SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 233/2015

In the matter between:

DDP Valuers (Pty) Ltd **Appellant**

and

Madibeng Local Municipality **First Respondent**

Dijalo Property Valuers **Second Respondent**

Neutral citation: *DDP Valuers (Pty) Ltd* v *Madibeng Local Municipality* (233/2015) [2015] ZASCA 146 (1 October 2015).

Coram: Mpati P, Lewis, Mhlantla, Bosielo and Swain JJA

Heard: 15 September 2015

Delivered: 1 October 2015

Summary: Administrative Law – review of municipal tender – interpretation and application of section 7(2) of the Promotion of Administrative Justice Act 3 of 2000 – duty to exhaust internal remedies prior to instituting judicial review proceedings – the dispute resolution mechanism created by regulation 50 of the Municipal Supply Chain Management Regulations does not constitute an internal remedy as contemplated by section 7(2) of the PAJA.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Makgoba J sitting as court of first instance).

1 The appeal is upheld with costs.

2 The first and second respondents are ordered to pay the costs of the appeal jointly and severally, the one paying the other to be absolved.

3 The order of the court a quo is set aside and replaced with the following order:

'The point *in limine* is dismissed with costs.'

4 The matter is remitted to the court a quo for a decision on the merits.

JUDGMENT

Mhlantla JA (Mpati P, Lewis, Mhlantla, Bosielo and Swain JJA concurring):

[1] This appeal with leave of the court a quo turns on whether the dispute resolution mechanism created by reg 50 of the Municipal Supply Chain Management Regulations, GN 868, *GG* 27636 of 30 May 2005 (the regulations) constitutes an 'internal remedy' contemplated in s 7(2) of the Promotion of Administrative Justice Act 3 of 2000 (PAJA). The litigation in this matter arose after the Madibeng Local Municipality (the Municipality) awarded a municipal contract to Dijalo Property Valuers (the second respondent) one of several entities that had tendered for a contract to perform services for it.

[2] The facts are uncomplicated. On 10 May 2013 the Municipality issued an invitation to tender for the compilation of a new General and Supplementary Valuation Roll for the period 2014 to 2018. Fifteen bidders submitted tenders. DDP Valuers (Pty) Ltd (the appellant), which had been the municipal valuer for the Municipality in the period preceding September 2013, and the second respondent were shortlisted.

[3] The second respondent was successful in its bid and was appointed to perform the services listed in the agreement with effect from 9 September 2013 until 30 June 2018 in terms of the Service Level Agreement concluded between it and the Municipality. Upon being advised of the award of the tender to the second respondent, the appellant lodged an objection in terms of reg 49 of the regulations on the basis that the second respondent's tender was out of proportion and far exceeded the appellant's bid which was the second lowest. Reg 49 provides the following:

'**49. Objections and complaints.**—The supply chain management policy of a municipality or municipal entity must allow persons aggrieved by decisions or actions taken by the municipality or municipal entity in the implementation of its supply chain management system, to lodge within 14 days of the decision or action a written objection or complaint to the municipality or municipal entity against the decision or action.'

[4] On 1 October 2013 the appellant directed its letter of objection to the Municipality requesting the latter to provide it with certain information relating to the winning bidder and the evaluation process. The appellant also requested the Municipality in terms of reg 50 of the regulations, to appoint a competent and qualified person to assist in resolving the dispute. The suspension of the operation of the new contract

with the second respondent was sought until the dispute with the appellant had been resolved.

[5] The Municipality replied on the same day by email stating that in view of the fact that the appellant had instituted action against it for payment of outstanding invoices, it would be unethical for the appellant to continue communicating with the Municipality and its staff.

[6] The appellant's reply to the email from the official was that its objection was a separate issue which had nothing to do with the summons issued against the Municipality. The appellant concluded by stating:

'Should we not receive the information requested, we will also take legal action on this matter against your municipality.'

