CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 34/10
[2010] ZACC 21

In the matter between:

VIKING PONY AFRICA PUMPS (PTY) LTD
t/a TRICOM AFRICA — Applicant

and

HIDRO-TECH SYSTEMS (PTY) LTD — First Respondent

CITY OF CAPE TOWN — Second Respondent

Heard on : 10 August 2010

Decided on : 23 November 2010

JUDGMENT

MOGOENG J:

Introduction

[1] One of the most vicious and degrading effects of racial discrimination in South Africa was the economic exclusion and exploitation of black people. Whether the origins of racism are to be found in the eighteenth and nineteenth century frontier or in the subsequent development of industrial capitalism, the fact remains that our history excluded black people from access to productive economic assets. After 1948, this

exclusion from economic power was accentuated and institutionalised on explicitly racially discriminatory grounds, further relegating most black people to abject poverty.

[2] Driven by the imperative to redress the imbalances of the past, the people of South Africa, through their democratic government, developed, among others, the broad-based black economic empowerment programme[1] and the preferential procurement policy.[2] Relevant to this case are the legislative and other regulatory measures which were put in place to enable organs of state to award tenders on the basis of a preferential point system to service providers or enterprises which have a significant shareholding by the previously marginalised. Those enterprises are given preferential points on condition that the historically disadvantaged shareholders actively participate in the running of, and exercise control over, the tendering enterprise to the extent commensurate with their ownership.[3]

[1] Section 9(2) of the Constitution mandates the enactment of, among others, measures designed to protect and advance persons disadvantaged by unfair discrimination.

[2] Section 217 of the Constitution makes provision for this. Its provisions are quoted at n 16 below. The preferential procurement policy is provided for in the Preferential Procurement Policy Framework Act 5 of 2000 (Procurement Act). Further see Penfold and Reyburn "Public Procurement" in Woolman *et al* (eds) *Constitutional Law of South Africa* 2 ed Original Service: 12-03 (Juta, Cape Town 2008) at 25-13 which reads:

> "The design of the South African preferential procurement framework is located within the history of apartheid. It is aimed at redressing historical disadvantage and increasing opportunities for those previously prevented from actively participating in the country's mainstream economy."

[3] For the meaning of historically disadvantaged individuals see [25] and n 21 below. See also regulation 13(4) of the Preferential Procurement Regulations, 2001, Government Gazette 22549 GN R725, 10 August 2001 (regulations) fully quoted at [46] below.

[3] This is an application for leave to appeal, against the judgment of the Supreme Court of Appeal.[4] It hinges on the correct application of the preferential procurement policy. This Court is required to clarify the nature and extent of the duty of an organ of state when presented with ostensibly true allegations that an enterprise to which a tender was awarded, fraudulently manipulated a preferential procurement scheme for the purpose of securing a preference. A proper determination of this issue depends primarily on the meaning of the words "detect" and "act against" in regulation 15(1) of the Preferential Procurement Regulations, 2001[5] (regulations).

Parties

[4] The applicant, Viking Pony Africa Pumps (Pty) Ltd t/a Tricom Africa (Viking), is a company that supplies and installs mechanical and electrical equipment for water and sewerage treatment works. The first respondent is Hidro-Tech Systems (Pty) Ltd (Hidro-Tech), a company which carries on substantially the same business as Viking. The second respondent is the City of Cape Town (City).[6] The City participated in the proceedings in the Western Cape High Court, Cape Town[7] (High Court) but elected to abide the decisions of both the Supreme Court of Appeal and this Court.

[4] V*iking Pony Africa Pumps (Pty) Ltd t/a Tricom Africa, and Another v Hidro-Tech Systems (Pty) Ltd* 2010 (3) SA 365 (SCA) *per* Heher JA with Mpati P, Mlambo, Bosielo JJA and Saldulker AJA concurring (*Viking Pony SCA*).

[5]Above n 3. Regulation 15(1) is quoted at [28] below.

[6] The City of Cape Town is a metropolitan municipality established in terms of the Local Government: Municipal Structures Act 117 of 1998 read with Establishment of the City of Cape Town, Western Cape Provincial Gazette 5588 PN 479, 22 September 2000.

[7] *Hidro-Tech Systems (Pty) Ltd v City of Cape Town and Others* 2010 (1) SA 483 (C).

Factual background

[5] Over the years Viking and Hidro-Tech received much work from the City and other municipalities in the Western Cape, Northern Cape as well as the Eastern Cape provinces. According to Hidro-Tech, Viking was awarded approximately 80% more tenders than Hidro-Tech. This was a source of concern to Hidro-Tech, as it believed that on at least three occasions it submitted a lower tender than Viking but still lost. This allegation is disputed by Viking.[8]

[6] Hidro-Tech's concern prompted it to investigate the reason behind Viking's unabating competitive edge over it. It found that Viking won most of these tenders because of its higher historically disadvantaged individual profile. Historically disadvantaged individuals held 70% of Viking's shares whereas the converse obtained in Hidro-Tech. Consequently, Viking was always given higher preference points which resulted in the tenders often being awarded to it.[9]

[7] At the heart of this case is the complaint by Hidro-Tech that historically disadvantaged individuals were neither remunerated nor allowed to participate in the management of Viking to the degree commensurate with their shareholding and their

[8] However, as the High Court found, it is not necessary to determine how many tenders were awarded to Viking. Of significance is the City and Viking's acknowledgement that the historically disadvantaged individual status of Viking had resulted in Viking obtaining an overall higher ranking, and consequently receiving more tenders, than Hidro-Tech.

