IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION)

HELD AT EAST LONDON **CASE NO: EL 1544/12**

ECD 3561/12

Date heard: 11 June 2013

Date delivered: 25 June 2013

REPORTABLE

In the matter between:

EVALUATIONS ENHANCED PROPERTY APPRAISALS (PTY) LTD	Applicant

and

THE BUFFALO METROPOLITAN MUNICIPALITY	1st Respondent
PRIMELAND PROPERTIES (PTY) LTD	2nd Respondent
AND THE FURTHER RESPONDENTS AS PER ANNEXURE "A" TO THE NOTICE OF MOTION FILED BY THE APPLICANT ON 27 NOVEMBER 2012	Further Respondent

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JUDGEMENT

DUKADA J:

[1] As previously observed by the Supreme Court of Appeal in a number of cases, awards of tenders are "*a fruitful source of litigation which has led to Courts being swamped with cases concerning complaints about the award of contracts."*[1]

The case at hand is one of them.

[2] The essential facts are largely common cause and are these.

During 2011 or 2012 tenders were called for by the first respondent for contract No.2953, inviting bids from experienced and suitably qualified registered property valuers for the compilation and maintenance of the general valuation rolls as well as the supply of other valuation related services in compliance with the Local Government Municipal Property Rates Act, 2004 (Act No.6 of 2004). The tender document contained a number of conditions, the details of which are not necessary at this stage.

The date of valuation was determined as 1 July 2013 and the implementation of the certified valuation was to take effect on 1st July 2014. The closing date for the submission of the tenders was 14 February 2012.

The applicant submitted its tender before that closing date. The second and further respondents also submitted their tenders. Later the applicant discovered in the website of the first respondent that the tender had been awarded to the second respondent. After the tender

[1] Groenewald v M 5 Developments 2010 (5) SA 82 (SCA) at 83 A; Moseme Road Construction CC and Others v King Civil Engineering Contractors (Pty) Ltd and Another 2010 (4) SA 359 (SCA) at 361 A-B

had been awarded to the second respondent the applicant was never notified of that decision and that her bid has failed.

Applicant made numerous attempts during or about August 2012 to get information from the first respondent about the outcome of the invitation to tender but in vain.

On the 21 August 2012 the applicant wrote a letter to the Municipal Manager of the first respondent the relevant contents of which read as follows:-

"*We have on numerous occasions over the past two weeks, enquired on the outcome of the process regarding the General Valuation 2013 Tender Contract No. 2953, as an interested party to the process. We have recently been informed by Supply Chain for the Municipality, Mr Christian Mkhosana, that the General Valuation Project Tender has been awarded. We hereby require as a matter of urgency, your written response as to whether the award has been made or whether the tender is still in the process of being adjudicated.*

We urge you to treat our request as urgent as if the tender has already been awarded it is our intention to lodge an objection against the decision by the Municipality to award this tender in terms of Section 62 of the Municipal Systems Act and to record our dissatisfaction with the entire process including the adjudication process leading up to any such award.

Furthermore if the award has been made and a service provider been appointed at this late stage, we request the urgent disclosure of all

documentation on the entire process, scoring and technical competence of the service provider.

We advise that should you fail to respond to our above urgent request by the close of business on the 14 September 2012 we propose instructing Counsel to move an urgent application in the High Court for the following relief:-

(i) *that the project to be stopped based on it being awarded irregularly; and*

(ii) *for a comprehensive forensic investigation into the process by the Office of the Public Protector and or the Special Investigating Unit;*

(iii) *that the cost of the action be paid by you".*

The first respondent did not respond to this letter and applicant's attorneys wrote a letter on the 3 October 2012 calling upon the first respondent to respond to the afore-quoted letter before the close of business of the day failing which the applicant would proceed with an urgent application in the High Court.

First respondent replied by her letter dated 11 October 2012 in which she basically called upon the applicant to comply with the requirements of the Promotion of Access to Information Act 2 of 2002.

On the 5 November 2012 the first respondent wrote a letter to applicant's attorneys informing them that it has not received the requisite standard complaint form and that it would continue to implement the General Evaluation Project as further delays would impact on its progress.

