IN THE HIGH COURT OF SOUTH AFRICA

MPUMALANGA DIVISION (MAIN SEAT)

CASE NUMBER 2640/2019

(1)	REPORTABLE: YES
(2)	OF INTEREST TO OTHER JUDGES: YES

//2022	LEGODI JP
DATE	SIGNATURE

BUHLE WASTE (PTY) LTD	**APPLICANT**

And

THE MUNICIPAL MANAGER CITY OF MBOMBELA MUNICIPALITY	**1ST RESPONDENT**
THE CHAIRPERSON, COUNCIL OF THE CITY OF MBOMBELA MUNICIPALITY	**2ND RESPONDENT**
THE CITY OF MBOMBELA MUNICIPALITY	**3RD RESPONDENT**
SEMBCORP SILULUMANZI (RF)(PTY) LTD	**4TH RESPONDENT**
BRAIN GEAR INVESTMENTS (PTY) LTD	**5TH RESPONDENT**
ZMG SCIENTIFIC SERVICES (PTY) LTD	**6TH RESPONDENT**
SOUTH AFRICAN WATER WORKS (PTY) LTD	**7TH RESPONDENT**
SEMBCORP UTILITIES (NETHERLANDS) NV	**8TH RESPONDENT**
SEMBCORP UTILITIES SOUTH AFRICA (PTY) LTD	**9TH RESPONDENT**

JUDGMENT

LEGODI JP

[1] At the heart of the dispute amongst the parties in this case, the question is whether the granting on 14 November 2018 of a consent by the City of Mbombela Municipality for a change in control of Silulumanzi and thus effecting the sale and transfer of controlling shares in Silulumanzi to the seventh respondent constituted an administrative action or decision as contemplated in terms of section 33 of the Constitution reviewable under section 7 of PAJA or whether such an approval or granting of consent and sale of shares arose from a pure contractual relationship between equal contracting parties where the principle of administrative review or legality review as envisaged in PAJA, did not apply. The fourth respondent is cited as Semcorp Silulumanzi (RF) (Pty) LTD (hereinafter referred to as Silulumanzi) and the seventh respondent is cited as South African Water Works (Pty) Ltd (hereinafter referred to as SAWW).

[2] Section 33(1) of the Constitution provides that everyone has the right to administrative action that is lawful, reasonable and procedurally fair. Everyone whose rights have been adversely effected by the administrative action has the right to be given written reasons.[1] National legislation must be enacted to give effect to those rights, and must: (a) provide for the review of administrative action by a court or where appropriate, an independent and impartial tribunal; (b) impose a duty on the state to give effect to the right, in subsections (1) and (2) and (c) promote an efficient administration[2].

[3] Promotion of Administrative Justice Act 3 of 2000 (PAJA) is such national legislation as referred to in subsection (3) of section 33 of the Constitution. Of

[1] Subsection (2) of section 33 of the Constitution
[2] Subsection (3) of section 33 *supra*

relevance, section 1(a) and (b) of PAJA provides that "administrative action" means any decision taken, or any failure to take a decision by a natural or juristic person other than an organ of state, when exercising a public power or performing a public function in terms of empowering provision which adversely affects the rights of any person and which has a direct, external legal effect. On the other hand, in terms of section 1 of PAJA "empowering provision" means a law, a rule of common law, customary law, or an agreement, instrument or other document in terms of which an administrative action was purportedly taken.

Background to the dispute

[4] It is necessary to provide some background facts that led to the approval or consent being granted on 14 November 2014 and the dispute referred to in paragraph [1] of this judgment. The background is provided based mainly on the common cause facts summarised as follows: In December 1996, the Municipality undertook a public tender process to find water service providers. On 9 December 1996, it issued a request for proposal. On 21 August 1999 the Municipality pursuant to a bidding process, appointed Silulumanzi (fourth respondent) as a nominated or successful water service provider. Subsequent to the appointment, a water services provision agreement (hereinafter referred to as "the concession agreement") was concluded between Silulumanzi and the Municipality.

[5] The shares in Silulumanzi were held by two entities, namely, the eighth and ninth respondents. The eighth respondent, that is, Semcorp Utilities (Netherlands)NV held 48% of the shares in Silulumanzi. The ninth respondent, namely Sembcorp Utilities South Africa (Pty) Ltd, held 52% of the shares in Silulumanzi. The ninth respondent on the other hand held 100% of the shares in the eighth respondent. Effectively, the ninth respondent owned or controlled Silulumanzi directly or indirectly. SAWW was geared to acquire all of eighth respondent's shares in Silulumanzi. This was after the eighth respondent in 2017 decided to restructure itself in the provision of water services in South Africa.

[6] On 21 February 2018 the eighth respondent agreed to sell its 100% of shares in Silulumanzi to the seventh respondent, SAWW. On 22 February 2018, the eighth

respondent requested the Municipality for a consent to change control of shareholding in Silulumanzi. This request as I see it, was based on two sources. First, the imperative in BBBEE Act. Second, on the specific provisions in the concession agreement. The concession agreement aforesaid was concluded between Silulumanzi and the Municipality in terms of the legislative imperative in the Water Services Act No. 108 of 1997. Section 19(1)(a) thereof provides that a water services authority may perform the functions of water services provider itself. The municipality is such water services authority. In terms of subsection (1)(b)(i) of the section 19, a water services authority may enter into a written contract with water services provider. Clause 7.4.2.1 of the concession agreement provides that no shares in the share capital of the concessionaire (referring to Silulumanzi) may be transferred to any person or entity that will have the effect that the entity or person has control over the concessionaire immediately before such transfer loses such control, save for any such transfer of control is effected with prior approval of the council and the lenders. The request for a change of control of shareholding in Silulumanzi was submitted to the Municipality on 2 March 2018.

[7] On 28 June 2018 the Municipality sat to consider the request. It agreed to the change of control in Silulumanzi but subject to fulfilment of certain suspensive conditions before a final unconditional approval for change in control of shareholding in Silulumanzi could be granted. At the risk of repetition, some of the salient suspensive conditions were crafted as follows:

"(a) Council approves and grants conditional consent in accordance with clause 7.4.2 of the Water and Sanitation Concession Agreement dated 21 April 1999, as amended, between the municipality, as Water Services Authority and Sembcorp/Silulumanzi (RF) Pty Ltd, as a Water Services provider; pertaining to the change of control;

(b) Conditional consent be granted for the transfer of all the shares held by Sembcorp utilities (Netherlands) NV in the Concessionaire (in conjunction with the transfer of its 100% shareholding in Sembcorp Utilities South Africa Pty Ltd) to SA Water Works Pty Ltd (formerly named K2018039949 (South Africa) Pty Ltd), CIPC registration number 2018/039949/07, as set out in the notification and

application for consent by the Concessionaire dated 2 March 2018 (annexure 127/18);

(c) Conditional consent be granted with the specific suspensive condition that SAWW and Silulumanzi immediately after this Council resolution, commence with the process of obtaining a 28% Mbombela based BBBEE shareholder in Silulumanzi and conclude the process within the prescribed 90 days from the date of the Council resolution;

(d) the City of Mbombela, represented by the Executive Mayor and the Acting Municipal Manager, oversee the process administered by SAWW and Silulumanzi regarding the 28% Mbombela based BBBEE shareholder in Silulumanzi;

(e) SAWW and Silulumanzi to select the final 28% Mbombela based BBBEE shareholder, in consultation with the representatives of the City of Mbombela; BBBEE Mbombela based shareholder;

(f) the Acting Municipal Manager, as Accounting Officer, be mandated to confirm that the requirements above have been met as per the terms of the conditions of the Conditional Consent granted;

(g) the Accounting Officer be authorised to sign all documents and do all things necessary in order to implement the above;

h) should the suspensive condition stipulated in (c) above not be met within 90 days from the date of the Council resolution and written confirmation not having been issued by the Acting Municipal Manager, confirming that all suspensive conditions for the conditional consent have been met, the Conditional Consent will automatically lapse and be of no further cause or effect and may not be relied upon by any party."

[8] As it would emerge later in this judgment, these conditions form the subject of contestation between the parties post 14 November 2018. Pursuant to the suspensive conditions so imposed by the Municipality and its obligations in terms thereof, the process of selecting a successful BBBEE purchaser of 28% shares in Silulumanzi unfolded. Invitation to participate in the selection of a 28% BBBEE shareholding in Silulumanzi was issued. The applicant, Buhle Waste (Pty) Ltd (hereinafter referred to as Buhle), Brian Gear Investments (Pty) Ltd, the fifth respondent (hereinafter referred to as Gear Investments) and ZMG Scientific Services (Pty) Ltd were the shortlisted candidates. On 17 September 2018 Silulumanzi informed the Municipality that Gear

Investments has been selected as a successful 28% BBBEE shareholding bidder in Silulumanzi.

[9] On 25 September 2018 Buhle attorneys requested the Municipality to provide information on the evaluation of the bids as well as the process followed. Buhle did so seen in the context of the obligations the Municipality imposed on itself as per the resolution of 28 June 2018, in particular its oversight functions and in consultation power in the selection process of 28% BBBEE shareholding in Silulumanzi. The view taken by Buhle in its letter of 25 September 2018 was *inter alia*; (a) that the bid evaluation was tainted and that Buhle was unfairly not chosen as a preferred bidder; (b) Buhle also requested information on the financial, environmental, social and technical due diligence information considered by SAWW without sellers; (c) the Municipality was also requested to consider and scrutinise the selection process and not merely rubber-stamp the selection of Gear Investments as a successful bidder for the 28% shareholding in Silulumanzi; and (d) that the Municipality should consider tax compliance, conflict of interest, nepotism etc, that might have overshadowed the selection process. The request for the information and enquiry as above, was according to Buhle prompted by the suspicion it had regarding the integrity of the selection process.

[10] On 28 October 2018 the Municipality responded to the letter of 28 September as follows:

"4. City of Mbombela's role in the process <u>was merely to oversee the selection process and ensure that the requirements spelled out in the council resolution are met.</u> The selection process having been concluded, City of Mbombela played no role in the matter..."

[11] The statement by the Municipality was preceded by the following events: On 6 July 2018 Gear Investments and SAWW wrote to the Municipality in response to the resolution of 28 June 2018. The letter was jointly authored by Messrs Van Aardt and Van Wyk of Silulumanzi and SAWW respectively. In the letter it was stated as follows:

"1. We refer to your letter dated 2 July 2018 requesting the process and timelines for the selection of a 28% local Mbombela Based Broad Black Economic Empowerment ("BBBEE") shareholders ("Local Consortium") for Sembcorp

Silulumanzi (RF) (Pty) Limited, (Registration Number 1998/016432/07) ("Silulumanzi") .

2. *We understand from your letter dated 28 June 2018, that the Executive Mayor and Municipal Manager has the following role in relation to the securing of local BEE:*

   2.1 *Oversee the process; and*

   2.2 *Selection to be made will be <u>in consultation with</u> the representatives of the City of Mbombela being the Executive Mayor and the Municipal Manager.*

3. *We understand oversee to mean supervision of the process.*
4. *We understand consultation to mean the process of formally consulting or discussion.*
5. *<u>We reiterate that the final decision on the BBBEE shareholding selection resides with SA Water Works.</u>*

6 *...*

7. *Request for Proposals*

   7.1 *For purpose of good corporate governance and applying best practise in this regard, Silulumanzi will engage the services of <u>PWC as independent advisor to manage the selection process, to report to the steering committee</u> and to provide corporate advisory services relating to the introduction of suitable local City of Mbombela ("COM") BBBEE partners of 28% shareholding (Attached in Annexure A: PWC Engagement Letter).*

   7.2 *<u>SAWW will select</u> the Local Consortium through a comprehensive RFP process that will be managed by PWC. The following Selection Criteria will be described in detail in the RFP and supporting documents will have to be provided to demonstrate that the participant(s) has the ability to fulfil the criteria. Weighagte for each criterion for the purpose of evaluating the participant(s) will be proposed by PWC <u>TO BE AGREED BY THE Steering Committee</u> for evaluation.*

8. *Selection Criteria*

1. *Local City of Mbombela based BBBEE partner with the bulk of its operations within the Mbombela municipal area;*
2. *Sound water industry or related knowledge;*
3. *A culture of integrity (integrity due diligence will be performed), ethics and governance that is beyond reproach;*
4. *Business acumen and track record;*
5. *Access to equity and/or debt Funding;*
6. *No politically exposed persons, government officials and their family members"*

9. ...

