THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Case No: 175/09

In the matter between:

VIKING PONY AFRICA PUMPS (PTY) LTD t/a

TRICOM AFRICA **1ST Appellant**

BUNKER HILLS PUMPS (PTY) LTD t/a

TRICOM SYSTEMS **2ND Appellant**

and

HIDRO-TECH SYSTEMS (PTY) LTD **Respondent**

Neutral citation: *Viking Pony Africa Pumps v Hidro-Tech Systems* (175/09) [2010] ZASCA 23 (25 March 2010)

Coram: MPATI P, HEHER, MLAMBO, BOSIELO JJA AND SALDULKER AJA

Heard: 9March 2010

Delivered: 25 2010

Updated:

Summary: Tender process – Preferential Procurement Policy Framework Act – Regulations – duty of organ of state to act when it detects that a preference has been obtained on a fraudulent basis – when duty arises – nature of action contemplated – whether organ of state in breach of duty.

ORDER

On appeal from: Cape of Good Hope Provincial Division (Irish AJ sitting as court of first instance).

The appeal is accordingly dismissed with costs.

JUDGMENT

HEHER JA (MPATI P, MLAMBO, BOSIELO JJA and SALDULKER AJA concurring):

[1] A tender for the provision of goods or services to an organ of state is regulated by the Preferential Procurement Regulations published[1] pursuant to the provisions of the Preferential Procurement Policy Framework Act 5 of 2000. A contract must be awarded to the tender which scores the highest points.[2] Points earned for the tender price and functionality and local manufacture may be supplemented by a preference also reflected in points. Such points are earned by being a Historically Disadvantaged Individual (HDI), for subcontracting with an HDI and for achieving certain specified goals[3] and also for equity ownership by HDI's.[4] A tenderer who claims preference points on any basis has, as do all tenderers, to declare that information provided in the tender is correct.[5]

[2] Corruption in the tender process is endemic. This appeal concerns the interpretation and application of reg 15(1) with particular reference to the duty imposed on an organ of state to act against a person who has obtained a preference by fraud.

[3] Regulation 15 is headed 'Penalties' and provides as follows:

'(1) An organ of state must, upon detecting that a preference in terms of the Act and these Regulations has been obtained on a fraudulent basis, or any specified goals are not attained in the

1 GN 725 in GG 22549 of 10 August 2001.
2 Reg 13(11), subject to certain exceptions not presently relevant, and reg 3(4) or 4(4) (depending on the Rand value of the tender/procurement).
3 Reg 8(7).
4 Reg 13(1).
5 Reg 14.

performance of the contract, act against the person awarded the contract.

(2) An organ of state may, in addition to any other remedy it may have against the person contemplated in subregulation (1) -

(a) recover all costs, losses or damages it has incurred or suffered as a result of that person's conduct;
(b) cancel the contract and claim any damages which it has suffered as a result of having to make less favourable arrangements due to such cancellation;
(c) impose a financial penalty more severe than the theoretical financial preference associated with the claim which was made in the tender; and
(d) restrict the contractor, its shareholders and directors from obtaining business from any organ of state for a period not exceeding 10 years.'

[4] The first appellant ('Viking' trading as Tricom Africa) and the second appellant (Bunker Hill Pumps (Pty) Ltd 'Bunker Hill' which trades as Tricom Systems,) are companies that supply and install mechanical equipment for water and sewerage treatment works from a common place of business in Bellville.

[5] The respondent ('Hidro-Tech') carries on similar business activities from premises in Cape Town. It is a competitor of the appellants. The origin of the present dispute lies in Hidro-Tech's repeated lack of success in winning contracts put out to tender by the City of Cape Town ('the City'). Several of these contracts were awarded to Viking despite the submission of lower tender prices by Hidro-Tech. The inference which Hidro-Tech drew was that Viking succeeded because of preference points derived from its HDI profile.

[6] Regulation 13 provides (to the extent relevant):

'(1) Preference points stipulated in respect of a tender must include preference points for equity ownership by HDIs.
(2) The equity ownership contemplated in subregulation (1) must be equated to the percentage of an enterprise or business owned by individuals or, in respect of a company, the percentage of a company's shares that are owned by individuals, who are actively involved in the management of the enterprise or business and exercise control over the enterprise, commensurate with their degree of ownership at the closing date of the tender.
(3) In the event that the percentage of ownership contemplated in subregulation (2) changes after the closing date of the tender, the tenderer must notify the relevant organ of state and such tenderer will not be eligible for any preference points.
(4) Preference points may not be claimed in respect of individuals who are not actively involved in the management of an enterprise or business and who do not exercise control over an enterprise or business commensurate with their degree of ownership.'

