

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

Case No: 8721/2021

REPORTABLE

In the matter between:

BUHLE WASTE (PTY) LTD

INTERVENING PARTY

In re:

MAKHATHINI MEDICAL WASTE (PTY) Ltd

APPLICANT

and

THE MEC FOR HEALTH, KWAZULU-NATAL

FIRST RESPONDENT

COMPASS MEDICAL WASTE SERVICES (PTY) LTD

**SECOND
RESPONDENT**

**THE CHAIRMAN, BID APPEALS TRIBUNAL
KWAZULU- NATAL**

THIRD RESPONDENT

MEC FOR FINANCE, KWAZULU-NATAL

**FOURTH
RESPONDENT**

ORDER

The following order is granted:

1. The intervening party, Buhle Waste (Pty) Ltd, is granted leave to intervene and is joined as second applicant in the review application under case number 8721/21P in respect of the decision to award the contract for Area 2: Umgungundlovu, Harry Gwala and Ugu Districts (Region 2) in terms of Tender

number ZNB5296/2020-H to the second respondent, Compass Medical Waste Services (Pty) Ltd.

2. The intervening party, Buhle Waste (Pty) Ltd is directed to file its founding affidavit on or before 14 December 2022.
3. The first respondent, the MEC for Health, and the second respondent, Compass Medical Waste Services (Pty) Ltd are directed to file their answering affidavits on or before 22 December 2022.
4. The intervening party is directed to file its replying affidavit on or before 4 January 2023.
5. The applicant, Makhathini Medical Waste (Pty) Ltd is directed to file any further affidavits it may wish to file on or before 6 January 2023.
6. The costs of the intervention application are reserved for decision by the court hearing the review.

JUDGMENT

BEZUIDENHOUT AJ

Introduction

[2] Buhle Waste (Pty) Ltd (Buhle) seeks leave to intervene and to be joined as a second applicant in an application brought by Makhathini Medical Waste (Pty) Ltd (Makhathini) under case no 8721/21 which was launched on 4 October 2021. In terms of that application, Makhathini inter alia seeks to review and set aside the decisions of the Bid Evaluation Committee and the Bid Adjudication Committee of the KwaZulu-Natal Department of Health, as well as the decisions of the Bid Appeals Tribunal and the MEC for Finance, KwaZulu-Natal. It relates to an award made in respect of tender number ZNB5296/2020-H (the tender), which was published on 7 May 2021.

Background

[3] This matter is the third application out of four which I have heard in recent weeks, pending the finalization of the review application, which has been set down for hearing on the opposed roll on 20 January 2023. Both Makhathini and the KwaZulu-Natal Department of Health oppose the application.

[4] Both Buhle and Makhathini applied in separate applications for orders interdicting the KwaZulu-Natal Department of Health from implementing the decision to award the tenders to the successful bidders or to conclude any contracts pursuant to the award of the tender. I heard both these applications on 14 October 2022 and subsequently issued orders on 20 October 2022, dismissing both Makhathini's and Buhle's applications for interdictory relief, with the reasons to follow.

[5] It is common cause that the KwaZulu-Natal Department of Health (the Department) on 17 July 2020 published a tender under Bid Document number ZNB5296/2020-H, inviting tenders for the provision of health care risk waste management services (the services) for a period of three years in three different regions or areas.

[6] Makhathini was awarded the tender for Area 1. Compass Medical Waste Services (Pty) Ltd (Compass), the second respondent in the review application, was awarded the tender for Area 2. Ecocycle Waste Solutions (Pty) Ltd (Ecocycle) and Vikela Africa Waste Care CC (Vikela) as a joint venture, were awarded the tender for Area 3.

[7] Makhathini seeks to review only the decision to award the tender to Compass in respect of Area 2 in its review application. Ecocycle and Vikela are accordingly not cited in the review application as they have no interest in the matter.

[8] Buhle submitted bids in respect of all 3 areas but was unsuccessful. It now seeks to review the award in respect of all three areas, in other words, in addition to the award to Compass, also the award to Makhathini in respect of Area 1 and the award to the Ecocycle Vikela Joint Venture in respect of Area 3.

[9] Buhle is the current service provider to the Department and has been doing so in terms of a so-called piggyback arrangement through a Mpumalanga Health Department contract approved in terms of Treasury Regulation 16A6.6¹ around April 2019. Buhle was initially appointed for 6 months, which appointment was subsequently extended on a month-to-month basis to 30 June 2021 and then to 31 December 2021 and thereafter. The Mpumalanga contract expired on 30 November 2022 and Buhle's provision of services in terms of that contract terminated on that date.

[10] It is perhaps worth mentioning that Buhle was also providing similar services to the Free State Department of Health, where it chose to participate in a piggyback contract concluded between the Department of Health of Limpopo and Buhle. The contract between Buhle and the Free State Department of Health was declared unlawful and set aside by the Free State Division of the High Court in *Compass Medical Waste Services (Pty) Ltd v MEC Department of Health, Free State and others*.²

¹ Treasury Regulations, GN R225, GG 27388, 15 March 2005.

² *Compass Medical Waste Services (Pty) Ltd v MEC Department of Health, Free State and others* [2021] ZAFSHC 185.

Buhle's case

[11] It is Buhle's case that it instructed its attorneys on 7 May 2021 to deliver a notice of appeal to the Department, on the day that the tender was awarded to Makhathini, Compass and the Ecocycle Vikela Joint Venture. A notice of appeal which also incorporated a request for reasons was subsequently sent to the Department on 17 May 2021, in accordance with Item 19(2) of the KwaZulu-Natal Supply Chain Management Policy Framework (the Supply Chain Policy).

[12] Item 18 of the Supply Chain Policy deals with the establishment of the Bid Appeals Tribunal by the MEC for Finance and Economic Development.

[13] Item 19 sets out the appeal procedure. The relevant portions read as follows:

‘(1) The following entities aggrieved by a decision of a departmental Bid Adjudication Committee or a delegate of an accounting officer, may appeal to the Bid Appeals Tribunal in the prescribed manner –

(a) a department;

(b) a bidder.

(2) The department or bidder must, within five working days of receipt of the notification of an award, deliver written notification of an intention to appeal.

(3) The department or bidder may, together with the notification of intention to appeal under paragraph (2), deliver a request for written reasons for the award of the said bid.

