



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

Case No: **8216/2022P**

In the matter between:

MAROTHODI METSI (PTY) LTD

APPLICANT

and

**UTHUKELA DISTRICT MUNICIPALITY
PREMIER OF KWAZULU-NATAL
MEMBER OF THE EXECUTIVE COUNCIL (MEC)
FOR CO-OPERATIVE GOVERNANCE AND
TRADITIONAL AFFAIRS (KWAZULU-NATAL)
PROVINCIAL EXECUTIVE COUNCIL
KWAZULU-NATAL
JAMES NKOSINATHI MADONDO N.O.**

**FIRST RESPONDENT
SECOND RESPONDENT
THIRD RESPONDENT

FOURTH RESPONDENT

FIFTH RESPONDENT**

Coram: Mossop J
Heard: 26 January 2024
Delivered: 20 February 2024

ORDER

The following order is granted:

1. The money judgment:

(a) The first respondent's application for a money judgment against the applicant, dated 14 December 2023, is adjourned sine die;

(b) All questions of costs are reserved.

2. The urgent application:

(a) The applicant's urgent application, dated 27 June 2022, is dismissed;

(b) The applicant shall pay the respondents' costs, such to include the costs of two counsel where so employed.

3. The rectification application:

(a) The applicant's rectification application, dated 22 February 2023, is dismissed;

(b) The applicant shall pay the respondents' costs, such to include the costs of two counsel where so employed.

4. The review application:

(a) The decision of the first respondent to award tender number 01/2020-PRS to the Marothodi Metsi and Sebata Group is reviewed, declared invalid and is set aside;

(b) The contract concluded between the first respondent and the Marothodi Metsi and Sebata Group, dated 30 July 2020, pursuant to the award of tender number 01/2020-PRS to the Marothodi Metsi and Sebata Group, is reviewed, declared invalid and is set aside.

(c) The applicant shall pay the respondents' costs, such to include the costs of two counsel where so employed.

JUDGMENT

MOSSOP J:

Introduction

[1] During February 2020, the first respondent published a tender in a nationally distributed Sunday newspaper and invited bids to be submitted to it. Five responses were received from competing bidders and ultimately the first respondent awarded the tender to two entities, one of which was an entity called 'the Marothodi Metsi and

Sebata Group' (the Marothodi Metsi and Sebata Group).¹ As a consequence, the first respondent thereafter duly entered into an agreement with the Marothodi Metsi and Sebata Group (the contract). On 3 June 2022, the first respondent terminated that contract. In reaction thereto, on 4 July 2022, the applicant, who is not the Marothodi Metsi and Sebata Group but rather an incorporated company called 'Marothodi Metsi (Pty) Ltd', brought an urgent application, inter alia, in which it sought to uplift the suspension of the contract (it apparently did not regard the contract as having been terminated) and sought specific performance of the contract (the urgent application).²

[2] The urgent application was the opening scherzo in a complex segue of related applications that then followed. Having launched the urgent application, the applicant brought an application to join the second to fifth respondents to that application (the joinder application). Later, it brought an application for the rectification of the very contract that it sought to enforce in the urgent application (the rectification application). The first respondent, in turn, brought a counter-application in the form of a legality review which seeks to set aside the decision to award the tender to the Marothodi Metsi and Sebata Group and the contract (the legality review). Finally, the first respondent, at the eleventh hour, launched an application for a money judgment and associated relief against the applicant (the money judgment application). All of these applications were brought under the same case number.

[3] Of these applications, only the joinder application is no longer contentious. On 15 March 2023, Smart AJ granted an order joining the second, third, fourth and fifth respondents to the urgent application.

¹ The other successful tenderer was an entity called Uyapo Engineering Projects.

² The relief claimed in the notice of motion was the following:

'2.1 The Respondent's suspension of the Contract concluded with the Applicant under Reference 01/2020-PRS which suspension is dated 14 June 2022, is declared to have lapsed and of no force and effect.

2.2 The Respondent is interdicted and restrained from unlawfully interfering with the Applicant's provision of services to the Respondent in terms of Contract 01/2020-PRS.

2.3 The Order sought in paragraph 2.2 above shall not limit either party's (sic) from enforcing their rights arising from the terms and conditions of Contract.

2.4 The Respondent is directed to forthwith issue a press release and publish same in the local newspaper, advising that the Applicant is entitled to execute the services relating to the installation of water metres in terms of Contract 01/2020-PRS and may continue to do so from the date of this Order.

2.5 The Respondent is directed to pay the costs of the application.'

[4] Accordingly, before me is the urgent application, the rectification application, the legality review, and the money judgment application. These applications occupy ten volumes of documents. All the applications, excluding the money judgment application, were due to be argued before me on the opposed roll on 10 November 2023, but were not so argued for reasons that I need not go into. I had read the ten volumes that these applications occupy, and rather than require another judge to read them, I agreed to retain the matter. The applications then extant on 10 November 2023 were set down for argument on 26 January 2024. There was no money judgment application in existence at the stage when that date was arranged. The money judgment application was launched on 14 December 2023 and was also set down for 26 January 2024. On 26 January 2024, I indicated to all counsel that I was not disposed to hearing the money judgment application for fear that there would be insufficient time to consider the other applications in respect of which the date had been arranged. It follows that the money judgment application is to be adjourned sine die, with the costs reserved.

[5] Irrespective of which application I may be dealing with in this judgment, I shall refer to the parties as they are cited in the urgent application after the joinder of the second to fifth respondents. Thus, the applicant and first respondent in the urgent application will continuously be referred to throughout this judgment by those appellations.

[6] Before proceeding further, it is necessary to thank counsel for their assistance. In this regard, Mr Dickson SC appeared for the applicant, Mr Broster SC and Ms Qono appeared for the first respondent and Mr de Wet SC appeared for all the other respondents. There was a lively exchange of submissions between counsel when the matter was argued, which was both entertaining and instructive.

[7] So, where to begin? Oscar Hammerstein II,³ in writing the lyrics for the song 'Do-Re-Mi' in 'The Sound of Music', proposed that one should start at the beginning

³ Oscar Greeley Clendenning Hammerstein II (12 July 1895 - 23 August 1960) was an American lyricist, librettist and theatrical producer best known for his collaborations with composer Richard Rodgers.

because it is a very good place to start. In my view, that may not be a very good place to start in these multiple applications, if the beginning is taken to be the urgent application. I could not commence with that application because it is premised upon a contract that, according to the applicant, is to be rectified. If I was to follow the sequence in which the applications were delivered, I would then have to start with the rectification application to determine whether the contract should be rectified and then enforced through the urgent application. But it seems to me that the logical place to commence is the review application as it seeks, as one of its goals, to set aside the contract that the applicant wishes to enforce in the urgent application and to rectify in the rectification application. If the review is upheld, that will put an end to both the urgent application and the rectification application as there will be no contract to enforce or to rectify. If it is not successful, those applications will then be considered. I shall therefore not begin at the very beginning but will begin with the legality review.

Legality review

Legal principles

[8] It is not in dispute that the first respondent is an organ of state⁴ and it is now settled law that an organ of state may not remedy a decision that it has taken, but no longer supports, by invoking the provisions of the Promotion of Administrative Justice Act 3 of 2000 (PAJA).⁵ It is confined, instead, to a legality review. The objective of such self-review is, notionally:

‘to promote open, responsive and accountable government’.⁶

[9] In *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council*,⁷ the Constitutional Court held that:

‘... a local government may only act within the powers lawfully conferred upon it. There is nothing startling in this proposition - it is a fundamental principle of the rule of law, recognised widely, that the exercise of public power is only legitimate where lawful. The rule

⁴ Section 2(a) of the Local Government: Municipal Systems Act 32 of 2000.

⁵ *State Information Technology Agency SOC Limited v Gijima Holdings (Pty) Limited* [2017] ZACC 40; 2018 (2) SA 23 (CC); 2018 (2) BCLR 240 (CC).

⁶ *Altech Radio Holdings (Pty) Ltd and others v Tshwane City* [2020] ZASCA 122; 2021 (3) SA 25 (SCA) para 71.

⁷ *Fedsure Life Assurance Ltd and others v Greater Johannesburg Transitional Metropolitan Council and others* [1998] ZACC 17; 1999 (1) SA 374 (CC); 1998 (12) BCLR 1458 (CC) para 56.

of law - to the extent at least that it expresses this principle of legality - is generally understood to be a fundamental principle of constitutional law.' (Footnote omitted.)

[10] In a similar vein, Sutherland DJP observed in *Transnet SOC Ltd and another v CRRC E-LoCo Supply (Pty) Ltd and others* that:⁸

'The appropriate starting point is to acknowledge the constitutional *grundnorm* that the Rule of Law is supreme. Upon that foundation rests the Principle of Legality. That principle finds its most potent expression in the maxim that every exercise of a public power must be authorised by law. Any purported exercise of a public power that fails that test is unlawful.'⁹

[11] In *Affordable Medicines Trust and others v Minister of Health and others*,¹⁰ the court summed up the position when it stated that:

'The exercise of public power must therefore comply with the Constitution, which is the supreme law, and the doctrine of legality, which is part of that law. The doctrine of legality, which is an incident of the rule of law, is one of the constitutional controls through which the exercise of public power is regulated by the Constitution.' (Footnotes omitted.)

