NOT REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE, GRAHAMSTOWN

Case no: 2775/2012
Date heard: 19.09.2013
Date delivered: 19.12.2013

In the matter between:

PRIMEDIA (PTY) LTD	**First Applicant**
MMT AGENCIES CC	**Second Applicant**
vs	
BUFFALO CITY METROPOLITAN MUNICIPALITY	**First Respondent**
GUNGULUZA TELECOMMUNICATIONS AND GEOGRAPHIC TECHNOLOGY CC	**Second Respondent**

JUDGMENT

TSHIKI J:

A) INTRODUCTION

[1] The first applicant and the first respondent had a rather sound contractual relationship dating back to January 2005. This contractual relationship relates to the right given by the first respondent to the first applicant to erect illuminated advertising signs incorporating street names in Buffalo City Municipal area. These signs are essentially poles on which there is a large space for local businesses to advertise their individual businesses. First applicant would then be charged by the first respondent a fixed monthly amount of just in excess of R31 500.00. This contract between the parties aforementioned gave the first applicant the right to supply, erect and maintain advertising signage incorporating street names. The contract was

concluded in 2005 and was to expire on 31 July 2006 but, it continued thereafter on a month to month basis until on or about 28 January 2010 when first respondent purported to terminate the agreement with effect from 1st February 2010. First respondent then required first applicant to remove all its structures by not later than 28th February 2010 on the basis that first respondent would, in the near future invite tenders for the right to supply illuminated street signage advertising. First applicant refused to remove its structures and continued to pay rentals to the first respondent and to maintain the signs. First respondent once more purported to terminate the agreement with immediate effect on 22 November 2011 which act was contested by first applicant.

[2] It is the first applicant's contention that the first respondent's decision to cancel the agreement and to require the first respondent to remove its structures amounts to unlawful administrative action which falls to be reviewed and set aside. First applicant has also, pending the final outcome of the review proceedings herein, applied for an order restraining first applicant from interfering, in any manner whatsoever, with first applicant's use and utilisation of all the sites controlled by the first respondent and currently used by applicants for advertising purposes.

[3] It would now appear that first respondent has made an undertaking not to unlawfully remove the advertising structures erected by the first applicant and therefore first applicant no longer seeks the interdict relief claimed in Part A of the notice of motion.

[4] The second applicant is MMT Agencies CC, a close corporation duly registered in terms of the Laws of the Republic of South Africa with the registered address at no 9 Beaconpark, Pell Street, Beacon Bay, Buffalo City. The applicants therefore decided to form a consortium to tender for street name advertising signs hence they both tendered for the same tender referred to in paragraph 7 below as a joint venture. Any reference to first applicant in this judgment should be viewed as including the second applicant unless the context shows otherwise.

[5] The first respondent is the Buffalo Metropolitan Municipality which issued the tender invitation for the supply, erection and maintenance of outdoor advertising mediums within the area of jurisdiction of the first respondent.

[6] The second respondent is Gunguluza Telecommunications and Geographic Technology CC, a close corporation duly registered in terms of the Laws of the Republic of South Africa and with its registered address at 27 Newton Street, Newton Park, Port Elizabeth.

[7] In April 2011, first respondent issued a tender inviting the successful applicant to have the sole right to supply, erect and maintain illuminated signage signs within the Buffalo City Municipal area. Various prospective tenderers including the first applicant and second respondent, submitted their tender proposals. The first respondent's Bid Adjudication Committee awarded the tender to the second respondent at its meeting held on 19th July 2011.

[8] First applicant has applied for the review of the conduct of the first respondent in awarding the tender to the second respondent on various grounds which are:

[8.1] that the first respondent has failed to give adequate reasons for awarding the tender to second respondent;

[8.2] first respondent has failed to comply with section 5(3) of the Promotion of Administrative Justice Act, no 3 of 2000 ("PAJA");

[8.3] that second respondent should have been disqualified on the grounds that it failed to score a minimum of 60 points in relation to the "Functionary Assessment" which points it was not entitled to get;

[8.4] that first respondent failed to comply with the provisions of its own Supply Chain Management Policy. It is the contention of the first applicant that the composition of the Bid Evaluation Committee as prescribed in paragraph 30(2) of the Policy thereof, on the evidence available to the Court it appears that the Bid Evaluation Committee was not properly composed or constituted;

[8.5] that first respondent failed to take account of relevant considerations, in that it awarded the tender to second respondent because its price unit was higher than that of the applicants. The method used was incorrect;

[8.6] improper application of the Preference Point System by first respondent.