(4) The Bid Adjudication Committee or a delegate of an accounting officer must deliver to the appellant the written reasons requested under paragraph (3) within ten working days.

(5) The appellant must, within ten working days of receipt of the written reasons delivered under paragraph (4), or, failing a request for written

reasons under paragraph (3), within ten working days of giving notice under paragraph (2), submit written representations to the Bid Appeals Tribunal, indicating sufficiently and without unnecessary elaboration the grounds and basis of the appeal and the nature of the complaint.

(6) Upon receipt of a notice of intention to appeal, the Bid Appeals Tribunal must notify other bidders who may be adversely affected by the appeal, in writing of the appeal and invite them to respond within five working days.'

[14] Buhle alleges that the Department has to date not responded to its request for reasons. It is perhaps important to note that the so called notice of appeal sent on Buhle's behalf on 17 May 2021 (outside the 5 day period) was not addressed or sent to the Department but to the Bid Appeals Tribunal. One would have expected Buhle to also address and deliver its notice of appeal and its request for reasons to the Department but as the Department has not yet raised this issue I will leave it at that. Buhle also stated that the BAC (a reference to the Bid Adjudication Committee) failed to notify it of the appeal by Makhathini, as it was obliged to do, which is not correct, as no such obligation exists. It is in fact the Bid Appeals Tribunal on whom the obligations rests, as set out in Item 19(6).

[15] As mentioned above, Makhathini launched its review application on 4 October 2021. Its review application followed upon its unsuccessful appeal before the Bid Appeals Tribunal. It is common cause that the Department initially failed to file the record, as it was obliged to do in terms of the provisions of Uniform rule 53(1)(b). Its failure necessitated Makhathini to bring an application to compel the Department to deliver the record, which it ignored and, facing an application for contempt of court, eventually filed the record on 3 October 2022. It is only since then that both Makhathini and Compass could consider the record and file the relevant affidavits to complete the papers in the review application, which is to be heard on 20 January 2023.

[16] Buhle contends that it has a direct and substantial interest in the subject matter of the dispute in the review application and that the relief it is seeking is dependent upon the determination of the same question of law or fact as in the review application albeit that two additional awards in respect of two additional areas are also disputed. Its grounds for review are the following:

(a) The tender validity period had expired before the tender was awarded. Buhle received correspondence extending the tender validity period to 10 April 2021. The tender was awarded on 7 May 2021 and was accordingly invalid and stood to be set aside.

(b) The Department failed to provide Buhle with the reasons for the award of the tender, as requested by Buhle during May 2021. The Department has also failed to dispatch the record of all the documents and electronic records relating to the making of the decision to award the tender. The Department's failure to provide reasons and its non-compliance with Uniform rule 53, as read with section 5(3) of the Promotion of Administrative Justice Act 3 of 2000 (PAJA), lead to the presumption that the decision to award the tender was taken without good reason and therefore stood to be reviewed and set aside.

(c) Lastly, Buhle aligned itself with the grounds relied upon by Makhathini in its review, in that the Department failed to comply with the Preferential Procurement Policy Framework Act 5 of 2000 in a number of respects. Firstly, the reasons for awarding the tender did not provide for objective criteria to award the tender to a lower scoring bidder. Secondly, the same criteria were taken into account twice by the Department in the decision to award the tender. Thirdly, the Department awarded the tender to Compass at a higher price than that of Makhathini without establishing whether Compass was willing to match Makhathini's price.

(d) In its interdict application, Buhle also made much of the fact that the Department apparently awarded the tenders on a 'comparative price' basis and not on the basis of the tenderers' tendered rates for the three years of the contract.

I deal with these particular grounds in the judgment of the two interdict applications.

[17] Buhle also set out further issues, not raised by Makhathini, which it alleges are the basis for its intervention:

(a) At the tender briefing session held on 2 December 2019, it raised various issues pertaining to the contents of the tender document and its implications. These included inter alia issues relating to containers and liners, performance security, audited financial statements, liquid chemical waste, functionality and the regional award of the tender.

(b) The Department failed to correct these issues.

(c) With reference to the regional award in that a bidder may not be awarded more than one region, despite it having the lowest price, it was stated that the invitation to bid on this basis was contrary to the Supply Chain Policy Framework as only the bids with the highest points may be selected. Buhle has perhaps lost sight of Item 12 of the Supply Chain Policy Framework which reads:

‘Despite paragraphs . . . a contract may, on reasonable and justifiable grounds, be awarded in respect of a bid that did not score the highest number of points. The reasons for such an award should be clearly documented for auditing purposes.’

[18] Buhle contends that it has a direct and substantial interest in ensuring that the procurement process leading to the award of the tender is lawful, reasonable and procedurally fair and should the tender stand, Buhle and the other bidders would be prejudiced as they were not subjected to a process that is lawful, reasonable and procedurally fair. Buhle also makes it clear that it seeks to have the entire tender set aside as opposed to Makhathini, who only seeks to review the award to Compass in respect of Area 2. Buhle contends that the tender should be re-advertised. It alleges that the relief sought by Makhathini, namely that Area 2 should be awarded to it or remitted back to the Department for a reconsideration is not plausible and will be unlawful in light of the irregularities in the process.

Makhathini's and the Department's case

[19] As mentioned above, both the Department and Makhathini oppose the application. Makhathini filed its answering affidavit around 14 March 2022. The Department only filed its answering affidavit on 25 October 2022, a few days before the hearing of this matter on 28 October 2022. The Department in essence aligned itself with the grounds of opposition raised by Makhathini and raised a few additional issues, alleging inter alia that Buhle's attempt at intervention is flawed because it seeks to challenge the entire tender process, wanting to set aside the awards in all three areas. It also pointed out that Buhle has failed to join Ecocycle (as well as Vikela, for that matter), the successful tenderer in Area 3, and that the application for intervention should fail on the basis of a material non-joined. I will return to the Department's other grounds of opposition if the need arises.