10.1 *SAWW, Silulumanzi and a representative of the City of Mbombela will form a Steering Committee (See attached Steering Committee Terms of Reference Annexure B) who will have regular update meetings to discuss the process and the progress relative to the indicative timetables.*

10.2 *Subject to compliance with all and any applicable South African law, SAWW shall manage and execute the RFP process, and have full authority for the planning and execution thereof, the selection and eventual negotiation with preferred entity/ies, as long as these meet the Selection Criteria.*

10.3 *SAWW will use reasonable commercial endeavours to complete the procurement of a BBBEE shareholders within 90-days of the Council Resolution on this matter.*

10.4 *SAWW will implement the RFP process with the selection and implementation of Local Consortium and negotiate and settle the terms of the Share Purchase Agreements with it, in its sole and absolute discretion deemed acceptable.*

10.5 *SAWW will immediately notify Council once the RFP process has been completed.*

10.6 *SAWW understands that the selection of the Local Consortium and the signing of the Share Purchase Agreement on the same commercial terms as SAWW's acquisition cost between SAWW and Local Consortium will be sufficient and consent will become unconditional.*

10.7 *If we follow this process as outlined we understand that we would comply with the council conditions and no further approval is required from the Council. As* *the Municipal Manager and/or his delegates has the delegated authority this will be sufficient to confirm that all requirements have been met.*

10.8 *In the event, that despite our best endeavours, the Local Consortium procurement process is not concluded within 90 days of the Council Resolution, consent will become unconditional and SAWW will provide an undertaking (on terms and conditions acceptable to both parties) in which SAWW undertakes to complete the process".*

[12] As it would appear from paragraph 7.2 of the letter of 6 July 2018, PWC was to manage the selection process of a 28% BBBEE shareholding in Silulumanzi. PWC was also to report to a steering committee and to provide corporate advisory services relating to introduction of suitable local City of Mbombela. The Steering Committee included Mr Neil Diamond, representing Municipality in his capacity as acting Municipal Manager. The first meeting of the steering committee took place on 17 July 2018 and amongst others it was recorded or resolved during the meeting as follows:
"The meeting agreed that as per the SAWW proposal, the COM (referring to the Municipality) will be consulting and will oversee the process while SAWW has full authority to exercise the RFP powers, including the selection and negotiation with the preferred entity/ies <u>*as long as it meets the agreed evaluation and selection criteria*</u>*"*

[13] Then in paragraph 1 of the steering committee minutes it was recorded:
"The proposed selection criteria was discussed and the meeting resolved that PWC will, as per the SAWW meeting proposal and the PWC TOR (terms of reference) advise the steering committee with regards to the weighty and application of selection criteria. In particular the criteria of Water Industry Knowledge, and Track Record was discussed as potentially limiting, and this has to be considered in relative weighting".

[14] On 3 August 2018 an invitation was issued. The rules of the invitation included the following:

"Improper assistance, fraud and corruption

- <u>*Respondents may not seek or obtain the assistance of employees, contractors or advisors of SAWW and/or SILU in the preparation of their Submission*</u>.

- *SAWW and/or SILU may in its absolute discretion, immediately disqualify a Respondent that it believes has sought or obtained such improper assistance.*
- *Respondents are to be familiar with the implications of contravening the Prevention and Combating of Corrupt Activities Act, No. 12 of 2004 and any other relevant legislation.*

Conflict of interest

- *A Respondent must not, and must ensure that its officers, employees, agents and advisors do not, place themselves in a position that may give rise to actual, potential or perceived conflict of interest between the interests of SAWW and/or SILU and the Respondents interests during the process.*
- *The Respondents Submission in this RFI requires the Respondent to provide details of any interests, relationships or clients which may or do give rise to a conflict of interest in relation to the supply of the services under any contract that may result from this RFI.*
- *If the Respondent submits its information Pack and a subsequent conflict of interest arises, or is likely to arise, which was not disclosed in the submission, the Respondent must notify PWC immediately in writing of that conflict to RFPSubmission@za.pwc.com;*
- *SAWW and/or SILU may immediately disqualify a Respondent from the process if the Respondent fails to notify SAWW and or SILU of the conflict as required."*

[15] The rules of invitation further required those who would want to participate in the bid to provide details of any interest, complete a form designed for the purpose and to make a declaration of relationships or clients which may give rise to a conflict of interest and the area of expertise in which that conflict of interest may arise. Paragraph 7 of the invitation document provides as follows:

"1.1 Any legal person, including persons employed by the Key Stakeholders, or persons having a kinship with persons employed by the Key Stakeholders, including a blood relationship, may make an offer or offers in terms of this invitation (includes an advertised competitive bid, a limited bid, a proposal or written price quotation). In

view of possible allegations of favouritism, should the resulting bid, or part thereof, be awarded to persons employed by the Key Stakeholders, or to persons connected with or related to them, it is required that the Respondent or his/her authorised representative declare his/her position in relation to the evaluating/adjudicating authority where:

(a) the Respondent is employed by the Key Stakeholders; and/or

(b) the legal person on whose behalf the bidding document is signed, has a relationship with persons/a person who are/is involved in the evaluation and or adjudication of the bid(s), or where it is known that such a relationship exists between the person or persons for or on whose behalf, the declarant acts and persons who are involved with the evaluation and or adjudication of the bid.

[16] On 6 September 2018 PWC submitted a draft report to the Steering Committee and *inter alia*, stated that the draft report was *"...for exclusive use of Sembcorp and Silulumanzi / South African Water Works... No other party whether referred to therein or not, is entitled to rely on the contents of the report".* The report was however disclosed to Buhle by the Municipality. Amongst others, the following were recorded in the report by PWC: Eleven participants were invited for possible selection, Gear Investment misrepresented their contributor level status as a level 1 in the Terms of Offer and certificate obtained from a rating agency, however, specified a level 2 rating. PWC indicated that it was not able to confirm all the work experience of key executives of Gear Investments. Despite all of these, Gear Investments is indicated as having outscored Buhle by score of 3.49 to 3.43. *PWC also in their report referring to a level 2 rating recorded:*

> *"In light of this misrepresentation the decision to proceed remains that of SAWW and SILU".*

[17] Apparently worried by what was happening between Silulumanzi and SAWW, on 12 September 2018 the Municipality wrote to Silulumanzi and expressed itself as follows:

"1. The 6th meeting of the steering committee (Steerco) to procure a BEE shareholder has reference as do our letter dated 10 September 2018.

2. *The City of Mbombela at a special council meeting on 27 June 2018 resolved under item A (10) that the Municipality should exercise oversight over the process of procuring a BEE Partner in Silulumanzi as a precondition for consent to change the shareholding in Silulumanzi.*

3. *The municipality wish to place on record that the transparent sharing of information is a prerequisite for accountability and oversight in this process.*

4. *The Steerco at its various meetings stressed the importance of a process that would be guided by principles of inclusivity and empowerment without fear or favour and that the integrity and neutrality of the Steerco members and stakeholders should be above reproach.*

5. *In this regard, City of Mbombela requires that SEMCORB and MERGENCE confirm in writing that either party separately or jointly were not involved with any RFI on 24 August 2018.*

6. *SEMCORB and MERGENCE to confirm in writing that either party separately or jointly gave no special support, favours or made funding arrangements or funding introductions for individual RFI participants prior to the closure of the RFI on 24 August 2018 that could be interpreted as prejudicial to any other participant or seen as an unfair advantage to any other participant and challenge the integrity and neutrality of this process.*

7. *The municipality under item A(10) on 27 June 2018 in specific Resolution A(10)(e) resolved that the City of Mbombela must be fully satisfied that this process was above reproach to procure a BEE shareholder to comply with the suspensive condition for consent.*

8. *In this regard we refer to the above mentioned as well as the terms and conditions imposed by Council resolution, A(10) dated 27 June 2018, the contents of which you are aware off.*

9. *Kindly disclose any possible unfair advantage, undue benefit or existing conflict of interest, or any possible conflict of interest that may arise on conclusion of this process, concerning the RFI participants and bidding parties.*

10. *Please regard the terms "unfair advantage", "undue benefit" and "conflict of interest" must be seen in the widest sense conceivable, including any set of circumstances that create a risk that judgment or actions regarding a primary interest will be unduly influenced by a secondary interest, any situation in which an individual or corporation is in a position to exploit a professional or official*

capacity in some way for their personal or corporate benefit, moreover including but not limited to tangible and non-tangible, "Competition of interest", including connotation of natural competition between valid interests.

11. *Please take note that the above should not be construed as an exhaustive list of all examples, and we advise that you seek legal counsel should there be any uncertainty in this regard.*

We trust that you find the above in order and look forward to receiving your written reply by close of business on 14 September 2018."

[18] This was almost like telling Silulumanzi as to who was in authority or superior. Almost like saying there will be no change of shareholding in Sululumanzi unless certain things are clarified and properly processed. I allude to more facts regarding this aspect later in this judgment when I deal with the critical issue raised in paragraph [1] of this judgment. When the municipality was apparently not satisfied with a response to the letter of 12 September 2018, on 16 September 2018 it despatched a follow-up letter and stated almost like repeating itself as follows:

"1. *Your letter from SA Water Works "SAWW" dated 14 September 2018 and sent via email on 16 September 2018 has reference.*

2. *The City of Mbombela at a special council meeting on 27 June 2018 resolved under item A(10) that the Municipality should exercise oversight over the process of procuring a BEE partner in Silulumanzi as a precondition for consent to change the shareholding in Silulumanzi. We hold the view that our oversight role is being undermined alternatively not taken seriously.*

3. *Your letter dated 14 September 2018 from SAWW is in response to our letter directed to SEMCORB and MERGENCE. We place on record that our letter of 12 September 2018 remains unanswered by both SEMCORB and MERGENCE.*

4. *Your SAWW letter makes various assumptions as deduced by you based on your interpretation of our letter to SEMCOR and MERENCE and subsequent discussions with your Mr. Mark van Wyk representing both SAWW and MERGENCE. Kindly take note that we do not intend responding to each and every assumption or deduction contained in your letter but reserved the right to do so in future, if necessary.*

5. *The City of Mbombela note with appreciation that SAWW provided written confirmation that no special support, favors or funding arrangements have been made for, or funding introductions made to, individual RFI participants prior to the closure of the RFI on 24 August 2018.*

6. *Notwithstanding this confirmation by SAWW the reasonable request to MERGENCE and/or SEMCORB to confirm same in writing remain unanswered. We trust this will be remedied urgently and we have directed separate communication to both parties in this matter today.*

7. *We have a responsibility to the residents and citizens of the City of Mbombela to ensure a free and fair process is followed as resolved by the Municipal Council. In this regard, we wish to remind you of the conditions imposed by the municipal Council in its resolution on 28 June 2018, as well as the timeframes set by the Steering Committee, and urge you to give consideration thereto. You are currently in default of the agreed time frames and your current default could prejudice all parties concerned.*

8. *Please adhere to the agreed time frames as per the steering committee and remedy any breech immediately without further delay."*

[19] On 11 October 2018 the Municipality apparently sought legal advice from its internal legal services which request *inter alia* was drafted as follows: *"The technical confirmed that the process for selection of preferred Mbombela BBBEE shareholder has been finalised. We believe that they have not fully complied with the conditions set out in the council resolution, in particular the element of consultation.*
Kindly confirm whether the process complied fully with the council resolution, ... SAWW and Silulumanzi will select the final 28% Mbombela based BBBEE shareholder in consultation with the representatives of the City of Mbombela".

[20] On 17 October 2018 the Municipality Senior Manager Legal Services responded to the request by the Municipality as per the latter's letter of 11 October 2018. The response was couched as follows:
"We have evaluated the process followed in selecting and appointing a BBBEE shareholder against the requirements specified in the council A(10) of 28 June 2018. We are satisfied that the process has complied with the council's resolution".

[21] On 28 October 2018 the Municipality then wrote to the Buhle as follows:

"4. City of Mbombela's role in the process was merely to oversee the selection process and ensure that the requirements out in the council resolution are met.

5. The selection process having been concluded City of Mbombela played no role in the matter".

[22] On 14 November 2018 the Municipality came to the conclusion that all suspensive conditions it imposed as per its resolution of the 28 June 2018 and quoted in paragraph (7) of this judgment have been fulfilled. The effect of this decision is that the agreement of sale of shares concluded between Silulumanzi and SAWW was complete and of effect. It is this decision which offended Buhle and in its amended notice of motion it asked for a relief as follows:

*"1. The decision taken by the first, second or third respondents ("the city") on or about 14 November 2018 to consent to a Change in Control Request presented to the City by the fourth and/or seventy and/or eighth and/or ninth respondents on or about 21 February 2018, in terms of which the fourth respondent sought the City's written approval of a transfer of certain shares in the fourth respondent to the seventh respondent ("**the consent decision**"), is declared unlawful, unconstitutional and is hereby reviewed and set aside.*

*2. The agreement concluded by the City and the fourth respondent on or about 14 November 2018, in terms of which the consent decision was given effect to and/or formally recorded ("the **agreement**"), is declared unlawful, unconstitutional and is hereby reviewed and set aside;*

3. Any share purchase agreement concluded between the seventh and the fifth respondents, pursuant to the consent decision and/or the agreement, is hereby reviewed and set aside.

4. The consent decision is hereby substituted by an order authorising the transfer of shares (in the fourth respondent) from the eighth and the ninth respondents to the seventh respondent, subject to the following conditions being fulfilled within three months of this order or such extension being granted (on good cause shown) by this Court upon application by any party in these proceeding:

4.1 *The seventh respondent shall conclude a share purchase agreement with the applicant on the same terms and conditions as those concluded (alternative intended to be concluded) with the fifth respondent and give effect to the Council Resolution of 28 June 2018 within three months of this order;*

4.2 *The fourth and seventh respondents are hereby ordered to do everything necessary to effect the transfer of 28% of the shares in the fourth respondent to the applicant as envisaged in the Council Resolution of 28 June 2018 within three months of this order;*

4.3 *The applicant shall pay the sum of R221 000 000 as follows:*

4.3.1 *By the delivery of such guarantee(s) by a bank or financial institution securing the payment of an amount equal to at least 90% of the sum of R221 000 000 to the seventh respondent; and*

4.3.2 *Payment of an amount equal to at least 10% of the sum of R221 000 000 to the seventh respondent;*

5. *The costs of this application shall be paid by any respondent that opposes this application, save that if more than one respondent opposes this application, they shall pay the costs thereof jointly and severally;*

6. *The applicant is granted further and/or alternative relief.*

<u>The attack by the respondents against the relief sought</u>

[23] The Municipality stated its salvo by making a statement as follows in its written heads of argument:

"The applicant's case is stillborn and ought to collapse at its preliminary stages. It is evident from the applicant's notice of motion, including its amended notice of motion that it seeks to review a decision which according to it, was taken on 14 November 2018".

