



**SPECIAL MEETING OF THE COUNCIL**  
**SPEZIALE VERGADERING VAN DIE RAAD**  
**INTLANGANISO EKHETHEKILEYO YEBHUNGA**

**A G E N D A**

**I-AJENDA**

**DATE / DATUM / UMHLA : 9 MARCH / MAART / MATSHI 2020**  
**VENUE / PLEK / INDAWO : BANQUETING HALL /**  
**BANKETSAAL**  
**CIVIC CENTRE / BURGERSENTRUM / IZIKO LOLUNTU**  
**HERMANUS**  
**TIME / TYD / IXESHA : 16:00**

# **MUNISIPALITEIT OVERSTRAND MUNICIPALITY**

Office of the Municipal  
Manager  
Municipal Offices  
HERMANUS

6 March / Maart / Matshi 2020

## **NOTICE TO ALL ALDERMEN & COUNCILLORS**

### **SPECIAL MEETING OF THE OVERSTRAND MUNICIPAL COUNCIL**

**NOTICE IS HEREBY GIVEN** that a **SPECIAL MEETING** of the **OVERSTRAND MUNICIPAL COUNCIL** will be held in the **Banqueting Hall, Civic Centre, Hermanus**, on **Monday, 9 March 2020** at **16:00** to consider the business set forth in the subjoined agenda.

*The attention of Councillors is directed to the Code of Conduct for Councillors and Municipal Officials, Schedules 1 & 2 of the Local Government: Municipal Systems Act, 2000 (Act 32 of 2000).*

**C GROENEWALD**  
**MUNICIPAL MANAGER**

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## **KENNISGEWING AAN ALLE RAADSHERE & RAADSLEDE**

### **SPESIALE VERGADERING VAN DIE OVERSTRAND MUNISIPALE RAAD**

**KENNIS WORD HIERMEE GEGEE** dat 'n **SPESIALE VERGADERING** van die **OVERSTRAND MUNISIPALE RAAD** gehou sal word in die **Banketsaal, Burgersentrum, Hermanus**, op **Maandag, 9 Maart 2020** om **16:00** om die sake op meegaande sakelys te bespreek.

*Raadslede se aandag word gevestig op die Gedragskode vir Raadslede en Munisipale Beamptes, Bylae 1 & 2 van die Wet op Plaaslike Regering : Munisipale Stelsels, 2000 (Wet 32 van 2000).*

**C GROENEWALD**  
**MUNISIPALE BESTUURDER**

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## **ISAZISO ESIYA KUBO BONKE OOCEBAKHULU NOOCEBA**

### **INTLANGANISO EKHETHEKILEYO YEBHUNGA LIKAMASIPALA WE-OVERSTRAND**

**OKU KUKWAZISA** ukuba **INTLANGANISO EKHETHEKILEYO YEBHUNGA**, eza kuba **se Banqueting Hall, kwiZiko LoLUNTU, eHermanus ngoMvulo, Umhla we 9 March 2020 ngeye-16:00** ukuqwalasela imicimbi ekule ajenda iqhotyoshelwe apha.

*OoCeba bayacelwa ukuba baqwalasele isikhokelo sokuziphatha sooCeba namaGosa kamasipala, amaXwebhu 1 & 2 kaRhulumente wooMasipala: uMthetho weeNkqubo zikaMasipala, 2000 (UMthetho 32 wowama-2000).*

**C GROENEWALD**  
**LOMPHATHI KAMASIPALA**

**AGENDA/...**

- 1. OPENING**
  
- 2. APPLICATIONS FOR LEAVE OF ABSENCE**
  
- 3. STATEMENTS AND COMMUNICATIONS BROUGHT FORWARD BY THE  
SPEAKER / EXECUTIVE MAYOR**

**4. COMPLAINT/ACCUSATION OF ALLEDGED MISCONDUCT: MR CC GROENEWALD, MUNICIPAL MANAGER**

4/3/R

D Arrison

Director : Management Services

6 March 2020

(028) 313 8001

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**1. Executive Summary**

The purpose of this report is to inform Council of a complaint/accusation of alleged misconduct brought by Mr Anton Kruger, on behalf of a group referred to as LiberTAS, against the Municipal Manager, Mr CC Groenewald.

**2. Service Delivery and Budget Implementation Plan Reference - IGNITE**

Municipal Manager

**3. Compliance with Strategic Priority**

Provision of democratic, accountable and ethical governance

**4. Delegated Authority**

None

**5. Legal Requirements**

Local Government: Disciplinary Regulations for Senior Managers, 2010 (GN 344 in GG 34213 dated 21 April 2011)

Council's Unauthorised, Irregular or Fruitless and Wasteful Expenditure Policy

**6. Discussion**

An allegation of misconduct, on a tender award, was brought against the Municipal Manager, Mr CC Groenewald, on 5 March 2020.

Regulation 5(1) of the Local Government: Disciplinary Regulations for Senior Managers, 2010 (GN 344 in GG 34213 dated 21 April 2011) prescribes that *any allegation of misconduct against a senior manager must be brought to the attention of the municipal council.*

Regulation 5(2) determines that any allegation as referred to in sub-regulation (1) must be tabled by the Executive Mayor, before Council, *not later than 7 days after receipt thereof.*

The Council is then to deal with the matter in accordance with the provisions of Regulation 5(3), which provides as follows:

- 5(3) *if the municipal council is satisfied that -*
- (a) *there is a reasonable cause to believe that an act of misconduct has been committed by the senior manager, the municipal council must within seven [7] days appoint an independent investigator to investigate the allegation[s] of misconduct; and*
  - (b) *there is no evidence to support the allegation[s] of misconduct against the senior manager, the municipal council must within seven [7] days dismiss the allegation[s] of misconduct.*

The document received from Mr Anton Kruger is attached as Annexure A. A response from the Municipal Manager, Mr CC Groenewald, is likewise attached as Annexure B.

## 7. Financial Implications

Costs related to an independent investigator, should it be necessary.

## 8. Staff Implications

None

## 9. Comments from other Departments, Divisions and Administrations

None

## 10. Annexures

Annexure A: Document received from Mr Anton Kruger

Annexure B: Response received from the Municipal Manager, Mr CC Groenewald

## RECOMMENDATION TO THE COUNCIL:

that, if Council is satisfied that: -

- (a) *there is a reasonable cause to believe that an act of misconduct has been committed by the Municipal Manager, and an independent investigator to investigate the allegation(s) of misconduct be appointed within seven (7) days; **OR***
- (b) *there is no evidence to support the allegation(s) of misconduct against the Municipal Manager, the allegation(s) of misconduct be dismissed.*

**RESPONSIBLE OFFICIAL :**

**DS ARRISON**

**TARGET DATE FOR IMPLEMENTATION :**

**IMMEDIATELY**

## 4 Annexure A

Coenie Groenewald - Re: Complaint against Municipal Manager

P1/9

**From:** Anita Visser <legalrecordsa@gmail.com>  
**To:** Mayor Overstrand <mayor@overstrand.gov.za>  
**Date:** 05/03/2020 07:39 AM  
**Subject:** Re: Complaint against Municipal Manager  
**Attachments:** letter to mayor Dudley Coetzee.pdf; Complaint Against Municipal Manager Mr. Coenraad Groenewald.pdf

Honorable Mayor Dudley Coetzee.

Please find signed documents attached, as requested.

Yours Sincerely

LiberTAS

On Wed, Mar 4, 2020 at 10:14 AM Mayor Overstrand <mayor@overstrand.gov.za> wrote:  
 Good day

I refer to your email first under.

In order for me to take this matter further I require an original document, signed by the person laying the complaint. I can not act on an unsigned document, which originates from a fictitious person.

Regards,

**Ald / Rdh Dudley Coetzee**

Executive Mayor / Uitvoerende Burgemeester / Usodolophu Olawulayo

Overstrand Municipality / Munisipaliteit / Umasipala

**M:** +27 (0) 82 574 4404 | **T:** +27 (0) 28 313 8058

**E:** [mayor@overstrand.gov.za](mailto:mayor@overstrand.gov.za)

**DISCLAIMER:** Please note that all invitations/requests are accepted on the basis that they could be cancelled, due to emergencies which could arise and require the Mayor's attention.



**Overstrand Municipality**

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**T:** +27 (0) 28 313 8000 | **F:** +27 (0) 28 312 1894

**E:** [enquiries@overstrand.gov.za](mailto:enquiries@overstrand.gov.za) | **W:** [www.overstrand.gov.za](http://www.overstrand.gov.za)

Vision Statement: "To be a centre of excellence for the community"

Disclaimer: This e-mail (including attachments) is subject to the disclaimer published at: <http://www.overstrand.gov.za>. Please read the disclaimer before opening any attachment or taking any other action in terms of this e-mail. By replying to this e-mail or opening any attachment you agree to be bound by the provisions of the disclaimer.

Please consider the environment before printing this correspondence.

>>> Anita Visser <legalrecordsa@gmail.com> 2020/03/03 07:38 AM >>>

Honourable Mayor Dudley Coetzee

P2/9

Dear Mr. Coetzee.

There is nothing fictitious about LiberTAS.

We have been advised that it is our legal right to lay a complaint as a group or organization, which is exactly what we are doing right now.

So please fill in the word LiberTAS on your complaint form.

If you had a look at the petition we have been running, of which we provided the link in our formal complaint, you would see that our complaint is well in line with the demand for Transparency, Accountability and Sustainability(TAS) in the Overstrand, and you will see that it has already been signed by 390 people by 8am this morning.

My name is Anton Kruger, and I am an executive member of LiberTAS, with full authority to write this letter and sign the complaint on behalf of our Group.

We find it worrying that you seem more concerned about who we are, than about the merits of our complaint.

Please do your duty without further delay, as stipulated under the Overstrand's "UNAUTHORISED, IRREGULAR OR FRUITLESS AND WASTEFUL EXPENDITURE POLICY."

Yours Sincerely  
Anton Kruger



On behalf of  
LiberTAS

05/03/2020

Honourable Mayor Dudley Coetzee

P3/9

We are representing a growing group of concerned citizens, demanding Transparency, Accountability and Sustainability (TAS) in the Overstrand. See

[https://www.change.org/p/overstrand-management-we-want-tas-79fe156a-9a1e-46ea-bf1d-a80ed2a7e89f?fbclid=IwAR2XqyfeFrL484v9oyM7qj0Oe6AxLjADTvc9cSm\\_ykNSb14EqpSEncCEq7E](https://www.change.org/p/overstrand-management-we-want-tas-79fe156a-9a1e-46ea-bf1d-a80ed2a7e89f?fbclid=IwAR2XqyfeFrL484v9oyM7qj0Oe6AxLjADTvc9cSm_ykNSb14EqpSEncCEq7E)

In accordance with Overstrand's "UNAUTHORISED, IRREGULAR OR FRUITLESS AND WASTEFUL EXPENDITURE POLICY", we would hereby like to make a formal complaint against current Municipal Manager, Mr. Coenraad Groenewald, regarding the matter as reported in <https://showme.co.za/hermanus/news/tender-turmoil/>.

Our concerns regarding the above matter are that:

1. Mr. Groenewald demonstrated poor judgement in awarding this tender, occurring great costs to the Ratepayer, delaying (possibly even derailing) the project by his actions and putting a question mark behind Mr. Groenewald's suitability for making this type of decision, or performing this type of Managerial duty.
2. Ratepayers had nothing to gain from the court cases that followed. This matter could have been settled out of court, at a considerably reduced cost.
3. In this case, it seems Mr. Groenewald was using Municipal Money (i.e. Ratepayers Money) for a personal matter, namely trying to clear his own name.
4. Appealing and losing this case in the High Court, apparently against advice of advocate Werner Zybrands, emphasises just how bad Mr. Groenewald's judgement is, and how wasteful this exercise truly was.

Please note that we have already communicated our unhappiness with Mr. Groenewald regarding this matter to him, in the form of an email, but received no response.

We therefore ask that:

1. It be made Public how much was spent on this court case, appeal and reimbursement for the complainant.
2. That this amount be reimbursed to the Municipal Coffers by Mr. Groenewald, after both interest and inflation has been taken into account.

We are also aware that this case is not isolated.

