THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

REPORTABLE

Case nos: 189/06 and 244/06

In the matter between

THE MINISTER OF SOCIAL DEVELOPMENT	**FIRST APPELLANT**
SNOTHO TRADING	**SECOND APPELLANT**
MDC CATERING	**THIRD APPELLANT**
PFULA MBOKOTO CONSORTIUM	**FOURTH APPELLANT**
and	
PHOENIX CASH & CARRY – PMB CC	**RESPONDENT**

Coram: **SCOTT, CLOETE, HEHER, CACHALIA JJA and THERON AJA**

Heard: **5 MARCH 2007**

Delivered: **26 MARCH 2007**

Summary: **Administrative law – public tender – bid conditions – interpretation.**

Neutral citation: **This judgment may be referred to as *Minister of Social Development v Phoenix Cash & Carry* [2007] SCA 26 (RSA)**

HEHER JA

HEHER JA:

[1] The award of public tenders is notoriously subject to influence and manipulation. Section 217(1) of the Constitution requires an organ of state to contract for goods or services 'in accordance with a system which is fair, equitable, transparent, competitive and cost-effective'. These principles must inspire all aspects of the process which makes provision for the conclusion of such a contract. Pursuant to s 217(3) of the Constitution the legislature passed the Preferential Procurement Policy Framework Act 5 of 2000 ('the PPPF Act') setting up the framework in which the preferential procurement goals identified in s 217(2) must be implemented. This, in turn, depends upon the submission of an 'acceptable tender' which is defined in s 1 of the Act as 'any tender which, in all respects, complies with the specifications and conditions of tender set out in the tender document'. Here also the principles of s 217(3) apply to any process which makes provision for the conclusion of a contract flowing from the submission of an 'acceptable tender'. Unfortunately, as experience in this Court proves, the high standards that the Constitution sets seem to be more honoured in the breach than in the observance.

[2] Without attempting a comprehensive survey of the circumstances which will offend against s 217(1) certain general observations are demonstrated as true by the facts of the present case-

(1) a tender process which depends on uncertain criteria lends itself to exclusion of meritorious tenderers and is opposed to fairness among tenderers, and between tenderers and the public body which supposedly promotes the public weal;

(2) a process which lays undue emphasis on form at the expense of substance facilitates corrupt practice by providing an excuse for avoiding the consideration of substance; it is inimical to fairness, competitiveness and cost-effectiveness. By purporting to distinguish between tenderers on grounds of compliance or non-compliance with formality, transparency in adjudication becomes an artificial criterion. In saying this I do not suggest that the tender board is not entitled to prescribe formalities which, if not complied with, will render the bid invalid,

provided both the prescripts and the consequences are made clear. What I am concerned to stress is the need to appreciate the difference between formal shortcomings which go to the heart of the process and the elevation of matters of subsidiary importance to a level which determines the fate of the tender.

It follows that a public tender process should be so interpreted and applied as to avoid both uncertainty and undue reliance on form, bearing in mind that the public interest is, after giving due weight to preferential points, best served by the selection of the tenderer who is best qualified by price. This is particularly relevant to the activities of a 'technical evaluation committee' which examines the tenders for formal compliance but does not evaluate the merits of the bids. In the present case the bids which survived the technical scrutiny were passed on to the bid committee for evaluation. By then the die was cast against the respondent ('Phoenix') and the bid committee was deprived of the opportunity of considering the merits of its tender.

[3] During October 2005 Phoenix applied to the Pietermaritzburg High Court for an order against six respondents – respectively the Minister of Social Development, the MEC for Social Development: Kwa Zulu-Natal, Snotho Trading, MDC Catering, Royal Rice Company and Pfula Mbokoto Consortium. The National Department of Social Development ('the Department') had awarded a tender to supply and deliver food hampers in Kwazulu-Natal to the third, fourth, fifth and sixth respondents. Phoenix, an unsuccessful tenderer, initially obtained a rule *nisi* that operated as an interim interdict restraining the respondents from entering into agreements to supply and deliver such hampers.

