FOR: DEPARTMENT OF THE PREMIER

WESTERN CAPE PROVINCIAL GOVERNMENT

RE: ALLEGED IMPROPER PROCUREMENT OF COMMUNICATION SERVICES

OPINION

GEOFF BUDLENDER SC

Chambers
Cape Town
9 May 2012

INTRODUCTION

1. During 2011, the Department of the Premier in the Provincial Government of the Western Cape contracted with TBWA (Pty) Ltd (*"TBWA"*) for the provision of various communications services.[1]

2. The agreement commenced on 1 January 2011 and is due to terminate on 31 December 2012.[2] The Department of the Premier has the right to renew the agreement for a further period of one year.[3]

3. Various complaints were made to the Public Protector with regard to this matter. The Public Protector conducted an investigation, and on 16 April 2012 issued a provisional report.[4] The Premier and the Director-General of the Western Cape Provincial Government, amongst others, have been invited to comment on the provisional report.

4. The provisional report sets out a number of specific findings of the Public Protector. They include the following:

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1 A Service Level Agreement sets out the details of the contract. It is preceded by a prescribed 2-page contract which is signed after a bid is awarded: see Departmental Financial Instruction 2 of 2010.

2 Service Level Agreement, clause 2.1.

3 Service Level Agreement, clause 2.2.

4 Report No 1 of 2012/13.

"Finding 4: The appointment by the Acting Deputy Director-General of two Special Advisers of the Premier to the BEC [Bid Evaluation Committee] ***was unlawful, rendered the adjudication management and the entire procurement process invalid and constituted improper conduct and maladministration.***

10.2.5 The appointment by the Deputy Director-General of two Special Advisers of the Premier to the BEC was improper and unlawful. It resulted in a fundamental deficiency in the procurement process, which, due to the unlawful involvement of the Special Advisers did not comply with the procurement system envisaged by section 217 of the Constitution and the PFMA.

10.2.6 Due to the non-compliance of the procurement process with the constitutional imperatives in respect of the procurement of goods and services by organs of state, the process was invalid. The conduct of the DG, as the accounting officer ultimately responsible for procurement and the Acting Deputy Director-General to whom the authority to appoint the members of the BEC was delegated, was therefore unlawful, improper and amounted to maladministration.

Finding 5: The contract entered into between TBWA and the Department is invalid.

10.2.7 The agreement entered into between TBWA and the Department is therefore also invalid".[5]

5. The provisional report proposes the following remedial action in terms of section 182(1)(c) of the Constitution:

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5 Provisional report, pp 77 – 78.

"11.1 The Director-General to take urgent steps to:

11.1.1 immediately terminate the further execution of the invalid agreement between the Department and TBWA;

11.1.2 assess the current status of the services delivered by TBWA in terms of the invalid agreement with a view to determine how outstanding services will be procured by the Department involved, if necessary".[6]

6. The provisional report also deals with certain other aspects of the procurement process, which are not within my brief.

7. I have been asked to advise on the following matters:

7.1 Whether the participation by the Special Advisers on the Bid Specification and Evaluation Committees was unlawful.

7.2 If the answer to 7.1 is in the affirmative, whether, and with reference to all the relevant facts and circumstances, it invalidates the entire process and the contract that was entered into within TBWA.

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6 Provisional report, p 78.

7.3 If the answer to 7.2 is in the affirmative, whether, and taking into account the various interests that may be affected by a termination of the contract, the recommendation that it be terminated immediately is justified.

8. In this opinion, I consider the following matters in order to answer these questions:

8.1 The distinction between unlawful and improper conduct.

8.2 Is it unlawful for a Special Adviser to be a member of a Bid Evaluation Committee?[7] I address here the relevant legal prescripts, and also the functions of Special Advisers, and delegation by the accounting officer.

8.3 If it was unlawful for the Special Advisers to be members of the BEC, what action may the Provincial Government lawfully take to address the matter? In particular, may it take the action proposed in the provisional report?

8.4 If the Provincial Government makes application to the High Court for an order declaring that the award of the contract should be set aside, and the court finds that participation by the Special Advisers in the BEC was unlawful, what order is the Court likely to make?

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7 I do not separately address the question of the Bid Specification Committee. If participation in the BEC was unlawful, then nothing turns on the Bid Specification Committee. If participation in the BEC was lawful, the same would apply to the Bid Specification Committee.