[20] Makhathini's opposition to Buhle's intervention application can be summarized as follows:

- (a) Buhle has not proved that it has *locus standi* to review the decision, as it has not annexed a copy of its tender to show it submitted a compliant tender. Buhle has not indicated what its ranking was – such that it would be the next highest ranking tender and entitled to any of the tenders.
- (b) Buhle's application did not satisfy the requirements of Uniform rule 10. (Buhle in its reply stressed that its application to intervene was brought in terms of Uniform rule 12 and not Uniform rule 10.)
- (c) It is not convenient for Buhle to pursue the causes of action it proposes to advance by consolidating its proposed review application with Makhathini's review. Neither Ecocycle nor Vikela are parties to the review application and the non-joinder of them is fatal to Buhle's application. If Buhle does join Ecocycle and Vikela, it will give rise to additional disputes with these parties, who are not part of Makhathini's review application.

(d) If the intervention is allowed and Ecocycle and Vikela are joined, the Department will be required to provide the record for the decision to award the tender for Area 3, which is at present irrelevant to the review application.

(e) These disputes and procedural issues will only serve to delay the finalization of Makhathini's review application. Buhle has no entitlement to join its review application as it would involve broader issues, thereby complicating the matter and delaying its finalization. Buhle's remedy is to institute its own separate review application.

(f) Makhathini has not sought to review or set aside the Department's award to Ecocycle and Vikela in respect of Area 3 and accordingly, Buhle's application will not depend upon the determination of substantially the same question of law or fact as in the review application. Buhle is furthermore also seeking to set aside the award to Makhathini in respect of Area 1, which adds an additional cause of action which will raise additional issues which do not involve the determination of substantially the same question of law or fact. Makhathini is not a respondent in the review application and Buhle has not cited it as a respondent in the intervention application. Buhle is seeking leave to intervene as a co-applicant with Makhathini. There is no provision in the Uniform rules for one applicant to seek relief against another applicant.

(g) Buhle's review application seeks to render Makhathini's review moot by seeking to impugn the whole tender. It does not involve the joinder of a cause of action that can suitably be decided with the issues in the review application and therefore does not meet the requirements of Uniform rule 10.

(h) Further delays will arise in order to obtain the record from the Department in respect of the award of the tender for Area 1 to Makhathini, which record will be irrelevant to Makhathini's review.

[21] Makhathini also alleged that Buhle's application was premature or not ripe for hearing as it has not shown that it has exhausted its internal remedies provided for in the Supply Chain Policy Framework and as required by section 7(1) and (2)(a) of PAJA. The relevant provisions of PAJA read as follows:

‘(1) Any proceedings for judicial review in terms of section 6 (1) must be instituted without unreasonable delay and not later than 180 days after the date—

(a) subject to subsection (2) (c), on which any proceedings instituted in terms of internal remedies as contemplated in subsection (2) (a) have been concluded; or

(b) where no such remedies exist, on which the person concerned was informed of the administrative action, became aware of the action and the reasons for it or might reasonably have been expected to have become aware of the action and the reasons.

(2) (a) Subject to paragraph (c), no court or tribunal shall review an administrative action in terms of this Act unless any internal remedy provided for in any other law has first been exhausted.’

[22] Section 7(2)(c) of PAJA is also relevant. It reads as follows:

‘A court or tribunal may, in exceptional circumstances and on application by the person concerned, exempt such person from the obligation to exhaust any internal remedy if the court or tribunal deems it in the interest of justice.’

Buhle has not made such an application.

[23] The Department also raised the issue of Buhle’s failure to exhaust its internal remedies, adding that there has been an unreasonable delay in the bringing of Buhle’s review application, alleging that the 180 day period had expired by 13 December 2021. Buhle’s response to these issues has simply been that the Department has failed to provide the reasons it has requested, and that the 180 day period starts running when not only the decision but also the reasons have been provided. Buhle did however indicate that it had the option available to apply for condonation, out of abundance of caution, once allowed to intervene in the review application.

[24] Buhle requested reasons simultaneously with its notice of appeal on 17 May 2021. Once the ten day period had expired and the BAC had failed to deliver the reasons (accepting that it actually received the request for reasons), nothing prevented Buhle from proceeding with the appeal by making written submissions to the Bid Appeals Tribunal and relying on the presumption that the BAC had taken a decision without good reason.

[25] It is common cause that Buhle has failed to proceed with its appeal, which lapsed by 15 June 2021. It appears not to have exhausted its internal remedies. It is however open to Buhle to apply to court for relief in terms of section 7(2)(c) of PAJA to resolve this issue, in addition to the problem it has, bearing in mind that the 180 days to bring its review would have expired on 13 December 2021, counting from 15 June 2021. Buhle only applied to intervene in the review application on 8 February 2022.

[26] As mentioned above, the Department aligned itself with the grounds of opposition raised by Makhathini but also raised a few additional issues. It stated inter alia that Buhle was found to be a responsive bidder but that it came in at a price that was almost double the tender price of other bidders. It was ranked 7th in Area 1, 7th in Area 2 and 8th in Area 3. It is clear from the so called DBEC submission, attached to the Department's answering affidavit, that 8 bidders were considered in the final evaluation stages. Buhle in essence came second last and last in the 3 respective Areas. The Department alleged that Buhle's prospects of success on review were rather limited due to its pricing. The Department also expressed concerns regarding the inordinate delay all the court processes have caused. The services that are to be provided are essential services and there cannot be a delay or an interruption of these services. The Department seems to forget that it is almost entirely to blame for the delay in this matter coming to court.

[27] The Department also stated that Buhle has enjoyed ‘the benefit of the tender’ for a considerable period of time and has been allowed to extend its contract on a month-to-month basis due to the difficulties in finally awarding the tender. Its tender was also duly considered but rejected.

Intervention in terms of Uniform rule 12

[28] Uniform rule 12 reads as follows:

‘Any person entitled to join as a plaintiff or liable to be joined as a defendant in any action may, on notice to all parties, at any stage of the proceedings apply for leave to intervene as a plaintiff or a defendant. The court may upon such application make such order, including any order as to costs, and give such directions as to the further procedure in the action as to it may seem meet.’

[29] In *SA Riding for the Disabled Association v Regional Land Claims Commissioner* the Constitutional Court stated the position regarding intervention as follows:

‘[10] If the applicant shows that it has some right which is affected by the order issued, permission to intervene must be granted. For it is a basic principle of our law that no order should be granted against a party without affording such party a predecision hearing. This is so fundamental that an order is generally taken to be binding only on parties to the litigation.

