



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Reportable
CASE NO 31/2007

In the matter between

MILLENNIUM WASTE MANAGEMENT
(PTY) LIMITED

Appellant

and

THE CHAIRPERSON OF THE TENDER
BOARD : LIMPOPO PROVINCE

First Respondent

MEC : DEPARTMENT OF HEALTH AND
SOCIAL DEVELOPMENT, LIMPOPO PROVINCE

Second Respondent

THERMOPower TECHNOLOGY
PROCESSORS / BUHLE WASTE /
AFRIMEDICALS JV

Third Respondent

Coram: Howie P, Nugent, Jafta, Maya JJA
 and Mhlantla AJA

Heard: 02 NOVEMBER 2007

Delivered: 29 NOVEMBER 2007

Summary: The award of tenders constitutes administrative action and consequently must comply with requirements of the Promotion of Administrative Justice Act 3 of 2000 and s 217 of the Constitution.

Neutral citation: This judgment may be referred to as *Millennium Waste Management v Chairperson Tender Board* [2007] SCA 165 (RSA)

JUDGMENT

JAFTA JA

[1] This is an appeal against a decision of Prinsloo J (sitting in the Pretoria High Court) in which he dismissed the appellant's application for an order reviewing and setting aside the decision to award a tender to a consortium called Thermopower Technology Processors/Buhle Waste/Afrimedicals JV (the consortium). The tender was for the provision of services relating to the removal, treatment and disposal of healthcare waste material from hospitals in the province of Limpopo (formerly called Northern Province). The appeal is with leave of this court.

[2] This case is about the fairness of the process followed by the Department of Health and Social Development which culminated in the award of the impugned tender, underlying the agreement for procurement of services by the department in question. Such process is governed by legislation which can be traced back to the interim Constitution.¹ It required, among other things, that provincial legislation establishing independent and impartial tender boards in each province, be passed.²

[3] The legislature in Limpopo passed the Northern Transvaal Tender Board Act³ (the Act) in terms of which the impugned decision was taken. This Act establishes a provincial tender board which is granted the sole power 'to procure supplies and services for the Province' (s4).⁴ However, the board is empowered

¹ Act 200 of 1993.

² Section 187 of the interim Constitution provides: '(1) The procurement of goods and services for any level of government shall be regulated by an Act of Parliament and provincial laws, which shall make provision for the appointment of independent and impartial tender boards to deal with such procurements. (2) The tendering system referred to in subsection (1) shall be fair, public and competitive, and tender boards shall on request give reasons for their decisions to interested parties. (3) No organ of state and no member of any organ of state or any other person shall improperly interfere with the decisions and operations of the tender boards. (4) All decisions of any tender board shall be recorded.'

³ Act 2 of 1994 which came into operation on 1 October 1994.

⁴ Section 4 of the Act provides: '(a) on behalf of the Province, conclude an agreement with a person within or outside the Republic for the furnishing of supplies and services to the Province, or for the hiring or letting of anything or the acquisition or granting of any right for or on behalf of the Province or for the disposal of

to delegate ‘any of its powers to any of its committees, any person (including any member of the board), any body of persons or the holder of any post designated by the Board’ (s5). The Act also empowers the Member of the Executive Council for Finance and Expenditure (the MEC) to make regulations governing the tender process (s9). On 14 February 1997 the MEC published such regulations. Regulation 2 provides that procurement of goods and services shall be done only through the board.⁵

[4] The final Constitution lays down minimum requirements for a valid tender process and contracts entered into following an award of tender to a successful tenderer (s217).⁶ The section requires that the tender process, preceding the conclusion of contracts for the supply of goods and services, must be ‘fair, equitable, transparent, competitive and cost-effective’. Finally, as the decision to award a tender constitutes administrative action, it follows that the provisions of the Promotion of Administrative Justice Act⁷ (PAJA) apply to the process. This is the legislative background against which the present matter must be considered.

[5] The facts in this matter are largely not in dispute. An invitation to tender was issued by the Department of Health and Social Development – the second

movable Provincial property; (b) with a view to concluding an agreement referred to in paragraph (a), in any manner it may deem fit, invite offers and determine the manner in which and the conditions subject to which such offers shall be made; (c) inspect and test or cause to be inspected and tested supplies and services which are offered or which are or have been furnished in terms of an agreement concluded under this section, and anything offered for hire; (d) accept or reject any offer for the conclusion of an agreement referred to in paragraph (a);...