[9] Regulations 3(4), 4(4), 5(4), 6(4) and 8(8) provide that only the tenderer with the highest number of preference points may be awarded a tender. Regulation 9 provides that the tender may be awarded to a tenderer who did not have the highest preference points where reasonable and justifiable grounds exist.

positions as directors.[10] Hidro-Tech further believes that the benefits that Viking received from tenders awarded by reason of its seemingly progressive shareholding profile, were being routed to its sister company, Bunker Hills Pumps (Pty) Ltd t/a Tricom Systems (Bunker Hills), which is a wholly white-owned company.

[8] This information was furnished to Hidro-Tech by Mr Zandberg and Mr James. Mr Zandberg is a white male who was an employee of Viking, and a director and 10% shareholder in Bunker Hills. Mr James is a historically disadvantaged individual who owned 35% of Viking's shares while Mr Mosea was the holder of the other 35%. Mr Zandberg and Mr James parted ways with Viking under unpleasant circumstances and joined the ranks of Hidro-Tech. After taking up employment with Hidro-Tech, they disclosed detailed information on the extent of the historically disadvantaged individuals' control over Viking and of their involvement in its management. Their disclosures reinforced Hidro-Tech's suspicion that the historically disadvantaged individuals' shareholding was not legitimate and that their black shareholders were mere tokens used to secure business deals.

[9] Another concern raised about Viking was that it was an instrument used by Bunker Hills to reap tender benefits which it would otherwise not have enjoyed, given its all-white shareholding and executive structures. Hidro-Tech's attorney characterised Viking

[10] This is based on regulation 13(4) which is quoted at [46] below. A historically disadvantaged individual is described at [25] and n 21 below.

as an opportunistic intermediary for tender procurement whilst the actual benefit derived from the tenders awarded to Viking were channelled to Bunker Hills. Mr Zandberg said that the benefits are then used to pay the directors of Bunker Hills handsomely whereas those of Viking earn a pittance.

[10] Mr Zandberg also alleged that while he was employed by Viking his monthly remuneration package was R23 500 plus medical aid, a petrol card and a credit card. At that time one of his bosses, Mr James who had a 35% stake in Viking, earned a meagre R5 600 per month and was entitled to medical aid but neither to a credit card nor a petrol card.

[11] Armed with these revelations Hidro-Tech lodged a complaint with the City. The complaint was that Viking had, over the years, made fraudulent misrepresentations in its tender documents to the City about its profile of historically disadvantaged individuals, for the purpose of securing a preference. A letter was sent by Hidro-Tech's attorneys to Mr Bindeman, the City's Head of Tenders and Contracts: Supply Chain Management Directorate. In that letter, Hidro-Tech alleged that the remuneration, dividends and benefits given to Viking's historically disadvantaged shareholders were negligible compared to those of its white shareholders, especially those of its sister company which benefitted the most from tenders awarded to Viking. It was accompanied by another letter in which Hidro-Tech set out the information which it had obtained from Mr James and Mr Zandberg. It was alleged, in this letter, that Mr James did not exercise control

over the company and did not actively participate in its management to the degree proportionate to his shareholding.

[12] The City asked external database managers, Quadrem t/a Tradeworld (Tradeworld), to investigate these allegations. Tradeworld performed a verification exercise which confirmed that the shareholding as reflected in Viking's tender documents was correct. A follow-up letter was written to the City by Hidro-Tech's attorneys. They expressed the view that the investigation conducted by Tradeworld was inadequate owing to Tradeworld's incapacity to investigate allegations of fronting.[11]

[13] Hidro-Tech's attorney subsequently held talks with a senior City official, Mr Schnaps. He is Mr Bindeman's boss. Mr Schnaps told him that the City was unable to take action against Viking at that stage. This discussion was followed by a letter written on behalf of Hidro-Tech to the City. In that letter, Hidro-Tech once again lamented the inadequacy of the investigation conducted by Tradeworld and requested an urgent and presumably proper investigation by the City. It also demanded the suspension of the work which Viking was doing for the City and a halt to the award of any further tenders to Viking. Hidro-Tech threatened legal action against the City, if its demands were not met.

[11] Also known as "window dressing" or "tokenism". Bolton *The Law of Government Procurement in South Africa* (LexisNexis Butterworths, Durban 2007) at 293-4 describes fronting as "the practice of black people being signed up as fictitious shareholders in essentially 'white' companies."

[14] When a favourable response was not forthcoming, it approached the High Court for relief.

Proceedings in the High Court

[15] The order sought in the High Court was that the City be directed to "act against" Viking in accordance with regulation 15[12] and in accordance with section 9.4 of the City's Procurement Policy Initiative.[13] The alternative order sought was that in the event of the High Court finding that there was a need for further investigation, the City be directed to conduct or cause to be conducted a sufficiently thorough investigation into the complaint of fronting and that the investigation be concluded within two months of the order. The order for further investigation was to be coupled with the order restraining the City from awarding contracts to Viking pending the finalisation of the investigation.

[16] The High Court made the following key findings: (i) the investigation conducted by Tradeworld was inadequate since that investigation did not address the real issues which are the inner workings of Viking and the actual status of its historically disadvantaged directors; (ii) Hidro-Tech was justified in forming the opinion that the City's response to its complaint was inadequate to safeguard its constitutional rights and legitimate commercial interest; (iii) the City was obliged to "act against" Viking; (iv) the content of the letter written at the instance of Hidro-Tech was true and it was in the

[12] Regulation 15(1) and (2) is respectively quoted at [28] and [50] below.

