THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Case No: 324/2008

In the matter between

MUNICIPAL MANAGER: QAUKENI LOCAL MUNICIPALITY **First Appellant**

QAUKENI LOCAL MUNICIPALITY **Second Appellant**

and

F V GENERAL TRADING CC **Respondent**

Neutral citation: *QAUKENI LOCAL MUNICIPALITY and F V GENERAL TRADING* (324/08) [2009] ZASCA 66 (29 May 2009)

Coram: MPATI P, BRAND, CLOETE, MAYA JJA and LEACH AJA

Heard: 14 May 2009

Delivered: 29 May 2009

Updated:

Summary: Contract – municipal contract concluded in breach of prescribed processes relating to procurement of municipal services – no difference in procument processes required for basic municipal services - contract invalid – unnecessary for appellants in present proceedings to have sought a formal review of the award of the contract – declaration of invalidity issued.

ORDER

On appeal from: High Court, Mthatha (Greenland AJ sitting as court of first instance).

1. The appeal succeeds with costs. Such costs are to include the costs of two counsel but shall exclude one half of the appellants' costs of preparing, perusing and lodging the appeal record.
2. The order in the court a quo is set aside and replaced with the following:

'(a) The application is dismissed with costs.

(b) The counter-application is granted with costs and the contract 'ZEV 2' concluded on 25 June 2006 is declared to be null and void.

(c) The costs shall include the costs of two counsel in each case.'

JUDGMENT

LEACH AJA (MPATI P, BRAND, CLOETE and MAYA JJA concurring):

[1] This appeal concerns the validity of a services procurement contract concluded by the second appellant, the Qaukeni Local Municipality, without due compliance with various statutorily prescribed procedures relating to municipal procurements. The second appellant is situated in that portion of the province of the Eastern Cape formerly known as Transkei. Its principal towns are Lusikisiki and Flagstaff. In the circumstances more fully described below, it purported to appoint the respondent as the refuse collector for its municipal area. The first appellant, the municipal manager Mr Fihlani, later sought to terminate the contract with effect from 30 June 2007. This gave rise to the respondent instituting urgent proceedings in the High Court, Mthatha seeking an order declaring the termination to be unlawful and directing the second appellant to '. . . continue with the contract and to pay the (respondent) for the work done in terms thereof until the contract is lawfully terminated'. In their absence, the court issued a rule nisi calling upon the appellants to show cause on the return day why such an order should not be granted. The appellants subsequently opposed the confirmation of the rule, contending that the contract relied on by the respondent was invalid and of no force and effect; and in a counter

application, they sought a declaratory order to that effect.

[2] In due course the matter came before Greenland AJ who held the contract to be valid. He further held that the appellants had not discharged the onus of showing that they had justifiably terminated the contract and, consequently, he granted the respondent's application and dismissed the counter-application. A subsequent application for leave to appeal was also dismissed but, with leave granted by this court, the appellants now appeal against the judgment in respect of both the main and counter-applications.

[3] The material facts relevant to the issues in the appeal are not in dispute. During November 2005, the respondent submitted a tender for a contract offered by the second appellant to collect refuse in both Lusikisiki and Flagstaff. Its tender was accepted and gave rise to the conclusion of an oral agreement under which the respondent provided the required service during the period November 2005 to 30 June 2006. The validity of this agreement has not been challenged and I mention it merely as historical background to the events that followed.

[4] When the oral agreement was nearing its end, the municipal manager at the time, Mr Cezula, contacted the respondent and invited it to submit a copy of its budget for the twelve month period from July 2006 to June 2007. This the respondent did, but the 'budget' it presented in fact appears to have been no more than an itemised quotation to continue to provide its services at a monthly charge of R351 350. Without inviting any other persons to tender for such a contract, the municipal council resolved to reappoint the respondent as the second appellant's refuse collector against payment of the monthly sum quoted in its 'budget' and tasked Cezula to draw up a written agreement for the respondent to sign. He did so, and presented it to the respondent for its approval. The respondent accepted the terms offered, and the contract was duly signed by both parties at Flagstaff on 25 June 2006 (a copy thereof is included in the papers as annexure 'ZEV 2').