[7] Hidro-Tech had its suspicions about the genuineness of Viking's HDI representivity but it was not until two former directors and employees of that company joined it that it was able to obtain apparent confirmation.

[8] On 17 January 2008 Jacques Viljoen Attorneys of Bellville caused two letters to be delivered to the City, addressed to the head of Tenders and Contracts and marked for the attention of Mr Ian Bindeman. Together they contain the information on which Hidro-Tech relied in its application to court as having given rise to the duty on the City to act against Viking and Bunker Hill. I therefore set their content out in full:

'RE: FRONTING PRACTICES OF VIKING PONY AFRICA PUMPS (PTY) LTD T/A TRICOM AFRICA REGISTRATION NUMBER: 2000/021393/07

We refer to the above and advise that we act on behalf of Hidro -Tech Systems (Pty) Ltd.

Our instructions are as follows:

1. Our client was unable to procure certain contracts from the City of Cape Town, despite having tendered the lowest contract price.

2. Our client failed to procure these contracts due to the fact that our client's HDI status is measured at 30% whilst Tricom Africa's status is indicated as 70%.

3. Our client suspects that Tricom Africa is engaging in f ronting practices in that:

3.1 Historically Disadvantaged Individuals being directors and shareholders are introduced on a basis of tokenism and are discouraged and inhibited from substantially participating in the core activities of Tricom Africa in that they are being excluded from any management decisions;

3.2 the economic benefits received by Tricom Africa, because of its HDI status, do not flow to Historically Disadvantaged Individuals in the ratio as specified per their shareholding in Tricom Africa;

3.3 Tricom Africa is utilized as an opportunistic intermediary whilst the actual benefit received from tenders awarded to Tricom Africa, are routed to a sister company known as Bunker Hills Pumps (Pty) Ltd t/a Tricom Systems ("Tricom Systems"), which company is wholly white owned.

We are of the opinion, after having consulted with two former directors of Tricom Africa and Tricom Systems, that the fronting practices referred to in paragraph 3 above exist and accordingly request you to urgently investigate this matter.

In order to assist you in your investigations, our client has requested us to prepare a separate confidential document, which shall be furnished to you under separate cover detailing the manner in which Tricom Africa is conducting these fronting practices.

Kindly contact the writer if any further details and/or assistance are required.

We await to hear from you.'

[9] The text of the accompanying letter was as follows:

'RE CONFIDENTIAL INFORMATION REGARDING FRONTING PRACTICES OF TRICOM AFRICA

We refer to our letter of even date and, as undertaken, furnish you herewith, with the confidential information to be utilized by you, in your investigations into the fronting practices of Tricom Africa.

We have been instructed to bring the following to your attention:

1. A former director of Tricom Africa, Mr Johannes James, is now in the employ of our client.

2. Mr James was a director of Tricom Africa for 3 years during 2003 until 20 06.

3. Mr James was also a shareholder of Tricom Africa and held a 35% shareholding in that company.

4. Mr James is a Historically Disadvantaged Individual.

5. A former director of Tricom Systems, Mr Heinie Zandberg, is also now in the employ of our client.

6. Mr Zandberg was a director of Tricom Systems during 2006.

7. Mr Zandberg was also a shareholder of Tricom Systems and held a 10% shareholding in that company.

8. In addition Mr Zandberg was also an employee of Tricom Africa.

9. Attach hereto marked "A" are copies of extracts from the records of the registrar of Companies from which it is evident that the two companies, Tricom Africa and Tricom Systems, share certain directors.

10. Tricom Africa has one Historically Disadvantaged Individual director, Mr Daniel Mosea, who is also a 70% shareholder of that company.

11. Tricom Systems on the other hand is wholly white owned.

12. During the period May – December 2006, whilst Mr Zandberg was an employee of

Tricom Africa, he received a monthly remuneration package of R23 500.00 together with medical aid, a company credit card for expenses as well as a petrol card. Of the R23 500.00 an amount of R13 500.00 was paid by Tricom Africa whilst the further amount of R10 000.00 was paid by another entity known as New Heights. Furthermore Mr Zandberg was entitled to spend R10 000.00 per annum on the company credit card with no strings attached.

13. Whilst Mr Zandberg was an employee of Tricom Africa, Mr James, who was a director of Tricom Africa, received a monthly remuneration package of only R5 600.00 together with medical aid but no company credit card or petrol card.

14. During his time as director of Tricom Africa Mr James was never involved in any meaningful business decisions in respect of the company and was never informed of the financial status of the company nor did he have any access to financial statements, financial records or any management accounts. He was also never informed of how dividends were calculated.