[9] Lastly first applicant's challenge is that the first respondent's cancellation of the month-to-month list contract should never have been unilateral without giving first applicant an opportunity to make representations prior to the decision to terminate the lease.

[10] I must at this stage explain the relationship between the two applicants. In the founding affidavit the deponent to the applicants' founding affidavit describes it as a joint venture business relationship between the two applicants. Therefore, in my view, second applicant would have a direct and substantial interest in the outcome of the present proceedings. The joint venture relationship involves the business of the right to supply, erection of and maintenance of illuminated street advertising signs within the jurisdictional area of the first respondent.

[11] Only the first respondent has opposed this application.

[12] First applicant's response to the allegations by applicant are that:

[12.1] Firstly, first respondent's response to the allegation relating to price and Historically Disadvantaged Individuals (HDI) is that second respondent tendered R9 300.00 per month, whereas the first applicant tendered R8 664.00 per month. It, therefore, contends that second respondent tendered the highest amount. I must say though that there is a disagreement on the interpretation of the points which constitute the highest marks herein that is whether it is the higher amount or the lesser of the two amounts. I will deal with this issue later in my judgment. First respondent, therefore, is of the view that it would benefit from the second respondent's offered amount. First respondent agrees that first applicant scored the full marks in respect of experience and technical proposal. On the other hand, no points were allocated to the second respondent (who won the tender) in respect of experience because it had none. However, second respondent was awarded 47 out of 50 points for its technical proposal because of the nature of the design and drawing that it submitted. First respondent concedes though that *although the*

design and drawing were good, first applicant's technical proposal was better. I do not, at this stage, appreciate the effect of this additional comment.

[13] After both first applicant and second respondent were assessed for functionality, out of 100 points first applicant obtained 82 points whereas second respondent was allocated 62 points in total.

[14] As stated *supra* Mr McNally for the applicants has raised five (5) main grounds for contesting the conduct of the first respondent by way of review. I will deal with each of those grounds in that manner.

B) FAILURE TO FURNISH ADEQUATE REASONS

[14.1] Applicants' grounds for contending that the reasons furnished by first respondent are inadequate is based on the fact that the document provided by first respondent purporting to be reasons for the first respondent's decision does not explain the reasons for the decision. The first respondent's bid committee says it had a comparative look at the current month-to-month contract between the first applicant and the first respondent and concluded as follows:

> "The committee had a comparative look at the current month-to-month contract and agreed that the proposed bidder would be more beneficial, paying R465.00 per unit versus the current rate of R193.86 being received per unit."

[15] Therefore, the Supply Chain Management proposed that a determination be made hereon and the General Manager for Amenitis, Sport and Recreation supported that the award be made based on both the motivation given and the benefit to be derived by the institution there from. On the above basis it was

resolved that the sole rights for the Supply, Erection and Maintenance of illuminated street advertising signs within the area of jurisdiction of the first respondent be awarded to the second respondent, being the responsive tenderer in terms of the Point Scoring System as per Council's Procurement Policy. In my view, the above narration does not amount to an explanation of how and why and on what basis has the second respondent been chosen as the bid winner. If anything, what has been said is the conclusion made by the bid committee and not the reasons why it arrived at the decision. In the absence of adequate reasons the Bid Committee and/or the decision maker is presumed to have been taken the decision without good reasons.

[16] Reasons are not really reasons unless they are properly informative. They must explain why action was taken or not taken, otherwise they are better described as findings or other information[1]. "From a constitutional point of view the provision of reasons is an important mechanism for making administrators accountable to the people they serve and for achieving the culture of justification our Constitution committed us to."[2] Findings, although they do not explain the decision, provide an important backdrop to the reasons that do explain the decision[3].