THE DISTINCTION BETWEEN IMPROPER AND UNLAWFUL CONDUCT

9. The Public Protector has the power, under section 182(1)(a) of the Constitution and section 6(4) of the Public Protector Act 23 of 1994, to investigate conduct that is alleged to be improper or unlawful. Section 6(4)(a)(v), for example, refers to both of these forms of conduct: it refers to an act or omission by a person in the employ of government or performing a public function *"which results in unlawful or improper prejudice to any other person"*.

10. It is possible for conduct which is lawful nevertheless to be improper for one reason or another.

11. In my opinion it is important to distinguish between these two forms of conduct, as they permit different remedies:

    11.1 Conduct which is unlawful is in breach of a prescription of the law. The unlawfulness may affect the legal validity of the conduct in question. The unlawfulness may also lead to a variety of other remedies, such as disciplinary consequences.

    11.2 Improper conduct is conduct which is inappropriate in some way. The fact that conduct has been improper does not affect its legal validity. The conduct remains lawful and valid. The impropriety may however lead to a number of other remedies, one of which is disciplinary consequences.

12. Propriety is a matter of proper governance. Unlawfulness is a matter of law.

13. In this opinion, I focus particularly on the question of lawfulness. However, I also make reference to propriety at certain points.

IS IT LAWFUL FOR A SPECIAL ADVISER TO BE A MEMBER OF A BID EVALUATION COMMITTEE (BEC)?

14. Section 217(1) of the Constitution provides that where an organ of state contracts for goods or services, *"it must do so in accordance with a system which fair, equitable, transparent, competitive and cost-effective"*.

15. The effect of this is the following:

15.1 there must be a system of procurement in place;

15.2 the system must be fair, equitable, transparent, competitive and cost-effective; and

15.3 the procurement must be in accordance with that system.[8]

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8 Chief Executive Officer, South African Social Security Agency and Others v Cash Paymaster Services (Pty) Ltd 2012 (1) SA 216 (SCA) para [15].

16. Once the system is in place, and the system complies with the constitutional demands of section 217(1), the question whether any procurement is *"valid"* has to be answered with reference to that system.[9]

17. Consistently with the Constitution, section 31(a)(iii) of the Public Finance Management Act 1 of 1999 (*"PFMA"*) provides that the accounting officer for a department must ensure that that department has and maintains *"an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost-effective"*.

18. Section 76(4)(c) of the PFMA authorises the National Treasury to make regulations or issue instructions concerning *"the determination of a framework for an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost-effective"*. Such Treasury Regulations have been made.[10]

19. Regulation 16A3.2(a) provides that the supply chain management system must be *"fair, equitable, transparent, competitive and cost-effective"*.

20. In the present matter, there is such a *"system"* in place. It is contained in the Provincial Government's document of January 2004 headed "The Accounting

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9 Ibid.

10 Government Notice R225 of 15 March 2005 as amended.

Officer's System (Supply Chain Management)", which is also referred to as the *"AOS"*. It was distributed by the Chief Financial Officer under cover of Supply Chain Management Circular No 5 / 2004.

21. The role of a BEC is to evaluate the bids which have been received. The bids are then adjudicated by the Departmental Bid Committee (DBC) or Bid Adjudication Committee (BAC). As will appear below, in certain cases the BAC makes a recommendation to the accounting officer or to the person whom he or she has authorised by way of delegation, to decide who shall be awarded the tender. In certain other cases the BAC has the delegated power to make the award.

22. The issue is whether the *"system"* makes it unlawful for a Special Adviser to be a member of a BEC.

23. I have been unable to find anything in the Constitution, the PFMA, the Treasury Regulations or the AOS which explicitly makes it unlawful for a Special Adviser to be a member of a BEC.

24. The provisional report refers[11] in this connection to the Supply Chain Management Guide for Accounting Officers (*"the Guide"*), which was issued by National Treasury in February 2004.

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[11] Para 8.3.3, pp 57 – 58.

25. The Guide is precisely that: a guide. It states its purpose and function as follows:

> *"This Guide is intended to facilitate a general understanding of the changes to SCM practices. It must be seen as a step to assist accounting officers/authorities in the smooth implementation of supply chain management within their institutions".*[12]

26. Its legal status is put beyond any doubt:

> *"The Guide is not a substitute for legislation and should not be used for legal interpretations".*[13] [emphasis added]

27. On its own terms, therefore, the Guide does not prescribe the law. It does not purport even to provide an authoritative interpretation of the law.

