THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

Case no: 372/2001
REPORTABLE

In the matter between:

LOGBRO PROPERTIES CC	Appellant

and

S A BEDDERSON, NO	First respondent
MINISTER OF HOUSING	Second respondent
NATIONAL HOUSING BOARD	Third respondent
MINISTER OF HOUSING, KwaZulu-Natal	Fourth respondent
BALSONS INVESTMENTS CC	Fifth respondent
K R GOVENDER	Sixth respondent
SB MKHIZE	Seventh respondent
K NAIDOO	Eighth respondent
J NARAINSAMY	Ninth respondent
R G MOODLEY	Tenth respondent
EVERSURE CARTAGE	Eleventh respondent
MOODLEY'S PROPERTY HOLDINGS	Twelfth respondent

Before:	Howie JA, Farlam JA, Cameron JA, Heher AJA, Lewis AJA
Heard:	23 August 2002
Judgment:	18 October 2002

Tender – Constitutional requirements of administrative justice apply to process – Fairness does not however require administrator in reconsidering decision set aside by Court to ignore supervening considerations – But affected party entitled to opportunity to make representations if such considerations may lead to adverse decision

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JUDGMENT

CAMERON JA:

[1] In 1997 the High Court ordered a provincial tender committee to 'reconsider' a tender the appellant had submitted two years earlier to buy a property. This appeal raises the question whether the committee when doing so was entitled to take into account the fact that property values had increased since 1995, or whether it should have adjudged the tender excluding this and other supervening considerations. The court below held that the increase could properly be taken into account. The appellant challenges that conclusion. If its main argument fails, it raises a fresh question in this Court: should the tender committee in 1997 have given it an opportunity to be heard on the significance of the price rise?

Background

[2] In February 1995, the KwaZulu-Natal provincial government ('the province') awarded a tender for the sale of a well-situated Richards Bay property, approved for development as a filling station, to one Naidoo. The appellant's tender was rejected. But it challenged the award on the basis that Naidoo's tender, although by a considerable margin the highest, did not comply with the tender conditions. Its challenge prevailed. In February 1997 Natal Provincial Division of the High Court (McLaren J) set aside the

award. It ordered the province's assets committee ('the committee') to reconsider the appellant's and other tenders that complied with the tender conditions. Non-compliant tenders, including Naidoo's, were to be excluded. There was no appeal against the decision of McLaren J.

[3] So the matter came before the committee (of which the first respondent later became chairman) less than a month after the High Court decision. The appellant's tender was now the highest. But the committee decided by 3 to 1 (the first respondent dissenting) to accept neither the appellant's nor any of the other 1995 tenders. Instead, in view of the increase in Richards Bay property values in the intervening two years, it recommended a call for fresh tenders entirely.

[4] The appellant went back to court. Its challenge, launched in the Natal Provincial Division in December 1998 and argued in September 2000, failed before Skweyiya J. In a judgment delivered in August 2001, he held that the meaning of McLaren J's order directing the Committee to 'reconsider' the qualifying tenders required the committee to consider the matter anew: this left it free to take into account new factors and circumstances, including the increase in property values since the abortive 1995 process. With

his leave the appellant appeals against that conclusion. Of the twelve respondents originally cited (including all the 1995 tenderers), only three oppose the appeal – the committee itself (represented by the first respondent), and the national and provincial executive members of government responsible for housing (respectively the second and fourth respondents).

Was the committee in 'reconsidering' the tender permitted to take the increase in property values into account?

[5] The starting point must be that the tender process constituted 'administrative action' under the Constitution. This entitled the appellant (and it does not matter in this case whether the interim or the 1996 Constitution applied)[1] to a lawful and procedurally fair process and an outcome, where its rights were affected or threatened, justifiable in relation to the reasons given for it.[2] I say 'must be' since in the light of several decisions of this

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[1] In terms of s 33 of the 1996 Constitution, read with item 23(2)(b) of Schedule 6, the administrative justice provision of the interim Constitution (s 24) remained in force until the Administrative Justice Act 3 of 2000 came into operation on 30 November 2000.

