



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

REPORTABLE
CASE NO: 482/2006

In the matter between

TETRA MOBILE RADIO (PTY) LIMITED

APPELLANT

and

**THE MEMBER OF THE EXECUTIVE COUNCIL OF
THE DEPARTMENT OF WORKS**

1ST RESPONDENT

**THE CHAIRMAN OF THE CENTRAL
PROCUREMENT COMMITTEE**

2ND RESPONDENT

INFOTRUNK (PTY) LIMITED

3RD RESPONDENT

THE CHAIRMAN OF THE APPEALS TRIBUNAL

4TH RESPONDENT

**THE MEMBER OF THE EXECUTIVE COUNCIL OF
THE DEPARTMENT OF FINANCE**

5TH RESPONDENT

**CORAM: HOWIE P, MTHIYANE, LEWIS, HEHER and VAN HEERDEN
JJA**

HEARD: 29 AUGUST 2007

DELIVERED: 28 SEPTEMBER 2007

**Summary: Interpretation and application of the KwaZulu Natal Procurement
Act 3 of 2001 – Access to information under the said Act.**

**Neutral Citation: This judgment may be referred to as *Tetra Mobile Radio v MEC,
Department of Works* [2007] SCA 128 (RSA).**

JUDGMENT

MTHIYANE JA

MTHIYANE JA:

[1] This is an appeal, with the leave of this court, against the judgment and order of Murugasen AJ sitting in the Pietermaritzburg High Court, refusing to grant the appellant, Tetra Mobile Radio (Pty) Limited, an order directing the respondents to make available to it certain documents relating to a provincial tender. The appellant required the documents in order to formulate its grounds of appeal to the Appeals Tribunal against the decision of the Central Procurement Committee ('the Procurement Committee') awarding the tender to the third respondent, Infotrunk (Pty) Limited.

[2] The appellant was one of three tenderers who had tendered for the award of contract ZNT 2482W: Province of KwaZulu Natal, for the maintenance of repeater networks. The appellant had held a similar contract for the previous four years and had anticipated that the new contract would be awarded to it because of its track record in providing the service. However, the Procurement Committee awarded the tender to the third respondent. The appellant noted an appeal to the Appeals Tribunal against the decision of the Procurement Committee in terms of

s 20 of the (now repealed) KwaZulu Natal Procurement Act 3 of 2001 ('the Procurement Act'). The relevant provisions of the section read:

'20(1) The following entities aggrieved by a decision of the Central Procurement Committee . . . may appeal to the Appeals Tribunal in the prescribed manner.

(a) . . .

(b) a tenderer.

(2)(a) . . . [a] tenderer must, within five days of receipt of the notification under section 5(1) (b) or 35(2) of the decision appealed against, deliver written notification of an intention to appeal.

(b) . . . [a] tenderer may, together with the notification of intention to appeal under paragraph (a), deliver a request for written reasons for the tender award decision.

(c) The Central Procurement Committee . . . must deliver to the appellant the written reasons requested under paragraph (b) within ten days.

(d) The appellant must, within ten days of receipt of the written reasons delivered under paragraph (c), or, failing a request for written reasons under paragraph (b), within the ten days referred to in paragraph (c), submit written representations to the Appeals Tribunal indicating sufficiently and without unnecessary elaboration the grounds and the basis of the appeal and the nature of the complaint.

(3) Upon receipt of a notice of intention to appeal under subsection (2)(a), the Appeals Tribunal must notify other tenderers who may be adversely affected by the appeal in writing of the appeal and invite them to respond within five days.

(4) No oral hearing of appeals will be allowed unless the Chairperson of the Appeals Tribunal, in the interests of justice issues a directive indicating otherwise, in which event the procedure to be followed will be as prescribed.

(5) A decision of the majority of the members of the Appeals Tribunal will be the decision of the Appeals Tribunal.'

[3] The notice of appeal was accompanied by a request for reasons in terms of s 20(2)(b) for the decision taken by the Procurement Committee. The deponent to the founding affidavit, a director of the appellant, stated that the grounds of appeal were submitted without the appellant having had sight of various documents which in his view were vital for it to formulate a proper set of grounds of appeal and the basis of its appeal.

[4] While reasons for the decision taken by the Procurement Committee to award the tender to the third respondent were furnished, the appellant did not consider them adequate. The appellant's complaint was that they merely indicated the points allocated, the basic method of allocating points and the fact that the third respondent had received the highest points. It contended that it still needed further documents and information.