[5] In terms of this contract the appellant was appointed the sole refuse collector for the second appellant for which it would be paid R351,350.00 per month, subject to a 20% annual escalation. Clause 2 further provided:

'. . . to ensure uninterrupted delivery of the service in the best interest of the local community, it is

agreed that this contract is for the initial period of one (1) year starting from 01 July 2006 to 30 June 2007. However for the contract to end on 30th June 2007 the notice that the contract will terminate on 30th June 2007 must be given to the service provider six (6) months prior to the date of termination otherwise the contract is automatically renewed on the 30th of June 2007 for another period of one (1) year at the 20% escalation on the fees charged for the service. In any case for the contract to lapse a notice of termination must be given six (6) months before the end of the contract otherwise it will be automatically renewed at a 20% escalation on the fees charged for the service. . . . .'

[6] The respondent duly proceeded to render the service it had undertaken and was paid the agreed monthly fee for doing so. As no notice of termination was given six months before 30 June 2007, the contract appeared set to continue beyond that date by reason of the automatic renewal provision in clause 2. However, in correspondence which passed between the parties commencing on 4 June 2007 the first appellant, Cezula's successor as municipal manager, informed the respondent that the municipal council had resolved that its services were not required beyond 30 June 2007 and that, although it would be at liberty to tender afresh when the second appellant called for tenders, the necessary statutory procedures would be strictly adhered to in the future.

[7] The letter of 4 June 2007 which conveyed this to the respondent was printed on a letterhead bearing the name 'Ingquza Hill Local Municipality'. This led to the respondent rushing to court to launch legal proceedings which terminated in chaos. In an application issued out of the Mthatha High Court under case number 891/2007, it sought an urgent order declaring 'the intervention of the Ingquza Hill Local Municipality [to be] wrongful and unlawful in terminating [the contract 'ZEV 2'] without giving the required notice'. In a brief affidavit to oppose the grant of interim relief, the appellants' attorney drew attention to the fact that the Ingquza Hill Local Municipality had been established on 2 December 2000 by Provincial Notice No. 107 of 2000 which, in turn, had been amended on 28 January 2002 by Provincial Notice No 5 of 2002 by the substitution of the name 'Ingquza Hill' with 'Qaukeni'.

[8] In the light of this amendment, the appellant's attorney averred that the Ingquza Hill Local Municipality neither continued to exist nor was a legal entity capable of suing or

being sued. Of course that was nonsensical as the municipality's name had merely been changed and the second appellant, which had previously been known as the Ingquza Hill Local Municipality, was thereafter known by its current name. But the respondent was so confused by all of this that it withdrew its application on 5 July 2007. It stated in the present proceedings that it had done so as the second appellant (viz. the Qaukeni Local Municipality) had had nothing to do with the letter of 4 June 2007 which had come from the Ingquza Hill Local Municipality, that the latter had no legal right to interfere with the contractual obligations between it and the second appellant, and that there had therefore been no reason to pursue the application in case 891/2007 as the second appellant had not sought to terminate the contract. As the second appellant and the Ingquza Hill Local Municipality were the same entity, all of this is farcical.

[9] In any event, the day after the withdrawal of the application in case 891/2007, the appellants wrote to the respondent (this time on a Qaukeni Municipality letterhead) referring to the letter of 4 June 2007 and re-iterating that such letter '. . . terminating or cancelling the contract still stands' and that the use of an incorrect letterhead had nothing to do with the identity of the parties to the contract. The appellants therefore stated that they persisted in the contents of the letter of 4 June 2007. As a result, on 10 July 2007 the respondent rushed back to the High Court and instituted the urgent proceedings which eventually culminated in the decision in the court a quo which the appellants now seek to have overturned.

[10] The respondent contended, both in this court and in the court below, that the written contract 'ZEV 2' had indeed been valid and of full force and effect and, that being so and as no notice of termination had been given six months before the end of June 2007, it had been automatically renewed for a further year and Fihlani's notice of termination was of no force and effect. On the other hand, the appellants argued that as the agreement had been concluded in breach of various prescribed statutory requirements it had been void *ab initio* and was thus incapable of being validly extended. The cardinal point in this appeal is therefore the validity of the agreement. I turn to consider that issue.

