IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, DURBAN

REPORTABLE

Case no: 11060/2017

In the matter between:

KWADUKUZA MUNICIPALITY **APPLICANT**

and

SKILLFUL 1169 CC **FIRST RESPONDENT**

TECHNOLOGIES ACCEPTANCES (PTY) LIMITED **SECOND RESPONDENT**

JUDGMENT

MADONDO DJP:

Introduction

[1] The applicant seeks an order declaring and setting aside as null and void *ab initio,* alternatively reviewing, the agreements appointing the first and second respondents as the maintainer and supplier respectively of office automation equipment for the applicant.

[2] The applicant is the KwaDukuza Municipality, a municipality as defined in terms of the Local Government Municipal Structures Act, 117 of 1998 and established in terms of such Act.

[3] The first respondent is Skillful 1169 CC, a close corporation with limited liability, duly incorporated in accordance with the Close Corporations Act, trading as Capital Office Automation at 24/26 Reynolds Street, Port Shepstone, KwaZulu-Natal.

[4] The second respondent is Technologies Acceptances (Pty) Limited, a company with limited liability, duly incorporated in accordance with the company laws of South Africa of Fintech Building, Stone Ridge Office Park, 8 Greenstone Place, Greenstone Hill, Gauteng.

Factual Background

[5] The applicant, in terms of the written agreements entered into between the parties on 5 December 2016, appointed the first respondent to service and maintain office automation equipment (being copiers, scanners, fax machines and the like) and the second respondent to supply such equipment to the applicant.

[6] In concluding such contracts, the applicant purportedly relied on the provisions of s 110 of the Local Government: Municipal Finance Management Act 56 of 2003 (the LGMFMA) read with reg 32 of the Municipal Supply Chain Management Regulations. It is common cause between the parties that the contracts in question were concluded without there having been a competitive bidding process. There was therefore non-compliance with the provisions of s 217 of the Constitution read with s 112 of the LGMFMA.

[7] Prior to the conclusion of the agreements between the parties, the practice at the applicant municipality had been that each and every department of the applicant was entitled to procure its own respective office automation equipment independently from one another. This exercise resulted in a multitude of rental and maintenance contracts being entered into between the various departments of the applicant and numerous suppliers of the required equipment. As a result of such

multiply agreements, deadlines in respect of renewals were often missed and this resulted in termination of services. According to the applicant it was becoming a nightmare to keep a track of agreements.

[8] As such, the applicant took the decision to investigate the possibility of concluding one agreement for the supply, service and maintenance of all its office automation equipment. The applicant thought that such an agreement would be more cost-effective than the current multitude of agreements, would allow better monitoring of the services rendered and, would also reduce the administrative costs involved in the processes of securing the services.

[9] During its investigation, the applicant discovered that the Greater Kokstad Municipality had secured such a contemplated supply agreement, after a competitive bid process. The applicant took the decision to explore the possibility of utilising the mechanism of reg 32 of the Municipal Supply Chain Management Regulations read with s 112(1) *(o)* of the LGMFMA in an effort to satisfy its procurement needs for office automation equipment.

[10] On 25 August 2016, the applicant, through its municipal manager, directed a letter to the municipal manager of the Greater Kokstad Municipality, requesting the latter's authorisation to utilise their competitive bidding procedure for the procurement of the applicant's office automation equipment. In reply thereto, the acting municipal manager of Greater Kokstad Municipality consented to the appointment of the service provider by the applicant under reg. 32 of the Municipal Supply Chain Management Regulations through the competitive bidding process of Greater Kokstad Municipality. The applicant also sought and obtained the consent of the service provider involved, who was the first respondent in this case.

[11] Following the obtaining of such consent, the applicant placed the matter before its Tender Evaluation Committee for its recommendation, which in turn recommended that the applicant proceed with concluding the agreement with the first respondent. The services to be procured from the first respondent was the supply and delivery of office machines on a full maintenance lease as per Greater Kokstad bid GKM 16-13/14, taking into consideration technology advancements and change of rates.

[12] On 3 October 2016 the applicant's Tender Adjudication Committee met, considered the matter and unanimously resolved to appoint the first respondent utilising the mechanism of reg 32 of the Municipal Supply Chain Management Regulations.

