THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case no: 283/09

In the matter between:

CC GROENEWALD NO First Appellant

OVERSTRAND MUNICIPALITY Second Appellant

ASLA DEVCO (PTY) LTD Third Appellant

and

M5 DEVELOPMENTS (CAPE) (PTY) LTD Respondent

Neutral citation: *CC Groenewald v M5 Developments* (283/09) [2010] ZASCA 47 (31 March 2010)

Coram: NAVSA, CLOETE, LEWIS, MHLANTLA and LEACH JJA

Heard: **12 March 2010**

Delivered: **31 March 2010**

Summary: Local authority – municipal tender – unsuccessful tenderer having a right of appeal under s 62 of the Local Government: Municipal Systems Act 32 of 2000 – appeal authority not entitled to award tender to another unsuccessful tenderer who did not appeal.

ORDER

On appeal from: Western Cape High Court, Cape Town (Le Grange J sitting as a court of first instance).

The appeal is dismissed with costs, such costs to include the costs of two counsel.

JUDGMENT

LEACH JA (NAVSA, CLOETE, LEWIS and MHLANTLA JJA concurring)

[1] As this court has recently observed, awards of tenders in the public sector are a fruitful source of litigation which has led to courts being swamped with cases concerning complaints about the award of contracts.[1] This is yet another such case. It arises out of the award of a municipal contract by the second appellant, the Overstrand Municipality, to one of several entities who had tendered for it.

[2] As I shall set out more fully below, the tender of the respondent ('M5') was initially accepted but, pursuant to an appeal, the first appellant, Mr CC Groenewald, who was at the time the acting municipal manager, reversed that decision and awarded the contract to the third appellant ('ASLA'). This led to M5 initiating review proceedings in the Western Cape High Court, Cape Town which set aside the municipal manager's decision to award of the contract to ASLA and declared M5 to be 'entitled to enter into a contract with (the municipality) pursuant to the allocation of (the tender)'. With leave of the court a quo, the first appellant, the municipality and ASLA now appeal to this court,

[1] Per Harms DP in *Moseme Road Construction CC & others v King Civil Engineering Contractors (Pty) Ltd & another* [2010] ZASCA 13 para 1.

contending that the review ought to have been dismissed.

[3] Section 217(1) of the Constitution requires organs of state, including municipalities, to contract for goods and services in accordance with a 'fair, equitable, competitive and cost-effective' system. The Local Government: Municipal Systems Act 32 of 2000 (the Systems Act) and the Local Government: Municipal Finance Management Act 56 of 2003 (the Finance Management Act) were designed to ensure compliance with this obligation.[2] At the same time, s 217(2) of the Constitution further provides that this obligation does not prevent an organ of state from implementing a procurement policy by providing for 'categories of preference in the allocation of contracts' and 'the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination'. In order to comply with s 217(3) of the Constitution which requires national legislation to prescribe a framework within which the policy in s 217(2) is to be implemented, the Preferential Procurement Policy Framework Act 5 of 2000 (the PPPF Act) was passed, s 5 of which empowers the Minister of Finance to make regulations to provide a framework for the implementation of a procurement process.

[4] In order to achieve a fair, equitable, competitive and cost-effective system for the procurement of municipal services, a municipality is obliged by s 111 of the Finance Management Act to have and implement a supply chain management policy which, under s 112 of that Act, must comply with a prescribed regulatory framework. That framework[3] also requires goods and

[2] See *Municipal Manager: Qaukeni Local Municipality & another v FV General Trading CC* 2010 (1) SA 356 (SCA) [2009] ZASCA 66 para 11.
[3] Promulgated in GN R 868 in GG 27636 of 30 May 2005.

services above a transaction sum of R200 000 to be procured by way of a competitive bidding process.[4] In addition, the regulations promulgated under the PPPF Act (the 'preferential procurement regulations') which, with some justification, have been criticised both in regard to their clarity as well as their content,[5] provide for the use of a formula for the evaluation of tenders in which points are awarded in respect of various criteria.

[5] In February 2007, the municipality intended to develop some 3 000 low-cost houses. In order to facilitate this project and to comply with its constitutional and statutory obligations, it published an advertisement inviting tenders for the appointment of an 'implementation agent' for its housing projects. The advertisement specifically stated that the municipality did not bind itself to accept the lowest or any tender and that tenders would be 'subject to the Standard Conditions of Tender, the Preferential Procurement Regulations of 2001 and (its) Supply Chain Management Policy'.