[11] Once the applicant for intervention shows a direct and substantial interest in the subject-matter of the case, the court ought to grant leave to intervene. In *Greyvenouw CC* this principle was formulated in these terms:

“In addition, when, as in this matter, the applicants base their claim to intervene on a direct and substantial interest in the subject-matter of the dispute, the Court has no

discretion: it must allow them to intervene because it should not proceed in the absence of parties having such legally recognised interests.”³ (Footnote omitted.)

[30] *Erasmus: Superior Court Practice*, in the commentary on Uniform rule 12, discusses the meaning of ‘entitled to join as a plaintiff or liable, to be joined as a defendant’ and states the following:

‘As in the case of joinder as of right, the applicant for leave to intervene must show that he has a “direct and substantial interest” in the subject matter of the action. Such an interest is more than merely a financial interest which is only an indirect interest in the litigation; it is a legal interest in the subject matter of the litigation that may be prejudicially affected by the judgment of the court. This means that the applicant must show that he has a right adversely affected or likely to be adversely affected by the order sought.’⁴ (Footnotes omitted.)

[31] In *Herbstein and Van Winsen* the following was said:

‘On the wording of the rule, the applicant for leave to intervene must be a person “entitled to join as a plaintiff or liable to be joined as a defendant”. In other words the test to be applied in order to decide whether a person can seek to intervene is to ask whether that person could have been joined as a party. As has been explained above, joinder is competent either on the basis of convenience or on the basis that the party whose joinder is in question has a direct and substantial interest in the subject-matter of the proceedings. A person is accordingly entitled to intervene in three sets of circumstances:

(a) Where the requirements of uniform rules 10(1) and 10(3) are satisfied, in that the determination of the intervening party's matter or dispute depends

³ *SA Riding for the Disabled Association v Regional Land Claims Commissioner and others* [2017] ZACC 4; 2017 (5) SA 1 (CC) paras 10 -11.

⁴ DE van Loggerenberg and E Bertelsmann *Erasmus: Superior Court Practice* (RS 19, 2022) at D1-139.

upon substantially the same question of law or fact as arises in the proceedings in which leave is sought to intervene.

(b) Where wider considerations of convenience favour intervention.

(c) Where the intervening party has a direct and substantial interest (legal interest) in the proceedings.’⁵ (Footnotes omitted.)

[32] The authors in *Herbstein and Van Winsen*⁶ also referred to *Nelson Mandela Metropolitan Municipality v Greyvenouw CC*⁷ (relied upon in *SA Riding for the Disabled Association*) as authority for the proposition that once a party has established a direct and substantial interest, the court should not proceed in the absence of such a party.

[33] It is furthermore not sufficient for a third party seeking to intervene to merely allege an interest in the action. Such party must give prima facie proof of the interest and the right to intervene.⁸

[34] In *United Watch & Diamond Co (Pty) Ltd and others v Disa Hotels Ltd and another*⁹ Corbett J examined the right of a party to intervene in legal proceedings, remarking that intervention is closely linked to joinder, and is ‘often treated as a particular facet of joinder’. The court, with reference to *Brauer v Cape Liquor Licensing Board*,¹⁰ stated that:

⁵ AC Cilliers et al *Herbstein and Van Winsen: Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa* 5 ed (2009) at 225-226.

⁶ Ibid at 226.

⁷ *Nelson Mandela Metropolitan Municipality and others v Greyvenouw CC and others* 2004 (2) SA 81 (SE).

⁸ AC Cilliers et al *Herbstein and Van Winsen: Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa* 5 ed (2009) at 227.

⁹ *United Watch & Diamond Co (Pty) Ltd and others v Disa Hotels Ltd and another* 1972 (4) SA 409 (C) at 415C.

¹⁰ *Brauer v Cape Liquor Licensing Board* 1953 (3) SA 752 (C).

'In *Brauer's* case application was made for the setting aside of the proceedings of a liquor licensing board on the ground that it had failed, in contravention of sec. 28 (1) of the Liquor Act, to keep a record of the proceedings in public of a meeting of the board at which the applicant's application for the removal of his bottle liquor licence to other premises was considered and refused. At the hearing of the application one Garb applied for leave to intervene as an additional respondent in opposition to the application. Garb, the licensee of certain hotel premises situated in the area to which removal was sought, had objected to the removal application before the board and contended that he was entitled to intervene on the ground that he had a substantial financial interest in the proceedings in that, if the application was granted and the board had to reconsider the application for removal, he would be left in a state of uncertainty and would have to incur expense in the protection of his interests by having to engage counsel to oppose the removal; and that if the board, upon reconsideration, granted the application, he, Garb, would be faced with business competition. The Court refused the application to intervene, stating (at p. 761):

"In the present case, Garb has no real interest in the enquiry as to whether the Board kept a proper record; whether it did or not is no legal concern of his. What he is interested in doing is to prevent the possibility of competition if the Board should, in the event of its being ordered to reconsider the removal application, grant it. The interest he alleges (and of which he has given no proof) is, at most, in the words of HORWITZ, A.J.P., "merely a financial interest which is only an indirect interest in the litigation". That this Court might make an order in favour of the applicant in the review proceedings might be "an unwelcome result", but in my view, is not a ground entitling him to intervene." ¹¹

Non-joinder of Ecocycle and Vikela

[35] Both Makhathini and the Department referred to the fact that neither Ecocycle nor Vikela had been joined to the present application to intervene. In *Erasmus*, in the commentary on Uniform Rule 10, the issue of non-joinder is discussed. The following is stated:

' . . . the question as to whether all necessary parties had been joined does not depend upon the nature of the subject matter of the suit, but upon the

¹¹ *United Watch & Diamond Co (Pty) Ltd and others v Disa Hotels Ltd and another* 1972 (4) SA 409 (C) at 416D-H.

manner in which, and the extent to which, the court's order may affect the interests of third parties. The test is whether or not a party has a "direct and substantial interest" in the subject matter of the action, that is, a legal interest in the subject matter of the litigation which may be affected prejudicially by the judgment of the court. A mere financial interest is an indirect interest and may not require joinder of a person having such interest . . . The rule is that any person is a necessary party and should be joined if such person has a direct and substantial interest in any order the court might make, or if such an order cannot be sustained or carried into effect without prejudicing that party, unless the court is satisfied that he has waived his right to be joined.'¹² (Footnotes omitted.)