[12] The noble principles highlighted in the extracts above have their source in s 217(1) of the Constitution which, in peremptory terms, states that:

'[w]hen an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective.'

It barely requires stating that the Constitution is the supreme law of this country and that any conduct inconsistent with it is invalid.¹¹

[13] The importance of s 217 of the Constitution was emphasised in *Steenkamp NO v Provincial Tender Board, Eastern Cape*,¹² when Moseneke DCJ stated that:

⁸ *Transnet SOC Ltd and another v CRRC E-LoCo Supply (Pty) Ltd and others* [2022] ZAGPJHC 228 para 14.

⁹ See *Pharmaceutical Manufacturers Association of SA and another: In Re Ex Parte President of the Republic of South Africa and others* [2000] ZACC 1; 2000 (2) SA 674 (CC); 2000 (3) BCLR 241 (CC) para 17; *Affordable Medicines Trust and others v Minister of Health and others* [2005] ZACC 3; 2006 (3) SA 247 (CC); 2005 (6) BCLR 529 (CC) para 49.

¹⁰ *Affordable Medicines Trust and others v Minister of Health and others* [2005] ZACC 3; 2006 (3) SA 247 (CC); 2005 (6) BCLR 529 (CC) para 49.

¹¹ Section 2 of the Constitution; see also *Minister of International Relations and Co-operation and others v Simeka Group (Pty) Ltd and others* [2023] ZASCA 98; [2023] 3 All SA 323 (SCA) para 31 ('Simeka').

¹² *Steenkamp NO v Provincial Tender Board, Eastern Cape* [2006] ZACC16; 2007 (3) SA 121 (CC); 2007 (3) BCLR 300 (CC).

'Section 217 of the Constitution is the source of the powers and function of a government tender board. It lays down that an organ of State in any of the three spheres of government, if authorised by law may contract for goods and services on behalf of government. However, the tendering system it devises must be fair, equitable, transparent, competitive and cost-effective. This requirement must be understood together with the constitutional precepts on administrative justice in s 33 and the basic values governing public administration in s 195(1).'¹³ (Footnote omitted.)

[14] The Constitutional Court stated in *Allpay Consolidated Investment Holdings (Pty) Ltd and others v Chief Executive Officer of the South African Social Security Agency and others* that:¹⁴

'Compliance with the requirements for a valid tender process, issued in accordance with the constitutional and legislative procurement framework, is thus legally required. These requirements are not merely internal prescripts that... may [be] disregard[ed] at whim. Too hold otherwise would undermine the demands of equal treatment, transparency and efficiency under the Constitution.'¹⁵ (Footnotes omitted.)

The relevant facts

[15] The first respondent is a district municipality with an unfortunate history. It has been beset with administrative and financial difficulties. As a consequence, the third respondent, acting in terms of the provisions of s 139 of the Constitution, intervened in its affairs and appointed an administrator to take control of the municipality. It appears that at one stage a Mr Martin Sithole (Mr Sithole) was the administrator, being appointed to that position on 1 October 2019 and remaining in that position until August 2020. With effect from 1 September 2020, Mr Sithole became the first respondent's municipal manager, a position that he held until the end of March 2022 when he was succeeded by Mr Mpumelelo Mnguni (Mr Mnguni), first in an acting capacity and then in a permanent capacity. The current administrator of the municipality is the fifth respondent, who was appointed on 11 May 2022.

¹³ Ibid para 33.

¹⁴ *Allpay Consolidated Investment Holdings (Pty) Ltd and others v Chief Executive Officer, South African Social Security Agency, and others* [2013] ZACC 42; 2014 (1) SA 604 (CC); 2014 (1) BCLR 1 (CC) ('*Allpay*').

¹⁵ Ibid para 40.

[16] During February 2020, prior to the appointment of both the fifth respondent and Mr Mnguni but while Mr Sithole was the administrator, the first respondent published the tender in question. The invitation to tender read as follows:

‘Tender No 01/2020-PRS

The uThukela District Municipality seeks professional service providers to formulate business plan (sic) on supply and installation of smart metering system together with technical, economical (sic), social & institutional interventions in addressing issues relating to our Municipal Strategic Self Assessment (MuSSA) risks. The plan has to also reflect in the municipality acquiring Blue Drop and Green Drop status and the dynamics relating to that accordingly. Sourcing of funding must be at no risk to the uThukela Municipality and must in no way whatsoever affect our current financial situation.’

The advert went on to state that the tender closed at 12h00 on 20 February 2020.

[17] From its wording, the advertisement seemed to seek merely the creation of a business plan. It also referred to the first respondent’s ‘Municipal Strategic Self Assessment (MuSSA) risks’. According to the business plan prepared by the applicant, which is attached to the founding affidavit in the urgent application, MuSSA is an annual assessment undertaken by Water Services Authorities (WSA):

‘The MuSSA is used to determine the overall business health of a WSA. By identifying key municipal vulnerabilities across a range of business attributes it allows municipalities to effectively plan and direct their resources more effectively, and for the Department of Water and Sanitation (DWS) and its partners to provide more focussed support.’

That being the case, the request for the development of a business plan appears to gel with the first respondent’s MuSSA obligations.

[18] While it was reasonably apparent that what was required was a business plan involving smart meters, the wording of the advertisement did not explicitly state what the smart meters should measure. However, the included reference to ‘Blue Drop’ and ‘Green Drop’ may be an indication of what was required. But otherwise, it is difficult to comprehend what the functioning of the smart metering system was intended to cover.

[19] It transpires that what the smart meters were intended to measure was water consumption. The uncertainty as to what was to be measured is matched by the

uncertainty of what services the first respondent actually required. As already mentioned, on the wording of the advertisement, it appears that what was sought was the development of a business plan (or plans according to the wording of the tender specification). However, the technical specification component of the bid document explained that what was required was the supply of the actual smart meters themselves, not merely a business plan relating to them. This appears from the following extract from that document:

‘The scope of the work is for the supply of a complete pre-payment metering system comprising of a meter box, a water management device, a water meter, a user interface unit (if relevant) and all fittings. A Meter Management System (MMS) is to be included as supplementary to the solution, without which the solution will be deemed as incomplete.’

[20] There is nothing, however, that indicated that the tender also involved the installation of the required smart meters or the collection of revenue arising out of the installation of the smart meters.

[21] As is to be expected, there were conditions attached to the tender. I mention here only the relevant conditions. The prescribed bid document indicated that:

- (a) The 90/10-point system was to apply to the tender;
- (b) A bidder had to score a minimum of 60 points in pre-qualification criteria to progress to the functionality evaluation;
- (c) Where a bid was submitted by a consortium or joint venture, each party was required to submit a separate tax clearance certificate. The note to that stipulation in the bid document was:

‘NOTE: Failure to do so will lead to your tender being disqualified.’

- (d) If the tendered value of the bid submitted exceeded R10 million (including VAT) and a bidder was required by law to prepare annual financial statements for auditing, then a bidder was required to furnish its audited annual financial statements for the preceding three years or since the date of its establishment if it had been established during the course of those preceding three years.

[22] On 7 July 2020, the first respondent awarded the tender to the Marothodi Metsi and Sebata Group and communicated that fact to it by way of a letter of that date (the first award letter). The letter did not mention the other entity to whom the

tender had also been awarded. It went on to itemise the scope of the work to be performed as being:

‘Formulation of business Plan on the supply and installation of Smart water meters
Sourcing of Funding on a Risk Basis
Installation and Maintenance of Smart Water Meters.’

The letter went on to state that:

‘The contract is hereby awarded to you at a unit price of R1 122,92 per meter inclusive of VAT at 15%.’

[23] The first award letter had a signature line for acceptance by the Marothodi Metsi and Sebata Group of the terms contained in the letter. It was required to sign the letter and return it to the first respondent. It did not sign the letter and there is no evidence that it returned the letter to the first respondent.

[24] The next day, 8 July 2020, a second letter of award was sent to the Marothodi Metsi and Sebata Group (the second award letter). The second award letter now had a markedly different description of the scope of work required to be performed, namely:

- ‘1. Formulation of business plan on the supply and installation of pre-paid Smart water meters and sourcing of funding from agencies on a risk basis.
2. Bad Debt Recovery and Revenue enhancement. (The immediate implementation of this intervention is of utmost importance in order to ensure that the uThukela District Municipality is a viable business entity).
3. Installation and maintenance of Smart water meters together with holistic interventions.
4. Vendorsing (sic) System together with the relevant Financial Support System and Mechanisms.’

The second award letter also included the following:

‘The unit price per meter is R1 122,92. Marothodi Metsi will charge 15%¹⁶ commission on the revenue collected from 60 days and above in all areas within the District.’

[25] As with the first award letter, there was a signature line for the Marothodi Metsi and Sebata Group on the second award letter. This time, the letter was signed, apparently on behalf of that entity. The ultimate consequence was that on 30 June

¹⁶ This amount was later reduced to 9%.

2020, the first respondent and the Marothodi Metsi and Sebata Group put pen to paper and signed the contract.

[26] Those are the relevant facts. The first respondent seeks the review of its own decision to award the tender to the Marothodi Metsi and Sebata Group based, essentially, on five grounds, namely:

- (a) There is no entity known as the Marothodi Metsi and Sebata Group;
- (b) The Sebata Group did not submit certain compulsory documentation that it was required to put up;
- (c) No audited annual financial statements were put up as required by the bid conditions;
- (d) The winning bid was incorrectly assessed, and scored, by the first respondent's bid evaluation committee; and
- (e) The terms of reference of the bid were impermissibly departed from by the first respondent.