[17] During argument of this application, Mr Bloem for the respondents contended that the reasons furnished by first respondent as contained in Mr Fani's answering affidavit on page 374 constitute sufficient reasons for the award of the tender to the second respondent. In my view, reasons referred to as contained in annexure

[1] See Cora Hoexter on Administrative Law in South Africa 2007 ed p 414
[2] Cora Hoexter *supra* p 416
[3] Cora Hoexter, 2nd ed p 461; see also Commissioner, South African Revenue Service v Sprigg Investment 117 CC t/a Global Investment 2011(4) SA 551 (SCA)

"FA16.1" do not constitute reasons as envisaged in section 5 of the Promotion of Administrative Justice Act[4]. Section 5(3) of the above Act provides:

> "If an administrator fails to furnish adequate reasons for an administrative action it must, subject to subsection (4) and in the absence of proof to the contrary, be presumed in any proceedings for judicial review that the administrative action was taken without good reason."

[18] When further requested by the applicants to furnish adequate reasons first respondent responded as follows:

> "The reasons for awarding the tender to the second respondent were given to Primedia before this application was instituted. The applicants were furnished with copies of the bid adjudication committee... those minutes are attached and marked annexure "FA16.1" to the deponent's affidavit. Those reasons are repeated herein."

[19] In ***Minister of Environmental Affairs and Tourism and Others v Phambili Fisheries (Pty) Ltd and Another***[5] Schulz JA had this to say:

> "What constitutes adequate reasons has been aptly described by Woodward J, sitting in the Federal Court of Australia, in the case of Ansett Transport Industries (Operations) Pty Ltd and another v Wraith and others (1983) 48 ALR 500 at 507 (23–41), as follows:
>
> > "The passages from judgments which are conveniently brought together in Re Palmer and Minister for the Capital Territory (1978) 23 ALR 196 at 206–7; 1 ALD 183 at 193–4, serve to confirm my view that s 13(1) of the Judicial Review Act requires the decision-maker to explain his decision in a way which will enable a person aggrieved to say, in effect: 'Even though I may not agree with it, I now understand why the decision went against me. I am now in a position to decide whether that decision has involved an unwarranted finding of fact, or an error of law, which is worth challenging.'

[4] Act 3 of 2000
[5] [2003] 2 ALL SA 616 (SCA); 2003(6) SA 407 (SCA) para [40]

> This requires that the decision-maker should set out his understanding of the relevant law, any findings of fact on which his conclusions depend (especially if those facts have been in dispute), and the reasoning processes which led him to those conclusions. He should do so in clear and unambiguous language, not in vague generalities or the formal language of legislation. The appropriate length of the statement covering such matters will depend upon considerations such as the nature and importance of the decision, its complexity and the time available to formulate the statement. Often those factors may suggest a brief statement of one or two pages only."
>
> To the same effect, but more brief, is what Hoexter says in *The New Constitutional and Administrative Law Vol 2 244*:
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> "[I]t is apparent that reasons are not really reasons unless they are properly informative. They must explain why action was taken or not taken; otherwise they are better described as findings or other information."
>
> See also ***Nkondo, Gumede and others v Minister of Law and Order and another*** 1986 (2) SA 756 (A) at 772I–773A."

[20] In the first place when first applicant sought reasons from the first respondent by way of this present application first respondent's response is that first applicant should go back to the unsatisfactory record annexure marked "FA16.1" and will get the reasons. It should be noted that the first applicant before instituting the present proceedings had already read the contents of annexure "FA16.1" but despite that it remained in the dark as to the reasons why the second respondent was awarded the tender in question. What it means is that first applicant had not been furnished sufficient reasons why the tender was not awarded to it but to the second respondent. I do not blame the first applicant for requesting the reasons because the contents of annexure "FA16.1" are not only vague, but do not even begin to state

reasons for the award of the tender to the second respondent. In ***Transnet Ltd v Goodman Brothers (Pty) Ltd***[6]:

> "One need hardly look further for a more obvious fundamental right which justifies the application of section 33 of the Constitution[7] to the present case. The right to equal treatment pervades the whole field of administrative law, where the opportunity for nepotism and unfair discrimination lurks in every dark corner. How can such right be protected other than by insisting that reasons be given for an adverse decision? It is cynical to say to an individual: you have a constitutional right to equal treatment, but you are not allowed to know whether you have been treated equally. The right to be furnished with reasons for an administrative decision is the bulwark of the right to just administrative action.