[13] On 4 October 2016 the applicant delivered a letter of appointment to the first respondent in terms of which the applicant's council procured the services of the first respondent in accordance with the specifications of Greater Kokstad Bid GKM 16-13/14. Such services were purported to be procured in accordance with s 110(2) *(c)* of the LGMFMA read with reg 32 of Supply Chain Management Regulations .

[14] In such letter it was recorded that the first respondent had confirmed its willingness to contract with the applicant municipality at the same rates charged to Greater Kokstad Municipality. The applicant municipality and the first respondent thereby entered into a contract for the supply and delivery of office machinery on a full maintenance lease for a period of three years from the date of appointment.

[15] It was further recorded in the letter of appointment that it was in the best interests of the applicant council to dispense with the calling of separate tenders but rather to exercise the then existing contract between the Greater Kokstad Municipality and the first respondent . The applicant municipality also entered into

the agreement with the second respondent for the supply of automation equipment.

[16] Both contracts concluded were subject to the provision of certain documents by the respondents and an audit by the applicant's Internal Audit Department. However, on receipt of the internal audit report, it became apparent to the applicant that the conclusion of the agreements referred to above was contrary to the approvals and the correct implementation of the reg 32 procedure.

[17] The following aspects in the agreement entered into between the applicant and the first respondent were highlighted in the internal audit report as being in violation of the reg 32 procedure:

(a) The agreement between the first respondent and the Greater Kokstad Municipality had already expired by the effluxion of time when the agreement between the applicant and the fist respondent was entered into. The contract between the first respondent and the Greater Kokstad Municipality expired on 30 September 2016 and the agreement between the applicant and the first respondent was concluded on 5 December 2016;

(b) The price between the two agreements, ie, the agreements between the Greater Kokstad municipality and the first respondent and the agreement between the applicant and the first respondent was different. The projected cost of the agreement with the Greater Kokstad Municipality was R1 034 208 over a period of two years whereas with the applicant the projected cost was R15 251 892 over a three year period;

(c) The nature of the two agreements differed in that the first respondent contracted with Greater Kokstad Municipality for the supply, service and maintenance of equipment whereas supply is not part of the agreement concluded with the applicant. The applicant entered into a rental agreement for the supply of office machinery with the first respondent whereas rental for

supply of office machinery was not part of the agreement with the Greater Kokstad Municipality.

(d) The type and nature of the office automation to be supplied differed; and

(e) The second respondent did not form part of the agreement with Greater Kokstad Municipality and there was no basis, using the reg 32 procedure, that the agreement with the second respondent could be concluded.

[18] The Internal Audit Committee concluded that the applicant did not derive any financial benefit from the transaction allegedly entered into in terms of reg 32 of the Municipal Supply Chain Management Regulations, instead, it was in a worse off financial position. Accordingly, the Committee recommended the immediate termination of the agreement in question in its internal audit report.

[19] The applicant avers that it is therefore apparent that the procedure and its conduct in taking the decision to contract and the resultant agreements were irregular and illegal. According to the applicant it was on this basis that it requested the respondents to uplift their machines from its premises, but the respondents failed to do so. The respondents dispute that the applicant has at any time requested that they uplift the machines.

[20] The respondents contend that the provision of services of Capital Office Automation's equipment was done in terms of reg 32 of the Municipal Supply Chain Management Regulations read with s 110(2)*(c)* and s 112(1)*(o)* of the LGMFMA. The respondents therefore deny that the agreements in question were concluded contrary to the Municipal Supply Chain Management Regulations and that they were illegal and invalid. The respondents have also argued that such agreements could only be terminated three years after their conclusion on 5 December 2016, on ninety (90) days' notice.

Issues for determination

[21] The issues for determination in this matter are:

(a) The validity of the agreements appointing the first and second respondents as the maintainer and supplier of automation equipment respectively, ie, whether the agreements are null and void *ab initio*;

(b) Whether the applicant's decision to appoint the respondents is reviewable under the Promotion of Administrative Justice Act 3 of 2000 (the PAJA); and

(c) Whether this court, on a just and equitable basis, may allow the agreements in terms of which the respondents were appointed, to stand or grant such other alternative relief which this court deems appropriate in the circumstances.