[5] The information requested by the appellant was the following or was contained in the following documents:

- (a) Copies of all tenders received by you in response to tender enquiry ZNT 2482W;
- (b) A Schedule setting forth the dates upon which each and every tender was received by you;
- (c) Copies of all applications for preference points (ZNT 30) received by you from the various tenderers;
- (d) The names of the members of the Tender Evaluation Committee which Committee was responsible for the evaluation of the tenders received in response to tender enquiry ZNT 2482W;
- (e) The name of the chairperson of the abovementioned Tender Evaluation Committee;
- (f) Copies of the ratification of the appointment of the members of the Tender Evaluation Committee by the Minister responsible for the administration of your department;
- (g) Copies of all reports, minutes and other documentation of whatsoever nature received in response to tender enquiries ZNT 2482W and dealt with by the Tender Evaluation Committee;
- (h) A copy of the recommendation made by the Tender Evaluation Committee to the Tender Award Committee in terms of the provisions of section 29(2)(3) of the said Act;
- (i) The name of the members of the Tender Award Committee which Committee adjudicated the tenders received under tender enquiry ZNT 2482W as provided for in section 29(a) of the said Act and awarded the contract in question;
- (j) In the event of any persons having been co-opted as advisors to either the Tender Evaluation Committee or the Tender Award Committee or to both said Committees in terms of Section 38 of the said Act, the name(s) of such advisor(s);
- (k) Whether the function to consider and award the tenders received under tender enquiry ZNT 2482W was delegated to an official in the employ of your department as provided for in section 39 of the said Act. In the event of such a delegation having taken place, you are requested to provide a copy of the written delegation;
- (l) Copies of all reports, minutes and other documentation of whatsoever nature received by the Tender Award Committee under or in the process of adjudicating tender enquiry ZNT 2482W;
- (m) Copies of the minutes of the deliberations of the Tender Award Committee;

(n) A detailed exposition of the points awarded to each of the tenderers in accordance with the provisions of the said Act.’

[6] The first, second, fourth and fifth respondents (‘the institutional respondents’), through the Head of the Department of Works: Province of KwaZulu Natal (‘HOD’), responded to the request by furnishing the appellant’s attorneys with an ‘adjudication report’, together with what the HOD considered to be the ‘the relevant portions of the minutes of the Tender Evaluation Committee and the Tender Award Committee’. The reasons furnished to the appellant were considered by the HOD to provide an answer to the request contained in paras (g), (h), (l), (m) and (n) above. As to the request in para (b), the HOD said all tenders were received and opened on the date of the closing of tenders. As to paras (d), (e) and (i), the response was that the members of the Departmental Committee which considered the tenders, as well as the chairpersons of these committees were named in the relevant minutes. As to para (j), the HOD replied that the tenders were considered by the Departmental Tender Evaluation Committee and the Tender Award Committee. The HOD went on to say that the successful tenderer was approved by the Procurement Committee. The HOD refused to furnish any information on the details of the tenders ‘as it is considered to be confidential information belonging to each tenderer.’

[7] The appellant launched an application in the court *a quo* seeking an order directing the respondent to furnish it with written reasons for the decision of the Procurement Committee and the information listed in paragraph 5 above. As already indicated, the application was unsuccessful in the court *a quo* – hence this appeal. The appellant is no longer persisting in its request for reasons but is pressing on with its claim for access to the documentation referred to and the respondents persist in their refusal to furnish it.

[8] It was argued before us that the appellant, as unsuccessful tenderer, had a right of appeal against the decision of the Procurement Committee (s 20(1) of the Procurement Act set out above). Until the information requested is furnished it is impossible, contends the appellant, for it to formulate and prosecute an appeal pursuant to the Procurement Act. Counsel submitted that a tender process and all the proceedings associated with it have to be fair. Indeed the stated purpose of the Procurement Act as it appears in the long title is to give effect to s 217 of the Constitution and to provide for matters connected therewith. Section 217 guarantees fair, equitable, transparent, competitive and cost-effective procurement processes. In addition, the decision awarding or refusing a tender constitutes administrative action and therefore engages the right to just administrative action. This requires that in considering a tender, the decision-maker must conduct itself in a procedurally fair manner. In the present matter, the conduct of the second respondent, the Chairperson of the Procurement Committee, is of course not under scrutiny. The appellant is still attempting to get to that enquiry. The appellant contends, however, that a fair hearing before the Appeals Tribunal will be impossible unless it is furnished with the documents it requires. It thus argues that the only way to achieve a fair hearing is for the appellant to be provided with the required documentation: otherwise the right of appeal is rendered nugatory.