⁵ Regulation 2 reads: ‘Subject to the provisions of any Act of the Provincial Legislature, supplies and services for and on behalf the acquisition or granting of any right for and on behalf of the Province and the disposal of movable provincial property shall be procured, arranged or disposed of only through the Board.’

⁶ Section 217 provides: ‘(1) When an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective. (2) Subsection (1) does not prevent the organs of state or institutions referred to in that subsection from implementing a procurement policy providing for– (a) categories of preference in the allocation of contracts; and (b) the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination. (3) National legislation must prescribe a framework within which the policy referred to in subsection (2) must be implemented.’

⁷ Act 3 of 2000.

respondent – following an audit query by the Auditor-General. The query related to the department's failure to properly dispose of medical waste in compliance with a range of statutes relevant to that process. Having acquired the necessary funds, the department advertised an invitation to interested parties to tender for the removal, treatment and disposal of medical waste. The deadline for lodging tenders was 11h00 on 24 February 2005. This invitation contained documents setting out, among others, the list of hospitals from which the medical waste would be collected, specifications and conditions applicable to the tender process.

[6] Fourteen companies responded to the invitation and timeously delivered their tenders at the appointed address. The appellant was one of them, as was the consortium. According to Mr Mpho Mofokeng – the chairman of the departmental tender committee – the tenders received were subjected to evaluation criteria which were 'divided into two phases, namely administrative compliance and technical compliance'. Seven tenders were disqualified at the first phase for failing to comply with the administrative requirements. These included the appellant's tender which was disqualified for failing to sign a form titled 'declaration of interest'.

[7] Six of the remaining tenders were disqualified at the second phase for failing to comply with technical requirements. The consortium's tender was the only one remaining after disqualifications at the second phase. All these disqualifications occurred in an *ad hoc* technical evaluation committee constituted by two technical advisors who were also members of the tender committee chaired by Mofokeng. At the conclusion of the second phase the technical committee recommended to the tender committee that the consortium be awarded the tender. After deliberation the tender committee approved the recommendation but also resolved that business premises of the fourteen companies that had tendered be inspected, even though thirteen of them were no

longer in the running owing to disqualifications.

[8] During the period 8 to 10 March 2005, members of the tender committee conducted inspections at business premises of eleven of the fourteen companies that had tendered. The appellant's business facilities were inspected and so were facilities of the consortium. At the appellant's premises the inspection revealed that the equipment used in treating medical waste did not possess the current technology and consequently it failed to render such waste completely unrecognisable, as required by tender specifications. The washing facility was not automatised and the appellant's employees were exposed to accidents and disease because they were not supplied with the necessary protective clothing. This, in the view of the committee, violated the Occupational, Health and Safety Act 85 of 1993 and the regulations made under it.

[9] Following the inspections, the tender committee held a meeting on 10 March 2005 at 18h10. In the committee's view the consortium was the only tenderer that complied fully with relevant legislation and had submitted a clear proposal. It was resolved that the technical committee must prepare a report the contents of which I refer to more fully below. The tender committee's recommendation that the consortium be awarded the tender was communicated by Mofokeng to Dr Hlamalani Manzini – the head of the department – to whom the power to award tenders was delegated. On the same date she awarded the tender to the consortium on specified conditions.⁸

[10] The report of the technical evaluation committee reveals (contrary to the tender committee's view) that the consortium did not comply with technical

⁸ The decision to award the tender was communicated to the consortium by Dr Manzini in a letter dated 18 March 2005 which, in part, reads: 'In a meeting of the 10th March 2005, the Department of Health and Social Development approved that the bid be awarded to your company with the attendant conditions hereinafter....' It may be noted that on 10 March neither the tender committee's written recommendation nor the technical committee's report existed.

requirements regarding the treatment of anatomical waste and sharps. Sharps are defined (in the report) as objects such as hypodermic needles, scalpel blades and other surgical accessories capable of cutting or penetrating human skin. The report raises concerns regarding its proposals and its ability to handle both anatomical waste and sharps, including their treatment. Regarding transportation of waste material, the report shows that it also failed to comply with legal requirements. This necessitated a meeting between the tender committee and the consortium on 23 March 2005 where an explanation for defects in its tender was furnished. But at that stage the tender had already been awarded.