[21] After both the applicants and second respondent were assessed for functionality, out of 100 points, applicants herein scored 82 points as against 62 points which were awarded to the second respondent. In terms of the general rule, and even common sense for that matter, the tenderer who scores the highest points should ordinarily be appointed. I will hereafter deal with each and every aspect complained of by applicants against the first respondent.

[22] First applicant's second ground of review is that the second respondent should have been disqualified. It is the contention of the first applicant that second respondent should have been disqualified because it failed to score a minimum of 60 points in relation to the "Functionality Assessment" and therefore should never have been considered further. In this regard first applicant contends that the functionality assessment was made up of three elements which are, *experience*, which carries

[6] See judgment of Olivier JA in Transnet Ltd v Goodman Brothers (Pty) Ltd 2001(1) SA 853 at 867 E-F para [42]
[7] The Constitution of the Republic of South Africa Act 108 of 1996

maximum 25 points, *technical proposal* based on design submitted which carries maximum of 50 points and *locality* carrying maximum of 25 points.

[23] In the absence of the reasons for its decision it is difficult for the first respondent to justify the allocation of 47 points out of 50 to the second respondent on a field on which it has no experience. The argument by first respondent that the marks awarded to second respondent on this aspect were earned cannot be justified unless first respondent furnishes adequate reasons for its allocation of the points to the second respondent which show how such points were earned.

[24] In his argument to gainsay Mr McNally's contention, Mr Bloem submitted that the fact that second respondent does not have the relevant experience does not mean that it cannot engage the services of relevant professionals to prepare a design for submission. And that the allocation of 47 points to the second respondent was based on the good design that it submitted. According to the first applicant, the ignorance displayed by the second respondent on the technical proposal aspect has not been justified by the first respondent. Therefore, in my view, it is unlikely in the extreme, that its technical proposal could have been rated at 47 out of 50, given that it has no experience whatsoever in the field. Adequate reasons explaining this anomaly should have been furnished by first respondent.

[25] Mr McNally further submitted that the second respondent's representative Mr Gunguluza, informed the first applicant that he was under the impression that the first respondent would provide the infrastructure in respect of the advertising signs. And that the second respondent did not have the necessary infrastructure to render

the services in fact required by the first respondent. Accordingly, the second respondent's understanding of its obligations under the tender is incompatible with it having submitted a technical proposal.

[26] In this regard, it is unfortunate that first respondent's response to the request for reasons for its decision is found wanting. In such cases one will always come to the conclusion arrived at by the first applicant that "it is unlikely in the extreme (that its second respondent's) technical proposal could have been rated at 47 out of 50, given that it has no experience whatsoever in the field". My common sense tells me that if the functionality assessment would not have been tested in the manner suggested by the first respondent, in that it would still be unfair to other contenders that second respondent would simply engage the services of relevant professionals to prepare a design for submission. The bottom line though is that the first respondent's failure to furnish reasons for its conclusion left everyone to remain groping in the dark and consequently ignorant on how it came to its conclusion on the manner it arrived at the marks awarded to second respondent in this regard. What further confuses this Court is the first respondent's explanation justifying its decision which reads:

> "It [the second respondent] was awarded 47 out of 50 points for its technical proposal because of the nature of the design and drawing that it submitted. Although the design and drawings were good, **Primedia's technical proposals was better**."

[27] The above explanation re-enforces the first applicant's view that the allocation to the second respondent of 47 points for its technical proposal was entirely arbitrary. In my view, if that is so, it does not make sense for the first respondent to conclude that the first applicant's (Primedia) technical proposal was better. Once more, in the

absence of adequate reasons by the decision maker it is difficult to understand how the decision was arrived at by the first respondent.