[27] The Supreme Court of Appeal has indicated that in a review application arising out of the procurement process, a court hearing such a matter is required:

'to assess the evidence that impugns the procurement process to establish whether such evidence justifies the conclusion that any one of the grounds of review has been established'.¹⁷ And the Constitutional Court in *Allpay*¹⁸ stated that:

'The materiality of irregularities is determined primarily by assessing whether the purposes the tender requirements serve have been substantively achieved.'

The Constitutional Court insisted in *Allpay* that process formalities must be complied with and indicated that such compliance serves a three-fold purpose:

'(a) it ensures fairness to participants in the bid process; (b) it enhances the likelihood of efficiency and optimality in the outcome; and (c) it serves as a guardian against a process skewed by corrupt influences.'¹⁹

First ground of review: there is no entity known as the Marothodi Metsi and Sebata Group

¹⁷ *Simeka* para 45.

¹⁸ *Allpay* 58.

¹⁹ *Ibid* para 27.

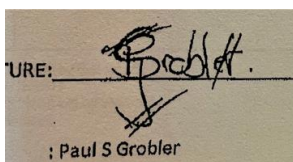
[28] I turn now to consider the first ground of review. In its founding affidavit in the urgent application, the applicant put up what it stated is the bid document that it submitted to the first respondent in response to the advertisement (the first bid document). It claims that the first bid document is that document that led to it being awarded the tender.

[29] Parties intending to submit bids were required to purchase a bid document from the first respondent. The bid document is a lengthy (75 pages), pre-printed document, with spaces for information to be inserted and to which annexures could be attached. The necessary information has been inserted in the first bid document in manuscript. Its first page states that the bidder is Marothodi Metsi and that its contact person is a Mr Paul Grobler (Mr Grobler).

[30] The submission of the applicant that the first bid document is the document that it submitted to the first respondent is vigorously disputed by the latter. It denies in no uncertain terms that the bidder was Marothodi Metsi, and it denies receiving the first bid document. Instead, it states that it received a different bid document (the second bid document) from an entity that described itself not as Marothodi Metsi (Pty) Ltd but as the Marothodi Metsi and Sebata Group.

[31] In bringing its review application, the first respondent complied with the provisions of Uniform rule 53 and put up the review record of the documents that it considered when evaluating and awarding the tender (the review record). The first bid document is before the court as an attachment to the founding affidavit in the urgent application. The second bid document forms part of the review record. The first bid document is not to be found in the review record. As will become apparent, a comparison of the two bid documents reveals them to be significantly different in material aspects.

[32] Physically, there are two versions of the bid document before the court. It is beyond dispute that they both exist, and that they are not identical. The second bid document, as with the first bid document, has been completed in manuscript, although clearly by a different hand. The second bid document appears, like the first, to have been signed by Mr Grobler. Mr Grobler has a very distinctive signature:



Signature: _____
; Paul S Grobler

The example of Mr Grobler's signature above comes from the second bid document.

[33] Because of their common foundational document, namely the purchased bid document, both bid documents have the identical number of pages, and can thus be easily compared with each other, as I now do:

(a) Page 1: this page requires, inter alia, the insertion of the name of the entity submitting the bid. In the first bid document, this is recorded as being 'Marothodi Metsi'. In second bid document, it is recorded as being 'Marothodi Metsi and Sebata Group';

(b) Page 4: this is a page with the title 'Checklist', and it requires the name of the bidder to be inserted. On both versions of the bid document, the same name appears, namely 'Marothodi Metsi & Sebata Group'. This page also indicates that the person completing the document, Mr Grobler, is a director of the 'Marothodi Metsi and Sebata Group'. That is plainly incorrect, for the 'Marothodi Metsi and Sebata Group' is not an incorporated entity;

(c) Page 5: This page is entitled 'Offer' and sets out the form of the offer and acceptance in the event of the bid being successful. In the first bid document, the name inserted is 'Marothodi Metsi'. In the second bid document, the name that appears is 'Marothodi Metsi and Sebata Group';

(d) Page 7: this is a page entitled 'Invitation to Bid'. It seeks the name of the bidder. In both versions of the bid documents the name 'Marothodi Metsi and Sebata Group' appears;

(e) Page 10: this is a page dealing with the compulsory briefing session that was to be conducted by the first respondent. It seeks the name of the representative of the bidder. In both versions of the bid document the bidder is identified as 'Marothodi Metsi and Sebata Group';

(f) Page 22: this page is entitled 'Proof of Good Standing with Municipal Accounts'. It has a space for the name of the bidder. In the first bid document the name 'Marothodi Metsi' appears, while in the second bid document the name 'Marothodi Metsi and Sebata Group' appears;

(g) Page 44: this page calls for the name of the bidder to be inserted. In the first bid document the name 'Paul Grobler' appears, while in the second bid document the name 'Marothodi Metsi and Sebata Group' appears;

(h) Page 46: this page, entitled 'Certificate of Independent Bid Determination', again requires the name of the bidder to be inserted. In the first bid document the name 'Paul Grobler' appears for a second time, while in the second bid document the name 'Marothodi Metsi and Sebata Group' appears;

(i) Page 47: this is the second page of the document referred to in the previous sub-paragraph. In the first bid document the name 'Paul Grobler' appears for the third time, while the second bid document has the name 'Marothodi Metsi and Sebata Group'.

(j) Page 49: this page also calls for the name of the bidder to be inserted. In the first bid document the name 'Paul Grobler' appears for a fourth time, while in the second bid document the name 'Marothodi Metsi and Sebata Group' appears.

[34] There is a further significant difference between the two bid documents that does not relate to the identity of the bidder. At page 57 of the bid document, the bidder is required to provide a pricing summary. The contract to be concluded in the event of a bid being successful was to be for a period of three years. This page accordingly required the unit cost of a smart meter to be specified and then sought the price for each year of the three-year period. In the first bid document, the space on the document for the unit cost of a smart meter is left blank, but the price for the first year was expressed as being R295, the cost for the second year was expressed as being R324.50 and in the third, and final year, the cost was expressed as being R356.95. Adding these amounts together, and adding VAT, the total comes to R1 122.92. In the second bid document, in the space for the unit cost of a smart meter, the aforementioned figure of R1 122.92 appears. However, the price per annum has now skyrocketed to R227 699 001.33, for each of the three years. The total cost for the three years of the contract, including VAT, now comes to the staggering amount of R785 561 554.59.

[35] From the rather tedious comparison exercise referred to above, it is apparent that in every instance in the second bid document where the identity of the bidder is requested, and there are ten such instances, the name supplied has been 'Marothodi

Metsi and Sebata Group'. That name appears only three times in the first bid document, but other names also appear as being the bidder, namely 'Marothodi Metsi' and 'Paul Grobler'.

[36] The review record has been put up under cover of an affidavit of the official employed by the first respondent who has had it in her custody since inception. Mr Dickson, who appears for the applicant, in argument conceded that the review record correctly reflected the documents that the first respondent considered when determining the tender. That being the case, the existence of the second bid document is admitted. Arising from this, why there should be two different versions of the bid document and why the first bid document does not form part of the review record if it was, indeed, submitted to the first respondent, are obvious questions that come to mind.

[37] Neither of these questions is addressed by the applicant at any stage in any of the affidavits that it has delivered across the range of the applications before me. In my view, it calls for an explanation and I accordingly asked Mr Dickson to address me on the issue. If I understood his explanation correctly, it is that the applicant holds the view that the first respondent has put up no evidence to challenge what the applicant states regarding the validity of the first bid document. The argument goes that a Mr Daniel Masomboka (Mr Masomboka), the chairman of the applicant, deposed to the applicant's founding affidavit in the urgent application. In that affidavit, he identified the first bid document as being the document submitted to the first respondent. Mr Sithole, who it will be remembered was the administrator at the time of the tender, has, according to counsel, confirmed in an affidavit delivered on behalf of the applicant that the first bid document is the bid document that the first respondent received from the applicant. Thus, it is argued, both sides involved in the tender have confirmed that the correct bid was that contained in the first bid document. The applicant's argument proceeds that the first respondent has not been able to put up affidavits from any other person involved in the tender who may be able to contradict what Mr Masomboka and Mr Sithole say. The only evidence on the point is, accordingly, evidence adduced in favour of the applicant's version. Thus, the court must accept the applicant's version, for the first respondent's version is simply

based upon conjecture and supposition by persons not directly involved with the tender.

[38] In my view, that is a superficial and unattractive argument that does not account for all the known facts. The known facts are:

(a) The applicant has admitted that the review record put up by the first respondent in terms of Uniform rule 53 correctly reflects the documents considered by the first respondent's bid evaluation committee. That admission reaffirms the existence of the second bid document.

(b) The first bid document does not appear in the review record.

(c) Mr Sithole did not actually confirm the identity of the bidder, nor did he identify the bid document submitted to the first respondent. What Mr Sithole actually states in his affidavit is that:

'I do not recall the issue of the precise identity of the tenderer but it was my assumption that it was the Applicant.'