15. It must also be noted that despite the fact that Tricom Africa has an estimated annual turnover in excess of R35 000 000.00 with an approximate net profit of R1 500 000.00, Mr James, upon resigning from Tricom Africa, only received an amount of R23 000.00 for his 35% shareholding in that company. In addition, Mr James, being a 35% shareholder, only received dividends of R47 000.00 over the three year period whilst he was a shareholder and director of this company.

16. In contrast to the above, Mr Zandberg, was given the opportunity to purchase shares in Tricom Systems during May 2006. At the time the value of the shareholding of both Tricom Africa and Tricom Systems were valued in an amount of R6 000 000.00.

We trust that you shall be able to utilize the abovementioned information in your investigations. We suggest that in the event of you being desirous to contact Messrs James or Zandberg, you do so via our offices in consultation with the writer.

We urge you to treat the abovementioned information as extremely confidential as our client may contemplate legal action against Tricom Africa and would not like any evidence to be destroyed once Tricom becomes aware of your investigations into their fronting practices.

Kindly contact the writer if any further information or assistance is required.'

[10] On 8 February 2008 the attorneys followed the earlier letters with another on the same subject:

'We refer to the above and in particular to our letter dated 17 January 2008 which was delivered to your Mr Bindeman by hand on 17 January 2008 and the subsequent telephone conversations the writer had with your Mr Bin deman.

We confirm your Mr Bindeman's advices that the fronting practices by the Tricom Group as evidenced by our abovementioned letters were reported to your data base managers, Quadrem Tradeworld. We further confirm your Mr Bindeman's advices that after Quadrem Tradeworld approached the Tricom Group, they were informed that a shareholders change is currently taking place and those details of such shareholders change will be provided within 7 days.

We, with respect, wish to point out that the above actions are not sufficient in that Quadrem Tradeworld do not have the ability nor is it their function to investigate the allegations of fronting made by our client. They are merely managing your data basis.

We therefore, once again, bring to your attention the fronting practices taking place within the Tricom Group as set out in our letters of 17 January 2008.

We urge you to have regard to what constitutes a fronting practice such as:

1. Historically Disadvantaged Individuals being directors and shareholders are introduced on a basis of tokenism and are discouraged and inhibited from substantially participating in the core activities of a business and are excluded from management decisions.

2. The economic benefits received by a business, because of its HDI status, do not flow to Historically Disadvantaged Individuals in the ratio as specified per their shareholding in such business.

The practices alluded to above cannot be properly investigated by Quadrem Tradeworld as it is not in their brief to do so, as they are merely data basis managers. It is up to the City of Cape Town to investigate these fronting practices and to ascertain whether such practices are taking place and to act accordingly once such practice has been established.

We wish to place on record that our client has suffered damages as a result of contracts being awarded to the Tricom Group based merely on their HDI status whilst in fact they were and still are undertaking fronting practices. In this regard we refer to the Race Course Road Pump Station (tender number WR11/2007), which was awarded to them whilst our client had submitted the lowest tender. We also understand from our client that an award is about to be made in respect of the Potsdam Filter Pump Station Upgrade (tender number Q07/114) and that the Tricom Group in all likelihood will once again be awarded this contract based on their HDI status when in fact they are partaking in fronting practices which practices are defeating the whole object of Black Economic Empowerment.

We have accordingly been instructed by our client to demand from you, as we hereby do, that the City of Cape Town urgently investigate the fronting practices of the Tricom Group failing which our client shall have no alternative but to approach the High Court for an interdict compelling the City of Cape Town to do so and furthermore claim damages from the City of Cape Town for the financial losses suffered and to be suffered by our client as a result of tenders being awarded to the Tricom Group of Companies in circumstances where they are conducting fronting practices.'

[11] Not receiving a response which satisfied his client, Mr Viljoen wrote again on 19 February in the following terms:

'We refer to our letters dated 17 January 2008 addressed to your Mr Ian Bindeman, our telefax addressed to your Mr Leonard Shnaps dated 8 February 2008 as well as the subsequent telephone conversation with your Mr Shnaps on 18 February 2008.

We confirm that during a telephone conversation on 11 February 2008, regarding the contents of our letters under reference, we were advised by Mr Shnaps that the City of Cape Town is unable to take any action against Tricom at this stage, and that our client's remedy would have to be to approach the High Court. During the telephone conversation with Mr Shnaps on Monday 18 January 2008, during which writer pointed out various statutory provisions relating to this issue, writer was advised to address another letter to the City, referring to the particular applicable statutory provisions, upon receipt of which Mr Shnaps would take the matter up with the City's legal advisors and revert to us on an urgent basis.