The Municipality did not respond to the appellant's letter and its request in terms of reg 50 of the regulations.

[7] The appellant proceeded to launch an application in the Gauteng Division of the High Court, Pretoria for the review and setting aside of the Municipality's award of the tender to the second respondent on a number of grounds including, inter alia:

(a) That the tender Bid Evaluation Committee (BEC) had evaluated the tender on criteria in respect of functionality that differed from what was stated in the tender specifications set out in the Request for Proposals (RFP).

(b) That the BEC evaluated the tender based on responsiveness instead of the preference points system prescribed in regs 5 and 6 of the Preferential Procurement Regulations[1] and contrary to reg 4(5) thereof.

[8] The Municipality and second respondent opposed the application.

[1] Preferential Procurement Policy Framework Act, 2000: Preferential Procurement Regulations, GN R502, *Government Gazette* 34350 of 8 June 2011.

In their answering affidavits, the respondents raised a point *in limine* that the appellant had not exhausted internal remedies in terms of s 7(2) of the PAJA, and in particular reg 50 of the regulations, prior to launching the judicial review proceedings. It was argued that upholding the point *in limine* would be dispositive of the case.

[9] The matter came before Makgoba J. The learned judge was asked to determine the point *in limine* before considering the merits. He held that reg 50 of the regulations constituted an internal remedy and that the appellant either had to exhaust that remedy or approach the court for exemption as contemplated in s 7(2) of the PAJA. Since the appellant had done neither, the court a quo upheld the point *in limine* and dismissed the application with costs.

[10] The issue to be determined is whether the dispute resolution mechanism created by reg 50 constitutes an internal remedy as contemplated in s 7(2) of the PAJA. The Municipality abides the decision of this court and accordingly did not make any submissions in respect of the merits of the appeal. The second respondent, whilst abiding the decision of the court, submitted written heads of argument to address the issue of costs of the appeal in the event the appeal is upheld.

[11] Central to the issues is reg 50 of the regulations, which provides the following:

'**50. Resolution of disputes, objections, complaints and queries.**— (1) The supply chain management policy of a municipality or municipal entity must provide for the appointment by the accounting officer of an independent and impartial person not directly involved in the supply chain management processes of the municipality or municipal entity —

(a) to assist in the resolution of disputes between the municipality or

municipal entity and other persons regarding —

(i) any decisions or actions taken by the municipality or municipal entity in the implementation of its supply chain management system; or

(ii) any matter arising from a contract awarded in the course of its supply chain management system; or

(b) to deal with objections, complaints or queries regarding any such decisions or actions or any matters arising from such contract.

(2) A parent municipality and a municipal entity under its sole or shared control may for purposes of subregulation (1) appoint the same person.

(3) The accounting officer, or another official designated by the accounting officer, is responsible for assisting the appointed person to perform his or her functions effectively.

(4) The person appointed must —

(a) strive to resolve promptly all disputes, objections, complaints or queries received; and

(b) submit monthly reports to the accounting officer on all disputes, objections, complaints or queries received, attended to or resolved.

(5) A dispute, objection, complaint or query may be referred to the relevant provincial treasury if —

(a) the dispute, objection, complaint or query is not resolved within 60 days; or

(b) no response is received from the municipality or municipal entity within 60 days.

(6) If the provincial treasury does not or cannot resolve the matter, the dispute, objection, complaint or query may be referred to the National Treasury for resolution.

(7) This regulation must not be read as affecting a person's rights to approach a court at any time.'

[12] The overarching statutory provision, s 7(2) of the PAJA, provides the following:

'(2)*(a)* Subject to paragraph (*c*), no court or tribunal 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 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.'