The identity of the bidder (and, inferentially, the bid document) has now been degraded to a mere assumption. Mr Sithole, therefore, does not confirm the version of Mr Masomboka. The argument must accordingly be rejected. The position is thus that no explanation has been provided by the applicant for the existence of the two different bid documents that each bear the signature of Mr Grobler.

[39] There are, however, reliable indications that what was submitted to the first respondent was not the first bid document but was, rather, the second bid document:

(a) The first respondent decided that the Marothodi Metsi and Sebata Group was the winning bidder and not the applicant. It did not decide that the successful bidder was Marothodi Metsi or Marothodi Metsi (Pty) Ltd. That decision is entirely consistent with the content of the second bid document and is inconsistent with the identity of the bidding party in the first bid document which, at best, could be described as unclear, with no less than three different names being used to identify the bidder;

(b) The first respondent at all times believed that the successful bidder had been the Marothodi Metsi and Sebata Group: that is why both the first and second award letters were addressed to the Marothodi Metsi and Sebata Group;

(c) The first respondent concluded the contract, not with the applicant or any other entity, but with the Marothodi Metsi and Sebata Group. It is unlikely that this would have occurred had the first bid document been the winning bid;

(d) Prior to the adjudication of the tender, the applicant sent a letter to the first respondent. The letter was dated 20 February 2020, the closing date of the tender, and appears to have accompanied the submission of the bid. In that letter, the following is stated:

‘4. Marothodi Metsi and Sebata Group understands the nature of the works in that it is a holistic intervention and therefore has selected subcontractors from a professional background who will be able to assist in meeting the expectations as a consolidated team.

5. Marothodi Metsi and Sebata Group is a firm who has done many similar assignments for the Department of Water and Sanitation, Water Boards and Local Government since 2004 with focus on turning around dysfunctional municipalities with the revenue enhancement and Supplying (sic) and installation of Smart Water Meters.’

It is improbable that such a letter would have accompanied the first bid document: it is for more likely that it would accompany the second bid document, which only bore the name ‘Marothodi Metsi and Sebata Group’ and which name is referred to in the letter. Ignoring the fact that the applicant has only been registered since 2016²⁰ and could not have performed contracts since 2004, the content of the letter accords with what appears in the second bid document and not the first bid document; and

(e) The copy of the first bid document before the court is not a true copy of the original first bid document. The original of the first bid document can no longer be in the applicant’s possession for, on its own version, it was submitted to the first respondent. Mr Broster drew my attention to page 10 of the first bid document. That page deals with the compulsory briefing session that all bidders had to attend. It bears a place for the signature of the representative of the bidder and a place for the signature of the representative of the first respondent. The signature of the applicant’s representative, Mr Grobler, appears where it ought to. Where the representative of the first respondent was required to append a signature, the following wording appears:

‘(Was done on original).’

The second bid document, on the other hand, indeed bears a signature of a representative of the first respondent and the stamp of the Supply Chain

²⁰ Its registration number is 2016/085759/07 and it was incorporated on 2 March 2016.

Management Unit Procurement Section of the first respondent on page 10. No other version of the first bid document has been shown to exist and has, therefore, not been put up. The only other bid document that, indeed, has a signature of the first respondent's official on it on page 10, is the second bid document.

[40] After careful consideration, I must find, as I do, that the bid document delivered by the applicant to the first respondent was not the first bid document but was the second bid document. The bidder was thus not Marothodi Metsi, as submitted by the applicant, but rather the Marothodi Metsi and Sebata Group as stated by the first respondent. On the applicant's own version, there is no such entity as will be revealed hereunder.

Second ground of review: the failure to submit compulsory documentation

[41] That brings me to the second ground of review. In its replying affidavit in the review application, the applicant states as follows:

'The Sebata Group is not part of Applicant, and we are not in a partnership with them in the legal sense. They are entirely separate and the manufacturer/supplier of the meters.'

And later, the following is said by it:

'The contract was erroneously drawn up by the municipality in the name of 'Marothodi Metsi and Sebata Group'. This as an entity does not exist and applicant contends that this should have been drawn up in the name of Marothodi Metsi only.'

Despite the wording of the letter of 20 February 2023, in which Mr Grobler stated, in reference to the Marothodi Metsi and Sebata Group, that 'We are a registered firm ...', it is not in dispute that there is no legal entity known as the Marothodi Metsi and Sebata Group. The applicant is an incorporated entity, and the Sebata Group is an agglomeration of companies apart from, and distinct from, the applicant. The applicant further asserts that it and the Sebata Group did not form a joint venture for the purpose of bidding for the tender.

[42] Yet, the second bid document is in both of their names, and it is to those two bidders that the tender was ultimately awarded. Even more confusingly, in bringing the urgent application, the applicant, inexplicably, in its founding affidavit describes itself as being:

‘Marothodi Metsi (Pty) Ltd and Sebata Group, a company duly registered in accordance with the laws of the Republic of South Africa ...’

The applicant claims that it never submitted a bid in the name of the Marothodi Metsi and Sebata Group, yet in the urgent application that is precisely how it has described itself.

[43] The first respondent, in inviting bids, identified certain compulsory documentation that had to be submitted with all bids, such as a tax clearance certificate. It was well entitled to do so. As Leach JA stated in *Dr JS Moroka Municipality and others v Betram (Pty) Ltd and another*:²¹

‘Essentially it was for the municipality, and not the court, to decide what should be a prerequisite for a valid tender, and a failure to comply with prescribed conditions will result in a tender being disqualified as an “acceptable tender” under by the Procurement Act unless those conditions are immaterial, unreasonable or unconstitutional.’

[44] It is not in dispute that the Sebata Group did not file any documents, let alone a tax clearance certificate. The point now taken by the first respondent is that because the Sebata Group made no attempt whatsoever to put up the compulsory documentation, the tender could not have progressed to the second stage of assessment and therefore could not have been awarded to the Marothodi Metsi and Sebata Group. In short, it ought to have immediately been disqualified. The document required by the first respondent from the Sebata Group would have allowed it to evaluate the Sebata Group’s legal, tax compliance, and rates and taxes status. It is, therefore, an important document that is material and serves a lawful purpose. I find the ground of review to be a good one and the failure to put up the compulsory documentation should have resulted in the bid being declared non-responsive.

Third ground of review: the failure to provide audited financial statements

[45] The third ground of review relied upon by the first respondent is that no audited annual financial statements were submitted in support of the bid. Page 48 of the bid document, in part, states the following:

²¹ *Dr JS Moroka Municipality and others v Betram (Pty) Ltd and another* [2013] ZASCA 186; [2014] 1 All SA 545 (SCA) para 10.

'DECLARATION FOR PROCUREMENT ABOVE R10 MILLION (ALL APPLICABLE TAXES INCLUDED

- 1 Are you by law required to prepare annual financial statements for auditing?
- 2 If yes, submit audited annual statements for the past three years or since the date of establishment if established during the past three years.'

[46] From the wording of the second bid document, it is apparent that the value of the tender to the bidder was R785 561 554.59. The procurement was thus above R10 million and the requirement to supply audited annual financial statements (the financial statements) was triggered if the bidder was required by law to prepare them. In the first bid document, the answer supplied to the question is 'Yes' as to this legal obligation. Nothing further is stated. In the second bid document, the question posed has also been answered in the affirmative. In addition, the following is also stated:

'Attached in returnable schedule page 16.'

[47] Thus, irrespective of which bid document is considered, the bidder confirmed that it is obliged by law to deliver financial statements. Commencing at page 394 of the review record are financial statements for the financial years ending 28 February 2017, 28 February 2018, and 28 February 2019 respectively. They are, obviously, not the financial statements of the Marothodi Metsi and Sebata Group, which does not exist: they are the financial statements of the applicant. However, it is apparent that they are not audited annual financial statements. Instead, they are financial statements that have been subjected to independent review. This is confirmed by the independent reviewer's report in each of the financial statements where he states that:

'We have not performed an audit and accordingly we do not express an audit opinion.'

[48] The obligation to furnish audited annual financial statements is found in regulation 21(d)(i) of the Municipal Supply Chain Management Regulations,²² which provides that:

²² Municipal Supply Chain Management Regulations, GN 868, GG 27636, 30 May 2005, made by the Minister of Finance in terms of s 168 of the Local Government: Municipal Finance Management Act 56 of 2003.

'(1) A supply chain management policy must determine the criteria to which bid documentation for a competitive bidding process must comply, and state that in addition to regulation 13 the bid documentation must -

...

- (d) If the value of the transaction is expected to exceed R10 million (VAT included), require bidders to furnish -
 - (i) if the bidder is required by law to prepare annual financial statements for auditing, their audited annual financial statements –
 - (aa) for the past three years; or
 - (bb) since their establishment if established during the past three years...

[49] The positive averment in the second bid document that the applicant was in law required to produce financial statements and its failure to do so, again, rendered the bid non-responsive. The bid should have progressed no further.