[24] Seeking to amplify the statement above, the Municipality in paragraphs 89 and 90 of its written heads, proceeded as follows:

"89. *However, once a tender is awarded, the agreement or contract concluded between an organ of state <u>and private entity</u> is purely a contractual matter governed by the principles of law of contract. In this regard, the parties* *conclude a contract on equal contractual footing. At this stage, no public authority or power is exercised by either or all the parties in such contractual agreement. Therefore, the concession agreement concluded by the Municipality and Silulumanzi is a purely contractual arrangement and should be viewed through the prism of the law of contract and not administrative.*

90. Equally, the share purchase agreement concluded between Silulumanzi and SAWW, being private juristic entities concluding their own private commercial affairs, is a purely contractual matter regulated by the law of contract. No public function, exercise of public authority or power features in this regard. Accordingly, this aspect is beyond the reach of the court's power of judicial review unless there are public policy considerations involved, which we submit is not the case in the present case".

[25] The statements quoted above became the theme adopted by all the respondents who participated in these proceedings. They all *inter alia,* sought to rely on the principle enunciated in the case of ***Cape Metropolitan Council v Metro Inspection Services Western Cape CC***[3]. It follows that whether or not conduct is administrative action would depend on the nature of the power being exercised. Other considerations which may be relevant are the source of the power, the subject matter, whether it involves the exercise of a public duty **and how closely related it is to the implementation of legislation**[4]. (My emphasis)

[26] The Cape Provincial Division in **Cape-Metropolitan Council** set aside a decision by the Council to terminate a contract with **Metropolitan Inspection Services (Western Cape) CC** and reinstated the contract. The Council was also ordered to afford Metropolitan Inspection Services or its nominated representative access to the written information contained in certain documents, to furnish reasons for its decision and to pay the costs of the application. The main issue that was before the appeal court in **Cape-Metropolitan Council case** was whether such cancellation constituted administrative action within the meaning of that phrase in the Constitution.

[3] (10/99) [2001] ZASCA 56 (30 march 2001)
[4] Para 4 in Cape Metropolitan Council

Cape Metropolitan Council denied that its cancellation of the contract constituted administrative action entitling Metropolitan Inspections Services to procedural fairness and reasons in terms of section 33 of the Constitution. It contended that it was entitled to summarily cancel the contract in that Inspections Services submitted claims for commissions to which it was not entitled to. The court *a quo* had found that when the Council made the decision to terminate its contract with Inspections Services the principle of administrative law applied to the decision. It stated that the Council was a public authority which derived its authority to appoint the Inspections Services from a public power and applying the principle expounded in **Administration, Transvaal and others v Zenzile and Others 1991 (1) SA 21 A,** came to the conclusion that its authority to terminate the agreement with the Inspections Services similarly derived from a public power. <u>It follows that whether or not conduct is administrative action would depend on the nature of the power being exercised[5]. Other consideration why may be relevant are the source of the power, the subject matter, whether it involves the exercise of a public duty and how closely related it is to the implementation of legislation[6].</u> I deal with this principle later in paragraph [36] of this judgment.

[27] Turning to the **Cape Metropolitan case**, the SCA in paragraph 18 of its judgment held as follows:

"[18] *The appellant is a public authority and, although it derived its power to enter into the contract with the first respondent from statute, <u>it derived its power to cancel the contract from the terms of the contract and the common law.</u> Those terms were not prescribed by statute and could not be dictated by the appellant by virtue of its position as a public authority. They were agreed to by the first respondent, a very substantial commercial undertaking. The appellant, when it concluded the contract, was, therefore, not acting from <u>a position of superiority or authority by virtue of its being a public authority</u> and, in respect of the cancellation, did not by virtue of its being a public*

[5] President of the Republic of South Africa and Others v South African Rugby Football Union and Others 2000 (1) SA 1 CC (Sarfu) at para 141
[6] See para 143 of Sarfu

authority, find itself in a stronger position, than the position it would have been in, had it been a private institution. When it purported to cancel the contract, it was not performing a public duty or implementing legislation; it was purporting to exercise a contractual right founded on the consensus of the parties, in respect of a commercial contract. In all these circumstances it cannot be said that the appellant was exercising a public power. S 33 of the Constitution is concerned with the public administration acting as an administrative authority exercising public powers not with the public administration acting as a contracting party from a position no different from what it would have been in, had it been a private individual or institution".

[28] Pausing for a moment and for the purpose of the issues raised in these proceedings and regard being had to the principles as enunciated in **Sarfu and Cape Metropolitan cases**, what is to be considered in the present case is clear: First, it is the nature of the power being exercised. Second, the source of the power, the subject matter in question and whether such subject matter involves the exercise of a public duty and how closely it is to the implementation of applicable legislation. Third, aspect to consider is whether the terms of the agreement between Silulumanzi and SAWW were dictated by the Municipality by virtue of its position as a public authority. Lastly, the other issue to be considered is whether the municipality when it so imposed suspensive conditions as per the resolution of 28 June 2018 it did so from a position of superiority or authority by virtue of it being a public entity exercising public authority to reach the ultimate decision it took on 14 November 2018. Put differently, whether the imposition of suspensive conditions and the ultimate decision of 14 November 2018 was taken by the exercise public authority, finding itself in a stronger position than the position it would have been in, had it not have been a public institution or had it have been a private entity.

Source documents

[29] As indicated in paragraph [3] of this judgment *"empowering provision"* in terms of section 1 of PAJA means "a law, a rule of common law or customary law or an

agreement , instrument, or other documents in terms of which an administrative action was purportedly taken". The words empowering provision should therefore be seen in the context of definition of the word *"decision"* under PAJA. The following documents are source documents some of which and other communications amongst the parties will be dealt with in this judgment to give context to the decision taken by the Municipality on 14 November 2018. The source documents are: Water Service Act, the concession agreement, Broad-Based Black Economic Empowerment Act, PAJA Act, the Constitution, the municipal resolution of 28 June 2018 and Employment Equity Act No. 55 of 1998. In this judgment one will consider each of the legislative imperatives, source documents and the facts in relation thereto insofar as they may be relevant.

<u>Water Services Act No. 108 0f 1997</u>

[30] The Act as a source document to the authority and power that was exercised on 14 November 2018 has to be seen in context. The Act was enacted to provide for the rights of access to basic water supply and basic sanitation services; to provide for setting of national standards and norms and standards for tariffs; to provide for water services development plans; to provide a regulatory framework for water services institutions and water services intermediaries; to provide for the establishment of water boards and water services committees and their power and to provide for monitoring of water services; etc.

[31] In the Preamble to the Act is amongst others, stated that there is a duty on all spheres of government to ensure that water supply services and sanitation services are efficient, equitable and sustainable and all spheres of government must strive to provide water supply services and sanitation services sufficiently for subsistence of economic activity. Furthermore, in terms of the Preamble, water supply services and sanitation services are often provided in a monopolistic or non-monopolistic circumstances and that the interests of consumers and broader goals of public policy must be promoted and the national government's role as custodian of the nation's water resources must be adhered to.

[32] The Municipality in terms of section 1 (LXX) of the Act is defined as water services authority. What is stated in the preamble is also largely repeated in section 2 of the Act. Section 2 deals with the main objects of the Act. Section 3 on the other hand deals with 'right of access to basic water supply and basic sanitation'. *Inter alia,* subsection (3) thereof provides that every water services authority must in its water services development plan provide measures to realise these rights. Section 19 of the Act deals with "contracts and joint ventures with water services providers". Subsection (1) of section 19 provides as follows:

"A water services authority-

(a) <u>May perform the functions of a water services provider itself</u>;

(b) <u>May-</u>

(i) <u>Enter into a written contract with a water services provider</u>; or

(ii) Form a joint venture with another water services institutions to promote water services".

[33] The concession agreement referred to in this judgment is the brain child of section 19(1)(b)(i) of the Act. That is, *"written contract with a water services provider".* The question is how is the Act of relevance to the decision of 14 November 2018 and related bidding process for the appointment of 28% shareholder in Silulumanzi. This requires a zoomed needle eye taking into account the fact that the concession agreement and annexures thereto consists of many pages. But before one ventures into this exercise, it is important that I turn first to deal with how the Municipality sees itself in relation to the concession agreement. In paragraph 12.4 of the municipality's answering affidavit the "concession agreement" is described as "water and sanitation agreement". In the same paragraph, the Municipality alludes to the fact that "following the bidding process, the Municipality identified Silulumanzi as the successful bidder and in April 1999 the Municipality and Silulumanzi entered into the concession agreement".

[34] Then in paragraph 13 of the affidavit a statement is made as follows:

"When the municipality <u>evaluated the bidding process</u>, which ultimately led to the appointment of Silulumanzi as successful bidder, <u>it was discharging its administrative duties</u> in terms of the WSA..."

[35] The bidding process in the selection of Silulumanzi as a water service provider and a nominee of the municipality was a discharge of municipality's administrative duties. So too should be the selection of 28% shareholder in Silulumanzi in particular the granting of consent to the change of control in Silulumanzi. This should be seen as municipality discharging its administrative duties. The Municipality however in its attempt to distance itself from the essence as quoted in paragraph [34] above, proceeded as follows:

"However, immediately after the tender was awarded, the relationship between the Municipality and Silulumanzi became one of ordinary contracting parties doing so on equal footing. Putting the same position differently, when the Municipality concluded the concession agreement as the Municipality was not concluded the concession agreement with Silulumanzi, this was purely a contractual matter, as the Municipality was not exercising public power or performing a public function when doing so".

[36] The municipality cannot have it both. I cannot agree with the contention as quoted in paragraph [35] above. For this purpose, the agreement and its terms have to be examined including the case law and municipality's own utterances. Later in this judgment I deal with the suggestion that post the conclusion of the concession agreement, the parties dealt with each on an equal footing. It suffices for now to state that I do not agree with suggestion. In paragraph [26] of this judgment I referred to **Sarfu case** and of relevance the principle laid down therein. That is, '... *it follows, whether or not conduct is administrative action would depend on the nature of the power being exercised...*' and '*other considerations which may be relevant are the source of the power, the subject matter, whether it involves the exercise of public duty and how closely related it is to the implementation of legislation'.* In my view, implementation of such legislation will include relevant provisions in the Water Services Act, BBBEE Act read with the concession agreement and communications amongst the parties and including other relevant legislative and constitutional imperatives.

[37] The conclusion of concession agreement between Silulumanzi and the Municipality in April 1999 arose from a legislative imperative in section 19 of the Act and quoted in paragraph [32] of this judgment. That is conceded as indicated in paragraph [34] above. A close look at the terms of the concession agreement in my

view, speaks to the objects in the Act referred to in paragraphs [30] to [34] of this judgment. For example, in terms of Annexure "B8" to the concession agreement in particular clause 3.1 thereof, Silulumanzi or its predecessor assumed the responsibility in terms and pursuant to the contract, the supply of water services in the concession areas. This is a term in a contract that speaks to the core function of the Municipality in terms of the Act which responsibility has been delegated to Silulumanzi or its predecessor in terms of section 19 of the Water Act referred to earlier in this judgment. So, any suggestion that this legislative imperative was lost by virtue of the concession agreement cannot be correct. The bucks stop with the Municipality in terms of the Act throughout. I later in this judgment deal with the issue of empowerment. This will be with reference to BBBEE and some relevant terms of the agreement in some of the annexures to the concession agreement.

[38] Clause 31 of the concession agreement deals with "Service requirements". In clause 31.1 it is recorded that supply of water service <u>is a public service</u> and shall be developed by the concessionaire (referring to Silulumanzi). This is a term in the agreement that is founded on the legislative imperative. It is a must provision binding the municipality and Silulumanzi the latter being a nominee of the municipality almost like the Municipality being at a higher level and not on an equal footing with Silulumanzi. Legislatively, the buck stops with the Municipality. Just to emphasise this point: Clause 40 deals with the tariffs policy. In clause 40.1 thereof it is recorded that in terms of the regulatory provisions, <u>the council being a democratically elected legislative body, has statutory power and authority</u> and social duty to set and levy tariffs on consumers for the supply of water services in the concession area in accordance with the regulatory provisions. This should dispose of any suggestion that post the selection process of Silulumanzi, the concession agreement was an agreement based on an equal footing between Silulumanzi and the Municipality. The nature of the agreement and its source is that the primary services to be rendered are heavily regulated so much that it became imperative in the concession agreement to set out the terms or conditions that would be in line with the legislative or regulatory imperative.