28. Section 76(4) of the PFMA authorises the National Treasury to make regulations or issue instructions regarding procurement. Section 1 of the PFMA defines *"the Act"* as including any regulations and instructions issued in terms of section 76. The term plainly does not include a document issued as a *"Guide".*[14]

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12 Page 2.

13 Page 3.

14 I do not address here the question whether instructions issued in terms of section 76(4) are legally binding on the recipients. That issue raises different questions.

29. It follows that the Guide is not part of the Act, and is not (and does not purport to be) legally binding.

30. The provisional report also refers in this context to the National Treasury Circular dated 27 October 2004 under the title *"Implementation of Supply Chain Management"*.[15]

31. The Circular is not a regulation or an instruction in terms of section 76(4) of the PFMA. As the provisional report points out, the Circular *"aims to provide further guidance and clarity to accounting officers and supply chain management practitioners"*.[16] It is issued by the Chief Director: Norms and Standards in the National Treasury. He does not have or claim the power to make law.

32. The Circular states[17] that the evaluation committee *"should be composed of supply chain practitioners and officials from the user departments requiring the goods and/or services"*. The view of National Treasury should obviously be taken very seriously in the composition of an evaluation committee. The Circular is however not a legal prescript, and does not purport to be such.

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15 Para 8.3.4, pp 58 – 59.

16 Para 8.3.4.1. See also page 2 of the Circular.

17 Para 4.1(b).

33. The result is that neither the Guide nor the Circular purports to constitute binding law, or a binding interpretation of the law. The fact that conduct is inconsistent with the Guide or the Circular does not make it unlawful. The lawfulness has to be determined by reference to the Constitution, the PFMA, the Treasury Regulations and the AOS.

34. It may be that in a particular instance, inconsistency with the Guide or the Circular will give rise to an inference or conclusion that the conduct was improper. But as I have pointed out, that does not make the conduct unlawful.

35. It follows from what I have said that there is no provision in the law which explicitly prohibits the participation of Special Advisers as members of a Bid Evaluation Committee.

36. The question is then whether such a prohibition is to be implied in the provisions of the Constitution, the PFMA, the Treasury Regulations or the AOS. They are the legally binding prescripts.

37. Before considering whether there is an implied prohibition on Special Advisers being members of a BEC, I first consider the position and function of Special Advisers.

Special Advisers

38. The appointment of Special Advisers is dealt with in section 12A of the Public Service Act, 1994. It provides that executive authorities may appoint persons under contract:

> *"(a) to advise the executive authority on the exercise or performance of the executive authority's powers and duties;*
>
> *(b) to advise the executive authority on the development of policy that will promote the relevant department's objectives; or*
>
> *(c) to perform such other tasks as may be appropriate in respect of the exercise or performance of the executive authority's powers and duties".*

39. The focus of the functions of a Special Adviser is therefore on the functions of the relevant executive authority. A Special Adviser is not part of the department, and it is not part of his or her task to carry out the functions of the department. However, there is no suggestion in the Public Service Act that a Special Adviser operates in a watertight compartment, hermetically sealed from the department in question. There is no quarantine.

40. A Special Adviser will naturally, in the course of his or her daily functioning, engage with departmental officials in various ways. For example, departmental

officials may wish (for example) to obtain the advice of a Special Adviser as to what the likely attitude is of the executive authority to a particular policy question. There is nothing in the law which prevents a Special Adviser from attending meetings with departmental officials, or from assisting the department at its request – just as there is nothing in the law which prevents a departmental official from assisting a Special Adviser at his or her request, subject of course to departmental lines of authority and permission.

41. One of the questions which have arisen is whether a Special Adviser is an *"official"* in terms of the Treasury Regulations. The position is as follows:

41.1 Treasury Regulation 1.1 contains general definitions. The term *"official"* is defined as *"an employee contemplated in section 1 of the Public Service Act 1994 ..."*. The term *"employee"* is defined in section 1 of the Public Service Act as excluding a person appointed in terms of section 12A. Clearly, therefore, a Special Adviser is not an *"official"* in terms of Treasury Regulation 1.