[50] Before proceeding to the next ground, something needs to be said about the content of the financial statements. It appears that the bid evaluation committee paid no attention to this. Had it done so, it may have been startled by what is contained therein, particularly given the context of a tender bid. The three years of annual statements are virtually identical. Where information is lacking in one, it is lacking in the other two.²³ I have compared the financial statements for each of the three years and the financial information contained in all three annual financial statements is identical for every year. The only value that is expressed is that relating to 'Property plant equipment', where the value is recorded as 'R2 100 000'. This figure also appears as being 'Equity attributable to owners' and as 'Share capital'. In all other respects, without exception, the figure appearing in the statements is '0.00'. Thus, the applicant has no cash, no trade and other receivables, no revenue, made no gross profit (nor an operating profit) and its profit for the year was '0.00'. Its total comprehensive income for each of the three years was, not surprisingly, '0.00'. Finally, the financial statements are incomplete. The compiler thereof has placed numbers next to certain entries. Those numbers indicate a reference to a specific

²³ For example, in the directors' report for February 2017, the following appears:
 'The financial statements set out on page 4 -13 which had been prepared on a going concern basis were approved by the board of directors on the and signed on its behalf by'.
 The identical wording, and omission, appears in the two other annual financial statements.

note. Notes in financial statements perform the function of explaining assumptions used to prepare the numbers in the financial statements as well as the accounting policies adopted by the company. Each financial statement commences with a note 2 and ends with a note 14. None of them have a note 1 or a note 13. But the notes in every iteration of the financial statements end at 1.8. They are, therefore, incomplete and of no real assistance in explaining any of the entries in the financial statements. This incompleteness attracted no adverse comment from the bid evaluation committee.

[51] What emerges from the financial statements is that the applicant has never traded and has generated no income over the three years preceding the tender. Its ability to perform the contract must have been in serious doubt. This is of significance when the fourth ground of review is considered.

Fourth ground of review: incorrect assessment of the winning bid

[52] The fourth ground of review relied upon by the first respondent alleges that the Marothodi Metsi and Sebata Group bid was incorrectly assessed, and scored, by the first respondent's bid evaluation committee. The general thrust of this ground is that the Marothodi Metsi and Sebata Group bid would not have progressed to the functionality assessment had it been properly evaluated.

[53] The first respondent makes the case that the evaluation process pertaining to received bids had three parts to it: the evaluation of the prescribed compulsory returnable documents that each bidder had to submit, the assessment of the functionality of each bidder, and the assessment of the price and preferential points in compliance with the Preferential Procurement Policy Framework Act 5 of 2000. The minimum point score at the second level of assessment was 60 points out of a possible 100 points.

[54] The bid document required a bidder to score itself in each of the following four categories, namely the bidder's experience, the bidder's capacity, the bidder's locality, and the bidder's approach paper. I deal in detail only with the first three. Both the first and the second bid documents have identical scores recorded. In the second bid document, the bidder scored itself as follows:

(a) Bidder's Experience

Description	Points	Points	Points
Number of similar supply projects/orders undertaken in the last five years with organs of state/municipalities	1 > 4 projects	5 < 9 Projects	> 10 Projects
Points allocated	5	15	30
Points claimed, Simply tick the appropriate box			✓

(b) Bidder's Capacity

Description	Points	Points	Points
Number of year's company has been in practice doing similar work requirements	1 > 4 Years	5 < 9 Years	> 10 Years
Points allocated	5	15	20
Points claimed, Simply tick the appropriate box			✓

(c) Bidder's Locality

Description	Points	Points	Points
Bidder's location and warehouse facilities	Outside of the District	Within the District	Within 5Km to Ladysmith CBD
Points allocated	5	15	20
Points claimed, Simply tick the appropriate box			✓

[55] The bidder thus gave itself maximum points in each of these three categories. This assessment was accepted by the bid evaluation committee without demur. In considering each of these categories, the following emerges:

(a) Insofar as the experience category is concerned, letters of reference were to be attached to the bid to support the response given. None were attached that recorded the involvement of the Marothodi Metsi and Sebata Group or the applicant. Nonetheless, 30 points were awarded and allocated by the bid evaluation committee. None ought to have been awarded;

(b) In the bidder's capacity category, the bidder claimed 20 points on the basis that it had done similar work for more than 10 years. The applicant, as opposed to the Marothodi Metsi and Sebata Group, was only registered in 2016. It manifestly could not have been doing these types of projects for more than 10 years, whether on its own or in conjunction with another entity such as the Sebata Group. The applicant was only registered for VAT purposes in January 2020. The financial statements referred to earlier demonstrate that it has never traded. No points should have been allocated; and

(c) The bidder's locality category required proof of an address and lease agreements in respect of premises to be put up. The bidder claimed that it had premises within 5 kilometres of the Ladysmith CBD and awarded itself the maximum of 20 points. The bid documents did include three lease agreements and one rates invoice. None of them, however, were in the name of the Marothodi Metsi and Sebata Group. One lease agreement was for property in Boksburg, Gauteng province, and two were for a warehouse in Brits, North West province. In the review record there is, however, an incomplete copy of a lease agreement in which the name of the applicant, not the Marothodi Metsi and Sebata Group, appears as the lessee. The lessor is one Suleman Jessop. There is no evidence as to when this lease was concluded, as the signature page has not been included in the review record, although the document does record that notwithstanding the date of signature, the lease was for a period of two years and commenced on 1 March 2019. But it is amply evident that the Marothodi Metsi and Sebata Group was not a party to it. The bid evaluation committee, however, approved the allocation of the maximum points to the bidder. None should have been allocated.

[56] The fourth category not analysed dealt with the bidders' approach paper. That seems to be a reference to the plan identified in the advertisement. The maximum score attainable in this category was 30 and the bidder allocated that score to itself. Assuming, but not deciding, that it was justified in doing so, it appears to me that the maximum score that the bidder could have achieved was 30 points. It could not therefore have advanced to the next phase of evaluation.

[57] In assessing the bid of the Marothodi Metsi and Sebata Group, the first respondent's bid evaluation committee concluded that:

‘Marothodi Metsi and Sebata Group has for the past 20 years been extensively involved in the financial viability of the municipalities. They specialise in the development implementation and management of revenue enhancement and revenue protection strategies.’

This is incorrect on multiple levels. Firstly, as pointed out, the applicant has not been in business for 20 years, having only been incorporated in 2016. Secondly, the Sebata Group did not submit the compulsory bid documentation and its experience thus counted for nought. Thirdly, the applicant could not have accumulated the experience that it claimed to have because its annual financial statements demonstrated that it has never traded.

[58] The bid should not have been allowed to progress to the next stage of assessment, as it could not have met the minimum score of 60 points.

Fifth ground of review: terms of reference impermissibly departed from

[59] This brings me to the fifth and final ground of review. The first respondent states that the terms of reference of the bid were impermissibly departed from by the first respondent’s officials. The vagueness of the advertisement of the tender and the tender specification has already been alluded to. Accepting for a moment that what was called for was the supply of smart water meters themselves, it bears repeating that nowhere in any of the tender documents is it specified that the successful bidder would be entitled to install those meters or involve itself with the collection of revenue generated by them and the like. There simply is no such provision in the tender. Yet in the first and second award letters, there is a reference to the installation of the smart meters and in the second award letter, there is reference to a bad debt recovery component, revenue enhancement and a ‘vendorrying’ system. None of these additional aspects are mentioned in the advertisement or in the bid specification. It seems to me that if that is what the first respondent in truth required, it would have to issue a second tender for those services. It did not, but simply granted the Marothodi Metsi and Sebata Group all those powers.

[60] But perhaps the strongest point in favour of the first respondent’s fifth ground of review is that the tender was intended to be at no expense to the first respondent. The advertisement stated as much:

‘Sourcing of funding must be at no risk to the uThukela Municipality and must in no way whatsoever affect our current financial situation.’

It was never in the contemplation of the first respondent’s invitation to tender that the project would cost it an amount in excess of R700 million. It already had financial difficulties. It had no approved budget for the project. That this was undoubtedly the case appears from the minutes of the first respondent’s bid specification committee meeting held on 12 December 2019. That document records at paragraph 4 thereof that:

‘There is no budget provided to the bid specification committee by the end user department. This contract is funded externally.’

Later, the minutes record the following:

‘The uThukela District Municipality has huge financial challenges and is seeking service providers that can self-fund the Project and in no ways must this project affect the municipality’s current financial situation and income in anyway (sic) whatsoever.’

[61] It is clear from this, as Mr de Wet argued, that there was non-compliance with the peremptory provisions of section 19(1) and 19(2) of the Local Government: Municipal Finance Management Act 56 of 2003, which states:

‘19(1) A municipality may spend money on a capital project only if—

- (a) the money for the project, excluding the cost of feasibility studies conducted by or on behalf of the municipality, has been appropriated in the capital budget referred to in section 17 (2);
 - (b) the project, including the total cost, has been approved by the council;
 - (c) section 33 has been complied with, to the extent that that section may be applicable to the project; and
 - (d) the sources of funding have been considered, are available and have not been committed for other purposes.
- (2) Before approving a capital project in terms of subsection (1) (b), the council of a municipality must consider—
- (a) the projected cost covering all financial years until the project is operational; and
 - (b) the future operational costs and revenue on the project, including municipal tax and tariff implications.’

[62] In summary, each ground of review raised by the first respondent has merit and must be sustained. It appears to me that the first respondent’s conduct in

awarding the tender to the Marothodi Metsi and Sebata Group was neither fair, equitable, transparent, competitive nor cost-effective, all factors mentioned in s 217(1) of the Constitution.

