THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

REPORTABLE
Case no: 602/2002

In the matter between

METRO PROJECTS CC **FIRST APPELLANT**

AFRICAN UNITY DEVELOPERS CC **SECOND APPELLANT**

and

KLERKSDORP LOCAL MUNICIPALITY **FIRST RESPONDENT**

and

ELEVEN OTHERS

Coram: **ZULMAN, FARLAM, NUGENT, CONRADIE and HEHER JJA**

Heard: **5 SEPTEMBER 2003**

Delivered: **22 SEPTEMBER 2003**

Summary: **Fairness in tender procedures mandated by Local Government Transition Act and Promotion of Administrative Justice Act – procedure unfair where wrong information on which to base award of tender given to mayoral committee**

–

JUDGMENT

CONRADIE JA:

[1] The appellants and the second to twelfth respondents tendered for the development of 1 333 stands in a township known as Jouberton extension 10 which lies within the jurisdiction of the first respondent, a local municipality established under the Local Government Municipal Structures Act 117 of 1998. On review the court *a quo* declined to uphold a contention by the appellants that the award of the tender to the ninth respondent ought to be set aside but granted them leave to appeal to this court against the dismissal of their application. The appellants (associates in a joint venture) and the first respondent are the only parties before us.

[2] The first respondent had been given a grant amounting to R18 400 by the Provincial Government of the North West Province for the development of each of the stands. In the invitation to tender prospective offerors were told that, apart from providing certain developmental services, they were expected to attend to the construction and handover of a top-structure (a house) on each of the stands. Each

tenderer was required to furnish a price breakdown and description of the products and services to be provided by it. Accordingly each of the tenderers included in its tender a plan stating the floor area of the house it proposed to build.

[3] The city civil engineer employed by the first respondent, Mr Nicolas Els, analysed the tenders. He submitted to the committee charged with deciding on them a recommendation in tabular form. It consisted of three columns, each divided into two sections to cater for two types of stand. The three columns are headed 'Tendered indirect cost', 'Amount available for top-structure' and 'Building area of top-structure.' These, quite clearly, were important features of each tender. After indirect costs had been taken into account, it was possible to determine how much of the R18 400 remained for the construction of the top-structure. That figure was inserted in the second column. In the third column was inserted the floor area of the top-structure which each tenderer offered to build with the money available to it after the other developmental expenses had been met.

[4] Among the tenderers that indicated the size of the structure they offered to build was the ninth respondent. The plan submitted with its tender indicated that it proposed building a structure of 30.2 sq m. This compared poorly with the other tenderers. Four of them, including the appellants, proposed a house of 37 sq m or larger. Except for one other tenderer none proposed a house as small as that of the ninth respondent. Nevertheless, Els recommended that the ninth respondent's tender be accepted. In the column dedicated to the provision of the floor area he inserted the following comment: 'the house size and layout to be discussed with community'. This comment misrepresented the content of the ninth respondent's tender. The ninth respondent had not tendered on the basis that the extent and layout of the top structure would later be settled between it and 'the community': its tender, like the others, included the size of the dwelling it proposed to build.

[5] Although he later declared that his omission to state the floor area was an error, Els at first defended his decision not to include this information in the case of the

ninth respondent by saying that in the scheme of the invitation to tender the floor area was not an important element and anyway, by the time he compiled his schedule, the ninth respondent had advised him that it would be prepared to increase the size of its tendered house. Els's schedule, however, did not disclose the post-tender offer to increase the floor area. It stated that the house size was to be 'discussed' with the 'community' and gave no indication of the extent to which the ninth respondent would be disposed to concede any eventual demands of the community (whose bargaining power as a non-party to the contract would be limited) for a larger house.

[6] Els's omission to state any sort of floor area in the schedule did not go unobserved. The city treasurer noticed it and tersely commented: 'Although the tender from Remmogo Property Developers [the ninth respondent] has the biggest amount available for the top-structure, they do not provide Council with an indication of the size of the top-structure, which makes it a bit risky. It is recommended that this be clarified with the company in advance.'

[7] Els's recommendation then went to the Local Economic Development Marketing and Procurement Committee ('the LED Committee') presided over by Ms Riani de Wet. This committee resolved at a meeting held on 16 May 2001 to hold the matter in abeyance until 'all relevant information' had been obtained. Without the 'relevant information' having been obtained, the tender recommendation made its way to the mayoral committee, the next level decision maker. This body on 18 June 2001 refused to deal with the tender until the track record of the ninth respondent and the floor area which it was to build had been ascertained. The requirements of the mayoral committee were communicated to Els by De Wet (who was also a member of that committee).