[4] All the respondents opposed confirmation of the rule. The first and second respondents filed an affidavit as did MDC. Having heard argument Morley AJ granted relief in the following terms:

'An order is granted-

(a) confirming paragraph 1(a) of the Rule granted on the 26th October 2005. The first and second respondents are ordered to pay the applicant's costs in relation to the interdict proceedings

jointly and severally, including the costs of two counsel where applicable;

(b) setting aside the decision of the applicant to award tender No SD 20/2004, in so far as it relates to Kwa Zulu-Natal, to the third to sixth respondents;

(c) requiring the first respondent to invite fresh tenders should the first respondent decide to pursue the supply and delivery of food hampers in terms of the National Food Emergency Scheme in Kwa Zulu-Natal;

(d) requiring the first respondent to take cognizance of this judgment in formulating new tender terms and conditions;

(e) that the respondents are ordered to pay the applicant's costs of the review proceedings jointly and severally including the costs of two counsel where applicable;

(f) that the first and second respondents are ordered to pay the costs of the third to sixth respondents jointly and severally, including any costs that the third to sixth respondents may be called upon to pay to the applicant.'

[5] The Minister, Snotho, MDC and Pfula applied for and were granted leave to appeal to this Court against the whole of the judgment. The MEC and Royal Rice did not seek leave.

The background to the litigation

[6] Phoenix held a contract to supply food hampers to poor families in the province for the period December 2003 to February 2004. After its expiry it submitted a further tender but the invitation was withdrawn without explanation. Thereafter the Department renewed its invitation under bid number SD 20/2004. The closing date for submission of tenders was 30 March 2005. The stated aim was the appointment of local service providers and consortiums to supply food items to about 150,000 families in the Kwa Zulu-Natal and Eastern Cape provinces. Bidders were required to provide prices for two options of hamper, the respective contents being specified. Each invitation to bid was accompanied by the Terms of Reference for the bid comprising nineteen clauses. Of these only parts of clause 17 need to be quoted:

'17. The following conditions apply to the bid and if any of the conditions are not met, the bid will

not be considered.

. . . .

17.2 The Department reserves that (*sic*) right to verify or request for (*sic*) proof to confirm that the service provider will be able to deliver at the price tendered. Should the service provider be unable to provide such proof, the bid will be cancelled.

. . . .

17.6 Bids will only be considered from service providers who are local traders, small business enterprises, NPOs and FBOs in the locality or service providers who form consortia with these local small business enterprises.

17.7 Local small business enterprises (shop owners) are encouraged to form consortiums to be able to have the required capacity to deliver on this bid.

. . . .

17.10 Financial resources must be readily available (provide audited financial statements, bank statements, letters from the bank) (*sic*) as proof of availability of funds. Should the financial resources be in the form of credit facilities such as for transport, warehousing, food items etc, a letter of approved credit facilities should be provided. If no such evidence is provided the bid will be invalidated. **Note**: Bank loan awaiting contract will not be considered.'

[7] Phoenix submitted a bid in purported compliance with its understanding of the conditions. It supported its bid with a letter from Standard Bank, Newcastle Branch dated 17 March 2005 addressed to the bid committee in the following terms:

'**Phoenix Cash and Carry – PMB Close Corporation**

Bid Number SD 20/2004

This letter serves to confirm that the above mentioned Close Corporation has been associated with our Institution since inception. Their accounts have been well conducted and there has been no reason or any occasion to return their drawings over the past 12 months.

We confirm that they have made the necessary financial arrangements with the Institution to support their financial requirements to service a contract with yourselves.

Kindly do not hesitate to conduct [presumably 'contact'] the writer should you require any futher information.'

Phoenix also submitted a letter addressed to the Committee from Messrs Khan, Salejee & Company, Chartered Accountants dated 22 March 2005, as follows:

'**RE: <u>TENDER NO. SD 20/2004</u>**

Kindly be advised that the 2003 financial statements and the 2004 interim financial statements for PHOENIX CASH AND CARRY – PMB CC are readily available for your perusal.

Should you require these statements, kindly do not hesitate to contact me.'

Furthermore, Phoenix submitted letters from six proposed commodity suppliers verifying that all financial arrangements had been made for the supply to it of the individual components of the items which were to be included in the hampers and letters from other suppliers in respect of the finalization of financial arrangements for the transport of goods and the packaging of groceries.

[8] About 4 October 2005 it came to the knowledge of Phoenix that the tender had been awarded to persons other than itself. Further enquiries revealed that the successful tenderers were the third to sixth respondents. Phoenix requested the Department to furnish written reasons for refusing to award the tender to it.