41.2 Treasury Regulation 16A, which deals with Supply Chain Management, contains its own definition of *"official"*. It means *"a person in the employ of a Department ..."*. There is no reference to the Public Service Act. It is therefore, in principle, possible for a person to be an *"official"* in terms of Regulation 16A, even though he or she is not an employee contemplated in section 1 of the Public Service Act. However, he or she must be *"in the*

employ of a department". Special Advisers are not employed by the department. They are employed by the Government of the Republic of South Africa, having been appointed by the relevant executive authority in terms of section 12A(1) of the Public Service Act. It follows that Special Advisers are also not *"officials"* in terms of Treasury Regulation 16A.

42. Treasury Regulation 16A plainly contemplates, however, that it is not only *"officials"* who will participate in the supply chain management system. Thus:

42.1 Regulation 16A8.1 provides that all *"officials and other role players in a supply chain management system must comply with the highest ethical standards in other to promote mutual trust and respect and an environment where business can be conducted with integrity and in a fair and reasonable manner".*

42.2 Regulation 16A8.2 states that the National Treasury's Code of Conduct for Supply Chain Management Practitioners must be adhered to by all officials and other role players involved in supply chain management.

42.3 Regulation 16A8.3 requires a supply chain management official or other role player to recognise and disclose any conflict of interest that may arise, treat all suppliers and potential suppliers equitably, and act in various other ways which are stipulated to ensure the credibility and integrity of the supply chain management system.

42.4 Regulation 16A8.4 requires a supply chain management official or other role player to disclose any private or business interest in any contract to be awarded, and withdraw from participating in any manner in the process relating to that contract.

42.5 Regulation 16A9.1(b) requires the accounting officer to investigate any allegations against an official or other role player of corruption, improper conduct or failure to comply with the supply chain management system, and (when justified) to take steps against any such official or other role player and inform the relevant treasury of such steps, and to refer any conduct that may constitute an offence to the South African Police Service.

42.6 Regulation 16A9.1(f) requires the accounting officer to cancel a contract awarded to a supplier of goods or services if any official or other role player committed any corrupt or fraudulent act during the bidding process or the execution of the contract that benefitted the supplier.

43. From this it is clear that the critical legal prescript contemplates that persons other than officials will play a significant role in the supply chain management process and may influence the process of awarding a contract. The accounting officer is to take steps against such persons if they act in a corrupt or improper manner or fail to comply with the supply chain management system.

44. Against that background, the question is whether the legal prescripts impliedly prohibit a Special Adviser from being one of the other role players involved in the supply chain management, and specifically as a member of a BEC.

45. Again, I draw attention to the fact that the focus of my enquiry is on legality, not on propriety. Opinions may differ on the question of propriety. It is possible to contend, for example, that it is always improper for a Special Adviser to participate in the supply chain management process, or that it is only sometimes improper for a Special Adviser so to participate, depending on the circumstances of the particular case. That is not the question with which I am concerned for the present moment. For present purposes, my focus is on legality.

46. It is convenient, in this context, to consider the *"Dispensation for the appointment and remuneration of persons (Special Advisers) appointed to Executive Authorities on grounds of policy considerations in terms of section 12A of the Public Service Act, 1994"*. It was issued on 1 January 2010 and amended with effect from 1 April 2010.

47. The Dispensation sets out the compensation for Special Advisers as determined by Cabinet, and also deals with various other matters, including the role of Special Advisers. It is not an Act of Parliament or a duly issued regulation or notice under a statute. It is therefore not law. This does not, however, mean that it is without significance: it states authoritatively the policy with regard to Special Advisers. Conduct inconsistent with the Dispensation may constitute impropriety,

depending upon the facts of the matter. The Dispensation does not however render conduct unlawful purely by reason of such inconsistency.

48. It is noteworthy that the Dispensation states[18] that it would be *"inappropriate"* for a Special Adviser to serve on a statutory board or council (or similar body) for which that executive authority is individually or collectively accountable. The reason for this is stated: *"it could give rise to a direct or indirect conflict of interest or advice which could be biased or perceived to be biased"*. One can readily understand this: the executive authority is responsible for and has to make decisions with regard to such boards of councils, and may seek the advice of his or her Special Adviser in that regard. This could give rise to a direct or indirect conflict of interest, or biased advice, where the person advising the Minister or Premier is also a member of the body in respect of which the Minister or Premier is to make a decision.