[13] In *Reed and others v The Master of the High Court and others*,[2] Plasket J defined the term 'internal remedy' when used in administrative law as follows:

'[T]he composite term "internal remedy" . . . is used to connote an administrative appeal – an appeal, usually on the merits, to an official or tribunal within the same administrative hierarchy as the initial decision-maker – or, less common, an internal review. Often the appellate body will be more senior than the initial decision-maker, either administratively or politically, or possess greater expertise. Inevitably, the appellate body is given the power to confirm, substitute or vary the decision of the initial decision-maker on the merits. In South Africa there is no system of administrative appeals. Instead internal appeal tribunals are created by statute on an *ad hoc* basis.' (Footnotes omitted.)

[14] Generally, the duty to exhaust internal remedies is not in and of itself absolute[3] nor is it automatic.[4] That much is clear from the latitude given to courts in s 7(2)*(c)* of the PAJA, to exempt applicants, in exceptional circumstances and upon application made by the person concerned, from exhausting internal remedies if deemed by the court to be in the interest of justice. Furthermore, 'a court will condone a failure to

[2] *Reed v Master of the High Court of SA* [2005] ZAECHC 5; [2005] 2 All SA 429 (E) para 25.
[3] *Koyabe v Minister of Home Affairs (Lawyers for Human Rights as Amicus Curiae)* [2009] ZACC 23; 2010 (4) SA 327 (CC) para 38.
[4] Lawrence Baxter *Administrative Law* (1984) at 720. See also Cora Hoexter *Administrative Law in South Africa* 2 ed (2012) at 539.

pursue an available remedy where the remedy is illusory or inadequate, or because it is tainted by the alleged illegality.'[5] Under the common law, the two 'paramount considerations' are (a) whether the domestic remedies are capable of providing effective redress, and (b) whether the alleged unlawfulness undermines the internal remedies themselves.[6]

[15] Section 7(2) of the PAJA was considered by Mokgoro J in *Koyabe v Minister of Home Affairs (Lawyers for Human Rights as Amicus Curiae)*,[7] where it was held that an aggrieved party must take reasonable steps to exhaust internal remedies in view of the rationale of internal remedies as 'a valuable and necessary requirement in our law'.[8] However, it was also held that this requirement should not be rigidly imposed, nor should it be used by administrators to 'frustrate the efforts of an aggrieved person or to shield the administrative process from judicial scrutiny'.[9] The court held that internal remedies are necessary because they are designed to provide more readily available, immediate and cost-effective relief.[10] They defer to the executive administrative autonomy and afford the relevant 'higher administrative body' an opportunity to rectify its own irregularities before resorting to litigation.[11] They also enable the administrators, where applicable, to apply specialised knowledge which may be of a technical or practical nature,[12] including fact-intensive cases, where administrators have easier access to the relevant facts and information, which benefits courts in judicial review proceedings having the full record of an internal adjudication.[13]

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[5] Hoexter (note 4 above) at 539. (Footnotes omitted.)
[6] Baxter (note 4 above) at 721.
[7] *Koyabe* (note 3 above) para 34-49.
[8] Paragraph 38.
[9] Paragraph 38.
[10] Paragraph 35.
[11] Paragraph 36.
[12] Paragraphs 36-37.
[13] Paragraph 37.

[16] In this court, counsel for the appellant submitted that reg 50 of the regulations does not provide an internal remedy in that the tribunal does not have the powers to declare the award of the tender invalid and set it aside. I agree. The heading of reg 50 merely refers to the 'resolution of disputes, objections, complaints and queries'. What is envisaged by subregulation (1) is that the procedure be contained in a municipality's Supply Chain Management policy (the SCM policy). This seems to suggest that the SCM policy must itself set out the procedure.

[17] The functions of the independent and impartial person are twofold. He or she must:

(a) *assist* in the resolution of disputes between the municipality or municipal entity and other persons regarding any decisions or actions taken by the municipality or municipal entity in the implementation of its supply chain management system or any matter arising from a contract awarded in the course of its supply chain management system; or

(b) *deal* with objections, complaints or queries regarding any such decisions or actions or any matters arising from such contract. Such appointed person must (i) strive to resolve promptly all disputes, objections, complaints or queries received; and must (ii) submit monthly reports to the accounting officer on all disputes, objections, complaints or queries received, attended to or resolved. Having regard to the words used in reg 50, in the context of the regulations as a whole and the apparent purpose to which they are directed,[14] reg 50 is not an internal remedy as envisaged in s 7(2) of the PAJA.