[11] On 7 April 2005 the appellant addressed a letter to Dr Manzini asking which tenderer was successful. She replied by a letter dated 25 April 2005, informing it that its tender was disqualified for failing to sign the declaration of interest and that the consortium had won the tender. The declaration referred to was duly completed and initialled on each of the two pages. It is necessary to set it out in full. In its completed form it reads:

‘DECLARATION OF INTEREST

1. Any legal person, including persons employed by the principal, or persons having a kinship with persons employed by the principal, including a blood relationship, may make an offer or offers in terms of this invitation to tender. In view of possible allegations of favouritism, should the resulting tender, or part thereof, be awarded to persons employed by the principal, or to persons connected with or related to them, it is required that the tenderer or his/her authorized representative declare his/her position in relation to the evaluating/adjudicating authority and/or take an oath declaring his/her interest, where—
 - the tenderer is employed by the principal; and/or
 - the legal person on whose behalf the tendering document is signed, has a relationship with persons/a person who are/is involved in the evaluation and or

adjudication of the tender(s), or where it is known that such a relationship exists between the person or persons for or on whose behalf the declarant acts and persons who are involved with the evaluation and or adjudication of the tender.

2. In order to give effect to the above, the following questionnaire must be completed and submitted with the tender.

2.1 Are you or any person connected with the tenderer, employed by the principal? No

2.1.2 If so, state particulars. N/A

2.2 Do you, or any person connected with the tenderer, have any relationship (family, friend, other) with a person employed by the principal and who may be involved with the evaluation and or adjudication of this tender? No

2.2.1 If so, state particulars. N/A

2.3 Are you, or any person connected with the tender, aware of any relationship (family, friend, other) between the tenderer and any person employed by the principal who may be involved with the evaluation and or adjudication of this tender? No

2.3.1 If so state particulars. N/A

DECLARATION

I, the undersigned (Name) R Gouws certify that the information furnished in paragraphs 2.1 to 2.3.1 above is correct. I accept that the principal may act against me in terms of paragraph 23 of the general conditions of contract should this declaration prove to be false.

.....

23.2.05

Signature

Date

Regional General Manger

Millennium Waste Management (Pty) Ltd.

Position

Name of tenderer'

[12] On 25 May 2005 the appellant instituted an urgent application in the court below for relief divided into two parts. First, it sought an interdict restraining the department from concluding and implementing a contract with the consortium, pursuant to the award of the tender. Such interdict was to be in force pending the determination of the review sought in the second part of the relief. Unbeknown to the appellant the department and the consortium had already entered into a service level agreement which was concluded on 29 April 2005. The implementation of this agreement commenced on 2 May 2005. These facts probably influenced the decision not to grant the interdict. The record does not shed light on the issue. Despite the application having been launched on an urgent basis, the review only came before Prinsloo J for consideration on 2 June 2006. I return to this point later in the judgment. As indicated above the learned judge dismissed the application with costs.

[13] There are two issues raised in this appeal. The first issue is whether the disqualification of the appellant's tender violated its right to procedural fairness. The second relates to the appropriate remedy in the event of the first issue being decided in the appellant's favour. I deal with the disqualification issue first.

[14] Counsel for both the department and the tender board argued in the court below and this court that the appellant's tender was lawfully and properly disqualified. In developing this argument, it was submitted that the terms of the tender documents relating to administrative compliance were couched in

peremptory language which expressly stated that non-compliance would result in disqualification. Proper signing of the tender documents is one of the terms which if not complied with, it was argued, led to disqualification. It was not procedurally unfair for the tender committee to disqualify the tender on the basis of the appellant's failure to sign, continued the argument, because it was forewarned that such a failure would lead to disqualification. Relying on the definition of 'acceptable tender' in the Preferential Procurement Policy Framework Act 5 of 2000 (the Preferential Procurement Act), counsel concluded by submitting that the appellant's tender did not constitute an acceptable tender due to the failure to sign.

[15] The department's argument was upheld by the court below. The learned judge, relying on *Minister of Environmental Affairs and Tourism v Pepper Bay Fishing*⁹, found that the tender committee lacked authority to condone the appellant's failure to comply with the peremptory requirements of the tender.