[36] In *Gordon v Department of Health, KwaZulu-Natal*¹³ the court dealt with the non-joinder of a party and held inter alia that the relief sought was relevant to determine whether a party has a direct and substantial interest in the subject matter of the proceedings. The facts were briefly that the appellant, a white male, was turned down when he applied for a post at the Department of Health. A black male (M) was appointed instead, notwithstanding the selection panel's finding that the appellant was the most suitable candidate. The appellant approached the Labour Court for relief which would amount to him receiving all the benefits he would have received had he been appointed to the post, without actually being appointed. The Labour Appeal Court dismissed the appellant's appeal on the basis that M, as the successful candidate, had not been joined in the application, which finding was revised on further appeal to the Supreme Court of Appeal. Mlambo JA held that: 'The issue in our matter, as it is in any non-joinder dispute, is whether the party sought to be joined has a direct and substantial interest in the matter. The test is whether a party that is alleged to be a necessary party, has a legal interest in the subject-matter, which may be affected prejudicially by the judgment of the court in the proceedings concerned. In the *Amalgamated Engineering Union* case (supra) it

¹² DE van Loggerenberg and E Bertelsmann *Erasmus: Superior Court Practice* (RS 19, 2022) at D1-124-D1-126.

¹³ *Gordon v Department of Health, KwaZulu-Natal* [2008] ZASCA 99; 2008 (6) SA 522 (SCA).

was found that “the question of joinder should . . . not depend on the nature of the subject-matter . . . but . . . on the manner in which, and the extent to which, the court's order may affect the interests of third parties”. The court formulated the approach as, first, to consider whether the third party would have locus standi to claim relief concerning the same subject-matter, and then to examine . . . This has been found to mean that if the order or “judgment sought cannot be sustained and carried into effect without necessarily prejudicing the interests” of a party or parties not joined in the proceedings, then that party or parties have a legal interest in the matter and must be joined.’¹⁴

[37] Mlambo JA further held that:

‘The successful appointee can only have a legal interest in the proceedings where the decision to appoint him is sought to be set aside which can lead to his removal from the post. He becomes a necessary party to the proceedings because the order cannot be carried into effect without profoundly and substantially affecting his/her interests.’¹⁵

[38] In *Bowring NO v Vrededorp Properties CC and another*¹⁶ Brand JA held that the enquiry relating to non-joinder remains one of substance rather than the form of the claim. The substantial test is whether the party, which is alleged to be a necessary party to the litigation, may be affected prejudicially by the judgment of the court in the proceedings.

¹⁴ Ibid para 9.

¹⁵ Ibid para 10.

¹⁶ *Bowring NO v Vrededorp Properties CC and another* [2007] ZASCA 80; 2007 (5) SA 391 (SCA) para 21.

[39] *Erasmus*,¹⁷ with reference to joinder of necessity and non-joinder of a party, stated that a court could, even on appeal, *mero motu* 'raise the question of non-joinder to safeguard the interests of third parties'. It further stated that '[t]he fact that the two parties before court desire the case to proceed in the absence of a third party cannot relieve the court from inquiring into the question whether the order it is asked to make may affect the third party'.¹⁸

[40] Buhle's answer in reply to the issue of non-joinder has simply been that it cannot apply for the joinder of Ecocycle and Vikela prior to being granted leave to intervene, and that in terms of Uniform rule 12 it is only required to give notice to the parties to the review application, which it has done. It is clear that Buhle gave no notice of the intervention application to Ecocycle and Vikela. It is also clear from the papers that despite the issue of non-joinder being raised by Makhathini, Buhle did not see it fit to at least give some notice of the application to Ecocycle and Vikela, even on an informal basis.

[41] There can be no doubt that the order granting Buhle leave to intervene and the accompanying relief it intends seeking in the review application, will have the effect of prejudicing Ecocycle's and Vikela's interests. They clearly would have a direct and substantial interest in the subject matter of the litigation. If Buhle is granted leave to intervene they are drawn into a review application of significant proportions. They have not been afforded an opportunity to make submissions on the merits of the intervention application, the outcome of which could have a significant impact on them. I will return to this issue should it be necessary.

Buhle's submissions

¹⁷ DE van Loggerenberg and E Bertelsmann *Erasmus: Superior Court Practice* (RS 19, 2022) at D1-126B.

¹⁸ *Ibid* at D1-127.

[42] All counsel involved are thanked for their comprehensive heads of argument and helpful submissions during the hearing.

[43] It was submitted on behalf of Buhle that it has a direct and substantial interest in the relief being sought in the review application, and as an unsuccessful tenderer it has a right to participate in the review application. Reliance was placed on *WDR Earthmoving Enterprises and another v Joe Gqabi District Municipality and others*¹⁹ and *Giant Concerts CC v Rinaldo Investments (Pty) Ltd and others*²⁰ for its submission that it had standing and therefore a right to participate in the review.

[44] In *WDR Earthmoving* the court had to determine inter alia whether the appellants had standing to seek the review and the setting aside of a declaration that a party's tender offer was responsive. The full court had previously held that the appellants lacked standing. With reference to *Giant Concerts*, Swain JA in *WDR Earthmoving* held as follows:

'[14] The Constitutional Court added, at para 32, that in determining a litigant's standing:

"... we must assume that its complaints about the lawfulness of the transaction are correct. This is because in determining a litigant's standing, a court must, as a matter of logic, assume that the challenge the litigant seeks to bring is justified."

It summarised the position at para 43, in the following terms:

"The own-interest litigant must, therefore, demonstrate that his or her interests or potential interests are directly affected by the unlawfulness sought to be impugned."

¹⁹ *WDR Earthmoving Enterprises and another v Joe Gqabi District Municipality and others* [2018] ZASCA 72.

²⁰ *Giant Concerts CC v Rinaldo Investments (Pty) Ltd and others* [2012] ZACC 28; 2013 (3) BCLR 251 (CC).

[15] The standing of the appellants has to be determined by considering whether the award of the tender to the fourth respondent would have a direct effect upon the interests, or potential interests of the appellants, without regard to whether the decision was valid or not. It has to be assumed that the challenge the appellants wish to bring is justified.