AC

We believe that the Municipality has quite recently been taken to court by Water and Sanitation Services South Africa Pty(Ltd) for another wrongful tender allocation. This matter was also apparently appealed and lost by the Municipality in the High court. Once again, Mr. Groenewald was the responsible person.

This is yet another matter with zero gain to the Ratepayers that could have been settled out of court at greatly reduced cost.

On the other hand, it has on several occasions been communicated to the Public that the Municipality cannot afford to construct an emergency sewage storage facility at the Onrus Main Pumping station right next to the Onrus Estuary. Please note that environmental protocol dictates the necessity of this storage facility in an environmental sensitive area. The reason we are bringing this up, is to point out that Mr. Groenewald's spending priorities seems to focus on personal priorities rather the best interest of the Ratepayers.

We find it questionable that Mr. Groenewald was appointed to the highly paid position of Municipal Manager shortly after the above mentioned tender incident, a position he still holds today.

We therefore ask that Mr. Groenewald be dismissed without further delay or pension benefits, after he has reimbursed the Municipality for unnecessary costs incurred, in a manner as stated above.

Please acknowledge receipt of this letter.

Yours Sincerely

Anton Kruger

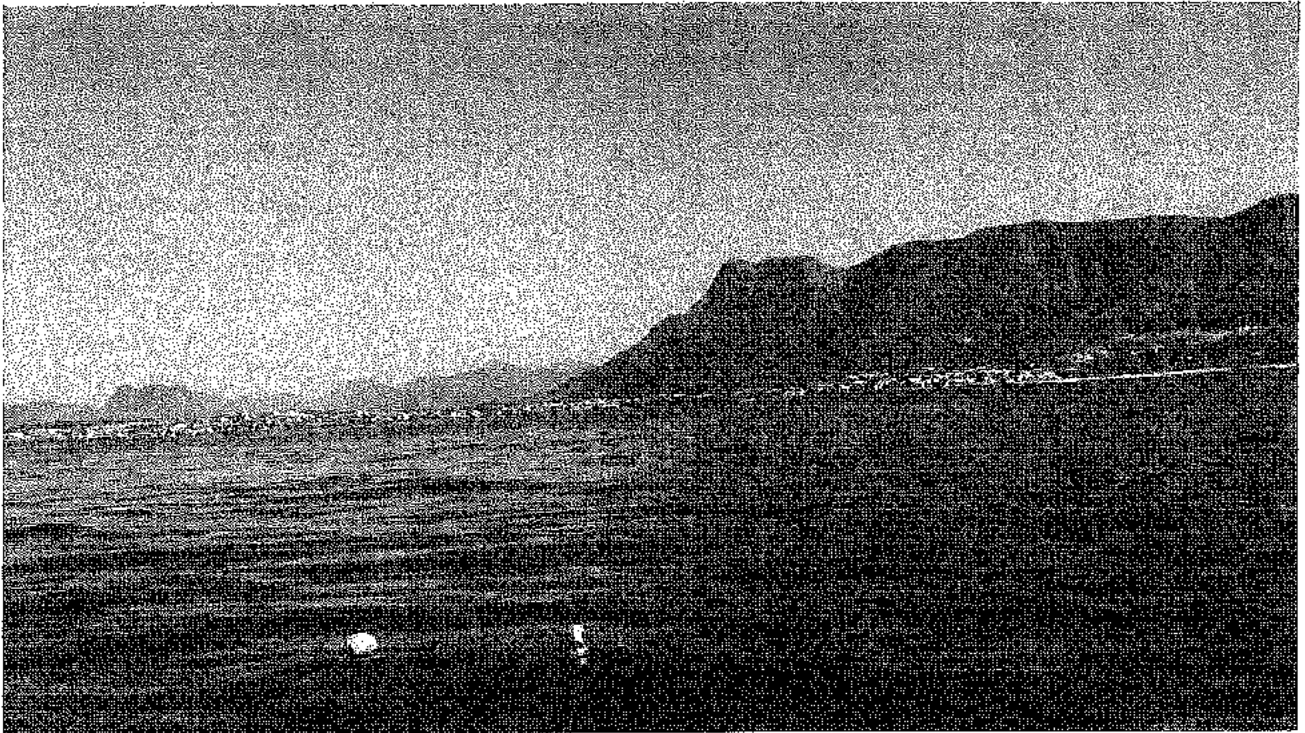


On behalf of

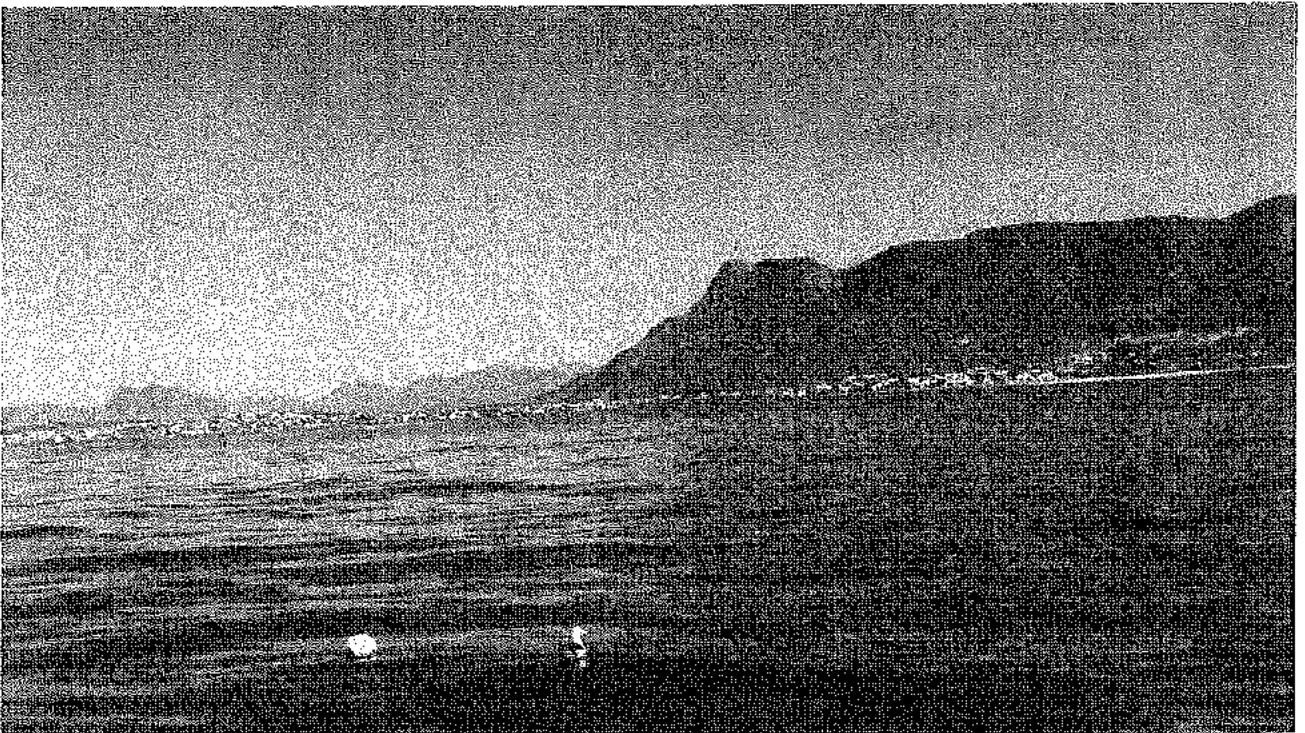
LiberTAS

05/03/2020

change.org



**We want TAS!!**



**385 have signed. Let's get to 500!**

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**We want TAS!! started this petition to Overstrand Management**

TAS

Transparency

Accountability

Sustainability

In South Africa we have excellent laws and legislation protecting Us and our Environment. Most of the problems in our beautiful Overstrand can be traced back to some Department Not enforcing (or ignoring) these Laws.

When pressed on these issues, these Departments tend to become very tight lipped about relevant information. According to the PAIA act, there is very little information that we as the Public are Not entitled to peruse.

The other issue that needs to be addressed urgently is sustainability in the Overstrand. We are living in a water scarce area, with water restrictions being the norm. Yet, people are streaming into the Overstrand from the Eastern Cape and settling informally in huge numbers, putting even more pressure on limited resources.

By signing this petition, you are pledging your support for Transparency, Accountability and Sustainability (TAS) in the Overstrand.

This document, together with a list of relevant concerns, will be presented to the different Departments, requesting that they start conforming to the law.

### **Start a petition of your own**

#### Start a petition of your own

This petition starter stood up and took action. Will you do the same?

Start a petition

### **Updates**

We want TAS!!

Thank you for taking the first step in getting Transparency, Accountability and Sustainability in the Overstrand.

...

We want TAS!!

Thank you for taking the first step in getting Transparency, Accountability and Sustainability in the Overstrand.

77 people have signed so far.

Please share this petition far and wide!

Where am I? ShowMe™ » Hermanus > News > Whale Coast Monitor > Tender Turmoil



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## Tender Turmoil

Date: May 1, 2012 | Posted in News | Whale Coast Monitor



**In the wake of last month's story on housing, comes the news concerning the real reason why the provision of low-cost housing in the Overstrand is so appallingly slow.**

At the beginning of 2007, the Municipality put out to tender a R600,000,000.00 contract for a "Turnkey Developer" to build low-cost housing in the Overstrand. Sixteen tender applications were received with only five regarded as bona fide, inclusive of M5, ASLA and Blue Whale Property CC.



The Housing Manager at the time, Mr Bobby von During, employed the services of consulting ICE Group, to make a recommendation as to whom the tender should be awarded. The evaluation tenders involves a prescribed points system with the company scoring the highest points being winner. The outcome of this process was that M5 was evaluated as the most suitable company. However, the evaluation process did not end there. All the documentation went on to an Evaluation Committee, who concurred with ICE in recommending M5 as the turnkey developer. The documentation then went on to the Adjudicating Committee, who once again recommended M5.

On the 20th of April 2007, M5 were notified of their appointment and the two other remaining companies were notified of their right to appeal this decision within 21 days. Blue Whale lodged an appeal, as did ASLA, but ASLA's appeal was not received within the legislated time period. Blue Whale's appeal then sat with the Municipality for some nine months without any progress.

Astoundingly, in February 2008, a decision was made by the then Acting Municipal Manager Coenie Groenewald, to change the scoring of the tender documents and award the tender to ASLA. Naturally, M5, who had originally won the tender, sued Groenewald and the Municipality in the Cape High Court. It emerged during court proceedings that the Overstrand Municipality did not even have a Supply Chain Management Policy as is prescribed by law.

M5 prevailed in the case and the tender reverted back to them. In his ruling, Judge le Grange stated 'The contention that Groenewald was in law obliged to, upon discovering an alleged scoring error whilst considering Blue Whale's appeal, make a decision on the correct scoring and re-allocate tender to Asla, is misconceived. Groenewald, in my view, erred and committed a serious misdirection to re-allocate the tender to Asla.'

More astoundingly, despite the recommendation of Mr Werner Zybrands, who had by then been appointed as the Municipal Manager, the Municipality decided to appeal the High Court's ruling. The matter was then retried by the Supreme Court of Appeal on the 12th of March 2010. This court upheld the High Court's decision and the Municipality was ordered to pay all of M5's costs. The Monitor requested from the Municipality the final cost of the two court cases, but to date this information has not been forthcoming.

In light of this situation, the Monitor posed the following questions to Mr Fanie Krige, Communicable Diseases Manager of the Overstrand Municipality:

1. What events led to Mr Coennie Groenewald reversing a tender decision after it was approved by the tender Adjudication Committee?
2. When M5 sued Mr Groenewald and the Municipality, who took the decision to defend the matter?
3. When the case was lost in the High Court, who made the decision to appeal the decision?
4. What was the final cost of both the court cases including the costs of the applicant?
5. Where did this money come from?
6. Given that the Municipality was in the wrong, how is the Municipality planning to reimburse Overstrand ratepayers for this wasteful expenditure?
7. How was it that Mr Groenewald was appointed Municipal manager, even though he wasted a significant amount of public funds and set back the housing planning in the Overstrand by some 2 years?