C) FAILURE TO COMPLY WITH SUPPLY CHAIN MANAGEMENT POLICY

[28] The Supply Chain Management Policy provides, *inter alia*, that a bid evaluation committee must evaluate bids in accordance with the specifications for a specific procurement, and the criteria set out in the bid documentation. Secondly, each bidder's ability to execute the contract must be established. It must also be established whether the recommended bidder is not in arrears with the municipal rates and taxes and municipal service charges. A bid evaluation committee must, as far as possible, be composed of:

(a) officials from department requiring the goods or services and;

(b) at least one supply chain management practitioner of the municipality;

(c) the chairperson of the bid evaluation committee shall be the supply chain management representative or his or her nominee.

[29] First applicant contends that the Bid Evaluation Committee which evaluated the tender process was not properly composed and/or constituted. First applicant alleges that on 2nd June 2011 the bid was evaluated by an Administrative Clerk, one Olwethu Mtshixa. It was thereafter checked by a person whose title is not given but who appears to have signed the form appearing on page 126 of the report. It was thereafter approved by the General Manager's Supply Chain Manager (TP Sali). Even on 22nd June 2011 and 15th July 2011 it was not evaluated by properly constituted officials. It is the contention of the first applicant that a tender issued by an organ of state such as the first respondent cannot be awarded to an entity whose

tax affairs are not in order and are not paid up to date. Therefore, the fact that the second respondent did not submit its annual returns at least for the period it was de-registered (14 November 2009 to 23 June 2011) provides proof that second respondent's tax affairs were not in order at the time of the tender. Therefore, on this basis alone the second respondent should have been disqualified from partaking in the tender process.

[30] The above requirements should have been enforced by the first respondent especially in the present proceedings and the allegation of non-compliance obliges the first respondent to disclose fully how such compliance was done. In this instance, there was no compliance by the first respondent with the Supply Chain Management Policy as read with Act 56 of 2003.

D) FAILURE TO TAKE ACCOUNT OF RELEVANT CONSIDERATIONS

[31] Once more first respondent herein is accused by first applicant of failure to take account of the relevant considerations when considering the highest price per unit. It considered the second respondent on the basis that the second respondent has tendered R9 300.00 per month. First respondent's justification for considering that the second respondent's offer was higher than that of the first applicant is justified as follows:

> "The second respondent tendered R9 300.00 per month (which was the highest tender) whereas Primedia tendered R8 664.00 per month. It means that the Municipality would receive R9 300.00 per month from the second respondent instead of only R8 664.00 per month from Primedia."

[32] Mr McNally's argument in this regard is that the above allegation by the first respondent is simply incorrect. His client's justification for this contention is that the only reference to 20 units in the invitation to tender was as follows:

> "A minimum of 20 illuminated street sign advertisements must be erected by the successful bidder within 90 days from the date of appointment, failing which Council will have to terminate the contract if it deemed so."

[33] According to first applicant the "pricing schedule", the "total per month" which was required to be filled in by each tenderer was based on a stated "estimated number illuminated street signs" of 20. Therefore, none of this suggests that the bids would be evaluated on the basis of only 20 streets signs. First applicant's justification of its submission is based on what follows hereunder:

> "The Consortium is in the advantageous position in that it already has estimated 202 illuminated street name advertising signs erected on council property. Therefore should the Consortium be awarded the tender, council will immediately be in a position to obtain an estimated monthly site rental of R87 627.50 (VAT inclusive)."

[34] Mr Bloem's counter argument in this regard is premised on the reasoning that the applicants submitted a tender of R433.20 per month per unit and the second respondent submitted a tender of R465.00 per month per unit. The second respondent's tender was therefore the highest hence the tender was awarded to the second respondent. According to Mr Bloem tenderers were required to submit tenders on how much they were prepared to pay per street sign (unit) per month. Whether there were 20 or 200 units is immaterial because what was important is how much was the tender per unit; and that all tenderers were assessed on a minimum of 20 units. Consequently, the tender would have been liable to be set aside had the second respondent taken into account the fact that the applicants

already have street signs erected in the area of the first respondent's jurisdiction. And that factor would have severely prejudiced the other tenderers who do not have street signs erected in the aforesaid areas. Mr Bloem, therefore, submits that applicant's submissions in this regard has no factual basis and should be rejected.