[18] In addition, reg 50 does not set out the manner in which these

[14] *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA) para 18.

complaints, queries or objections will be dealt with and what documents will be considered in the process of dealing with them. The grounds upon which the decisions may be challenged are not specified. The appointed person is required to 'submit monthly reports to the accounting officer'. The independent and impartial person is not directly involved in the supply chain management processes, evincing the lack of the hierarchy and specialised knowledge requirements mentioned in *Koyabe*. There appears to be no indication that the report(s) will be communicated to the aggrieved person. Importantly, the powers of the independent and impartial person are not set out in reg 50, but they clearly do not include powers to correct or set aside the decision of the Municipality complained of. It is clear that this person has no decision-making powers. This too falls short of what an internal remedy would constitute.

[19] Where the dispute remains unresolved within a period of 60 days, or no response is received from the municipality within that period, the aggrieved party may refer the dispute to the relevant provincial treasury, failing which it may be escalated to the national treasury. No procedure is provided on how these objections and complaints would be resolved save to state that if the impartial person is unable to resolve the dispute, the aggrieved party may refer the dispute to the provincial treasury. Similarly, if the latter cannot resolve the dispute, the complaint or objection must be referred to the national treasury. The regulation is silent as to how and by whom the dispute would be resolved at these levels and on further action if the national treasury has not resolved the dispute.

[20] Finally, subreg (7) provides that the 'regulation must not be read as affecting a person's rights to approach a court at any time'. A person is therefore given a choice either to lodge a dispute in terms of reg 50 of the

regulations or launch an application in court. As has been pointed out by Professor Phoebe Bolton,[15] on a reading of the regulations, there is no intention on the part of the legislature for the independent and impartial person to have remedial powers. He or she is simply required to resolve or settle complaints and objections. On the wording of the regulations, a municipality or municipal entity is under an obligation to provide for the filing of objections and complaints without prescribing remedial outcomes. The regulations do not provide an internal remedy in terms of s 7(2) of the PAJA. Consequently, the regulations do not constitute an internal remedy.

[21] In my view the decision of Plasket J in *ESDA Properties (Pty) Ltd v Amathole District Municipality*[16] is correct. In that case, the learned judge was faced with provisions similar to those of reg 50, ie ss 108 and 109 of Amathole District Municipality Supply Chain Management Policy, 2012.[17] The learned judge held as follows in paras 10-11:

'In my view it was, for two reasons, not obligatory for ESDA to have first utilised this mechanism before applying for the review of the award of the tender.

The first is that ss 108 and 109 do not create an internal appeal or review in which the decision-maker has the power to confirm, substitute or vary the decision complained of. Instead, it creates a dispute resolution mechanism in which a person, with no decision-making powers, is appointed to assist the parties to resolve their dispute, acting, it would appear, as a mediator or conciliator. This is not an internal remedy contemplated by s 7(2) of the PAJA. The second reason is that s 109(6) provides in express terms that a party has a choice of either using the dispute resolution mechanism or approaching a court. In other words, it does not operate to prevent a party from approaching a court "at any time".'

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[15] Phoebe Bolton 'Municipal tender awards and internal appeals by unsuccessful bidders' *Potchefstroom Electronic LJ* 2010 (13) 3 at 80, available at *http://www.nwu.ac.za/p-per/index.html*.

[16] *ESDA Properties (Pty) Ltd v Amathole District Municipality & others* [2014] ZAECGHC 76; 2014 JDR 1878 (ECG).

[17] The policy adopted by the Amathole District Municipality is very similar to reg 50 of the regulations.

