



**IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN**

Case No.: 59/24

In the matter between:

H & I CIVIL & BUILDING (PTY) LTD

First Applicant

H & I CONSTRUCTION (PTY) LTD

Second Applicant

and

THE CITY OF CAPE TOWN

First Respondent

**WILSON BAYLY HOLMES – OVCON
LIMITED**

Second Respondent

CVS CONSTRUCTION (PTY) LTD

Third Respondent

ASLA CONSTRUCTION (PTY) LTD

Fourth Respondent

**BASELINE CIVIL CONTRACTORS
(PTY) LTD**

Fifth Respondent

MARTIN & EAST (PTY) LTD

Sixth Respondent

POWER CONSTRUCTION (PTY) LTD

Seventh Respondent

RUWACON (PTY) LTD

Eighth Respondent

**JUDGMENT DATED 18 OCTOBER 2024
Delivered Electronically**

MAGARDIE, AJ

Introduction

- [1] This application requires us to decide whether a new preferential procurement scoring system introduced by the City of Cape Town ('the City') in relation to bids for tenders in the construction sector and its application to two construction tenders advertised by the City, is lawful and consistent with the Constitution.
- [2] The City's new scoring system allocates preference points to bidders based on ownership of the bidding entity by women, Black people, disabled people and the extent to which the bidding entity has promoted small and micro enterprises.
- [3] The Applicants have brought a wide-ranging substantive and procedural challenge to the legality of the new scoring system. Their central complaint is that it is not only irrational and unconstitutional but exclusionary in both its form and effect. The Applicants contend that given what they say are the already small margins in construction work, the City's new scoring system establishes an insurmountable threshold to their participation in bids for tenders to which the new scoring system applies.
- [4] The relief sought by the Applicants is first and foremost for the City's decision to introduce the new scoring system to be declared unlawful, invalid and reviewed and set aside. In addition, the Applicants seek relief directing the City to implement its previous scoring system, which allocated preference points exclusively on the basis of a bidder's Broad-based Black Economic Empowerment ('B-BBEE') contributor status level, in respect of all construction work which the City has and will in future be putting out to tender.

- [5] The evaluation of public tenders and implementation of procurement policies by organs of state are exercises of public power constrained by the principle of legality. Public procurement processes are also required to serve wider societal and economic transformation goals. These goals include providing economic redress for persons disadvantaged by unfair discrimination and historically excluded from economic opportunities in the public procurement sector. Legality and the promotion substantive equality through public procurement are however not mutually exclusive. Our Constitution requires a commitment to and compliance with both.

The parties

The applicants

- [6] The First Applicant (H & I Civils') and the Second Applicant ('H & I Construction') are private companies and contractors in the building and construction industry. They are engaged in the construction of buildings, public roads and bridges and large scale complex civil engineering projects throughout the country, but primarily in Cape Town. The Applicants are level 1 Broad-Based Black Economic Empowerment ('B-BBEE') contributors in terms of the scorecard provided for by the Broad-based Black Economic Empowerment Act 53 of 2003 ('B-BBEE Act') and registered members of the Construction Industry Development Board ('CIDB'), which regulates and promotes the South African construction industry.
- [7] H & I Civils specializes in the the construction of commercial, industrial and residential buildings, schools, hospitals and other large building infrastructure. It often operates in joint ventures with the Second Applicant, H & I Construction, which is a multi-disciplinary construction company operating in the areas of transportation, energy, mining, marine and water infrastructure construction.

- [8] The Applicants are wholly owned subsidiaries of H&I Group (Pty) Ltd ('HIG'), a privately owned engineering company engaged in the fields of engineering and infrastructure development. The shareholding of HIG is held by three shareholder groups. One of these is the H&I Broad Based Employee Trust ('HIBBET'). HIBBET is an employee share incentive trust formed in 2006 when a portion of HIG's shares were sold to HIBBET at par value for an amount of R33.9 million. The beneficiaries of HIBBET are permanent employees of the Applicants and other subsidiaries in the HIG group with more than two years' service.
- [9] HIG is the sole shareholder of the Applicants. The total shareholding in HIG held by Black people is 36.83%. Of this, the employee share incentive trust, HIBBET, holds 25.29%. The remaining 11.54% shareholding is owned by Black shareholders in their own capacity.
- [10] According to the Applicants, they are largely dependent for their survival on public procurement work derived from various government agencies, including local government agencies such as the City. The Applicants have in this regard been awarded several multi-million rand construction tenders by the City between 2009 and 2023. The contract value of construction tenders awarded by the City to H & I Civils amounts to approximately R538 206 312. The combined contract value in respect of two construction tenders which the City has awarded to H & I Construction, with contract start dates of February 2022 and May 2023, is approximately R1 619 469 428.44 (approximately R1.6 billion).

The Respondents

- [11] The First Respondent is the City of Cape Town ("the City"). The City is an organ of state in the local sphere of government and a metropolitan municipality established in terms of section 12 of the Local Government: Municipal Structures Act 117 of 1998.

[12] This application relates to two construction tenders which have been advertised by the City.

[13] The first was tender no. 54Q/2023/24 ('Tender 54Q') published by the City on 15 September 2023. Tender 54Q is a tender for the redecoration, alteration, construction of new buildings and maintenance of structures for Safety & Security and other City facilities.

[14] The second tender at issue is Tender no. 91Q/2023/24 ('Tender 91Q') advertised by the City on 27 October 2023. This tender is for the construction of the City's Integrated Road Transport ("IRT") Metro South-East Corridor (Phase 2A) Stations infrastructure. Both tenders are administered by the City's Supply Chain Management ("SCM") Department.

[15] The Second to Eighth respondents are construction companies and bidders for the two tenders. No relief is sought against these respondents.

Constitutional and legislative framework regulating public procurement

Section 217 of the Constitution

[16] What follows is a discussion of the framework in which, in my view, this application should be considered. Public procurement by organs of state is regulated by section 217 of the Constitution. Organs of state at all levels of government are required to contract for goods and services in accordance with a system which is fair, equitable, transparent, competitive and cost effective.¹

¹ Section 217(1) of the Constitution: '...When an organ of state in the national, provincial, or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost effective.'

[17] In terms of section 217(2), organs of state are entitled to implement a procurement policy which provides for categories of preference in the allocation of contracts and the protection or advancement of persons or categories of persons who have been subjected to historical disadvantage due to unfair discrimination.² Preferential procurement is the implementation of such procurement policies by organs of state. It is the mechanism utilised by organs of state to advance the objectives set out in section 217(2) of the Constitution.

[18] The purpose of section 217(2) of the Constitution is both remedial and transformative. That purpose is the use of public procurement to promote economic transformation, substantive equality and to address our country's history of racially based economic exclusion. The legacy of colonialism, apartheid and racial discrimination is the economic exclusion of many of South Africa's people from ownership of productive assets and possession of advanced skills.

[19] Section 217(2) therefore expressly permits the use of public procurement as a transformational instrument which may not be prevented or stultified by appeals to the guarantee of non-discrimination in section 9 of the Constitution.³ As the Constitutional Court held in *Allpay*, providing economic redress for previously disadvantaged people lies at the heart of our constitutional and legislative procurement framework.⁴

² Section 217(2): '...sub-section (1) does not prevent the organ of state or institutions referred to in that subsection from implementing a procurement policy providing for... (a) Categories of preference in the allocation of contracts; and (b) The protection or advancement of persons or categories of persons, disadvantaged by unfair discrimination.'

³ *Airports Company South Africa SOC Ltd v Imperial Group Ltd and Others* 2020 (4) SA 17 (SCA) (ACSA).

⁴ *Allpay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency* 2014 (1) SA 604 (CC) (*Allpay*) at para 4.