[2] Section 24 of the fundamental rights chapter of the interim Constitution read:

Administrative justice

24. Every person shall have the right to —

(a) lawful administrative action where any of his or her rights or interests is affected or threatened;

(b) procedurally fair administrative action where any of his or her rights or legitimate expectations is affected or threatened;

(c) be furnished with reasons in writing for administrative action which affects any of his or her rights or interests unless the reasons for such action have been made public; and

(d) administrative action which is justifiable in relation to the reasons given for it where any of his or her rights is affected or threatened.

Court applying the Constitution's administrative justice provisions to governmental tender processes[3] the statement seems obvious. Yet counsel for the province asserted the contrary. It is necessary to deal with his argument, not because it has substance, but because of the terms in which it was advanced. Counsel contended, distinguishing the cases referred to, that the tender conditions the province stipulated gave it a contractual right to withdraw the property from tender in 1997, which could be exercised 'without having to pass the scrutiny of lawful administrative action'. He invoked two decisions of this Court, *Mustapha and Another v Receiver of Revenue, Lichtenburg and Others*[4] and *Cape Metropolitan Council v Metro Inspection Services (Western Cape) CC and Others*.[5]

[6] It is correct that in the first litigation McLaren J held that the province's tender offer, accepted by the tenderers, gave rise to a contract whose conditions the tenderers could enforce against the province. The tender conditions included:

> '1.1 The highest tender will not necessarily be accepted.
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> 1.2 No reasons will be given for the acceptance or non-

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[3] *Umfolozi Transport (Edms) Bpk v Minister van Vervoer en Andere* [1997] 2 All SA 548 (SCA) 552-553; *Transnet Ltd v Goodman Brothers (Pty) Ltd* 2001 (1) SA 853 (SCA) 870; *Olitzki Property Holdings v State Tender Board and Another* 2001 (3) SA 1247 (SCA) para 33. Compare *Premier, Free State and Others v Firechem Free State (Pty) Ltd* 2000 (4) SA 413 (SCA) para 32 and *Eastern Cape Provincial Government and Others v ContractProps 25 (Pty) Ltd* 2001 (4) SA 142 (SCA) para 8.

[4] 1958 (3) SA 343 (A).

[5] 2001 (3) SA 1013 (SCA).

acceptance of [a] tender.

1.3 The Regional Housing Board, KwaZulu-Natal may at any stage and without giving reasons withdraw a property or properties from the tender.

1.4 Tenders which do not comply with the requirements set out below should not be considered.

…'

[7] It was condition 1.4 that McLaren J held the appellant could enforce to secure the exclusion of Naidoo's and other non-compliant tenders, though it is the others the province now seeks to invoke. But the argument is flawed. Even if the conditions constituted a contract (a finding not in issue before us, and on which I express no opinion), its provisions did not exhaust the province's duties toward the tenderers. Principles of administrative justice continued to govern that relationship, and the province in exercising its contractual rights in the tender process was obliged to act lawfully, procedurally and fairly. In consequence, some of its contractual rights – such as the entitlement to give no reasons – would necessarily yield before its public duties under the Constitution and any applicable legislation.

[8] This is not to say that the conditions for which the province stipulated in putting out the tender were irrelevant to its subsequent powers. As will appear, such stipulations might bear

on the exact ambit of the ever-flexible duty to act fairly[6] that rested on the province. The principles of administrative justice nevertheless framed the parties' contractual relationship, and continued in particular to govern the province's exercise of the rights it derived from the contract.