[22] In its contention the applicant places much reliance on the provisions of the empowering legislation s 110(2) of the LGMFMA read with reg 32 of the Municipal Supply Chain Management Regulations. The applicant alleges that there were irregularities in the reg 32 procedure, in that the Municipal Supply Chain Management Regulations were followed. In support of these allegations the applicant relies on its Internal Audit Committee report.

[23] The respondents deny that there were irregularities relating to the reg 32 procedure during the conclusion of the agreements between the applicant and the respondents respectively. Mr *Kissoon Singh* for the respondents argued that in evaluating the alleged irregularities, if any are found to exist, this court must also determine whether they amount to the grounds of review under the PAJA.

(a) Validity of the agreements in terms of which the respondents were appointed as service providers

[24] In deciding the first question whether there have been irregularities in the applicant's procurement of goods and services from the respondents which had the

effect of rendering the resultant agreements between the parties null and void, this court must first analyse the provisions of s 110 of the LGMFMA and reg 32 and interpret same.

[25] In terms of s 110, Part 1 of the Supply Chain Management applies to the procurement by a municipality or municipal entity of goods and services. The relevant wording of s 110 of the LGMFMA is as follows:

‘ (1)This Part, subject to subsection (2), applies to –

(a) the procurement by a municipality or municipal entity of goods and services;

(b) the disposal by a municipality or municipal entity of goods no longer needed;

(c) the selection of contractors to provide assistance in the provision of municipal services otherwise than in circumstances where Chapter 8 of Municipal Systems Act applies; and

(d) the selection of external mechanisms referred to in section 80 (1) *(b)* of the Municipal Systems Act for the provision of municipal services in circumstances contemplated in section 83 of that Act.

(2)This Part, except where specifically provided otherwise, does not apply if a municipality or municipal entity contracts with another organ of state for –

(a) the provision of goods or services to the municipality or municipal entity;

(b) the provision of a municipal service or assistance in the provision of a municipal service; or

(c) the procurement of goods and services under a contract secured by that other organ of state, provided that the relevant supplier has agreed to such procurement.’

[26] Where an organ of state has procured goods or services under a contract preceded by due processes in compliance with the prescribed supply chain management policy, then another organ of state which requires the same goods may contract with the first organ of state for the supply of such goods or services but, the supplier must agree to such procurement. See s 112(1) *(o)* of the LGMFMA.

[27] Regulation 32 of the Municipal Supply Chain Management Regulations reads thus:

‘32 Procurement of goods and services under contracts secured by other organs of state –

(1) A supply chain management policy may allow the accounting officer to procure goods or services for the municipality or municipal entity under a contract secured by another organ of state, but only if –

(a) the contract has been secured by that other organ of state by means of a competitive bidding process applicable to that organ of state;

(b) the municipality or entity has no reason to believe that such contract was not validly procured.

(c) there are demonstrable discounts or benefits for the municipality or entity to do so; and

(d) that other organ of state and the provider have consented to such procurement in writing.'

[28] Section 217(1) of the Constitution provides that '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'.

[29] Section 112(1) of the LGMFMA provides that the supply chain management policy of a municipality or municipal entity must be fair, equitable, transparent, competitive and cost effective and comply with a prescribed regulatory framework for municipal supply chain management, which must cover at least certain items listed in the section.

[30] The object and purport of the exemption under s 110(2)*(c)* and reg 32 is to prevent a costly and time-consuming duplication of tender procedures whilst retaining the constitutional imperatives under s 217 of the Constitution read with s 112 of the LGMFMA. This procedure also removes the complication of costs relating to bureaucratic red tape from the tender process. See *Blue Nightingale Trading 397(Pty) Ltd t/a Siyenza Group v Amathole District Municipality* 2017 (1) SA 172 (ECG) para 48. This is achieved by allowing an exemption if the procurement is in respect of goods and services under contract with another organ of state.