[20] In *Afribusiness*, the Constitutional Court recognised that the implementation of public procurement with no recognition of our country's history of economic disadvantage experienced by the majority of its people, would mean not only the perpetuation of this disadvantage but possibly the widening of its gap.⁵ Madlanga J observed that:

“What section 217(2) seeks to achieve is consonant with the transformative nature of our Constitution. And its provisions dovetail with those of section 9(2) of the Constitution. Without provisions of this nature, true or substantive equality would forever be pie in the sky for the vast majority of South Africans and the transformative agenda of the Constitution would be unrealisable.”⁶

[21] Substantive equality encompasses both equality of opportunity and equality of results. In this way, it is a concept different to formal equality which assumes that the playing field for all participants, is level to begin with. Our Constitution therefore embraces the concept of substantive equality, which includes restitution measures aimed at addressing existing inequality, emphasizes a commitment to eliminate barriers to equality and the taking of positive steps to root out of systematic or institutionalised under-privilege.⁷ The obligation of the state to take positive action to advance substantive equality is in my view a relevant factor when assessing the lawfulness of remedial measures which are implemented as a public procurement policy objective. This applies with particular force in a case such as the present where a procurement mechanism implemented by an organ of state to give preference to categories of persons historically disadvantaged by unfair discrimination, is challenged on the basis that it is irrational.

⁵ *Minister of Finance v Afribusiness NPC* [2022 (4) SA 362 (CC)] (*Afribusiness*).

⁶ *Afribusiness* at para 99.

⁷ *Minister of Finance and Other v Van Heerden* [2004 (6) SA 121 (CC)] (*Van Heerden*) at para 31.

Procurement Act and Regulations

- [22] Section 217(3) of the Constitution requires the enactment of legislation which provides the framework within which a preferential procurement policy envisaged by section 217(2) of the Constitution is to be implemented. Parliament has enacted the Preferential Procurement Policy Framework Act 5 of 2000 ('Procurement Act') as the specific legislation designed to provide this framework. The purpose of the Procurement Act is clear from its preamble. It states that the purpose of the Act is to give effect to section 217(3) of the Constitution by providing a framework for the implementation of the procurement policy contemplated in section 217(2) of the Constitution.'
- [23] Section 2(1) of the Procurement Act requires an organ of state to determine its preferential procurement policy and to implement it within the framework set out in the Act. Section 2(1) of the Procurement Act is obligatory and does not provide for organs of state a discretion to decide whether or not to develop and implement a preferential procurement policy.
- [24] The Procurement Act establishes a preference point system for the award of contracts by an organ of state. The preference point system provides for the award of points not only on the basis of the price tendered by bidders for a public procurement contract but also for the achievement of specific goals provided for in section 2(1)(d) of the Act. In terms of section 2(1)(d), these specific goals may include contracting with persons or categories of persons historically disadvantaged by unfair discrimination on the basis of race, gender or disability. Section 2(1)(d)(ii) provides for further specific goals for which points may be awarded to contractors. The specific goals catered for by the Procurement Act also include implementing programmes of the Reconstruction and Development Programme ("RDP") as published in Government Gazette No. 16085 of 23 November 1994.

- [25] In terms of section 2(1)(e) of the Procurement Act, any specific goal for which a preference point can be awarded, must be clearly specified in the invitation to submit a tender. Section 2(2) in turn provides that such specific goals must be measurable, quantifiable and monitored for compliance.
- [26] The preference point system created by the Procurement Act distinguishes the allocation of preference points based on the value of a specific contract. A maximum of 100 points may be awarded to contractors. The primacy of obtaining the best price for goods and services subject to public procurement, is recognized by the scheme established for the award of preference points. That scheme in essence allocates more preference points for lower value contracts below a prescribed Rand value ('the 80/20 preference point system') and less preference points in respect of higher value contracts above a prescribed amount ('the 90/10 preference point system').
- [27] In terms of regulations gazetted by the Minister of Finance under section 5(1) of the Procurement Act ('the 2022 Procurement Regulations'), the 80/20 preference point system applies in respect of tenders for the acquisition of goods and services with a Rand value equal to or below R50 million. The 90/10 preference points system on the other hand, applies to tenders for the acquisition of goods and services with a Rand value above R50 million. The preference point system also applies to tenders for income generating projects. This includes public procurement processes relating to concessions and the leasing of government assets.

Broad-Based Black Empowerment Act and Codes

- [28] The commitment embodied in the Procurement Act to address historic unfair discrimination and economic exclusion through the use of preferential measures in government procurement processes, finds similar expression in the B-BBEE Act.

[29] The preamble to the B-BBEE Act states that the purpose of the BBBEE Act is to '...promote the achievement of the constitutional right to 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.'

[30] Section 9 of the B-BBEEE Act empowers the Minister of Trade and Industry ('the Minister') to issue codes of good practice on Black economic empowerment, which may, in terms of section 9(1)(b), include qualification criteria for preferential purposes for procurement and other economic activities. In terms of section 10, every organ of state and public entity must apply any relevant code of good practice issued in terms of the B-BBEE Act in inter-alia, developing and implementing a preferential procurement policy.

Construction Sector Charter and Construction Sector B-BBEE Codes

[31] In terms of section 12 of the B-BBEE Act, the Minister is empowered to publish in the Gazette, transformation charters for particular sectors of the economy. Such transformation charters must be developed by major stakeholders in that sector and advance the objectives of the B-BBEE Act. Pursuant to section 12 of the B-BBEE Act, the Minister issued the Construction Sector Charter in Government Notice 11 Government Gazette 29616 of 19 February 2007. The Construction Sector Transformation Charter ('Construction Sectoral Charter' or 'the Charter'), in section 1.5 thereof, committed the parties to the Charter to actively promote a vibrant, transformed and competitive construction sector that would not only provide adequate services to the domestic economy, but would also be reflective of the South African nation as a whole and contribute to the establishment of an equitable society.

- [32] Section 2 of the Construction Sectoral Charter recognizes a number of challenges facing the construction sector. These challenges are stated to include the inadequate addressing of B-BBEE and a narrow focus on equity ownership due to inconsistent interpretation of preferential procurement policy. Additional challenges identified in section 2.4 of the Charter include the sector reflecting 'vast inequalities in ownership, with little transformation having taken place, little penetration of black enterprises in capital and knowledge intensive components of the sector' and the '...absence of adequate financial and other support mechanisms for SMMEs.' The challenges noted in the Charter also include 'limited numbers of Black people, especially Black women, in controlling positions, managerial positions and in the specialized professions in the larger enterprises in the sector.'
- [33] Section 3 of the Construction Sectoral Charter sets its objectives. Foremost amongst these is to 'achieve a substantial change in the racial and gender composition of ownership, control and management of the sector.' Given the vast ownership inequalities in the construction sector, the parties to the Construction Sectoral Charter committed themselves to making far reaching and substantial changes in the racial and gender composition of ownership and control in the construction sector.
- [34] Section 5.1.3 of the Charter committed the parties to achieve a number of ownership targets by December 2013. These included a target of 30% economic interest held by Black people, 30% participation by Black people in voting rights, 10% economic interest held by Black women and 10% participation by black women in voting rights.
- [35] The Charter recognizes that black people and black women in particular continued to be under-represented at board level and executive management level in the sector. Enterprises in the construction sector therefore committed themselves to achieve, by December 2013, a target of 40% Black people at board level and 20% Black women at board level.