[9] On 17 October 2005 Phoenix received the following response from the Department:

'Insofar as your request for reasons is concerned, the Department responds as follows:

5.1 your client is not entitled as of right to be awarded the tender;

5.2 the Department evaluated all bids and awarded to the entities listed in annexure A;

5.3 the bids of the entities listed in annexure A satisfied the requirements of the tender;

5.4 the Department exercised its prerogative in awarding the tender to the entities in annexure A. In other words, the Department exercised its discretion not to award the tender to your clients and did so after consideration of all bids that were submitted.'

[10] The Department supplied certain information relating to the tenders that had been received. This showed, inter alia, that the tender prices per parcel of the successful tenderers ranged between R269,10 and R299,69. The prices per parcel for the two options that Phoenix offered were in striking contrast at R187,00 and R180,70 respectively. As the adjudication procedures had notified prospective bidders that the tenderer with the lowest bid would obtain 90 out of the maximum possible 100 points

available and as Phoenix believed that it must also have scored an additional 5 points awarded to historically disadvantaged individuals as well as a further 5 points for carrying on an enterprise located in the province, it was understandably perplexed at not having succeeded in its bid.

[11] As Phoenix justifiably complained in its founding affidavit,

'Nothing in the National Department's reply constitutes *objective criteria* which would justify the award to a tenderer other than the Applicant in terms of Section 2(1) of the PPPF Act.[1] The reply is vague. It in fact provides no reason at all why the Applicant's tender did not succeed. It does not comply with the abovementioned requirements of the Constitution and the PPPF Act. It also does not comply with the provisions of the Promotion of Administrative Justice Act No. 3 of 2000.'

[12] However, on 10 November 2005, after service of the founding papers in the application, the State Attorney served a notice on Phoenix's attorney which stated that the bid was unsuccessful for the following reasons:

'1. [I]t failed to satisfy the requirements of the bid regarding the financial resources. It failed to provide the following documents:

1.1 audited financial statements;

1.2 bank statements;

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[1] '(1) An organ of state must determine its preferential procurement policy and implement it within the following framework:

(a) A preference point system must be followed;

(b) (i) for contracts with a Rand value above a prescribed amount a maximum of 10 points may be allocated for specific goals as contemplated in paragraph *(d)* provided that the lowest acceptable tender scores 90 points for price;

(ii) for contracts with a Rand value equal to or below a prescribed amount a maximum of 20 points may be allocated for specific goals as contemplated in paragraph *(d)* provided that the lowest acceptable tender scores 80 points for price;

(c) any other acceptable tenders which are higher in price must score fewer points, on a *pro rata* basis, calculated on their tender prices in relation to the lowest acceptable tender, in accordance with a prescribed formula;

(d) the specific goals may include-

(i) contracting with persons or categories of persons, historically disadvantaged by unfair discrimination on the basis of race, gender or disability;

(ii) implementing the programmes of the Reconstruction and Development Programme as published in *Government Gazette* 16085 dated 23 November 1994;

(e) any specific goal for which a point may be awarded, must be clearly specified in the invitation to submit a tender;

(f) the contract must be awarded to the tenderer who scores the highest points, unless objective criteria in addition to those contemplated in paragraphs *(d)* and *(e)* justify the award to another tenderer; and

(g) any contract awarded on account of false information furnished by the tenderer in order to secure preference in terms of this Act, may be cancelled at the sole discretion of the organ of state without prejudice to any other remedies the organ of state may have.

(2) Any goals contemplated in subsection 1 *(e)* must be measurable, quantifiable and monitored for compliance.'

1.3 a letter from the bank containing sufficient information.'

[13] At the same time the State Attorney purported to file the record of the proceedings in the matter, consisting, apparently, of the formal tender documents that had accompanied Phoenix's bid and a schedule of bidders (some 112 in all) who did not meet the bid requirements and whose bids were therefore not considered at all (this schedule is apparently the 'matrix' referred to below). The annotation in the comments column opposite Phoenix's name was 'Not considered. No financial resources.'