[6] This advertisement was misleading as in fact the municipality had not adopted a supply chain management policy, but nothing turns on its failure to do so. What is important is that the advertisement led to 16 tenders being received by the municipality, five of which were considered to be acceptable. These included tenders from M5, ASLA and a close corporation known as Blue Whale Property CC ('Blue Whale').

[7] The municipality employed a firm of consulting engineers, ICE Group

[4] *Quakeni* paras 12 and 13.
[5] See eg *Hidro-Tech Systems (Pty) Ltd v City of Cape Town & others* 2010 (1) SA 483 (C) [2009] ZAWCHC 125 paras 51-53.

(Pty) Ltd ('ICE'), to evaluate these tenders. This it did in detail, scoring each in terms of the applicable formula prescribed by the preferential procurement regulations. It is unnecessary to set out the formula in question, it being sufficient for present purposes to record that it involved scoring each tender out of a maximum of 100 points, ten of which (so-called 'PPPFA' points) related to those goals set out in s 2(1)(d) of the PPPF Act.

[8] Having evaluated the tenders, ICE compiled a written report to the municipality dated 23 March 2007 in which it stated that the two tenders most worthy of consideration were those of M5, which it had scored at 91.6 points, and ASLA, which had been awarded 91 points. The difference between the two related to the scores allocated in respect of the ten PPPFA points, M5 having been given a single point and ASLA 0.6 points in that regard – their scores otherwise having been identical. The other three tenders lagged far behind in the scoring stakes. Those in third and fourth places were scored at 78.94 and 40.25 points respectively, while that of Blue Whale languished in a very distant last place with but 17.25 points. Based solely on its slightly higher score, ICE recommended that M5 should be appointed rather than ASLA.

[9] ICE's report was placed before the municipality's tender evaluation committee. It also decided to recommend to the municipality's tender adjudication committee that M5 should be awarded the contract.

[10] On 13 April 2007 the municipality's tender adjudication committee met and accepted the recommendations of ICE and the evaluation committee that

M5 should be awarded the contract. Consequently, on 20 April 2007 M5 was informed that its tender had been successful. The four unsuccessful tenderers were simultaneously informed in writing of the outcome and that they had 21 days to lodge an appeal under s 62 of the Municipal Systems Act.

[11] Unhappy that it had been unsuccessful, Blue Whale decided to appeal, and lodged a notice within the stipulated period. ASLA also filed a notice of appeal in which it contended that the evaluation report of ICE had not been independent. But it did so only on 31 May 2007, almost three weeks out of time. Since the only appeal lodged in time was that of Blue Whale, and since it clearly had no prospect of success, it is surprising to say the least that it took some nine months to finalise the appeal.

[12] In the meantime, the municipal manager when the appeal was launched, Mr Koekemoer, had been replaced by Groenewald, who was acting as municipal manager, and it was he who eventually determined the appeal and awarded the contract to ASLA. This he did despite being of the view that ASLA's appeal could not be considered and that of Blue Whale had to be dismissed.

[13] Groenewald explained how this somewhat surprising result came about. After he had been appointed to the post in November 2007, he went through the available documentation, including the reports of ICE and the evaluation committee, and was initially somewhat confused by the differences in the scoring. He discussed the matter with the chairperson of the tender

evaluation committee, Ms La Cock, who advised him that the evaluation committee had received certain information relevant to the PPPFA points which contradicted that accepted by ICE, and that because it perceived that ICE had also erred in other respects of the scoring in regard to those points, it had re-assessed the tenders, increased the score of M5 to 94.3 points and that of ASLA to 93.4 points, but reduced Blue Whale's score to 15.25 points. None of this appears in the minutes of the tender evaluation committee or in its recommendation to the tender adjudication committee. Nevertheless, according to La Cock, as M5 still retained a slight lead over ASLA, the evaluation committee had also decided to recommend M5.

[14] On considering this information, and although he accepted the validity of the criticism of ICE's scoring, Groenewald concluded that the evaluation committee had itself also incorrectly scored the tenders. Doing his own scoring exercise, he decided that ASLA ought to have been awarded 92.4 points, fractionally more than M5 to which he gave 92.3 points. As in his opinion ASLA had outscored M5, albeit by a minimal margin, he concluded that it and not M5 ought to have been awarded the contract.