The first respondent further wrote a letter to the applicant on the 16 October in response to the latter's letter of 11 October 2012, advising that no Service Level Agreement has been signed yet and that the project had not yet started.

Applicant's attorneys again wrote a letter to the first respondent on the 7 November 2012 advising that they have been instructed to move an interdict on an urgent basis which will seek to interdict the awarding of the Tender Contract No.2953 and/or interdict the implementation of the award of the tender.

Applicant's attorneys further wrote a letter to first respondent on the 8 November 2012 requesting, *inter alia*, the confirmation of whether or not the tender has been awarded and if the tender has been awarded, to whom it was awarded and when it was awarded.

On the 23 November 2012 the first respondent wrote to applicant's attorneys setting out the chronology of events that have happened between the parties and informing the applicant that a request for access to information must be made on a form in accordance with section 18(1) of the Promotion of Access to Information Act 2 of 2000 (the PAIA). The letter also informed the applicant that contract no.2980 was awarded to Primeland Properties (Pty) Ltd on 16 August 2012 and that a service level agreement has been signed with the successful tenderer.

Applicant, however, states that she received this letter via e-mail by her attorneys on the 28 November 2012.

This application was thereafter launched on the 27 November 2012 on an urgent basis. Part A of the Notice of Motion sought orders for the delivery by the first respondent to the applicant of some copies of documents including a copy of the letter of the award of the tender to the second respondent, an order interdicting and restraining the first

and second respondents from awarding and/or concluding and/or implementing any agreement (whether Service Level Agreement or otherwise) in respect of the contract No. 2953 pending finalisation of the review application referred to in Part B of the Notice of Motion, and also ordering first respondent to provide such reasons as may be appropriate and as envisaged in Rule 53 of this Court in respect of the award of the afore-said contract to the second respondent.

In part B of the Notice of Motion applicant sought an order, *inter alia* reviewing and setting aside the decision of the first respondent to award the contract to the second respondent.

First and second respondents opposed the application and delivered answering affidavits to which applicant replied. The first and second respondents challenged the application on a number of grounds including lack of urgency and applicant's failure to exhaust internal remedies.

The matter then came before Revelas J and was argued on the 14 December 2012. Judgment was delivered on the 20 December 2012 granting, among others, an interim interdict order as mentioned above and ordered the first respondent to furnish reasons, as envisaged in Rule 53, in respect of contract No. 2953 to the respondent by not later than 11 January 2013. It also ordered that that order would lapse on Friday 18 January 2013 at 12H00 if the applicant had not filed his application for review by that date.

[3] First respondent delivered to the applicant's attorneys the reasons for the award together with supporting documents on the 11 January 2013.

[4] Applicant delivered a supplementary Notice of Motion on the 18 January 2013 which sought orders mainly reviewing and setting aside the decision of the first respondent to award Contract No. 2953 to the second respondent and an order substituting the said decision with an order awarding the contract to the applicant.

Applicant also delivered a supplementary founding affidavit to which the first respondent answered and applicant also replied.

The matter then came before me and argued on the 11 June 2013.

[5] The first and second respondents have raised a point in *limine* to the effect that the applicant has failed to exhaust the internal remedy provided by section 62 of the Local Government: Municipal Systems Act 32 of 2000 (the Municipal Systems Act) by giving written notice of the appeal and the reasons to the Municipal Manager prior to the institution of the review proceedings. Futhermore according to Section 7 (2) of Promotion of Administrative Justice Act (PAJA), the applicant is precluded from pursuing its review in the absence of an application to be exempted from the provisions of section 7(2) on the basis of exceptional circumstances and for which no application is made by the applicant.

[6] All parties agreed that only the point in *limine* be argued at this stage.

[7] Mr Buchanan SC, Counsel for the applicant has argued that section 7(2) of PAJA refers to an effective remedy whereas the appeal referred to would not have been as such in this matter.

He contended that the requirements of section 7(2) of PAJA should not be utilized by organs of the State to frustrate or delay the rights of an individual to obtain relief.

He referred me to *Koyabe v Minister for Home Affairs 2010 (4) SA 327 (CC) at para 38.*

He further submitted that an aggrieved party cannot appeal against a decision in terms of the Municipal Systems Act if he has not been notified of such decision. The first respondent only advised the application of the decision on the 28 November 2012 which was when this applicant had already been launched. He sketched out the chronology of the events and correspondence which was exchanged between the parties prior to the institution of these proceedings on the 27 November 2012.