- [36] Additional commitments reflected in the Charter include those relating to employment equity, skills development, procurement, enterprise development of micro, small and medium enterprises and corporate social investment. Following the publication of the Charter, the Minister issued in terms of section 9(1) of the B-BBEE Act, codes of good practice for the construction sector on 5 June 2009 in Government Notice Government Gazette 3205 and on 1 December 2017 in Government Notice 931 Government Gazette 41287. The latter, being the Code of Good Practice on Broad Based Black Economic Empowerment: Amended Construction Sector Code ('the Construction Sectoral Code') is the currently applicable B-BBEE sectoral code for the construction sector.
- [37] As a point of departure, the Construction Sectoral Code notes in section 1.3.1 thereof, that the Construction Sector Transformation Charter is the basis for the development of the Construction Sectoral Code. Section 1.4.2 of the Construction Sectoral Code records the stated commitment in the Charter to far reaching changes to the racial and gender inequalities in the construction sector. Section 1.4.1 states that the Construction Sectoral Code in particular aims to '...achieve a substantial, meaningful and accelerated change in the racial and gender composition of ownership, control and management in the sector' while section 1.4.2.6 records that a further objective of the Code is 'enhancing transformation by ensuring that the Construction Sector creates productive assets in the hands (actual control and ownership) of black people.'
- [38] The Construction Sectoral Code sets out a detailed framework and mechanisms for measuring B-BBEE initiatives under the code at all the levels of the balanced scorecard for B-BBEE, these being management and ownership control, skills development, enterprise and supplier development and socio-economic development.

- [39] Section 9.3 of the Code provides for enhanced recognition of certain categories of Black people in the measurement of an entity's B-BBEE score in terms of the code. These categories include Black people with disabilities, Black youth, Black People living in rural areas and Black unemployed people.

The City's previous scoring system and subsequent regulatory developments

- [40] Before concluding this overview of the various legislative instruments giving effect to the economic transformation imperatives of section 217(2) of the Constitution, it is necessary to outline certain regulatory developments in the public procurement sector which impacted on the City's previous preferential procurement scoring system.
- [41] Prior to the gazetting of the 2022 Procurement Regulations, procurement by organs of state was regulated by regulations under the Procurement Act which came into effect on 1 April 2017 ('the 2017 Procurement Regulations'). In terms of Regulation 6 and Regulation 7 of the 2017 Procurement Regulations, the 80/20 preference point system applied to tenders with a rand value between R30 000.00 and R50 million. The 90/10 preference point system applied to tenders with a Rand value above R50 million.
- [42] The 2017 Procurement Regulations prescribed a mechanism for the allocation of preference points to be awarded to a bidder based on their B-BBEE contributor status level. In short, the scheme designed by the 2017 Procurement Regulations provided that the higher that bidders B-BBEE contributor status level, the higher the number of preference points awarded to that bidder for preferential procurement. A bidder with a Level 1 B-BBEE contributor status, i.e. the highest obtainable B-BBEE contributor status level based on the balanced scorecard provided for in the B-BBEE Codes, would therefore be awarded a maximum 20 points in tenders to which the 80/20 preference point system applies and a maximum of 10 points in a tender to which the 90/10 preference point system applies.

[43] The number of points awarded to a bidder would reduce in accordance with the bidder's B-BBEE level contributor status, with a non-compliant contributor being awarded zero points. The 2017 Procurement Regulations did not afford organs of state a discretion to implement a preference point system advancing specific goals other than those provided for in the regulations. A bidder's B-BBEE contributor status level was the sole consideration to be determined in the allocation of preference points in terms of the 2017 Procurement Regulations. The City's previous scoring system for the determination and award of tenders was based on the scheme set out in the 2017 Procurement Regulations and allocated preference points on the basis set out in the following table:

B-BBEE Level status of contributor	Number of points for financial value up to and including R50 000 000	Number of points for financial value above R50 000 000
1	20	10
2	18	9
3	14	6
4	12	5
5	8	4
6	6	3
7	4	2
8	2	1
Non-compliant contributor	0	0

The Afribusiness Judgment

[44] During 2017, an organization known as Afribusiness NPC ('Afribusiness'), applied to the High Court, Gauteng Division, Pretoria for orders inter-alia reviewing and setting aside the 2017 PPPFA Regulations on the basis that the Minister had acted beyond the scope of the powers conferred on him by the PPPFA when he made the regulations.

- [45] The High Court dismissed the application with costs and concluded that the promulgation of the 2017 Procurement Regulations was rational, reasonable, and fair.
- [46] A subsequent appeal by Afribusiness succeeded in the Supreme Court of Appeal ('SCA')⁸. Aggrieved by the judgment of the Supreme Court of Appeal, the Minister then appealed to the Constitutional Court.
- [47] On 16 February 2022 the Constitutional Court handed down judgment, in which the majority of the court concluded that the 2017 Procurement Regulations were ultra vires the Procurement Act because they usurped a power vested with organs of state to devise their own policy for preferential procurement.
- [48] The effect of the Constitutional Court's judgment in *Afribusiness* was to uphold the order of the Supreme Court of Appeal's order declaring the 2017 Procurement Regulations unconstitutional and invalid. The declaration of invalidity was suspended for 12 months, thus requiring the Minister to make new regulations on or before January 2023 in order to avoid a situation where no valid regulations governing public procurement were in effect.

The 2022 Procurement Regulations

- [49] Following the *Afribusiness* judgment of the Constitutional Court and on 10 March 2022, the Minister published the draft Preferential Procurement Framework Act regulations for public comment in Government Notice No. R1581 Government Gazette 46026. The closing date for the submission of comment on the draft regulations was stipulated to be 22 April 2022.

⁸ *Afribusiness NPC v Minister of Finance* [2020] ZASCA 140; 2021 (1) SA 325 (SCA).

- [50] On 20 June 2022 the Acting Chief Procurement Officer of the National Treasury issued PPPFA Circular 1 of 2022/23 regarding the implications of a second judgment of the Constitutional Court handed down on 30 May 2022, which dismissed with costs an application by the Minister for variation of its previous order in *Afribusiness*.⁹ The circular recorded that the 2017 PPPFA Regulations would remain in place until 26 January 2023 and that organs of state should ensure that by 27 January 2023, procurement policies were in line with the Constitutional Court's judgment in *Afribusiness*.
- [51] On 4 November 2022 the Minister of Finance gazetted the 2022 Procurement Regulations, which were to take effect from 16 January 2023.
- [52] The key difference between the 2022 and 2017 Procurement Regulations, is that the 2022 regulations do not regulate how organs of state are required to award the 10 or 20 preference points for specific goals. Regulation 3 of the 2022 Procurement Regulations records that it is for an organ of state to stipulate in its tender documents the applicable preference point system as envisaged in regulations, 4, 5, 6 or 7.

Development of the City's new scoring system

- [53] After the judgment of the Constitutional Court in *Afribusiness* and the publication of the new 2022 Procurement Regulations in November 2022, the City embarked on a process to amend its SCM Policy in the light of these developments in the public procurement sector. At this stage, the City's SCM Policy reflected the scoring system and regulatory approach provided for by the 2017 Procurement Regulations, which allocated preference points solely and automatically on the basis of a bidders B-BBEE contributor status level.

⁹ *Minister of Finance v Sakeliga NPC (previously known as Afribusiness NPC) and Others* 2022 (4) SA 401 (CC)

- [54] The City states that following the publication of the 2022 Procurement Regulations in November 2022, its SCM Department convened immediately to address the impact of the regulations on the City's SCM policy, which required amendment to address the changes in the regulatory landscape. The SCM Department commenced working on amendments to the SCM Policy in November 2022 by considering the kinds of specific goals that it intended advancing through the award of preference points. According to the City, in the course of this process it consulted broadly and internally with other City Departments in the consideration of the specific goals to be advanced. The consultation process also included meetings with officials in the Mayor's office.
- [55] Towards the end of November 2022, the City's legal advisors briefed senior and junior counsel to advise and provide legal opinion on a range of matters relating to the impact of the 2022 Procurement Regulations on the City's SCM policy. The legal advice and opinion were sought from counsel on an urgent basis, given that time was of the essence in the light of the pending coming into effect of the 2022 Procurement Regulations on 16 January 2023. To illustrate the expedition with which it acted in this regard, the City in its answering affidavit annexed the brief to counsel instructed by the City's attorneys. It is apparent therefrom that counsel was briefed to urgently advise on a comprehensive range of matters relevant to the implications of the 2022 Procurement Regulations on the City's SCM policy.
- [56] The matters on which counsel's advice were sought included the extent to which the City's SCM Policy was consistent with the 2022 regulations, specific clauses in the 2022 policy that may be regarded as inconsistent with the 2022 regulations and the consequences of non - compliance with the 2022 regulations.