[16] I cannot accept the department's argument. On the assumption that there was a valid delegation of power from the tender board to Dr Manzini and further to the tender committee, the answer to the question of authority lies in regulation 5(c) which empowers the tender board to accept tenders even if they fail to comply with tender requirements.¹⁰ In these circumstances reliance on the *Pepper Bay Fishing* case was misplaced. In that case the issue was whether the chief director to whom the power to grant fishing licences was delegated, had authority to condone procedural defects in applications for fishing rights submitted to him. On the enquiry relating to the chief director's powers Brand JA said (para 31):

⁹ 2004(1) SA 308 (SCA).

¹⁰ Regulation 5 provides: 'When, at the invitation of tenders, offers are submitted for the purpose of concluding an agreement referred to in section 4 (1)(a) of the Act— (a) the Board is not obliged to accept the lowest or any offer; (b) the Board may, where an offer relates to more than one item, accept such offer in respect of or any specific item or items; (c) the Board may accept any offer notwithstanding the fact that the offer was not made in response to any particular tender invitation, or does not comply with the tender invitation in respect of which the offer has been made.'

‘As a general principle an administrative authority has no inherent power to condone failure to comply with a peremptory requirement. It only has such power if it has been afforded the discretion to do so.... The Chief Director derives all his (delegated) powers and authority from the enactment constituted by the general notice. If the general notice therefore affords him no discretion, he has none. The question whether he had a discretion is therefore entirely dependent on a proper construction of the general notice.’

With this I agree and wish to add that in the present case the tender committee was afforded the necessary discretion by reg 5(c). Therefore it erred in thinking that it did not possess such power.

[17] Moreover, our law permits condonation of non-compliance with peremptory requirements in cases where condonation is not incompatible with public interest and if such condonation is granted by the body in whose benefit the provision was enacted (*SA Eagle Co Ltd v Bavuma*).¹¹ In this case condonation of the appellant’s failure to sign would have served the public interest as it would have facilitated competition among the tenderers. By condoning the failure the tender committee would have promoted the values of fairness, competitiveness and cost-effectiveness which are listed in s 217. The appellant had tendered to provide the needed service at a cost of R444 244,43 per month whereas the consortium had quoted and was awarded the tender at the amount of R3 642 257,28 per month.

[18] I turn to the question whether the appellant’s tender constitutes an acceptable tender as defined in the Preferential Procurement Act. It defines an acceptable tender as ‘any tender which, in all respects, complies with the specifications and conditions of tender as set out in the tender document’. When

¹¹ 1985 (3) SA 42 (A) at 49G-H.

Parliament enacted the Preferential Procurement Act it was complying with the obligation imposed by s 217 (3) of the Constitution which required that legislation be passed in order to give effect to the implementation of a procurement policy referred to in s 217 (2). Therefore the definition in the statute must be construed within the context of the entire s 217 while striving for an interpretation which promotes ‘the spirit, purport and objects of the Bill of Rights’ as required by s 39 (2) of the Constitution.¹² In *Chairperson: Standing Tender Committee and Others v JFE Sapela Electronics (Pty) Ltd and Others*¹³ Scott JA said (para 14):

‘The definition of “acceptable tender” in the Preferential Act must be construed against the background of the system envisaged by section 217(1) of the Constitution, namely one which is “fair, equitable, transparent, competitive and cost-effective”. In other words, whether “the tender in all respects complies with the specifications and conditions set out in the contract documents” must be judged against these values.’

[19] In this context the definition of tender cannot be given its wide literal meaning. It certainly cannot mean that a tender must comply with conditions which are immaterial, unreasonable or unconstitutional. The defect relied on by the tender committee in this case is the appellant’s failure to sign a duly completed form, in circumstances where it is clear that the failure was occasioned by an oversight. In determining whether this non-compliance rendered the appellant’s tender unacceptable, regard must also be had to the purpose of the declaration of interest in relation to the tender process in question.

[20] Counsel for the department submitted that the purpose of the declaration of interest was to curb corruption. As the failure to sign may be intentional, so he argued, the possibility existed that a person or persons inside the department had

¹² For an elaborate discussion of s 39 (2) see *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others* 2004 (4) SA 490 (CC) paras 88-92 and authorities there collected.

¹³ [2005] 4 All SA 487 (SCA).

an interest in the tender of the appellant. A perfunctory perusal of the appellant's declaration shows that the failure to sign was inadvertent. Secondly, the tender committee does not say the information furnished by the appellant to the effect that it had no relationship with the department's employees (including those linked to the evaluation and adjudication of tenders), was false. I am unable to appreciate how the signing of the form would have safeguarded against corruption. It seems to me that what is of paramount importance is the nature of the information furnished and not the signature. As is apparent from the declaration itself, Mr Rhyno Gouws inserted his name on it as the person who furnished the necessary information. He was thus clearly identified. If the appellant intended to misrepresent facts, it is unlikely that Gouws would have exposed himself in that fashion. I may add that he signed the tender on behalf of the tenderer on the very same date which the declaration bears.

