

# Who excludes bidders from future contracts?

*Entsha Henra BK v Hessequa Munisipaliteit* 2008 JDR 0455 (C)

The duty to create and maintain a sound supply chain management (SCM) system is an essential component of the good governance of any municipality. While the Municipal Finance Management Act (MFMA) clearly outlines the type of relationship that should exist between the municipality and those bidding to supply services, it is difficult at times to determine how acts of bribery, for example, should be dealt with and the appropriate procedures to be followed when these matters arise. In the case of *Entsha Henra BK v Hessequa Munisipaliteit*, the Cape High Court had to review the decision of the executive mayoral committee of the Hessequa Municipality to exclude a bidder from future contractual opportunities. More importantly, it had to evaluate whether this responsibility fell within the powers of the mayoral committee or the municipal manager.

## Facts

The applicant, Entsha Henra BK, is a close corporation (CC) that conducts a civil engineering business. Over the years it developed good business relations with the Hessequa Municipality and a number of contracts were successfully tendered for and executed. The applicant's contracts manager (Mr M) had

## key points

- Bidders can be excluded from future contracts for acts of bribery.
- A mayoral committee has no power to make such an exclusion decision.
- The power to exclude lies with the municipal manager.
- Proper procedures must still be followed.
- Adequate notice must be given to the bidder of the intention to exclude.
- Information on the underlying reasons for possible exclusion must be provided.
- The bidder must be allowed to present arguments and evidence in response to the allegations.
- The bidder must be informed that it can approach a court of law to review the decision.

regular contact and a good business relationship with one of the managers of the municipality (Mr S). Their relationship developed into a friendship of the kind that involved the exchange of e-mails and, in the execution of projects, occasional lunches and drinks together with other people and the advisory engineers.

The friendship between Mr M and Mr S turned sour, however, when Mr M attempted to give Mr S a 'gift' for his upcoming trip to France. The gift took the form of R600, which Mr M said Mr S should use to "buy beers". Mr S refused the gift, saying that he was not a "corrupt official" and was offended by Mr M's actions. In a chance meeting later, Mr M asked Mr S if he would feel better if they (the CC) instead bought him a travel bag or a jacket, but Mr S replied that he wanted nothing from the CC. He further told Mr M that his behaviour was unacceptable and communicated the events to his municipal manager in a written report.

It is important to note that the parties by and large agreed on the facts of the events in question. The explanation of the CC was simply that the members had decided that in light of Mr S's upcoming overseas holiday they would give him a cash amount of R600 as a token of appreciation for their good working relationship. However, the fact that Mr S had laid a complaint with his municipal manager regarding Mr M's actions was not communicated to the applicant. It would also appear that neither the municipal manager nor Mr S took the matter further until six months later, when it was raised at a special meeting of the mayoral committee. In the meantime, further tenders had been accepted by the tender committee of the municipality, one of which was awarded to the applicant.

At the meeting of the mayoral committee, which was attended by the municipal manager and Mr S, a decision was taken that "weens die poging van omkoperij van 'n werkgewer van Hessequa Munisipaliteit deur 'n werknemer van Entsha Henra, die Raad geen verdere sake met the voormelde firma sal doen nie". Later that day the municipality's tender committee had a meeting (also attended by the municipal manager and Mr S) to decide on the award of a particular tender. In light of the decision of the mayoral committee regarding the applicant, the tender committee decided to award the tender in question to another bidder, even though its tender was higher than that of the applicant.

When the applicant learned of the tender award, it objected and asked for reasons for the award. The applicant was then informed of the decision of the mayoral committee – the first time that this decision had been communicated to the applicant. One of the members of the CC then had a

conversation with the municipal manager, after which a letter was written in which the applicant assured the municipal manager that the "welwillendheidsgebaar" to Mr S should be seen as having been done in good faith and with no corrupt intentions. The letter further requested the council to reconsider and withdraw its decision. The letter came before the mayoral committee, which considered it but decided to stand by its earlier decision. The CC then made an urgent application to the court for the review and setting aside of decisions made by the council to the effect that the municipality would not have further contractual dealings with it.

## Issue and arguments

The applicant argued that the decisions of the mayoral committee were illegal and invalid in that the committee had no statutory power to take the decisions in question. Section 3(2) of the MFMA provides that "[i]n the event of any inconsistency between a provision of this Act and any other legislation in force when this Act takes effect and which regulates any aspect of the fiscal and financial affairs of municipalities or municipal entities, the provision of this Act prevails". Section 111 further provides that "[e]ach municipality and each municipal entity must have and implement a supply chain management policy which gives effect to the provisions of this Part" and, in terms of section 112, the supply chain management policy (SCMP) must be "fair, equitable, transparent, competitive and cost-effective and comply with a prescribed regulatory framework for municipal supply chain management" covering a variety of subjects.