[63] The first respondent, in bringing its review application, highlighted its dissatisfaction with the issues that I have just dealt with. However, it went further and alleged that the applicant is guilty of fraudulent conduct. It appears that the allegation of fraud has at least two levels. The first level is that the applicant knew that on its own track record it could not succeed with its bid. It then submitted the bid in its name and the name of the Sebata Group and rode on the latter's track record and expertise to secure the tender. That conduct was dishonest and fraudulently misrepresented the facts. The second level is that the applicant has acted fraudulently in stating that the first bid document is the one that it submitted to the first respondent when it well knew that what had been submitted was the second bid document, and it has thereafter advanced a false narrative based upon the first bid document. The submission is that such conduct is equally dishonest and is designed to deceive the court.

[64] The allegation of fraud is obviously one of the most serious kind. Dishonesty and deception have no place in life or in litigation. The law, however, does not easily infer fraud,²⁴ but when it is found to exist, it:

'vitiates every transaction known to the law'.²⁵

I, however, caution myself with two realisations when considering this allegation. The first is that fraud should not be considered as a 'flame-thrower, withering all within reach'.²⁶ As Cameron J observed further in *Absa Bank Ltd v Moore and another*:²⁷

²⁴ *Gilbey Distillers & Vintners (Pty) Ltd and others v Morris NO and another* 1990 (2) SA 217 (SE) at 226A.

²⁵ *Esorfranki Pipelines (Pty) Ltd and another v Mopani District Municipality and others* [2014] ZASCA 21; [2014] 2 All SA 493 (SCA) para 25. In *Lazarus Estates Ltd v Beasley* [1956] 1 QB 702 (CA) at 712, Lord Denning uttered these well-known and oft repeated words:

'No court in this land will allow a person to keep an advantage which he has obtained by fraud. No judgment of a court, no order of a Minister, can be allowed to stand if it has been obtained by fraud. Fraud unravels everything. The court is careful not to find fraud unless it is distinctly pleaded and proved; but once it is proved it vitiates judgments, contracts and all transactions whatsoever . . . '.

²⁶ *Absa Bank Ltd v Moore and another* [2016] ZACC 34; 2017 (1) SA 255 (CC) para 39.

²⁷ *Ibid.*

‘Fraud unravels all directly within its compass, but only between victim and perpetrator, at the instance of the victim. Whether fraud unravels a contract depends on its victim, not the fraudster or third parties.’

The second is that motion proceedings are generally not designed to permit a court to easily make findings of fraud.²⁸ As Seegobin J said in *Commissioner for the South African Revenue Services v Sassin and others*:²⁹

‘Our courts have consistently held that it would be unwise to decide a disputed issue of whether fraud was committed on motion proceedings without the benefits inherent in the hearing of oral evidence, including discovery of documents, cross-examination of witnesses, and so forth.’

[65] It seems to me that considering the date of registration of the applicant and the fact that the financial statements put up by it establish unquestionably that it had never traded, the applicant had very little prospect of succeeding on its own in securing the tender. The only way that could occur would be if it included the Sebata Group as a bidding partner. Everything that it said about its association with the Sebata Group was a fiction, designed to mislead the first respondent and to win the tender. It also seems likely to me that the applicant would know what bid document it submitted to the first respondent, and it would have an explanation of why the second bid document exists and why that document and not the first bid document formed part of the review record. But no explanation has been offered. The invitation to conclude that the applicant constructed its case around the first bid document knowing that what had been submitted to the first respondent was the second bid document is almost impossible to resist. That conclusion becomes irresistible when two further occurrences are considered.

[66] The first occurrence relates to the conclusion of the contract. The closing date for the tender, as previously noted, was 12h00 on 20 February 2020. There was no indication of when the award would be published but it is not in dispute that the result of the tender was announced on 7 July 2020, when the first respondent issued the first award letter. Mr Broster drew attention to the contract. The signature page of that document states that the contract was concluded on 30 June 2020. Remarkably,

²⁸ *Korff v Scheepers en Andere* 1962 (3) SA 83 (W) at 85.

²⁹ *Commissioner for the South African Revenue Service v Sassin and others* [2015] ZAKZDHC 82; [2015] 4 All SA 756 (KZD) para 47.

that was a week before the award of the tender was announced. How could this be? I invited Mr Dickson to address me in reply on this issue. He stated that the applicant had openly disclosed the date of conclusion of the contract in its founding affidavit in the urgent application and had not tried to hide it. That may well be so, because the following is, indeed, stated in the founding affidavit in that application:

‘The Contract was signed by the parties on 30 JUNE 2020. This agreement was signed days before the letters of award had been delivered and are reference (sic) in the 7 July 2020 letter

of award (FA6).’

[67] In my view, the disclosure had to be made. The applicant's urgent application invited attention to the contract, which the applicant contended had been incorrectly suspended. Later, the applicant sought rectification of that very contract. It therefore had to put up the contract when it brought the urgent application. The anomaly over the date of signature of the contract would have quickly become apparent. The disclosure in the applicant's founding affidavit in the urgent application did no more than state the unavoidable, obvious truth. What is disconcerting, however, is that the disclosure of this rather extraordinary fact is not accompanied by any explanation as to how, or why, this occurred. How is it possible that before the awarding of the tender had been decided upon, the applicant and the first respondent had already concluded the contract that is a consequence of the awarding of the tender? Such conduct is not only irregular but contrary to the provisions of clause 12 of the tender conditions which states that:

‘Bidders shall not contact the uThukela District Municipality on any matter relating to their bid from the time of the opening of the bid to the time the contract is awarded.’

For the contract to have been concluded before the announcement of the awarding of the tender, there must have been contact between the applicant and the first respondent.

[68] This conduct is unsettling and carries with it the malodorous whiff of collusion and unfairness. The inference appears to me to be inescapable that there was some degree of collusion between the applicant and the representative or representatives of the first respondent then in office. I suggested to Mr Broster that the conclusion of the contract before the result of the tender was announced raised the spectre of a

'stitch up'.³⁰ He agreed. Mr Dickson did not agree and explained why he did not share that view, but I confess that I did not truly understand the explanation advanced by him.

[69] The suggestion of impropriety attaching to the tender intensifies when the second occurrence is considered. Both the first and second award letters, as stated, required a signature of acceptance from the Marothodi Metsi and Sebata Group. The first award letter was not signed and returned to the first respondent. Why this should be the case is not disclosed. The second award letter was signed. The second award letter recorded that the appointment would be valid once it was signed by the two contracting parties. It was signed by the first respondent's representative upon dispatch of the letter to the Marothodi Metsi and Sebata Group and it was signed by a representative of the Marothodi Metsi and Sebata Group upon receipt by it of the letter on 8 July 2020. The appointment that the letter dealt with was then final.

[70] However, on 22 July 2020, after it had already accepted and signed the second award letter, the applicant purported to reply to the first award letter, dated 7 July 2020. In the first award letter (and, indeed, in the second award letter), the first respondent had set out certain conditions, five in the first award letter and six in the second award letter. In its reply of 22 July 2020, the applicant copied the five conditions in the first award letter and pasted them onto its separate letter of acceptance. This letter was typed on a Marothodi Metsi letterhead. There is, perhaps, nothing sinister about that, although strictly speaking it was unnecessary for a separate letter to be drafted as the first award letter could simply have been signed and returned. It was also unnecessary considering that the second award letter had already been signed by the applicant's representative. But it appears that there was a clamant need for the separate letter of acceptance. This may be gleaned from the opening two paragraphs of the reply:

'We herewith acknowledge receipt of your Appointment Letter/Tender Award Letter dating the 07th July 2020 and accept your decision.

³⁰ Collins Online Dictionary: <https://www.collinsdictionary.com/dictionary/english/stitch-up>. When used as a phrasal verb, '[t]o stitch up an agreement, especially a complicated agreement between several people, means to arrange it'.

We thank you for accepting our bid and we commit to serving the institution of uThukela District with highest level of professionalism and we will strive to run and conclude this project with highest level of excellence.'

[71] There is no reference whatsoever to the Sebata Group in the applicant's letter. The original offer was directed to the Marothodi Metsi and Sebata Group. It was not open for the applicant to accept that offer in its own right. But that is what it did, for below the signature line on its letter of 22 July 2020 was the name of Marothodi Metsi only. It appears that this acceptance was effective and was accepted by the first respondent because the applicant then commenced working on the tender.

[72] All of this is disquieting. The entire tender process is suffused with inexplicable conduct by the applicant and the first respondent. That conduct appears at worst to be potentially dishonest but at the very least is unfair. I refrain from explicitly making a finding regarding the allegation of fraud although there are strong indications that this is what was intended and what had occurred. But it appears certain that the tender was poorly devised, carelessly administered and improperly awarded and offends virtually every conceivable principle of fairness and transparency that our law demands and holds dear. It cannot be permitted to stand, unless the only point of substance raised by the applicant succeeds. That is the principle of undue delay.

Undue delay

[73] The applicant raises this point, stating, correctly that the tender was awarded on 7 July 2020 and that the review application was launched on 20 July 2022, two years later. The applicant contends that the review falls to be dismissed because of this undue delay and that it should not be condoned or overlooked.

[74] In *Buffalo City v Asla Construction*,³¹ the Constitutional Court distilled four essential principles when assessing an alleged undue delay in a legality review:

³¹ *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd* [2019] ZACC 15; 2019 (4) SA 331 (CC); 2019 (6) BCLR 661 (CC) ('Asla').