[21] Since the adjudication of tenders constitutes administrative action, of necessity the process must be conducted in a manner that promotes the administrative justice rights while satisfying the requirements of PAJA (*Du Toit v Minister of Transport*).¹⁴ Conditions such as the one relied on by the tender committee should not be mechanically applied with no regard to a tenderer's constitutional rights. By insisting on disqualifying the appellant's tender for an innocent omission, the tender committee acted unreasonably. Its decision in this regard was based on the committee's error in thinking that the omission amounted to a failure to comply with a condition envisaged in the Preferential Procurement Act. Consequently, its decision was 'materially influenced by an error of law'

¹⁴ 2006 (1) SA 297 (CC). Writing for the majority in that case Mokgoro J said (para 26): 'Although the [the National Roads Act 54 of 1971] has for nearly two decades been applied in the expropriation of property and has been regarded as the major source of expropriation law in South Africa, it is important to recognise and appreciate that, since the inception of the Constitution, all applicable laws must comply with the Constitution and be applied in conformity with its fundamental values. It is therefore now the Constitution, and not the Act, which provides the principles and values and sets the standards to be applied whenever property, which in turn is now also constitutionally protected, is expropriated. Every act of expropriation, including the compensation payable following expropriation must comply with the Constitution, including its spirit, purport and objects generally and s 25 in particular.'

contemplated in s 6 (2)(d) of PAJA, one of the grounds of review relied on by the appellant. Therefore, the tender process followed by the department was inconsistent with PAJA. In the light of this finding, it is not necessary, in my view, to consider other grounds raised by the appellant. Suffice it to say that they were all based on PAJA and it appears that the appellant could have succeeded on more than one ground.

[22] The question of relief remains for consideration. While acknowledging that there was no culpable delay on the part of the appellant to institute review proceedings, exercising its discretion the court below dismissed the application with costs. In so doing the court overlooked the provisions of s 8 of PAJA which require that any order granted in matters such as this be just and equitable.¹⁵ This guideline involves a process of striking a balance between the applicant's interests on the one hand, and the interests of the respondents, on the other. It is impermissible for the court to confine itself, as the court below did, to the interests of the one side only. Furthermore, the section lists a range of remedies from which the court may choose a suitable one upon a consideration of all relevant facts. The dismissal of the application by the court below does not constitute an appropriate and effective relief contemplated in s 38 of the Constitution. In view of the court *a quo*'s error this court is entitled to interfere with the order granted.

[23] The difficulty that is presented by invalid administrative acts, as pointed out by this court in *Oudekraal Estates*,¹⁶ is that they often have been acted upon

¹⁵ Section 8(1) provides: '(1) The court or tribunal, in proceedings for judicial review in terms of section 6 (1), may grant any order that is just and equitable, including orders— (a) directing the administrator— (i) to give reasons; or (ii) to act in the manner the court or tribunal requires; (b) prohibiting the administrator from acting in a particular manner; (c) setting aside the administrative action and— (i) remitting the matter for reconsideration by the administrator, with or without directions; or (ii) in exceptional cases— (aa) substituting or varying the administrative action or correcting a defect resulting from the administrative action; or (bb) directing the administrator or any other party to the proceedings to pay compensation; (d) declaring the rights of the parties in respect of any matter to which the administrative action relates; (e) granting a temporary interdict or other temporary relief; or (f) as to costs.'

¹⁶ *Oudekraal Estates (Pty) Ltd v City of Cape Town* 2004 (6) SA 222 (SCA) para 46.

by the time they are brought under review. That difficulty is particularly acute when a decision is taken to accept a tender. A decision to accept a tender is almost always acted upon immediately by the conclusion of a contract with the tenderer, and that is often immediately followed by further contracts concluded by the tenderer in executing the contract. To set aside the decision to accept the tender, with the effect that the contract is rendered void from the outset, can have catastrophic consequences for an innocent tenderer, and adverse consequences for the public at large in whose interests the administrative body or official purported to act. Those interests must be carefully weighed against those of the disappointed tenderer if an order is to be made that is just and equitable.