[16] I agree with the submission by the appellants that a declaration that a decision on whether the fourth respondent's tender offer was non-responsive, would directly affect their rights. In the event of a decision against the fourth respondent, the tender process would have to be recommenced as the only responsive tender offers were those of the appellants and the fourth respondent. The appellants and the fourth respondent together with any other interested parties, would then be entitled to compete for the tender. The appellants therefore have standing to seek the review and setting aside of the declaration of the fourth respondent's tender offer as responsive, as also the award of the tender to the fourth respondent.'

[45] The court ultimately held that the full court had erred in concluding that the standing of the appellants to challenge the award was determined by the finding that the appellant's bid was non-responsive.

[46] In *Giant Concerts* Cameron J held that:

'[33] The separation of the merits from the question of standing has two implications for the own-interest litigant. First, it signals that the nature of the interest that confers standing on the own-interest litigant is insulated from the merits of the challenge he or she seeks to bring. An own-interest litigant does not acquire standing from the invalidity of the challenged decision or law, but from the effect it will have on his or her interests or potential interests. He or she has standing to bring the challenge even if the decision or law is in fact valid. But the interests that confer standing to bring the

challenge, and the impact the decision or law has on them, must be demonstrated.

[34] Second, it means that an own-interest litigant may be denied standing even though the result could be that an unlawful decision stands. This is not illogical. As the Supreme Court of Appeal pointed out, standing determines solely whether *this* particular litigant is entitled to mount the challenge: a successful challenge to a public decision can be brought only if “the right remedy is sought by the right person in the right proceedings”. To this observation one must add that the interests of justice under the Constitution may require courts to be hesitant to dispose of cases on standing alone where broader concerns of accountability and responsiveness may require investigation and determination of the merits. By corollary, there may be cases where the interests of justice or the public interest might compel a court to scrutinise action even if the applicant’s standing is questionable. When the public interest cries out for relief, an applicant should not fail merely for acting in his or her own interest.

[35] Hence, where a litigant acts solely in his or her own interest, there is no broad or unqualified capacity to litigate against illegalities. Something more must be shown.’ (Footnote omitted.)

[47] Buhle submitted that it was clearly ‘entitled to join’ in the review proceedings, in light of the aforementioned decisions. The question is not only whether Buhle has standing but whether it has made out a case that its interests will be affected, which would entitle it to intervene in the review application. Buhle has furthermore chosen not to apply to join the review application in terms of Uniform rule 10. Buhle ultimately has to show a right which is affected by the order sought by Makhathini.

[48] Buhle’s counsel, Mr J G Wasserman SC, submitted before me in argument that before consideration is given to Buhle’s right to intervene, serious consideration should be given to the possible practical implications of refusing leave to intervene.

There would be an overlap of review applications if Buhle was compelled to institute its own review application. It was submitted that a situation could arise where one court could find that the decision to award the tender to Compass was lawful. Another court might however find in favor of Buhle in its own review application. Buhle's counsel submitted that such a situation should not be tolerated and would be untenable. Reliance was also placed on what was held in *Gordon*.²¹

[49] Buhle also addressed the issues raised by both the Department and Makhathini regarding its failure to exhaust its internal remedies. I have dealt with these issues above. It was submitted by Buhle in its argument, with reference to *Koyabe and others v Minister for Home Affairs and others (Lawyers for Human Rights as Amicus Curiae)*,²² that Makhathini's suggestion that it should have prosecuted its appeal without such reasons is a 'strange proposition'. Buhle relied on what was held in *Koyabe*, namely that '[r]easons for the finding, as in this case, are therefore important in seeking a meaningful review'.²³ As mentioned before, Buhle has a right to apply for exemption from having to exhaust internal remedies.

[50] Buhle referred in its argument to Makhathini's contentions regarding the non-joinder of Ecocycle and Vikela – calling it 'bizarre', submitting that it could not seek to join other parties when it seeks itself to be joined to the review application. Buhle in my view misses the point, as it is clear that Ecocycle and Vikela would have a direct and substantial interest in the relief it is seeking, especially when Buhle seeks to ultimately involve Ecocycle and Vikela in its relief on review. It is difficult to understand why Buhle could not simply serve a copy of its papers on Ecocycle and Vikela.

²¹ *Gordon v Department of Health, KwaZulu-Natal* [2008] ZASCA 99; 2008 (6) SA 522 (SCA) para 9.

²² *Koyabe and others v Minister for Home Affairs and others (Lawyers for Human Rights as Amicus Curiae)* [2009] ZACC 23; 2010 (4) SA 327 (CC).

²³ *Ibid* para 61.

[51] Buhle's counsel also made submissions at the hearing regarding the so called extension of the tender validity period, placing reliance on *City of Ekurhuleni Metropolitan Municipality v Takubiza Trading & Projects CC and others*.²⁴ It was submitted that according to the record provided by the Department, Compass was requested to consent to an extension, but did not respond. It was also submitted that neither Buhle nor Makhathini had agreed to the extension. It is however apparent from the submissions and documents which form part of the papers in some of the other matters that both Compass and Makhathini apparently agreed to an extension. This issue is addressed in the judgment of the implementation application brought by Compass, which was the fourth application heard by me.

Submissions by Makhathini

[52] Counsel for Makhathini, Mr N Singh SC, submitted that Buhle is seeking to join Makhathini's review as an applicant, seeking to review different decisions, on different grounds, against different respondents, than Makhathini. It was submitted that there would have been no difficulty if Buhle was only interested in challenging the decision to award the contract for Area 2 to Compass. Instead Buhle wants to join a separate cause of action to be heard with the current cause of action in the review application. It was submitted that this does not 'fit' into what Uniform rule 12 was intended for.

[53] It was submitted by Makhathini that Uniform rule 12 has not overridden or replaced the common law approach to intervention and that under the common law, joinder can be sought as of right, where a party has a direct and substantial interest in the matter or if it is convenient that it be joined.

²⁴ *City of Ekurhuleni Metropolitan Municipality v Takubiza Trading & Projects CC and others* [2022] ZASCA 82.

[54] As far as joinder as of right is concerned, it was submitted that since Makhathini is not seeking any relief in respect of the awards relating to Areas 1 and 3, Buhle cannot say that its rights have been affected in this regard, and it would accordingly not have a basis for an intervention in the review application.