[39] Section 6 of the Act deals with access to water services through nominated water services providers. Silulumanzi is such water services provider nominated by

the council. Without the approval of the Municipality to supply water and sanitation services, Silulumanzi would offend the provisions of section 6(1). This too shows the extent of the Municipality's authority for which the concession agreement was all about. That is rendering water and sanitation services by Municipality through its nominee, namely Silulumanzi. Therefore, it cannot be correct to suggest that concession agreement and its terms are not closely related or connected to the legislative framework from which the municipality derives its public authority. This then brings me to another important term of the concession agreement which is linked to a constitutional legislative framework.

Constitutional imperative leading to the concession agreement

[40] Section 27(1)(b) of the Constitution guarantees everyone of a right to have access to sufficient food and water. On the other hand, section 7(2) of the Constitution provides that the state must respect, protect, promote and fulfil the rights in the Bill of Rights. One of such rights is access to clean water services. Section 9(2) of the Constitution provides that "*equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and measures designed to protect or advance persons or categories of persons, disadvantaged by unfair, discrimination may be taken into consideration*". (My emphasis).

[41] The Municipality in paragraph 13 of its answering affidavit deposed to on 17 October 2019 articulated itself as follows:

"On 20 May 2018, the municipality and indeed influenced by the provisions of the Broad Based Black Economic Empowerment Act, 53 of 2003 ("the BBBEE Act"), proposed that the local Broad Based Black Economic Empowerment ("BBBEE") partners should also be considered in the SPA. In this regard, SAWW proposed to offer a maximum equity participation of 28% in Silulumanzi to local BBBEE partners, then yet to be identified".

[42] In my view, the statement above, should also dispose of any suggestion that administrative review or public law review does not apply because of the contended pure contractual relationship between the Municipality and Silulumanzi. Look at the legislative framework in the BBBEE Act this way: First, because of our past, it was

necessary to have a legislation and other measures designed to protect or advance persons, categories of persons, disadvantaged by unfair discrimination. This is not just a pure contractual obligation. It is a constitutional provision in section 9(2) of the Constitution. Second, BBBEE Act is the Act that was enacted to deal with this very fundamental constitutional imperative also read with the provisions of section 7(2) and 27(1) of the Constitution referred to earlier in this judgment. The municipality recognised and acknowledged the imperative in BBBEE Act No 53 of 2003 read with the constitutional imperative.

[43] The Preamble to BBBEE Act says it all. That is, under apartheid race was used to control access to South African's productive resources and access to skills and that South Africa's economy still excluding the vast majority of its people from ownership of productive assets and the possession of advanced skills and that unless further steps are taken to increase the effective participation of the majority of South Africans in the economy, stability and prosperity of the economy in the future may be undermined to the detriment of all South Africans, irrespective of race. This is a fundamental prelude to the objects of the Act aimed at promoting the achievement of the constitutional right of equality, increase broad-based and effective participation of black people in the economy and promote a higher growth rate, increased employment and more equitable income distribution and establish a national policy on broad-based black economic empowerment, *inter alia*, so as to promote equal opportunity and equal access to government services.

[44] Section 2 of the BBBEE Act deals with the objects of the Act. That is, to facilitate broad-based economic empowerment (a) by promoting economic transformation in order to enable meaningful participation of black people in the economy; and (b) by achieving a substantial change in the racial composition of ownership and management structures and in the skilled occupations of existing and new interpose act. In interpreting the Act, one must interpret its provisions so as to give effect to its objectives and to comply with the Constitution. These provisions are founded on section 3 of the BBBEE Act. Section 10 of the BBBEE Act provides *inter alia* that every organ of state and public entity <u>must</u> take into account and as far as is reasonably possible, apply any relevant code of good practice issued in terms of the

Act (referring to the BBBEE Act). "*Every organ of state and public entity*" has to be the emphasis, in my view, for the purpose of the issues at hand.

[45] As on 16 August 1999 when the concession agreement was concluded, the imperative in the Constitution under section 9 was there to be complied with particularly read in the context of sections 7 and 27 of the Constitution. One must therefore have a look at some of the terms and conditions in the concession agreement. This is important to determine whether such terms and conditions are closely linked or connected to the constitutional imperative in section 9(2) of the Constitution and other relevant provisions in the Constitution including other national legislations relevant hereto.

[46] In **Sarfu case** referred to the paragraph [26] of this judgment, one other consideration is whether the decision or action complained of involves the exercise of public duty and how closely related it is to the implementation of a legislative imperative. This principle was also reaffirmed in paragraph [17] in the case of **Cape Metropolitan Council v Metro Inspection Services Western Cape CC and Others (10/99) [221] ZASCA 56 (30 March 2001)**. It is therefore necessary to examine whether consenting to the appointment of Gear Investments as 28% BBBEE shareholder in Silulumanzi is closely related to the imperative in section 9(2) of the Constitution. Put differently whether the inclusion of clause 7.4.2.1 in the concession agreement is closely related to the imperative in the BBBEE Act and the Constitution in particular section 9(2) thereof.

[47] In terms of clause 7.4.2 of the concession agreement "no share in the share capital of the Silulumanzi or concessionaire may be transferred to any person or entity that will have the effect that the entity or person controlling Silulumanzi immediately before such transfer loses such control, <u>save for any such transfer or change in control-</u>

<u>"7.4.2.1 that is effected with the prior written approval of the Council Municipality and lenders".</u>

[48] This term of an agreement cannot be divorced from the constitutional imperative in section 9(2) of the Constitution. It appears even more clearly in

paragraphs 1 and 2 of the annexure D3 to the concession agreement. I deal later with this when one deal with the relevant provisions in BBBEE Act which came into effect after the conclusion of the concession agreement in April 1999. But, embodied in the concession agreement there are specific terms which speak directly to the imperative in section 9(2) of the Constitution read with the enabling provisions of national legislations envisaged in the Constitution. In clause 26 of the concession agreement is recorded: "*The concessionaire <u>shall</u> comply with the regulatory provisions <u>in respect of employment equity and implement the affirmative action and equal opportunity employment plan in the affirmative</u> schedule annexed hereto marked annexure D3 as from the effective date*". I mention this term of the concession agreement to show that it was not just a pure contractual relationship based on an equal footing with no regulatory or statutory terms and conditions attached to it. This also shows the extent to which Silulumanzi was to continue to supply water services in terms of the Water Services Act at the will of the Municipality bearing in mind that the latter is a public entity and the buck stops with it.

[49] What appears in schedule D3 referred to above is even more interesting and pointed. This will appear even more relevant when dealing with the challenged decision of 14 November 2018 in relation to BBBEE Act. Annexure D3 to the concession agreement deals with "Affirmative Action Schedule". Paragraph 1 thereof deals with the "Policy" and of relevance is recorded as follows:

"1.1 The Concessionaire shall comply with all regulatory provisions in respect of employment equity and implement and adhere to the following principles in respect of its employment practices, namely-

1.1.1 <u>Preference</u> will be given to the employment of suitable qualified and experienced <u>previously disadvantaged individuals from communities within the concession area</u>, based on the operational needs of the Concessionaire as well as its training and development requirements,

1.1.2 The Concessionaire shall, as far as possible, maintain and employ a staff complement that is representable in terms of the demographic composition of the community within the concession".

[50] What is stipulated in annexure D3 quoted above as terms and obligations contained in the concession agreement can only have been prompted by the Constitutional imperative in section 9(2). This in my view, disposes of any suggestion that the concession agreement was just a contract with mere contractual obligations that are not based on any legislative imperative. Clause 2 in Annexure D3 deals with targets. *Inter alia*, it is recorded that target compliance will be in conformity with the Employment Equity Act No. 55 of 1998.

[51] Similarly, the purpose of Equity Act in section 2 is to advance equity by, (a) promoting equal opportunity and fair treatment in employment through the elimination of unfair discrimination and (b) by implementing affirmative action measures to redress the disadvantages in employment experienced designated groups, in order to ensure their equitable representations in all occupational categories and levels in the workplace. Section 3 of the Employment Equity Act requires any interpretation of the Act to comply with the Constitution so as to give effect to the purpose the Act by taking into account any relevant code of practice issued in terms of the Act or any other employment law. The Employment Equity Act in my view, is meant to promote and encourage entities or institutions to comply with the constitutional provisions *inter alia*, in section 9(2) of the Constitution. This should be read with the imperative in the BBBEE Act which is mainly designed to deal with organs of state. Therefore, even from the point of view of Employment Equity Act, one cannot say the Municipality and Silulumanzi on the facts of the present case, contracted purely on an equal footing and that same is implicit in the concession agreement. The Municipality in my view, never saw itself as an equal partner in terms of its interaction with Silulumanzi preceding the taking of a decision on 14 November 2018.

<u>Municipality resolution of 28 June 2018</u>

[52] The resolution of 28 June 2018 was brought about by the terms of the concession agreement in particular clause 7.4.2 thereof and quoted earlier in this judgment. What is stipulated in clause 7.4.2 are specific obligations placed on Silulumanzi in terms of the resolution, which obligations cannot be divorced from the provisions of the Water Services Act, section 9(2) of the Constitution and Employment Equity Act. The BBBEE Act also came into the picture after the conclusion of the

concession agreement and its imperative thereof as so conceded by the Municipality seen in the contents of its averments quoted in paragraph [41] of this judgment.

[53] At the risk of repetition, the resolution of 28 June 2018 of relevance was crafted as follows:

"(a) *Council approve and grant conditional consent, in accordance with clause 7.4.2 of the Water and Sanitation Concession Agreement dated 21 April 1999, as amended, between the municipality, as Water Services Authority and Sembcorp/Silulumanzi (RF) Pty Ltd, as a Water Services provider; pertaining to the change of control;*

(b) *Conditional consent be granted for the transfer of all the shares held by Sembcorp utilities (Netherlands) NV in the Concessionaire (in conjunction with the transfer of its 100% shareholding in Sembcorp Utilities South Africa Pty Ltd) to SA Water Works Pty Ltd (formerly named K2018039949 (South Africa) Pty Ltd), CIPC registration number 2018/039949/07, as set out in the notification and application for consent by the Concessionaire dated 2 March 2018 (annexure 127/18);*

(c) *Conditional consent be granted with the specific suspensive condition that SAWW and Silulumanzi immediately after this Council resolution, commence with the process of obtaining a 28% Mbombela based BBBEE shareholder in Silulumanzi and conclude the process within the prescribed 90 days from the date of the Council resolution;*

(d) *the City of Mbombela, represented by the Executive Mayor and the Acting Municipal Manager, <u>oversee the process administered by SAWW and Silulumanzi regarding the 28% BBBEE Mbombela based shareholder</u>;*

(e) *SAWW and Silulumanzi to select the final 28% Mbombela based BBBEE shareholder, <u>in consultation with the representatives of the City of Mbombela;</u>*

(f) *the Acting Municipal Manager, as Accounting Officer, be mandated to confirm that the requirements above have been met as per the terms of the conditions of the Conditional Consent granted;*

(g) *the Accounting Officer be authorised to sign all documents and do all things necessary in order to implement the above;*

(h) *should the suspensive condition stipulated in (c) above not be met within 90 days from the date of the Council resolution and written confirmation not having* *been issued by the Acting Municipal Manager, confirming that all suspensive conditions for the conditional consent have been met, the Conditional Consent will automatically lapse and be of no further cause or effect and may not be relied upon by any party."*

[54] The conditional consent set out in (c) and (e) is somewhat in line with the quotation referred to paragraph [47] of this judgment and that it was "*indeed influenced by the provisions of the Broad Based Economic Empowerment Act*" as quoted in paragraph [41] above. I deal later with this under the heading "*Superiority or authority*". This conditional consent derived from BBBEE Act is with reference to the sale of shares between Silulumanzi and the seventh respondent. It suffices to mention that certain terms or conditions in the resolution of 28 June 2018 may not have been specifically mentioned in any of the legislative or constitutional imperative, but there can be so implied or inferred. These are the terms or conditions dictated by the Municipality and so set by it on the basis of its public authority. For example, based on its public authority, it so imposed a condition for 28% BBBEE shareholding in Silulumanzi almost like as a non-negotiable condition before a consent as envisaged in clause 7.4.2.1 could be granted. The respondents knew of this authority and acted on the basis that the authority was not negotiable save of course for the percentage of BBBEE shareholding in Silulumanzi

<u>Superiority or authority of the Municipality</u>

[55] The real question is whether the Municipality throughout acted from a position of superiority or authority. Based on the facts of the case, the answer should be in the affirmative. For example, the Municipality prompted by its legislative authority and on its own, started to advance affirmative action. When it concluded the concession agreement in 1999, it ensured that should an opportunity arise, it will activate clause 7.4.2.1 thereof. In my view, it had an upper hand here driven by the imperative in the Constitution in particular section 9(2) thereof. In an equal footing contractual relationship, Silulumanzi or its shareholders would have been free to sell any of its shares to change the controlling power in it without anyone's consent. However in the present case this was not the situation. The concession agreement concluded in 1999 was never on "an equal footing contractual relationship". Silulumanzi had no power

or freedom to freely dispose of its shares having the effect of change its control through sale of its shares. When clause 7.4.2.1 was activated, the Municipality seized the opportunity by not only invoking the imperative in section 9(2) of the Constitution but by also invoking the provisions of the BBBEE Act. The BBBEE Act was the Municipality's ace card to twist Silulumanzi's hand. For this, on 28 June 2018 the Municipality imposed a 28% BBBEE shareholding on the Silulumanzi. It did not only do that, but it also ensured that it did not become a by-stander in the selection of the 28% BBBEE shareholder in Silulumanzi. This was almost like "take or leave it" attitude towards the Silulumanzi. The municipality did so in the exercise of its public authority. Probably, Silulumanzi must have pleaded with the seventh respondent to agree to a stipulation in the Municipality's resolution of 28 June 2018 regarding 28% BBBEE shareholding in Silulumanzi. The seventh respondent was clearly desirous of obtaining a control over Silulumanzi. For this, it had to agree and comply with the suspensive conditions imposed by the Municipality on 28 June 2018.