[24] In this case there are four identifiable interests that need to be taken into account in exercising that discretion. In doing so it must be borne in mind that the unfairness here does not lie in the process of inviting tenders. It lies only in the omission of the appellant's tender from the process of evaluation. It was accepted in argument before us that the proper course that will need to be followed if the decision is set aside is not to invite fresh tenders but rather for the tender board to properly evaluate both tenders and decide which tender, if either, to accept.

[25] The loss to the appellant from the unfair act was no more than the loss of the opportunity to have its tender considered. It is by no means clear that its tender would have been accepted or that it will be accepted upon a fresh evaluation. Even if its tender ought to have been accepted at the outset its loss relates mainly to the profit it would have realised on the contract. We are not told what that profit might be; it might be modest or even minimal. Against that must be weighed the potential loss that will be caused if its tender is not accepted on reconsideration.

[26] There is no suggestion that the consortium was complicit in some way in bringing about the exclusion of the tender – had that been shown it would have been appropriate to set the decision aside for that reason alone – and it must be accepted that it is an innocent party.

[27] With effect from 1 May 2005 the consortium became obliged to perform, and has performed, the service that it tendered, under a contract that was concluded on the terms of its tender with some supplementary formal provisions. On the strength of that contract it purchased eleven vehicles and other equipment at a cost of about R3.5 million and incurred other costs, and it hired 35 employees. (It is alleged that they were employed on fixed term contracts.) It also leased premises in Polokwane upon which to construct a waste treatment plant, which it was obliged to construct within four months. Whether it has constructed the plant does not appear from the evidence but in view of its contractual obligation it is likely that it has done so. The evidence does not disclose the cost of constructing the plant. The consortium's return for providing the service takes the form of a monthly fee over a period of five years. No doubt the monthly fee has been structured to recover its capital, running costs and a profit. We do not know whether or to what extent the capital costs will have been recovered if the contract terminates midway through its term.

[28] From the point of view of the public serious questions arise if the contract is now terminated. The service is for the removal and safe disposal of medical waste from all public hospitals in Limpopo province (it seems there are 44). The removal and disposal of medical waste must be carried out without interruption and the province does not have the capacity to step in itself if the contract is terminated. No doubt some or other interim measures are capable of being taken but how and at what cost is uncertain.

[29] There is one further interest to be brought to account that changes the picture and that is the public purse. At first sight the price differential between the two tenders is enormous: the consortium provides the service at a fee of R3 642 257 per month, while the appellant tendered to do so at a monthly fee of R444 244. We are not able to assess why the differential is so large. It might be that the consortium is profiteering obscenely or it might be that the service offered by the appellant was materially different and hugely under-priced for what is required. In answer to the appellant's charge that it is profiteering the consortium pointed out that an earlier call by the province for tenders elicited only one response, and that its price is in line with estimates that have been made for a comparable service in Gauteng. There are also at least two elements of the respective tenders – the volume of material upon which they were priced and the facilities for waste disposal that were proposed – that at first sight might account for a large portion of the differential. But if the appellant is indeed able to provide the service at the price that it has offered then the completion of the contract by the consortium even at this stage – 29 months has yet to expire – will clearly be at enormous unwarranted cost to the public purse that could be avoided if the decision is set aside.

[30] Whether that cost to the public purse will ever eventuate is at this stage a matter only for speculation. It is only if the appellant's tender is now evaluated and found to be acceptable, and the decision to accept the consortium's tender is not set aside, that any loss will occur. But if the appellant's tender were not to be accepted, and the decision to appoint the consortium has meanwhile been set aside, nothing will have been gained and there is the real prospect that loss and disruption might occur. At best for the province there is the prospect that the consortium might be willing to resume the contract or to conclude a fresh contract on the same terms. But it will have no obligation to do either and sound commercial reasons can be envisaged for why it might decline to do so. The province might even be driven to commence the tender process all over again and

end up contracting at a higher price. Meanwhile there is the potential for the interruption of the collection and disposal of medical waste throughout the province.

[31] But all that is speculation at this stage. We simply cannot predict what will occur if the tender is now set aside and uncertainty is thereby introduced. I do not think we should make an order that creates uncertainty – with no promise of gain but instead the potential for loss and chaotic disruption – when that can be avoided.