In response to these questions the Monitor was invited to the Municipal offices to read through transcripts of the court cases as well as the confidential Legal Council's brief. Unfortunately, these documents shed no light on the questions posed. In fact, this episode simply raised the additional question as to why these documents were not part of the public record.

Of serious concern is the fact that the present Municipal Manager was appointed to his position even though he was found by two courts to have committed serious errors in exercising his responsibilities. Also, his position commands a salary that warrants a level of discretion beyond that displayed in this matter where ratepayers are left with massive legal costs and a housing plan in tatters.

The Monitor will keep its readers updated should the Municipality decide to answer the questions stated in this article.

**Source:** [Whale Coast FM](#)

## Related Articles



**Fishing rights allocations process on track**



Kantoor van die  
Munisipale  
Bestuurder

## MEMORANDUM

Office of the  
Municipal  
Manager

Annexure B  
P1/61

e-mail/e-pos: cgroenewald@overstrand.gov.za

Tel: 028 313 8003

Faks/Fax: 086 568 9726

### WITHOUT PREJUDICE

6 March 2020

The Executive Mayor

#### COMPLAINT/ACCUSATION OF MISCONDUCT: MR ANTON KRUGER/LiberTAS

I refer to your e-mail dated 5 March 2020 in which you requested my comments regarding a complaint/accusation of misconduct against me by one Mr Anton Kruger, seemingly on behalf of a group/organisation referred to as LiberTAS.

Kindly at the onset note that the fact that I am not referring to, or addressing, all of Mr. Kruger's accusation should not be construed as an acknowledgement of mine as to the correctness of same.

If I understand Mr Kruger's accusation correctly, it seems as if I am being accused of having "**... demonstrated poor judgement (sic!) in awarding this tender, occurring great costs to the Ratepayer, delaying (possibly even derailing) the project by his actions and putting a question mark behind Mr. Groenewald's suitability for making this type of decision, or performing this type of Managerial (sic!) duty.**" It furthermore seems that Mr. Kruger is referring to matters that occurred some 11 (eleven) years ago, i.e. the judgments *M5 Developments (Cape) (Pty) Ltd v Groenewald NO and Others (6277/08) [2009] ZAWCHC 3 (12 February 2009)* in the High Court of South Africa (Cape of Good Hope Provincial Division) and *Groenewald NO and Others v M5 Developments (Cape) [2010] ZASCA 47; 2010 (5) SA 82 (SCA); [2011] 1 All SA 17 (SCA) (31 March 2010)* in the Supreme Court of Appeal of South Africa.

The cryptic details of the aforementioned matters are as follows:

- The Overstrand Municipality invited tenders during the first quarter of 2007 for the appointment of a Housing Implementing Agent.
- During April 2007 a resolution was adopted by Overstrand Municipality's (OM) Bid Adjudication Committee to appoint M5 Developments (Cape) (Pty)Ltd (M5) as Housing Implementing Agent.

- Appeals were lodged against the aforementioned adjudication
- At that time Adv JF Koekemoer was the Municipal Manager of the OM. He resigned on 31 October 2007 – unfortunately without having considered/finalised the appeals submitted.
- I, at that stage the Head: Management Services, was appointed as Acting Municipal Manager from 1 November 2007 until 31 March 2008. (Adv W Zybrands was appointed Municipal Manager as from 1 April 2008.)
- I thus inherited the appeals referred to above (submitted approximately 6-months before) and endeavoured to resolve same.
- Whilst considering the matter I discovered certain errors in the points awarded which, if I was correct, would have resulted in one of the other tenderers, Asla Devco (Pty)Ltd (ASLA), to have won the contract.
- I sought legal advice from Adv Eduard Fagan,SC (Adv Fagan) as per my memorandum dated 18 January 2008 which memorandum, excluding its annexures, is attached hereto as '**Annexure A**'. This Memorandum and annexures to the Advocate and Attorney comprised of 191 pages and the annexures will be made available to you under separate cover. Such advice, amongst others, to give guidance what the authority of the appeal authority is when it considers an appeal from an appellant and, when doing so, establishes that the Adjudication Committee based its decision on wrong information and that the tender should have been awarded to ASLA? In other words, what should the appeal authority do in respect of the knowledge he has acquired concerning the incorrect scoring of M5 and ASLA?
- Adv Fagan submitted his opinion on 22 January 2008, a copy of which is attached as '**Annexure B**'. **Paragraphs 14 to 20** of the opinion are, for purposes of this memorandum, of importance. I then painstakingly followed the advice provided.
- This gave rise to the matter *M5 Developments (Cape) (Pty) Ltd v Groenewald NO and Others (6277/08) [2009] ZAWCHC 3 (12 February 2009)* in the High Court of South Africa (Cape of Good Hope Provincial Division), attached as '**Annexure C**'.
- The aforementioned court case gave rise to the matter *Groenewald NO and Others v M5 Developments (Cape) [2010] ZASCA 47; 2010 (5) SA 82 (SCA); [2011] 1 All SA 17 (SCA) (31 March 2010)* in the Supreme Court of Appeal of South Africa attached as '**Annexure D**'. **Paragraphs 15 and 16 describe my dilemma at that time.**

I wish to emphasise that I:

- had at all times acted in a bona fide manner and in good faith;
- had acted in accordance with the legal advice obtained; and
- have kept the previous Executive Mayor, Cllr Theo Beyleveldt, the then and current Speaker, Ald Anton Coetsee and Adv Werner Zybrands, who was

appointed as Municipal Manager as from 1 April 2008, informed during the whole process.

(Written evidence to this effect will also be made available to you under separate cover.)

I also haste to mention that following the 2018 social unrest and the demand from Overstrand Unite that I be "fired", all relevant documentation regarding the two judgments was made available to the then Premier, Premier Hellen Zille. She had her legal experts to scrutinise same and the outcome was that my handling of the matters was above board and that there was nothing sinister with my conduct. This she also conveyed to the attendees of a public meeting thereafter.

In closure I wish to emphasise that I have always acted in good faith and that I pledge my full cooperation in any investigation should Council decide to order such in terms of the provisions of the Local Government: Disciplinary Regulations for Senior Managers (GN 344 dated 21 April 2011) read with Overstrand Municipality's Standard Procedures for the Management of Allegations of Misconduct against Senior Managers or the Municipal Manager in terms of Disciplinary Regulations, or the provisions of, but not limited to, the following:

- Code of Conduct for Municipal Staff Members as is contained in Schedule 2 of the Local Government: Municipal Systems Act, No. 32 of 2000;
- Overstrand Municipality's Fraud Prevention and Anti-Corruption Policy, Plan and Strategy;
- Overstrand Municipality's Code of Ethics for Municipal Staff;
- Overstrand Municipality's Unauthorised, Irregular or Fruitless and Wasteful Expenditure Policy;
- Municipal Regulations on Financial Misconduct Procedures and Criminal Proceedings (Government Notice 430 in Government Gazette 37682 of 30 May 2014); and
- Prevention and Combating of Corrupt Activities Act, No. 12 of 2004.



**COENIE GROENEWALD**  
**MUNICIPAL MANAGER**

## MEMORANDUM TO ADVOCATE AND ATTORNEY

DISPUTE(?): TENDER SC055/2007: IMPLEMENTING AGENT FOR HOUSING PROJECTS IN THE OVERSTRAND MUNICIPAL AREA.

1. The Overstrand Municipality, during the beginning of 2007, invited tenders for the appointment of an **Implementation Agent for Housing Projects in the Overstrand Municipal Area**. A copy of the tender advertisement is attached as **Annexure A**.
2. The tender advertisement provides that *"The Overstrand Municipality does not bind itself to accept the lowest or any tender and reserves the right to accept any tender, as it may deem expedient. Tenders are subject to the Standard Conditions of Tender, the Preferential Procurement Regulations of 2001 and the Supply Chain Management Policy of the Overstrand Municipality"*.
3. Copies of the documents referred to in 2, above are attached as follows:
  - 3.1 "Standard Conditions of Tender" – **Annexure B**;
  - 3.2 "Preferential Procurement Regulations of 2001" – **Annexure C**;
  - 3.3 "Supply Chain Management Policy of the Overstrand Municipality" – **Annexure D**. (Counsel's attention is invited to the fact that the aforementioned policy is a draft! I am informed that the public participation process for purposes of the adoption thereof by Council will only commence during the second half of February 2008.)
4. Five (5) tenders were received and a copy of the report which served before the municipality's Tender Evaluation Committee on 11 April 2007 is attached as **Annexure E**.

11. A representative of one of the other unsuccessful tenderers, one Schalk Loots of ASLA DEVCO (Pty) Ltd [hereinafter referred to as ASLA] in the meantime requested a meeting with the Executive Mayor, Cllr TB Beyleveldt, on 28 May 2007 which meeting was followed up with a letter of the same date to the Executive Mayor (see **Annexure J**). Due to the sensitive nature of the content of the aforementioned letter, the Executive Mayor handed the letter to me, in my capacity as Head: Management Services in the Office of the Municipal Manager, on 31 May 2007 with the request that the letter be brought to the attention of the Municipal Manager upon his return to office, which I did.
12. Copies of a further letter dated 15 November 2007 and of an e-mail dated 28 November 2007 directed to the Municipal Manager are attached as **Annexures K and L** respectively.
13. Adv Koekemoer has in the meantime resigned as Municipal Manager and, though his services will only terminate on 31 January 2008, he acts as per agreement as a Project Consultant from 1 November 2007. I have been appointed as Acting Municipal Manager as from 1 November 2007 (see **Annexure M**).
14. Adv Koekemoer however replied to the letter and e-mail mentioned in 12. on 28 November 2007 and a copy of the letter is attached as **Annexure N**.
15. ASLA replied to the letter mentioned in 14. on 7 December 2007 and a copy of the letter is attached as **Annexure O**.

5. The relevant item and recommendation then served before the municipality's Tender Adjudication Committee on 13 April 2007 and a copy of the minutes, as far as this item is concerned, of the said meeting is attached as **Annexure F**.
6. The aforementioned resolution was executed on 20 April 2007 and copies of the letters forwarded to the tenderers are attached as **Annexure G**.
7. The attention of tenderers was invited to the fact that they could lodge appeals in terms of section 62 of the Local Government: Municipal Systems Act, 2000 (Act 32 of 2000) [hereinafter referred to as the Systems Act] against the allocation of the tender and that the appeal period would expire on **11 May 2007**.
8. Only one (1) tenderer, to wit Messrs Blue Whale Property Projects CC, submitted an appeal within in the appeal period and a copy of the appeal is attached as **Annexure H**.
9. The Council of the Overstrand Municipality has in the meantime on 28 February 2007 appointed the Municipal Manager of the Municipality as the appeal authority for the hearing of tender appeals (see **Annexure I**) and the appeal referred to in 8. above was, in the absence of the Municipal Manager, who was abroad as from 17 May 2007, submitted to the then Acting Municipal Manager on 25 May 2007 by the Manager: Procurement Management.
10. The then Acting Municipal Manager however did not consider the appeal and forwarded the documentation to the Municipal Manager (Adv Jan Koekemoer) for him to consider the matter upon his return to office on 11 June 2007 or thereafter.

16. Adv Koekemoer replied to **Annexure O** (see 15.) on 11 December 2007, a copy of which is attached as **Annexure P**. [I must admit that the content of this letter only came to my knowledge on 18 January 2008 whilst finalizing this memorandum and this might change the gist to my questions – I however do unfortunately not have time to amend or re-think the questions!!]
17. During the middle of December 2007 I, with the assistance of Adv Koekemoer, considered the appeal of Messrs Blue Whale Property Projects CC (see 8. above and **Annexure H**) and I was satisfied with the tender not being awarded to them. Though a reply was drafted and signed by me – see **Annexure Q**, I was informed by the Manager: Procurement Management that, for reasons unknown to me, the said reply was not forwarded to them.
18. I was likewise, with the assistance of Adv Koekemoer and after discussions with the Manager: Housing of the Municipality (Mr. Bobby Von Düring) and Mr. Pieter Engelbrecht from the company ICE Group (Pty) Ltd [hereinafter referred to as ICE Groep] who assisted in the evaluation of the tenders (and after both have denied the correctness of ASLA's accusations – see 11. above and **Annexure J**) satisfied that the resolution of the Adjudication Committee was correct in awarding the tender to M5 Developments (Cape) (Pty) Ltd [hereinafter referred to as M5] - the latter to have won the tender by a mere 0.6 points due to points awarded to them for their company's HDI status (see 5. above and **Annexure F**). During the aforesaid discussions a copy of the evaluation report of ICE Group was made available to us, a copy of which is attached as **Annexure R**.