Our understanding of the situation, after having consulted counsel, is as follows:

1. On the evidence that we have presented in our letter of 17 January 2008 (which letter is marked "confidential"), there can be absolutely no doubt that Tricom was and possibly still is guilty of fronting practices and/or fraudulent representation of its HDI status. We annex hereto as "A" and "B", copies of affidavits by Messrs James and Zandberg, confirming the contents of the abovementioned letter addressed to your Mr Bindeman dated 17 January 2008. We have every reason to believe that these unlawful practices are ongoing.

2. The relevant legislation, subordinate legislation and policy documents that we wish to bring to your attention (although this should not be necessary), are the following:

2.1 In terms of sec. (b) of the "Guidelines on Complex Structures and Transactions, and Fronting (previously statement 002)" of the Department of Trade & Industry (a copy of the relevant pages being annexed as "C" hereto): "*Fronting means a deliberate circumvention or*

attempted circumvention of the BBBEE Act[6] *and the codes*" and includes "*window-dressing*" which include the situation where black people are appointed or introduced to an enterprise on the basis of tokenism;

2.2 Item 9.4, Vol. 1 of the Procurement Policy Initiative of the City of Cape Town (a copy of the relevant pages being annexed as "D"), in terms of which a contractor found guilty of "*misrepresenting any facts in respect of either ownership or empowerment indicator, either in a tender submission, or on the supplier data base, in order to effect the outcome of a tender, either before or after the award of a contract, (shall) with the approval of the Implementing Agent, be blacklisted on the supplier data base for a period of 12 months and shall be notified accordingly. The effect of such blacklisting is that absolutely no further work may be awarded to that contractor*

6 Broad-Based Black Economic Empowerment Act 53 of 2003.

for the duration of the blacklisting".

2.3 Section 13(4) of the Preferential Procurement policy Framework Act, 5 of 2000, which forbids the claiming of preference points in respect of individuals who were not actively involved in the management of an enterprise or business and who do not exercise control over an enterprise or business commensurate with their degree of ownership;

2.4 Section 15(1) of the said Act (copies of the relevant pages are annexed as "E") in terms of which **an organ of state must, upon detecting that a preference . . . has been obtained on a fraudulent basis**, act against the person awarded the contract, and Section 15(2) in terms of which an organ of state may, *inter alia*, cancel the contract and claim damages, impose a financial penalty, and restrict the contractor, its shareholders and directors from obtaining business from any organ of state for a period not exceeding 10 years.[7]

2.5 Section 8 of the Promotion of Administrative Justice Act, 3 of 2000 (a copy of the relevant pages are annexed as "F"), setting out the relief that may be granted together with judicial review proceedings, including [in sub]paragraph 1(c)(ii)(bb)] directing the administrator or any other party to the proceedings to pay compensation and in terms of sub-section 8(1)(e), granting a temporary interdict or other temporary relief.

3. You are also reminded of the common law principle that "*fraud unravels everything*", which is particularly pertinent to this situation.

4. According to our instructions, apart from instances in the past where our client has lost tenders to Tricom (in respect of which our client's rights to claim damages are reserved), there are two current tenders which are affected, namely:

4.1 Tender no WR11/2007 in respect of the Race Course Road Pump Station, which we believe was awarded to Tricom on or about 15 December 2007; and

4.2 Tender no Q07/114 for the Potsdam Filter Pump Station upgrade, in respect of which the tenders closed on or about 14 December 2007, but which ha s not yet been awarded.

5. Our instructions are to demand that we be given the assurance by no later than 17h00 on

7 Emphasis in the original letter.

Tuesday 26 February 2008, that the City of Cape town will:

5.1 on an urgent basis investigate, or cause to be investigated, the fronting practices of Tricom and act in accordance with the relevant legislation and policy guidelines that we have referred to. In this regard we point out that it is of no use whatsoever to simply refer the matter to the database managers, Quadrem Tradeworld (as your Mr Bindeman has done), who has already advised writer hereof that they do not conduct any investigations "behind" the stated shareholding of a company; and

5.2 immediately suspend all work on the Race Course Project and completion of the tender process in respect of the Potsdam Project, pending the outcome of any investigation,

failing which, our client shall have no alternative other than to approach the High Court on an urgent basis for a *mandamus*, compelling the City to comply with its aforesaid obligations and a temporary interdict halting the aforesaid projects, pending the outcome of such investigations.'

In their enclosed affidavits Messrs James and Zandberg each confirmed the truth and correctness of the contents of the confidential letter in so far as it related to him.

[12] In short, the two letters of complaint alleged that Viking had

(1) tendered for and been awarded contracts on the strength of its HDI status as represented in its tender submissions; and

(2) misrepresented its HDI status in that its HDI directors were token appointees excluded from active participation in management, decision-making and oversight of its financial affairs.