Mr Smuts SC, Counsel for the first respondent, submitted that from applicant's letter of the 21 August 2012 it is clear that applicant was aware of the provisions of Section 62 of the Municipal Systems Act. He referred to various paragraphs in applicant's replying affidavit where applicant maintained a position that in his afore-quoted letter of the 21 August 2012 he was invoking Section 62 of the Municipal System Act. Applicant further denied that he failed to exhaust internal remedies as alleged or at all.

Mr Quinn SC, Counsel for second respondent, stated that there is no application for exemption from exhausting internal remedies. He contended that applicant's stand is clear from its affidavit that she has exhausted internal remedies and it relies for that on her letter of the 21 August 2012.

He submitted that this application falls to be dismissed on this point in *limine.*

In reply Mr Buchanan submitted that the Municipal Manger could have given notification of the decision in respect of the award of the tender by fax or e-mail. He submitted that the first respondent also had to respond fully and timeously to questions that were asked by the applicant but she failed to do so.

[8] It is now trite law that the process of bidding for tenders evaluating and adjudicating upon such tenders, and awarding such tenders constitutes an administrative action under the Constitution[2].

It has been held that PAJA gives effect to Section 33 of the Constitution of the Republic of South Africa Act, No. 108 of 1996 (The Constitution).

That entitles the applicant to a lawful and procedurally fair process and an outcome, where its rights were affected or threatened, justifiable in relation to the reasons for it.[3]

Consequently these proceedings are subject to the procedures and provisions of PAJA.

[9] The relevant provisions in this matter are in Section 7(2) of PAJA which provides:-

"*7(2) (a) subject to paragraph (c), no Court shall review an administrative action in terms of this Act unless any internal remedy provided for in any other law has first been exhausted.*

(b) Subject to paragraph (c), a Court or tribunal must, if it is not satisfied that any internal remedy referred to in paragraph (a) has been exhausted, direct that the person concerned must first

[2] Lodbro Properties CC v Bedderson NO and Others 2003 (2) SA 460 (SCA) at para 5
[3] Koyabe v Ministe for Home Affairs, s, at para 32

exhaust such remedy before instituting proceedings in a Court or tribunal for judicial review in terms of this Act.

(c) A Court or tribunal may, in exceptional circumstances and on application by the person concerned, exempt such person from the obligation to exhaust any internal remedy if the Court or tribunal deems it in the interest of justice."

[10] The effect and meaning of Section 7(2) of PAJA was discussed and analysed by Jafta JA (as he then was) in *City of Cape Town v Reader and Others* [4] where the Court was faced with a similar issue as in the present case, namely whether Section 7(2) of PAJA precluded an aggrieved party from seeking an order reviewing and setting aside a decision of the municipality until he had exhausted internal remedies.

Jafta JA (as he then was) remarked as follows at para 12:-

"*Generally speaking s 7(2) excludes, albeit temporarily, the Court's jurisdiction on review proceedings where there is provision for an internal remedy. In those circumstances the aggrieved person's right of access to Courts or other independent and impartial tribunals is denied until he or she has exhausted the internal remedy. The subsection is concluded in peremptory terms which oblige every reviewing Court to decline to hear a review application bought under PAJA until the aggrieved party has exhausted internal remedies.*[5]

[11] Another provision which applies in this matter is Section 62 of the Municipal Systems Act which affords the aggrieved party an internal remedy contemplated in Section 7(2) of PAJA. That Section provides:-

[4] 2009 (1) SA 555 (SCA)

[5] See also Nichol and Another v Registrar of Pension Funds and Others 2008 (1) SA 383 (SCA) at para 15; and Koyabe v Minister for Home Affairs, *supra* at para 46-48

"*1. A person whose rights are effected by a decision taken by a political structure, political office bearer, councillor or staff member of a municipality in terms of a power or duty delegated or sub-delegated by a delegating authority to the political structure, political office bearer, councillor or staff member, may appeal against that decision by giving written notice of the appeal and reasons to the Municipal Manager within 21 days of the date of the notification of the decision.*

2. The Municipal Manager must promptly submit the appeal to the appropriate appeal authority mentioned in subsection (4).