- [57] On 1 December 2022 the City consulted with senior and junior counsel to discuss the issues on which counsel had been briefed. Counsel thereafter and on 14 December 2022 and 12 January 2023, provided the City with two legal opinions on whether the City's SCM Policy was compliant with the new 2022 PPPFA Procurement Regulations. Further legal opinion was sought from counsel on 18 January 2023 on the issue of functionality and the interpretation of the specific goals' as defined in the PPPFA and the 2022 Procurement Regulations.
- [58] On 17 January 2023 the City's Chief Financial Officer and Mayoral Committee ('Mayco') member for Finance, signed a report to the City's Mayco and Council submitting a revised SCM policy for their consideration. The 17 January 2023 report noted that the amendments to the City's SCM Policy were necessary in order to ensure alignment of the City's SCM Policy with the new 2022 PPPFA Regulations. The report recorded that the revisions to the 2022 SCM policy mirror the prescripts of the 2022 PPPFA Regulations and were in line with the judgment of the Constitutional Court in *Afribusiness*.
- [59] On 26 January 2023 the City Council approved the amendments proposed in the 17 January 2023 report and adopted the City Amended Supply Chain Management Policy ('ASCMP'), which was to be implemented with effect from 26 January 2023. The ASCMP at pages 94 to 97 sets out the City's Preferential Procurement Policy. The policy largely incorporates the provisions of the 2022 PPPFA Regulations. Paragraph 455 of the ASCMP states that where the preferential procurement policy does not provide for a matter regulated in the 2022 Procurement Regulations, the provisions of those regulations will prevail in respect of a tender' as defined in the regulations. Following the adoption of the ASCMP on 26 January 2023, the City then continued with a process of developing a guideline to implement preferential procurement in the City.

- [60] The City states that where it was uncertain of any aspect and when it required guidance on the legal landscape, it adopted a conservative and careful approach and only made decisions after seeking legal advice. According to the City, it appreciated the importance of developing a guideline that would be both lawful and accessible and that an overly complicated system would create greater room for tender irregularities and undermine the procurement process. The aspects on which the City sought counsel's advice included the interplay between the B-BBEE Act and the PPPFA as well as other legislation relevant to the B-BBEE Codes. The City states that the process of obtaining continuous legal input from counsel lasted for four months.
- [61] The City's SCM Department then developed a binding implementation guideline for preferential procurement in terms of the new 2022 Procurement Regulations ('the Implementation Guideline'). The purpose of the Implementation Guideline was to determine how preferential procurement would work in the City. The Implementation Guideline became effective on 1 July 2023 and sets out the City's new scoring system. The new scoring system and the manner in which it allocates preference points applies to all preferential procurement by the City and competitive bids to which the 80/20 or 90/10 preference point system applies. The City states that the purpose of the guideline is to ensure uniformity in procurement processes by the City. According to the City, the preference points allocation system in the guideline is binding on City officials and that they do not have the discretion to depart from the new scoring system and the specific goals which the City has identified for allocation of preference points.
- [62] The full title of the Implementation Guideline is 'Preferential Procurement Regulations, 2022: Implementation Guideline for Specific Goals.' Chapter 1 of the Implementation Guideline records that the guideline '...serves to ensure that procurement processes comply with the changes to the Preferential Procurement Regulations, 2022 (PPR), under the Preferential Procurement Policy Framework Act, 2000 (PPPFA), and that such processes

are conducted in a simplified and controlled manner and in line with all applicable prescripts including the SCM Policy.'

[63] Chapter 4 of the Implementation Guideline is titled 'Setting and Evaluating Specific Goals.' Referring to the provisions of section 2(1)(d) of the PPPFA which refers to specific goals including implementing the programmes of the Reconstruction and Development Programme (RDP') and contracting with with persons, or categories of persons, historically disadvantaged by unfair discrimination on the basis of race, gender or disability, the Implementation Guideline states '...A goal that clearly stands out is the promotion of micro and small enterprises, which the City adopted for implementation. HDI [historically disadvantaged individuals] however, is clearly defined and contains only three considerations, namely race, gender and disability.'

[64] The Implementation Guideline then sets out the City's new scoring system. The guideline provides that in respect of tenders with a rand value above R50 million, these being tenders to which the 90/10 preference point system applies, the 10 points for preferential procurement are awarded in accordance with the following table:

#	Specific goals allocated points	Preference Points (90/10)
	<i>Persons, or categories of persons, historically disadvantaged- (HDI) by unfair discrimination on the basis of</i>	
1	<i>Gender are women (ownership)*</i> <i>>75% - 100% women ownership: 3 points</i> <i>>50% - 75% women ownership: 2 points</i> <i>>25% - 50% women ownership: 1 point</i> <i>>0% - 25% women ownership: 0.5 point</i> <i>0% women ownership = 0 points</i>	3
2	<i>Race are black persons (ownership)*</i> <i>>75% - 100% black ownership: 3 points</i> <i>>50% - 75% black ownership: 2 points</i>	3

	<i>>25% - 50% black ownership: 1 point >0% - 25% black ownership: 0.5 point 0% black ownership = 0 points</i>	
3	<i>Disability are disabled persons (ownership)* WHO disability guideline >2% ownership: 1 point >0% - 2% ownership: 0.5 point 0% ownership = 0 points</i>	1
	<i>Reconstruction and Development Programme (RDP) as published in Government Gazette</i>	
4.	<i>Promotion of Micro and Small Enterprises Micro with a turnover up to R20million and Small with a turnover up to R80 million as per National Small Enterprise Act, 1996 (Act No.102 of 1996) SME partnership, sub-contracting, joint venture or consortiums</i>	3
	<i>Total points</i>	10

**Ownership: main tendering entity*

- [65] The Implementation Guideline records at page 12 that '...The City regards the above activities as a contribution towards achieving the goals of the HDI and RDP, and as such grant preference points in the adjudication of tenders.'
- [66] In respect of tenders with a value between R200 000 and R50 million (VAT inclusive) i.e. tenders subject to the 80/20 preference point system, the Implementation Guideline provides that a maximum of 5 points are awarded for women ownership, 5 points for ownership by Black persons, 3 points for ownership by disabled persons and 7 points for the promotion of small, medium and micro enterprises.
- [67] Chapter 5 of the Implementation Guideline sets out the documents which the City would require from bidders in order to confirm the specific goals claimed by a bidder. In relation to the specific goals relating to gender, race, disability and micro and small enterprises, these documents are listed to include company registration certification, Central Supplier Database report, B-BBEE

certificate and in relation to micro and small enterprises, financial statements and the B-BBEE contribution level status of the bidder.

- [68] Chapter 4 of the Implementation Guideline sets out the roles and responsibilities of the City's Bid Specification Committee (BSC') and Bid Evaluation Committee ("BEC"). The role of the BEC is stated to be to 'evaluate the tender in accordance with the HDI/Specific Goals outlined in the tender document advertised.' The role of the BSC is recorded as being to '...determine which HDI or Specific Goal will be best suited for that specific tender based on market research, analysis or historical data in the disposal of the City and advertised accordingly for evaluation criteria to be fairly applied.' The Applicants have latched on to this particular sentence of the guideline, contending that it was not complied with by the City and that consequently the new scoring system and its application to the two tenders was unlawful and invalid. As stated earlier, the City contends however that its SCM officials are not obliged to determine the allocation of preference points other than in the manner set out in the implementation guideline.
- [69] The final chapter of the Implementation Guideline, Chapter 7, deals with monitoring and assessment. The Implementation Guideline records that the City did not currently have oversight regarding the impact of the 2022 PPPFA Regulations and the change in evaluating specific goals rather than B-BBBEE contribution status. The guideline notes however that monitoring mechanisms were currently being developed in collaboration with the City's Enterprise Development department and it was aimed to develop a set of such measures that would be used for future considerations and amendments to the Implementation Guideline where feasible.
- [70] As is evident from the description of the City's new scoring system set out above, there is a significant difference between the City's new scoring system and the old scoring system in relation to the calculation and allocation of preference points.