The complaints were buttressed by affidavits from one former HDI shareholder and director (James) and one former non-HDI shareholder and director (Zandberg) confirming that HDI directors and shareholders did not receive financial benefits proportionate to their ostensible shareholding and measure of control and that the profits accrued by the award of the tenders were largely passed on to Bunker Hill, whose directors and shareholders were not historically disadvantaged persons. The inference necessarily borne by these allegations is that Mosea, who took over James's 35% shareholding and now holds 70% of the equity of Viking, is likewise a puppet of those who control Bunker Hill.

[13] As counsel for the appellants readily conceded, the substance of the complaint was serious. It was reinforced by the confirmation of persons who might reasonably be expected to know the truth. The City had no well-grounded reason to doubt their

veracity or reliability. I will, for the moment, postpone reference to the City's reaction and response to the complaint. Suffice to say that Hidro-Tech found it unsatisfactory. It was advised that the City had been obliged by reason of the substance of the complaint to act against Viking and Bunker Hill as contemplated by reg 15(1) but refused to do so and that the City was also in breach of its own Procurement Policy Initiative (which had been referred to in its letter of 19 February 2008).

[14] Hidro-Tech applied to the Cape High Court for an order against the City and Viking in the following terms:

'That a *rule nisi* be issued calling upon the First Respondent and any other interested parties to show cause, on a date to be determined by this Honourable Court, why an order in the following terms should not be made:

2.1 That the First Respondent be ordered to act against the Second Respondent in accordance with section 15 of the Regulations promulgated in terms of the Preferential Procurement Policy Framework Act, 5 of 2000;

2.2 That the First Respondent acts against the Second Respondent in accordance with item 9.4 of the Procurement Policy Initiative of the City of Cape Town;

2.3 In the alternative to paragraphs 2.1 and 2.2 above, and only in the event of the Honourable Court finding that further investigation is required in order to enable the First Respondent to so act against the Second Respondent, that the First Respondent[8] be ordered to conduct or cause to be conducted a sufficiently thorough investigation into the Applicant's complaint of fronting practices by the Second Respondent, which investigations must be concluded within a reasonable time period, but no longer than two months from the date of such order;

2.4 That, in the event of the Honourable Court ordering that a further investigation is required as prayed for in paragraph 2.3 above, no tenders for contracts be awarded to the Second Respondent by the First Respondent, pending the conclusion of such investigation;

2.5 Costs of the application to be borne by the Respondents'.

8 In terms of an amendment effected at the commencement of the hearing. Paragraph 2.3 had previously provided for an investigation to be conducted by a forensic auditor.

[15] Viking, Bunker Hill and the City opposed. The companies made common cause and filed extensive affidavits supported by the production of minutes of meetings of Viking's

directors and Management Meetings of 'the Tricom Group' and 'the Tricom Board' as well as a Shareholders' Agreement between the shareholders of Viking concluded on 3 August 2004 to which Messrs Mosea and James as well as other (white) shareholders were parties. The primary focus of the opposition appeared to be the rebuttal of what was perceived as a case of fraudulent misrepresentation made in the founding affidavit. As counsel for the appellants conceded, that approach was misconceived because the true nature of Hidro-Tech's case was to persuade the court that *the substance of the complaint* was sufficient to trigger the City's duty under reg 15(1).

[16] The affidavits filed on behalf of the City, deposed to by Messrs Bindeman and Shnaps, were principally addressed to establishing that the City had given (and would continue to give) serious attention to the complaint.

[17] The application was argued before Irish AJ. He made a final order in the following terms:

'1. The First Respondent is ordered to act against the Second Respondent in accordance with section 15 of the Regulations promulgated in terms of the Preferential Procurement Policy Framework Act 5 of 2000;

2. The First, Second and Third Respondents are ordered , jointly and severally, to pay the costs of the application, including the costs occasioned by the amendment of the notice of motion.'[9]

The careful judgment of the learned judge is now reported as *Hidro-Tech Systems (Pty) Ltd v City of Cape Town and Others* 2010 (1) SA 483 (C).

[18] The key findings of the learned judge may conveniently be summarised in his own words:

'On the probabilities established by the Second Respondent's own documentation together with the allegations of the applicant which have not been denied, I am satisfied that neither James nor Mosea were actively involved in the management of the Second Respondent or exercised control over it to an extent commensurate with their respective shareholdings at the time of the

9 He also granted orders in favour of Hidro-Tech against Viking and Bunker Hill relating to a striking out application and a counter-application neither of which is at issue in this appeal.

submissions by the Second Respondent of the tenders awarded in the years 2006 and 2007 and set out in annexure "RJV3" to the founding affidavit.'[10]

As to the role played by the City, the learned judge wrote:

'It is probably true that the First Respondent's officials felt somewhat unsure of their powers, given the wording of the regulations. But they nevertheless did regard themselves as obliged to investigate the complaint. The real problem is that their investigation did not address the complaint.[11]