[15] In the light of this, Groenewald considered himself to be on the horns of a dilemma. On the one hand, he thought that ASLA's appeal could not be entertained as it had been filed out of time while that of Blue Whale was devoid of merit and had to be dismissed. On the other, he felt it would be irregular, improper and, indeed, unconstitutional for M5 to be awarded a contract which the tender adjudication committee, on his scoring, ought to

have awarded to ASLA.

[16] Finding himself in a quandary, Groenewald took legal advice. Having done so, and as part of what he viewed to be the overall appeal process, he wrote to both M5 and ASLA on 29 January 2008, informing them that he had difficulty in respect of the scoring and inviting them to make written representations on certain issues on or before 6 February 2008. At the same time he made it quite clear to ASLA that its appeal could not be considered as it had been lodged out of time and that, in any event, there was no merit in its allegation as to ICE's lack of impartiality.

[17] Although ASLA responded swiftly to Groenewald's request to provide further information, M5 did not: and so the municipal manager wrote to it on 7 February 2008, extending the period for its response to 11 February 2008. In reply, however, attorneys acting for M5 wrote to him, stating that M5 could not provide the information requested in the time available and requesting a further extension of 14 days. Groenewald was not prepared to agree and, taking into account the fresh information furnished by ASLA, he increased its score to 92.4 points, a total slightly higher than the 91.6 points he had awarded M5. In the light of this, he felt duty bound to award the contract to ASLA. It was this decision that was the subject matter of M5's application for review which, in due course, was upheld in the court a quo.

[18] Although a plethora of issues was raised in the papers, the ambit of the dispute narrowed and only four issues were ventilated before this court of

which only two need to be determined. The first is whether an appeal against the adjudication committee's award of the contract lay under s 62(1) of the Systems Act which provides:

'A person whose rights are affected 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.'

[19] In *City of Cape Town v Reader & others*[6] the issue arose whether a landowner had a right under s 62 to appeal against the approval of certain building plans for the erection of a structure on its neighbour's property. The majority held that s 62 gives no general right to appeal to those who object to a municipal planning permission or decision and that a neighbour, who was not a party to the application for the approval of the building plans, did not have a right directly affected by a decision on the application and thus had no right to appeal under s 62. The question whether an unsuccessful tenderer would have a right to appeal against the acceptance of the tender of another was specifically left open.

[20] In its papers in the application a quo, as well as in its heads of argument filed in this court, M5 argued both that ASLA was not a party to the appeal due to its notice of appeal having been filed late and that, as an unsuccessful tenderer, it did not have clearly defined rights adversely affected by the decision of the tender adjudication committee. Relying upon the majority decision in *Reader* it therefore contended that neither ASLA (nor Blue Whale for that matter) had enjoyed a right to appeal under s 62 and that, on

[6] 2009 (1) SA 555 (SCA) [2008] ZASCA 130.

this basis alone, it ought not to have been awarded the contract. In argument, however, counsel for M5 stated that for purposes of the appeal he conceded that both ASLA and Blue Whale had enjoyed a right of appeal under s 62.

[21] This concession was correctly made. As I have mentioned, the decision of the majority in *Reader* was based on the reasoning that a neighbour could not be considered as a person whose rights were affected by the municipality's decision in regard to building plans approved for a neighbouring property as it had not been a party to the application process relating to those plans. In the present case, of course, the unsuccessful tenderers, together with M5, were all parties to the tender approval process. I therefore have no difficulty in concluding that both ASLA and Blue Whale were entitled to appeal under s 62.

[22] That brings me to the next issue, namely, whether Groenewald, as appeal authority, was entitled to award a contract to an unsuccessful tenderer who had not appealed against the initial decision to award it to another. Arguing that Groenewald had been perfectly entitled to do so, counsel for the appellants, as a starting point, contended that an appeal in terms of s 62 is a so-called 'wide appeal'[7] involving a re-hearing of the issues. From that base, they argued that the award of a municipal contract was a matter falling within the public domain, involving a decision which had to be taken in the public interest in the light of the various constitutional and statutory imperatives I have already mentioned, including the necessity to advance those goals

[7] Compare eg *Tikly & others v Johannes NO & others* 1963 (2) SA 588 (T) at 590F-591A; *Nichol & another v Registrar of Pension Funds & others* [2006] 1 All SA 589 (C) paras 19-22; Cora Hoexter *Administrative Law in South Africa* pp 66-68.

identified in the PPPF Act. The award of the contract therefore had to be considered in this constitutional and statutory context, and it was necessary for a municipality to act lawfully in doing so. In these circumstances, so the argument went, a municipal manager was bound in his re-hearing of the matter to award the contract to the party to whom it should have been awarded in the first place, even if that party had not appealed.