3. The appeal authority must consider the appeal, and confirm, vary or revoke the decision, but no such variation or revocation of a decision may detract from any rights that may have accrued as a result of the decision.

4. When an appeal is against a decision taken by ----

(a) a staff member other than the Municipal Manager, the Municipal Manager is the appeal authority;

(b) the municipal manager, the executive committee or executive mayor is the appeal authority, or, if the municipality does not have an executive committee or executive mayor, the council of the municipality is the appeal authority; or

(c) a political structure or political office bearer, or a councillor----

(i) the municipal council is the appeal authority where the council comprises less than 15 councillors; or

(ii) a committee of councillors who were not involved in the decision and appointed by the Municipal Council for this purpose is the appeal authority where the council comprises more than 14 councillors.

5. An appeal authority must commence with an appeal within six weeks and decide the appeal within a reasonable time.

6. The provisions of this section do not detract from any appropriate appeal procedure provided for in any other applicable law".

[12] In *casu* applicant's rights have been affected by a decision taken by the Municipal Manager in terms as a power duly delegated to him. It is common cause that this question in issue at this stage in this matter falls squarely within the threshold of section 62 of the Municipal Systems Act.

[13] Section 62(1) gives to a person whose rights are affected by the decision in question a right to "*appeal against that decision by giving written notice of the appeal and reasons to the Municipal Manager within 21 days of the date of the notification of the decision".* Putting this in the context of this matter, the applicant had a right to appeal against the decision of the Municipal Manager of the first respondent of awarding the tender to the second respondent instead of him, by giving written notice of his appeal and reasons to the Municipal Manager written 21 days of the date of the notification of the decision.

[14] It is common cause that section 62(1) of the Municipal Systems Act affords the internal remedy contemplated in section 7(2) of PAJA. What needs to be considered is whether the applicant has exhausted the internal remedy provided for in the said section 62 before approaching this Court for the review of the said decision.

[15] The applicant wherever in the papers of this matter she is challenged of failing to exhaust the internal remedy in terms of section 62(1) of the Municipal Systems Act, she maintains a position that it has done so and refers in his support to her afore-quoted letter written to the Municipal Manager on the 21 August 2012. The particular paragraph of this letter which deals with this aspect reads:-

"*We urge you to treat our request as urgent as if the tender has already been awarded it is our intention to lodge an objection against the decision by the Municipality to award this tender in terms of Section 62 of the Municipal Systems Act and to record our dissatisfaction with the entire process including the adjudication process leading up to any such award."*

[16] As stated above section 62 requires a party noting an appeal against the decision in question to <u>give written notice of the appeal and reasons</u> to the Municipal Manager within 21days of the date of the notification of the decision. In my view to simply say in a letter. "*it is our intention to lodge an objection against the decision by the Municipality to award this tender in terms of Section 62 of the Municipal Systems Act,"* does not constitute an "*act of appealing*" (so to say) in the context of section 62.

The argument to that extent has not merit at all and falls to be rejected.

[17] The other question to consider is what the date of notification of the decision was from which date within 21 days the applicant was expected to appeal. The key word in this question is "*notification*". As to what "*notification*" means is not defined in the Municipal Systems Act and I had to resort to the shorter Oxford English Dictionary, Vol.2, 3rd Edition where the word is defined as "*the action of notifying*"; the verb "*notify"* is defined to mean "*to give notice, to inform*". Following the so-called "*golden rule of interpretation*", in my view, the ordinary grammatical meaning of *"notification*" means that the applicant had to give his written notice to appeal and reasons to the Municipal Manager within 21 days after he had been notified or informed of the decision and in my view, such notification or act of informing the applicant should have been in writing. Section 62 requires the affected person to give the notice of appeal in writing and reasons to the Municipal Manager, to me that requirement of writing should fairly and justly equally apply to the maker of the decision in notifying the affected person. I do not think the legislature intended otherwise. Mr Smuts has submitted that the applicant knew of the decision awarding the tender on the 21 August 2012 when he was informed by Mr Christian Mkhosana of Supply Chain for the Municipality. He argued that the notification of that decision occurred at that time.