[13] The full text is available at http://www.capetown.gov.za/en/SupplyChainManagement/Documents/ProcurementPolicy-final.pdf accessed on 31 August 2010. Section 9.4 is quoted at [49] below.

public's, as well as Hidro-Tech's, interest; (v) the City's persistent opposition to the relief sought on the face of the totality of the evidence before the court, justified a mandatory order against it; (vi) on the probabilities neither Mr James nor Mr Mosea were actually involved in the management of, or exercised control over, Viking to the extent commensurate with their respective shareholding at the time of Viking's submission of the tenders awarded in 2006 and 2007; and (vii) Viking is guilty of a fraudulent misrepresentation.

[17] Having found Viking guilty of a fraudulent misrepresentation, the High Court ordered the City to "act against" Viking in accordance with regulation 15. The City, Viking and Bunker Hills were ordered to pay the costs of the application.[14] This order displeased Viking. As a result, it sought and obtained leave from the High Court to appeal to the Supreme Court of Appeal.

Proceedings in the Supreme Court of Appeal

[18] Before the Supreme Court of Appeal, Viking and Hidro-Tech agreed that the High Court ought not to have assessed the probabilities and made some of the factual findings set out above on the papers in motion proceedings. The Supreme Court of Appeal also

[14] The High Court ordered at para 84:

> "1. The [City] is ordered to act against [Viking] in accordance with regulation 15 of the regulations promulgated in terms of the Preferential Procurement Policy Framework Act 5 of 2000;
>
> 2. The [City], [Viking] and [Bunker Hills] are ordered, jointly and severally, to pay the costs of the application, including the costs occasioned by the amendment of the notice of motion".

chose not to align itself with those factual findings. It addressed only the question whether the City conducted the kind of investigation which the serious allegations levelled against Viking cried out for, and found that the City was in breach of its duty to investigate. The Supreme Court of Appeal concluded that the High Court did not err in granting the relief, and dismissed the appeal with costs. Viking then approached this Court for leave to appeal against the decision of the Supreme Court of Appeal. It is convenient to deal with the preliminary issue first.

Leave to appeal

[19] It is trite that the granting of leave to appeal, in this Court, depends on whether the following two key requirements are met: (i) does the application raise a constitutional issue; and (ii) if it does, is it in the interests of justice to grant leave? This application for leave to appeal is about the City's constitutional and statutory obligations to take appropriate action against a tenderer who was awarded a contract allegedly on account of the false information it furnished, in respect of its historically disadvantaged individual profile, to secure preference. Both parties agree that this matter raises a constitutional issue of some importance.

[20] It follows that not only the City and the Department of Trade and Industry (DTI), but other organs of state too, would benefit from the guidance that this Court will provide on what constitutes appropriate action to take, in circumstances where credible

allegations of fraud or corruption are levelled against an enterprise to which a tender has been awarded. There can be no doubt that this issue has a significant public interest.

[21] For these reasons, I am satisfied that it is in the interests of justice to grant leave to appeal. An order to this effect will be made.

The issues in this Court

[22] The main issue is what the obligations of an organ of state are in circumstances where an enterprise which has been awarded a tender is plausibly accused of having been successful only because of the fraudulent representations it made. In this matter the misrepresentation is about the enterprise's profile of historically disadvantaged individuals. Out of the main issue the following subsidiary matters arise:

(a) the source of an organ of state's obligation to investigate;

(b) the meaning of "detect" in regulation 15(1);

(c) the meaning of "act against" in regulation 15(1);

(d) the applicability of the Promotion of Administrative Justice Act[15] (PAJA);

(e) the adequacy of the steps taken by the City to address the complaint; and

(f) the meaning and effect of the Supreme Court of Appeal order.

[15] 3 of 2000.

The source of an organ of state's obligation to investigate

[23] Section 217 of the Constitution sets out the basis on which organs of state may enter into contracts for the procurement of goods and services. It also allows for the preferential allocation of contracts for the advancement of persons previously disadvantaged by unfair discrimination and provides for the enactment of national legislation that would lay down the framework within which a procurement policy, which is designed to favour historically disadvantaged individuals, is to be implemented.[16]

[24] The Preferential Procurement Policy Framework Act[17] (Procurement Act) owes its existence to section 217.[18] Some of the specific goals of the Procurement Act are to (i) have an organ of state contract with persons, or categories of persons, historically disadvantaged by unfair discrimination on the basis of race, gender or disability; and (ii) give the organ of state the discretion to cancel any contract awarded as a result of the

[16] Section 217 of the Constitution provides:

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

[17] Above n 2.

[18] Bolton "The regulation of preferential procurement in state-owned enterprises" (2010) 1 *TSAR* 101 at 102.

false information supplied by the tenderer for the purpose of securing preference, without prejudice to any other remedies the organ of state may have.[19]

[25] The Minister of Finance is empowered to make and did make regulations on certain matters in order to facilitate the achievement of the objects of the Procurement Act.[20] These regulations: (i) describe a historically disadvantaged individual[21] as a South African citizen who was disenfranchised during apartheid South Africa, a female or a disabled person; (ii) set out the principles which regulate the preferential point system;[22] (iii) underline the importance of truthful and correct information in submitting tender

[19] Section 2(1) of the Procurement Act provides that:

> "An organ of state must determine its preferential procurement policy and implement it within the following framework:
>
> . . . .
>
> (d) the specific goals may include—
>
> (i) contracting with persons, or categories of persons, historically disadvantaged by unfair discrimination on the basis of race, gender or disability;
>
> . . . .
>
> (g) any contract awarded on account of false information furnished by the tenderer in order to secure preference in terms of this Act, may be cancelled at the sole discretion of the organ of state without prejudice to any other remedies the organ of state may have."

[20] Section 5 of the Procurement Act.