[11] In considering the validity or otherwise of the written contract 'ZEV 2', it is necessary to recall that s 217(1) of the Constitution, couched in peremptory terms, provides *inter alia*

that an organ of state in the local sphere (such as a municipality) which contracts for goods and services '***must*** do so in accordance with a system which is fair, equitable, competitive and cost-effective' (my emphasis). This constitutional imperative is echoed in both the Systems Act and the Municipal Finance Management Act 56 of 2003 ('the Financial Management Act') as will become apparent from what is set out below.

[12] The provisions of these two Acts, both of which relate to the procurement of 'municipal services' by municipalities are interrelated and somewhat convoluted. For present purposes it suffices to summarise the applicable provisions relating to the procurement of such services from a non-municipal entity such as the respondent (defined in s 1 of the Systems Act as an 'external service provider') as follows:

- A municipality is to have and implement a supply chain management policy[1] which is 'fair, equitable, transparent, competitive and cost-effective' and which complies with a regulatory framework designed to have that effect which, inter alia, covers 'competitive bidding processes', procedures for 'the evaluation of bids to ensure the best value for money' and measures to combat 'fraud, corruption, favouritism and unfair and irregular practices in municipal supply chain management'.[2]
- A municipality may provide a municipal service by way of an 'external mechanism' by concluding a service delivery agreement with an external service provider.[3]
- In the event of a municipality deciding to do so it must select the external service provider by a process which complies with its supply chain management policy, including a competitive bidding process which allows all prospective service providers to have equal access to information relevant to the bidding process and which minimises the possibility of fraud and corruption.[4]
- The process by which an external service provider is selected must be 'fair, equitable, transparent cost-effective and competitive'.[5]
- The regulatory framework governing a municipal supply chain management policy[6] requires the policy to provide for the procurement of goods and services above a

1 Section 111 of the Finance Management Act.
2 Section 112(1)(f),(h)(ii) and(m)(i).
3 Section 76(b)(v) of the Systems Act.
4 Section 80(1)(a) as read with s 83 of the Systems Act.
5 Section 83(3) of the Systems Act.
6 Promulgated in Government Notice R868 of 30 May 2005.

transaction sum of R200 000 by way of 'a competitive bidding process'.[7] As the value

- of the present contract exceeds R4 million per annum, this regulation was obviously intended to apply to such a contract.
- Before appointing the external service provider, the municipality must establish 'a programme for community consultation and information dissemination' regarding the appointment and the contract to be concluded with the service provider.[8]

[13] These statutory precepts therefore oblige a municipality concluding a service delivery agreement with an external supplier at a contract amount in excess of R200 000 to act openly and in accordance with a fair, equitable, competitive and cost-effective system, and in terms of a supply chain management policy designed to have that effect. Unfortunately for the members of the local community who live and work within its municipal area, the second appellant appears to have ignored its obligation to have and implement a supply chain management policy and both in this court and the court below the matter was argued on the basis that no such policy was in place. But the respondent's failure to implement a supply chain management policy cannot relieve it of its statutory obligation to act in a manner as summarised above, and it would be untenable to suggest that the respondent was therefore not obliged to act openly, transparently and without following a fair, equitable, competitive and cost-effective process when contracting with an external service supplier to render a municipal service.

[14] It was suggested by the respondent both in the court below and in the heads of argument filed in this court that a failure to comply with these statutory precepts did not automatically visit a contract with an external service supplier with nullity, and that the court had a discretion to enforce such a contract if the supplier would otherwise be prejudiced. However counsel who appeared for the respondent in the appeal (who I should hasten to add had been briefed for the first time in the matter at the eleventh hour and had not been responsible for the respondent's heads of argument) was unable to advance this argument with any enthusiasm. His diffidence is understandable. It is not a question of a court being entitled to exercise a discretion having regard to issues of

7 Regulation 12(1)(d)(i).

fairness and prejudice. Rather, the question is one of legality.

