at 548 puts it:

"The administration cannot be expected to share with the individual every phase of its final decision-making process."

This point, too, must fail.'

Accordingly he contended that the first respondent had treated the assessment for quality and functionality quite properly.

[64] I do not agree. In my view *Scenematic* does not lay down any hard and fast rule but instead implies that each case must be dealt with on its own merits.

[65] In this matter the nature of the tender and the information sought from prospective tenderers gave them no particular insight as to how that information would be treated and more especially where any particular emphasis would be placed. That this must be so is demonstrated in my view by the first respondent's own words when it explained in its answering affidavit that:

'[t]he first and foremost consideration in awarding a tender is therefore the capability and capacity – or perceived capacity – of the tenderer to successfully carry out the tolling and maintenance operations. It is only if the tenderer meets certain minimum threshold requirements in respect of capability, capacity and service delivery that they can be considered for the award of the tender, irrespective of the price quoted. It makes no difference how cheaply the tenderer pitches his bid if there is a perceived risk that the tenderer, if awarded the contract, will not reliably be able to carry out the tolling and maintenance operations.'

[66] At first blush that statement is indicative of a sensible approach and innocent in outcome. However, it will not go unnoticed that *perceived* is employed twice in that explanation. To my mind there is no clearer indicator that quality and functionality was in large part processed by subjective as opposed to objective analysis.

[67] Much of the argument on both sides was devoted to a detailed analysis of the evaluation and adjudication reports and how those documents treated the scoring on each of the elements and sub-categories described above. I do not have to go that far and certainly do not intend re-scoring the tender. That is not my function. As a general observation however, it is certainly clear that whilst some of the elements and sub-categories were treated apparently objectively, a fair number were certainly scored on a subjective basis.

[68] It seems to me therefore, that if the first respondent wanted to assess and score quality and functionality on that basis, and more especially if quality and functionality was to serve a gatekeeper function, objectivity,

rationality and functionality demanded more clarity on how prospective tenderers could get through the gate.

[69] The first respondent made repeated reference to the fact that the second respondent (as an entity) has relevant previous experience. It was also acknowledged, however, that some of the key personnel that the applicant intended employing to manage and perform the contract had some relevant previous experience. However, the pre-determined classification of the various elements and sub-categories reveals a bias towards entity specific and institutional experience as opposed to personnel experience. In itself there is nothing wrong with that approach, but given the constitutional importance placed on price it is, in my view, important to tell prospective tenderers precisely how experience would trump price and more importantly the subjective and objective assessments that would be employed in that process. That was not done here.

[70] It seems to me that given the earlier reluctance on the part of the first respondent to furnish the applicant with the relevant documents, and given its initial reaction that price alone non-suited the applicant, and given the manner in which price was dealt with insofar as the applicant was concerned suggests a leaning on the part of the evaluation and adjudication committees towards the advancement of the interest of tenderers in the position of the second respondent, ie those who had previously been awarded contracts of this nature. That, in the context of this case, is unfair.

[71] So too, for the manner in which quality and functionality was treated, the award to the second respondent falls to be reviewed and set aside.

THE RELIEF

[72] Mr *Olsen* argued, if I were to find for the applicant, that any order I make ought to be suspended for a period of time so as to allow the first and second respondents an opportunity to arrange their affairs. The submission was made on the authority of *JFE Sapela Electronics (Pty) Ltd & Ano v Chairperson: Standing Tender Committee & Ors* [2004] 3 All SA 715 (C) where *HJ Erasmus J* concluded that:

'Setting aside the decisions to award the tenders and declaring the resultant contracts null and void will undoubtedly have disruptive effect on all involved. On the other hand, a tender process which is in law fatally flawed cannot be allowed to stand because setting it aside would have a disruptive effect. The disruptive effect can be mitigated by suspending the coming into operation of the orders made so as to enable the parties to make appropriate arrangements for phasing out of work on the tenders, and completing particular facets of work which are incomplete.'

[73] There is much to warrant that approach. In addition, by the time this judgment is delivered only approximately one year of the eight year contract period will have elapsed. A significant portion remains.

[74] The following Order is made:

1. The decision of the First Respondent to award the contract to the Second Respondent for the Operations and Maintenance of the N2 South coast toll plazas KwaZulu-Natal, is hereby reviewed and set aside.
2. The First Respondent is hereby directed to reconsider the award of the contract in the light of this judgment, save that the officials who adjudicated the award of the contract referred to in paragraph 1 above are precluded from participating in the reconsideration thereof.
3. The Orders in paragraphs 1 and 2 above shall come into effect on a date calculated to be two months from the date of this judgment.
4. The First Respondent is directed to pay the costs of the application, such costs to include those incurred by the applicant consequent upon the employment by it of two counsel.


VAHED J

Case Information:

Date of Hearing: 6 & 7 March 2012

Date of Judgment: 27 July 2012

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