'I accordingly find that the applicant was justified, firstly, in bringing the complaint to the attention of the First Respondent and, secondly, in forming the opinion that the First Respondent's response to such complaint was wholly inadequate to safeguard the applicant's constitutional rights and legitimate commercial interests.'[12]

[19] As to the proper interpretation of reg 15 in the context of the Act and Regulations designed to fulfil the constitutional role of a mechanism to ensure openness and accountability in public procurement, Irish AJ concluded:

'If the Minister had intended that action only be taken "after establishing", or "after satisfying itself" or any other of the many other phrases routinely employed in regulatory enactments, he would presumably have said so. In my view, in employing the participle "detecting", the Minister intended to cast a very wide net, precisely so as to ensure that an organ of state be proactive in responding to the reasonable possibility that a preference has been obtained fraudulently, or that a specific goal of its preferential policy in terms of which a contract was awarded is not being pursued.'[13]

And, further:

'In my view, the action to be taken by the organ of state is dependent upon the nature of the information that reaches it. If that information constitutes what is at face value no more than a credible complaint, seriously advanced, of the obtaining of a preference by fraudulent means, then the organ of state must act (and would presumably usually so do) by requiring the tenderer in question to provide proof of its real and operative HDI status. The organ of state might appoint a forensic accountant to analyse any proof furnished on its behalf; or to assist it in calling for such further documentation as might be required. There is no undue hardship in requiring a tenderer who has claimed a certain status from being required to justify that claim. Indeed, an entity that does not wish to be put in the position of having to justify a claimed HDI status, should not claim such when tendering.'[14]

[20] Irish AJ granted the unsuccessful respondents leave to appeal to this Court. The City did not participate in the appeal. It elected to abide our decision.

10 Para 22 of the judgment a quo.
11 Ibid para 70.
12 Ibid para 71.
13 Ibid para 65.
14 Ibid para 67.

[21] Counsel were *ad idem* before us that the court *a quo* had erred in entering upon an assessment of the probabilities and in relying upon evidence adduced in the application that went beyond the content of the complaint to the City.

[22] I hope I do Mr Dickerson, counsel for the appellants, no injustice when I describe his argument as consisting of two major submissions, one factual, the other legal.

[23] The first argument was to the following effect:

1. Hidro-Tech had, both in its correspondence and founding affidavit, made claim only to an investigation by the City. Its grouse was that the investigation which the City had purported to undertake did not address the complaint.

2. Viking and Bunker Hill had never been opposed to a proper investigation by the City. But a failure to investigate properly or at all was insufficient to breach reg 15 because the compulsion to act could only arise after the completion of any investigation. Until then there could not be said to be a detection of fraudulent preferment because to 'detect' meant to 'establish as a fact'.

3. From the evidence placed before the court *a quo*, the City regarded investigation of the complaint as necessary. It was equally clear that its investigation had not been completed before the application was brought. Therefore the duty to act had not arisen, could not have been breached and the order of the court *a quo* that its act was incompetent or, at least, premature.

[24] I do not agree with counsel's analysis of the correspondence or the founding averments. The thrust of Mr Viljoen's letters to the City was the spelling out of facts which justified an immediate inference of fraudulent preferment: '. . . there can be absolutely no doubt that Tricom was and possibly still is guilty of fronting practices' (letter of 19 February 2008). In the same letter he called upon the City, 'on an urgent basis' to 'investigate . . . and act'. In my view the call to investigate was not an acknowledgement that the fraud was not established on the face of the complaint, but was merely a practical recognition that the City might first wish to try to confirm the allegations. The cardinal response which Hidro-Tech demanded was action.

[25] The content of the founding affidavit is in essence a reiteration of the factual

allegations made in the letters. The case is not that Viking's HDI participation *may be* a sham but that it *is* a sham and that Viking *is* simply a front for Bunker Hill[15] and that the tenders *were* obtained unlawfully[16]. It is the *facts* which have been brought to the City's attention 'to no avail'[17] not merely Hidro-Tech's subjective suspicions. The deponent says that Hidro-Tech has no alternative but to seek an order against the City 'to comply with its statutory obligations to investigate the Applicant's complaints and act against [Viking and/or Bunker Hill] accordingly, thus drawing a clear distinction between investigating the complaint and acting upon it, but claiming relief in both forms (as did the Notice of Motion). Later in the founding affidavit the applicant states unequivocally that 'the evidence' (ie the same averments as those in the letters of complaint) 'clearly shows unlawful fronting practices' giving rise to an alleged clear right in the applicant.[18]

[26] In summary, I am left in no doubt that Hidro-Tech relied on the sufficiency of the complaint to trigger the duty to act and regarded investigation as a fall-back option. That being so, the order granted by Irish AJ was consonant with the case made out.