[14] The procedure followed by the Department in weeding out invalid bids and evaluating those that complied is described in the answering affidavit of the Minister and the MEC made by the Director-General of the Department:

'[A]fter the bidding time had closed, the bids were opened and entered into a register. The technical evaluation committee considered the bids in terms of whether they were acceptable bids. It then compiled a matrix of all the bids indicating the compliance or non-compliance with the terms of the bid. A copy of the matrix and the bids were then submitted to the procurement section of the department. Copy of the matrix is annexed hereto marked annexure "**VM1**". The procurement section then submitted them to the bid committee. The bid committee then considered the bids. It then sent all the bids and its recommendations to me. I then considered the matrix, the recommendations of the bid committee and the bids. I then made the decision on the basis of all that information.'

[15] The answering affidavit of MDC did not take the matter further as the deponent possessed no personal knowledge of the circumstances relevant to the application.

The judgment of the court *a quo*

[16] Morley AJ, in granting the application, delivered a careful judgment in which he reasoned as follows:

1. Section 217 of the Constitution required the first and second respondents to act in accordance with a system which is fair, equitable, transparent and cost-effective.
2. Section 33(1) of the Constitution provided a right to lawful, reasonable and procedurally fair administrative action.

3. The decision to reject the Phoenix's tender was administrative action.
4. Fair administrative action depends on the circumstances of the case.
5. The formulation of the tender conditions is the first step in ensuring fair administrative action in the bid adjudication.
6. The terms of clause 17.10 of the Terms of Reference were not sufficiently certain to satisfy the requirement of fairness since they did not inform a tenderer with reasonable and sufficient certainty of the requirements for a valid and acceptable tender. Tender documentation should speak for itself.
7. Uncertainty may result in lack of competitiveness and cost-effectiveness because of exclusion of otherwise valid tenders. Nor does it answer the demands of fairness in the process.
8. Vagueness flowed from
    (a) the absence of an indication of the period covered by audited financial statements;
    (b) the absence of a stated period for which bank statements were to be provided;
    (c) the failure to specify what information from the bank was required;
    (d) the uncertainty as to whether the second sentence of clause 17.10 was to be read conjunctively or disjunctively with the first sentence.
9. The tender document was too vague to satisfy the requirements of administrative fairness. It required to be redrafted. The consequence was that if the Department wished to proceed with the tender it would have to begin *de novo*.
10. The requirement that the procurement process be procedurally fair requires that interested parties be given a reasonable opportunity to make representations relating to the award of the contract.

Discussion

[17] I see the matter somewhat differently. On a plain reading of clause 17.10 the

substance of the conditions of validity of a bid is apparent: first, financial resources to carry out the contract must be readily available; second, the tenderer must furnish evidence of that fact including, where credit facilities will be relied on, proof that such facilities have been approved. The form lies in the means of proof. The words in parenthesis (properly bracketed, '(provide audited financial statements, bank statements, or letters from the bank, as proof of availability of funds)') seem to me no more than advisory or indicative of the various possibilities of proving that financial resources are readily available. The examples mentioned are not intended to be cumulative or exhaustive. The letters from suppliers furnished by the applicant are an obvious addition to the possibilities. Likewise production of a letter of approval of credit facilities or a bank letter could never have been intended to exclude any other obviously sufficient means of proof such as an affidavit from a relevant source in appropriate terms.

[18] Counsel for the second, third and fourth appellants submitted that the expression 'no such evidence' in the penultimate sentence of clause 17.10 should be construed as a reference to the specific items of evidence expressly identified in the clause. However, the purpose of obtaining proof of the ready availability of financial resources is best served if the expression is afforded a broad scope, ie no evidence having the tendency to establish such availability; cf *Nissan SA (Pty) Ltd v Commissioner for Inland Revenue* 1998 (4) SA 860 (SCA) at 869C-870C.

[19] I have quoted clauses 17.2, 17.6 and 17.7 of the Terms of Reference because they are relevant to a proper understanding of clause 17.10. The first affords the Department the flexibility of investigating the financial substance of a service provider. When the applicant submitted its tender every supporting document from the bank and its suppliers invited the bid committee to contact the writer should any further information be required. The opportunity properly to evaluate a bid which was on the face of it markedly superior to the tenders of the respondents was however spurned. The remarks of Conradie JA in *Metro Projects CC v Klerksdorp Local Municipality* 2004 (1) SA 16

(SCA) at para 13 bear repeating:

'In the *Logbro Properties* case *supra*, paras [8] and [9] at 466H-467C, Cameron JA referred to the "ever-flexible duty to act fairly" that rested on a provincial tender committee. Fairness must be decided on the circumstances of each case. It may in given circumstances be fair to ask a tenderer to explain an ambiguity in its tender; it may be fair to allow a tenderer to correct an obvious mistake; it may, particularly in a complex tender, be fair to ask for clarification or details required for its proper evaluation. Whatever is done may not cause the process to lose the attribute of fairness or, in the local government sphere, the attributes of transparency, competitiveness and cost-effectiveness.'