49. I mention this provision of the Dispensation because it makes clear that those responsible for the Dispensation recognised that Special Advisers may serve on various bodies. It implies that there is no objection to this, except where the body concerned is a statutory board or council, or similar body, for which the executive authority is individually or collectively accountable. Again, that consideration will be relevant to the propriety of membership of other bodies, and not to its legality.

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[18] Para 8.

The question of delegation

50. The Provincial Accounting Officer has issued delegations with regard to Supply Chain Management. The most recent version was issued by the Accounting Officer on 25 May 2010 under Departmental Finance Instruction 2 of 2010.

51. The Accounting Officer has delegated certain powers to the Bid Adjudication Committee (BAC). They include matters such as the approval of Special bid conditions and process, and Special bid evaluation criteria. The BAC may in certain instances award an advertised bid on the recommendation of the evaluation committee. It may also cancel a bid upon receipt of *"an acceptable recommendation"* of the bid evaluation committee.

52. The only power conferred on what is referred to as the *"Evaluation committee"* is the power *"To evaluate and recommend bids"*.

53. The provisional report suggests, in summary, that it is to be implied that it is unlawful to appoint Special Advisers as members of a BEC because a BEC exercises delegated powers; the Accounting Officer retains responsibility for the exercise of delegated powers; and the Accounting Officer cannot exercise authority over people who are not officials, such as Special Advisers.

54. The difficulties in that argument are the following:

54.1 The BEC has not been delegated any decision-making power. It does not exercise any authority in terms of any statute. It has only the power to make recommendations to the persons and bodies which do exercise such authority.

54.2 Treasury Regulation 16A (which unlike the Guide and the Circular, constitutes law) specifically contemplates that there may be role players other than officials in the supply chain management system.

54.3 Treasury Regulation 16A9.1(b) specifically contemplates that the accounting officer may investigate and take action against such other role player who is guilty of corruption, improper conduct, failure to comply with the supply chain management system, or criminal conduct generally.

55. Under the circumstances, I do not think one can draw the inference that the law implicitly prohibits the participation of a Special Adviser in a BEC. As I have pointed out, there is no legal prescript which explicitly prohibits the participation of a Special Adviser in a BEC. It may be that the participation of a Special Adviser in a BEC will not be proper or prudent. However, I do not think that it can be said to be unlawful.

56. I now turn to consider what the consequence is if I am incorrect in this regard, and the participation of a Special Adviser in a BEC is prohibited by law.

THE PROVINCIAL GOVERNMENT'S REMEDY IF THE PARTICIPATION OF THE SPECIAL ADVISERS WAS UNLAWFUL

57. As I have noted, the provisional report proposes that the Director-General should *"immediately terminate the further execution of the invalid agreement between the Department and TBWA"*,[19] and *"assess the current state of the services delivered by TBWA in terms of the invalid agreement with a view to determining how outstanding services will be procured by the Departments involved, if necessary"*.[20]

58. The question of termination of the contract is dealt with in clause 16 of the Service Level Agreement. It authorises a party to terminate the agreement if the other party commits a breach of the terms of the agreement, and fails to remedy the breach within fourteen days of being required by written notice to do so. There is no suggestion that TBWA has breached the agreement.

59. The contract is also subject to the General Conditions of Contract, which are annexure "C" to the Service Level Agreement, to the extent that there is no conflict between the Service Level Agreement and the General Conditions of Contract.[21]

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19 Para 11.1.1, p 78.

20 Para 11.1.2, p 78.

21 Clause 24.

60. Clause 23 of the General Conditions of Contract entitles the Province to terminate the contract in the event of default by the supplier, or in the event that the supplier has engaged in corrupt or fraudulent practices in competing for or in executing the contract. Neither of those situations arises here.