[22] In the result, since reg 50 of the regulations did not provide an internal remedy, there was no obligation on the appellant to utilise its provision or apply for an exemption in terms of s 7(2)*(c)* of the PAJA. Therefore, the court a quo erred when it concluded that even though a purported internal remedy would not be effective and its pursuit would be futile, it was still incumbent upon the appellant to approach the court for exemption from the obligation to exhaust internal remedies. The court a quo erred in upholding the point *in limine*.

[23] In my view, the only other provision that could have been applicable is s 62 of the Local Government: Municipal Systems Act 32 of 2000 (the Systems Act),[18] which is a general appeal provision for municipalities and does constitute an internal remedy contemplated in s 7(2) of the PAJA. Unlike reg 50 of the regulations, in that section, the appeal authority is empowered after considering the appeal to confirm, vary or set the decision aside, provided such variation will not adversely affect the rights that have already accrued to the preferred bidder. In the majority judgment of *City of Cape Town v Reader and others*,[19] Lewis JA considered the meaning of s 62 of the Systems Act to be that a decision can only be appealed against in terms of that section, if the outcome of the appeal does not detract from the rights of the successful applicant.

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[18] Section 62 subsecs (1), (2) and (3) of the Local Government: Municipal Systems Act 32 of 2000 provide:
'(1) 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.
(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.'

[19] *City of Cape Town v Reader & others* [2008] ZASCA 130; 2009 (1) SA 555 (SCA) para 32.

[24] In *Groenewald NO and Others v M5 Developments (Cape)(Pty) Ltd*,[20] it was held that unsuccessful tenderers were entitled to appeal under s 62 of the Systems Act. Leach JA held:

'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).'

[25] In this case, the appellant as an unsuccessful tenderer would have been entitled to appeal under s 62. However, the Municipality had already awarded the contract to the second respondent and the parties had already signed an agreement to that effect resulting in the rights accruing to the second respondent. It follows that the appellant could not resort to that procedure in order to comply with s 7(2) of the PAJA.

[26] In the result, the only recourse available for the appellant as an unsuccessful bidder was to apply for the judicial review of the tender award and the conclusion of the contract, which it did. The appeal must therefore succeed.

[27] What remains is the question of costs. The second respondent in its written heads of argument submitted that it should not be ordered to pay the costs of appeal. It submitted that it would not be fair or equitable to mulct it with these costs as it did not oppose the appeal and it gave all the parties notice of its non-opposition, three and a half months before the

[20] *Groenewald NO & others v M5 Developments (Cape)(Pty) Ltd* [2010] ZASCA 47; 2010 (5) SA 82 (SCA) para 24.

hearing of the appeal. In the alternative, it submitted that it should only be liable for the appellant's costs until 9 June 2015 when it filed its notice to abide.

[28] The basic rule is that all costs are in the discretion of the court. It is true that the second respondent filed a notice to abide the decision of the court. This obviously does not have the effect of setting aside the order of the court a quo. The appellant still had to proceed with the appeal to have that order set aside so that the review process could proceed. The appellant therefore had no choice but to carry on with the appeal.

[29] The general rule on appeal is that a substantially successful party is entitled to the costs of the appeal. There is no reason to depart from the general rule on the facts of this case. Accordingly, the appellant is entitled to its costs of appeal which shall be paid by both respondents jointly and severally.

[30] In the result, I make the following order:

1 The appeal is upheld with costs.

2 The first and second respondents are ordered to pay the costs of the appeal jointly and severally, the one paying the other to be absolved.

3 The order of the court a quo is set aside and replaced with the following order:

'The point *in limine* is dismissed with costs.'

4 The matter is remitted to the court a quo for a decision on the merits.

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N Z MHLANTLA

JUDGE OF APPEAL

APPEARANCES:

For Appellant:	B C Stoop SC
Instructed by:	Coetzer and Partners, Pretoria
	Honey Attorneys, Bloemfontein
For Respondents:	No appearance