19. It was my intention to attach **Annexures R** (18. above) and **E** (4. above) to my letter to ASLA as support of my preliminary decision to uphold the resolution of the Adjudication Committee in awarding the tender to M5. However, when preparing the attachments, I have noted that Annexure A to the report – first paragraph on page 4 of the report (see 18. above and **Annexure R**) was not attached.
20. I have requested my secretary to obtain the annexure under discussion from either Mr. Von Düring or Mr. Engelbrecht and a copy of the annexure so obtained is attached as **Annexure S**.
21. When studying the annexure under discussion (**Annexure S2/2**) I immediately discovered that there are certain differences between the information on the said annexure and the information submitted to the Adjudication Committee by the Evaluation Committee (**Annexures E8/8**).

The differences are:

Evaluation criteria:	ICE Group:		Evaluation Committee:	
Tenderer:	M5	ASLA	M5	ASLA
Local content	3	2	1	1
Empowerment workforce	0.7	1.4	0	0

22. I requested a meeting with the Manager: Procurement Management to discuss the aforementioned differences.
- 22.1. As far as **local content** is concerned she referred me to paragraph 9.7 of the tender documents. Copies of these pages are attached as follows:
- M5 - Annexure T; and  
ASLA - Annexure U.

The address submitted by M5 is a holiday home in Onrus River and no business is conducted from that property. M5 thus only qualifies for one (1) point for there address of business being in the Western Cape.

The address submitted by ASLA is in Strand. According to her the consultant erred in awarding two (2) points to the said tenderer as Strand is not in the Overberg and they thus only qualify for one (1) point for there address of business being in the Western Cape.

I have no problem with the above and concur with her reasoning.

22.2. As far as **empowerment of workforce / development of human resources** are concerned, my attention was invited to annexure MBD6.6 of the tender documents, copies of which are attached as follows:

M5 - **Annexure V**; and  
ASLA - **Annexure W**.

M5 claimed 0.7 points for 1-1.5% of their wage bill being spent on development of human resources.

ASLA claimed 1.4 points for 1.6-2% of their wage bill being spent on development of human resources.

22.2.1. The Manager: Procurement Management however decided not to award any points to the tenderers for this criterion as they have *"failed to submit documentary proof with their tender documents to substantiate their claims"*.

22.2.2. I beg to differ from this viewpoint. My reason for this is that nowhere in the tender documents are tenderers requested to submit documentary proof for points so claimed. In fact, in paragraph 5(iii) on annexure MBD6.6 of the tender documents (see **Annexures V2/2 and W2/2**), tenderers are requested to *inter alia*

acknowledge that *"In the event of a contract being awarded as a result of points claimed, the contractor may be required to furnish documentary proof to the satisfaction of the purchaser that the claims are correct."* (My emphasis.) The Manager: Procurement Management has confirmed that no such requests were directed to both the applicable tenderers!

23. It means that, if my viewpoint put forward in paragraph 22.2.2. is correct, M5 must have been awarded 0.7 points for empowerment of workforce and ASLA must have been awarded 1.4 points for same - with the result that, when added up with the other points awarded, the total points (out of hundred) to be awarded to the two tenderers under discussion should have been
- M5 : 92.3 points; and  
ASLA : 92.4 points  
with ASLA as the bid winner by 0.1 point!
24. At this stage it needs to be mentioned that, as far as paragraphs two (2) and five (5) of Annexure G1/5 is concerned, I am informed that no such agreements were concluded with M5.
25. Having regard to section 62(3) of the Systems Act, which section provides that:
- "The appeal authority must consider the appeal, and confirm, vary or revoke the decision, but no such variation or revocation of a decision may detract from any rights that may have accrued as a result of the decision"* (my emphasis),
- and bearing in mind the economic value of this tender, I need counsel's advice on the following:

- 25.1. Can the appeal authority regard **Annexure J**, which annexure was received 17 days after the appeal period in terms of section 62(2) of the Systems Act has lapsed, as a legitimate appeal – notwithstanding the content of **Annexure P**?
- 25.2. If the answer to 25.1. is in the negative, what is the authority of the appeal authority when it considers a legitimate appeal from **appellant XYZ (Annexure H)** and when doing so establishes that the Adjudication Committee based its decision on wrong information and that the tender should have been awarded to **tenderer ABC** – bearing in mind that *“... the appeal authority must consider the appeal”* as opposes to an appeal?
- 25.3. If the appeal authority has the authority to act in terms of the scenario mentioned in 25.2., can M5 argue that section 62(5) of the Systems Act (*“An appeal authority must commence with an appeal within six weeks and decide the appeal within a reasonable period.”*) was not adhered to and, if found in their favour, what will/can the effect of such a founding be?
- 25.4 Bearing in mind 24. above, can it be argued that any rights towards M5 have accrued as a result of the decision (see 5. and **Annexure F**)?
- 25.5 Can the appeal authority under the said circumstances decides that, as a result of the wrong information submitted to the Adjudication Committee, new tenders are to be invited?

**COENIE GROENEWALD**

**ACTING MUNICIPAL MANAGER: OVERSTRAND MUNICIPALITY**

**MOBILE PHONE: 082 552 9555**

**18 JANUARY 2008**

B1/13

**From:** "Deirdre Olivier" <dolivier@fairbridges.co.za>  
**To:** "Coenie Groenewald" <cgroenewald@overstrand.gov.za>  
**Date:** 2008/01/23 12:18 PM  
**Subject:** Opinion on appeal vs tender for housing implementer  
**Attachments:** Scan7885.pdf

Dear Coenie,

As requested please find attached Advocate Fagan's opinion on the appeal = process for the tender awarded for a housing implementer.

In essence his advise is that you must consider the incorrect scoring = which has come to your attention and advise ASLA and M5 of it and ask = for their representations. In this regard see paragraph 19 of the = opinion.

The other issues raised are also dealt with.

Should you have any queries do not hesitate to contact the writer.

Regards

Deirdré Olivier

Director: Litigation Department  
Fairbridges  
Constantia  
Tel: (021) 794 0911 Tel (International): +27 21 794 0911  
Fax: (021) 794 0922 Fax (International): +27 21 794 0922  
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Website: www.fairbridges.co.za <http://www.fairbridges.co.za>

The Directors of Fairbridge Arderne & Lawton Inc, registration number = 1985/000003/21, are listed at : = <http://www.fairbridges.co.za/directors.htm>

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-----Original Message-----

From: konica@fairbridges.co.za [mailto:konica@fairbridges.co.za]  
Sent: 23 January 2008 02:07 PM  
To: Deirdre Olivier  
Subject: Scans from the Konica scanner

Your scanned data is attached

**Ex parte:**

**OVERSTRAND MUNICIPALITY**

**In re:**

**TENDER APPEAL**

**OPINION**

**EDUARD FAGAN**

Chambers

Cape Town

### Introduction

1. Consultant is the Overstrand Municipality.
2. At the beginning of 2007 Consultant invited tenders for the appointment of an implementation agent for housing projects within its area of jurisdiction.
3. Consultant received five tenders. A report in regard to the tenders served before Consultant's tender evaluation committee on 11 April 2007. The item and recommendation of the evaluation committee then served before Consultant's tender adjudication committee on 13 April 2007,
4. On 20 April 2007 Consultant addressed a letter to the successful tenderer, M5 Development (Cape) (Proprietary) Limited ("M5"), advising it that it had been successful and that a contractual relationship would be established upon completion and signature of the formal contract.
5. Also on 20 April 2007, Consultant addressed letters to the unsuccessful tenderers, advising them of this fact and of their right to lodge an appeal in terms of section 62 of the Local Government: Municipal Systems Act 32 of 2000 ("the Systems Act") within 21 days. Two of the unsuccessful tenderers were ASLA Devco (Proprietary) Limited ("Asla") and Blue Whale Property Projects CC ("Blue Whale").

6. On 10 May 2007, i.e. within the 21-day period allowed therefor, Blue Whale lodged an appeal. The notice of appeal contains effectively only two grounds: first, that Consultant failed to adhere to its own policy of preferring local contractors over others; and secondly, that in so far as the decision might have been based on the fact that M5 had built the Kwasa-Kwasa RDP houses, Blue Whale had been treated unfairly in not having been given a fair opportunity to compete with M5.
  
7. On 28 May 2007 (at the earliest) Asla lodged an appeal. It did so on the basis that Mr Pieter Engelbrecht of the engineering firm that had assisted Consultant in evaluating the tender had been improperly influenced by Consultant's housing manager, Mr Bobby von During, in awarding points to the various tenderers. Whilst it recognised that its appeal was lodged out of time, Asla said, first, that the fact on which it relied had only come to its attention after the appeal period had terminated, and secondly, that the appeal of Blue Whale was still pending.
  
8. Consultant's acting municipal manager, Mr Coenie Groenewald, is the appeal authority. He has discussed the allegation of Asla with Messrs Engelbrecht and Von During, who deny its correctness. I am advised by Mr Groenewald that there is no merit in the appeal of Blue Whale, but that Blue Whale has not yet been told that its appeal is being turned down.

9. In the course of his investigations, Mr Groenewald however discovered that the points allocation in terms of which the tender was decided was incorrect, and that instead of M5 having obtained the highest points by a margin of 0,6 points over Asla, Asla should have been awarded a score that is 0,1 points higher than that of M5.
10. I am instructed, as a matter of considerable urgency, to advise Consultant on the following:
- 10.1 whether the appeal authority is entitled to consider Asla's appeal, notwithstanding the fact that it was lodged out of time;
- 10.2 what the appeal authority should do in respect of the knowledge he has acquired concerning the incorrect scoring of Asla and M5;
- 10.3 assuming that the appeal authority were to find on appeal that Asla is the successful tender, whether M5 can raise as an objection to that finding the fact that the decision was not taken timeously in terms of the Systems Act;
- 10.4 whether any rights have been accrued by M5; and

10.5 whether the appeal authority can in the circumstances decide that new tenders should be invited.

Asla's appeal

11. Section 62(1) of the Systems Act places an absolute restriction on Consultant's ability to determine appeals. The only basis on which an appeal can proceed, is if written notice of the appeal and reasons have been given to the municipal manager within 21 days of the date of the notification of the decision.
12. The Systems Act gives Consultant no authority to condone the late lodgement of an appeal, and such authority is not a necessary concomitant of the appeal power that Consultant does have.
13. In the circumstances, Asla's appeal is out of time and cannot be considered. The 21-day period is not extended for other potential appellants merely because one of the unsuccessful tenderers did appeal within the prescribed period. Nor is it relevant that the necessary information only came to Asla's attention after the 21-day period had elapsed: that would be a fact that has a bearing on condonation only, for which no power exists.

Incorrect scoring

14. The issue as to what Consultant should do in regard to its knowledge of incorrect scoring, notwithstanding the fact that no appeal on that basis is before is, is not without complexity. On a careful consideration of the matter, though, it seems to me that there is a clear answer.
15. Let us consider first what the purpose of an internal appeal is. Baxter *Administrative Law* p 255 puts it thus:

A right of appeal is an invaluable safeguard. It provides an aggrieved individual with the assurance that the decision will be *reconsidered* by a second decision-maker. The appellate body is able to exercise a calmer, more objective and reflective judgement. Detached from the 'dust of the arena', as it were, and the immediacy of the initial decision, the second decision-maker is in a better position to discern a *faulty reasoning process* and, in particular, to evaluate facts. This assumes special importance in the case of a discretionary decision since much of that decision is likely to depend on the *inferences* ('ultimate facts') drawn from the raw evidence ('basic facts'). In the end the final decision will have been the subject of more careful scrutiny, prolonged debate and sober reflection.

