Access to tender documents

Water Engineering and Construction (Pty) Ltd v Lekoa Vaal Metropolitan Council 1999(9) BCLR 1052 (W), deals with the issue of access to information after an unsuccessful tender . Water Engineering and Construction's (WEC) tender for a water works project for the Lekoa Vaal Metropolitan Council (LVMC) was rejected by the LVMC. LVMC gave WEC the reasons for the rejection in writing after a request by WEC. WEC wanted copies of the contract with the successful tenderer, copies of all tenders received in response to the invitation, a copy of the tender evaluation report and all documents pertaining to the evaluation of all tenders. WEC did not dispute the fact that these documents contained confidential information. In seeking access to these documents, WEC relied on sections 32 (right to access to information), 23 (right to fair administrative action) and 217 (state procurement) of the Constitution. Some of the tenderers, including the successful one, indicated that they objected to this disclosure to WEC. WEC did not include them in its application for disclosure because, its counsel argued, they must be presumed to have waived their right to confidentiality when they submitted their documents, whatever their content, to an organ of state for tendering purposes. Otherwise, the counsel for WEC argued, the constitutional rights of access to information and fair administrative action would be negated. The High Court disagreed. Firstly, the tenderers were informed of the conditions of tender, including a provision that the details of submitted documents and of the tender inquiry were to be kept confidential. Secondly, all tenderers were each other's competitors and "if each tenderer can obtain access to its competitor's confidential information, it would have the effect of tenderers withholding important information, or even worse, not tendering at all with obvious commercial ramifications". Therefore, the conclusion of the Court was that the other tenderers had a direct and substantial interest in the order sought by WEC, and that the application was to be dismissed for the failure of WEC to include the other tenderers in the procedure.

Affirmative action appointment

On 27 May 1997, the Council of Louis Trichardt appointed Mr Masengana as Town Treasurer.

In the application procedure, candidates had been subjected to an internal test. From the short-list of five candidates, which included three black candidates and two white candidates, Mr Masengana was the candidate with the lowest score. A further short-list of three had been compiled and referred to the Council for a decision. Compared to the other two candidates, Mr Masengana possessed substantially less experience in municipal and accountancy affairs. The Council appointed Mr Masengana, using affirmative action as the sole criteria. In *Independent Municipal & Allied Workers Union v Greater Louis Trichardt Transitional Local Council* Case No. J 644/97, the Labour Court was tasked to review this appointment. The Court observed that the need for affirmative action is recognised in law. However, affirmative action should not be applied in an arbitrary and unfair manner. For affirmative action to survive judicial scrutiny, two factors are critical: (1) there must be a policy through which affirmative action is to be effected and (2) that policy must be designed to achieve the adequate advancement or protection of certain categories of persons or groups disadvantaged by unfair discrimination. These requirements ensure accountability and transparency, ensure the presence of a measure to test affirmative action, prevent arbitrary or unfair practices occuring under the guise of affirmative action, and also ensure knowledge and participation in the establishment and implementation of the policy. Council had not formulated or adopted such an affirmative action policy, even though the Agreement on Equal Employment Practise and Affirmative Action, which was signed by employer organisations and unions and which was adopted by the Council, envisaged the formulation of an affirmative action programme. The Council had done nothing envisaged by the agreement and therefore, the Court held, it could not even begin to consider affirmative action in appointments: "In the absence of an affirmative action programme specifically designed in terms of the collective agreement, any appointment on purported affirmative action grounds is illegitimate. It is illegitimate because it is not in terms of any formulated policy against which it can be tested." Looking at whether the appointment could be justified on other grounds, the Court accepted as common cause that Mr Masengana was one of three applicants from disadvantaged backgrounds, that he scored the lowest of the other two black applicants in the test, and that he lacked the necessary experience in local government, which the other candidates had. The Court observed that, in an affirmative action consideration, experience will remain relevant but not determinative. The overriding requirement in such cases is the potential to develop and perform. However, merit and experience remain relevant in so far as the comparison with other applicants from the disadvantaged group is concerned. If the playing field is levelled, candidates from disadvantaged groups will always come second especially if one considers experience. "The successful candidate should be the best out of the group previously disadvantaged by unfair discrimination". In this case, it was not clear why Mr Masengana was preferred above the other two black candidates who scored better in the test. Therefore, the appointment could not be justified on any other basis and amounted to unfair labour practice in terms of Item 2(1)(a) of schedule 7 of the Labour Relations Act 66 of 1995.