[55] It was also submitted that as far as the award in respect of Area 2 is concerned, Buhle has not shown that its rights have been affected. Buhle cannot assert a right to be awarded the tender because it was not the second highest bidder and none of its grounds of review are aimed at making out a case that due to some administrative irregularity, it was not awarded the tender for Area 2.

[56] With reference to Buhle's right to just administrative action, it was submitted that Buhle was required to exhaust its internal remedies in terms of section 7(2)(a) of PAJA, and it was obliged in terms of section 7(1) of PAJA to bring its review within 180 days after its appeal lapsed on 15 June 2021, which period expired on 13 December 2021. It was submitted that Buhle must bring its review in the right forum at the right time, with reliance being placed on *Merafong City v AngloGold Ashanti Ltd*.²⁵ Buhle's review is furthermore premature as its appeal is still extant and has not been dealt with by the Bid Appeal's Tribunal. It was submitted that Buhle has taken no action to prosecute its appeal. For these reasons it was submitted that Buhle has not established that it has a basis to be joined as of right.

[57] As far as joinder as a matter of convenience is concerned it was inter alia submitted that:

- (a) To allow Buhle to intervene to ventilate its objections in relation to Areas 1 and 3 would result in grave prejudice and inconvenience to Makhathini.

²⁵ *Merafong City v AngloGold Ashanti Ltd* [2016] ZACC 35; 2017 (2) SA 211 (CC) fn 63.

(b) Makhathini's review application will be delayed until Buhle has joined Ecocycle and Vikela and once they have been joined, further delays will ensue in order to obtain the record for the decisions relating to Areas 1 and 3.

(c) It was not convenient for Buhle to consolidate its review application and the causes of action it proposes with Makhathini's review application, especially bearing in mind that Ecocycle and Vikela are not parties in Makhathini's review application and have not been joined in the intervention application.

(d) The records relating to Areas 1 and 3 will be irrelevant to Makhathini's review application.

(e) Buhle seeks to intervene as a co-applicant in Makhathini's review application but also seeks relief against Makhathini as it intends adding a cause of action, reviewing the tender award to Makhathini in respect of Area 1. Makhathini has not been joined as an interested party who would be entitled to oppose the application. The rules furthermore make no provision for one applicant to seek relief against another applicant.

(f) It was submitted that Buhle's remedy is to institute a separate review application which can be dealt with on its own terms and disposed of without interfering with the procedures and timelines of Makhathini's review application. Reference was made to *Premier of KwaZulu-Natal others v KwaZulu-Natal Gaming and Betting Board and others and a related matter*.²⁶ Olsen J held that applications to join certain suppliers had to fail as it sought to bring three new sets of decisions under review in the original review application which would also have entailed the joinder of the suppliers, who were not parties to the review application.²⁷ It would lead to an extension of the duration of the proceeding and the costs would increase significantly. It would also raise technical issues to which the original parties would have nothing to contribute.

²⁶ *Premier of KwaZulu-Natal and others v KwaZulu-Natal Gaming and Betting Board and others and a related matter* [2019] ZAKZPHC 44; [2019] 3 All SA 916 (KZP).

²⁷ *Ibid* paras 37-42.

[58] Mr Singh submitted that *KwaZulu-Natal Gaming and Betting Board* was on all fours with the present matter and that Buhle is seeking to join different causes of action involving different decisions and different parties. It was also submitted that Buhle has failed to make out a case in terms of the common law to intervene in terms of Uniform rule 12.

[59] Mr Singh in closing urged me to dismiss the application unless Buhle confined itself to a challenge in respect of Area 2 only and aligned itself with Makhathini's challenge.

The Department's submissions

[60] Mr V Naidoo SC, appearing for the Department indicated that he supported the submissions made by Mr Singh SC on behalf of Makhathini. He handed further argument over to his junior, Mr C Reddy who proceeded to address me inter alia on the issue of Buhle's alleged non-compliance with PAJA. It was submitted that Buhle's tender was the lowest ranked tender and that it was accordingly 'not even a horse in the race'. It was also submitted that Buhle has not shown that it has an interest in the outcome of the tender.

[61] The Department's counsel also made submissions regarding the non-joinder of Ecocycle and Vikela as well as Buhle's failure to exhaust its internal remedies. Submissions were further made regarding Buhle's alleged failure to take action within the requisite period of 180 days as required by PAJA. I have dealt with Buhle's apparent delay above as well as the remedies at its disposal.

[62] As far as Buhle's allegations and submissions regarding the extension of the tender validity period is concerned, it was submitted that the case relied upon by

Buhle is distinguishable from the facts in the present matter. I was referred to two further judgments. As indicated above, I deal with this particular issue in the judgment in the implementation application brought by Compass. It was however submitted that should the tender process have to start *de novo*, Buhle would have a foot in the door despite it being ranked amongst the lowest in the evaluation of the bids.

[63] The Department submitted that it had followed a fair and compliant tender process which was in accordance with section 217 of the Constitution. It was submitted that Buhle's proposed intervention will result in the review being ultimately delayed which will cause irreparable harm to the Department and to the bidders who were successful in the tender process. It was also submitted that the process in terms of which Buhle was providing services to the Department on a month-to-month basis was not in accordance with section 217 of the Constitution.

Buhle's submission's in reply

[64] A number of submissions were made in reply but I will only highlight the most relevant. The Department was criticized for its continued focus on the period of 180 days within which Buhle ought to have brought its review. Buhle submitted that the 180 days started running from the date of receipt of reasons. I have dealt with this issue above, Buhle perhaps lost sight of the fact that section 7(2)(a) of PAJA, which deals with the period of 180 days after a person became aware of the action and the reasons for it, applies to those instances where no internal remedies exist. This is clearly not the case in the present matter.

[65] With reference to *WDR Earthmoving*, it was submitted that even the lowest ranked bidder would be entitled to compete and is not out of the race, and therefore Buhle had an interest in the review.

[66] In response to Makhathini's submissions, it was submitted that its concession that it would be different if Buhle had only sought to intervene in the review in respect of Area 2, was fatal to any further opposition by Makhathini. It was however submitted that to split the review into two would be 'absurd' and would deprive Buhle of its right to access to court.