[31] The words ‘under a contract secured by another organ of state’ in the regulation can only refer to the contract with another organ of state as contemplated by s 110(2) of the empowering legislation (the LGMFMA). See *Blue Nightingale* above para 36.

[32] The first requirement under s 110(2) is that the municipality must contract with another organ of state for the procurement of such goods or services. In the present case, the applicant, having obtained permission to participate in the agreement between the Greater Kokstad Municipality and the first respondent, concluded an agreement directly with the service provider (the first respondent) by substituting itself in the place of the Greater Kokstad Municipality as the contracting party. The applicant thereafter proceeded to amend the material terms and conditions of the agreement between Greater Kokstad and the first respondent. The applicant went on to contract further with the second respondent without both respondents having been subjected to any prescribed legislative tender procedure or process, in breach of the provisions of s 217 of the Constitution, s 110 of LGMFMA and reg 32. The constitutional imperative was therefore not met.

[33] The applicant by means of written agreements with the respondents purported to appoint them to supply and maintain office automation equipment for it. In so doing, it relied on the exclusionary provisions of s 110(2) *(c)* of the LGMFMA read with reg 32 of the Municipal Supply Chain Management Regulations. The first respondent had concluded a contract for the supply and maintenance of office automation equipment with the Greater Kokstad Municipality upon which the parties purported to rely as a founding basis for the exemption. The parties believing that they were entitled to rely on the exemption did not comply with s 217 of the Constitution read with s 112 of the LGMFMA.

[34] For the exemption to operate, the contract between the supplier and another organ of state must be extant, resulting from a competitive bidding process. The second organ of state must become a party to the same contract, in other words, the terms and conditions of the second contract must be the same as that of the first contract. When the parties entered into an agreement on 5 December 2016, the contract between the Greater Kokstad Municipality and the first respondent had already expired on 30 September 2016. In the premises, such a contract could not be relied upon as the founding basis for the operation of the exemption in terms of s 110(2) *(c)* of the LGMFMA when concluding the contract between the applicant and the first respondent.

[35] The exemption in s 110(2)*(c)* of the LGMFMA is not applicable where the applicant does not become a party to, either directly or as a third party receiving benefits, the existing contract between a first organ of state and the supplier. The applicant did not become a party to the contract between the first respondent and the Greater Kokstad Municipality; instead, it concluded two independent agreements, on different terms, with the first and second respondents respectively. It therefore follows that even if the contract between the Greater Kokstad Municipality and the first respondent had not expired, the applicant and the second respondent were not parties to such contract, and as such the applicant could not avail itself with the contract in question as the founding basis for an exemption. Furthermore, the applicant did not receive any benefits from the contract between the Greater Kokstad Municipality and the first respondent as reg 32(1) *(c)* provides, instead it was in a worse off financial position. Section 110(2) *(a)*, *(b)* and *(c)* refers to the situation where a municipality contracts with another organ of state for the provision of goods or services to such municipality. In these instances, the other organ of state becomes the supplier who supplies the municipality. This will happen for instance, where the other organ of state has an excess of goods procured by it in terms of its

approved procurement policy and tender processes, has no further use for such excess products, and now provides the municipality with such goods at the same price it procured same.

[36] Further, for the exemption to operate under s 110(2) of LGMFMA, the goods or services procured by the second organ of state must be the same as those required by the first organ of state and the contract price as well as the terms and conditions of the contracts must be the same.

[37] The contract between the applicant and the respondents is characterised by material differences between the levels of service agreed to in the contract between the first respondent and the Greater Kokstad Municipality as opposed to the applicant's agreement with the respondents. The two agreements differed materially in terms of the goods and services to be delivered, terms and conditions of the contract and pricing for goods to be delivered and services to be rendered.

[38] The first respondent contracted with Greater Kokstad Municipality for the supply, service and maintenance of automation equipment whereas supply is not part of the agreement the first respondent concluded with the applicant. In the latter, the respondents contracted to deliver and service office automation machinery on a full maintenance lease whereas lease of office machinery was not part of the agreement with Greater Kokstad Municipality.

[39] The terms and conditions between the applicant municipality and first respondent differ markedly from the contract between the Greater Kokstad Municipality and the first respondent. The duration of the contract between the first respondent and the Greater Kokstad Municipality was two (2) years whereas in the contract between the applicant and the first respondent was three years.