61. The result is that the Province does not have the legal power to terminate the contract on contractual grounds. The award of the contract is an administrative act. It can therefore be set aside on administrative law grounds, but it remains effective unless and until it has been set aside by a competent court.[22] The Province is entitled to apply to the High Court for an order setting aside the allegedly irregular administrative act.[23]

62. TBWA would of course be entitled to oppose such an application. It could contend that the participation of the Special Advisers on the BEC was not unlawful. As I have pointed out above, is an argument which may well succeed. It could also contend that even if that participation was unlawful, the award should not be set aside because it was an innocent party, the facts show that the participation of the Special Advisers made no difference to the outcome of the BEC, it has performed under the contract and undertaken expenses in that regard, and the initial period of the contract has now almost come to an end. (Indeed, one can anticipate that the period in question would have come to an

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22 Oudekraal Estates (Pty) Ltd v City of Cape Town and Others 2004 (6) 222 (SCA) para [31].

23 Pepcor Retirement Fund and Another v Financial Services Board and Another 2003 (6) SA 38 (SCA) para [10].

end by the time the matter was decided by a court.) I deal further with this issue in the next section of this Opinion.

63. It appears that the provisional report may have been alive to these difficulties in attempting to terminate the agreement, as it does not propose termination of the agreement. Rather, it proposes termination of *"the further execution"* of the agreement. It is not altogether clear to me what is contemplated here. If however, what is contemplated is that the contract itself will not be terminated, but rather that the continued execution or performance of the contract will be terminated, this gives rise to the following difficulties:

63.1 The Province has legally binding obligations under the agreement. It cannot unilaterally terminate them or ignore them.

63.2 In particular, TBWA has exclusive rights under the contract to perform the services in question. On the premise which I have set out above, the contract would not be terminated, and those exclusive rights would therefore continue to exist.

63.3 The Department of the Premier would therefore be precluded by law from contracting with any other party to perform the services provided for in the contract.

63.4 I am instructed that the Department would not itself be able to perform those services. The reason for this is that the staff complement of the communications section of the Department has been designed and approved on the premise that a great deal of the work will be outsourced. That of course is the purpose of the contract in question. The Department does not have the necessary staff, with the necessary skills, in order to be able to carry out the functions in question. If it wished to do so, it would have to obtain approval for a new staff complement, and then recruit and appoint persons to the new positions so appointed. In the nature of things, this is a lengthy process. During the intervening period, the Department would simply be unable to carry out the communications functions, because the execution by TBWA would have been terminated, the Department would be precluded by law from contracting with anyone else to perform the service, and it would not be able to perform the service itself. I am instructed that in any event, it would not be possible to hire people with the necessary skills at the prescribed salary levels.

64. It follows from what I have said that:

64.1 The Department is not entitled to terminate the contract without making application to the High Court for an order for cancellation. This is likely to result in the matter not being resolved before the initial two-year contract has expired, and possibly even not before an extended one year has been completed; and

64.2 if the Department terminates the "execution" of the contract without actually terminating the contract itself, it will not be able to perform the necessary functions itself or contract with anyone else to do so. In the words of paragraph 11.1.2 of the provisional report, it will not be possible to procure the outstanding services.

WHAT REMEDY IS A COURT LIKELY TO ORDER IF PARTICIPATION BY THE SPECIAL ADVISERS WAS UNLAWFUL?

65. The next question is this: Assuming that application is made to the High Court, and the Court finds that it was unlawful for Special Advisers to be members of the BEC, what order is the Court likely to make?

66. As the Supreme Court of Appeal has pointed out on a number of occasions:

> *"It is important to mention that the mere failure to comply with one or other administrative provision does not mean that the whole procedure is necessarily void. It depends in the first instance on whether the act contemplated that the relevant failure should be visited with nullity and in the second instance on its materiality".*[24] [emphasis added]

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[24] Nokeng Tsae Taemane Local Municipality v Dinokeng Property Owners Association (518/09) [2012] ZASCA 128 (30 September 2010) para [14]. See also Nkisimane v Santam Insurance Co Ltd 1978 (2) SA 430 (A) at 433H-434E.

67. The matter has also been expressed as follows:

> *"...It is clear from the authorities that even where the formalities required by statute are peremptory it is not every deviation from the literal prescription that is fatal. Even in that event, the question remains whether, in spite of the defects, the object of the statutory provision had been achieved ...".*[25]

68. In relation specifically to tenders, the Supreme Court of Appeal held as follows in the Moseme case:

> *"...The learned Judge, in reaching his conclusion, failed to have any regard to the position of the innocent Moseme. He also did not consider the degree of the irregularity. He assumed incorrectly that King was entitled to the contract and he underestimated the adverse consequences of the order. I therefore conclude that he erred in the exercise of his discretion. This means that King, in spite of the imperfect administrative process, is not entitled to any relief. Not every slip in the administration of tenders is necessarily to be visited by judicial sanction".*[26]

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25 Unlawful Occupiers, School Site v City of Johannesburg 2005 (4) SA 199 (SCA) para [22].

