

July to September 2014 (3)

JQR Public Procurement 2014 (3)

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1. Legislation

No important legislation relating to public procurement was enacted in the period under review.

2. Cases

2.1 Coverage of public procurement rules

In *Eden Security Services CC v Cape Peninsula University of Technology*² the court grappled with the question whether procurement by the respondent public university was subject to public procurement rules. The court held that it was not.

The respondent invited public tenders for security services at its various campuses. The applicants submitted bids, but were unsuccessful. They subsequently challenged the award of the bids in terms of the Promotion of Administrative Justice Act 3 of 2000 (PAJA). The respondent argued that PAJA was not applicable since the award of the tender did not amount to administrative action. In essence the respondent thus argued that its procurement was not subject to public procurement rules.

In a comprehensive judgment, which also included extensive comparative perspectives, the court held that the respondent was neither an organ of state for procurement purposes nor did it exercise public power or fulfil a public function in procuring the security services.

Of particular interest is that the court used the coverage provisions of s 217 of the Constitution to determine whether the respondent was an organ of state in its procurement activities for purposes of the definition of administrative action in s 1 of PAJA. The court thus noted that the respondent was not covered by s 217 and as a result could not be viewed as an organ of state for purposes of the definition of administrative action.³

However, PAJA also includes actions of non-organs of state in the definition of administrative action. The definitive criterion in this respect is whether the entity is exercising public power or fulfilling a public function. The court thus also assessed whether the respondent's procurement actions amounted to the exercise of public power or fulfilling a public function despite its not being an organ of state.⁴ The court held that the respondent's procurement actions did not involve the exercise of public power, but was rather 'domestic in nature'.⁵ The court seems to have reached this conclusion on the basis that the particular services procured were aimed at the respondent's internal functioning rather than linked to its external public function of providing education. The court also noted that the respondent was not acting in terms of any section in its general empowering statute, the Higher

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² Unreported, referred to as [2014] ZAWCHC 148, 8 September 2014; available online at <http://www.saflii.org/za/cases/ZAWCHC/2014/148.html>.

³ At para 44.

⁴ At para 45.

⁵ At para 49.

Education Act 101 of 1997, when procuring the services, which also pointed away from an exercise of public power.

While the court's reasoning in respect of the public function element technically cannot be faulted, it is not entirely clear on what basis, apart from the absence of a legislative source for the action, the court reached the conclusion that the procurement of security services was 'domestic in nature'. In dealing with this type of inquiry, the key issue is always one of causality.⁶ That is, how does one define the relationship between the goods or services procured and the entity's obvious and general public function in reaching a conclusion that the particular procurement does not fall under the entity's general public functions, or in the words of the court in the present matter, is 'domestic in nature'. In *Transnet Ltd v Goodman Brothers (Pty) Ltd*,⁷ a case that the present court also relied on, the SCA held that the purchase of gold watches to present as long-service awards to employees was sufficiently closely linked to Transnet's public function of providing transport services to qualify as the exercise of public power.

2.2 Internal appeals against municipal tender awards

In *ESDA Properties (Pty) Ltd v Amathole District Municipality*⁸ the court had to deal with the issue of internal remedies in the procurement context, including the vexing question of the application of s 62 of the Local Government: Municipal Systems Act 32 of 2000 in this context. This is an issue that has often troubled our courts and that has resulted in divergent judgments.

In the present matter the applicant challenged the award of a tender by the respondent to another bidder. The respondent argued that s 7(2) of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) barred recourse to judicial review at this stage since there were internal remedies that the applicant had not yet exhausted.

The respondent pointed to two sets of internal remedies in its argument. The first set originated in the supply chain management policy of the respondent. Two sections (108 and 109) in the policy created a dispute resolution mechanism to the following effect:

a person aggrieved by a decision or action taken in the implementation of the supply chain management system may lodge an 'objection or complaint'; that the accounting officer must appoint an independent and impartial person to 'assist in' the resolution of the dispute; that this person must 'strive to resolve' the dispute promptly and submit monthly reports to the accounting officer; that, if a dispute has not been resolved within 60 days, the dispute may be referred to the provincial treasury; and if the provincial treasury is unable to resolve the dispute, it may be referred to the national treasury. Finally, s 109 'must not be read as affecting a person's rights to approach a court at any time'.⁹

The court held that this mechanism did not constitute an internal remedy for purposes of s 7(2) of PAJA for two reasons. Firstly, the mechanism did not create the possibility to 'confirm, substitute or vary' the challenged procurement decision. It rather created a mediation or conciliation mechanism, which is not an internal remedy as envisaged by PAJA.¹⁰ Secondly, the provisions of the policy expressly reserved an aggrieved bidder's right to approach a court. The court held that the effect of this was that s 7(2) was not triggered by the remedy.