[40] There were also deviations in respect of price and equipment. The price in the contract between the Greater Kokstad Municipality and the first respondent was R1 034 208 over a two year contract period whereas with the contract between the applicant and the first respondent it is R15 251 892 over a three year period. Pricing would also change for various reasons which included deterioration of the value of the land, inflation and the passage of time, newer models with more advanced features and benefits replacing the equipment that was supplied to the Greater Kokstad Municipality and the number of units required by the applicant was different to that of the Greater Kokstad Municipality, 66 items as compared to 20.

[41] None of the incidents in the present matter triggered the operation of the exemption. The evidence establishes that the agreements between the parties were not validly procured in terms of reg 32 read with the exclusionary provisions of s 110(2). There was therefore a need for the applicant to prepare a tender document, call for tenders and evaluate same.

[42] In *Municipal Manager: Qaukeni Local Municipality & another v FV General Trading CC* 2010 (1) SA 356 (SCA) para 13, the court held that the statutory precepts oblige a municipality concluding a service delivery agreement with an external supplier at a contract amount in excess of R200 000 to act openly and in accordance with a fair, equitable, competitive and cost effective system and in terms of supply chain management policy designed to have that effect.

[43] The award of government tenders is governed by s 217(1) of the Constitution. Accordingly, awards must be made in accordance with a system that is fair, equitable, transparent, competitive and cost effective. See *Moseme Road Construction CC & others v King Civil Engineering Contractors (Pty) Ltd & another* 2010 (4) SA 359 (SCA) para 2.

[44] It is common cause between the parties that no competitive bidding or procurement process as envisaged in s 217 of the Constitution read with s 112 of the LGMFMLA and reg 32 took place prior to the making of the purported appointments. In the circumstances, the inevitable conclusion I come to is that the agreements and the resultant appointments in question were null and void *ab initio* and that they were therefore invalid.

(b) Do the decisions of the applicant to procure office equipment and to appoint the respondents constitute an administrative action?

[45] Mr *Kissoon Singh* for the respondents has argued that the decision taken by the applicant to procure office equipment and the decision to conclude agreements with the first and second respondents to supply, service and maintain such equipment, were administrative actions which fall within the provisions of s 6 of the PAJA.

[46] Section 6(2) provides –

'(2) A court or tribunal has the power to judicially review an administrative action if –

(a) the administrator who took it -

(i) was not authorised to do so by the empowering provision;

(ii) acted under a delegation of power which was not authorised by the empowering provision; or

(iii) was biased or reasonably suspected of bias.'

[47] It is apparent from the provisions of s 6 that unfairness in the outcome or result of an administrative decision is not, apart from unreasonableness, a ground for judicial review of an administrative action. It is a long-held principle of our administrative law that the primary focus in scrutinising administrative action is based on the fairness of the process, not the substantive correctness of the outcome. In *Qaukeni Municipality* above, the court held that a public body may not only be

entitled but also duty-bound to approach a court to set aside its own irregular administrative act.

[48] Section 1 of the PAJA defines administrative action as meaning:

'. . . any decision taken, or any failure to take a decision, by –

(a) an organ of state, when –

(i) exercising a power in terms of the Constitution or a provincial constitution; or

(ii) exercising a public power or performing a public function in terms of any legislation; or

(b) a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision,

which adversely affects the rights of any person and which has a direct, external legal effect. . .'

[49] An administrative action entails a decision, or failure to make a decision, by a functionary, and which has a direct legal effect on an individual. See *Nedbank Ltd v Mendelow & another NNO* 2013 (6) SA 130 (SCA) para 25. In *Grey's Marine Hout Bay (Pty) Ltd & others v Minister of Public Works & others* 2005 (6) SA 313 (SCA) para 24 Nugent JA said:

'Whether particular conduct constitutes administrative action depends primarily on the nature of the power that is being exercised rather than upon the identity of the person who does so.' (Footnote omitted)

[50] When the applicant contracted with the respondents it was not exercising public power or performing a public function having a legal effect on an individual but rather procuring goods or services for itself. Its conduct cannot be said to fall within the ambit of the definition of an administrative action. Though there were irregularities in the applicant's procurement of goods and services for itself, the conclusion of the agreements could not be described as administrative action capable of review under the PAJA.