[32] The effects that I have described can be avoided by an order that requires the tenders to be evaluated, and sets aside the decision to accept the consortium's tender only if the appellant's tender is found to be accepted. An order to that effect vindicates the appellant's rights to the full while it prevents the potential for disruption to the service, and it avoids unwarranted loss to the public purse. It might end up that the consortium suffers loss – that will occur only if appellant's tender is accepted and even then commercial considerations that minimise the loss might come into play – but that is inevitable if we are to accommodate the potential loss to the public purse. It seems to me that such an order promises no loss to the public purse and an uninterrupted service. And if it turns out that the consortium has indeed been profiteering excessively and loses the contract as a result, then any loss that it might suffer does not weigh heavily with me. The order envisaged here maintains a balance between the parties' conflicting interests while taking into account the public interest.

[33] The reconsideration of the tenders must, in my view, be carried out by the tender board itself and not the departmental tender committee and the departmental head. Although the Act permits the board to delegate any of its powers, including the adjudication of tenders, it is undesirable for it to delegate

the latter power to persons or bodies which are neither independent nor impartial. By conferring the sole power upon the board to procure goods and services for the provincial government, both the Act and the regulations seek to promote the values of independence and impartiality. The process followed by the tender committee in this matter shows that it did not only lack the skill necessary for adjudicating tenders but also the understanding of the legislative prescripts. Furthermore, the chairman of the tender committee incorrectly reported to the departmental head that the consortium's tender complied with all requirements when this was not the case. On realising the contradiction in the technical report, he invited its representatives to a meeting so that they could explain the defects. This is proof of a process which is not 'fair, equitable, transparent, competitive and cost-effective'. Section 217 of the Constitution was not the only provision overlooked by the departmental tender committee.

[34] In conclusion there is one further matter that needs to be mentioned. It appears that in some cases applicants for review approach the high court promptly for relief but their cases are not expeditiously heard and as a result by the time the matter is finally determined, practical problems militating against the setting aside of the challenged decision would have arisen. Consequently the scope of granting an effective relief to vindicate the infringed rights become drastically reduced. It may help if the high court, to the extent possible, gives priority to these matters.

[35] The following order is made:

1. The appeal is upheld with costs including costs of two counsel. Such costs to be paid by the first and second respondents jointly and severally.
2. The order of the court below is set aside and the following is substituted:

- ‘(a) The exclusion of the tender of the applicant (Millennium Waste Management), and the consequent decision to accept the tender of the third respondent (the consortium), are declared to have been invalid.

- (b) The tender board is directed to evaluate the tender that was submitted by Millennium Waste Management and the tender submitted by the consortium relative to one another and to decide by not later than 15 February 2008, or by such later date as may be determined by a court before that period expires, which tender ought properly to have been accepted.

- (c) Upon reaching such decision the tender board shall immediately record the decision in writing in its official records and communicate the decision to the respective attorneys of Millennium Waste Management and the consortium such that it is received by not later than 3 days after the decision has been made.

- (d) If it is decided that the tender of Millennium Waste Management ought to have been accepted but only upon conditions then the decision shall be deemed to have been made by the tender board and recorded in its records for the purposes of paragraph (c) upon receipt by the tender board or its nominated official of written acceptance by Millennium Waste Management of those conditions.

- (e) If it is decided that the tender of Millennium Waste Management ought to have been accepted – but only if it is so decided – then the following further orders shall issue upon the last day of the month in which such decision is recorded in the records of the tender board as envisaged by paras (c) and (d):

- (i) the decision that is the subject of this review is set aside.
 - (ii) the consortium shall be entitled to claim all moneys that would properly have been due to it but for this order on that date and to retain all moneys that were properly paid to it at that date.
 - (iii) this order shall not prejudice any claim in law that the consortium might have for losses it might have suffered in consequence of its tender being accepted and subsequently being set aside.
- (f) If it is decided that the tender of Millennium Waste Management ought properly to have been rejected then the acceptance of the consortium's tender will remain extant.
- (g) If notwithstanding the terms of this order no decision has been made by the tender board by the date referred to in paragraph (b) then an order shall issue on that date in the terms contained in paras (i), (ii) and (iii) above.
- (h) The first and second respondents, jointly and severally, are ordered to pay the costs of the applicant, including the costs of two counsel.'

C N JAFTA
JUDGE OF APPEAL

CONCUR:)
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 HOWIE P
 NUGENT JA
 MAYA JA
 MHLANTLA AJA