16. Now let us consider the nature of the appeal. It seems to me that it is a wide appeal, in the sense that the appeal authority is entitled to have regard to additional evidence or information. That is the usual nature of an internal appeal (Baxter *op cit* p 257; see also *Tikly and others v Johannes NO and others* 1963 (2) SA 588 (T) at 590F-592E; Hoexter *Administrative Law in South Africa* pp 66-67). Since the purpose of an internal appeal is

ultimately for the administrative body, the organ of state, in question to make a correct determination, it is sensible that the appeal should ordinarily be a wide one. There is nothing in the wording of section 62 that would cause one to consider that the appeal should be limited in this instance to what was before the adjudication committee. In any event, even were the appeal to be limited in that way, it seems that the scoring of the evaluation committee was wrong on the evidence before it, which is also evidence now before the appeal authority: the appeal authority has not in fact elicited new evidence.

17. Once one understands the position of the appeal authority to be that of ensuring that the tender is correctly awarded by Consultant, it follows that any knowledge in his possession relevant to that issue should be applied to his determination on appeal. Consultant is at the end of the day obliged to act lawfully. That means, amongst other things, that in terms of section 2(1)(f) of the Preferential Procurement Policy Framework Act 5 of 2000 the contract must be awarded to the tenderer who scores the highest points, unless objective criteria exist justifying an award to a different tenderer; and that in terms of section 217(1) of the Constitution of the Republic of South Africa, 1996, Consultant must follow a process that is fair, equitable, transparent, competitive and cost-effective (see also paragraph 2(1) of Consultant's supply chain management policy). Furthermore, there is a general duty on Consultant to act in the best interests of the local

community (section 4(2)(a) of the Systems Act), which is presumptively a duty best achieved – all other things being equal – by awarding the tender to the tenderer who scores the highest number of points.

18. Asla has not appealed timeously, and in its appeal did not raise as a complaint the fact that it was incorrectly scored in one crucial respect. Asla clearly is unaware of this mistake. The appeal authority is however aware of it, and is seized of the matter of the award of the tender generally by virtue of the appeal of Blue Whale. I do not think that it would be proper for the appeal authority to close his eyes to the true facts. Instead, he should use the opportunity presented by the appeal process – subject to what I advise below regarding how the process should be conducted and the delay in completing the appeal process – to correct the scoring, which will in all probability have the result (since there is no other reason, as far as I am aware, why Asla would not be a suitable contractor) of the tender being awarded to Asla rather than to M5.
19. I would however suggest to Consultant that the appeal authority follow a process. He should address correspondence to both M5 and Asla – not to the other tenderers, for none of them is affected by this matter – advising them of what he has discovered regarding the scoring of M5 and Asla. He should then invite both of them to make written representations regarding this finding. Since the appeal process has already been delayed

considerably (an aspect with which I shall deal below), it would be advisable to keep them to short time periods. The appeal authority will be able to decide whether he should give M5 and Asla a further opportunity to comment on one another's representations, either again in writing or orally, once he has considered them himself.

20. I find nothing in section 62 of the Systems Act or in Consultant's supply chain management policy that precludes the appeal authority from following such a procedure. It seems to me sensible and appropriate that he should do so. His decision is one of considerable financial significance, and a fair process of this kind will enable him to understand better why the initial scoring was apparently incorrect. It would also be the correct thing to do vis-à-vis M5, which has at least a legitimate expectation at this stage of being heard on the question of whether the tender awarded to it should instead be awarded to Asla.

#### The delay in the appeal process

21. In terms of section 62(5) of the Systems Act, the appeal authority must commence with an appeal within six weeks and decide the appeal within a reasonable period. It is not apparent that the appeal authority did either of these things. (I must add that the acting municipal manager was only

appointed in that position with effect from 1 November 2007, so that the delay was not caused by him.)

22. It is now a somewhat remarkable eight months since Blue Whale lodged its appeal. The probabilities are considerable that the appeal authority did not commence the appeal process within six weeks from 10 May 2007. In any event, it is to my mind inconceivable, given the limited nature and the lack of substance of Blue Whale's appeal, that eight months could be considered anything but an unreasonable period in which to decide the appeal.
  
23. It does not however follow from this that the appeal authority now can no longer come to a decision on appeal. Section 6(3)(b) of the Promotion of Administrative Justice Act 3 of 2000 envisages that where an administrative official has failed to take a decision within the period prescribed by law, proceedings for judicial review may be instituted "on the ground that the administrator has a duty to take the decision notwithstanding the expiration of that period". This gives effect to the common-law position, according to which it has always been possible to obtain a *mandamus* compelling a slow or reluctant administrator to take action or make a decision (Currie and Klaaren *The Promotion of Administrative Justice Act Benchbook* p 168).

24. I am therefore of the view that the appeal authority should continue with the appeal, notwithstanding the rather inordinate delay to date. Indeed, it would be inappropriate for the appeal authority not to do so. If his determination of the appeal is out of time, that is a point to be taken by a dissatisfied tenderer on review in due course, not by the appeal authority *mero motu*. The appeal authority is seized of the appeal, and should determine it.

**Rights accrued by M5**

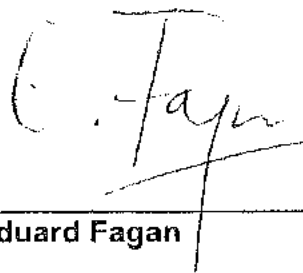
25. In the judgment of Cleaver J in *Jicama 17 (Pty) Ltd v West Coast District Municipality* 2006 (1) SA 116 (C) the Court held that a binding agreement came into force upon the acceptance of a tender, notwithstanding the fact that a formal contract still remained to be signed (at 121B-D). What the Court found, was that in the event of such a contract not being signed, the successful tenderer would nevertheless be entitled to rely on the acceptance of its tender as constituting a binding agreement.
26. There is one fact in the present matter which may serve to take it outside of the ambit of the *Jicama* judgment, namely that the letter by which Consultant informed M5 of its success in the tendering process expressly stated that a binding contract would be constituted by the completion and signing of the formal contract. That was not the situation in the *Jicama*

case. I am however of the view that that difference is probably insufficient to result in a finding contrary to that in the judgment. The letter to M5 commences by advising it that "your enterprise has been appointed as the successful tenderer to the provision of abovementioned service".

27. The fact that M5 may have acquired rights makes no difference to the question of what Consultant is to do on appeal, though. On the reasoning of Cleaver J, it will almost invariably be so that on award of a tender, rights accrue – subject, however, to the outcome of the appeal process for which legislative provision is made.

**Whether the appeal authority can decide that new tenders should be invited**

28. The appeal authority's power is limited to the determination of the appeal. He cannot invite new tenders. He can only make a finding on the basis of the existing tender process, aimed at ensuring that the ultimate decision of Consultant is the correct one.



Eduard Fagan

Chambers

Cape Town

22 January 2008



Republic of South Africa

P25/61  
C1/21

**IN THE HIGH COURT OF SOUTH AFRICA  
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)**

Case No: 6277/08  
**"REPORTABLE"**

In the matter between:

**M5 DEVELOPMENTS (CAPE) (PTY) LTD**

**Applicant**

and

**CC GROENEWALD N.O  
OVERSTRAND MUNICIPALITY  
ASLA DEVCO (PTY) LIMITED  
BLUE WHALE PROPERTY PROJECTS CC**

**First Respondent  
Second Respondent  
Third Respondent  
Fourth Respondent**

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**JUDGMENT: 12 FEBRUARY 2009**

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**Le Grange J:**

[1] In this matter the Applicant (M5) seeks an order reviewing and setting aside a decision by First Respondent (Groenewald), the acting municipal manager, that a tender (SC055/2007) of Second Respondent (the Municipality), which was allocated by the Tender Adjudication Committee of Second Respondent to the Applicant, be re-allocated to Third Respondent (Asla).

[2] M5 furthermore seeks a declaratory order that a valid and binding contract came into existence between the Municipality and itself, pursuant to the allocation of the tender to M5, alternatively that Applicant is entitled to enter into such contract, thereby giving effect to the allocation of the tender.

[3] The factual matrix is mainly common cause between the parties in this matter.

[4] The Municipality, in the first quarter of 2007, published an invitation to tender for services that had to be rendered as the implementing agent for housing projects in the Overstrand Municipal Area.

[5] M5 duly submitted its tender documents and from the 16 tender documents that were received by the Municipality, only 5 tenders were regarded as *bona fide*, from *inter alia* M5, Asla and Blue Whale (Fourth Respondent).

[6] The Municipality thereafter appointed an independent consultant firm, namely ICE Group (Pty) Ltd ("ICE"), who recommended that the tender be allocated to M5.

[7] The Municipality's Tender Evaluation Committee, pursuant to the recommendation of ICE, made a formal recommendation that the tender be allocated to M5.

[8] At a subsequent meeting of the Municipality's Tender Adjudication Committee

held in April 2007, a resolution was adopted whereby the tender was allocated to M5 in accordance with the aforementioned recommendation.

[9] M5 was informed of the allocation of the tender to it by means of a letter dated 28 April 2007. The letter records the following relevant information:-

*"It is our pleasure to inform you that your tender for the provision of the abovementioned service has successfully complied with the conditions and specifications of the tender as set by the Municipality and that your enterprise has been appointed as the successful tenderer for the provision of abovementioned service.*

*Upon completion and signature of the formal Contract and upon the issuing of this letter of acceptance by the Municipality a binding contract will be established between your enterprise and the Municipality for the above mentioned service.*

*You are advised that all the terms and conditions of tender as well as the tender specifications and requirements continue to apply to the contract for the duration thereof, and that any variation or failure to comply with the tender specifications and requirements, will amount to a breach of contract, unless approved in writing by the Municipality.*

*Please be informed that the unsuccessful tenderers have a right of appeal in terms of Section 62 of the Local Government Municipal Systems Act, 2000 (Act 32 of 2000) against the decision taken by the Tender Committee, which right of appeal must be exercised within 21 days from date of this letter.*

*After expiry of the appeal period, you will be required to sign the service contract before the implementation date."*

[10] Letters were also forwarded to the unsuccessful tenderers, in which it was

stated that they are afforded 21 days in which to lodge appeals in terms of Section 62 of the Local Government: Municipal Systems Act, No 32 of 2000 ("the Systems Act") against the allocation of the tender.

[11] Blue Whale lodged an appeal timeously. Asla failed to lodge an appeal within the prescribed time period, but filed a notice of an appeal after the expiry date. From May 2007 to January 2008, no steps were taken by any official of the Municipality to finalize the appeal. Groenewald, who has been employed by the Municipality in various positions, was the acting municipal manager between the periods 1 November 2007 to 31 March 2008. The previous municipal manager had resigned and a new municipal manager was appointed with effect from 1 April 2008.

[12] In February 2008, Groenewald dismissed the appeal of Blue Whale and in a letter dated 12 February 2008 recorded the reason for the decision as follows: "*I have considered your representations and have to inform you that your appeal had to be rejected as no fault could be found regarding the adjudication process.*"

[13] Groenewald however, whilst considering the appeal lodged by Blue Whale, discovered that there were certain differences between the evaluation done by ICE and the information submitted to the Municipality's Tender Adjudication Committee by the Tender Evaluation Committee. According to Groenewald, in the category (empowerment of workforce/development of human resources), certain points were awarded incorrectly to M5 and Asla. In a letter dated 29 January 2008, M5 was informed about this. The letter also records the rescoring of the points of the category in question and Asla as the bid winner by 0.1 point.

[14] M5 was invited to make written representations to Groenewald regarding all the matters raised in the letter, within a period of one week. M5 was also requested to submit, along with the written representations, further information and documentation, including a confirmatory letter by M5's chartered accountants relating to the points claimed in the category in question in terms of which the tender was evaluated.

[15] In a further letter dated 7 February 2008, Groenewald indicated that if he did not receive anything from M5 by 11 February 2008, he would assume that M5 intends not to avail itself of the opportunity to participate in the appeal process to assist the appeal authority reaching a correct decision.

[16] M5's attorneys responded on 11 February 2008 with a request that M5 be afforded an extension of time as it was advised by its auditors that it would take approximately 14 days from that date, to provide and furnish First Respondent with the relevant information and documentation. M5's attorneys also made reference in the letter that 1 point was awarded under a particular heading "Local Content" to M5, when in fact it qualifies for the full 3 points and the rights of M5 were reserved in that regard.