- [71] The previous scoring system allowed for a bidder with a Level 1 B-BBEE contributor status to be automatically awarded the full 10 preference points. The new scoring system on the other hand focuses on three categories of specific goals and their weighting. Preference points under the City's new scoring system are allocated on a reduced sliding scale should there be lower degrees of ownership in these three categories, being ownership by women, black persons, disabled persons and promotion of micro and small enterprises.
- [72] In terms of the City's new scoring system, bidders such as the Applicants would no longer be entitled to be automatically awarded the full 10 or 20 preference points based solely on their status as a level 1 B-BBEE contributor. According to the Applicants, whereas under the City's old scoring system they would stand to be awarded the full 10 preference points based on their status as a level 1 B-BBEE contributor, under the new scoring system they now stand to be awarded a minimum of 3 points and a maximum of 6 out of the 10 preference points for tenders to which the 90/10 preference points system applies.
- [73] Given the value of the construction tenders at issue and their previous success in being awarded several major construction tenders by the City under the old scoring system, the Applicants were unsurprisingly aggrieved by the approach adopted by City's new scoring system. Litigation on the issue was clearly going to be more than a mere possibility. It would be a certainty.

Litigation history

- [74] On 15 September 2023 the City advertised Tender 54Q, the tender for the redecoration, alteration, additions to and construction of new buildings and structures and maintenance for Safety & Security and other City facilities. The closing date for the submission of bids in respect of tender 54Q was 18

September 2023. This closing date was later extended to 27 October 2023. The tender invitation to tender recorded that preferences would be offered to tenderers who tendered in accordance with the PPPFA Regulations and the City's SCM Policy. The invitation to tender also made it clear that in terms of the PPFA Regulations and the City's SCM Policy, tenderers 'were required to meet the HDI and/or RDP specific goals.'

- [75] The Applicants say that they only became aware of the City's new scoring system on or about 29 September 2023, after obtaining and considering the tender document for tender 54Q. The Applicants state that the tender document for tender no. 5Q was ambiguous because at one place in the document, it stated that preferential points would allocate based on the tenderer's B-BBEE contributor level but at page 14 of the Tender Data, the document recorded that preference points would be awarded based on specific goals.
- [76] The First Applicant's Mr Isaacs sought clarity on this aspect at a Tender Clarification Meeting that was conducted online with representatives of the City on 5 October 2023. The queries raised by Mr Isaacs regarding the ambiguity in the tender documentation concerning the preferential scoring system to be used in Tender 54Q were addressed in Tender Notice 3, which was issued by the City on 13 October 2023.
- [77] Tender Notice 3 contained the minutes of the tender clarification meeting on 5 October 2023, which recorded that that the 90/10 preference points system would be applied to Tender 54Q. The minutes recorded that the 10 preference points for the tender would be allocated and based on the specific goals for the tender. These specific goals were listed to be ownership of the bidding entity by women (3 points), ownership by Black persons (3 points), ownership by disabled persons (1 point) and promotion of micro and small enterprises (3 points).

[78] This corresponds with the approach set out in the Implementation Guideline for the determination of specific goals for a tender to which the 90/10 preference point system applies. The minutes of the 5 October 2023 meeting attached to Tender Notice 3 also detailed the evidence to be provided in respect of each specific goal for which preference points were claimed. The evidence to be provided included a company's registration certification, Central Supplier Database report and B-BBEE certificate. It is clear from this that the Applicants were at that stage aware of how the City would be allocating preference points for the tenders at issue and what evidence would be required to substantiate a claim for preference points. The Applicants would therefore be at liberty to provide any such evidence or additional evidence to substantiate any claim which they would wish to make for preference points in their tender submissions.

[79] After receiving Tender Notice 3, the Applicants instructed their attorneys to address correspondence to the City. On 25 October 2023 the Applicants attorneys directed a letter to the City's principal agent for tender 54Q contending that the City's new scoring system was unlawful on the basis that it did not comply with the provisions of the B-BBEE Act and the applicable sectoral codes adopted for the construction sector.

[80] The letter invited the City to abandon its new scoring system and requested that bid adjudication be based on the City's old scoring system and scorecard. The letter and a subsequent letter from the Applicants' attorneys on 26 October 2023, recorded that the Applicants would be submitting a bid for tender no. 54Q on condition that it would be adjudicated by the City using the previous scoring system for preferential points when evaluating and adjudicating tenders.

[81] The Applicants' attorneys directed follow up correspondence to the City on 26 October 2023, 3 November 2023, 6 November 2023 and 15 November 2023. The City's Mr Eben Lewis replied to the correspondence on 15 November 2023. In his response, Mr Lewis inter-alia pointed out that the tender document for Tender 54Q governed any queries or grievances and that the City's SCM Department was not the delegated or appropriate authority that deals with appeals, objections, complaints, queries and disputes. The Applicants were requested to comply with Cl.6.5 of the tender document, which deals with disputes, objections, complaints and appeals in terms of section 52 of the Local Government Municipal Systems Act 32 of 2000 (Systems Act') against decisions taken by the City. Mr Lewis concluded his response by stating that the B-BBEE Act and the PPPFA served different purposes, that the City had to align its SCM Policy in accordance with legislation governing procurement preferences and that to act outside of these parameters, would have an adverse impact on the City maintaining its clean audit status.

[82] At this stage and on 27 October 2023, the City had advertised tender no. 91Q/2023/24 ('Tender 91Q'), the tender for the construction of the City's IRT Metro South-East Corridor (Phase 2A) Stations Infrastructure. The closing date for Tender no.91Q was initially 8 December 2023 however it was later extended to 26 January 2024 and thereafter further extended to 16 February 2024.

[83] On 24 November 2023 the Applicants lodged appeals in terms of section 62 of the Systems Act against the City decision to proceed with the evaluation of the tenders under its new preferential procurement scoring system. The appeals were lodged in respect of both Tender 54Q and Tender no.91Q.

[84] The case stated in the Applicants' appeals was that the manner in which the City had identified the 'specific goals' according to which it intends to award points for preferential procurement, was unlawful and invalid and that the City's refusal to reconsider and/or amend the identification and/or scoring in respect of the chosen specific goal was unreasonable and unlawful. The Applicants contended that the conduct of the City in this regard was in breach of the Applicants rights under section 217 of the Constitution and their rights under various pieces of legislation promulgated pursuant thereto. The case advanced in the Applicants appeals was in essence the same grounds on which they contend in this application that the new scoring system is unlawful and irrational.

[85] On 21 December 2023 the City's Municipal Manager dismissed the Applicants' appeals against the decision to implement the new scoring system in respect of both tenders. The outcome of the appeals was communicated to the Applicants' attorney that same afternoon. The appeals were dismissed inter-alia on the basis that the communication by the City's Mr Lewis on 15 November 2023 did not amount to a decision taken in terms of a power or duty delegated or sub-delegated by a delegating authority, that Tender no. 54Q was still at an evaluation stage and that the 'appeal' by the Applicants was therefore premature and not a competent appeal.