[27] In so far as it was argued on behalf of Hidro-Tech (and Irish AJ found) that the City's investigation did not address the complaint, the thrust was twofold: the City was delaying in acting upon the complaint to no purpose and, for the purpose of the alternative relief directed to a proper investigation, to show that what the City relied on as compliance with the duty to investigate was in fact no compliance at all. That argument was not an indication that Hidro-Tech rested its complaint or its case solely on an alleged duty to

15 Para 24 of the founding affidavit.
16 Ibid para 25.
17 Ibid para 26.
18 Ibid paras 37 and 38.

investigate.

[28] Having found that Hidro-Tech indeed relied on a breach of a duty to act, as reg 15 requires, it follows that the learned judge would have been wrong to order the City to carry out an investigation. That is so because the duty is not circumscribed in that regulation. The organ of state has the primary responsibility to decide on the form of action that it regards as appropriate. The court *a quo* had only to find that the duty to act had been triggered by the complaint.

[29] But the duty to act only arises once a fraudulent preference has been detected by an organ of state. That brings me to Mr Dickerson's second, legal, submission, which I summarise as follows:

1. On a proper interpretation of s 15 there can be no 'detection' of the obtaining of a fraudulent preference unless the existence of that jurisdictional fact is established to the satisfaction of the organ of state. Such establishment requires more than suspicion or even prima facie proof: the organ of state must be satisfied that the complaint is proved as a fact.
2. In support of this degree of proof Mr Dickerson argued that 'detection' is, in the context of reg 15, an administrative act which requires the application of principles of fairness, including the affording to the party complained against insight into the complaint and the opportunity to address it before a conclusion is reached by the City.
3. Furthermore, reg 15 is punitive in its purpose and effect. Because 'detection' leads to penal consequences the organ of state cannot be expected to act before it is certain of its facts.

[30] Irish AJ undertook a careful analysis of reg 15(1) with particular regard to its place in the promotion of the process established by parliament in order to satisfy the constitutional imperatives.[19] I do not think I can improve on it. He examined the possible meaning and scope of the phrase 'upon detecting' in the context that he had thus identified. I agree with both the process of his reasoning and his conclusion that:

> 'In my view, in employing the participle "detecting" the Minister intended to cast a very wide net, precisely so as to ensure that an organ of State be proactive in responding to the reasonable possibility that a preference has been fraudulently [obtained], or that a

19 At paras 41 to 56 of the judgment.

specific goal of its preferential policy, in terms of which a contract was awarded, is not being pursued.' [20]

[31] I wish to add only two comments to the reasoning of the learned judge. The first is that because 'detect' connotes the discovery or awareness of a certain state of affairs not previously known to the person who so detects, it would strain the meaning unduly to limit it to a conclusion reached at the end of a process of investigation or confirmation; in everyday speech 'detect' bears the sense of a provisional or unilateral opinion as to the given state (as in 'I detect hesitation in your voice') which is open to contradiction rather than carrying the force of a final judgment on the matter. The second is that the range of action open to an organ of state is limited only by its appropriateness to the proper addressing of the fraud detected by it. The clearer the fraud the more decisive the action is likely to be. (But the option of further investigation where the City is unsure is not excluded.) One of the most common ways of dealing (properly) with an allegation of fraud is to refer the complaint to the police or director of public prosecutions. In neither instance need investigation be completed by the person who refers it or before it is referred, nor is that person required to achieve any particular level of proof in his own mind before he so acts, so long as he is not motivated by malice in so doing.

[32] I do not agree with Mr Dickerson that reg 15 is punitive as a whole. It is true that the detection and action contemplated in subreg (1) may lead to a remedy at the instance of the organ of state which may take the form of one of the types of redress for which subreg (2) provides. But subreg (1) is essentially remedial in nature: it ensures that no organ of state will remain passive in the face of evidence of fraudulent preferment but is obliged to take appropriate steps to correct the situation. The remedies to which subreg (2) refers are discretionary and, if invoked, need not be an immediate consequence of the action contemplated in subreg (1).

[33] The fact that reg 15 bears the caption 'Penalties' is neither here nor there. The

20 Ibid paras 65 and 67. See also para 19 above.

importance of headings in the interpretation of statutes is well-recognised.[21] But I am by no means certain that the same rule should be applied to subordinate legislation (such as these regulations) more particularly when regard is had to the rationale for permitting reference to headings but not to side-notes: *S v Liberty Shipping and Forwarding* 1982 (4) SA 280 (D) at 285E-F.[22] It is, however, unnecessary to resolve the question since the heading 'Penalties' is reconcilable with the potentially damaging consequences of action against a party responsible for obtaining a tender preference through fraud even if such action falls outside of reliance on the remedies referred to in subreg (2). Thus no conflict with the interpretation placed on reg 15(1) by Irish AJ flows from the caption.