[56] In paragraphs [17] to [19] of this judgment I set out in some details some of the articulations by the Municipality expressing displeasure in the way the selection process of 28% shareholding in Silulumanzi was being conducted. But before I deal with those assertions, it is necessary to deal first with what was required. It suffices for now to mention that the Municipality expressed itself as it did in paragraphs [17] to [19] of this judgment because it appreciated or understood the superiority or authority it had on the appointment of 28% BBBEE shareholder in Silulumanzi.

[57] What was said in the other case law herein, is relevant to the issue at hand. That is, whether the Municipality and Silulumanzi were exercising mere contractual obligations or whether they were performing public functions in the selection of a 28% BBBEE shareholder in Silulumanzi. The late Sigogo AJ had an occasion to deal with an application in terms of rule 35(12). Buhle was forced to approach the court for disclosure of the share purchase agreement. In finding that the documents required by Buhle should be provided, Sigogo AJ inter alia, held:

"There is no doubt that when the first respondent (referring to Silulumanzi) availed itself to provide public service, it waived its private entity and clothed itself with the public entity in respect of the scope of public service it sought to deliver. Importantly,

it is through this SPA (referring to share purchase agreement) that the second respondent (referring to the seventh respondent) took control of the first respondent..."

[58] I cannot fault this finding by the late Sigogo AJ. That should also be seen the context of what was articulated in the case of **AllPay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer, South African Security Agency and Others 2014(4) SA 179 (CC).** In paragraph [49] of its judgment, the Constitutional Court held:

"Organs of state have obligations that extend beyond the merely contractual. In terms of section 8 of the Constitution, the Bill of Rights binds all organs of state. Organs of state, even if not state departments or part of the administration of the national, provincial or local spheres of government, must thus "respect, protect, promote and fulfil the rights in the Bill of Rights".

[59] The municipality is such an organ of the state in these proceedings although it delegated its core function to Silulumanzi to make water services accessible as so entrenched in the Constitution and the Water Services Act. Silulumanzi in these proceedings performs public duty by virtue of the concession agreement and its terms and obligations in the agreement. It therefore, as Sigogo AJ concluded, "clothed itself with public entity in respect of public service it sought to deliver".

[60] The Constitutional Court in **AllPay** put it this way in paragraph [52] of its judgment:

"That SASSA is an organ of state is clear. But, for the purposes of the impugned contract, so too is Cash Paymaster. In determining whether an entity is an organ of state, the presence or absence of governmental control over that entity is a factor, but in our constitutional era, is not determinative. In **Cash Paymaster's case** the "control test" is not helpful; although it may be independent from SASSA's control, the function that it performs – the country-wide administration of the payment of social grants – is fundamentally public in nature".

[61] Just to pause for a moment and comment on the absence or presence of government's control. That is, municipality's control over the selection process of BBBEE shareholding in Silulumanzi. First, is the municipality's articulation as quoted in paragraph [41] of this judgment. Second, it is its assertions in its letter of 12 September wherein *inter alia,* it stated:

"2. *The City of Mbombela at a special council meeting on 27 June 2018 (referring to 28 June 2018) resolved under item A(10) that the Municipality should exercise oversight over the process of procuring a BBBEE Partner in Silulumanzi as a pre-conditionn for consent to change shareholding in Silulumanzi". (My emphasis)*

[62] This is a statement of authority and superiority found in paragraph (e) of the resolution of 28 June 2018 in terms of which "SAWW and Silulumanzi was to select the final 28% Mbombela based BBBEE shareholder in consultation with the representative of the City of Mbombela". Also, almost like another "take or leave it" attitude towards both SAWW and Silulumanzi. The authority is founded on the BBBEE Act, the Constitution and reinforced in the resolution of 28 June 2018. It was not just a simple contractual pre-condition term. It was based on the public and constitutional authority bestowed on the municipality in terms of the law.

[63] This statement quoted in paragraph [61] above was preceded by a statement made in a letter dated 6 July 2018 from SAWW. This letter by SAWW as I see it, was intended to thwart the authority which the municipality set for itself in the resolution of 28 June 2018 in particular with reference to the "in consultation" process. The statement was made by SAWW as follows:

"2. *We understand that from your letter dated 28 June 2018, that the Executive Mayor and Municipal Mayor has the following role in relation to securing of local BBBEE:*

2.1 *Oversee the process; and*

2.2 *Selection to be made will be in consultation with the representatives of the City of Mbombela being the Executive Mayor and Municipal Manager".*

[64] The Municipality as indicated in the quotation under paragraph [18] of this judgment regarded these assertions as assumptions by SAWW to which it did not necessarily agree. Having restated the in consultation process contained in the resolution of 28 June 2018 and apparently worried by the power which the Municipality bestowed on itself as it was so entitled to do, SAWW tried to deflate the "in consultation" imperative. SAWW in its letter of 6 July 2016 argues as follows:

"4. *We understand "consultation" to mean the process of formally consulting or discussing.*

5. *We reiterate that the final decision on the BBBEE shareholding selection resides with SA Water Works".*

[65] In my view, SAWW was all wrong for the following reasons: (a) "consultation" as so stated in paragraph 4 of the letter is one thing, and "in consultation" as stated in paragraph 2.2 of SAWW's letter is another. "In consultation" means that the person required to consult before arriving at a decision arrives at the decision after securing the agreement or consent of the person so consulted. Therefore, SAWW was wrong in law in thinking that "the final decision on the BBBEE shareholding selection" resided with it. Without the consent or agreement of the Municipality, the purchase of shares by SAWW in Silulumanzi would never have taken place as so stipulated in clause 7.4.2.1 of the concession agreement.

[66] On the other hand, and according to **Meriam Webster Dictionary** "*oversee*" means *"to watch over and direct-in order to ensure a satisfactory outcome of performance".* Therefore, the statement by SAWW in its letter of 6 July 2018 was wrong when it stated: "*3. We understand oversee to mean supervision of the process".* The statement is wrong because it is not only a question of supervision, but is also the power to direct the process and to ensure that a satisfactory outcome of performance is realised. The municipality never formally withdrew the authority that it gave to itself in the resolution of 28 June 2018. An attempt by the municipality at the end tail of the process to act contrary to its public authority and obligation so reinforced in its resolution of 28 June 2018, is unhelpful to its asserted defence in these proceedings.

[67] Until the decision of 14 November 2018 was made, the Municipality never withdrew its superiority or authority in terms of the resolution of 28 June 2018. I say so because despite SAWW's letter of 6 July 2018, the Municipality on 12 September 2018 expressed itself as indicated in paragraph [61] of this judgment. In the same letter of 12 September 2018 the Municipality further made a statement to this effect:

"1. *The 6th meeting of the steering committee (Steerco) to procure a BEE shareholder has reference as do our letter dated 10 September 2018.*

2...

3. *<u>The municipality wish to place on record that the transparent sharing of information is a prerequisite for accountability and oversight in this process.</u>*

4. *The Steerco at its various meeting stressed the importance of a process that would be guided by principles of inclusivity <u>and empowerment without fear or favour and that the integrity and neutrality of the</u> Steerco members and <u>stakeholders should be above reproach</u>.*

5. *In this regard, <u>the City of Mbombela requires that SEMCORB and MERGENCE confirm in writing that either party separately or jointly were not involved with any RFI participants prior to the conclusion of the closure of the RFI on 24 August 2018.</u>*

6. *SEMCORB and MERGENCE to <u>confirm in writing that either party separately or jointly gave no special support, favours or made funding arrangements or funding introductions for individual RFI</u> participants prior to the closure of the RFI on 24 August 2018 that <u>could be interpreted as prejudicial to any other participant or seen as an unfair advantage to any other participant and challenge the integrity and neutrality of this process</u>.*

7. *The municipality under item A(10) on 27 June 2018 in specific Resolution A(10)(e) resolved that the City of Mbombela must be fully satisfied that this process was above reproach to procure a BEE shareholder to comply with the suspensive condition for consent.*

8. *In this regard we refer to the above mentioned as well as the terms and conditions imposed by Council resolution, A(10) dated 27 June 2018, the contents of which you are aware off.*

9. *Kindly <u>disclose any possible unfair advantage, undue benefit or existing conflict of interest, or any possible conflict of interest</u> that may arise on conclusion of this process, concerning the RFI participants and bidding parties.*

10. *<u>Please regard the terms "unfair advantage", "undue benefit" and "conflict of interest" must be seen in the widest sense conceivable, including any set of circumstances that create a risk that judgment or actions regarding a primary interest will be unduly influenced by a secondary interest, any situation in which an individual or corporation is in a position to exploit a professional or official capacity in some way for their personal or corporate benefit, moreover including</u>*

but not limited to tangible and non-tangible, "Competition of interest", including connotation of natural competition between valid interests.

11. *Please take note that the above should not be construed as an exhaustive list of all examples, and we advise that you seek legal counsel should there be any uncertainty in this regard.*

12. *We trust that you find the above in order and look forward to receiving your written reply by close of business on 14 September 2018".*

[68] It is clear that the municipality considered itself as dictating the terms in the appointment of BBBEE partner or shareholder in Silulumanzi. Furthermore, two letters were written to SAWW on 16 September 2018 and in a somewhat authoritative and repetitive way in the first letter of 16 September 2018 the Municipality recorded:

"1. *The 6th meeting of the steering committee (Steerco) to procure a BEE shareholder has reference as do our letter dated 10 September 2018 and 12 September 2018 that remain unanswered.*

2. *The City of Mbombela at a special council meeting on 27 June 2018 resolved under item A(10) that the Municipality should exercise oversight over the process of procuring a BEE partner in Silulumanzi as a precondition for consent to change the shareholding in Silulumanzi.*

3. *The municipality wish to place on record that it made a reasonable request for SEMCORB and MERGENCE to provide written confirmation that no special support, favors or funding arrangements have been made for, or funding introductions made to, individual RFI participants prior to the closure of the RFI on 24 August 2018.*

4. *Notwithstanding this reasonable request no reply from MERGENCE and/or SEMCORB were received by close of business on Friday 14 September 2018. The inference drawn from this is that there may very well may be a challenge to the integrity and neutrality of this process which will be most disappointing and unfortunate.*

5. *We have a responsibility to the residents and citizens of the City of Mbombela to ensure a free and fair process is followed as resolved by the Municipal Council and herewith call upon MERGENCE and SEMCORB to immediately*

and without any further delay respond to our reasonable request as outlined in our letter of 12 September 2018".

[69] A response by SAWW caused the municipality to hit back as follows and again in a repetitive way:

"1. Your letter from SA Water Works "SAWW" dated 14 September 2018 and sent via email on 16 September 2018 has reference

2. The City of Mbombela at a special council meeting on 27 June 2018 resolved under item A(10) that the Municipality should exercise oversight over the process of procuring a BEE Partner in Silulumanzi as a precondition for consent to change the shareholding in Silulumanzi. We hold the view that our oversight role is being undermined alternatively not taken seriously.

3. Your letter dated 14 September 2018 from SAWW is in response to our letter directed to SEMCORB and MERGENCE. We place on record that out letter of 12 September 2018 remains unanswered by both SEMCORB and MERGENCE.

4. Your SAWW letter makes various assumptions as deduced by you based on your interpretation of our letter to SEMCORB and MERGENCE and subsequent discussions with your Mr. Mark van Wyk representing both SAWW and MERGENCE. Kindly take note that we not intend responding to each and every assumption or deduction contained in your letter but reserved the right to do so in future, if necessary.

5. The City of Mbombela note with appreciation that SAWW provided written confirmation that no special support, favors or funding arrangements have been made for, or funding introductions made to, individual RFI participants prior to the closure of RFI on 24 August 2018.

6. Notwithstanding this confirmation by SAWW the reasonable request to MERGENCE and/or SEMCORB to confirm same in writing remain unanswered. We trust this will be remedied urgently and we have directed separate communication to both parties in this matter today.

7. We have a responsibility to the residents and citizens of the City of Mbombela to ensure a free and fair process is followed as resolved by the Municipal Council. In this regard, we wish to remind you of the conditions imposed by the *municipal council in its resolution on 28 June 2018, as well as the timeframes set by the Steering Committee, and urge you to give consideration thereto. You are currently in default of the agreed time frames and your current default could prejudice all parties concerned.*

8. *Please adhere to the agreed time frames as per the steering committee and remedy any breach immediately without further delay."*

[70] You only speak like this when you believe in your authority and superiority. The extensive quotation is necessary as all the respondents sought to deflate the authority, power or superiority of the municipality based on contractual, legislative and constitutional imperative the municipality had in the selection of BBBEE shareholder in Silulumanzi. This serves to show that the ultimate consent given by the Municipality was not just a mere contractual terms and obligations based on an equal footing by the contracting parties. Therefore, the main argument urging the court to find that no basis has been laid for administrative or legality review of the decision of 14 November 2018, has to be rejected. There was just no private affair about the process of selecting the BBBEE partner. The municipality could not have stood on the road side particularly seen in the context of what has already been alluded to in this judgment and also as hereunder. The municipality had a public obligation and authority to dictate its involvement or participation in the form of in consultation process to identify a 28% BBEE partner in Silulumanzi and the ultimate appointment thereof followed by its decision on 14 November2018 which is in the main the subject of the review proceedings herein. Accordingly, the decision by the Municipality on 14 November 2018 falls to be reviewed under PAJA.