26 Moseme Road Construction CC v King Civil Engineering Contractors (Pty) Ltd 2010 (4) SA 359 (SCA) para [21].

69. Subsequently, in another tender case, the Supreme Court of Appeal referred with approval to the passages in the Nokeng and Moseme judgments which I have quoted above, and held follows:

> *"Considerations of public interest, pragmatism and practicality should inform the exercise of a judicial discretion whether to set aside administrative action or not."*[27]

70. The provisional report refers to the judgment of Leach JA in the Qaukeni case.[28] That judgment must be read in this context. The Qaukeni case was decided on 29 May 2009. Subsequently, the SCA gave judgment in the Moseme case (15 March 2010), the Nokeng case (30 September 2010), and the Cash Paymaster case (11 March 2011), to which I have referred above. To the extent that they are inconsistent with what is said in Qaukeni, they naturally prevail. However, in my opinion, there is in fact no inconsistency. The Qaukeni judgment did not purport to lay down a general rule that every breach of the legal requirements for the award of a tender necessarily results in a decision that the award is unlawful and has to be set aside.

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27 Chief Executive Officer, South African Social Security Agency and Others v Cash Paymaster Services (Pty) Ltd 2012 (1) SA 216 (SCA) para [29]; see also para [28]. The Court also referred in this context to Associated Institutions Pension Fund and Others v Van Zyl and Others 2005 (2) SA 302 (SCA) para [46].

28 Municipal Manager: Qaukeni Local Municipality and Another v FV General Trading CC 2010 (1) SA 356 (SCA).

71. Reference may also be made in this regard to the earlier decision of the Supreme Court of Appeal in the Millennium Waste case:[29]

> *"A decision to accept a tender is almost always acted upon immediately by the conclusion of a contract with the tenderer, and that is often immediately followed by further contracts concluded by the tenderer executing the contract. To set aside the decision to accept the tender, with the effect that the contract is rendered void from the outset, can have catastrophic consequences for an innocent tenderer, and adverse consequences for the public at large in whose interests the administrative body or official purported to act. Those interests must be carefully weighed against those of the disappointed tenderer if an order is to be made that is just and equitable."*

72. From this overview of the cases, it becomes clear that there are two questions which have to be answered:

72.1 First, the court must determine whether the legislative prescription contemplates that failure to comply should be visited with nullity; if so

72.2 Second, the court has a discretion as to whether to set aside the contract. That discretion has to be exercised with regard to considerations of public

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29 Millennium Waste Management (Pty) Ltd v Chairperson, Tender Board: Limpopo Province and others 2008 (2) SA 481 (SCA) para [24].

interest, pragmatism and practicality, which will include the interests of the innocent tenderer and the persons with whom that tenderer has in turn contracted.

73. As to the first question: In my opinion, a legislative prescript that certain persons are disqualified from membership of a Bid Evaluation Committee is to be taken to contemplate nullity if there is a failure to comply. Although the BEC does not award the tender or even recommend the award of the tender, its part in the tender process is an important one. If it does not act lawfully, that can have significant consequences. For example, I have no doubt that if a member of the BEC was a family member of a tenderer, that would give rise to a possible setting aside of the ultimate award.

74. In this matter, however, the situation is somewhat blurred by the fact that there is no explicit prohibition of Special Advisers being members of Bid Evaluation Committees. If there is such a prohibition, it is one which is to be inferred from other provisions of the law. It seems to me that this weakens the applicability of the general proposition that the legislation contemplates that a failure to constitute the BEC lawfully is to result in a nullity.