Mr Buchanan has argued that the information that the applicant got on the said 21 August 2012 from the Supply Chain for the Municipality was only verbal and he received no confirmation that the decision awarding the tender was made. He further submitted that the Municipal Manager should have given notification of the decision in writing, even by fax or e-mail.

I fully agree with Mr Buchanan. This decision concerns a tender in respect of a very important work or services involving the compilation

and maintenance of the general evaluation roll, asset register of all municipal properties and supplementary valuation rolls, as well as the supply of other valuation related services in compliance with the Local Government: Municipal Property Rates Act, No.6 of 2004. The tender required bids from experienced and suitably qualified registered property valuers. It is common knowledge that rates are a source of revenue for the Municipality which enable it, *inter alia,* to provide services to the people. The assessment of rates of course has financial implications to the rate- payers

I cannot for a moment accept that it would be reasonable to expect that a bidder would get notification in the manner in which the applicant got to know that the tender award decision has been made.

[18] The other dimension to this aspect is my difficulty to understand how the applicant could have been expected to formulate a notice of appeal and the reasons therefore as required by section 62(1) when he just heard verbally of the tender award decision from someone in the Supply Chain for the Municipality who did not even make the decision. Although section 62(1) does not specifically state that the notification of the decision must be accompanied by the reasons for that decision, I am of the view that in our present Constitutional democracy, the maker of that decision is obliged to give reasons for it.

[19] Furthermore Section 33(2) of the Constitution gives a right to written reasons to those whose rights have been adversely affected by administration and PAJA was enacted to give effect to that right and other administrative justice rights. In the preamble of PAJA its purpose, *inter alia*, is stated as "*to create a culture of accountability, openness, and transparency in the public administration or in the exercise of public*

power or the performance of a public function, by giving effect to just administrative action." In my view, these provisions read together obliged the maker of this tender award decision also to give reasons in the notification of the decision. The applicant was one of the bidders to the tender and surely applicant can be expected to be anxious to know the basis on which her bid failed and the other succeeded. The reasons for the decisions would enable applicant to formulate properly the notice of appeal and its reason as required by section 62(1) of the Municipal Systems Act. Those reasons would also assist her in a subsequent review, if any, to set aside that decision.

Mokgoro J in *Koyabe v Minister for Home Affairs*, supra while considering the question whether reasons should be furnished in respect of a decision made in terms of section 8(1) the Immigration Act No 13 of 2002 which did not specifically require reasons for the decision, remarked as follows at paragraph 62:-

"*Further, in our Constitutional democracy, officials are enjoined to ensure that the public administration is governed by the values enshrined in our Constitution. Providing people whose rights have been adversely affected by administrative decisions with reasons, will often be important in providing fairness, accountability and transparency. In the context of a contemporary democratic public service like ours, where the principles of batho pele, coupled with the values of ubuntu, enjoin the public service to treat people with respect and dignity and avoid undue confrontation, the Constitution indeed entitles the applicants to reasons for the decision declaring them illegal foreigners. It is excessively over-formalistic and contrary to the spirit of the Constitution for the respondents to contend that under 58(1) they were not obliged to give reasons."*

I fully agree with these remarks and, in my view, they apply equally to this matter. Section 217 of the Constitution also requires that the

organs of the State (such as the first respondent) may only contract for goods or services "*in accordance with a system which is fair, equitable transparent, competitive and cost-effective*".

[20] Revelas J correctly remarked in her judgment in respect of an interim order in this matter, when she said at para 13:-

"*Whereas the applicant perhaps could have been pro-active in placing the first respondent on specific terms, the correspondence between the parties strongly suggests that the first respondent was most unco-operative by not adhering to a single request made by the applicant (the only other tenderer). The respondents relied ex post facto and repeatedly on the applicant's knowledge of the outcome of the tender award as early as 21 August 2012. It was not open to the respondent to rely on its website aunouncements to attribute specific knowledge to the applicant in the circumstances where the applicant had been asking for detailed information and documentation about the tender."*

Turning to this case I cannot understand why the first respondent, in the observance of our Constitutional culture of accountability, openness and transparency, she failed to be accountable, open and transparent enough in respect of this tender award by simply notifying the applicant of her decision and give reasons therefore.