The criteria for the selection of BBBEE shareholder and the role of the steering committee

[71] The criteria that were set for the selection of 28% BBBEE-Shareholding in Silulumanzi cannot be divorced from the legislative imperative in the Water Services Act. The main objective of the Act being to make water and sanitation services accessible to every person as so envisaged in section 27(b) of the Constitution which provides that everyone has the right to have access to sufficient food and water. One of the critical criteria set for the selection of a 28% BBBEE-Shareholder in Silulumanzi

was stated as "sound water industry or related knowledge". This was not an isolated requirement in the bidding process. "Sound water industry or related knowledge" is a broad requirement based on the Water Services Act, the Constitution, BBBEE Act, concession agreement and the 28 June 2018 municipality's resolution. This too speaks to the fact that the municipality and Silulumanzi did not want to lose their legislative authority and obligation, the two being responsible to perform public functions by providing or making water access in the areas identified in the concession agreement. In addition, the requirement was to ensure that the 28% BBBEE shareholder in Silulumanzi will significantly contribute to the provision of water services and at the same time serve as advancing broad based economic empowerment envisaged in the BBBEE Act.

[72] There was another requirement that was meant to be observed and drafted as the rules to be utilised and followed by the Project Steering Committee. Its role inter alia, was indicated as being to ensure that the project is aligned with municipality's condition precedent. For this purpose, one must be mindful of the fact that the Steering Committee consisted of a representative from the municipality and Messrs Marius van Aardt and Mark van Wyk from Silulumanzi and SAWW respectively. In terms of paragraph 1 of the Terms of Reference it was recorded: "*The purpose of the Steering Committee is to fulfil the requirements of the condition".* This must have been with reference to 28% BBBEE shareholding condition imposed on Silulumanzi as per the municipal's resolution of 28 June 2018. In paragraph 5 of the Terms of Reference, the responsibilities of the members of the Steering Committee included and regarding the individual steering committee members an understanding of the goals, objectives and desired outcomes of the project and an understanding in representing the interest of the project stake-holders and taking genuine interests in the project's outcomes and overall success, and act on opportunities to communicate through attendance, discussion and review of the minutes, papers and other steering committee documents and to support open discussion and debate, and encourage fellow steering committee members to voice their insights. These responsibilities will become more relevant when dealing with the municipality's attempts to suggest its passive role in the selection of 28% BBBEE shareholder in Silulumanzi. It suffices for now to mention that the municipality represented by Mr Neil Diamond was part of the steering committee. He was not just only an invitee or nominee in the steering committee. He

was there because of the legislative and constitutional imperative including the terms of the concession agreement and the resolution of 28 June 2018 discussed earlier in this judgment. The municipality however failed to properly exercise its oversight role and *in consultation* authority in the selection of a 28% shareholding in Silulumanzi as provided for in the resolution of 28 June 2018. I now turn to deal with other facts which led to the ultimate decision which is now the subject of review.

Letter from municipality's legal division and subsequent decision of 14 November 2018

[73] On 11 October 2018, the Acting Municipal Manager wrote to the municipality's internal legal team. In his letter he stated *inter alia, the followings*:

"The Technical Committee confirmed that the process of the selection and appointment of preferred Mbombela based BBBEE shareholder has been finalised. We believe that they have not fully complied with the conditions set out in the Council Resolution, the element of consultation.

Kindly confirm whether the process complied fully with the Council Resolution, A(10)(e), SAWW and Silulumanzi will select the final 28% Mbombela based BBBEE shareholder in consultation with the representatives of the City of Mbombela.

You are kindly requested to provide legal opinion as to whether the perceived non-compliance is material to the extent that the council may withhold the granting of the consent".

[74] Starting with the latter statement, the municipality clearly as on 11 October 2018 believed and correctly so in my view, that it was still calling the shot, so much that it understood that in terms of its authority, it could still "*withhold the granting of consent*". If the municipality ultimately withheld its consent, it would effectively have aborted any attempt to sell the shares in Silulumanzi to SAWW. It is something that the municipality was entitled to do provided the facts were on its side. This authority goes against the suggestion that the municipality had no role to play in the selection of 28% BBBEE shareholder. The statement, '*we believe that they have not fully complied with the conditions set out in Council Resolution in particular the element of consultation...*' read with in consultation process as expressed by the municipality, speaks to its authority and superiority. The municipality through its municipal manager clearly seems to have understood the meaning of "in consultation" and thus entitling it to

withhold the consent as envisaged in clause 7.4.2.1 of the concession agreement read with the resolution of 28 June 2018.

[75] On 17 October 2018 the Legal Services of the municipality in a somewhat unexplained and unmotivated fashion replied to the letter of 11 October 2018 as follows:

"1. Purpose

The purpose of this memorandum is to provide the Acting Municipal Manager with Legal Advice pertaining to the process culminating in the appointment of a BBBEE Shareholder for Sembcorp Silulumanzi.

2. Discussion

We have evaluated the process followed in selecting and appointing a BBBEE shareholder against requirements specified in the Council Resolution A(10) of 28 June 2018. We are satisfied that the process has been complied with the council resolution.

3. RECOMMENDATION

It is hereby recommended that-

- *In terms of clause (g) of the resolution mandating the Acting Municipal Manager (Accounting Officer), he <u>is authorised to sign all documents and do all things necessary to implement the Council Resolution"</u>*

[76] Starting with the latter statement, it is important to recall that and as quoted paragraph [7] of this judgment, the signing of all documents and do all things to implement the Council Resolution must be preceded by in consultation process in its fullest and overseeing the process as so contemplated in paragraphs (c),(d) and (e) of the municipal resolution of 28 June 2018. The statement: "*We have evaluated the process followed in selecting and appointing a BBBEE shareholder against requirements specified in the Council Resolution A(10) of 28 June 2018. We are satisfied that the process has been complied with the council resolution*", is with respect unhelpful and lacking in both facts and substance. To have relied on it, in my view, amounted to a dereliction of duty by the municipality. Look at it this way: Nothing

is said about the in consultation process followed and fulfilled. For example, who was consulted as part of *in consultation process* and what was the view or decision taken by the person so approached as part of in consultation process. Did the legal team take into account all the concerns previously raised by the acting municipal who so forcefully expressed his frustrations in the manner in which the selection process of 28% BBBEE was unfolding? What about the concerns raised in the PWC's report also alluded to earlier in this judgment? Those concerns have been quoted elsewhere in this judgment.

[77] The legal advice by the municipality's Legal Services is not explained. In particular, how it came to the conclusion that they were '*satisfied that the process has complied with the Council Resolution*'. No indication that the Legal Services clearly understood the process that was to be followed, what role was to be played by the municipality and what is meant by "in consultation", bearing in mind the enquiry by the acting municipal manager was for the Legal Services to legally advise whether in selecting Gear Investments as a 28% BBBEE-shareholder all the criteria and selection requirements have been complied with including due diligence, checks and balances requirements.

[78] Things started to hot up and unfolded very dramatically and interestingly or shockingly just less than a month before the impugned decision of 14 November 2018. The letter by the Legal Services dated 17 October 2018 seems to have been brought to the attention of the Buhle's attorney on the same day. I say so because on 17 October 2018 Buhle through its attorneys wrote a letter to the municipality requesting for access to the record and also enquiring what fees were payable for access to the record. On 25 October 2018 the Legal Services of the municipality and on behalf of the municipality *inter alia,* and of relevance informed the Buhle's attorneys as follows:

"1 ...

2 ...

3 We further like to reiterate that the City of Mbombela <u>did not play active role in the decision that led to the section of a BBBEE partner in Sembcorp Silulumanzi (Pty) Ltd.</u>

4 *City of Mbombela role in the process was merely to oversee the selection process and ensure that the requirements spelled out in the council resolution are met.*

5 *The selection process having been concluded, City of Mbombela play (sic) no further role in this matter and you are free to liaise with Sembcorp Silulumanzi (Pty) Ltd on any additional request for information.*

6 *...*

7 *...*"

[79] The response by the Legal Services of the Municipality in my view is revealing, almost like washing off hands. It is revealing and in my view, deflating the legal advice it provided to the Municipality as quoted in paragraph [75] of this judgment. It exposes the municipal's or its Legal Services' lack of the understating of "*overseeing and in consultation*" stipulated in the municipal resolution of 28 June 2018. The quotation in paragraph [78] above looks uninformed or ignoring the history or context that preceded the 25th October 2018 letter penned by the "**Acting GM: Legal Services**" on behalf of the municipality. I do not find it necessary to repeat myself. The September letters written by the Acting Municipal Manager and quoted in paragraphs [17] to [19] and other letters quoted in paragraphs [67] to [69] of this judgment are at odds with the statement now made by the Legal Services. No facts and legal basis were provided by the Legal Services in their advice and municipality's passive role as quoted in paragraphs [74] and [77] above. In paragraphs [64] and [65] of this judgment I dealt with the meaning of "to oversee" and "in consultation". If the Legal Services of the municipality was privy to all the background and context provided in this judgment, then its response as per the letter of 25 October 2018 boggles one's mind. But it looks like the municipality just capitulated. On 14 November 2018 it sought to have concluded an agreement with Silulumanzi in terms of which a consent as contemplated in clause 7.4.2.1 of the concession agreement was granted and thus giving effect to the transfer of shares in Silulumanzi to SAWW.

[80] Why the municipality concluded an agreement with Silulumanzi instead of taking a resolution on its own as it did on 28 June 2018 is astonishing and raises some eyebrows. Perhaps it was meant to facilitate an argument that the decision taken on14 November 2018 was an issue between two contracting parties dealing with each other

on an equal footing. I have already dealt with this aspect at length in this judgment. The suggestion that the municipality and Silulumanzi had been operating on an equal footing as contracting parties had already been rejected and same should apply here if that was meant to be the argument when a written agreement was concluded post the impugned decision of 14 November2018.

[81] There are also interesting features regarding what had happened on 14 November 2018. In paragraph 4 of the 14th November 2018 document, it is recorded that a resolution was taken on 28 June 2018 after having considered a request for "change in control request". Then in a somewhat contradictory version the municipality in paragraph 5 of the 14th November 2018 document made a statement as follows:

"The concessionaire has, to the satisfaction of COM (referring to the municipality), selected a local BBBEE shareholder as contemplated in Annexure A (referring to the resolution of 28 June 2018). Com confirms the fulfilment of the conditions referred to in Annexure A and the parties now wish to formally record the consent granted by Com to the concessionaire".

[82] This is what prompted the present litigation. At the risk of repeating myself "*to oversee*" means "*to watch over and direct in order to ensure a satisfactory outcome or performance*". So, characterisation of "*overseeing*" as meaning the municipality '*not playing active role in the decision that led to the selection of BBBEE partner in Sembcorp Silulumanzi...*', is a mischaracterisation of the role which the municipality was to play as set out in this judgment. The municipality was not only required "to watch over", but it was also required "to direct" the process in the selection of 28% BBBEE shareholder in Silulumanzi. The acting manager never took a stance on behalf of the municipality as is now articulated by its Legal Services Unit after the acting municipal manager has asked for legal advice. Unfortunately for the municipality, the acting manager relented and so the municipality did on the advice of its Legal Service without more, and that is where their actions became fatal to their case.

[83] The decision to consent to a change of control in Silulumanzi was not the decision of Silulumanzi, neither was a pre-requisite for the municipality to enter into an agreement with Silulumanzi as it did after having taken a decision on 14 November

2018 which decision is now the subject of a challenge. It was also not necessary to record in the agreement between the municipality and Silulumanzi that '*...the parties now wish to formally record the consent granted by Com to the Concessionaire'*. Such formalisation as I see it, was conflating as an attempt to make an argument that the decision falls under law of contract and thus not reviewable under administrative law or public law review. I am satisfied that the decision taken on 14 November 2018 for reasons explained in this judgment falls to be reviewed under administrative law and thus PAJA finds application. I deal later with the issue of delay in relation hereto, but before I do so, I find it necessary to deal with the essence of the attack against the decision and the remedy suggested.

<u>The attack against the decision of 14 November 2018</u>

[84] Under this heading, I deal first with the criteria for the selection of 28% BBBEE shareholder in Silulumanzi , one of which I have already dealt with as "sound water industry or related knowledge". The criteria were recorded by Silulumanzi and SAWW in a letter of 6 July 2018 referred to in paragraph [11] of this judgment. The followings were some of the selection criteria: (a) a culture of integrity (integrity due diligence will be performed), (b) business acumen and track record, (c) access to equity and/or debt funding and, (e) no politically exposed persons, government officials and their family members. With regard to the request for proposals it was stated that "for the purpose of good corporate governance and applying best practices in this regard, Silulumanzi will engage the services of PWC (an auditing firm) as independent advisor to manage the selection process, to report to the steering committee and to provide corporate advisory service relating to the introduction of suitable local City of Mbombela ("COM") BBBEE partners of 28% shareholding. The request for proposal was to be managed by PWC. The participants, that is, <u>bidders were to provide documents to demonstrate that they have the ability to fulfil the criteria"</u>. (My emphasis.)