[9] The appeal procedure, as already indicated, is provided for in s 20 of the Procurement Act. Under this section the appellant is entitled to reasons for the decision (subsection (2)(b)) and the Procurement Committee is obliged to furnish reasons to the unsuccessful tenderer (subsection (2)(c)). But s 20 says nothing about any entitlement to receive documentation for the purposes of noting an appeal or that the Procurement Committee or any other relevant body must act fairly towards the unsuccessful tenderer. Counsel for the third

appellant, Infrotrunk (Pty) Ltd, asserted during argument that there was thus no obligation on the part of the Procurement Committee to act fairly. The argument is misplaced. First, it ignores the fact that the Procurement Act has as its object the giving of effect to s 217 of the Constitution, to which I have already referred. Second, fairness is inherent in the tender procedure. Its very essence is to ensure that before Government, National or Provincial, purchases goods or services, or enters into contracts for the procurement thereof, a proper evaluation is done of what is available and at what price, so as to ensure cost-effectiveness and competitiveness. Fairness, transparency and the other facts mentioned in s 217 permeate the procedure for awarding or refusing tenders. (See *Logbro Properties CC v Bedderson NO*;¹ *Metro Projects CC v Klerksdorp Local Municipality*;² *Steenkamp NO v Provincial Tender Board, Eastern Cape*.³)

[10] Although there is no specific mention of fairness in the section, it therefore stands to reason that the requirement has to be read in. The right of appeal afforded by the Procurement Act is partly to give effect to the requirement of procedural fairness.

[11] It is significant also that the appeal provided for in s 20 is in substance a review. This is demonstrated by s 21 of the Act which sets out the grounds of appeal. These are that interference by the Appeals Tribunal may occur only where the Procurement Committee, a Tender Award Committee or a member of any such committee:

- ‘(a) committed misconduct in relation to their duties as members;
- (b) committed a gross irregularity;
- (c) exceeded its or their power;
- (d) awarded a tender in an improper manner; or

¹2003 (2) SA 460 (SCA).

²2004 (1) SA 16 (SCA) paras 11 and 12.

³2007 (3) SA 121 (CC) paras 20 and 21.

(e) awarded a tender inconsistent with the objectives of this Act.’

An Appeals Tribunal cannot determine whether any of these grounds has been established without reference to the documents that were before the relevant committee, the record of the relevant meetings and the reasons for the decision. In this matter the Tribunal would need sufficient information in order to determine (*inter alia*) whether the third respondent was capable of undertaking the work. This follows from the very nature of the process and the grounds for interference. There is little purpose served if the unsuccessful tenderer does not know what case it must meet.⁴ This is a basic tenet of fairness, which in turn is a fundamental requirement of administrative action.

[12] The appellant argues that the fairness contemplated in the tender procedure means that it should have been given sufficient information, by way of disclosure of documents, to enable it to know what material was before the Tender Evaluation Committee when it concluded that the third respondent was capable of undertaking the work, why the appellant was unsuccessful and its reasons for coming to these conclusions. This, argues the appellant, flows from the nature of the process and enquiry rather than from any specific provision of the Procurement Act. The appellant argues that it should have been ‘put in possession of such information as will render [its] right to make representations a real and not an illusory one.’ (See *Heatherdale Farms (Pty) Ltd v Deputy Minister of Agriculture*.⁵)

[13] The argument advanced by the institutional respondents that the appellant should have followed the procedure set out in the Promotion of Access to Information Act 2 of 2000 (‘PAIA’) cannot be upheld. One has only to look at the disparity between the time frames prescribed for the request for information under the Procurement Act (s 20) and those laid down for access to information

⁴*Naude v Fraser* 1998 (4) SA 539 (SCA) at 563F-G.

⁵1980 (3) SA 476 (T) at 486F-G.

under PAIA (s74–77) to conclude that the latter Act is irrelevant to the appellant’s claim. Although the argument based on PAIA was not abandoned, it is not one that counsel for the institutional respondents pursued with any degree of conviction. What counsel persisted in vigorously was that the institutional respondents could not furnish the documentation because it was confidential. The appellant, continued the argument, thus failed to prove its entitlement to the documents in question.

[14] The appellant contended that the respondents had not made out a case for reliance on confidentiality: if there was any apprehension on the part of the respondent regarding any specific document, that concern could be met by making an order similar to the one granted by Schwartzman J in *ABBM Printing & Publishing (Pty) Ltd v Transnet Ltd*,⁶ where the parts of the documents in respect of which disclosure might result in breach of confidence were to be identified and marked as confidential and the applicant’s attorney was prohibited from disclosing such parts to any other party, including the applicant, save for the purpose of consulting with counsel or an independent expert. In that way a fair balance could be achieved between the appellant’s right of access to documentation necessary for prosecuting its appeal, on the one hand, and the third respondent’s right to confidentiality, on the other.