- (a) The court has a broader discretion concerning undue delay than in a review brought in terms of PAJA;
- (b) Whether the delay is reasonable is to be considered in the light of the reasons advanced for the delay. This is a fact-specific enquiry linked to a value judgment as to whether it can be inferred that the delay is 'undue'.
- (c) It must be considered whether circumstances exist that permit the delay to be overlooked. This will include the assessment of whether any party will be prejudiced, the merits of the challenge to the impugned decision and the conduct of the party seeking the review; and
- (d) The provisions of section 172(1)(a)³² of the Constitution may dictate that even if the delay has been excessive, the impugned decision be set aside where its deficiencies are clear and undisputed.³³

[75] In *Asla*, Theron J affirmed that the test to be applied is the test initially postulated in *Gqwetha v Transkei Development Corporations Ltd and others*,³⁴ and reaffirmed in *Khumalo v Member of the Executive Council for Education, KwaZulu-Natal*,³⁵ namely that:

'Firstly, it must be determined whether the delay is unreasonable or undue. This is a factual enquiry upon which a value judgment is made, having regard to the circumstances of the matter. Secondly, if the delay is unreasonable, the question becomes whether the Court's discretion should nevertheless be exercised to overlook the delay to entertain the application.'³⁶

Any explanation offered for a delay must cover the whole period of the delay.³⁷

[76] In *Altech Radio Holdings (Pty) Ltd and others v Tshwane City*,³⁸ Ponnann JA reaffirmed that:

³² Section 172(1)(a) provides as follows:

'When deciding a constitutional matter within its power, a court -

(a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency'.

³³ *Asla* paras 48-72.

³⁴ *Gqwetha v Transkei Development Corporation Ltd and others* 2006 (2) SA 603 (SCA); [2006] 3 All SA 245 (SCA).

³⁵ *Khumalo and another v MEC for Education, KwaZulu-Natal* [2013] ZACC 49; 2014 (5) SA 579 (CC); 2014 (3) BCLR 333 (CC) ('*Khumalo*').

³⁶ *Asla* para 48.

³⁷ *Asla* para 52.

³⁸ *Altech Radio Holdings (Pty) Ltd and others v Tshwane City* [2020] ZASCA 122; 2021 (3) SA 25 (SCA) para 18.

‘It is a long-standing rule that a legality review must be initiated without undue delay and that courts have the power (as part of their inherent jurisdiction to regulate their own proceedings) to either overlook the delay or refuse a review application in the face of an undue delay.’

[77] The requirement that legality reviews must be brought without delay was further

explained in *Merafong City v AngloGold Ashanti Ltd*³⁹ where Cameron J reiterated that:

‘The rule against delay in instituting review exists for good reason: to curb the potential prejudice that would ensue if the lawfulness of the decision remains uncertain. Protracted delays could give rise to calamitous effects. Not just for those who rely upon the decision but also for the efficient functioning of the decision-making body itself.’

[78] On how the reasonableness of a delay is to be assessed, Plasket JA in *Valor IT v Premier, North West Province and others*⁴⁰ indicated that:

‘Whether a delay is unreasonable is a factual issue that involves the making of a value judgment. Whether, in the event of the delay being found to be unreasonable, condonation should be granted involves a “factual, multi-factor and context-sensitive” enquiry in which a range of factors – the length of the delay, the reasons for it, the prejudice to the parties that it may cause, the fullness of the explanation, the prospects of success on the merits – are all considered and weighed before a discretion is exercised one way or the other.’ (Footnotes omitted.)

[79] While the court has a discretion to refuse a review because of an unacceptable delay, if the decision about which complaint is made is patently unlawful, this may in turn dictate that the delay be overlooked and that the review be granted. The requirement to bring review proceedings without undue delay is to ensure that there is finality in those proceedings. The Constitutional Court has held that there is a strong public interest in both certainty and finality.⁴¹

³⁹ *Merafong City v AngloGold Ashanti Ltd* [2016] ZACC 35; 2017 (2) SA 211 (CC); 2017 (2) BCLR 182 (CC) para 73.

⁴⁰ *Valor IT v Premier, North West Province and others* [2020] ZASCA 62; [2020] 3 All SA 397 (SCA) para 30.

⁴¹ *Khumalo* para 47.

[80] Sutherland DJP in *Transnet SOC Ltd and another v CRRC E-LoCo Supply (Pty) Ltd and others*⁴² summarised the principles applicable to the so-called 'delay defence' in legality reviews, as distilled from *Asla*, as follows:

'[17.1] it is improper to deal with delay before giving attention to the merits of the review,

[17.2] where invalidity is indeed detected, it must be declared to be so,

[17.3] the merits are relevant to what to choose to do about an undue delay when that is found to exist,

[17.4] whether or not to overlook undue delay is a flexible evaluation which is driven by several factors

[17.5] undue delay is bound up in the just and equitable remedy which may be that no consequent relief is granted; ie, the review might succeed but the contracts are not set aside.' (Footnotes omitted.)

[81] With those principles in mind, I consider the explanation for the delay. Mr Mnguni, in his founding affidavit in the review application, provides the following explanation:

'The circumstances surrounding this tender were covered up by the former municipal manager and officials loyal to his administration. I have not yet completed my investigation into which officials were involved in the cover up of this bid and the contract concluded to give effect to it. I, as I have previously said, was appointed to the position of municipal manager on 1 April 2022, more or less three months ago.'

[82] Mr Mnguni has made it plain in the affidavits that he has delivered that he is a new appointee to the position of municipal manager of the first respondent. Upon his appointment, he immediately commenced an investigation into the contracts and tenders binding upon the first respondent. That is commendable. He indicates that before his investigation was even complete, the review application was launched. That is even more commendable. Mr Mnguni states that the review application was purposefully brought in haste to permit it to be heard at the same time as the urgent application and the rectification application.

[83] It appears from his explanation that Mr Mnguni suggests that there has not been an undue delay. Certainly, Mr Mnguni has personally acted with exemplary

⁴² *Transnet SOC Ltd and another v CRRC E-LoCo Supply (Pty) Ltd and others* [2022] ZAGPJHC 228 para 17.

briskness in exposing what occurred, considering that the date of his appointment was 1 April 2022, and he had the review application before court on 20 July 2022. But can his swiftness offset the lengthy period of inactivity on the part of the first respondent?

[84] In my view it can. A matter cannot be said to have been unduly delayed where those responsible for unlawful conduct have actively engaged in hiding their malfeasance. I have already found that the conduct of the principal parties to the tender was suffused with unacceptable conduct. Those involved in that type of conduct would take no steps to disclose it but would rather suppress any such knowledge. When those who are expected to raise the alarm when impropriety is found to exist are involved in the impropriety themselves, right-thinking members of the community would not attribute any resulting delay to the employer.

[85] A similar issue was raised before a full court of this division in *KZN Oncology Inc v KZN Province MEC for Health and another*.⁴³ The matter involved a review, and the issue of undue delay was raised. The court, of which I was a member and the scribe, stated the following:

‘It was explained in some detail by the first respondent that the person who signed the contract with the appellant, being the head of the department, was the person who ought to have brought the review proceedings. However, that person had been implicated in the forensic report with specific reference to wrongdoing in respect of the contract in question in this application and disciplinary steps were recommended to be taken against him. Before this could occur, he resigned. The next two most senior persons, who might have taken the contract on review, were also implicated with regard to the same contract in the same forensic report. Given their apparent wrongdoing, there was no incentive for any of these three persons to have taken any steps to review the contract. However, once the forensic report was received, the first respondent acted expeditiously, and the review was brought collaterally as a counter-application.’⁴⁴

[86] The court in went on to consider the following question:

‘What is an organ of state required to do if the very person who ought to bring the review proceedings setting aside an unlawful contract is in fact the person who concluded the

⁴³ *KZN Oncology Inc v KZN Province MEC for Health and another* [2021] ZAKZPHC 72.

⁴⁴ *Ibid* para 24.

contract? The obvious answer is that such official could not have been the only person to have known of the existence of the contract, and accordingly others with such knowledge should take that step. But what if the other people who ought to have taken the matter on review were also implicated in the awarding and conclusion of the unlawful contract? In this case, none of the persons involved in the awarding of the contract in question had any incentive to review it because their personal shortcomings would have been revealed as a consequence.’⁴⁵

[87] I conclude that there has not been an undue delay given the facts of this matter.

But it is possible that I am incorrect in this conclusion. I therefore consider the alternative scenario, namely that the delay has been unduly long. Are the circumstances of this matter sufficient to permit the delay to be overlooked? In considering other decided matters where lengthy periods of delay have occurred, I again caution myself that determining such issue is largely based upon the facts specific to a matter.

[88] In *Swifambo Rail Leasing (Pty) Ltd v Prasa*,⁴⁶ the delay was three years, but it was condoned in circumstances where the full extent of the wrongdoing at Prasa was

concealed from the board of directors.⁴⁷ Lewis JA observed as follows:

‘The Prasa board, once reconstituted, did not ascertain the irregularity in the award of the bid to Swifambo for all the reasons stated until August 2015 and launched the application for review in November of that year. It acted as expeditiously as possible. On the assumption that there was indeed delay at common law (for just under three years), it applied for condonation. In my view, there was no unreasonable delay in all the circumstances. However, it is useful to consider whether condonation should have been granted by the High Court, given the lengthy period between the award of the contract and the institution of review proceedings.’⁴⁸

The court later concluded that condonation had correctly been granted. It did so citing

⁴⁵ Ibid para 25.