[9] Counsel's invocation of the *Cape Metropolitan* case as authority to the contrary is mistaken. There it was held that a local authority's cancellation of an agreement was not 'administrative action' under the Constitution entitling the other contractant to procedural fairness before termination. Although the public authority derived its power to conclude the contract from statute, it was held that the same could not necessarily be said about its power to cancel. But the *Cape Metropolitan* case turned on its own facts, and this Court was careful to delineate them. In the first place, the tender cases were expressly distinguished.[7] Second, the employment cases (where a public authority's express statutory power to dismiss public sector workers was held bound by public duties of fairness notwithstanding that a corresponding right existed at common law or that such a right might also have

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[6] *Du Preez and Another v Truth and Reconciliation Commission* 1997 (3) SA 204 (A) 231H-233C, *Premier, Mpumalanga, and Another v Executive Committee, Association of State-Aided Schools, Eastern Transvaal* 1999 (2) SA 91 (CC) para 39. Compare now s 3(2)(a) of the Promotion of Administrative Justice Act 3 of 2000.

[7] 2001 (3) SA 1013 (SCA) para 19.

been contained in a contract)[8] were also distinguished.[9] Third and most importantly, the Court in *Cape Metropolitan* did not purport to provide a general answer to the question whether a public authority in exercising powers derived from a contract is in all circumstances subject to a public duty to act fairly. That question was left open. Instead, the Court's judgment makes it plain that the answer depends on all the circumstances. The critical passage in the reasoning of Streicher JA is this:

> 'Those terms [ie entitling the public authority to cancel the contract] were not prescribed by statute and could not be dictated by the [public authority] by virtue of its position as a public authority. They were agreed to by the first respondent, a very substantial commercial undertaking. The [public authority], when it concluded the contract, was therefore not acting from a position of superiority or authority by virtue of its being a public authority and, in respect of the cancellation, did not, by virtue of its being a public authority, find itself in a stronger position than the position would have been had it been a private institution. When it purported to cancel the contract it was not performing a public duty or implementing legislation; it was purporting to exercise a contractual right founded on the consensus of the parties in respect of a commercial contract. In all these circumstances it cannot be said that the [public authority] was exercising a public power.'[10]

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[8] *Administrator, Transvaal and Others v Zenzile and Others* 1991 (1) SA 21 (A); *Administrator, Natal and Another v Sibiya and Another* 1992 (4) SA 532 (A).
[9] 2001 (3) SA 1013 (SCA) paras 11-12.
[10] 2001 (3) SA 1013 (SCA) para 18.

[10] The case is thus not authority for the general proposition that a public authority empowered by statute to contract may exercise its contractual rights without regard to public duties of fairness. On the contrary: the case establishes the proposition that a public authority's invocation of a power of cancellation in a contract concluded on equal terms with a major commercial undertaking, without any element of superiority or authority deriving from its public position, does not amount to an exercise of public power.[11]

[11] In the present case, it is evident that the province itself dictated the tender conditions, which McLaren J held constituted a contract once the tenderers had agreed to them. The province was thus undoubtedly, in the words of Streicher JA in *Cape Metropolitan*, 'acting from a position of superiority or authority by virtue of its being a public authority' in specifying those terms. The province was therefore burdened with its public duties of fairness in exercising the powers it derived from the terms of the contract.

[12] For reasons not only doctrinal but historical, the province's invocation of *Mustapha*'s case is even less appropriate. There the

[11] The importance to the decision of the parties' equality of bargaining power is rightly emphasised by Iain Currie and Jonathan Klaaren *The Promotion of Administrative Justice Act Benchbook* (2001) 72, 74.