[86] In respect of the appeal of the Second Applicant in relation to Tender no. 91Q, the City's appeal body held that the Second Applicant had not submitted a bid for that tender and therefore did not meet the threshold requirement of section 61(1) of the Systems Act as a party involved in the tender process whose rights were affected thereby. This appeal was similarly dismissed on the grounds that it was not a competent appeal as contemplated by section 62(1) of the Systems Act.

- [87] On 9 January 2024 the Applicants launched an urgent two-pronged application in the Western Cape High Court, Cape Town for an interim interdict pending the determination of review proceedings to set aside the City's decision to implement the new scoring system for the tenders and its decision to dismiss their internal appeals. The City opposed the application and filed answering affidavits. The application came before Cloete J on 18 January 2024.
- [88] On 30 January 2024 Cloete J handed down judgment concluding that the Applicants had established the requirements for interim relief pending the final determination of the review proceedings. An order was granted interdicting and restraining the City from proceeding with the adjudication and award of the two tenders pending the determination of the part B review proceedings.¹⁰
- [89] The City duly filed its Rule 53 record in relation to the pending part B review proceedings. The Applicants' attorneys complained that the record was incomplete. Following a series of further skirmishes between the parties by correspondence, additional Rule 53 documents were provided by the City on 16 February 2024.
- [90] The Applicants' supplementary affidavit in terms of Rule 53(4) was then filed on 27 February 2024. An amended notice of motion accompanied the supplementary affidavit, in which the Applicants now sought significantly wider relief than that set out in their original part B notice of motion. The amended relief sought is extensive and is set out in full below:

¹⁰ *H & I Civil & Building (Pty) Ltd and Another v City of Cape Town and Others* (59/2024) [2024] ZAWCHC 15 (30 January 2024).

- '1. Reviewing and setting aside the decisions of the members of the Bid Specifications Committee of the First Respondent, or of any official employed in its Supply Chain Management Department, or any other official employed by the First Respondent, to introduce, determine, set, implement and / or include the new preferential procurement points scoring systems which were set during or about September and October 2023 respectively (and clarified pursuant to its clarification meeting in respect of Tender No. 54Q/2023/24 on or about 13 October 2023) (as described in paragraph 61 of the founding affidavit in support of the Part A relief in this application) for and in the invitations to bid for the following two tenders ("the new scoring system"):
 - 1.1 Tender No. 54Q/2023/24 (for the redecoration, alteration, additions to and construction of new buildings and structures for the Maintenance, Safety & Security and other City of Cape Town facilities); and
 - 1.2 Tender No. 91Q/2023/24 (which is for the construction of the IRT Metro south-east corridor (Phase 2A) stations infrastructure) ("the tenders").
2. Reviewing and setting aside the decisions of the Appeal Authority of the First Respondent, taken on or about 21 December 2023, in terms of which the Applicants' appeals against the decisions referred to in paragraph 1 above were dismissed.
3. Reviewing and setting aside any earlier decision of the First Respondent and / or its Council and / or any official of the First Respondent, taken on or about 26 January 2023 or at any date thereafter, to introduce and / or sanction and / or approve and / or direct the use of the new scoring system for the tenders (to the extent that such a decision was indeed taken as part of the adoption and / or implementation of the Amended Supply Chain Management Policy ("SCMP") of the First Respondent alternatively pursuant thereto alternatively in terms thereof, and to the extent that that decision prohibited officials of the CoCT from applying a bidder's B-BBEE level status (as certified under the Broad-Based Black Economic Employment Equity Act, 53 of 2003 and the Sectoral Codes for the

Construction Industry promulgated in terms of that Act) for purposes of scoring preferential procurement points in general and for construction work in particular.

4. Extending the time limits for the bringing of a review against the decision of the First Respondent and / or its Council on or about 26 January 2023 and condoning the late bringing of such review and such failure as there may have been for not complying with any internal appeal remedy that there may have been against that decision, insofar as this may be necessary.
5. Declaring that the new scoring system which was adopted for the tenders as part of or pursuant to the Preferential Procurement Policy of the First Respondent in its SCMP and / or in the implementation of its SCMP is unlawful and invalid to the extent that it conflicts with the Broad-Based Black Economic Employment Equity Act, 53 of 2003 and the Sectoral Codes for the Construction Industry promulgated in terms of that Act and does not recognise nor adopt nor apply a bidder's B-BBEE level status for this part of the scoring of the tenders.
6. Directing the First Respondent to not use the new scoring system for the awarding of preferential procurement points for the tenders and in respect of all other City of Cape Town tenders for its construction work.
7. Directing the First Respondent to implement the previous scoring system for the awarding of preferential procurement points for the tenders and in respect of all other City of Cape Town tenders for the construction industry (as described in paragraph 63 of the founding affidavit in support of the Part A relief in this application) which preferential procurement points scoring system recognises, complies with and gives effect to the Broad Based Black Economic Empowerment Act and the Sectoral Codes for the Construction Industry promulgated in terms of that Act ("the previous scoring system").
8. Directing the First Respondent further, to, in the formulation of any new preferential procurement scoring system and before reaching any decision concerning such a scoring system to:

- 8.1 comply with the Constitution and the law (including but not limited to the Preferential Procurement Policy Framework Act, 5 of 2000, the Broad-Based Black Economic Employment Equity Act, 53 of 2003, the applicable Sectoral Codes adopted and promulgated for the Construction Sector under that Act, the Municipal Finance Management Act and all other relevant legislation regulating public procurement) (and to the extent that the Broad-Based Black Economic Employment Equity Act, 53 of 2003, and the applicable Sectoral Codes adopted and promulgated for the Construction Sector under that Act may conflict with any earlier legislation, to give preference thereto)(“the law”);
 - 8.2 give notice to and allow for a reasonable opportunity for all interested persons, including the Applicant and the remaining Respondents herein, as well as the Ministers of Trade and Industry and Finance, to make representations to it concerning any proposed new policy and / or scoring system for preferential procurement in respect of the tenders and all other tenders of the City of Cape Town,
 - 8.3 have proper regard to such representations and
 - 8.4 formulate its proposed policy and / or determine a replacement preferential procurement scoring system, which complies with the Constitution and the law.
9. To the extent that the new scoring system has already been introduced, implemented and / or applied for the tenders, or either one of them, and to the extent that the tenders need to be re-advertised with a scoring system which complies with paragraph 6 above, setting aside that tender or those tenders and directing the First Respondent to re-advertise the tenders to include a scoring system which complies with paragraph 6 above.
10. Insofar as any time limit set by the Promotion of Administrative Justice Act in respect of the above claims for review relief, or any part thereof, may need to be extended, and non-compliance with these time limits may need to be condoned, extending such time limit

and condoning any non-compliance by the Applicant with such time limit.

11. That the First Respondent pays the costs of this application on the scale as between attorney and own client, which costs are to include the costs in respect of both Part A and Part B, and to include the costs of senior counsel.
12. That any other Respondents who may oppose this application, be ordered to pay the costs of this application jointly and severally with each other and the First Respondent, such costs to be paid on the scale as between party and party.”

[91] Following the filing of the Applicants’ supplementary affidavit, on 1 March 2024, an order was taken by agreement before Goliath AJP in terms of which the Applicants’ part B review application was set down for hearing on 21 and 22 May 2024.

The Part C relief sought in relation to the Macassar tenders.

[92] A further dispute had in the meanwhile arisen between the parties regarding two tenders which had been advertised by the City with, according to the Applicants, the same new scoring system which was the subject of the Applicant’s Part B review proceedings. These tenders are tenders 191Q/2023/24 and 203Q/2023/24 for construction work in the Macassar area (‘the Macassar tenders’).

[93] Both tenders have a rand value in excess of R50 million and relate to design, mechanical and electrical works for the upgrading and extension of the Macassar wastewater treatment works. The Applicants had intended submitting bids in respect of both tenders.