The regulatory framework referred to in section 112 has taken the form of the *Local Government: Municipal Finance Management Act (56/2003): Municipal Supply Chain Management Regulations* released in 2005. The Hessequa Municipality's SCMP took effect in January 2006 and follows the regulations almost word for word. In terms of the SCMP, the accounting officer, who, for the purposes of the municipality, was the municipal manager, possessed wide powers and duties, which included the award and handling of tenders. Paragraph 38, for example, deals with the combating of abuse of the SCM system and vests in the municipal manager a range of powers, which include:

- taking all reasonable steps to prevent abuse of the SCM system;
- investigating allegations against officials or other role players of fraud, corruption, favouritism, unfair or irregular practices or failure to comply with the SCM policy, and even, where justified, taking steps against such officials or role players;

- reporting alleged criminal conduct to the SAPS; and
- checking the National Treasury’s database to ensure that tenders are not awarded to bidders who are listed as non-preferred suppliers.

The municipal manager further, in terms of paragraph 38, has the power to reject any tender for the non-payment of municipal rates, taxes and service charges, or for unsatisfactory performance under a previous contract with the municipality or other state organ, etc. In specified instances the municipal manager has to inform the National Treasury and the provincial treasury concerned of his/her actions and decisions.

Paragraph 47 of the SCMP deals with “[i]nducements, rewards, gifts and favours to municipalities, officials and other role players” and prohibitions on offering these to any official or other role player involved in the implementation of the SCMP. Paragraph 47(2) also prescribes the procedure that should be followed by the municipal manager in the event of such a breach. Paragraphs 49 and 50 further provide for the handling of complaints and state that any person aggrieved by a decision taken in the implementation of the municipality’s SCMP should lodge a complaint within 14 days, in which event the municipal manager must appoint an independent and impartial person to assist in the resolution of the dispute, who must try to resolve it promptly.

Section 114(1) of the MFMA deals with the approval of tenders, in a way similar to paragraph 38 of the municipality’s SCMP, and provides that “[i]f a tender other than the one recommended in the normal course of implementing the supply

chain management policy of a municipality or municipal entity is approved, the accounting officer of the municipality or municipal entity must, in writing, notify the Auditor-General, the relevant provincial treasury and the National Treasury and, in the case of a municipal entity, also the parent municipality, of the reasons for deviating from such recommendation” unless the different tender was approved in order to rectify an irregularity.

In light of the above provisions in the MFMA, read together with the relevant regulations, including the municipality’s SCMP, the applicant argued that the responsibility for the handling and consideration of tenders in the first instance rested with the municipal manager, and that the mayoral committee (and also the council) had no power to exclude the applicant from future contract opportunities.

## Judgment

The court agreed with the applicant’s arguments and in doing so referred to Steytler and De Visser’s *Local Government Law of South Africa* (LexisNexis, 2007), which points out that section 114 of the MFMA “signals the ultimate distrust in the participation of the political organ of the municipality in the procurement process; the council is totally excluded from the decision-making and the municipal manager’s decision is not subject to the review of the council. Oversight is then effected by external organs of state.” The court also referred to sections 117 and 118 of the MFMA, which forbid councillors from being members of municipal bid committees or any other committees evaluating

# Taking participation to the streets and the Courts

## THE *MERAFONG* JUDGMENT

*Merafong Demarcation Forum and Others v President of the Republic of South Africa and Others 2008 (5) SA 171 (CC)*

On 13 June 2008, the Constitutional Court delivered a landmark judgment in what has popularly been referred to as the *Merafong* or *Khutsong* case. The ongoing struggle of the Merafong community to resist being transferred from the Gauteng province to the North West province has been widely publicised in the media, but the judgment is significant for a number of reasons aside from the public interest generated by the case.

Firstly, the judgment builds on the jurisprudence around community participation which was established in the earlier landmark judgments of *Matatiele* and *Doctors for Life*. It examines the contentious issue of participatory versus representative democracy – and, more particularly, whether the right to participate entitles communities to a specific outcome.

This case has also seen one of the longest and most vehement campaigns of public protest launched in post-apartheid South Africa. The communities involved will undoubtedly take years to recover from the economic and social toll of these protests.

Last, but certainly not least, is the curious change in the government's stated position. After securing a decision in its favour, and after considerable time and energy invested in resisting the campaign of the Merafong community, the new Minister of Provincial and Local Government, Siculo Shiceka, announced that the government would not only revisit the issue of Merafong/ Khutsong, but would also deal with other challenges raised by cross-boundary municipalities.