[21] Regulation 1(h) of the regulations provides that:

> "'Historically Disadvantaged Individual (HDI)' means a South African citizen—
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> (1) who, due to the apartheid policy that had been in place, had no franchise in national elections prior to the introduction of the Constitution of the Republic of South Africa, 1983 (Act No 110 of 1983) or the Constitution of the Republic of South Africa, 1993 (Act No 200 of 1993) ("the Interim Constitution"); and/or
>
> (2) who is a female; and/or
>
> (3) who has a disability:
>
> Provided that a person who obtained South African citizenship on or after the coming to effect of the Interim Constitution, is deemed not to be an HDI".

[22] Regulations 3-13.

documents;[23] and (iv) provide for the obligations and powers of an organ of state to "act against" any person who was awarded a tender, as a consequence of a fraudulent misrepresentation of the facts that earned him or her preference points in terms of the Procurement Act or the regulations, when the fraud is detected.[24]

[26] Organs of state routinely procure goods and services.[25] This is generally done through a tender system.[26] It is the responsibility of the procuring organ of state to invite for, evaluate and award tenders and also to monitor the implementation of what was tendered for.[27] When any service provider, who did not secure a tender, cries foul and registers its complaint with the relevant organ of state, an appropriate response or action would naturally be called for. As to what kind of response would be appropriate depends on the particular circumstances of each case, and on the obligations imposed on the organ of state.

[23] Regulation 14 provides:

> "A tenderer must, in the stipulated manner, declare that—
>
> (a) the information provided is true and correct;
>
> (b) the signatory to the tender document is duly authorised; and
>
> (c) documentary proof regarding any tendering issue will, when required, be submitted to the satisfaction of the relevant organ of state."

[24] See regulations 14(c) and 15(1).

[25] Bolton "The use of government procurement as an instrument of policy" (2004) 121 *SALJ* 619 at 619.

[26] See generally the Procurement Act, the regulations and section 112 of the Local Government: Municipal Finance Management Act 56 of 2003 (MFMA).

[27] See section 2(1)(f) of the Procurement Act; regulations 8, 9, 11 and 17(4) of the regulations; and section 112(1)(g) and (h) of the MFMA.

[27] There are different statutory sources for the obligation of an organ of state to investigate allegations of impropriety in municipal tendering processes. One is the Local Government: Municipal Finance Management Act[28] (MFMA) and the regulations promulgated under it.[29] Another is regulation 15 of the regulations. It is the latter

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[28] Above n 26.

[29] See section 112(1) of the MFMA which provides:

> "The supply chain management policy of a municipality or municipal entity must be fair, equitable, transparent, competitive and cost-effective and comply with a prescribed regulatory framework for municipal supply chain management, which must cover at least the following:
>
> . . . .
>
> (m) measures for—
>
> (i) combating fraud, corruption, favouritism and unfair and irregular practices in municipal supply chain management; and
>
> (ii) promoting ethics of officials and other role players involved in municipal supply chain management".

Further see regulation 38 of the Municipal Supply Chain Management Regulations, Government Gazette 27636 GN R868, 30 May 2005 which reads:

> "(1) A supply chain management policy must provide measures for the combating of abuse of the supply chain management system, and must enable the accounting officer—
>
> (a) to take all reasonable steps to prevent such abuse;
>
> (b) to investigate any allegations against an official or other role player of fraud, corruption, favouritism, unfair or irregular practices or failure to comply with the supply chain management policy, and when justified—
>
> (i) take appropriate steps against such official or other role player; or
>
> (ii) report any alleged criminal conduct to the South African Police Service;
>
> . . . .
>
> (f) to cancel a contract awarded to a person if—
>
> (i) the person committed any corrupt or fraudulent act during the bidding process or the execution of the contract; or
>
> (ii) an official or other role player committed any corrupt or fraudulent act during the bidding process or the execution of the contract that benefited that person".

Lastly see article 430 of the City's Supply Chain Management Policy available at http://www.capetown.gov.za/en/Budget/Documents/2010%20-

regulation that formed the subject of debate in these court proceedings, and which must, therefore, be given special attention.

The nature of the obligation imposed

[28] Hidro-Tech lodged a complaint with the City about Viking's alleged manipulation of the tender system. The question is whether the City has discharged its obligations to investigate the complaint satisfactorily in terms of the regulatory framework provided for that purpose. This issue cannot be properly resolved until the nature of the obligation, which in turn depends on the meaning of "detect" and "act against" in regulation 15(1), is determined.[30] The meaning of these words must be determined within the context of the Procurement Act and the regulations. These legislative measures are, after all, a mechanism through which the constitutional imperative of empowering the historically disadvantaged individuals is sought to be realised. This can be done by rooting out any fraudulent scheme designed to divert the economic benefits primarily reserved for historically disadvantaged individuals, to historically empowered individuals.[31] Regulation 15(1) provides:

%202011%20Budget%20final/Annexure%2012%20SupplyChainManagementPolicy%201011Budget%20May2010.pdf accessed on 7 September 2010.

[30] The provisions of article 430 of the City's Supply Chain Management Policy above n 29 are similar to the provisions of regulation 15.

[31] It was said in *West Rand Estates Ltd v New Zealand Insurance Co Ltd* 1925 AD 245 at 261 and *Secretary for Inland Revenue v Brey* 1980 (1) SA 472 (A) at 478A-B that the purpose of legislation is to be considered when interpreting it.

> "An organ of state must, upon detecting that a preference in terms of the Act and these regulations has been obtained on a fraudulent basis, or any specified goals are not attained in the performance of the contract, act against the person awarded the contract."