Minister, mainly for racially discriminatory reasons, terminated a statutory permit to occupy land. This Court by a majority held that since the permit was embodied in a contract, the termination constituted the exercise of an absolute and unqualified contractual power, rendering the racial discrimination permissible or at least irrelevant.[12] Schreiner JA delivered a strong dissent:

> 'Although a permit granted under sec. 18 (4) of Act 18 of 1936 has a contractual aspect, the powers under the sub-section must be exercised within the framework of the Act and the regulations which are themselves, of course, controlled by the Act. The powers of fixing the terms of the permit and of acting under those terms are all statutory powers. In exercising the power to grant or renew, or to refuse to grant or renew, the permit, the Minister acts as a state official and not as a private owner, who need listen to no representations and is entitled to act as arbitrarily as he pleases, so long as he breaks no contract. For no reason or the worst of reasons the private owner can exclude whom he wills from his property and eject anyone to whom he has given merely precarious permission to be there. But the Minister has no such free hand. He receives his powers directly or indirectly from the Statute alone and can only act within its limitations, express or implied. If the exercise of his powers under the sub-section is challenged the Courts must interpret the provision, including its implications and any lawfully made regulations, in order to decide whether the

[12] 1958 (3) SA 343 (A) 356B-357C, per Ogilvie Thompson AJA.

powers have been duly exercised …'[13]

[13] The artificiality in the majority's approach was pointed out at the time. It was observed that its reasoning 'virtually severs the agreement from the statute', which was at least in part the contract's 'progenitor'. This in turn conferred on the agreement 'an ineffaceable orientation',[14] which rendered its termination an inescapably public exercise of power. The moral and political implications of the majority decision also attracted censure.[15] The total fissure the majority attempted to effect between the statutory source of the contract and the exercise of the powers the contract conferred is clearly incompatible with *Cape Metropolitan*, particularly the passage set out earlier, and it is necessary for *Mustapha* now to be overruled, and for the dissenting judgment of Schreiner JA to be recognised as correct.

[14] The significance of this analysis is that even if the terms the province stipulated for the tender process entitled it to withdraw the Richards Bay property, it could exercise that power only with due regard to the principles of administrative justice. It could not withdraw the property capriciously or for an improper or unjustified reason. And this is the core of the appellant's case: that the

[13] At 347D-G.
[14] Ellison Kahn 1958 *Annual Survey* 23.
[15] John Dugard *Human Rights and the South African Legal Order* (1978) 320-321, 323.

property's withdrawal because of the increase in property values constituted improper and unjustified administrative action.

[15] Whether this is so does not in my view depend on the precise meaning to be attached to the word 'reconsider', but rather on determining what 'reconsidering' the appellant's and other compliant tenders entailed in the light of the principles of administrative fairness. In making this determination, the brunt of the appellant's complaint must be appreciated. On the table before the committee in both 1995 and 1997 were departmental recommendations that the property be sold to the highest tenderer. This implies two consequences. First, had the committee excluded non-compliant tenders from consideration in 1995, the appellant's tender would in all likelihood have been accepted. Second, had the committee in 1997 omitted from consideration the increase in property values, acceptance of the appellant's tender was a foregone conclusion.

[16] In other words, had the 1995 process been perfect, the appellant would in all likelihood have received the benefit of a property acquisition judged against then market values. That provides the basis for its current claim that in 1997 the committee should have ignored the supervening increase in market values.

But the underlying question the appellant's case raises is broad and important, and its general force must be appreciated: to what extent is the administrative subject entitled to be immunised from the adverse consequences of mistakes by an administrator? Formulated differently, the question is to what extent the right to administrative justice entails exemption from the prejudicial effects of a functionary's mistakes.

[17] In a nuanced argument, Mr Marcus conceded that the appellant was not entitled to a perfect process, free of innocent errors, and that the administrative subject could not expect to be immunised from all prejudicial consequences flowing from such errors. He also conceded also that in some cases it might be appropriate for an administrator in repairing a previously botched process to take changed circumstances into account. Here, however, he submitted, the reason for the changed circumstances was a delay caused by the committee's own error. What was more, the appellant, having succeeded in a competitive and secret process in 1995 in judging the market and other conditions rightly, should not be made to forfeit the profits of its labour and skill by the tender process being re-opened.