[17] Groenewald, notwithstanding this requests, informed M5 on 12 February 2008 that as the duly appointed appeal authority, he came to the conclusion that in the category (empowerment of workforce/development of human resources) certain

points were incorrectly scored and are to be awarded to M5 and Asla. As a result of the rescoring, M5 achieved 92.3 points and Asla 92.4 points. Groenewald re-allocated the tender to Asla and informed M5 that its tender was unsuccessful.

[18] Against this background M5, on an urgent basis, launched these proceedings. The founding affidavit filed on behalf of M5 relies upon a number of review grounds. As a result of my view of the matter, I deem it unnecessary to deal with all of these grounds.

[19] The main attack against Groenewald's decision is firstly, the Municipality has failed to adopt and implement a Supply Chain Management Policy, and for that reason Groenewald as appeal authority, was not authorized in terms of the empowering provisions of either the Local Government: Municipal Systems Act 32 of 2000, the Preferential Procurement Policy Framework Act No 5 of 2000: Municipal Finance Management Act No. 56 of 2003 (MFMA), or the Municipal Supply Chain Management Regulations (The Regulations) as published in terms of Section 168 of the MFMA, to make the decision to re-allocate the tender to Asla. Secondly, the appeal of Asla was time barred and therefore Groenewald could not have considered their appeal. Lastly, Groenewald, as appeal authority failed to apply the *audi alteram partem* rule. Moreover, Groenewald became *functus officio* when he advised Blue Whale that its appeal had been dismissed and acted *ultra vires* in re-allocating the tender to Asla.

[20] Mr. J.W. Olivier (SC) assisted by Mr. R.B. Engela appeared on behalf of M5.

Mr. E Fagan appeared for Groenewald and the Municipality and Mr. H.C Schreuder for Asla. Blue Whale did not oppose the Application.

[21] Mr. Olivier and Mr. Fagan addressed me extensively on the relevant legislation pertaining to matters relating to tenders. Reference was also made to decided cases, including Reader and Another v Ikin and Another 2008 (2) SA 582 (C) and Syntell (Pty) Ltd v The City of Cape Town and Another (CPD case no 17780/07). See also: The Municipality of the City of Cape Town v Reader and Another (719/2007) [2008] ZASCA 130 dated 14 November 2008.

[22] The principal submissions by Mr. Olivier are firstly, that the purported exercise of the power in terms of the provisions of section 62 of the Systems Act, was unlawful and illegitimate as the decision *in casu*, was not taken by a staff member in terms of a power or duty delegated in terms of section 59 of Part 3 of the Systems Act, but by the Bid Adjudication Committee in accordance with a committee system and accordingly there was no right of appeal for Blue Whale. Moreover, Second Respondent's failure to comply with the express provisions of the MFM Act and the prescribed regulatory framework could not have provided Groenewald with an appeal authority in terms of the Systems Act. Secondly, even if Groenewald was vested with an appeal authority, he failed to apply the *audi alterem partem* rule and the decision to re-allocate the tender to Asla was irrational as he dismissed the appeal of Blue Whale that was before him and became *functus officio*.

[23] The submissions by Mr. Fagan, briefly stated, are that the Acting Municipal

Manager was the relevant appeal authority in terms of the provisions of section 62 (4) of the Systems Act, and therefore had the necessary authority to hear an appeal and did not act *ultra vires*. He also contended that there is no validity in the argument that Groenewald should have applied the Supplied Chain Management Policy as the provisions of section 62 of the Systems Act makes adequate provisions for Groenewald to hear an appeal, which process is separate from the tender evaluation and adjudication process. The legal validity thereof must, according to Mr. Fagan, be judged on its own terms. With regard to the attack by M5 on the procedural fairness of the process, it was argued on behalf of Groenewald and Asla that M5 was given an opportunity to be heard, but did not avail itself of such opportunity. It was also argued that Groenewald was not *functus officio* when he advised Blue Whale that its appeal had been dismissed. Furthermore, the appeal process had not come to an end and Groenewald was within his rights to re-allocate the tender to Asla, as no rights accrued to M5.

[24] Mr H.C Schreuder agreed mainly with the submissions made by Mr. Fagan, and contended that unless there are certain objective criteria that justify the award to another tenderer, the contract should be awarded to the tenderer who scored the highest point, which was Asla.

[25] It is a fundamental principle of the Rule of Law that the exercise of a public power is only legitimate where it is lawful. It is central to our constitutional order that the legislature and the executive are in every sphere constrained by the principle that they may exercise no power and perform no function beyond those

conferred on them by law. In this regard see Fedsure Life Assurance v Greater Johannesburg TMC 1999(1) SA 374 (CC) at para's 56 and 58 and Minister of Local Government, Housing and Traditional Affairs, Kwazulu-Natal v Umlambo Trading 29 CC and Others 2008 (1) SA 396 (SCA) at 401 H.

[26] Section 217 (1) of the Constitution provides that when an organ of state, in the local sphere of government, in contracts for goods or services, it must be done in accordance with a system which is fair, equitable, transparent, competitive and cost effective. National legislation has to prescribe a framework in which the policy, referred to in section 217 of the Constitution, must be implemented. See also: Darson Construction (Pty) Ltd v City of Cape Town 2007 (4) SA 488 (C) at page 498 D-E.

[27] This principle is confirmed in section 112(1) of the Local Government: Municipal Finance Management Act, No. 56 of 2003 (the MFM Act) which, *inter alia*, provides that the supply chain 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.

[28] The MFM Act mainly deals with the financial affairs of municipalities and other institutions in the local spheres of government to secure sound and sustainable management. Section 3 (2) thereof provides that in the event of any inconsistency between a provision of the MFM Act and any other legislation in force, then the MFM Act takes effect, and which regulates any aspect of the physical and financial affairs

of municipalities or municipal entities, a provision of the MFM Act prevails.

[29] Part 1 of chapter 11 of the MFM Act deals with Supply Chain Management with regard to the procurement of goods and services. In terms of Section 111, each municipality must have, and implement a Supply Chain Management Policy which gives effect to the provisions of Part 1.

[30] It is not in dispute that the Municipality did not adopt and implement a Supply Chain Management Policy at the time that Groenewald took the decision to re-allocate the tender to Asla.

[31] Section 112 of the MFMA likewise provides that the Supply Chain Management Policy of a municipality or a municipal entity must be fair, equitable, transparent, competitive, cost-effective and comply with the prescribed regulatory framework for Municipal Supply Chain Management. In terms of the provisions of section 83 and 85 of the Municipal Systems Act, 32 of 2000, detailed requirements are stipulated for the procurement of services through agreements with non-public sector providers. The purpose of the prescribed regulatory framework is to ensure a fair and transparent service to avoid corruption and fraud within the system and to preserve ethics to any service that is delivered by the Municipality. It also highlights oversight and accountability and ensures that municipal managers abide by these ethical rules.

[32] Returning to the undisputed facts of this matter, the decision by the

Municipality to award the tender to M5 was made by its Tender Adjudication Committee. The members of this committee were the Chief Financial Officer (the Chairperson), the Director of Infrastructure, the Director of Community Services, the Director of Economic Development and the Head of Management Services. These persons are all staff members of the Municipality and three members constitute a quorum. From the composition of this committee, all of whom are staff members, it is evident that the decision on the tender was taken by staff members other than the municipal manager.

[33] The argument that the Tender Adjudication Committee lacked the necessary written delegation as it did not form part of the record provided to M5 by Groenewald and the Municipality, is in my view without merit. This issue was raised for the first time by M5 in its replying papers. According to the answering affidavit filed by Groenewald, the composition of the Tender Adjudication Committee had been determined by the council of the Municipality. There is therefore no basis to come to the conclusion that the Committee lacked the necessary written delegation. The argument therefore that the decision in question was not taken by a staff member in terms of a power or duty delegated by section 59 of Part 3 of the Systems Act is therefore without substance. I am satisfied that, in terms of the provisions of section 62 (4) of the Systems Act, the municipal manager is the appeal authority.

[34] It is further common cause that the Municipal Supply Chain Policy was not officially implemented, although the policy was applied in the process of this matter.

Groenewald, however, relied on the provisions of the Systems Act to consider the appeal of Blue Whale. The contention on behalf of M5 that Groenewald acted *ultra vires* as the legislator could never have intended a further general appeal procedure in terms of section 62 of the Systems Act if a specific appeal procedure has been set out in regulation 49 and 15 of the Supply Chain Management System, is misconceived.

[35] Despite the provisions of Section 111 of the MFMA which stipulates that each municipality must have and implement a supply chain management policy, the legislature clearly envisage a period, after the enactment of the MFMA, that municipalities will not have a supply chain management policy in place. It will be untenable in law, that during these periods no internal appeals could be heard. Section 62 of the Systems Act, is therefore in my view, the operative provision.

[36] In *casu*, the tender was awarded to M5 on condition that the unsuccessful tenderers have a right of appeal against the decision taken by the tender committee, which must be exercised within 21 days. Blue Whale exercised its rights and Asla filed a notice of appeal outside the 21-day time limit.

[37] Groenewald, in my view, correctly considered the appeal of Blue Whale as the tender awarded to M5 by the Municipality, was conditional and subject to a 21-day appeal process. See also Syntell *supra* at paragraph 58.

[38] The issue that needs closer scrutiny is whether Groenewald acted within his authority as outlined in the Municipal Systems Act and complied with lawful administrative action when he dismissed the Blue Whale's appeal, and *mero muto*, revoked the decision to allocate the tender to M5 and re-allocate it to Asla. In this regard see Logbo Properties CC v Bedderson N.O in and Others 2003 (2) SA 460 (SCA) at 465 F; Transnet LTD v Goodman Brothers (PTY) LTD 2001 (1) SA 853 (SCA); Metro Projects CC v Klerksdorp Local Municipalities 2004 (1) SA 16 (SCA) at 21 B-D and Promotion of Administrative Justice Act of 2000, section 6 (2)(a)(i) and 6 (2)(i).

[39] The relevant provisions of section 62 of the Systems Act provide as follows:-

*"(1) A person whose rights are affected by a decision taken by a political structure, political office bearer, councillor or staff member of a municipality in terms of a power or duty delegated or sub delegated by a delegating authority to the political structure, political office bearer, councillor or staff member, may appeal against that decision by giving written notice of the appeal and reasons to the municipal manager within 21 days of the date of the notification of the decision.*

*(2) The municipal manager must promptly submit the appeal to the appropriate appeal authority mentioned in subsection (4).*

*(3) The appeal authority must consider the appeal and confirm, vary or revoke the decision, but no such variation or revocation of a decision may detract from any rights that may have accrued as a result of the decision.*

(4) *When the appeal is against a decision taken by-*

(a) *a staff member other than the municipal manager, the municipal manager is the appeal authority;*

(b).....

(c).....

(5).....

6) *The provisions of this section do not detract from any appropriate appeal procedure provided for in any other applicable law."*

[40] It is common cause on the papers filed, that Groenewald only considered the appeal of Blue Whale and after due consideration dismissed it on the basis that no fault could be found regarding the adjudication process. The contention by Mr Fagan that Asla was essentially the unintended beneficiary of the appeal, lodged timeously by Blue Whale, is in my view misconceived.

[41] I am in agreement with counsel for the respective parties that an appeal in terms of section 62 of the Systems Act is a wide appeal. But the re-hearing and or fresh determination by the appeal authority must rationally be relevant to the subject of the appeal. See Deville, Judicial Review of Administrative Actions in South Africa, Lexis Nexis Butterworths, 2003, at pages 384 – 389; Baxter, Administrative Law, Juta & Co Limited 1984 at page 256 and Tikly and Others v Johannes N.O and Others 1963 (2) SA 588 (T) at 591 G. Moreover, it can only be the parties involved in

the appeal that can adduce new or further evidence and no one else. The following dictum in the matter of The Municipality of the City of Cape Town v Reader and Another (719/2007 [2008] ZASCA 130 (14 November 2008) at para 31, is in my view instructive:-

*"[31]..... the purpose of section 62 as a whole is to give to the dissatisfied applicant for permission – and to no one else – an opportunity for the matter to be reheard by a higher authority within the municipality."*

[42] The contention that Groenewald was in law obliged to, upon discovering an alleged scoring error whilst considering Blue Whale's appeal, make a decision on the correct scoring and re-allocate the tender to Asla, is misconceived.