[8] The obvious and honest answer to the mayoral committee's query would have been to take the requested information from the ninth respondent's tender plan and advise the committee that the schedule had not shown a floor area for the ninth respondent because it intended improving on its tender offer. This was not done.

Instead Els wrote a report to the committee to which was attached not the 30,2 sq m tender plan but a plan for a house of 34,3 sq m. Els did not disclose to the committee that this was not the ninth respondent's tender plan nor did he reveal the provenance of the new plan. It had been ready since 9 May 2001, having been drawn a fortnight or so after the close of tenders on 20 April 2001 at a time when the floor areas proposed by the other tenderers must have been known to the ninth respondent.

[9] The deception of the mayoral committee did not end there. Either because Els suppressed the information or because the ninth respondent concealed it from Els the committee was also not made aware that the ninth respondent could afford to produce an even bigger house, one that could compete with the best that was on offer. Also dated 9 May 2001, but delivered to Els at a later date, was a further plan proposing a top-structure of 38 sq m. For it to have served any purpose at all the plan must have been delivered to him before the date on which the tender was awarded to the ninth respondent. The papers do not explain what Els was supposed to do with the plan but

he should, in the discharge of his fiduciary duty to the first respondent, have disclosed it to the mayoral committee. In the absence of any explanation a probable inference is that it was a contingency plan, drawn up at the same time as the 34,3 sq m plan but held back to see if the earlier more modest one would not suffice to secure the tender.

[10] The first respondent's justification for having accepted the late offer is diffuse. Its first line of defence is that it was not bound to follow tender procedures, an untenable suggestion put up by Els (who, as city engineer, should have known better) that was not pursued by the ninth respondent's counsel. Its second line of defence was that although it accepted that it was obliged to have acted fairly it had done so.

[11] As an organ of state in the local government sphere the first respondent in awarding a tender is obliged to comply with s 10G(5)(*a*) of the Local Government Transition Act 209 of 1993 read with s 217(1) of the Constitution of the Republic of South Africa Act 108 of 1996. These provisions mandate it to do so in accordance

with a system which is fair, equitable, transparent, competitive and cost-effective. The Preferential Procurement Policy Framework Act 5 of 2000 requires organs of state to establish a procurement policy, and also makes it obligatory for the first respondent, as an organ of State in the local sphere, to follow a tender procedure for the procurement of goods and services.

[12] There is another reason that the tender procedure of a local authority must be fair. Invitations to tender by organs of State and the awarding of tenders where it is done in the exercise of public power is an administrative process (see *Logbro Properties CC v Bedderson NO and Others* 2003 (2) SA 460 (SCA) at 465F-466C where the leading cases are collected). Section 3(2)(*a*) of the Promotion of Administrative Justice Act 3 of 2000 requires the process to be lawful, procedurally fair and justifiable. But primarily, in the case of a local authority, the process must be fair because s 10G (5)(*a*) of the Local Government Transition Act 1993 requires it.

[13] In the *Logbro Properties* case *supra* 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.

[14] Was the tender process followed in the present case fair? A high-ranking municipal official purported to give the ninth respondent an opportunity of augmenting its tender so that its offer might have a better chance of acceptance by the decision-making body. The augmented offer was at first concealed from and then represented to the mayoral committee as having been the tender offer. It was accepted on that basis. The deception stripped the tender process of an essential element of

fairness: the equal evaluation of tenders. Where subterfuge and deceit subvert the essence of a tender process, participation in it is prejudicial to every one of the competing tenderers whether it stood a chance of winning the tender or not.

[15] The appellants contended that there were several respects in which the ninth respondent's tender failed to comply with the tender conditions. In the light of my conclusion it is unnecessary to discuss what the effect of these imperfections on the validity of its tender might have been. The Preferential Procurement Policy Framework Act 5 of 2000 defines an 'acceptable tender' as one that 'in all respects complies with the specifications and conditions of tender as set out in the tender document'. There are degrees of compliance with any standard and it is notoriously difficult to assess whether less than perfect compliance falls on one side or the other of the validity divide. Whether or not there can in any particular case be said to have been compliance with 'the specifications and conditions of tender' may not be an easy question to answer. In the present case there is no difficulty. The offer put before the

mayoral committee was not the one made in the ninth respondent's tender. It was not one elicited by the specifications and conditions of tender.

The appeal succeeds with costs. The order of the court *a quo* is replaced by an order reading -

'(a) The award by the first respondent to the ninth respondent of tender CCE9/2001 is set aside;

(b) The first respondent is ordered to pay the costs of the application.'

_____

J H CONRADIE
JUDGE OF APPEAL

ZULMAN JA)Concur
FARLAM JA)
NUGENT JA)

HEHER JA)