### Background

Cross-boundary municipalities were created to accommodate municipal areas that could not feasibly be accommodated within the boundaries of one province. While the result – that a single municipality could straddle the border between two provinces – was unwieldy, it was hoped that this arrangement would allow such a municipal area to remain a coherent unit. This would arguably be conducive to better administration and sustainability. The Constitution Second Amendment Act of 1998 and the Cross-boundary Municipalities Act of 2000 facilitated the creation of such municipalities, of which the Merafong City Local Municipality was one, with 74% of the population situated in Gauteng and the remaining 26% in the North West.

One of the few undisputed issues in this case is that of the difficulties associated with the administration of cross-border municipalities. While the intention behind their creation may have

## key points

- The duty to facilitate public participation is a constitutional requirement that all organs of state, including the legislatures at local, provincial and national levels, must adhere to.
- While public participation may inform decision-making, it cannot dictate outcomes.
- For public participation to be meaningful it must reflect some level of responsiveness to the views expressed.
- The exercise of public power by elected representatives can be reviewed.
- Where elected representatives have acted rationally, a court will be slow to replace their views with its own.



been to facilitate better administration, cross-border municipalities have been notorious for poor service delivery and administration. This has often left residents frustrated and confused, not certain whom to turn to for assistance.

The proposal to abolish cross-border municipalities, as presented in the Constitution Twelfth Amendment Bill of 2005, was therefore not in dispute. The Merafong community fully supported it. However, the act of abolishing cross-boundary municipalities would not, of itself, solve the problem. It would be necessary to locate the entire municipality within the borders of a particular province. In that regard, the Bill sought to remove Merafong City from Gauteng and to incorporate it into the North West. It was this proposal that the Merafong community strongly objected to. More particularly, it objected to the decision by the Gauteng Legislature to support the proposal. The issues before the Court therefore revolved around two broad questions, namely:

- the extent to which public participation had been facilitated in the legislative processes of the Gauteng Legislature, as required by section 118(1) of the Constitution; and
- whether the decision of the Gauteng Legislature to support the Bill was rational.

## Constitutional framework

The Constitution, in protecting the integrity of the provinces, outlines special procedures to be followed when provincial boundaries are to be altered. A Bill that changes provincial boundaries must be passed by the National Assembly with a two-thirds majority, and by the National Council of Provinces (NCOP) with a supporting vote from at least six of the nine provinces.

Section 74(8) specifies that if such a Bill, or any part of that Bill, concerns only a specific province or provinces, the NCOP may not pass the Bill or the relevant part unless it has been approved by the legislature(s) of the province(s) concerned. This 'protective mechanism' effectively allows a province to veto the part of the Bill that relates to its boundaries, thus ensuring that provincial interests are taken into account in the national sphere. Section 118(1)(a) furthermore affords the public the opportunity to influence these processes by requiring every provincial legislature to "facilitate public involvement in the legislative and other processes of the legislature and its committees".

Every legislature thus has to adopt special procedures to formulate a mandate to present to the NCOP. In doing so, it must take into account the views and opinions of the communities who stand to be affected by the proposed changes. The question which this case raised was the extent to which the views of the public could influence these processes and *bind* the legislature.

## Facts

On receiving the Twelfth Amendment Bill, the Gauteng Legislature mandated its Local Government Portfolio Committee to facilitate public participation on the Bill's content and to formulate a negotiating mandate to present to the NCOP. The Bill essentially recommended abolishing cross-boundary municipalities and incorporating the entire Merafong community into the province of the North West.

The Committee took this duty seriously and facilitated a public hearing on the Bill as well as receiving written and oral submissions from members of the public. These submissions strongly reflected the 'vehement opposition' of the Merafong community to its proposed incorporation into the North West. Their concerns ranged from the bad service delivery record of the North West to the province's poor economic conditions, as well as the strong economic, historic, social and identity links between the Merafong community and the province of Gauteng.

The Committee carefully considered these views and was mostly in agreement with them. This can be seen in the negotiating mandate that was adopted. The Committee recommended that the Legislature assent to the Bill only on condition that Merafong remain within Gauteng. This recommendation had the unanimous support of the Merafong community.

When it presented this mandate to the NCOP, however, it was explained to the Committee that they could only fully assent to the Bill or veto it. They could not make recommendations on the content of the Bill or amend it. On the basis of this information, and considering all options, including the consequences of not approving the Bill, the Committee made a complete about-turn and recommended that the Legislature support the Bill.