[34] Nor am I able to agree with counsel that the detection of fraud which reg 15 contemplates is *per se* 'administrative action' within the definition in s 1 of the Promotion of Administrative Justice Act 3 of 2000 ('PAJA'). If such a detection is overtly made (and it need not be) and an organ of state has evidence that a tender has been procured through a fraudulent preference, the detection does not of itself have the capacity to affect the rights of any person.[23] Nor does it exercise a direct, external effect (although it may do so within the organ inasmuch as it is bound to act upon the fraud that it has detected). Of course, once a duty to act arises, if the action that is decided upon constitutes administrative action, the target of the action will be entitled to rely upon the protection afforded by PAJA.

[35] Appellant's counsel attached weight to a dictum of this Court in *Chairman, State Tender Board and Another v Supersonic Tours (Pty) Ltd* 2008 (6) SA 220 (SCA). In that case the State Tender Board resolved to restrict the company and its directors from obtaining any business from an organ of state for a period of 10 years. It did so purporting to act pursuant to the powers conferred on an organ of state by reg 15.

21 *Turffontein Estates Ltd v Mining Commissioner, Johannesburg* 1917 AD 419 at 431; *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC) at para 12; *Ex parte President of the Republic of South Africa: In re Constitutionality of the Liquor Bill* 2000 (1) SA 732 (CC) at para 27; *S v Jordan and Others* 2002 (6) SA 642 (CC) at para 49.

22 Counsel were unable to furnish a precedent and my own research has uncovered no authority in point.

23 *Grey's Marine Hout Bay (Pty) Ltd v Minister of Public Works* 2005 (6) SA 313 (SCA) at para 23.

Although the decision was an administrative act within the meaning of PAJA[24] the Court held that an 'incorrect' claim for preference does not, without more, permit reliance on reg 15(1) (and consequently, also upon reg 15(2)). Cloete JA referred to the requirements of subreg (1) as 'either that the preference was obtained on a fraudulent basis, or that there was non-attainment of specific goals in the performance of the contract'.[25] Counsel tried to support his submission as to the need to *establish* the existence of a fraudulent preference on this weak foundation; weak because the learned judge was only concerned to paraphrase the requirement and was not at all interested in spelling out the ambit of its operation.

[36] I must now give attention, brief as it may be, to the submission that the City had not arrived at the stage of taking action before the application was brought. Here too I agree with the reasoning and conclusions of Irish AJ quoted above. The City referred the complaint to Tradeworld, a 'verification agency', because, according to Mr Bindeman:

'It is impossible for the City to keep abreast with all of the changes in shareholdings, shareholders agreements and actual flow of money betwee n related companies. . .
However, for the purposes of investigating fronting practices, the investigations of [Viking] will go further than merely the information on Tradeworld's database.'

Unfortunately, the role and expertise of Tradeworld remained unexplained. No affidavit was filed on its behalf. The court *a quo* was left to guess as to how the investigations would be carried beyond Tradeworld's database. In so far as the City relied on an investigation that had been initiated it was coy to the point of concealment as to the detail. What is beyond dispute is that Mr Bindeman, Head: Tenders for the City, perplexed as to the means of proceeding, sloughed off its responsibility and diverted Hidro-Tech's attorney to the Department of Trade and Industry, rather than take a meaningful decision.[26] Mr Shnaps, Director: Supply Chain Management, for the City, notified Viljoen in late February 2008 that 'the City is unable to take any action against Tricom at this stage'. When Bindeman deposed to his affidavit on 28 March, he stated, 'This is still the position'. It was clear, as the learned judge found, that the City had

24 At para 14 of the judgment.

25 At 228B.

26 In an e-mail to Ms Bence of Tradeworld on 20 December 2007 Bindeman recorded: 'I have been given advice from our legal staff not to "involve the City", but rather refer the complainant to the Department of Trade and Industry.'

taken no rational step to address the complaint. There was, therefore, no decision taken by the City which the court *a quo* needed to set aside before making its own order. Since the allegation of fraudulent procurement was serious, clear, particularised, supported by cogent sworn statements and stood uncontradicted, only an official who was unreasonably cautious could have neglected to take appropriate action. The City was in breach of its duty from, at least, the time of receiving the affidavits of James and Zandberg on about 19 February.

[37] I conclude that the court *a quo* did not err in granting the relief it did. The appeal is accordingly dismissed with costs.

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J A Heher
Judge of Appeal

APPEARANCES

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