75. While the answer to the first question may be in some doubt, in my opinion, there can be no doubt as to the answer to the second question. If one assumes that the legislation implicitly prohibits Special Advisers from being members of a BEC, and that it contemplates that a breach will result in nullity, there can in my opinion

be no doubt that a Court would hold that on the facts of this case, considerations of public interest, pragmatism and practicality have the consequence that the breach should not result in the judicial sanction of nullity. This is so for the following reasons:

75.1 The breach was far from clear: it is a matter which is open to doubt.

75.2 The breach was inadvertent.

75.3 As the provisional report points out, a review by the Provincial Treasury concluded that it was common cause that the bidder would ultimately have been awarded the contract based on its functionality, compliance to specifications, proven track record and score in terms of the preference points system.[30] The provisional report concluded that:

> *"No evidence was presented or could be found during the investigation that was materially inconsistent with the findings made by the Provincial Review Report".*[31]

75.4 There was no suggestion that the Special Advisers acted improperly or tried to manipulate or influence the process in any manner.[32]

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30 Provisional report, para 6.7.2.11, p 35.

75.5 The majority of BEC members ranked TBWA as the highest. The exception was Mr Coetzee, one of the Special Advisers. His participation therefore did not favour TBWA: to the contrary, it was to their disadvantage. They were nevertheless awarded the tender. The other Special Adviser held the same view as the other BEC members, namely that TBWA should ranked highest.

75.6 It follows that the participation of the Special Advisers as members of the BEC had no discernible impact on the outcome of the process. If they had not participated, the position of TBWA would have been even stronger.

75.7 The contract is for an initial period of two years, from 1 January 2011 to 31 December 2012. More than two-thirds of that period has already elapsed. If the Provincial Government now applies to the High Court for the award to be set aside, the matter is in any event not likely to be decided before the termination of the two-year period.

75.8 The successful tenderer had no part in the irregularity.

75.9 The successful tenderer has entered into contracts with third parties, and has made payment on behalf of the Provincial Government in respect of

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[31] Provisional report, para 7.6.1, p 43.

[32] Provisional report, para 7.6.2, p 43.

those contracts. The third parties have performed their obligations in terms of the contracts, and have given value to the Provincial Government in that regard. If the decision to accept the tender is set aside, with the effect that the contract is rendered void from the outset, this can have catastrophic consequences for the innocent tenderer (TBWA) and possibly for third parties which have contracted with it.

75.10 The innocent tenderer will be prejudiced if the contract is now terminated.

75.11 The public interest will also be prejudiced if the contract is now terminated. As I have pointed out, the Provincial Government is not able to undertake the work in question, because it does not have the necessary staff resources and skills. The result is that unless and until new staff positions are created and are then advertised and filled, or alternatively a new tender is issued and adjudicated, the Department of the Premier will not be able to carry out its function of communicating with the public, to the prejudice of the public and of the Department itself.

76. In my opinion, all of these factors weigh heavily in favour of a conclusion that if the Provincial Government applied to Court for an order cancelling the contract, the Court would inevitably find that *"considerations of public interest, pragmatism and practicality"* lead to the conclusion that the award of the tender should not now be set aside.

SUMMARY OF CONCLUSIONS

77. For the reasons which I have given above, I conclude as follows:

77.1 It is important to distinguish between improper conduct and unlawful conduct. It is only unlawfulness which may have the effect of invalidating the conduct in question.

77.2 There is no legally binding prescript (as opposed to non-binding advice) which explicitly prohibits Special Advisers from being members of a Bid Evaluation Committee.

77.3 The legally binding prescripts do not impliedly prohibit Special Advisers from being members of a Bid Evaluation Committee.

77.4 If I am incorrect in this regard, the Provincial Government does not have the power to terminate the contract, or to suspend implementation of the contract. Its remedy is to apply to the High Court for an order setting aside the award of the tender.

77.5 If the Provincial Government were to make such an application, the High Court would find that on the facts of the matter, considerations of public

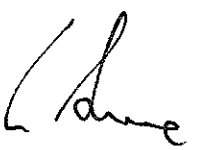
interest, pragmatism, practicality and fairness to other parties lead to the conclusion that the award of the tender should not now be set aside.

78. I therefore answer the specific questions addressed to me as follows:

78.1 The participation by the Special Advisers on the Bid Specification and Evaluation Committees was not unlawful.

78.2 If I am incorrect in this regard, the Provincial Government may not summarily terminate the contract. It may apply to the High Court for relief.

78.3 If Provincial Government makes such an application, the Court will take into account the various interests that may be affected by a termination of the contract, and will not set aside the award of the tender.



GEOFF BUDLENDER SC

Chambers
Cape Town
9 May 2012