This decision was taken without reference to the Merafong community and, understandably, was met with overwhelming disapproval. The result was feelings of distrust and uncertainty in the community. Subsequently, members of the community ranging from schoolchildren to doctors, teachers, social workers, taxi drivers and religious leaders mobilised to form the Merafong Demarcation Forum, which embarked on a campaign of protest culminating in the case before the Constitutional Court.

## The Court

The Court had to evaluate the processes of public participation and the events leading up to the decision by the Legislature.

While there was one majority judgment in this case, there were six dissenting judgments, indicating the extent to which the Court had grappled with the issues. While the majority judgment holds, the dissenting judgments raise very important insights.

## Facilitating public participation

The Court adopted the view expressed in *Matatiele* and *Doctors for Life* that the greater the impact on a defined portion of the population, the more intense the need to facilitate public participation. In evaluating the Committee's conduct, the Court found that substantive consultation clearly had taken place. This was evident from the initial mandate adopted by the Committee. The Court unanimously agreed that up to that point – the initial formulation of the mandate to the NCOP – the requirements of reasonable participation had been fully met and the Committee's conduct was, as such, reasonable. However, the Court was divided on whether the failure to inform the community of the change in position to one of supporting the Bill constituted reasonable action. Judge Sachs remarked that

there can be no doubt that participatory democracy does not require constant consultation by the Legislature with the public, nor does it presuppose that the views of the community will be binding on the Legislature, nor that the Legislature is precluded from changing its mind. Far from it. What is involved is not a set of prescriptions but an appropriate civic relationship.

On the failure of the Committee to go back to the community, he remarked: "In some ways an interrupted dialogue ... can be more disruptive ... than silence". In other words, starting a dialogue without finishing it and, in so doing, creating expectations of continued dialogue, is sometimes worse than if no dialogue had been started at all.

That being said, the majority of the Court held that

[t]he facilitation of public involvement is aimed at the legislature being informed of the public's views on the main issues addressed in a Bill, not at the accurate formulation of a legally binding mandate. Consultation requires the free expression of views and the willingness to take those views into account. This did happen.

The Court concurred that it would certainly have been "desirable" for the Committee to report to the people of Merafong that it was impossible to adhere to the position taken in the negotiating mandate. In fact, it agreed that it might even have been disrespectful *not* to do so. However, the Court held that this did not amount to failure to take reasonable measures to facilitate public involvement.

## Rationality

In evaluating the decision by the Legislature to support the Bill, the Court held that the exercise of public power in a democracy must be rational – that is, there must be a logical connection between the purpose of the legislation and democracy. In a constitutional state, the court added, arbitrariness or the exercise of public power on the basis of naked preferences clearly went against what the Constitution provided. However, as long as a legitimate public purpose was

served, the political merits or demerits of disputed legislation were of no concern to a court.

What is required, insofar as rationality may be relevant here, is a link between the means adopted by the legislature and the legitimate governmental end sought to be achieved.

In applying these principles to the case before it, the Court noted that the Committee had been fully aware of its power to veto the Bill. It did not misunderstand its mandate. In reaching its decision to support the Bill, the Committee had regard to its objectives to abolish cross-boundary municipalities and, in so doing, to meet the national objectives of improving service delivery. It was not the role of the Court, furthermore, to "second-guess" the option chosen by the Gauteng Legislature to achieve these policy goals. The Court therefore concluded that public participation had been reasonably facilitated and that in supporting the Bill, the Legislature had acted within the bounds of its mandate.

## Comment

While not finding in favour of the Merafong Demarcation Forum, this judgment reiterates the importance of participatory democracy at all levels of government. Although democratically elected public institutions and representatives can never be held to ransom by the wishes of the public, open and transparent dialogue is fundamental to the processes that these institutions engage in. While there may not always be agreement, meaningful, substantive dialogue builds respect, consolidates the dignity of institutions and communities, and makes the proverbial 'bitter pills' that have to be swallowed from time to time a bit easier to digest.

The Court sounded a firm warning in respect of participatory governance at the local level. It held that while community wishes could never override national goals and objectives which are based on constitutional and democratic principles,

[g]overnment must be open and responsive to the wishes of communities, which may not necessarily be adequately represented in national elections and could therefore find expression in localised resistance.

The Court also remarked:

Politicians, who are perceived to disrespect their voters or fail to fulfil promises without explanation, should be held accountable. A democratic system provides possibilities for this, one of which is regular elections.

While we do not know what motivated the about-turn in the position of the government in the aftermath of this judgment, we can only hope that it will repair the deep rifts of distrust and strengthen accountability to the electorate.