Taking into account the context and purpose of the Procurement Act and the regulations, the Supreme Court of Appeal correctly held that regulation 15(1) "ensures that no organ of state will remain passive in the face of evidence of fraudulent preferment but is obliged to take appropriate steps to correct the situation."[32]

[29] The importance of context in statutory construction was aptly articulated by Ngcobo J in *Bato Star* in the following terms:

> "The technique of paying attention to context in statutory construction is now required by the Constitution, in particular, section 39(2). As pointed out above, that provision introduces a mandatory requirement to construe every piece of legislation in a manner that promotes the 'spirit, purport and objects of the Bill of Rights'."[33]

It is with this approach in mind that regulation 15(1) must be interpreted.

The meaning of "detect"

[30] There is a particular meaning of "detect" that Viking contends for. It is that "detect" presupposes the existence of conclusive evidence or satisfactory proof of the matter after investigation. Viking therefore argues that detection implies more than a

[32] *Viking Pony SCA* above n 4 at para 32.

[33] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others* [2004] ZACC 15; 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC) at para 91.

suspicion or *prima facie* proof. On the contrary, counsel for Hidro-Tech submits that "detect" means no more than a suspicion or a provisional unilateral opinion.

[31] I am satisfied that "detect" generally means no more than discovering, getting to know, coming to the realisation, being informed, having reason to believe, entertaining a reasonable suspicion, that allegations, of a fraudulent misrepresentation by the successful tenderer, so as to profit from preference points, are plausible. In other words it is not the existence of conclusive evidence of a fraudulent misrepresentation that should trigger responsive action from an organ of state. It is the awareness of information which, if verified through proper investigation, could potentially expose a fraudulent scheme.

[32] The context within which "detect" is used in regulation 15(1) dictates that the word be interpreted broadly.[34] It would be incorrect to construe it to mean that something is

[34] See *Department of Land Affairs and Others v Goedgelegen Tropical Fruits (Pty) Ltd* [2007] ZACC 12; 2007 (6) SA 199 (CC); 2007 (10) BCLR 1027 (CC) where this Court emphasised that the Constitution as well as remedial legislation "umbilically linked" to the Constitution must be interpreted in a purposive and contextual manner. This Court held at para 53:

> "[W]e are obliged to scrutinise its purpose. As we do so, we must seek to promote the spirit, purport and objects of the Bill of Rights. We must prefer a generous construction over a merely textual or legalistic one in order to afford claimants the fullest possible protection of their constitutional guarantees. In searching for the purpose, it is legitimate to seek to identify the mischief sought to be remedied. In part, that is why it is helpful, where appropriate, to pay due attention to the social and historical background of the legislation. We must understand the provision within the context of the grid, if any, of related provisions and of the statute as a whole, including its underlying values. Although the text is often the starting point of any statutory construction, the meaning it bears must pay due regard to context. This is so even when the ordinary meaning of the provision to be construed is clear and unambiguous."

Further, the Supreme Court of Appeal, in *Millennium Waste Management (Pty) Ltd v Chairperson, Tender Board: Limpopo Province and Others* 2008 (2) SA 481 (SCA), a judgment that considered the definition of tender as contained in the Procurement Act, held at para 18:

detected only when its existence has already been conclusively established as a fact. Obtaining any information that gives rise to a reasonable suspicion that preference points might have been fraudulently awarded does amount to a detection.[35] There are, however, different degrees and levels of detection. At the one level the information might be somewhat scanty yet capable of exposing corruption in a particular tender. At times the information detected might be conclusive. It is the level of detection that determines the appropriateness of the action to be taken against the alleged offending party.

The meaning of "act against"

[33] Viking maintains that "act against" does not encompass investigation. It contends that "act against" only has to do with the imposition of penalties such as those set out in regulation 15(2).[36] Hidro-Tech on the other hand supports a more liberal construction of "act against", which includes investigation.

[34] Whenever an enterprise is plausibly accused of having furnished false information in its tender documents, the organ of state responsible for the tender is, upon becoming aware of the alleged misrepresentation, under an obligation to investigate the matter. This stems from the tenderer's obligation to vouch for the truthfulness and correctness of

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> "[T]he definition in the statute must be construed within the context of the entire section 217 while striving for an interpretation which promotes 'the spirit, purport and objects of the Bill of Rights' as required by section 39(2) of the Constitution."

[35] See *Viking Pony SCA* above n 4 at para 31.

[36] Regulation 15(2) is quoted at [50] below.

the information provided in terms of regulation 14.[37] Furthermore, the organ of state has the power to call upon any tendering enterprise to submit satisfactory documentary proof of any issue relating to the tender. This would be done to enable the organ of state to investigate and satisfy itself about the correctness or otherwise of the issues relating to the tender. In sum, regulation 14 enjoins the organ of state to "act against" any tenderer that seems to have flouted the law.

[35] "Act against" in a situation where the allegations of fraud are somewhat superficial might require an in-depth investigation by a suitably qualified person or institution. The organ of state may conduct the investigation itself or it may refer it to any other competent person or institution. When conclusive evidence is available to the organ of state, the appropriate action to take might be no more than affording the party accused of wrongdoing the opportunity to present its side of the story. In due course, a pronouncement might have to be made on the guilt or otherwise of the party accused of wrongdoing. That would be another incident of acting against. "Act against" also extends to the determination of the appropriate penalty to impose on the party found to have acted fraudulently.

[36] It follows that "act against" includes conducting an appropriate investigation which is designed to respond adequately to the complaint lodged, as well as the determination of both culpability and penalty. All these things, however, depend on the circumstances of

[37] Above n 23.

each case. The question whether PAJA applies to "detect" or "act against" or both needs to be addressed. This is done below.