[94] Between 2 February 2024 and 3 April 2024, a flurry of correspondence ensued between the Applicants' attorneys and the City's attorneys in relation to the Macassar tenders. The Applicants attorneys sought undertakings from the City that it would not adjudicate the Macassar tenders in accordance with the new scoring system and would suspend the new scoring system pending the determination of the review proceedings which had been set down for hearing on 21 and 22 May 2024. The City declined to do so.

[95] Following several further exchanges of correspondence between the parties, on 3 April 2024 the City's attorneys informed the Applicants' attorneys that the City would not agree to a demand by the applicant's attorneys to suspend the closing date for the Macassar tenders. This response by the City then triggered a further application, by agreement described by the parties as 'Part C', which was launched by the Applicants on 15 April 2024 and set down for hearing in the urgent motion court on 13 May 2024. The Applicants' notice of motion in the Part C application seeks the following relief:

- "2. The First Respondent is directed to suspend the further processing, consideration and awarding of tenders 191 Q/2023/24 and 203Q/2023/24 under its new preferential procurement scoring system as advertised by it for these tenders City's new scoring system") pending the final determination of Part B of the review application between the Applicants and the First Respondent which is to be heard in the above Honourable Court on 21 and 22 May 2024 under case number 59/2024 ("Part B")
3. The First Respondent is directed to suspend the specification, advertising, processing, consideration and awarding of all other tenders for construction work in which its new scoring system is to be employed pending the final determination of Part B.
4. The First Respondent is to pay the costs of this application on the scale as between attorney-and-client, including the costs of two counsel."

[96] The City filed its answering affidavit in relation to the Part C application on 30 April 2024 and the Applicants filed their replying affidavit on 10 May 2024. A document described as a 'further supplementary affidavit' was filed by the Applicants on 10 May 2024. The latter elicited strong objection by the City which contended that the affidavit has been filed without leave and should be regarded as *pro non scripto*.

[97] The parties agreed to an order postponing the Part C application for hearing simultaneously with the main review. The Part C relief sought by the Applicants in relation to the Macassar tenders was addressed and argued at the hearing on 21 and 22 May 2024.

The post hearing draft order submitted by the Applicants.

[98] Following the hearing of the application on 21 and 22 May 2024, the Court granted the parties leave to file post hearing notes on issues arising during oral argument and in respect of the Applicants in particular, on aspects which they had been unable to canvass fully in their reply owing to time constraints. The Applicants' post hearing note, some 56 pages in extent, was filed on 24 May 2024. The Applicants note had attached to it two draft orders. The Applicants contended that the two draft orders simplified the relief sought in the light of what they said to be a further refinement and narrowing of the City's grounds of opposition to the Part B relief and the City's argument on an appropriate remedy.

[99] The City objected to the Applicants' draft order attached to their post hearing note and contended that the draft order impermissibly sought new relief without formal amendment in terms of Rule 28 of the Uniform Rules. In addition, the City contended that the Applicant's draft order sought relief which was not legally competent in that it not only simultaneously sought both remittal and substitutionary relief but did so in circumstances where the

requirements for substitutionary relief had neither been made out nor pleaded by the Applicants. The City submitted that the Applicants draft order should not be considered by the Court as it amounted to relief being sought through the back door and was an abuse of process.

[100] The City points out that paragraph 1 of the Applicant's proposed draft order differs from what was sought in paragraph 1 of the Applicant's amended notice of motion. Paragraph 1 of the amended notice of motion sought the review and setting aside of the decision of the BSC '...or any other official' employed by the City 'to introduce, determine, set, implement and/or include the new preferential procurement points system...'. Paragraph 1 of the Applicants proposed draft order however sought the review and setting aside of the decisions of the City to '...adopt and implement the new scoring system' in relation to the two tenders. Paragraph 2 of the Applicants' proposed draft order seeks the remittal of the matter to the City's BSC for the determination of the preferential procurement points scoring system to be used for the evaluation and adjudication of the tenders.

[101] At paragraph 3, the draft order sought a declarator that the new scoring system is unlawful on the grounds that the City failed to comply with the Amended Supply Chain Management Policy. Neither of these proposed orders were sought in the Applicants amended notice of motion. The City submits that it was not called upon on the papers to address either the proposed remittal relief or the declarator in paragraph 3 of the proposed draft order.

Discussion

[102] It is trite that fair civil proceedings require a party to be appraised of the case they are required to meet, particularly in constitutional litigation which requires precision in pleading. It is not permissible for a party to be directed

to one particular direction in pleadings only to then take a different direction in arguments and submissions.¹¹

[103] The relief sought by the Applicants in their draft order exceeds the permitted boundaries of mere refinement and simplification. It introduces relief which is different to the Applicants amended notice of motion and does so in circumstances where the City has not fairly been afforded an opportunity to answer thereto. Absent a formal amendment in terms of Rule 28 of the Uniform Rules to authorise the relief sought in the Applicants post hearing draft order, fairness in my view requires that the merits of the relief sought by the Applicants, be determined on the basis of their pleaded case, that being the relief set out in the Applicants amended notice of motion.

[104] Before dealing with the merits, it is to identify the nature of the decisions and/or conduct impugned by the Applicants and assess whether they constitute legislative, executive or administrative action. The exercise is important because the executive or legislative powers or functions are only susceptible to review under the principle of legality, which imposes less stringent constraints than the level of scrutiny applicable to judicial review of administrative action in terms of the Promotion of Administrative Justice Act 3 of 2000 ('PAJA').

The nature of the impugned decisions and decision-making process

[105] The City argued that there were three levels to the decision-making process which forms the subject of this application.

[106] The first level of the decision-making process, the City contended, was the decision of the City Council on 26 January 2023 to approve amendments to and adopt ASCMP, in order for the City's procurement policy to reflect the legal position contained in the 2022 Procurement Regulations.

¹¹ *Thulie Water Forum and another v Bloemwater and Others* 2021 JDR 3295 (FB) at para 15.

[107] The City submitted that this decision constituted legislative action as it was a decision was taken by a Municipal Council acting in terms of section 160 of the Constitution.¹²

[108] In terms of section 1(dd) of PAJA, the legislative functions of a Municipal council are excluded from the definition of 'administrative action' in section 1 of PAJA. I agree with the City's contention that the City Council's decision on 26 January 2023 to adopt the ASCMP amounts to legislative action. It was a legislative decision taken by a deliberative legislative body whose members are elected and politically accountable to the electorate.¹³ Such a legislative decision by a Municipal Council is in my view not reviewable on the grounds set out in PAJA, but remains an exercise of public power susceptible to review under the principle of legality.

[109] The second level of decision-making, according to the City, was the decision of the City's Supply Chain Management ('SCM') to devise the Implementation Guideline which introduced the City's new scoring system and determined how preferential procurement would work in the City. The new scoring system set out in the Implementation Guideline became effective on 1 July 2023. The City contended that this level of decision making constituted executive action taken by the City to fulfil its own policy objectives and was also not reviewable on the grounds set out in PAJA. In terms of section 1(cc) of PAJA, the executive powers or functions of a Municipal Council are excluded from the definition of 'administrative action'.

¹² Section 160(1)(a) of the Constitution: 'A Municipal Council makes decisions concerning the exercise of all the powers and the performance of all the functions of the municipality.'

¹³ *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council* 1999 (1) SA 374 (CC) (*Fedsure*) at para 41 – 42.

[110] The City accepted however that even if its decision to introduce the new scoring system was not administrative action as defined in PAJA, the decision amounted to the exercise of a public power which was disciplined by and reviewable under the principle of legality. The Applicants on the other hand, argued that this the decision of the SCM Department to introduce the new scoring system was administrative action as it was aimed at implementing a policy and not setting or deciding on a policy.