[15] It is true that the appeal provisions embodied in s 20 of the Procurement Act are very terse. But they do not, in my view, prevent a conclusion that the Appeals Tribunal must have before it the same information that was before the Procurement Committee in order to provide a fair hearing to the aggrieved party, in this case the appellant. By the same token the appellant, too, must have at least that information to enable it to formulate its grounds of appeal. It is clear that s 20 of the Procurement Act, read with s 217 of the Constitution,

⁶1998 (2) SA 109 (W) at 122I – J to 123A-B.

contemplates a fair system which envisages that, from the time of the award, the appellant has the right of access to information necessary to formulate its appeal properly. The argument by counsel for the third respondent that fairness is not inherent in the appeal procedure provided for in s 20 would, if adopted, lead to absurd or even unconstitutional results, by denying the appellant access to information, a right to which is entrenched in s 32 of the Constitution. The argument also ignores the grounds of appeal which by their very nature embody the requirement of fairness.

[16] I turn to the question of costs. Counsel for the institutional respondents argued that his clients should not be ordered to pay costs as they had engaged in litigation simply in order to assist the court. The respondents, so goes the argument, were caught between the competing interests of the appellant, on the one hand, and those of the third respondent, on the other. This argument is in my view untenable as the institutional respondents effectively did oppose the application for access to documents. The deponent for these respondents, Dr Kwazi Brian Mbanjwa, even asked for the appellant's application to be dismissed with costs. The same approach was adopted in the heads. In its turn the third respondent seeks to avoid costs by contending that it came on appeal to argue a constitutional point and should for that reason not be mulcted in costs. In my view this argument is also flawed. We are concerned here with the interpretation and application of the Procurement Act – legislation passed to give effect to the right of access to information under the Constitution. We are not directly concerned with the interpretation and application of the provisions of the Constitution. I see no valid reason why costs should not follow the event.

[17] In the result the appeal is upheld. The respondents are ordered jointly and severally to pay the appellant's costs of appeal, including those of the application for leave to appeal and the costs of two counsel where so employed,

the one paying the other to be absolved. The order of the court *a quo* is set aside and replaced with the following:

- '1. The first, second, fourth and fifth respondents are ordered to furnish the applicant with the following documentation within fourteen days of this order:
 - (i) The minutes of the Central Procurement Committee meeting at which contract ZNT 2482W was awarded;
 - (ii) The complete set of tender documents submitted by the Third Respondent and in particular:
 - (a) the Tender Form "Main Contract";
 - (b) the application for preference points claim form (ZNT30, pages 1 – 12);
 - (c) the document entitled "additional particulars of the tenderer" at pages 1 – IV;
 - (d) the tax clearance certificate submitted by Third Respondent;
 - (e) the authority to sign the tender;
 - (f) the declaration of interest;
 - (g) the site inspection certificate relating to Third Respondent;
 - (h) the "Addendum A" form which contains the list of proposed specialist sub-contractors;
 - (i) the whole of part 6, together with product pamphlets submitted by the Third Respondent;
 - (j) the whole of part 7;
 - (k) a detailed exposition of the points awarded to each of the tenderers in accordance with the provisions of the KwaZulu-Natal Procurement Act (No. 3 of 2001).
 - (iii) Letters and/or reports, if any, submitted by consultants GA du Toit (Pty) Ltd in connection with the various tenders;
 - (iv) The further documentation which was before the Central

Procurement Committee when it made its decision with regard to the aforesaid tender and which has not been included in the above.

2. The respondents are ordered to pay the costs of this application jointly and severally, the one paying the other to be absolved;
- 3.1 On the copy of each document referred to in para 1 above, the respondents shall mark or record that part of the document which it considers to be confidential.
- 3.2 Save for purposes of consulting with counsel or an independent expert, the applicant's attorney shall not disclose to any other party, including the applicant, any part of a document in respect of which the respondents claim confidentiality.
- 3.3 Should the applicant dispute any claim to confidentiality and should the parties be unable to resolve such dispute, the applicant shall on notice to the respondents and any person having an interest therein, have the right to apply to a judge of the Pietermaritzburg High Court in chambers for a ruling on the issue.
- 3.4 Should circumstances require, either party shall have the right to apply to a judge of the Pietermaritzburg High Court in chambers for an amendment to paras 3.1, 3.2 and 3.3 of this order.'

KK MTHIYANE
JUDGE OF APPEAL

CONCUR:

HOWIE P
LEWIS JA
HEHER JA
VAN HEERDEN JA