[23] Counsel for M5 conceded that s 62 involved an appeal in the wide sense and, for present purposes, I intend to accept that he was correct in doing so. But that does not mean that such an appeal requires the re-evaluation of each submitted tender. If that were so, administrative anarchy would result. In a simple case such as this involving the re-consideration of but three tenders, the appeal process took nine months and I shudder to think how long it would have taken had it been necessary to deal with, say, 50 tenders just because one unsuccessful tenderer had decided to appeal.

[24] The obvious fallacy in the appellants' argument is found on an examination of the section under which the appeal authority is empowered to act. Section 62(1) allows a person to appeal by giving 'written notice of the appeal and reasons' to the municipal manager who, under s 62(2) has then to submit 'the appeal' – obviously the notice of appeal and the reasons lodged therewith under s 62(1) – to the appeal authority for it to consider 'the appeal' under s 62(3). Although in terms of this latter subsection the appeal authority is empowered to 'confirm, vary or revoke the decision' it exercises that power in the context of hearing 'the appeal' viz the appeal and the reasons lodged by

the aggrieved person under s 62(1). That defines the ambit of the appeal, the sole issue being whether that aggrieved person should succeed for the reasons it has advanced. It is not for the appeal authority to reconsider all the tenders that had been submitted. If that had been the legislature's intention, it would have said so. It did not, and for obvious reasons. There is a need in matters of this nature for decisions to be made without unreasonable delay. If each and every tender had to be revisited it could easily become an administrative nightmare with the appeal authority having to hear representations from all parties who tendered, some of whom might have no realistic prospect of success, in regard to a myriad of issues, many of which might in due course be proved to be wholly irrelevant. This could never have been the legislature's intention. It is inconsistent with the requirement that a person aggrieved must file a notice of appeal with reasons within a fairly short period.

[25] Thus while I accept that the appeal is a wide one in the sense of a re-hearing, it is a re-hearing related to the limited issue of whether the party appealing should have been successful. In the context of a municipal tender, an appeal by a person whose tender was unsuccessful therefore does not entitle the appeal authority to reconsider all the tenders that were lodged and to decide whether the committee which adjudicated upon the tender ought to have awarded the contract to a person whose tender was not accepted, but who did not appeal against that decision (and who might no longer have any interest in being awarded the contract). In the present case, the appeal related solely to whether the contract should have been awarded to Blue

Whale rather than M5 and, having concluded that issue against Blue Whale and declining to consider ASLA's appeal, the appeal should merely have been dismissed and the adjudication committee's decision left undisturbed.

[26] Furthermore, while Groenewald may have had concerns about the legality of the award of the tender, it is important to bear in mind that those concerns were based on his perceptions flowing from his own investigations on issues identified by him and that his conclusions were challenged by M5.

[27] It was suggested during argument that if Groenewald had not been empowered to award the contract to ASLA, the court a quo should have referred the matter back to the adjudication committee to enable it to reconsider the award, and that this court should therefore make such an order. There seems to me to be no merit in this suggestion. Groenewald's power under s 62(3) was to 'consider the appeal, and confirm, vary or revoke the decision'. He had no power to refer the matter back to the adjudication committee for reconsideration. That being so, the court a quo could not have made an order on review that Groenewald could not have made, and neither can this court.

[28] The conclusion that Groenewald should merely have dismissed the appeal under s 62 renders it unnecessary to deal with any of the other questions raised on appeal. In regard to the question of costs, it is clear that the matter is of substantial importance and the parties were correctly agreed that costs should follow the event and that the employment of two counsel was justified.

[29] In the result, the following order is made:

'The appeal is dismissed with costs, such costs to include the costs of two counsel'.

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L E
LEACH

JUDGE OF APPEAL

APPEARANCES

1st & 2nd APPELLANTS:	E W Fagan SC
3rd APPELLANT:	H C Schreuder
1st APPELLANT & 2ND APPELLANT	Instructed by Fairbridges Attorneys, Cape Town; McIntyre & Van der Post, Bloemfontein.
3rd APPELLANT	Instructed by Louw du Plessis Inc, Somerset West; McIntyre & Van der Post, Bloemfontein.
RESPONDENT:	J W Olivier SC (with him R B Engela) Instructed by Malan Laäs & Scholtz Inc, Durbanville; Webbers, Bloemfontein.