[15] Consequently, in a number of decisions this court has held contracts concluded in similar circumstances without complying with prescribed competitive processes are invalid. In *Premier, Free State and Others v Firechem Free State (Pty) Ltd* 2000 (4) SA 413 (SCA) this court set aside a contract concluded in secret in breach of provincial procurement procedures, holding that such a contract was 'entirely subversive of a credible tender procedure' and that it would 'deprive the public of the benefit of an open competitive process'.[9] Similarly in *Eastern Cape Provincial Government v Contractprops 25 (Pty) Ltd* 2001 (4) SA 142 (SCA), which concerned the validity of two leases of immovable property concluded between the respondent and a provincial department without the provincial tender board having arranged the hiring of the premises as was required by statute, this court concluded that the leases were invalid. In giving the unanimous judgment of this court, Marais JA, after outlining the applicable statutory tender requirements, said the following:[10]

' As to the mischief which the Act seeks to prevent, that too seems plain enough. It is to eliminate patronage or worse in the awarding of contracts, to provide members of the public with opportunities to tender to fulfil provincial needs, and to ensure the fair, impartial, and independent exercise of the power to award provincial contracts. If contracts were permitted to be concluded without any reference to the tender board without any resultant sanction of invalidity, the very mischief which the Act seeks to combat could be perpetuated.

As to the consequences of visiting such a transaction with invalidity, they will not always be harsh and the potential countervailing harshness of holding the province to a contract which burdens the taxpayer to an extent which could have been avoided if the tender board had not been ignored, cannot be disregarded. In short, the consequences of visiting invalidity upon non-compliance are not so uniformly and one-sidedly harsh that the legislature cannot be supposed to have intended invalidity to be the consequence. What is certain is that the consequence cannot vary from case to case. Such transactions are either all invalid or all valid. Their validity cannot depend upon whether or not harshness is discernible in the particular case.'

[16] I therefore have no difficulty in concluding that a procurement contract for municipal

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8 Section 80(2) of the Systems Act.
9 At [30].
10 At [8] and [9].

services concluded in breach of the provisions dealt with above which are designed to ensure a transparent, cost effective and competitive tendering process in the public interest, is invalid and will not be enforced.

[17] Faced with this reality, counsel for the respondent argued, that while the removal of refuse is a service rendered by a municipality, it had not been shown that the service which the respondent provided was a 'municipal service' as envisaged by the procurement provisions in the Systems and Financial Management Acts.

[18] The respondent's argument in this regard was based on the fact that both Acts contain identical definitions of 'basic municipal services' and 'municipal services'. The former is defined as a 'municipal service that is necessary to ensure an acceptable and reasonable quality of life and, if not provided, would endanger public health or safety or the environment' while the latter is defined as 'a service that a municipality in terms of its powers and functions provides or may provide to or for the benefit of the local community' irrespective of whether it does so by way of an internal or external mechanism or whether or not fees, charges or tariffs are levied in respect of such service. The respondent's argument is that as the statutory procurement processes I have dealt with spoke only of 'municipal services' and not of 'basic municipal services', a municipality was not bound to apply such processes in the procurement of the latter – and as the refuse removal service the respondent had agreed to perform may well be such a basic service, it had not been shown that the appellants had been obliged to follow those processes in awarding the contract to the respondent.

[19] This argument was raised for the first time when the appeal was called in this court. As it is an issue of both fact and law, it should properly have been raised by the respondent in its papers in the court below and for that reason alone the respondent should not be entitled to raise it now: see *Minister of Land Affairs and Agriculture and Others v D & F Wevell Trust and Others* 2008 (2) SA 184 (SCA) para 43. But in any event, as a matter of law it is ill-founded. Not only does s 217 of the Constitution not draw any difference between "municipal services" and "basic municipal services" in obliging a municipality contracting for goods and service to do so in a fair, equitable, competitive and cost effective system, but there is no reason to think that the legislature intended basic

municipal services to be procured in any other manner to the detriment of the public and the public purse. After all, the resources of many municipalities will be used in supplying only basic services as defined. In addition, while s 73(1) of the Systems Act obliges a municipality to give effect to the provisions of the Constitution, to give priority to the basic needs of the local community and to ensure access to at least the minimum level of basic municipal services, s 73(2) provides for municipal services to be equitable and accessible, provided in a manner that is conducive to a prudent, economic, efficient and effective use of available resources, be financially sustainable and be regularly reviewed. No distinction is drawn in sub-section (2) between "basic municipal services" and "municipal services" and, clearly, "basic municipal services" are nothing more than "municipal services" which are provided to ensure an acceptable and reasonable quality of life – as explained in the definition.