[35] Mr McNally attacks the first respondent's contention by submitting that the first respondent's allegation that the use of the 20 units multiplier is said to derive from the fact that "the bid specifications required tenderers to tender based on a unit price per sign subject to a maximum of 20 signs" is simply incorrect. He develops his argument by further submitting that it is entirely irrational, in evaluating the respective tenders, not to take into account of the fact that the applicants have already erected a substantial number of illuminating street name advertising signs from which the first respondent would derive rental income. First respondent's explanation is a simply one, that the second respondent tendered R9 300.00 per month which was the highest tender whereas first applicant tendered R8 664.00 per month which was less than R9 300.00 tendered by second respondent.

[36] The contention by the first applicant that it already has erected a substantial number of illuminated street name advertising signs from which the first respondent would derive rental income, and therefore, the total overall income to be derived from the erection of illuminated street name advertising signs must be taken into account. This to me appears to have sense because the first respondent could not simply wish away the fact that first applicant for that reason has an advantage over the second respondent. This goes back to the first applicant's contention that first respondent's reasons for its decision are not sufficient to explain why the second

respondent was awarded the tender. The issue at hand is one of those grey areas in so far as reasons are concerned. The reasons proffered should also have considered the first applicant's contention herein which suggests that the higher amount tendered does not simply answer the question of the highest tender. It does not therefore appear to me that the first respondent's Bid Adjudicating Committee had taken into account the total overall income to be derived from the erection of illuminated street name advertising signs which it should have done. In the absence of adequate reasons for the first respondent's conclusion it is difficult to know how the decision was arrived at by the first respondent. Therefore, if the reasoning of the Bid Adjudicating Committee excludes the applicant's reasoning, it becomes arbitrary in the absence of full reasons for its decision.

E) IMPROPER APPLICATION OF THE PREFERENCE POINT SYSTEM

[37] First applicant in this regard contends that first respondent had specified in its tender invitation that it would apply the "Council's 90/10 point system". First applicant further submits that the application of the 90/10 point system is not in accordance with Regulation 8 of the Preferential Procurement Regulations, 2001, published in terms of the Preferential Procurement Policy Framework Act No 5 of 2001 which was applicable when the tender was adjudicated. Mr McNally's further submission is that it was contrary to the Preference Point System to consider points for price and HDI separately from those scored for functionality. Therefore, the two should have been added together, in which case the applicant' total point score would have exceeded that of the second respondent.

[38] Mr Bloem's response to this submission is that it is an aspect that was not raised by the applicants in their founding affidavit. For that reason the first respondent did not pertinently deal with it in its answer. Therefore, the applicants cannot make out its case on this aspect in its replying affidavit.

[39] Regulation no 8(1) of the Preferential Procurement Policy Framework Act No 5 of 2000 deals with the Evaluation of tenders on Functionality and it prescribes as follows:

> "8(1) An organ of State must, in the tender documents, indicate if, in respect of a particular tender invitation, tenders will be evaluated on functionality and price.
>
> 8(2) the total combined points allowed for functionality and price may, in respect of tenders with an estimated Rand value equal to, or below R500 000.00 not exceed 80 points.
>
> 8(3) The total combined points allowed for functionality and price may, in respect of tenders with an estimated Rand value above R500 000.00 – not exceed 90 points.
>
> 8(4) When evaluating the tenders contemplated in the item, the points for functionality must be calculated for each individual tenderer.
>
> 8(5) The conditions of tender may stipulate that a tenderer must score a specified minimum number of points for functionality to qualify for further adjudication.
>
> 8(6) The points for price, in respect of a tender which has scored the specified number of points contemplated in sub-regulation (5) must, subject to the application of the evaluation system for functionality and price contemplated in this regulation, be established separately and be calculated in accordance with the provisions of regulations 3 and 4.
>
> 8(7) Preferences for being an HDI and/or sub-contracting with an HDI and/or achieving specified goals must be calculated separately and must be added to the points scored for functionality and price.
>
> 8(8) Only the tender with the highest number of points scored may be selected."