[85] The first meeting of the steering committee was held on 17 July 2018. In paragraph 1 of the minutes of the meeting in question and having agreed that PWC will advise the steering committee with regard to the weighting and application of the selection criteria, it was recorded: '*In particular the criteria of water industry knowledge*

and Track Record was discussed as potentially limiting and that this has to be considered in the relative weighting'.

[86] The meeting of 17 July 2018 was attended by the deputy municipal manger on behalf of the municipality and Mr Mojake Mosala from the Legal Services of the municipality. Mr Mosala was the man who provided legal advice to the acting municipal manager, Mr Diamond on 25 October 2018. On 3 August 2018 the invitation to participate in an investment opportunity in Silulumanzi for the 28% BBBEE shareholding was issued. The rules of invitation were included. Of relevance, the following headings were pointers: "*Improper assistance, fraud and corruption*", and "*conflict of interest*".

[87] Under "improper assistance, fraud and corruption", the following were recorded as the rules of the game in the selection of the 28% BBBEE shareholding: (a) respondents may not seek or obtain the assistance of employers of contracting or advisors of SAWW and or SILU in the preparation of their submission, (b) SAWW and or SILU may in its absolute discretion, immediately disqualify a respondent that it believes has sought or obtained such improper assistance, and (c) respondents are to be familiar with the implications of contravening the Prevention and Combating of Corrupt Activities Act, No.12 of 2004 and any other relevant legislation.

[88] As regards the rule dealing with *"conflict of interest"*, the following were recorded: (a) a respondent must not and must ensure that its officers, employees, agents and advisors do not place themselves in a position that may give rise to actual, potential or perceived conflict of interest between the interest of SAWW and or SILU and the respondents interest during the process; (b) if the respondent submits the information pack and a subsequent conflict of interest arises, or is likely to arise, which was not disclosed in the submission, the respondent must notify PWC immediately in writing of that conflict to REP…,(c) the respondents submission in the RFI (requests for information) requires the respondent to provide details of any interests, relationships or clients which may or do give rise to a conflict of interest in relation to the supply of the services under any contract that may result from this RFI, and (d) SAWW and or SILU may immediately disqualify a respondent from the process if the respondent fail to notify SAWW and or SILU of the conflict as required.

[89] In the invitation, the participants or respondents were further notified or required in the bid- process 'to provide details of any interests, complete as attached Form in ANX006-Declaration relationships or clients which may give of interest rise to a conflict of interest and the area of expertise in which that conflict of interest may arise'. Lastly, in the invitation notice and clearly without the participation of the municipality it was recorded that *"...the draft and findings are for the exclusive use of Semcorp Silulumanzi and South African Water Works...no other party referred to therein or not is entitled to rely on the contents of the report*".

[90] It looks like somewhere along the selection process, the municipality abandoned its oversight role in the selection of a 28% BBBEE partner including its "in consultation" authority. That appears clearly from the letters written by the acting municipal manager quoted in this judgment. Failure to play its role as per its own resolution of 28 June 2018, is fatal to its decision of 14 November 2018.

Due diligence report by PWC

[91] The report was handed over to Buhle by the Municipality on 1 November 2018. Submission of this report to Buhle was preceded by a request to the municipality for the record of the decision in the selection of Gear Investments as a preferred 28% BBBEE shareholder in Silulumanzi. Failure to submit the report at the time when the record for the decision was first requested is seen by Buhle as having been a deliberate move by the municipality not to disclose the report. The strange thing however is that in the municipality's letter of September 2019, it was indicated to Buhle that the municipality never had in its possession the report by PWC whereas it was the municipality that provided such a report on 1 November 2018. That is, before it made its impugned decision on 14 November 2018. According to Buhle the report by PWC contained damning information and findings against Gear Investments. For this, it is contended that the disclosure of the report makes it patently clear that the municipality's decision of 14 November 2018 cannot withstand legal scrutiny. I tend to agree as it would appear later herein.

Conflict of interest

[92] Mr Van Aardt who was at the time managing director of Silulumanzi was part of the steering committee referred to earlier in this judgment and he was therefore exposed to all the information in connection with the biding of 28% BBBEE shareholding in Silulumanzi. He had direct interest in his representative capacity in the bidding process and selection of a successful BBBEE shareholder, so was the contention by Buhle. On the other hand, one Mr John Pempela Shongwe was a director of the Gear Investments, an entity that was ultimately selected as a successful 28% shareholder in Silulumanzi. But Mr Shongwe was not only director in Gear Investments, he was also a chairman and director of Silulumanzi of which Mr Van Aardt was a managing director. On the other hand, one Mr Eddy Mabuza who was the head of economic regulations in Silulumanzi was also a director in Gear Investments. In other words, three prominent people in Silulumanzi had an interest or a role to play in Gear Investments. Mr Van Aardt sat as a member of the steering committee which ultimately supported or played a role in the appointment of Gear Investments as a successful 28% BBBEE shareholder in Silulumanzi. This information was only disclosed in the PWC's report. Mr Mabuza also submitted a report by Brian Investments apparently as its director.

[93] Buhle sees this relationship explained above as too close to the successful bidder, namely Gear Investments. The close relationship between Gear Investments and Silulumanzi is seen as a clear conflict of interests and contrary to the Rules of the bid as set out in the invitation of 3 August 2018 referred to in paragraph [86] of this judgment and that it offended against the rule relating to "improper assistance" referred to in paragraph [87] above . But what boggles one's mind is the municipality's attitude that it had no role to play or that it played no role in the selection of 28% BBBEE shareholder in Suilulumanzi, something which was contrary to its own resolution of 28 June 2018. This attitude was adopted very close to the decision of 14 November 2018. I say so because as explained in this judgment, all along the municipality through its acting municipal manager adopted the stance that the municipality had a role to play. It only relented and had a second thought when its Legal Services through Mr Mosala suggested that there was nothing unto what regarding the selection process. The municipality therefore relied on a legal advice which in my view, was flawed both on the facts and the law.

[94] The municipality as explained previously in this judgment, had a duty to ensure that the process was flawless and that it was executed with integrity. For obvious reasons, it should have avoided any negativity surrounding Silulumanzi which was responsible for the supply of water and sanitation services on behalf of the municipality. The information as stated above tainted the integrity of the process. On careful consideration, the consent to the change of shareholding in Silulumanzi should never have been granted without due regard to all relevant facts and the law applicable alluded to in this judgment. I now turn to another worrying factor.

Lack of track record and experience on the part of Gear Investments

[95] To the exclusion of the municipality, evaluation of the bids took place on 11 and 12 September 2018 when Gear Investments was chosen as a successful bidder for the 28% BBBEE shareholder in Silulumanzi. Either this was deliberately done for the municipality just to remove itself from the process of evaluation or was deliberately excluded by other role players in the bidding and evaluation processes. This was done despite the municipality's membership in the steering committee and its obligations as it imposed on itself in the resolution of 28 June 2018. The ultimate successful candidate was recommended and reported as having "*strong technical knowledge and experience in the water sector*". As a start, knowledge and experience in the water sector was all what the municipality needed to do through Silulumanzi to ensure that its constitutional and legislative obligation to provide clean water and sanitation services were met or complied with.

[96] There is a serious problem with the statement that "*Gear Investments had a strong technical knowledge and experience in the water sector*" and that Gear Investments was also recognised as "*existing operator in the water sector*". Buhle in paragraph 59 of its supplementary founding affidavit deposed to on 26 September 2019 responded to these questionable statements praising Gear Investments. Buhle hit back as follows: "*None of these statements are correct. In fact, they are designed to mislead and expose the flaws in the matter in which the selection process were undertaken*". I tend to agree. Look at it this way. Gear Investment's CIPC records, show that Gear Investments was only incorporated on 16 April 2018. In the CIPC's

records a statement is made as follows: "*Brian Gear Investments (Pty) Ltd has been recently registered solely for the purpose of bidding for this transaction*".

[97] It was on this basis that Buhle in its supplementary affidavit stated that *'it is patently clear from submission that Brian Gear could never have had the experience referred to in the report by SAWW's report'*. According to Buhle, Silulumanzi and SAWW must have known that the statements quoted in paragraphs [95] and [96] above, were incorrect. The municipality seems to have ignored this information and the evidence as so articulated by Buhle in these proceedings. In fact, the municipality seems to have no defence to these averments and contentions made by Buhle. Therefore its decision of 14 November 2018 cannot stand. Reliance on some experience on the part of some individuals in Gear Investments is not enough as Gear Investments exists in law separate from its employees and or directors.

Lack of integrity on the part of Gear Investments

[98] In paragraph 62 of the supplementary founding affidavit Buhle states that it is also not stated how a company (referring to Gear Investments) that had barely been in existence for a few weeks or months could be of a good integrity and record and chosen as a preferred 28% BBBEE shareholder in Silulumanzi. PWC in its due diligence report alluded to and expressed its concerns about the apparent lack of good record and integrity on the part of Gear Investments. Eleven participants were invited for possible selection. According to PWC Gear Investments misrepresented their contributor level which was stated as a level 1 in the Term offer. The certificate obtained from a rating agency specified a level 2 rating and not level 1. To this effect, *PWC* in its report made a statement as follows*:*
"In light of this misrepresentation the decision to proceed remains that of SAWW and SILU".

[99] In its report, PWC was not able to confirm all the work experience of the key executives, but despite all of the above, Gear Investments was scored 3.49 as against 3.43 for Buhle. To all of these, the attitude by the municipality is that it played no role in the selection process and in the same breath it came to the conclusion that all suspensive conditions have been met and that it was satisfied that everything was

above board. There was a good reason why PWC was to report to the steering committee of which municipality was a member represented by the acting municipal manager, Mr Diamond. The appointment of PWC was meant to ensure that unbiased and independent entity or body was to do due diligence to avoid suspicion of cover-up and hidden agendas in the selection process. All things happening in the course of the selection process were meant to be reported not only to SIlulumanzi and SAWW, but also to the municipality in the fulfilment of its oversight role and in consultation as contemplated in its resolution of 28 June 2018. This was meant to ensure that the municipality fulfils its public duty both in terms of the Water Services Act, the concession agreement, BBBEE Act, Employment Equity Act, the Constitution and the resolution of 28 June 2018. The Municipality however failed to do so as indicated earlier in this judgment and as it would also appear further hereunder. Such failure is one of the grounds for review in these proceedings.

Simulation of share purchase agreement.

[100] The allegations of simulation of the share purchase agreement between Silulumanzi and SAWW came up strongly in Buhle's second supplementary affidavit deposed to on 28 January 2021. Starting at the top before the tail end of the allegations, on 30 December 2020 Buhle was provided with share register of Silulumanzi. It shows that a total of 31 000 ordinary shares in Silulumanzi have purportedly been issued. According to Buhle, this accords with clause 2 of the share purchase agreement to which I refer later in some detail under this heading. The share register was provided to the Buhle by the municipality. It is not clear whether at the time the municipality took the decision on 14 November 2018, it had in its possession the share register in question. If it did, it must be found to have ignored critical information that could have had a bearing on its decision. If it did not, then it should be found to be guilty of dereliction of duty as it would have failed to ensure that everything was above board before it took its decision on 14 November 2018.

[101] The share register further reveals that on 20 November 2018 a total of 10612 ordinary shares of Gear Investments in Silulumanzi were purportedly issued to an entity named **Brian Gear Investments South Africa (Pty) Ltd** (hereinafter referred to as "**Gear Investments SA**"). This is not **Brain Gear Investments (Pty) Ltd**. That

is, it is not Gear Investments, the fifth respondent in these proceedings and a preferred 28% BBBEE shareholder in Silulumanzi. You need a needle eye to pick up the difference between **Brian Gear Investments South Africa (Pty) Ltd** and **Brian Gear Investments (Pty) Ltd.** Gear Investments SA was established or incorporated on 16 November 2018. That is, two days after the municipality had granted the consent on 14 November 2018. One should not lose sight of the fact that Gear Investments (the fifth respondent) which was a participant as a bidder in the selection process of 28% BBBEE shareholding in Silulumanzi, was only incorporated on 16 April 2018.

[102] Gear Investments (fifth respondent) in its answering affidavit deposed to in November 2019 acknowledged that it did not have money to pay for the shares. Perhaps this did not come as a surprise taking into the infant nature of Gear Investments already alluded to in this judgment. Gear Investments, that is, the fifth respondent then alleged in its affidavit that it would complete the share purchase transaction within few days from deposition of its affidavit in November 2019. According to Buhle, this latter assertion or statement by Gear Investments is not only untrue, but it also shows that the parties involved in the transactions, that is, Silulumanzi and SAWW never had any intention of transferring the 28% shareholding in Silulumanzi to Gear Investments. Instead the 28% BBBEE shares in Silulumanzi were meant to be transferred straight to another entity, purportedly the newly established Gear Investment SA, so was the contention by Buhle. I tend to share this view. This then brings me to the events that preceded the incorporation of Gear Investments SA and the shares in Silulumanzi that were ultimately transferred to it. The shares purchase agreement that was allegedly concluded on 22 February 2018 between Silulumanzi and SAWW, was according to Buhle, ultimately shown to have actually been concluded on 1 December 2017. That is, about two months before the municipality was approached for a consent as contemplated in clause 7.4.2.1 of the concession agreement. What preceded 22 February 2018 is painstakingly explained in Buhle's second supplementary affidavit deposed to on 28 January 2021.