[20] Accordingly the legislature clearly did not intend to draw any distinction between the processes required for the provision of municipal services and those for municipal services which could be regarded as "basic". The distinction drawn in the definition is only to ensure that a municipality provides at least basic municipal services. Consequently, even if the contract presently in dispute amounted to the provision of basic municipal services, it was therefore still necessary for the prescribed procurement procedures to be followed.

[21] The refuse collection service the respondent undertook to provide was clearly a municipal service as envisaged by the Systems Act and the Financial Management Act, and the second appellant was therefore obliged to follow the procurement processes they prescribed. It did not do so in awarding the contract to the respondent. Instead the appellants decided on the terms of the contract, including payment of the amount the respondent had quoted to provide the required services, and then made an offer to the respondent to contract with it on those terms. All this was done without any transparent, competitive, cost-effective or bidding process taking place and without any programme involving community consultation or information dissemination being followed. Clearly as this infringed the prescribed procedures I have mentioned, the contract was invalid: with the concomitant result that it could not be validly extended and the second appellant was not bound thereby beyond the end of June 2007.

[22] Despite this, the respondent raised, both in the court *a quo* and in the heads of argument, what effectively amounts to an objection in *limine* based on the contention that it was an innocent party who had done nothing wrong but had merely accepted the appellants' offer whereas the appellants had failed to follow the municipal procedures that bound them. The respondent therefore argued that the appellants were not entitled to bring proceedings that would result in them gaining an advantage from their own unlawful conduct to the prejudice of the respondent.

[23] This argument cannot be upheld. This court has on several occasions stated that, depending on the legislation involved and the nature and functions of the body concerned, a public body may not only be entitled but also duty bound to approach a court to set aside its own irregular administrative act: see *Pepcor Retirement Fund v Financial Services Board* 2003 (6) SA 38 (SCA) para 10. Consequently, in *Rajah & Rajah (Pty) Ltd and Others v Ventersdorp Municipality and Others* 1961 (A) SA 402 (A) at 407D-E it held that the interest a municipality had to act on behalf of the public entitled it to approach a court to have its own act in granting a certificate to obtain a trading licence declared a nullity. Similarly, in *Transair (Pty) Ltd v National Transport Commission and Another* 1977 (3) SA 784 (A) at 792H-793G this court held that an administrative body which held wide powers of supervision over air services to be exercised in the public interest, had the necessary *locus standi* to ask a court to set aside a licence it had irregularly issued. Finally, in *Premier, Free State and Others v Firechem Free State (Pty) Ltd*, *supra*, Schutz JA, in giving the unanimous judgment of this court, concluded that 'the province [the appellant] was under a duty not to submit itself to an unlawful contract and [was] entitled, indeed obliged, to ignore the delivery contract and to resist [the respondent's] attempts at enforcement'.[11]

[24] In the present case, the contract in issue was concluded by a body created to serve the citizens of the country who live and work within its municipal area, and which under s 73 of the Systems Act is obliged to see to the needs of the local community and to provide municipal services in a manner 'conducive to . . . the prudent, economic, efficient and effective use of available resources'. The contract in question was concluded in order to

11 Supra at [36].

provide a service to the second appellant's local community and, of course, payments due thereunder were to be met by the use of public funds. In these circumstances, I have no hesitation in concluding that the appellants were entitled to raise the alleged invalidity of the contract and to seek to have it set aside.

[25] This brings me to another issue raised by the respondent for the first time during the appeal. The thrust of the argument of respondent's counsel was this: the award of a municipal contract of the nature of that in the present case constituted 'administrative action' as envisaged by the Promotion of Administrative Justice Act 3 of 2000 (commonly known as 'PAJA'); the appellants should have brought review proceedings under PAJA to set aside such action; the appellants failed to do so and their counter-application could not be regarded as such, not only as it was never intended to be a review but as certain facts relevant to a review had not been canvassed; thus not only had the appellants misconceived their defence to the main application but as the award of the contract to the respondent could not be reviewed on the present papers, the contract had to be regarded as binding; consequently the appellants had no defence to the relief that had been sought against them and their counter-application had also to be dismissed.