[40] Therefore, according to the applicants the aforesaid Regulations 8(6) and 8(7) prescribe that the score for functionality and price must be added separately and be added to that of HDI. Failure to comply with such regulation by first respondent amounts to a contravention of the provisions of the regulation in that the potential points for functionality was not added to the potential 90 points for price.

[41] In addition, and according to applicants, Regulation 10(2) provides that in the event that the application of the 90/10 preference point system as stipulated in the tender documents, all tenders received are equal to, or below R500 000.00, the tender must be cancelled. The tender issued by first respondent was for a contractual period of 3 years, and a figure of 20 signs was used as a yard stick. Based on the offer of the second respondent, the first respondent would have received a total amount of R380 210.04 which would have been far below the threshold as prescribed in the Regulations whose requirements would not have been met.

[42] In terms of a letter dated 22nd November 2011, first respondent terminated its month-to-month contract which existed for an indefinite period and was terminated with immediate effect. This contract is a lease agreement between the first applicant and the first respondent in terms of which first applicant would hire from first respondent the relevant sites on which first applicant would erect illuminated advertising street name signs. These street name signs would include, *inter alia*, double sided advertising frame on a supporting street pole, to accommodate four advertising faces. The advertising signs are illuminated approximately 1.033mm x 1,588mm in size and are made of durable materials and are constructed and erected in accordance with engineering specifications that ensure compliance with all the

relevant building and safety prescriptive measures. Presently, the first applicant has to date more than 150 erected street name signs in the Buffalo City Municipality area, at a rental of R31 500.00 per month inclusive of electricity consumption charges.

F) DECISION TO CANCEL APPLICANTS MONTH-TO-MONTH CONTRACT

[43] The first applicant was notified by the first respondent about the lease contract being terminated with immediate effect. It is common cause that the first applicant was not given any opportunity to make representations prior to the decision to terminate the lease. According to the first applicant the sole purpose and effect of the cancellation would have been to hand over to first applicant all the areas occupied by the first applicant. The relationship between the two parties in this regard dates back to the year 2004. Mr McNally's contention in this regard is that the decision to cancel the month-to-month contract aforementioned constitutes administrative action. He develops his argument by further contending that not only is the decision to terminate procedurally unfair but it is also illogical and irrational. In his view, the result of the termination would be that the applicant would be required to dismantle and remove at considerable cost, over 200 illuminated street name advertising signs in circumstances where the second respondent only tendered to erect 20 such signs.

[44] In this regard, only if the first respondent's act does not amount to administrative action would it be exonerated from giving first applicant a hearing

before the former can terminate the lease agreement referred to above. The test here is whether at the time of the termination of the lease agreement between first applicant and first respondent the latter's act constituted administrative action. The conduct of the first respondent can only amount to administrative action if it involves the exercise of public power or the performance of a public function in terms of legislation[8]. In ***Grey's Marine Hout Bay (Pty) Ltd and Others v Minister of Public Works and Others***[9] Nugent JA remarked as follows:

> 'Whether particular conduct constitutes administrative action depends primarily on the nature of the power that is being exercised rather than upon the identity of the person who does so. Features of administrative action (conduct of 'an administrative nature') that have emerged from the construction that has been placed on s 33 of the Constitution are that it does not extend to the exercise of legislative powers by deliberative elected legislative bodies, nor to the ordinary exercise of judicial powers, nor to the formulation of policy or the initiation of legislation by the executive, nor to the exercise of original powers conferred upon the President as head of State. Administrative action is rather, in general terms, the conduct of the bureaucracy (whoever the bureaucratic functionary might be) in carrying out the daily functions of the State, which necessarily involves the application of policy, usually after its translation into law, with direct and immediate consequences for individuals or groups of individuals."

[45] It also appears from the decided cases that there is also no distinction between administrative action as contemplated by section 33 of the Constitution from administrative action as envisaged by PAJA. If there is any such distinction it does not apply in the case *in casu*[10].