⁶ See G Quinot *State Commercial Activity: A Legal Framework* (2009) 113–116.

⁷ 2001 (1) SA 853 (SCA).

⁸ Unreported, referred to as [2014] ZAECGHC 76, 18 September 2014; available online at <http://www.saflii.org/za/cases/ZAECGHC/2014/76.html>.

⁹ At para 9 (references omitted).

¹⁰ At para 11.

This finding is significant since the mechanism contained in the supply chain management policy of the respondent closely resembles the mechanism prescribed in regulation 50 of the Municipal Supply Chain Management Regulations promulgated under the Local Government: Municipal Finance Management Act 56 of 2003. The implication is thus that the mechanism for the 'Resolution of disputes, objections, complaints and queries' as set out in the Regulations does not trigger s 7(2) of PAJA and an aggrieved bidder in a municipal tender process can proceed to judicial review without recourse to the internal dispute resolution mechanism.

The second internal remedy relied upon by the respondent was the internal appeal created in s 62 of the Systems Act. Various high courts have in recent years come to different conclusions on the impact of s 62 on procurement disputes.¹¹ In some judgments the s 62 appeal was held to be available to a disappointed bidder,¹² while in others it was held not to be available,¹³ at times depending on the nature of the notice to the winning bidder.¹⁴ A narrower question is whether the s 62 appeal triggers s 7(2) of PAJA. Of course an appeal under s 62 must in principle be available before it can trigger s 7(2), but its mere availability will not automatically mean that s 7(2) is triggered. Section 7(2) will only be triggered if an appeal under s 62 also provides an effective remedy. For an aggrieved bidder this must include the possibility of varying the award decision complained of. In light of s 62(3) it will only be possible to vary the award decision if no rights have vested yet. Thus, s 7(2) of PAJA will be triggered by s 62 of the Systems Act only where no rights have vested following the award decision.

In the present matter the court held that a successful appeal under s 62 would adversely impact on the rights of the winning bidder, in whom rights vested when it was informed of the success of its bid. It followed that relief could not be granted to the applicant under s 62, because of the precepts of s 62(3). The further consequence was that s 62 did not constitute an internal remedy in the present matter and thus did not trigger s 7(2) of PAJA.

It should be noted that the judgment should not be read to impact on the broader question of the availability of a s 62 appeal in procurement disputes. This matter was concerned only with the narrower question of the impact of s 62 appeals for s 7(2) of PAJA.

3. Literature

Quinot, G 'The Role of Quality in the Adjudication of Public Tenders' (2014) 17 *Potchefstroom Electronic Law Journal* 1110–1136 (<http://dx.doi.org/10.4314/pej.v17i3.08>)

Sonnekus, JC 'Procurement contracts and underlying principles of the law — no special dispensation for organs of state (part 2 — developing the common law, consequences and remedies)' 2014 *TSAR* 536

¹¹ See JQR Public Procurement 2009 (1) 2.5; JQR Public Procurement 2010 (1) 2.1; JQR Public Procurement 2014 (2) 2.4.

¹² *Groenewald NO v M5 Developments (Cape) (Pty) Ltd* 2010 (5) SA 82 (SCA); *Syntell (Pty) Ltd v The City of Cape Town* (unreported, case no 17780/07 (CPD), 13 March 2008); *Total Computer Services (Pty) Ltd v Municipal Manager, Potchefstroom Local Municipality* 2008 (4) SA 346 (T); *Evaluations Enhanced Property Appraisals (Pty) Ltd v Buffalo City Metropolitan Municipality* [2014] 3 All SA 560 (ECG).

¹³ *Lohan Civil-Tebogo Joint Venture v Mangaung Plaaslike Munisipaliteit* (unreported, case no 508/2009 (O), 27 February 2009); *Loghdey v City of Cape Town* (unreported, case no 100/09 (WCC), 20 January 2010).

¹⁴ *Loghdey v Advanced Parking Solutions CC* 2009 JDR 0157 (C).