⁴⁶ *Swifambo Rail Leasing (Pty) Ltd v Prasa* [2018] ZASCA 167; 2020 (1) SA 76 (SCA).

⁴⁷ Ibid paras 34 and 36.

⁴⁸ Ibid para 39.

the following dicta⁴⁹ in *Cape Town City v Aurecon SA (Pty) Ltd*,⁵⁰ in which the Constitutional Court stated that if the irregularities discovered had:

‘...unearthed manifestations of corruption, collusion or fraud in the tender process, this court might look less askance in condoning the delay. The interests of clean governance would require judicial intervention.’⁵¹

[89] In *Simeka*⁵² the court commented as follows:

‘Whilst one must accept that the Department could have acted with more urgency than it did in unravelling the facts, given that it sought to review its own decision, sight should nevertheless not be lost of the fact that the bureaucratic machinery is notorious for moving slowly even though the exigencies of a particular case might require that matters be dealt with expeditiously. However, it must be emphasised that recognising this reality in no way seeks to excuse laxity. It is more to say that, notwithstanding the constitutional dictates of a responsive and accountable public administration, the reality is that public administration in our country has over time been allowed to slide to a quagmire of inefficiency. This is a state of affairs that is antithetical to the values underpinning our constitutional order that the citizenry holds dear.’

[90] The court further stated that:

‘As it turns out, the interests of justice and the unexplained egregious material deviations from the tender requirements coupled with the onerous financial burden that the revision of the tender requirements post its award to Simeka Group are all relevant factors that, amongst others, were not sufficiently accorded due weight by the high court in determining whether the unreasonable delay should be overlooked.’⁵³

[91] Considering the unsatisfactory conduct that has been uncovered by the first respondent, even if I should be incorrect in coming to the conclusion that there has not been an undue delay in bringing the review application, it seems to me that the reasoning in the extracts from *Simeka* referred to above are of equal application to the facts of this matter. In my view, if there has been an undue delay, it should be overlooked.

⁴⁹ Ibid para 41.

⁵⁰ *Cape Town City v Aurecon SA (Pty) Ltd* [2017] ZACC 5; 2017 (4) SA 223 (CC).

⁵¹ Ibid para 50.

⁵² *Simeka* para 85.

⁵³ Ibid para 108.

Remedy

[92] Section 172(1) of the Constitution reads as follows:

- '(1) When deciding a constitutional matter within its power, a court -
- (a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and
- (b) may make any order that is just and equitable, including -
 - (i) an order limiting the retrospective effect of the declaration of invalidity; and
 - (ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.'

[93] Given the findings which I have come to regarding the circumstances under which the tender was awarded, and the contract concluded, I am obliged to find in terms of s 172(1)(a) of the Constitution that the awarding of the tender to the Marothodi Metsi and Sebata Group is invalid, as is the conclusion of the contract with that entity.

Such a finding was foreshadowed in the applicant's answering affidavit in the review application. Mr Masomboka indicated in that affidavit that if such a finding is made, then the applicant sought an order in terms of s 172(1)(b) limiting the retrospective effect of invalidity and suspending the declaration of invalidity until the end of the contractual period. However, by the time that the applications were argued, the contractual period had expired through the effluxion of time and the latter relief fell away.

[94] In advancing its claim for the remaining relief claimed in terms of s 172(1)(b), the applicant seeks such an order to keep alive any claim that it may have for damages or lost expenses arising out of the implementation of the contract. This relief was justified, so the applicant submitted, by the fact that the first respondent solicited the services of the applicant and awarded it the contract, then unlawfully suspended the contract and then opportunistically sought to set aside the contract '... when it no longer suited the Municipality to abide by the contract.'

[95] Section 172(1)(b) of the Constitution endows this court with a discretion.⁵⁴ In *Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and others*,⁵⁵ Froneman J held that this discretionary power follows upon an order of invalidity in terms of PAJA or the principle of legality. It is normally triggered under circumstances where parties have altered their position on the basis that the administrative action was valid and would be prejudiced if the administrative action is subsequently set aside. But in exercising this discretion, the court must be convinced to either exercise its discretion to grant a remedy or to refuse it. The discretion is a true discretion.⁵⁶

[96] The court appears to have a wide remedial power to ensure that an injustice does not occur because of a tender being set aside. In *Gijima*,⁵⁷ the court noted that a court hearing a constitutional matter:

‘... is empowered to make “any order that is just and equitable”. So wide is that power that it is bounded only by considerations of justice and equity.’

[97] In considering this issue, a court is required, to the extent possible, to classify the conduct of the tenderer as being involved in, or free from, wrongdoing in the circumstances of the tender. As was stated in *Central Energy Fund SOC Ltd and another v Venus Rays Trade (Pty) Ltd and others*:⁵⁸

‘The law draws a distinction between parties who are complicit in maladministration, impropriety, or corruption on the one hand, and those who are not, on the other. The category into which a party falls has a significant impact on the appropriate just and equitable remedy that a court may grant. Parties who are complicit in maladministration, impropriety or corruption are not only precluded from profiting from an unlawful tender, but they may also be required to suffer losses. On the other hand, although innocent parties are not entitled to benefit from an unlawful contract, they are not required to suffer any loss as a result of the invalidation of a contract.’ (Footnotes omitted.)

⁵⁴ *Special Investigating Unit v Phomella Property Investments (Pty) Ltd and another* [2023] ZASCA 45; 2023 (5) SA 601 (SCA) para 10.

⁵⁵ *Bengwenyama Minerals (Pty) Ltd and others v Genorah Resources (Pty) Ltd and others* [2010] ZACC 26; 2011 (4) SA 113 (CC) para 84.

⁵⁶ *Central Energy Fund SOC Ltd and another v Venus Rays Trade (Pty) Ltd and others* [2022] ZASCA 54; 2022 (5) SA 56 (SCA); [2022] 2 All SA 626 (SCA) para 43.

⁵⁷ *State Information Technology Agency SOC Limited v Gijima Holdings (Pty) Limited* [2017] ZACC 40; 2018 (2) SA 23 (CC); 2018 (2) BCLR 240 (CC) para 53.

⁵⁸ *Central Energy Fund SOC Ltd and another v Venus Rays Trade (Pty) Ltd and others* [2022] ZASCA 54; 2022 (5) SA 56 (SCA); [2022] 2 All SA 626 (SCA) para 42.

[98] In its heads of argument, the applicant draws attention to certain decided cases which deal with:

‘... a consideration of the losses suffered by an innocent tenderer ...’.

The applicant is not an innocent tenderer. I must find that the applicant falls into the first category identified in *Venus Rays Trade* mentioned above. The grounds advanced by the applicant entitling it to an order in terms of s 172(1)(b) demonstrate a clear lack of insight into its own conduct. It fails to appreciate that the first respondent did not award the contract to the applicant: it was awarded to the Marothodi Metsi and Sebata Group. Further, the first respondent did not simply decide that it no longer wished to abide by the contract because it did not suit it to do so: it was compelled to act in the face of questionable conduct in the awarding of the contract.

[99] The first respondent does not seek any order relating to the applicant disgorging any benefits that it thus far may have received. Mr Broster submitted merely that there was nothing further owing to the applicant as it had been paid for those services that it had already rendered. His argument was simply that the applicant is not entitled to any further benefits. In my view, because of the conduct of the applicant as already described, it is inappropriate to allow the applicant the relief that it seeks in terms of s 172(1)(b). I accordingly decline to grant any such order.

The urgent application and application for rectification of the contract

[100] As the contract is to be set aside, the urgent application must fail, as must the rectification application.

Costs

[101] The first respondent has succeeded in its review application and there is no reason why costs should not follow the result. The first respondent wisely employed two counsel and the costs ordered must cover the costs of those two counsel. The same order as to costs must issue with regard to the failed urgent application and the failed rectification application.

Order

[102] I accordingly grant the following order:

1. The money judgment:

- (a) The first respondent's application for a money judgment against the applicant, dated 14 December 2023, is adjourned sine die;
- (b) All questions of costs are reserved.

2. The urgent application:

- (a) The applicant's urgent application, dated 27 June 2022, is dismissed;
- (b) The applicant shall pay the respondents' costs, such to include the costs of two counsel where so employed.

3. The rectification application:

- (a) The applicant's rectification application, dated 22 February 2023, is dismissed;
- (b) The applicant shall pay the respondents' costs, such to include the costs of two counsel where so employed.

4. The review application:

- (a) The decision of the first respondent to award tender number 01/2020-PRS to the Marothodi Metsi and Sebata Group is reviewed, declared invalid and is set aside;
- (b) The contract concluded between the first respondent and the Marothodi Metsi and Sebata Group, dated 30 July 2020, pursuant to the award of tender number 01/2020-PRS to the Marothodi Metsi and Sebata Group, is reviewed, declared invalid and is set aside.
- (c) The applicant shall pay the respondents' costs, such to include the costs of two counsel where so employed.

MOSSOP J

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Date of Hearing	:	26 January 2024
Date of Judgment	:	20 February 2024