[43] The dissatisfied entity was Blue Whale who lodged its appeal timeously. The subject of the appeal which had to be considered was whether a correct decision was taken by the Municipality not to award the tender to Blue Whale. Section 62(3) clearly stipulates that the appeal authority must consider the appeal and confirm, vary or revoke the decision, on condition that no such variation or revocation may detract from any rights that may have accrued as a result of the decision.

[44] In considering the decision not to award the tender to Blue Whale, and coming to the conclusion that the appeal should be dismissed, the authority of Groenewald in terms of the provisions of section 62 was complete and his decision final. The contention that Groenewald was not *functus officio*, as he informed the relevant parties on the same day of his decision, is without merit.

The letter to Blue Whale dated 12 February 2008, records the following:

*"...I have considered your representations and have to inform you that your appeal had to be rejected as no fault could be found regarding the adjudication process. Regarding your questions, I have to advise that all the tenders were evaluated on the same basis. In terms of this evaluation, (my underlining) the tender was awarded to the bidder with the highest points which was far higher than your tender, even with preferential points awarded to you..."*

[45] The facts speak for itself, Groenewald could only have dismissed Blue Whale's appeal first before re-allocating the tender to Asla.

[46] Groenewald, in my view, erred and committed a serious misdirection to re-allocate the tender to Asla. There was no valid appeal before him from Asla. Once the appeal was dismissed, Groenewald's authority in terms of the provisions of section 62 had lapsed and he became *funtus officio*. Moreover, pursuant to the lapse of the 21 days appeal period and in the absence of a successful appeal, rights in my view, accrued to M5 and Groenewald was incapable of varying or revoking a decision as provided in terms of s 62(3).

[47] Even if Groenewald was entitled to re-allocate the tender to Asla when dismissing the appeal of Blue Whale, the administrative process followed, was in my view grossly unfair and fundamentally flawed. On that basis alone, the decision of Groenewald needs to be set aside.

[48] The provisions of PAJA provide that fair administrative procedure depends on the circumstance of each case. Section 3(3) of PAJA stipulates that in order to give effect to the right to procedurally fair administrative action, an administrator may, in his or her discretion, also give a person an opportunity to obtain assistance and, in serious or complex cases, legal representations, present and dispute information and arguments and appear in person. Procedural fairness in terms of our common law also demands that the rules of natural justice, which embodies two fundamental principles, the right to be heard (*audi alteram partem*) and the rule against bias (*nemo iudex in sua causa*), should be adhered to. The right to be heard on appeal is not only consonant with the fundamental right to lawful and fair administrative action as entrenched in s 217 of the

Constitution, but also accorded with the common principles of natural justice, fairness and reasonableness. See further: Logbo Properties CC, *supra* at 472 B.

[49] The contention that Groenewald regarded it as important to determine the appeal as soon as reasonably possible and his decision not to afford M5 a further extension of time, to furnish him with the relevant information, was not procedurally unfair, is misconceived.

[50] M5 was alerted by Groenewald on 29 January 2008, by letter, of his concerns and sought the further information as requested. M5 immediately responded stating that legal advice was sought and its attorneys would make formal representations on their behalf. On Wednesday 6 February 2008, M5's attorneys responded and raised

their clients concerns. Groenewald replied the next day stating *inter alia*, that the appeal was not time-barred as the unsuccessful tenderer lodged its appeal timeously. M5 was also urged to participate in the appeal process failing which it would be assumed by close of business on the Monday (11 February 2008), that M5 did not want to avail itself of this opportunity. On Monday, before close of business, M5 requested a further extension of time for 14 days. They also mentioned their concerns with regard to the particular heading "*Local Content*". According to M5 it qualified for the full 3 points instead of the 1 point that was awarded to it and their rights are reserved in this regard.

[51] The request for an extension of time by M5 cannot be regarded as unreasonable having regard to the time frame in which the appeal was dealt with. Procedural fairness, on the facts of this case, demanded that Groenewald at least granted M5 the extension of time within which to furnish the necessary documentation, especially as the chartered accountants of M5 needed to confirm some of the information requested. There could also have been no prejudice suffered by the respective parties if an extension of time was granted. Moreover, M5 alerted Groenewald of a particular heading in which they disputed the points allocated to them. Groenewald, re-hearing the matter, should have at least allowed M5 to provide him with the necessary information or evidence as to their complaint. His failure to do so is in my view a gross irregularity.

[52] Inasmuch as Groenewald was of the view that the decision to award the tender to M5 was flawed, in dismissing the appeal of Blue Whale, the Municipality is

bound by its decision to award the tender to M5 unless and until they are set aside by a court of law. See: Oudekraal Estates (Pty) Ltd v City of Cape Town and Others 2004 (6) SA 222 at paragraph 26.

[53] For the reasons stated I am satisfied that the First Respondent's decision falls to be set aside.

[54] In the Result the following order is made:

1. The First Respondent's decision to re-allocate the tender is reviewed and set aside. The Applicant is entitled to enter into a contract with Second Respondent pursuant to the allocation of tender SC055/2007.
2. The costs of this application be paid by First, Second and Third Respondents jointly and severally. The costs include the costs of two counsel.

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**LE GRANGE, J**

P44/61  
C20/21

Republic of South Africa

**IN THE HIGH COURT OF SOUTH AFRICA  
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)**

Case No: 6277/08  
**"REPORTABLE"**

In the matter between:

**M5 DEVELOPMENTS (CAPE) (PTY) LTD**  
**Applicant**

and

<b>CC GROENEWALD N.O</b>	<b>First</b>
<b>Respondent</b>	
<b>OVERSTRAND MUNICIPALITY</b>	<b>Second</b>
<b>Respondent</b>	
<b>ASLA DEVCO (PTY) LIMITED</b>	<b>Third</b>
<b>Respondent</b>	
<b>BLUE WHALE PROPERTY PROJECTS CC</b>	<b>Fourth</b>
<b>Respondent</b>	

Matter was heard on the 30<sup>th</sup> of October 2008 and judgment was reserved on this date.

Counsel for Applicant:	Adv JW Olivier(SC) & Adv RB Engela
Attorneys for Applicant:	Malan Laas Inc c/o De Klerk & Van
Gend	

Counsel for First and Second Respondents:	Adv E Fagan
Attorneys for First and Second Respondents:	Fairbridges Attorneys

Counsel for Third Respondent:	Adv HC Schreuder
Attorneys for Third Respondent:	Louw Du Plessis Inc

Judgment was delivered on 12 February 2009.

P46/61  
Δ 1/16**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA****JUDGMENT**

Case no: 283/09

In the matter between:

**CC GROENEWALD NO**

First Appellant

**OVERSTRAND MUNICIPALITY**

Second Appellant

**ASLA DEVCO (PTY) LTD**

Third Appellant

and

**M5 DEVELOPMENTS (CAPE) (PTY) LTD**

Respondent

**Neutral citation:** *CC Groenewald v M5 Developments* (283/09) [2010]

ZASCA 47 (31 March 2010)

**Coram:** NAVSA, CLOETE, LEWIS, MHLANTLA and LEACH JJA**Heard:** 12 March 2010**Delivered:** 31 March 2010

**Summary:** Local authority – municipal tender – unsuccessful tenderer having a right of appeal under s 62 of the Local Government: Municipal Systems Act 32 of 2000 – appeal authority not entitled to award tender to another unsuccessful tenderer who did not appeal.

P47/161  
Δ 2/16

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ORDER

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**On appeal from:** Western Cape High Court, Cape Town (Le Grange J sitting as a court of first instance).

The appeal is dismissed with costs, such costs to include the costs of two counsel.

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JUDGMENT

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LEACH JA (NAVSA, CLOETE, LEWIS and MHLANTLA JJA concurring)

[1] As this court has recently observed, awards of tenders in the public sector are a fruitful source of litigation which has led to courts being swamped with cases concerning complaints about the award of contracts.<sup>1</sup> This is yet another such case. It arises out of the award of a municipal contract by the second appellant, the Overstrand Municipality, to one of several entities who had tendered for it.

[2] As I shall set out more fully below, the tender of the respondent ('M5') was initially accepted but, pursuant to an appeal, the first appellant, Mr CC Groenewald, who was at the time the acting municipal manager, reversed that

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<sup>1</sup> Per Harms DP in *Moseme Road Construction CC & others v King Civil Engineering Contractors (Pty) Ltd & another* [2010] ZASCA 13 para 1.

decision and awarded the contract to the third appellant ('ASLA'). This led to M5 initiating review proceedings in the Western Cape High Court, Cape Town which set aside the municipal manager's decision to award of the contract to ASLA and declared M5 to be 'entitled to enter into a contract with (the municipality) pursuant to the allocation of (the tender)'. With leave of the court a quo, the first appellant, the municipality and ASLA now appeal to this court, contending that the review ought to have been dismissed.

[3] Section 217(1) of the Constitution requires organs of state, including municipalities, to contract for goods and services in accordance with a 'fair, equitable, competitive and cost-effective' system. The Local Government: Municipal Systems Act 32 of 2000 (the Systems Act) and the Local Government: Municipal Finance Management Act 56 of 2003 (the Finance Management Act) were designed to ensure compliance with this obligation.<sup>2</sup> At the same time, s 217(2) of the Constitution further provides that this obligation does not prevent an organ of state from implementing a procurement policy by providing for 'categories of preference in the allocation of contracts' and 'the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination'. In order to comply with s 217(3) of the Constitution which requires national legislation to prescribe a framework within which the policy in s 217(2) is to be implemented, the Preferential Procurement Policy Framework Act 5 of 2000 (the PPPF Act) was

<sup>2</sup> See *Municipal Manager: Qaukeni Local Municipality & another v FV General Trading CC* 2010 (1) SA 356 (SCA) [2009] ZASCA 66 para 11.

passed, s 5 of which empowers the Minister of Finance to make regulations to provide a framework for the implementation of a procurement process.

[4] In order to achieve a fair, equitable, competitive and cost-effective system for the procurement of municipal services, a municipality is obliged by s 111 of the Finance Management Act to have and implement a supply chain management policy which, under s 112 of that Act, must comply with a prescribed regulatory framework. That framework<sup>3</sup> also requires goods and services above a transaction sum of R200 000 to be procured by way of a competitive bidding process.<sup>4</sup> In addition, the regulations promulgated under the PPPF Act (the 'preferential procurement regulations') which, with some justification, have been criticised both in regard to their clarity as well as their content,<sup>5</sup> provide for the use of a formula for the evaluation of tenders in which points are awarded in respect of various criteria.

[5] In February 2007, the municipality intended to develop some 3 000 low-cost houses. In order to facilitate this project and to comply with its constitutional and statutory obligations, it published an advertisement inviting tenders for the appointment of an 'implementation agent' for its housing projects. The advertisement specifically stated that the municipality did not bind itself to accept the lowest or any tender and that tenders would be

<sup>3</sup> Promulgated in GN R 868 in GG 27636 of 30 May 2005.

<sup>4</sup> *Quakeni* paras 12 and 13.

<sup>5</sup> See eg *Hidro-Tech Systems (Pty) Ltd v City of Cape Town & others* 2010 (1) SA 483 (C) [2009] ZAWCHC 125 paras 51-53.

'subject to the Standard Conditions of Tender, the Preferential Procurement Regulations of 2001 and (its) Supply Chain Management Policy'.

[6] This advertisement was misleading as in fact the municipality had not adopted a supply chain management policy, but nothing turns on its failure to do so. What is important is that the advertisement led to 16 tenders being received by the municipality, five of which were considered to be acceptable. These included tenders from M5, ASLA and a close corporation known as Blue Whale Property CC ('Blue Whale').

[7] The municipality employed a firm of consulting engineers, ICE Group (Pty) Ltd ('ICE'), to evaluate these tenders. This it did in detail, scoring each in terms of the applicable formula prescribed by the preferential procurement regulations. It is unnecessary to set out the formula in question, it being sufficient for present purposes to record that it involved scoring each tender out of a maximum of 100 points, ten of which (so-called 'PPPFA' points) related to those goals set out in s 2(1)(d) of the PPPF Act.