(c) Just and equitable relief

[51] I now turn to consider whether a just and equitable remedy may be afforded in this case instead of setting aside the procurement process or the appointments. Mr *Kissoon Singh* has contended that once a finding of invalidity is made, the affected decision or conduct must be declared unlawful and a just and equitable order must be made. In support of this contention Mr *Kissoon Singh* referred me to the legal approach adopted in *All Pay Consolidated Investment Holdings (Pty) Ltd & others v Chief Executive Officer, South African Social Security Agency, & others* 2014 (1) SA 604 (CC).

[52] If irregularities are found to amount to the grounds of review under the PAJA, the court is then enjoined to consider just and equitable relief which may be granted, instead of setting aside the contracts. See *All Pay Consolidated* para 45. In the present case, the central focus of the inquiry has been whether the decisions were correct and whether the process is reviewable as set out in the PAJA. The irregularities found in this case could not be described as constituting administrative action capable of review under the PAJA. The applicant municipality's procurement of the automation equipment through the contract between the first respondent and the Greater Kokstad Municipality has been declared unlawful, void and invalid and as such it could not be enforced. It is not that when making such procurement the applicant failed to take relevant considerations into account. The agreements have been declared unlawful and void *ab initio* on the basis that the provisions of s 217 of the Constitution and of reg 32 have not been complied with.

[53] It has been argued on behalf of the respondents that if the contracts with the respondents are terminated, the first respondent will suffer losses which are substantial and which will result in the closure of its business and the unemployment of some thirty five people. In addition, according to the first respondent, the second respondent is its integral business associate which fairly finances transactions in

which the first respondent is a party, and, it is one of only a few financial entities which is prepared to offer financing, on computer and allied equipment.

[54] The first respondent avers that the cancellation of the contract between the applicant and the respondents will deleteriously affect future business relations between the respondents since the second respondent is likely to decline financing the first respondent in future. The first respondent does not have the means to pay off the balance of the debt owing to the second respondent arising from the contract it concluded with the applicant.

[55] It is trite that contracts concluded without complying with prescribed processes are invalid. In *Premier, Free State & others v Firechem Free State (Pty) Ltd* 2000 (4) SA 413 (SCA) para 36, the court held that the province (the applicant) was not duty bound to submit itself to an unlawful contract and was entitled, indeed obliged, to ignore the delivery contract and to resist the respondent's attempts at enforcement. This position was affirmed in *Qaukeni Municipality* para 16 when Leach AJA said:

'I therefore have no difficulty in concluding that a procurement contract for municipal services concluded in breach of the provisions . . . which are designed to ensure a transparent, cost-effective and competitive tendering process in the public interest, is invalid and will not be enforced.'

[56] It is now therefore settled that a procurement contract for municipal services concluded in breach of the relevant provisions is invalid and cannot be enforced. All parties have conceded that it was inappropriate for the respondents to refuse to remove the automation equipment at the request of the applicant and equally so, for the applicant to continue using the equipment without paying for such use. Mr *Kissoon Singh* has argued on behalf of the respondents that notwithstanding the date of the contracts, the equipment was delivered, installed and utilised by the applicant as from November 2016. In the circumstances I deem it just and equitable

to order the applicant to pay to the first respondent rental for the use of equipment from the date the applicant requested the respondents to remove it from its premises until the date of its removal from the applicant's premises.

Order

[57] In the result the following order shall issue

(a) The application is granted with costs, such costs to include the costs consequent upon the employment of two counsel;

(b) The agreements appointing the respondents by the applicant as the maintainer and supplier of automation equipment respectively, are declared null and void, and set aside; and

(c) The applicant is directed to pay to the first respondent rental for the use of equipment from the date the applicant requested the respondents to remove the equipment from its premises until the date of its removal

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MADONDO DJP

Appearances

Date reserved:	25 May 2018
Date delivered:	6 July 2018
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