The applicability of PAJA

[37] PAJA defines administrative action as a decision or failure to take a decision that adversely affects the rights of any person, which has a direct, external legal effect.[38] This includes "action that has the capacity to affect legal rights".[39] Whether or not administrative action, which would make PAJA applicable, has been taken cannot be determined in the abstract. Regard must always be had to the facts of each case.[40]

[38] Detecting a reasonable possibility of a fraudulent misrepresentation of facts, as in this case, could hardly be said to constitute an administrative action. It is what the organ of state decides to do and actually does with the information it has become aware of which could potentially trigger the applicability of PAJA. It is unlikely that a decision to

[38] Section 1 provides that "administrative action"—

> "means any decision taken, or any failure to take a decision, by—
>
> (a) an organ of state, when—
>
> (i) exercising a power in terms of the Constitution or a provincial constitution; or
>
> (ii) exercising a public power or performing a public function in terms of any legislation; or
>
> (b) a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision,
>
> which adversely affects the rights of any person and which has a direct, external legal effect".

[39] *Grey's Marine Hout Bay (Pty) Ltd and Others v Minister of Public Works and Others* 2005 (6) SA 313 (SCA) at para 23.

[40] *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* [1999] ZACC 11; 2000 (1) SA 1 (CC); 1999 (10) BCLR 1059 (CC) at para 143.

investigate and the process of investigation, which excludes a determination of culpability could itself adversely affect the rights of any person, in a manner that has a direct and external legal effect.

[39] If the City were about to pronounce on the culpability or otherwise of Viking, Hidro-Tech and Viking would have to be afforded the opportunity, in terms of PAJA, to make whatever representations they may wish to make. Similarly, if Viking were found guilty, then the relevant provisions of PAJA would have to be invoked before an appropriate sanction is considered and imposed by the City.[41] This case has not,

[41] See section 3 of PAJA which provides:

> "(1) Administrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair.
>
> (2) (a) A fair administrative procedure depends on the circumstances of each case.
>
> (b) In order to give effect to the right to procedurally fair administrative action, an administrator, subject to subsection (4), must give a person referred to in subsection (1)—
>
> (i) adequate notice of the nature and purpose of the proposed administrative action;
>
> (ii) a reasonable opportunity to make representations;
>
> (iii) a clear statement of the administrative action;
>
> (iv) adequate notice of any right of review or internal appeal, where applicable; and
>
> (v) adequate notice of the right to request reasons in terms of section 5.
>
> (3) In order to give effect to the right to procedurally fair administrative action, an administrator may, in his or her or its discretion, also give a person referred to in subsection (1) an opportunity to—
>
> (a) obtain assistance and, in serious or complex cases, legal representation;
>
> (b) present and dispute information and arguments; and
>
> (c) appear in person.
>
> (4) (a) If it is reasonable and justifiable in the circumstances, an administrator may depart from any of the requirements referred to in subsection (2).

however, reached that stage yet. The need to give some guidance is accentuated by the apparent lack of clarity and direction displayed by the City and the DTI. The next question relates to the adequacy of the steps taken by the City.

The adequacy of the steps taken by the City

[40] In order to address the question whether the City took appropriate action in response to Hidro-Tech's complaint, the steps taken by the City must be tracked from the lodging of the complaint all the way through to just before Hidro-Tech launched the application for a mandatory order. Those steps follow below.

[41] Mr Viljoen of Hidro-Tech went to Mr Bindeman's office to lodge a verbal complaint against Viking on 5 December 2007. His complaint was that Viking was awarded most of the tenders because of its fronting practices. In response, Mr Bindeman requested Tradeworld to investigate Hidro-Tech's complaint. He also conducted his own

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(b) In determining whether a departure as contemplated in paragraph (a) is reasonable and justifiable, an administrator must take into account all relevant factors, including—

(i) the objects of the empowering provision;

(ii) the nature and purpose of, and the need to take, the administrative action;

(iii) the likely effect of the administrative action;

(iv) the urgency of taking the administrative action or the urgency of the matter; and

(v) the need to promote an efficient administration and good governance.

(5) Where an administrator is empowered by any empowering provision to follow a procedure which is fair but different from the provisions of subsection (2), the administrator may act in accordance with that different procedure."

internal investigation and was satisfied that if Viking's historically disadvantaged individual status were a sham, it would indeed have resulted in an unfair award of tenders to Viking. He communicated his findings on the possible implications of a fraudulent misrepresentation by Viking, to Tradeworld and impressed on it to investigate properly. He informed his superior, Mr Schnaps, of the allegations. Tradeworld concluded its investigation on 14 December 2007. It found that Viking's shareholding was correctly reflected in the proof of shareholding which was submitted with Viking's tender documents. It said nothing about the fronting allegations. On 20 December 2007, Mr Bindeman thanked Tradeworld for the report. He also informed them that the City's legal advisers had advised him not to involve the City in any further attempt by Hidro-Tech to resolve issues around Viking's alleged fronting practices, but rather to refer the complaint to the DTI.

[42] Hidro-Tech was not told of any steps taken to address its oral complaint. Accordingly, it caused two letters, both dated 17 January 2008, to be delivered to the City. These letters added more substance to Hidro-Tech's verbal allegations. A receipt of these letters triggered a meeting between Mr Bindeman and Mr Schnaps. They decided to refer the matter to Tradeworld again, to investigate thoroughly and confirm the historically disadvantaged individual status of Viking. In a subsequent discussion with the attorney for Hidro-Tech, Mr Bindeman informed him that the matter had been referred to Tradeworld, which had since established that Viking and its sister company, Bunker Hills, were in the process of changing their shareholding.

[43] The attorney for Hidro-Tech addressed a letter to the City dated 8 February 2008. He queried the adequacy of the investigation conducted by Tradeworld since he believed that Tradeworld lacked the capacity to investigate properly the allegations of fronting. He expressed the view that it was for the City to investigate these allegations, to find out if these practices existed and if they did to act appropriately. Hidro-Tech demanded that the City urgently investigate the alleged fronting practices by Viking or else the High Court would be approached to compel the City to do so.