[8] Having evaluated the tenders, ICE compiled a written report to the municipality dated 23 March 2007 in which it stated that the two tenders most worthy of consideration were those of M5, which it had scored at 91.6 points, and ASLA, which had been awarded 91 points. The difference between the two related to the scores allocated in respect of the ten PPPFA points, M5

having been given a single point and ASLA 0.6 points in that regard – their scores otherwise having been identical. The other three tenders lagged far behind in the scoring stakes. Those in third and fourth places were scored at 78.94 and 40.25 points respectively, while that of Blue Whale languished in a very distant last place with but 17.25 points. Based solely on its slightly higher score, ICE recommended that M5 should be appointed rather than ASLA.

[9] ICE's report was placed before the municipality's tender evaluation committee. It also decided to recommend to the municipality's tender adjudication committee that M5 should be awarded the contract.

[10] On 13 April 2007 the municipality's tender adjudication committee met and accepted the recommendations of ICE and the evaluation committee that M5 should be awarded the contract. Consequently, on 20 April 2007 M5 was informed that its tender had been successful. The four unsuccessful tenderers were simultaneously informed in writing of the outcome and that they had 21 days to lodge an appeal under s 62 of the Municipal Systems Act.

[11] Unhappy that it had been unsuccessful, Blue Whale decided to appeal, and lodged a notice within the stipulated period. ASLA also filed a notice of appeal in which it contended that the evaluation report of ICE had not been independent. But it did so only on 31 May 2007, almost three weeks out of time. Since the only appeal lodged in time was that of Blue Whale, and since

it clearly had no prospect of success, it is surprising to say the least that it took some nine months to finalise the appeal.

[12] In the meantime, the municipal manager when the appeal was launched, Mr Koekemoer, had been replaced by Groenewald, who was acting as municipal manager, and it was he who eventually determined the appeal and awarded the contract to ASLA. This he did despite being of the view that ASLA's appeal could not be considered and that of Blue Whale had to be dismissed.

[13] Groenewald explained how this somewhat surprising result came about. After he had been appointed to the post in November 2007, he went through the available documentation, including the reports of ICE and the evaluation committee, and was initially somewhat confused by the differences in the scoring. He discussed the matter with the chairperson of the tender evaluation committee, Ms La Cock, who advised him that the evaluation committee had received certain information relevant to the PPPFA points which contradicted that accepted by ICE, and that because it perceived that ICE had also erred in other respects of the scoring in regard to those points, it had re-assessed the tenders, increased the score of M5 to 94.3 points and that of ASLA to 93.4 points, but reduced Blue Whale's score to 15.25 points. None of this appears in the minutes of the tender evaluation committee or in its recommendation to the tender adjudication committee. Nevertheless, according to La Cock, as

M5 still retained a slight lead over ASLA, the evaluation committee had also decided to recommend M5.

[14] On considering this information, and although he accepted the validity of the criticism of ICE's scoring, Groenewald concluded that the evaluation committee had itself also incorrectly scored the tenders. Doing his own scoring exercise, he decided that ASLA ought to have been awarded 92.4 points, fractionally more than M5 to which he gave 92.3 points. As in his opinion ASLA had outscored M5, albeit by a minimal margin, he concluded that it and not M5 ought to have been awarded the contract.

[15] In the light of this, Groenewald considered himself to be on the horns of a dilemma. On the one hand, he thought that ASLA's appeal could not be entertained as it had been filed out of time while that of Blue Whale was devoid of merit and had to be dismissed. On the other, he felt it would be irregular, improper and, indeed, unconstitutional for M5 to be awarded a contract which the tender adjudication committee, on his scoring, ought to have awarded to ASLA.

[16] Finding himself in a quandary, Groenewald took legal advice. Having done so, and as part of what he viewed to be the overall appeal process, he wrote to both M5 and ASLA on 29 January 2008, informing them that he had difficulty in respect of the scoring and inviting them to make written

representations on certain issues on or before 6 February 2008. At the same time he made it quite clear to ASLA that its appeal could not be considered as it had been lodged out of time and that, in any event, there was no merit in its allegation as to ICE's lack of impartiality.

[17] Although ASLA responded swiftly to Groenewald's request to provide further information, M5 did not: and so the municipal manager wrote to it on 7 February 2008, extending the period for its response to 11 February 2008. In reply, however, attorneys acting for M5 wrote to him, stating that M5 could not provide the information requested in the time available and requesting a further extension of 14 days. Groenewald was not prepared to agree and, taking into account the fresh information furnished by ASLA, he increased its score to 92.4 points, a total slightly higher than the 91.6 points he had awarded M5. In the light of this, he felt duty bound to award the contract to ASLA. It was this decision that was the subject matter of M5's application for review which, in due course, was upheld in the court a quo.

[18] Although a plethora of issues was raised in the papers, the ambit of the dispute narrowed and only four issues were ventilated before this court of which only two need to be determined. The first is whether an appeal against the adjudication committee's award of the contract lay under s 62(1) of the Systems Act which provides:

'A person whose rights are affected by a decision taken by a political structure, political office bearer, councillor or staff member of a municipality in terms of a power or duty delegated or sub-delegated by a delegating authority to the political structure, political office bearer, councillor or staff member, may appeal against that decision by giving written notice of the appeal and reasons to the municipal manager within 21 days of the date of the notification of the decision.'

[19] In *City of Cape Town v Reader & others*<sup>6</sup> the issue arose whether a landowner had a right under s 62 to appeal against the approval of certain building plans for the erection of a structure on its neighbour's property. The majority held that s 62 gives no general right to appeal to those who object to a municipal planning permission or decision and that a neighbour, who was not a party to the application for the approval of the building plans, did not have a right directly affected by a decision on the application and thus had no right to appeal under s 62. The question whether an unsuccessful tenderer would have a right to appeal against the acceptance of the tender of another was specifically left open.

[20] In its papers in the application a quo, as well as in its heads of argument filed in this court, M5 argued both that ASLA was not a party to the appeal due to its notice of appeal having been filed late and that, as an unsuccessful tenderer, it did not have clearly defined rights adversely affected by the decision of the tender adjudication committee. Relying upon the majority

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<sup>6</sup> 2009 (1) SA 555 (SCA) [2008] ZASCA 130.

decision in *Reader* it therefore contended that neither ASLA (nor Blue Whale for that matter) had enjoyed a right to appeal under s 62 and that, on this basis alone, it ought not to have been awarded the contract. In argument, however, counsel for M5 stated that for purposes of the appeal he conceded that both ASLA and Blue Whale had enjoyed a right of appeal under s 62.

[21] This concession was correctly made. As I have mentioned, the decision of the majority in *Reader* was based on the reasoning that a neighbour could not be considered as a person whose rights were affected by the municipality's decision in regard to building plans approved for a neighbouring property as it had not been a party to the application process relating to those plans. In the present case, of course, the unsuccessful tenderers, together with M5, were all parties to the tender approval process. I therefore have no difficulty in concluding that both ASLA and Blue Whale were entitled to appeal under s 62.

[22] That brings me to the next issue, namely, whether Groenewald, as appeal authority, was entitled to award a contract to an unsuccessful tenderer who had not appealed against the initial decision to award it to another. Arguing that Groenewald had been perfectly entitled to do so, counsel for the appellants, as a starting point, contended that an appeal in terms of s 62 is a so-called 'wide appeal'<sup>7</sup> involving a re-hearing of the issues. From that base,

<sup>7</sup> Compare eg *Tikly & others v Johannes NO & others* 1963 (2) SA 588 (T) at 590F-591A; *Nichol & another v Registrar of Pension Funds & others* [2006] 1 All SA 589 (C) paras 19-22; *Gora Hoexter Administrative Law in South Africa* pp 66-68.

they argued that the award of a municipal contract was a matter falling within the public domain, involving a decision which had to be taken in the public interest in the light of the various constitutional and statutory imperatives I have already mentioned, including the necessity to advance those goals identified in the PPPF Act. The award of the contract therefore had to be considered in this constitutional and statutory context, and it was necessary for a municipality to act lawfully in doing so. In these circumstances, so the argument went, a municipal manager was bound in his re-hearing of the matter to award the contract to the party to whom it should have been awarded in the first place, even if that party had not appealed.

[23] Counsel for M5 conceded that s 62 involved an appeal in the wide sense and, for present purposes, I intend to accept that he was correct in doing so. But that does not mean that such an appeal requires the re-evaluation of each submitted tender. If that were so, administrative anarchy would result. In a simple case such as this involving the re-consideration of but three tenders, the appeal process took nine months and I shudder to think how long it would have taken had it been necessary to deal with, say, 50 tenders just because one unsuccessful tenderer had decided to appeal.

[24] The obvious fallacy in the appellants' argument is found on an examination of the section under which the appeal authority is empowered to act. Section 62(1) allows a person to appeal by giving 'written notice of the

appeal and reasons' to the municipal manager who, under s 62(2) has then to submit 'the appeal' – obviously the notice of appeal and the reasons lodged therewith under s 62(1) – to the appeal authority for it to consider 'the appeal' under s 62(3). Although in terms of this latter subsection the appeal authority is empowered to 'confirm, vary or revoke the decision' it exercises that power in the context of hearing 'the appeal' viz the appeal and the reasons lodged by the aggrieved person under s 62(1). That defines the ambit of the appeal, the sole issue being whether that aggrieved person should succeed for the reasons it has advanced. It is not for the appeal authority to reconsider all the tenders that had been submitted. If that had been the legislature's intention, it would have said so. It did not, and for obvious reasons. There is a need in matters of this nature for decisions to be made without unreasonable delay. If each and every tender had to be revisited it could easily become an administrative nightmare with the appeal authority having to hear representations from all parties who tendered, some of whom might have no realistic prospect of success, in regard to a myriad of issues, many of which might in due course be proved to be wholly irrelevant. This could never have been the legislature's intention. It is inconsistent with the requirement that a person aggrieved must file a notice of appeal with reasons within a fairly short period.

[25] Thus while I accept that the appeal is a wide one in the sense of a re-hearing, it is a re-hearing related to the limited issue of whether the party

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appealing should have been successful. In the context of a municipal tender, an appeal by a person whose tender was unsuccessful therefore does not entitle the appeal authority to reconsider all the tenders that were lodged and to decide whether the committee which adjudicated upon the tender ought to have awarded the contract to a person whose tender was not accepted, but who did not appeal against that decision (and who might no longer have any interest in being awarded the contract). In the present case, the appeal related solely to whether the contract should have been awarded to Blue Whale rather than M5 and, having concluded that issue against Blue Whale and declining to consider ASLA's appeal, the appeal should merely have been dismissed and the adjudication committee's decision left undisturbed.

[26] Furthermore, while Groenewald may have had concerns about the legality of the award of the tender, it is important to bear in mind that those concerns were based on his perceptions flowing from his own investigations on issues identified by him and that his conclusions were challenged by M5.

[27] It was suggested during argument that if Groenewald had not been empowered to award the contract to ASLA, the court a quo should have referred the matter back to the adjudication committee to enable it to reconsider the award, and that this court should therefore make such an order. There seems to me to be no merit in this suggestion. Groenewald's power under s 62(3) was to 'consider the appeal, and confirm, vary or revoke

the decision'. He had no power to refer the matter back to the adjudication committee for reconsideration. That being so, the court a quo could not have made an order on review that Groenewald could not have made, and neither can this court.

[28] The conclusion that Groenewald should merely have dismissed the appeal under s 62 renders it unnecessary to deal with any of the other questions raised on appeal. In regard to the question of costs, it is clear that the matter is of substantial importance and the parties were correctly agreed that costs should follow the event and that the employment of two counsel was justified.

[29] In the result, the following order is made:

'The appeal is dismissed with costs, such costs to include the costs of two counsel'.

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L E LEACH  
JUDGE OF APPEAL

APPEARANCES

1<sup>st</sup> & 2<sup>nd</sup> APPELLANTS: E W Fagan SC  
3<sup>rd</sup> APPELLANT: H C Schreuder

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