[18] It serves no purpose, however, in weighing the significance

of the disadvantage the appellant experienced, to categorise the committee's conduct in 1995 in awarding the tender to Naidoo pejoratively as 'unlawful' or 'improper'. Such epithets represent conclusions of law applicable to a wide range of administrative errors, some innocent, some malign. On the evidence before us, the fact is that the committee made an innocent mistake, and Mr Marcus on behalf of the appellant was constrained to concede as much. It took a judgment of the High Court to establish that the condition specifying that non-compliant tenders 'should not be considered' was enforceable. In these circumstances the appellant can found an entitlement to the benefit it failed to acquire in 1995 on neither bad faith nor administrative perversity, and the question becomes solely whether fairness required the committee in 1997, having innocently erred in 1995, to ignore the supervening increase in property values.

[19] That increase was however not only a fact, but an obvious fact. The committee's mandate was to dispose of public assets in the public interest. In determining what was fair to the appellant, it could hardly have been proper for it to ignore competing claims on the public purse – including the claims of those to whose material advancement the department in which the committee functioned, namely the department of housing, was committed. The

committee rightly refers in its deposition to ‘the legitimate interest of the State in obtaining the best possible price for the property’, and points out that it was not only the appellant’s interests that came into play when it had to decide the matter whether to recommend re-advertisement.

[20] The fact is that the committee’s performance of its duty in 1997 was a prime instance of what commentators have dubbed ‘polycentric decision-making’. It was not a unilinear question involving the assertion of one subject’s rights against the administration. The appellant had a right to a fair tender process in 1995. That right McLaren J vindicated with his order that the committee ‘reconsider’ its tender. In doing so he rightly emphasised that the appellant ‘is naturally not entitled to an order that its tender should be accepted’, but only ‘to have its offer considered without competition from [Naidoo’s] tender or any other tender which does not comply with the tender conditions’. When, therefore, the committee set out to ‘reconsider’ the compliant tenders, it undertook the typically complex task of balancing all the public interests its mandate required it to fulfil. This included fair reconsideration of the appellant’s tender – but not to the exclusion of considerations involving its broader responsibilities. These included the public benefit to be derived from obtaining a higher

price by re-advertising the property.

[21] It is in just such circumstances that a measure of judicial deference is appropriate to the complexity of the task that confronted the committee. Deference in these circumstances has been recommended as:

> ' … a judicial willingness to appreciate the legitimate and constitutionally-ordained province of administrative agencies; to admit the expertise of those agencies in policy-laden or polycentric issues; to accord their interpretation of fact and law due respect; and to be sensitive in general to the interests legitimately pursued by administrative bodies and the practical and financial constraints under which they operate. This type of deference is perfectly consistent with a concern for individual rights and a refusal to tolerate corruption and maladministration. It ought to be shaped not by an unwillingness to scrutinize administrative action, but by a careful weighing up of the need for – and the consequences of – judicial intervention. Above all, it ought to be shaped by a conscious determination not to usurp the functions of administrative agencies; not to cross over from review to appeal.'[16]

[22] I agree. The conclusion is unavoidable that the committee in 1997 acted unimpeachably in considering that the increase in

[16] Cora Hoexter 'The Future of Judicial Review in South African Administrative Law' (2000) 117 *SALJ* 484 at 501-502, citing A Cockrell '"Can You Paradigm?" – Another Perspective on the Public Law / Private Law Divide' 1993 *Acta Juridica* 227.

property values might point away from immediate disposal of the property, and, albeit for somewhat different reasons, I agree Skweyiya J's conclusion.

The audi point

[23] But in this Court Mr Marcus raised an entirely new point on behalf of the appellant – that the committee before deciding not to award the tender in 1997 should have given the appellant an opportunity to make representations, at least in writing, on the significance of the price increase. That point, although not raised in the affidavits or argued in the court below, may properly be raised at this stage since not only are the facts before us clear, but neither party wishes to adduce any further relevant evidence. The unquestioned fact is that the committee decided to recommend re-advertisement without giving any of the compliant tenderers an opportunity to make representations.