The second- and third-mentioned clauses illustrate that the process was intended to encourage bidders with little or no financial history. But the process followed by the committee treated each item of evidence mentioned in clause 17 as peremptory and the whole as excluding reliance on any not specifically mentioned. By doing so it failed to appreciate that audited financial statements might reasonably be inapplicable to a small business only beginning to find its feet or to a consortium without a previous history. Thereby it potentially shut out or discouraged the very interests which clauses 17.6 and 17.7 were intended to attract.

[20] Counsel for the second, third and fourth appellants, conscious that the alleged vagueness of clause 17.10 was not going to be persuasive in the appeal, submitted that the letter from the Standard bank did not in any event provide acceptable evidence that the necessary resources were readily available to Phoenix. I disagree. The averment is made in unequivocal terms in the second paragraph of that letter. The technical committee had no reason to question its accuracy.

[21] The process of sifting bidders adopted by the Minister succeeded in discarding the wheat with the chaff. In the result there was no proper evaluation of Phoenix's tender (and, conceivably, of many others) and Phoenix did not receive the benefit of procedurally fair administrative action as was its constitutional entitlement.

[22] For these reasons the court *a quo* was correct in setting aside the award of the

tender to Snotho, MDC, Pfula and Royal Rice and directing that a fresh tender process should be undertaken if the Department intended to pursue the distribution of hampers. Because of the change in emphasis in this judgment, the order which that court embodied in paragraph (d) is no longer appropriate.

[23] The affidavits in this matter revealed disquieting features, which, in view of the conclusion which I have reached, need to be noted by those responsible, in order avoid repetition.

1. The initial reasons furnished to Phoenix by the Department were, to say the least, seriously misleading. They created the impression that its tender had been evaluated and rejected on its merits, which was far from being the case. No explanation for the compilation of those reasons was ever furnished. In a proper case such a failure might justify an inference of *mala fides*. In addition, the reasons speak of a 'prerogative' and a 'discretion' which betrays a fundamental misconception of the function to be performed by the adjudicator of the tender, whose duty under s 2(1)(f) of the PPPF Act is to award the contract to the tenderer who scores the highest points, unless objective criteria in addition to those contemplated in s 2(1)(d) and (e) of the Act justify the award to another tenderer.
2. The representative of the Department, Ms Phemba, was unable to supply Phoenix's attorneys on request with the addresses of Snotho and Phula and those respondents could not be served or given notice of the application proceedings. Yet they were represented by counsel when the matter came to court. This also was unexplained.
3. According to records from the Companies' Office annexed to the applicant's supplementary founding affidavit, Snotho is a close corporation, but one that was only incorporated after the closing date of the tender. *Prima facie* that rendered its bid invalid: *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2006 (3) SA 151 (SCA) at para 51. One perforce asks how Snotho could have satisfied the requirement of providing evidence of readily available financial resources within

the terms of clause 17.10 as the technical committee is said to have interpreted that requirement.

4. As has been shown, the merits of Phoenix's tender were so manifest and the grounds of its exclusion so flimsy that doubts are necessarily raised as to the reliability and credibility of the procurement process employed by the Department.

5. Counsel for Phoenix informed us that notices in terms of Rule 14(5) calling on Snotho and Pfula to disclose particulars of the proprietors or partners had been served at the hearing. Those notices were neither followed up nor answered. The unsatisfactory result is that counsel representing those entities asked this Court to make orders in favour of those respondents without knowledge of their *locus standi*, their true nature or the faces behind them.

[24] In the result the following order is made:

1. The appeals are dismissed, save that paragraph (d) of the order made by the court *a quo* is set aside.
2. The costs of the appeals, including the costs consequent upon the employment of two counsel, are to be paid by the appellants in the appeals jointly and severally.

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J A HEHER
JUDGE OF APPEAL

SCOTT JA)Concur
CLOETE JA)
CACHALIA JA)
THERON AJA)