[67] It was also submitted that Makhathini's reliance on *KwaZulu-Natal Gaming and Betting Board* was inappropriate as it has no application to the present matter, which deals only with one tender process. Reliance was place on *Gordon*, as authority that it would be proper to grant the relief sought by Buhle.

Discussion

[68] Whilst considering not only this application, but also the three other applications, my primary focus has been on the one hand to ensure that the review, which has already been inordinately delayed, be dealt with as expeditiously as possible, and on the other hand, to be sure that there is no interruption in the service delivery of what is clearly an essential service to the Department.

[69] Buhle's application to intervene, and the far-reaching relief it is seeking, is aimed at reviewing the tenders awarded in respect of all three Areas, which would bring Ecocycle and Vikela into the fray as successful bidders in respect of Area 3 and Makhathini as the successful bidder in Area 1.

[70] Buhle's motivation is of course clear for all to see. It has been benefitting from being the sole supplier of the services for the entire province of KwaZulu-Natal for a

number of years. The delay in the awarding of the tender and thereafter the delay in the prosecution of Makhathini's review has allowed Buhle to continue benefitting up until the expiration of the original contract on 30 November 2022. Buhle applied for the tenders but was found wanting in respect of all three Areas. It now claims to have a direct and substantial interest in the relief Makhathini is seeking in its review, which is only in respect of the award to Compass in respect of Area 2.

[71] Despite all the different issues raised, in my view the only relevant question is whether Buhle has a direct and substantial interest in the review. Counsel for the Department is correct when he submits that Buhle was not even a horse in the race, due to its low ranked tender. I am however of the view that Buhle, even as the lowest ranked tenderer, would have an interest in the relief being sought by Makhathini, even if it is on the marginal level of being allowed to compete for the tender should it be set aside and re-advertised, as held in *WDR Earthmoving*. As it is only this one award that is being challenged in the review, it is only in respect of this award that Buhle can have an interest and it is the only order that can affect Buhle.

[72] Counsel for Makhathini made valuable and convincing submissions regarding the practical difficulties that would ensue should the relief, which Buhle claims, be granted. I agree with the submissions as the challenges that will arise are clear to see. It was also submitted that there would be no issue if Buhle simply aligned itself with the review as it stands. Bearing in mind the facts of the matter and the principles set out above, I am of the view that the only relief that is appropriate is that Buhle be granted leave to intervene in respect of the award in respect of Area 2, especially since this is the only review before me. It will not close the door to Buhle's reviews in respect of Areas 1 and 3 - it would be free to pursue them in due course without disrupting the current review. Buhle's right to access to court would certainly not be infringed if it is allowed to intervene in Makhathini's review in respect of Area 2 and it will still be able to pursue its other reviews. I see nothing absurd in such a situation. It would not create a situation where another court could potentially make a finding

on the same issues as only one court will deal with the award in respect of Area 2. It will also give effect to what Cameron JA referred to in *Giant Concerts*, namely that a successful challenge ‘can be brought only if “the right remedy is sought by the right person in the right proceedings”’.²⁸ It might have been a different situation if Buhle has applied to join in terms of Uniform rule 10 but I am not required to deal with this issue.

[73] In *Caesarstone Sdot-Yam Ltd v World of Marble and Granite*²⁹ the court dealt with concerns where different courts may pronounce on the same issue with the risk that they may reach different conclusions. The court was dealing with a plea of *lis pendens*. It was held that the situation would only arise where the same dispute between the same parties is sought to be placed before the same tribunal. In the absence of these elements, there was no potential for a duplication of actions. In my view, Buhle’s concerns that there might be an ‘overlap’ will not arise if it pursues its review with Makhathini respect of Area 2 and the remainder of its review in a separate review application.

[74] In *Socratous v Grindstone Investments*³⁰ it was held that ‘[c]ourts are public institutions under severe pressure. The last thing that already congested court rolls require is further congestion by an unwarranted proliferation of litigation’. I am mindful of the practical implications of yet another review but in this matter the proverbial horse has already bolted - with no less than four applications being heard by myself. The alternative is simply not appropriate in the circumstances.

²⁸ *Giant Concerts CC v Rinaldo Investments (Pty) Ltd and others* [2012] ZACC 28; 2013 (3) BCLR 251 (CC) para 34.

²⁹ *Caesarstone Sdot-Yam Ltd v World of Marble and Granite* [2013] ZASCA 129; 2013 (6) SA 499 (SCA) paras 2-4.

³⁰ *Socratous v Grindstone Investments* [2011] ZASCA 8; 2011 (6) SA 325 (SCA) para 16.

[75] In light of what I have found above, I do not believe that it is necessary to deal with any of the other issues. I am also mindful of not making any findings on certain issues as it would be for the court hearing the review to do so.

[76] As far as the costs of the application are concerned, I am of the view that it would be appropriate to leave the issue of costs for the court hearing the review to decide. Buhle has been successful in obtaining leave to intervene but only to a very limited extent. It might have certain hurdles to overcome before its review will be considered and therefore that court will be best placed to decide the issue.

Order

[77] I accordingly make the following order;

1. The intervening party, Buhle Waste (Pty) Ltd, is granted leave to intervene and is joined as second applicant in the review application under case number 8721/21P in respect of the decision to award the contract for Area 2: Umgungundlovu, Harry Gwala and Ugu Districts (Region 2) in terms of Tender number ZNB5296/2020-H to the second respondent, Compass Medical Waste Services (Pty) Ltd.
2. The intervening party, Buhle Waste (Pty) Ltd is directed to file its founding affidavit on or before 14 December 2022.
3. The first respondent, the MEC for Health, and the second respondent, Compass Medical Waste Services (Pty) Ltd are directed to file their answering affidavits on or before 22 December 2022.
4. The intervening party is directed to file its replying affidavit on or before 4 January 2023.
5. The applicant, Makhathini Medical Waste (Pty) Ltd is directed to file any further affidavits it may wish to file on or before 6 January 2023.
6. The costs of the intervention application are reserved for decision by the court hearing the review.

E BEZUIDENHOUT AJ

This judgment was handed down electronically by circulation to the parties' representatives by email. The date of hand down is deemed to be 7 December 2022.

Date reserved: 28 October 2022

Date delivered: 7 December 2022

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