[24] While, as Mr Marcus pointed out, it is no answer to a claim to be heard that the subject might have had little or nothing to say if such an opportunity had existed,[17] it is certainly worth pointing out that, if afforded, the opportunity might have been extremely valuable. The fact of an increase in property values between 1995

[17] *Administrator, Transvaal and Others v Zenzile and Others* 1991 (1) SA 21 (A) 37C-F, per Hoexter JA.

and 1997 was undisputed before us. But its extent is unknown. The appellant's 1995 tender exceeded the property's then market value by more than 50%. Did the increase over the next two years surpass that margin? We do not know. Whether it did or not, the appellant was entitled to try to persuade the committee that accepting its 1995 offer would be more advantageous, taking all factors into consideration, than a call for fresh tenders; and in any event that, given its investment in time and money and its employment of skill, fairness pointed notwithstanding any increase to acceptance of its tender.

[25] Procedural fairness in my view demanded that the committee in reconsidering the tenders would afford the compliant tenderers an opportunity to make representations, at least in writing, on any factor that might lead the committee not to award the tender at all. That opportunity not having been afforded, the committee's 1997 decision must be set aside, and the matter remitted to the appropriate authority to afford the appellant and the other compliant tenderers the opportunity to make representations, at least in writing, on any supervening consideration relevant to the committee's exercise of its powers in relation to the award or non-award of the tender.

[26] During the hearing the parties were asked, if this conclusion were reached, to supply us with an agreed form of order. After a considerable delay, of nearly five weeks, two sets of draft orders were supplied. The order at the end of this judgment reflects in material respects the parties' respective proposals. For the sake of clarity, it is worth spelling out that the authority charged with repairing the flawed process of 1997 is itself now entitled to take into account any consideration material to the decision whether or not to recommend the sale of the property on the basis of the 1995 tenders (including further increases in property values since 1997), but must give the compliant tenderers an opportunity to respond, at least in writing, to the considerations in question.

Costs

[27] As pointed out earlier, the appellant raised the *audi* point in written argument it submitted shortly before the hearing in this Court. The respondents' stance in contesting at all stages the relief sought is nevertheless relevant to determining what order will be fair in respect of costs. The main argument – in which the respondents persisted before us, and persisted despite the *audi* point being raised – was that the tender process was contractual, not administrative, and that considerations of fairness were irrelevant. In the alternative, they argued that because the *audi*

point was not raised in the papers it could not be raised now. This does not suggest that had the *audi* point been raised earlier, the respondents would have relented, and in these circumstances the costs must follow the result.

[28] There is therefore an order in the following terms:

1. The order of the Court below is set aside, and in its place there is substituted:

   '(a) The decision taken on 4 March 1997 by the assets committee of the Province of KwaZulu-Natal, established under s 12A of the Housing Arrangements Act 155 of 1993, that Lot 11113 Brackenham, Richards Bay, KwaZulu-Natal, be re-advertised for sale by public tender, is set aside.

   (b) The fourth respondent is directed:

   (i) to appoint within 30 days of the date of this order a committee ("the committee") to reconsider the tenders which were considered by the assets committee on 4 March 1997;

   (ii) to require the committee to call upon the appellant and other tenderers whose tenders were before the assets committee on 4 March 1997 to make, on or before a date determined by the fourth respondent in conjunction with the committee, such representations as the appellant and the other tenderers may wish to make as regards the market value of Lot 11113 as at February 1995 and since;

   (iii) to require the committee to consider such

representations and, within 60 days of the date of its appointment, to declare its decision as to the sale by tender of Lot 11113.'

2. The first, second and third respondents are to pay the appellant's costs, jointly and severally, the one paying, the other to be absolved.

E CAMERON
JUDGE OF APPEAL

HOWIE JA	**)**	
FARLAM JA	**)**	**CONCUR**
HEHER AJA	**)**	
LEWIS AJA	**)**	