[8] Kouga Municipality v De Beer and Another 2008(5) SA 503 (ECD)
[9] 2005(6) SA 313 (SCA); [2005]3 ALL SA 33; 2005(10) BCLR 931 para [24]
[10] Grey's Marine Hout Bay (Pty) Ltd v Minister of Public Works *supra* fn 9

[46] Mr Bloem contends that the decision to cancel the month-to-month contract does not, on the facts of this case, amount to administrative action. In his view, the letter dated 28th January 2010 which gave notice to first applicant to remove all its structures by not later than 28th February 2010 gave him sufficient notice as contemplated by the agreement. I do not agree that the first respondent's conduct aforementioned amounted to compliance with either the terms of the agreement or with the requirements of PAJA. Given the circumstances of the two parties especially the length of time of their relationship the time given by first respondent would amount to insufficient time for the first applicant to make representations or to be able to remove its material erected within the first respondent's city. In any event, I am of the view that the first respondent's conduct in terminating the said contract amounts to administrative action as contemplated within the requirements of PAJA. Therefore, the first applicant should have been given sufficient time to enable it to either make representations and/or to be able to remove its property. Obviously the one month given to first applicant by first respondent was too short to qualify as sufficient time in the circumstances.

[47] In the present case and relative to the tender the main crux of the complaint is the failure by the first respondent to give reasons for its decision to award the tender to the second respondent. Without reasons or at least adequate reasons for its decision as indicated elsewhere in this judgment[11] it would be difficult for the applicants to know how the first respondent awarded the tender to the second respondent. It is apparent that "reasons are not really reasons unless they are

[11] Para 19 of the judgment

properly informative. They must explain why action was taken or not taken; otherwise they are better described as findings or other information."[12]

[48] In the present matter I would be engaged in speculation if I pretend as if I know the reasons why the first respondent came to its decision to grant the tender to the second respondent. In my view, the first respondent, instead of furnishing reasons for its decision, it has simply furnished its conclusions which cannot amount to reasons for its decision. I have already indicated what would have been expected from the first respondent that would amount to reasons for its decision. This it has failed to do. I must, however, add that it is impossible to lay down a general rule of what could constitute adequate or proper reasons, for each case must depend upon its own facts[13]. As already alluded to above the decisions made by first respondent and/or its sub-committees cannot in the very least be justified. This is made worse by the first respondent's failure to provide adequate reasons for its decision.

[49] The only remedy in the circumstances of this case is to set aside the decision of the first respondent and to refer the matter back to the first respondent for the tender process to be started *de novo*.

[50] Therefore, I hereby make the following order:

[50.1] Applicants are hereby granted extended time within which to file the present application, in terms of section 9(1) and (2) of The Promotion of Administrative Justice Act No 3 of 2000.

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[12] Hoexter – Administrative Law in South Africa at 414

[13] Hoexter on page 428, Rean international Supply Company (Pty) Ltd v Mpumalanga Board 1999(8) BCLR (T) at 927 H-I

[50.2] That applicants are hereby exempt from the obligation to exhaust any internal remedy against first respondent in terms of the provisions of section 7(2)(c) of the Promotion of Administrative Justice Act No 3 of 2000.

[50.3] The decision of the first respondent to appoint the second respondent as a successful tenderer is hereby reviewed and set aside.

[50.4] The first respondent, if so advised, and if it still intends to go ahead with the same tender may do so afresh.

[50.5] The first respondent's decision to terminate the month-to-month contract with the first applicant can only be lawful upon first respondent giving the first applicant a reasonable opportunity to make its representations on why the contract should not be terminated, and first respondent is so ordered to do so.

[50.6] The first respondent is hereby ordered to pay costs of this application which costs shall include costs occasioned by the appointment of two counsel where necessary.

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P.W. TSHIKI
JUDGE OF THE HIGH COURT

Counsel for the applicant	:	Adv PVJ McNally SC
Instructed by	:	Neville Borman & Botha GRAHAMSTOWN (Mr Powers)
Counsel for the respondent	:	Adv GH Bloem SC
Instructed by	:	Whitesides Attorneys GRAHAMSTOWN (Mr Basson)
Date heard:	:	19 September 2013
Date delivered	:	19 December 2013