[26] While I accept that the award of a municipal service amounts to administrative action that may be reviewed by an interested third party under PAJA, it may not be necessary to proceed by review when a municipality seeks to avoid a contract it has concluded in respect of which no other party has an interest. But it is unnecessary to reach any final conclusion in that regard. If the second respondent's procurement of municipal services through its contract with the respondent was unlawful, it is invalid and this is a case in which the appellants were duty bound not to submit to an unlawful contract but to oppose the respondent's attempt to enforce it.[12] This it did by way of its opposition to the main application and by seeking a declaration of unlawfulness in the counter-application. In doing so it raised the question of the legality of the contract fairly and squarely, just as it would have done in a formal review. In these circumstances, substance must triumph over form. And while my observations should not be construed as a finding that a review of the award of the contract to the respondent could not have been brought by an interested

12 Compare *Premier, Free State and Others v Firechem Free State (Pty) Ltd supra,* at [36].

party, the appellants' failure to bring formal review proceedings under PAJA is no reason to deny them relief.

[27] In the light of what I have set out above, the respondent's application in the court below should have been dismissed and the appellants' counter-application upheld. The appeal must accordingly succeed.

[28] That brings me to the question of costs. Counsel for the respondent drew attention to the appellants' failure at the outset of the dispute to draw the respondent's attention to the precise statutory provisions which had been breached. In the light of this failure, and the allegation that the respondent was the innocent victim of the appellants' failure to comply with the prescribed procedures, he submitted it would be equitable for each party to pay its own costs of all stages, including the costs of the appeal. In the alternative, he submitted that the respondent should only bear costs with effect from the stage the appellants had pointed out the precise respects in which the contact breached the prescribed statutory procedures.

[29] However, as appears from the letter of 4 June 2007 the respondent was alerted at the outset that the contract had not been concluded in compliance with the necessary statutory requirements and while the appellants did not spell out in chapter and verse the provisions upon which they relied for their contention that the contract was invalid, I do not think it was incumbent upon them to do so. Rather it was for the respondent, alerted to the suggestion that statutory procedures had not been complied with, to fully investigate the validity of the contract before rushing into court to enforce it. In any event, even when the appellants did explain why they maintained that the contract was invalid, the respondent persisted in contending otherwise, up to and including the appeal, and there is therefore no reason to think its attitude would have been any different had the appellants fully explained their case before proceedings commenced. There therefore seems to me to be no reason why the costs, both in the court below and in this court, should not follow the event.

[30] There is, however, another issue relating to costs that needs to be considered. The record in this appeal is replete with unnecessary documents, and contains both the heads

of argument filed during previous proceedings as well as a transcription of the lengthy argument of counsel in the court below. None of this ought to have been included in the record and the fact that it has, has resulted in at least half of the record being wholly unnecessary. This not only inflates the high costs of litigation but also leads to a complete waste of valuable judicial time and inconvenience to members of this court.

[31] This court has previously expressed its displeasure at records that include unnecessary documents of this kind[13] and has, where appropriate, ordered costs to be paid by attorneys *de bonis propriis*[14] or disallowed the appellant's attorney's costs of perusing the record[15]. In the present matter, the exigencies of the case will be met by allowing the appellants only one half of their costs of preparing, lodging and perusing the record.

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

1. The appeal succeeds with costs. Such costs are to include the costs of two counsel but shall exclude one half of the appellants' costs of preparing, perusing and lodging the appeal record.
2. The order in the court a quo is set aside and replaced with the following:

'(a) The application is dismissed with costs.

(b) The counter-application is granted with costs and the contract 'ZEV 2' concluded on 25 June 2006 is declared to be null and void.

(c) The costs shall include the costs of two counsel in each case'.

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L E LEACH
ACTING JUDGE OF APPEAL

13 Eg *Neon And Cold Cathode Illuminations (Pty) Ltd v Ephron* 1978 (1) SA 463 (A) at 469D-G.
14 Eg *Absa Bank v Davidson* 2000 (1) SA 1117 (SCA) at [28].
15 Eg *Venter v Bophuthatswana Transport Holding (Edms) Bpk* 1997 (3) SA 374 (SCA) at 390G-391B.

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