[103] According Buhle, the change in the control of Silulumanzi had in fact fallen in the hands of SAWW from 1 December 2017. For this, Buhle takes the view that SAWW, Silulumanzi and others simply engineered an arrangement scheme in terms of which certain role-players in Silulumanzi and SAWW were conflicted. They were

conflicted as they were participants both as referees and beneficiaries in the selection process of a 28% BBBEE shareholder, so was the argument by Silulumanzi and I tend to agree seen in the context of what is alluded to in paragraphs [92] to [94] of this judgment. Copy of the redacted version of the Shares Purchase agreement is said to have been provided to Buhle on the date of the hearing of the rule 30A application before Sigogo AJ. In clause 1.1.26 of the shares purchase agreement, the effective date of the share purchase agreement or takeover of Silulumanzi was indicated as 1 December 2017.

[104] Further clauses of the share purchase agreement which the parties never wanted to disclose either to the municipality or Buhle is very telling as to what had gone behind the scenes preceding 22 February 2018. In clause 4.1 for example, the rights and obligations of the parties were to be subject to the fulfilment of suspensive conditions from the signature date or such other date as is specified in relation to any specific suspensive condition. It looks like despite the effective date in terms of the share purchase agreement determined as 1 December 2017 in terms of clause 1.1.26, the parties, that is, Silulumanzi and SAWW accepted that the municipality and correctly so in my view, was having an upper hand derived from the concession agreement read with the provisions of the Water Services Act, BBBEE Act and the Constitution. As everything is so very much linked to the public authority, the parties to the share purchase agreement correctly anticipated that the suspensive conditions would be imposed for the change of control in Silulumanzi in terms of the 1999 concession agreement. The municipality had that authority to impose suspensive conditions seen in the context of clause 7.4.2. of the concession agreement.

[105] In clause 4.1.3 of the share purchase agreement, Silulumanzi and SAWW mooted a possibility of unconditional approval by the municipality regarding a change of control in Silulumanzi. In the same clause, a possibility of conditional approval and their right to reject any such conditional approval was also mooted. But, they were mistaken as they were in a weak position. Any such rejection of conditional approval for a change of control in Silulumanzi would have meant that there will be no change in the control of Silulumanzi. Clause 5.2 of the share purchase agreement is very important and in my view, speaks to part of the issues under discussion. It provides that, "*Notwithstanding the closing, date, the risk in and the benefit of the sale of shares,*

<u>shall pass to the purchaser on and with effect from the Effective Date</u>. Ownership of the sale shares, shall pass to the Purchaser on the Closing Date against payment of the adjusted Acquisition Price and delivery in accordance with clause 7.5…"

[106] The provision of clause 5.2 is said not to have been disclosed to the municipality. Therefore, as on 28 June 2018 when it imposed suspensive conditions, the municipality did not know that the <u>risk in</u> the share purchase agreement that might have a bearing on a possible 28% BBBEE shareholding, was effective from 1 December 2017. According Buhle, the effective control of Silulumanzi by SAWW effectively took place from 1 December 2017. This is an issue, not disclosed to the municipality so was Buhle's contention. The municipality did not interrogate this, and by so doing failed to exercise an oversight role and due diligence in real time before it decided to grant a consent on 14 November 2018 to a change of control in Silulumanzi. The municipality failed in its duty and therefore its decision is found to be reviewable under PAJA for reasons already mentioned in this judgment. A case for reviewing and setting the decision aside, is made. This then brings me to another issue.

<u>The delay in the institution of the review proceedings and condonation for the late filing second supplementary affidavit</u>

[107] On 28 November 2018 Buhle became aware of the impugned municipality's decision of 14 November 2018. The background preceding the decision of 14 November 2018 has already been sketched out in this judgment and I do not find it necessary to repeat same. It suffices to mention that the scanty information provided by the municipality and other parties to Buhle before the alleged undue delay, did not assist much, neither was there any willingness to play open cards with Buhle regarding the requested information. This actually contributed to the delay. According Buhle, during December 2018 to May 2019 it tried to obtain necessary information after it became aware of the impugned decision. Information was needed to place Buhle in a position to decide whether or not to challenge the decision and if so the nature of the facts in relation thereto to justify a *prima facie* case for review. The municipality's stance post the advice by its Legal Services to date hereof has been that the issue at hand had nothing to do with its public authority as an organ of state and that the

complaint or issues raised by Buhle were based on the law of contract between or amongst equal negotiating parties.

[108] According to Buhle it was during June-July 2019 that it obtained some information and carried out some research on Gear Investments. It was only then that it was able to provide counsel with some information and documentation. Subsequent thereto, the present proceedings were instituted. Silulumanzi and SAWW is said to have done everything in their power to conceal the share purchase agreement until the dispute was laid before Sigogo AJ when he inter alia, found as quoted in paragraph [57] of this judgment.

[109] Look at it this way: The present proceedings were instituted on 9 July 2019. This was slightly less than two months after the expiry of the 180 days calculated from 28 November 2018. Presence of prejudice or absence thereof to the respondents based on an element of <u>undue</u> delay in instituting the present proceedings, is important. The municipality was fully aware as early as September 2018 that there was threat of litigation. When information was required, it did not seek to help Buhle. Instead, the municipality became somewhat destructive or dilatory. Most importantly, none of the respondents has claimed prejudice occasioned by the less than two months' delay. Lastly, the delay in question cannot be said to be undue in the circumstances of the case. I therefore find that a case for condonation has been made.

[110] As regards condonation for the late filing of second founding affidavit, Buhle states that it had to fight booth tooth and nail to have access to share purchase agreement which ultimately it was obtained through an order of court when an application was laid before the late Sigogo AJ. It is further Buhle's view that had the municipality done what it was required to do during the decision making process, it would have sought a copy of the share purchase agreement. I tend to agree. I am satisfied that a case for allowing the second supplementary affidavit has been made. I now turn to deal with the last issue.

<u>Just and equitable</u>

[111] At the end of the hearing on 26 May 2022, I directed the parties to file supplementary written heads of argument to deal with appropriate remedy in the event I was to find in favour of Buhle, the applicant. I am greatly indebted to the legal representatives of the parties who have provided detailed heads of argument.

[112] Once a ground of review under PAJA has been established, there is no room for shying away from dealing with just and equitable remedy requirement. First, section 172(1)(a) of the Constitution requires the decision to be declared unlawful. The consequences of the declaration of unlawfulness must then be dealt with in a just and equitable order under section 172(1)(g). Section 8 of PAJA gives detailed content of "just and equitable" remedy in line with the Constitution. In this case, I have already found that the decision to grant a consent to a change in the control of Silulumanzi was an administrative decision reviewable under PAJA or under public law. Secondly, the grounds of review articulated in this judgement have been established. In particular, regarding the municipality's attempts to distance itself from the selection and adjudication process that resulted in the appointment of Gear Investments as a preferred or successful 28% BBBEE shareholder in Silulumanzi.

[113] Section 217 of the Constitution deals with procurement and subsection (2) thereof provides that subsection (1) does not prevent an organ of state or institution referred to in that subsection from implementing a procurement policy providing for, (a) categories of preferences in the allocation of contracts; and (b) the protection or advancement of persons or categories of persons disadvantaged by unfair discrimination. It was the municipality's intention in its resolution of 28 June 2018 to comply with this constitutional imperative. It did so by imposing suspensive conditions on a change in the control of Silulumanzi. When it did so, it also invoked the imperative in the national legislation namely, BBBEE Act. The municipality's conduct in distancing itself from the selection and lack of due diligence on its part before it granted the consent to a change in the control of Silulumanzi rendered the decision of 14 November 2018 unlawful and susceptible to be reviewed and set aside. This finding brings one to consider a "just and equitable remedy" in the context of the facts of the present case and the law applicable thereto.

[114] Section 8 of PAJA deals with remedy in proceedings for judicial review. It entitles the court to grant any order that is just and equitable including amongst others, setting aside an administrative action and remit the matter for reconsideration by the administrator or decision maker as contemplated in section 8(1)(c)(i) with or without directions.

[115] I must immediately indicate that I am inclined to invoke the provisions of paragraph (c) (i) of section 8(1) of PAJA. Look at it this way: Three bidders for the 28% BBBEE shareholding in Silulumanzi were shortlisted. These were, Buhle, Gear Investments and ZMG Scientific Services (Pty) Ltd the latter cited as the sixth respondent in these proceedings. The sixth respondent did not participate in these proceedings. The grounds of review set out in this judgment have been established. The effect of this is that the change of control in Silulumanzi based on the municipality's decision of 14 November 2018 has to be reversed pending reconsideration by the municipality. Therefore the appropriate remedy in these circumstances would be to refer the matter to the municipality for reconsideration of its decision of 14 November 2018.

[116] Section 8(1)(d) provides that the court may in proceedings for review in terms of section 6(1) grant an order that is just and equitable, including the orders declaring the rights of the parties in respect of <u>any matter to which the administrative action relates.</u> In my view, the question whether the suspensive conditions have been fulfilled is such "*any matter to which the administrative action relates*". Put it differently, what is the effect of reviewing and setting the municipality's decision which effected the change of control in Silulumanzi? This question, in my view, also speaks to the requirement of "just and equitable" remedy.

[117] In several case law the principle has been established that a court's remedial discretion under section 8 of PAJA is to moderate or minimise injustice. In the exercise of the discretionary power, an element of prejudice that might affect other people or the public will be one of the considerations to take into account. In this case, continuous and uninterrupted supply of water and sanitation services should weigh heavily in favour of continuity thereof. There will however no need for this court to exercise its court's discretionary power in this regard as the nature of the order I intend

to make hereunder does not impeded on that obligation to supply and sanitation services. I say this in the context of the fact that there can be no properly appointed 28% BBBEE shareholder in Silulumanzi in the absence of a legal decision granting consent to change shareholding control in Silulumanzi. That is, once the decision of 14 November 2018 is reviewed and set aside as I hereunder intend to do, there can be no valid change of control in Silulumanzi, neither can there be a valid appointment of Gear Investments as a 28% BBBEE shareholder in Silulumanzi. Change of control and appointment of 28% BBBEE shareholder in Silulumanzi, were set as suspensive conditions in the municipal resolutions of 28 June 2018. In other words, the rights which Gear Investments (the fifth respondent) acquired in Silulumanzi or the rights which were so acquired by John Gear Investments South Africa (Pty) Ltd after the granting of consent to a change in the control of Silulumanzi, should be found to be of no effect pending the reconsideration by the municipality as hereunder ordered. In the light of the order I make herein, I do not find it necessary to deal with other reliefs sought. Perhaps that could be an issue for another day, should a need arise.

[118] Consequently, an order is hereby made as follows:

118.1 The decision taken by the municipality on 14 November 2018 in terms of which it consented to a change in control of Silulumazi is declared unlawful and is hereby reviewed and set aside.

118.2 The request for the consent regarding change in control of Silulumanzi is hereby remitted to the municipality for reconsideration of its decision of 14 November 2018.

118.3 In reconsidering its consent to a change in the control of Silulumanzi, the municipality shall take into account all what has been alluded to in this judgment regarding the process that led to the appointment of 28% BBBEE shareholder, its failure to exercise oversight role as per its resolution of 28 June 2018 regarding the adjudication process, issues of concerned raised in this judgment leading to the appointment of Gear Investment as a successful 28% BBBEE shareholder in Silulumanzi including the transfer of shares to another entity after the consent was granted on 14 November 2018 and any other relevant factor and alluded in this judgment.

118.4 A decision with regard to the reconsideration of its consent to a change in the control of Silulumanzi should be concluded and delivered by not later than **17 October 2022**.

118.5 Such a decision and the reasons thereof should be filed with the court registrar of this court and by email at PMaitsapo@judiciary.org.za and LRameregi@judiciary.org.za.

118.6 The appointment of John Gear Investments Pty Ltd as a successful 28% BBBEE shareholder in Silulmanzi and the effective date of the transfer of 28% BBBEE shareholding in Silulumanzi to either **John Gear Investments (Pty) Ltd** or to **John Gear Investment South Africa (Pty) Ltd** based on the decision of 14 November 2018 is hereby suspended pending the reconsideration of the decision to grant consent for a change in the control of Silulumanzi.

118.7 It is hereby declared that pending the reconsideration of the municipal decision of 14 November 2014, the suspensive conditions in the resolution of 28 June 2018, have not been fulfilled.

118.8 The first, second, third, fourth, fifth, seventh and ninth respondents are hereby ordered to pay the costs of the application including reserved costs and costs of employment of two counsel for the applicant, such costs to be paid jointly and severally the one paying the other to be absolved.

LEGODI JP

DATE OF HEARING: : 26 May 2022
DATE OF JUDGMENT : 17 August 2022

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