[44] The attorney for Hidro-Tech had a discussion with Mr Schnaps on 11 February 2008. Mr Schnaps told him that the City was unable to take action against Viking and Bunker Hills at that stage and advised Hidro-Tech to rather approach the High Court for a remedy. This discussion prompted a letter by Hidro-Tech's attorneys dated 19 February 2008 again calling upon the City to investigate expeditiously the allegations of fronting. Tradeworld, who had already confirmed to Hidro-Tech's attorneys that their investigation could not go beyond the verification of shareholding, was again rejected on the basis that it was ill-equipped to investigate properly. The City was asked to suspend immediately all the work on the project that Viking was doing for the City and the finalisation of the tender process in respect of another project, pending the outcome of the investigation. Hidro-Tech threatened that failure to do so would result in an application to the High Court for a mandatory order compelling the City to investigate, and a restraining order putting the project and the tender process on hold.

[45] The City gave no assurance. Instead, it advised Hidro-Tech's attorney to speak to one of its internal legal advisers. The legal adviser refused to speak to Hidro-Tech's attorney on the ground that the City's policy forbade their direct engagement with members of the public. Again on the advice of the City, Hidro-Tech referred its complaint to the DTI for investigation. The DTI did not respond to Hidro-Tech's complaint. Hidro-Tech then launched the threatened application in the High Court on 6 March 2008.

[46] The nature and seriousness of the complaint and the details provided in its support impose an obligation on the City, to investigate allegations of non-compliance with the provisions of the regulations. The provisions which lie at the heart of Hidro-Tech's complaint to the City are set out in regulation 13 in these terms:

> "(1) Preference points stipulated in respect of a tender must include preference points for equity ownership by [historically disadvantaged individuals].
>
> . . . .
>
> (4) Preference points may not be claimed in respect of individuals who are not actively involved in the management of an enterprise or business and who do not exercise control over an enterprise or business commensurate with their degree of ownership."

The complaint is that the historically disadvantaged individuals neither exercised control over the tendering enterprise nor were they actively involved in its management, to the extent commensurate with their degree of ownership. The converse is the requirement

for awarding preference points in terms of regulation 13. It follows from this regulation that it is not enough merely to have the historically disadvantaged individuals holding the majority shares in a tendering enterprise. The exercise of control and the managerial power actually wielded by the historically disadvantaged individuals, in proportion to their shareholding, is what matters. The complaint was not that the shareholding was incorrectly reflected in Viking's tender papers.

[47] For an effective investigation to be conducted, the City needs an entity or person who, unlike Tradeworld, can in fact go behind the shareholding. More importantly, whatever investigation the City opts for, would probably have to address the following questions which flow from, among others, regulation 13(1) and (4): (i) were Mr Mosea and Mr James genuine 70% shareholders of Viking; (ii) did their salary package and benefits correspond with their majority shareholding; (iii) did these historically disadvantaged individuals exercise control over Viking and participate actively in its management in proportion to their shareholding; and (iv) what is the true nature of the relationship between Viking and Bunker Hills? This list is not exhaustive. It, however, underscores the point that the verification of the correct shareholding in the company register is irrelevant to the complaint. What happens behind the scenes matters the most when the shareholding is said to be a façade.

[48] Communication between the City officials and Hidro-Tech's attorneys afforded the City the opportunity to understand what the complaint was really about, assess whether

the allegations warranted serious attention, and determine which action would be appropriate in the circumstances. The steps taken by the City to investigate, namely the referral of the complaint to its indifferent lawyers, Tradeworld and the DTI, amount to a failure by the City to respond appropriately to the demands of the complaint. The City was duty-bound to "act against" Viking by investigating the matter properly. It could do so itself, or refer the matter to, say, the Commercial Crimes Unit of the South African Police Service, the Directorate for Priority Crime Investigations, the National Prosecuting Authority or a firm of forensic accountants. There is some uncertainty about whether or not the order of the Supreme Court of Appeal is similar to that of the High Court. This concern is addressed below.

The meaning and effect of the High Court order

[49] The High Court found that Viking has committed fraud. This left it with no choice but to impose a sanction which obviated the need for further investigations.[42] It, however, refused to grant an order in terms of section 9.4 of the City's Procurement Policy Initiative which provides:

> "Notwithstanding the imposition of any penalties that may be applied in terms of section 7.4.7 of this guide, where a contractor is found guilty of misrepresenting any facts in respect of either ownership or empowerment indicator, either in a tender submission, or on the supplier database, in order to [a]ffect the outcome of a tender, either before or after the award of a contract, then that contractor shall, with the approval of the Implementing

[42] See the essence of the order that was applied for at [15] above.

> Agent, be blacklisted on the supplier database for a period of twelve months and shall be notified accordingly.
>
> The [e]ffect of such blacklisting is that absolutely no further work may be awarded to that contractor for the duration of the blacklisting."[43]

The High Court reasoned that the City never made a finding that Viking was guilty of misrepresenting the facts, which must precede the decision to blacklist. It therefore held that a case had not been made out for an order in terms of section 9.4.

[50] The penalty which the High Court ordered the City to impose was to "act against" Viking in terms of regulation 15. Given its finding that Viking had acted fraudulently, it follows that the High Court had regulation 15(2) in mind, which sets out these punitive measures:

> "An organ of state may, in addition to any other remedy it may have against the person contemplated in sub-regulation (1)—
>
> (a) recover all costs, losses or damages it has incurred or suffered as a result of that person's conduct;
>
> (b) cancel the contract and claim any damages which it has suffered as a result of having to make less favourable arrangements due to such cancellation;
>
> (c) impose a financial penalty more severe than the theoretical financial preference associated with the claim which was made in the tender; and
>
> (d) restrict the contractor, its shareholders and directors from obtaining business from any organ of state for a period not exceeding 10 years."