Instead the respondent failed to do so despite repeated requests for her to confirm whether she has made the tender award decision, until after these review proceedings were instituted.

[21] Although, as remarked by Revelas J above, the applicant perhaps could have been more pro-active in protecting and enforcing her rights to be

furnished with the tender award decision and the reasons therefore, the conduct of the first respondent cannot be countenanced.

It is apt as this juncture to quote the following remarks by Mokgoro J in *Koyabe v Minister for Home affairs, supra at para 38:-*

"*The duty to exhaust internal remedies is therefore valuable and necessary requirement in our law. However, that requirement should not be rigidly imposed. Nor should it be used by administrators to frustrate the efforts of an aggrieved person or shield the administrative process from judicial scrutiny. PAJA recognises this need for flexibility, acknowledging in s 7(2) (c) that exceptional circumstances may require that a Court condone non-exhaustion of internal process and proceed with judicial review nonetheless. Under s 7(2) of PAJA, the requirement that an individual exhaust internal remedies is therefore not absolute"*

In *casu* I am not prepared to acquiesce to a situation which is akin to frustrating the efforts of an aggrieved person or shield the administrative process from judicial scrutiny, for to dismiss this application only on this point in *limine* would, in my view, be tatamount to that.

[22] I may mention that the issue of an exemption from exhausting an internal remedy does not arise in this matter as no application therefore was made to this Court. Consequently that option to resolve this matter is not available for consideration.

[23] I am mindfull of the following remark by Mokgoro J in Koyabe case, supra at para 35:

"*Internal remedies are designed to provide immediate and cost-effective relief, giving the executive the opportunity to utilise its own*

mechanisms, rectifying irregularities first, before aggrieved parties resort to litigation. Although costs play a vital role in providing litigants with access to justice, the importance of more readily available and cost-effective internal remedies cannot be gainsaid."

[24] As far as the argument that the appeal in terms of section 62 would not have been an effective remedy in this matter, I respectfully do not agree with that argument. In fact there is no factual basis to support that argument.

[25] Regarding the question of time in this matter, in my view, had the first respondent give notification of her decision together with reasons immediately after making the decision an ample time could have been saved in respect of the project in question.

[26] I am of the view that a solution of this matter at this stage lies in section 7(2) (b) of PAJA which states:-

"S*ubject to paragraph (c) a Court or tribunal must, if it is not satisfied that any internal remedy referred to in paragraph (a) has been exhausted, direct that the person concerned must first exhaust such remedy before instituting proceedings in a Court or tribunal for judicial review in terms of this Act."*

[27] I have concluded that the applicant has not exhausted the internal remedy referred to in Section 62(1) of the Municipal Systems Act.

COSTS

[28] Regarding the question of costs I have taken into account that despite the fact that the applicant came to this Court on review without exhausting the internal remedy provided for in Section 62 of the Municipal Systems Act, in the same way the unco-operative and over-formalistic conduct of the first respondent, who treated the applicant as though she has no right to be informed or notified of the tender award decision in the first place, was unhelpful and not without fault. The utter disregard or lack of insensitivity to the culture of openness, transparency, fairness and justice on the part of administrators in this Constitutional era cannot be tolerated.

As far as the second respondent is concerned she aligned herself with the first respondent in regard to the point in *limine*. Consequently they are treated alike in regard to the question of costs.

In my view a costs order against the applicant would not be just and equitable in the circumstances of this case. In the result I will make no order as to costs.

[29] In the circumstances the following order shall issue:-

1. The applicant is directed to proceed within seven (7) days of this judgment with the appeal in terms of Section 62 of the Local Government : Municipal Systems Act 32 of 2000;

2. That the present review proceedings are hereby postponed sine die pending the outcome of the appeal mentioned in (1) above;

3. There is no order as to costs at this stage.

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D.Z.DUKADA

JUDGE OF THE HIGH COURT

Appearences:-

For the Applicant	:	Adv Buchanan SC Instructed by Smith Tabata Inc **EAST LONDON**
For the 1st respondent	:	Adv Smuts SC Instructed by Conlon Associates Inc **EAST LONDON**
For the 2nd respondent	:	Adv Quinn SC Instructed by Jonathan Clark Attorneys **EAST LONDON**