[43] Above n 13.

It follows that the City was directed to impose any or all of the penalties set out in regulation 15(2) on Viking.

The meaning and effect of the Supreme Court of Appeal order

[51] Consistently with the agreement between the parties, the Supreme Court of Appeal distanced itself from the findings of fraud made by the High Court. It however expressed its finding that the City had breached its duty to investigate in these terms:

> "Since the allegation of fraudulent procurement was serious, clear, particularised, supported by cogent sworn statements and stood uncontradicted, only an official who was unreasonably cautious could have neglected to take appropriate action. The City was in breach of its duty from, at least, the time of receiving the affidavits of James and Zandberg on about 19 February.
>
> I conclude that the court *a quo* did not err in granting the relief it did. The appeal is accordingly dismissed with costs."[44]

[52] These factual findings as well as the rejection of the finding of culpability for fraud, provide the context within which the order of the Supreme Court of Appeal must be understood. A mere reading of the order may convey the unintended meaning that, just like the High Court, the Supreme Court of Appeal had ordered the City to punish Viking in terms of regulation 15(2). Clarification is therefore called for.

[44] *Viking Pony SCA* above n 4 at paras 36-7.

[53] An organ of state can punish an offending tenderer only if a finding of prohibited conduct has been made. The Supreme Court of Appeal did not make or endorse the High Court's finding to that effect. It only found that the City breached its duty to investigate Hidro-Tech's allegations of fronting. Read within this context, the Supreme Court of Appeal order cannot be understood to mean that a penalty must be imposed on Viking as the High Court had ordered. The Supreme Court of Appeal order was intended to do no more than direct the City to "act against" Viking, by launching a proper and effective investigation against it. This is the only remedy which the facts of this case justify.

Costs

[54] The meaning of "detect" and "act against" contended for by Viking have been rejected. The construction placed on these words by Hidro-Tech is the one this Court has found to be correct. Viking's contentions with regard to PAJA have suffered the same fate. In all these issues Hidro-Tech is the successful party.

[55] The only point on which Viking was successful relates to the kind of action the City should take against it. Hidro-Tech supported the decision of the High Court for immediate sanction and the unclarified order of the Supreme Court of Appeal which seemed to be similar to the High Court order. In this Court, Viking was not opposed to an investigation being conducted. This was so even in the Supreme Court of Appeal. Since this Court holds that nothing more than a proper investigation is called for at this stage Viking is the successful party on this point.

[56] Both parties being partially successful, it would be just and equitable to order that, unless there is a party who could be held liable for their costs, each party be ordered to pay its own costs. One matter of considerable concern has been the effect of the City's attitude towards its legal obligations in relation to the complaint, as well as its non-participation in the proceedings in this Court, when the facts of this case required its participation.

[57] The City's dereliction of duty is largely responsible for this protracted and expensive litigation. The fact that the City quietly slid away into the remotest backroom of litigation ought not to be enough to exonerate it from the consequences of its failure to honour its constitutional and statutory obligations.[45] It may not be an inappropriate response to its generally lackadaisical attitude, to mulct it with the costs of this appeal. In the exercise of our discretion, we consider that it may be just and equitable that the City be ordered to pay the parties' costs. The difficulty is that the City chose to abide the decision of the Supreme Court of Appeal and of this Court.

[58] As a result, it made no appearance in this Court and the question of its possible liability for costs was not debated with the parties and with the City itself. A provisional order that the City pays both Hidro-Tech and Viking's costs will be issued. And the

[45] See *Biowatch Trust v Registrar, Genetic Resources, and Others* [2009] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC) at para 28.

parties, including the City, will be afforded the opportunity to make representations on whether the provisional costs order should be made final.

Order

[59] In the result the following order is made:

1. Leave to appeal is granted.
2. The appeal is dismissed save as is indicated below.
3. The order of the Supreme Court of Appeal is set aside and replaced with the following:

> "(a) The City of Cape Town is directed to investigate the allegations made by Hidro-Tech Systems (Pty) Ltd against Viking Pony Africa Pumps (Pty) Ltd t/a Tricom Africa and Bunker Hills Pumps (Pty) Ltd t/a Tricom Systems, including whether or not the historically disadvantaged individuals who held the majority of the shares in Viking Pony Africa Pumps (Pty) Ltd t/a Tricom Africa, were at the time referred to in the complaint actively involved in the management of the company and exercised control over the company, commensurate with the degree of their ownership.

(b) The order for costs made by the Western Cape High Court, Cape Town, is confirmed.

(c) The appeal is otherwise dismissed with costs."

4. The City of Cape Town is ordered to pay the costs of Hidro-Tech Systems (Pty) Ltd and Viking Pony Africa Pumps (Pty) Ltd t/a Tricom Africa in this Court, including the costs of two counsel.

5. The order in sub-paragraph 4 is provisional.

6. The parties and the City of Cape Town are invited to make representations within 10 days of the date of delivery of this judgment on whether the provisional order should be made final.

Ngcobo CJ, Moseneke DCJ, Brand AJ, Cameron J, Froneman J, Khampepe J, Nkabinde J, Skweyiya J, and Yacoob J concur in the judgment of Mogoeng J.

For the Applicant:	Advocate JG Dickerson SC and Advocate AM Smalberger instructed by Rabie & Rabie.
For the First Respondent:	Advocate DC Joubert instructed by Jacques Viljoen Attorneys.