[111] In *Motau*, the Constitutional Court explained the distinction between administrative action and executive policy formulation powers, as follows:

‘Executive powers are, in essence, high-policy or broad direction-giving powers. The formulation of policy is a paradigm case of a function that is executive in nature. The initiation of legislation is another. By contrast, “[a]dministrative action is . . . the conduct of the bureaucracy (whoever the bureaucratic functionary might be) in carrying out the daily functions of the state, which necessarily involves the application of policy, usually after its translation into law, with direct and immediate consequences for individuals or groups of individuals.” Administrative powers are in this sense generally lower-level powers, occurring after the formulation of policy. The implementation of legislation is a central example. The verb “implement”, which also appears in section 85(2)(a) of the Constitution and distinguishes it from section 85(2)(e), may serve as a useful guide: administrative powers usually entail the application of formulated policy to particular factual circumstances. Put differently, the exercise of administrative powers is policy brought into effect, rather than its creation.’¹⁴

[112] In my view, the decision-making process which resulted in the development of the City’s Implementation Guideline, amounts to the creation or formulation of policy relating to preferential procurement, not the implementation of existing policy.

¹⁴ *Minister of Defence and Military Veterans v Motau* 2014 (8) BCLR 930 (CC) at para 37.

- [113] The purpose of the City's Implementation Guideline was to set out the framework for how preferential procurement would work in the City in the light of the Council's adoption of the ASCMP reflecting the legal position in the 2022 Procurement Regulations. The Implementation Guideline sets out the City's new scoring system applicable to tenders and the specific goals for which preference points would be awarded. The City states that before formulating the Implementation Guideline, it had followed a careful process of obtaining prior legal advice on a range of matters relevant to the Implementation Guideline and had considered the points to be awarded for specific goals in each category of the 20 or 10 preference points to be allocated for tenders.
- [114] The Implementation Guideline records that the City's ASCMP and the Implementation Guideline support the City's strategic focus areas, which included being an inclusive City '...where people have equitable access to economic opportunities and social amenities, and the barriers to inclusion and well - being are reduced'.
- [115] The City furthermore stated that in its consideration of the specific goals set out in the Implementation Guideline, by promoting black and women owned businesses as a specific goal for which preference points would be awarded, the City sought to achieve meaningful transformation that allows those who previously experienced barriers to economic participation, with an opportunity of doing business with the City. All of this in my assessment is consistent with the features of an executive process of high-level policy formulation by an organ of state. As a decision taken in the exercise of executive powers to formulate policy, the City's decision to devise the Implementation Guideline which sets out the specific goals for which preference points would be allocated to tenderers, is an executive decision to formulate policy. Although it is not administrative action as defined in PAJA, it is a decision however which amounts to the exercise of a public power and remains reviewable under the principle of legality.

[116] The City submitted that third level of decision-making relates to the implementation of the Implementation Guideline, which the City maintains is a binding guideline, to the two tenders. According to the City this decision was taken by the City's Bid Specification Committee ('BSC'), which is responsible for formulating tender invitations. The City accepts that this decision-making process i.e. the implementation of the guideline and its application to the two tenders, amounts to administrative action reviewable in terms of PAJA. The Applicants do not only argue that the application of the guideline to the two tenders is reviewable on a number of grounds, but they also go further and submit that there is no evidence that the BSC took a decision to apply the new scoring system to the tenders to begin with.

The Applicants' PAJA grounds of review

[117] It would be convenient at this stage to set out the grounds of review under PAJA which are relied on by the Applicants. Ascertaining the specific review causes of action advanced by the Applicants, it must be said, is not a simple exercise. The Applicants grounds of review are overlapping, interlinked with submissions regarding legality review, directed at different decisions and in several instances unclear. For example, the Applicants contend on one hand that the focus of their review is the application of the scoring system to the tenders and not the Council's decision to adopt the ASCMP. But on the other hand, at later parts of their supplementary affidavit and in heads of argument, the decision to adopt the ASCMP is impugned on both PAJA and legality grounds.

[118] To the extent that the key focus of the review can be ascertained, it is that the Applicants maintain that the City's decision to adopt, introduce and implement the new scoring system was an administrative act which impacted on them directly.

[119] They argue that it is a decision which constitutes administrative action reviewable under PAJA, whether the City's SCM Department took the decision in respect of all tenders or the BSC took the decision in relation to the two specific tenders at issue.

[120] The Applicants rely on the following PAJA grounds of review in this regard:

[120.1] the action was procedurally unfair as the Applicants were not heard before the decisions were taken.¹⁵

[120.2] the action was materially influenced by an error of law because the City erroneously used the new scoring system to put in place unlawful exclusionary provisions.¹⁶

[120.3] The Applicants were not heard before the City's policy changes came about and therefore the action was taken because irrelevant considerations were taken into account or relevant considerations were not considered.¹⁷

[120.4] The Procurement Act requires measurable criteria, and the action therefore contravenes a law and is not authorised by the empowering provision.¹⁸

¹⁵ Section 6(2)(c) of PAJA: '...the action was procedurally unfair'.

¹⁶ Section 6(2)(d) of PAJA: '...the action was materially influenced by an error of law.'

¹⁷ Section 6(2)(e)(iii) of PAJA: '...because irrelevant considerations were taken into account or relevant considerations were not considered.'

¹⁸ Section 6(2)(f)(ii) of PAJA: 'the action itself...contravenes a law or is not authorised by the empowering provision.'

[111.5] The action itself is otherwise unconstitutional and unlawful.¹⁹

[111.6] The action is not rationally connected to the purpose for which it was taken; the purpose of the Procurement Act read with the B-BBEE Act and the Construction Sectoral Code; the information before the administrator or the reasons given for it by the administrator.²⁰

Merits

Judicial review of public procurement decisions

[121] Section 217 of the Constitution sets out the legislative framework for procurement policy and is the context within which judicial review of state procurement decisions under PAJA review grounds must be assessed. The approach to be applied when assessing alleged irregularities in a public procurement process was explained as follows in *Allpay*:

“... the requirements of a constitutionally fair, equitable, transparent, competitive and cost-effective procurement system will thus inform, enrich and give particular content to the applicable grounds of review under PAJA in a given case. The facts of each case will determine what any shortfall in the requirements of the procurement system – unfairness, inequity, lack of transparency, lack of competitiveness or cost inefficiency – may lead to: procedural unfairness, irrationality, unreasonableness or any other review ground under PAJA.

Doing this kind of exercise is no different from any other assessment to determine whether administrative action is valid under PAJA. In challenging the validity of administrative action an aggrieved party may rely on any number of alleged irregularities in the administrative process. These alleged irregularities are presented as evidence to establish that any one or more of the grounds of review under PAJA may exist.

¹⁹ Section 6(2)(i) of PAJA: ‘the action is otherwise unconstitutional or unlawful.’

²⁰ Section 6(2)(f)(ii) of PAJA: ‘... is not rationally connected to (aa) the purpose for which it was taken; (bb) the purpose of the empowering provision; (cc) the information before the administrator; or (dd) the reasons given for it by the administrator.’

The judicial task is to assess whether this evidence justifies the conclusion that any one or more of the review grounds do in fact exist.”²¹

[122] This approach applies here alleged irregularities in a procurement process constitute administrative action. Where however the impugned action or decision constitutes the exercise of an executive or legislative power or function, different considerations apply. This is because the exercise of such powers or functions are, as set out earlier, excluded from the definition of administrative action in section 1 of PAJA. Having concluded earlier that the City Council's decision to adopt the ASCMP constitutes legislative action subject to legality review, that the decision to devise the Implementation Guideline setting out the new scoring system constitutes executive action also subject to legality review and that the implementation of the scoring system amounts to reviewable administrative action, I now turn to an evaluation of the Applicants various grounds of review

Review Ground 1: Procedural unfairness

Legitimate expectation

[123] The Applicants contend that they had a legitimate expectation that the City's old scoring system would continue and at least would not be unilaterally changed without affording them an opportunity to be heard. The City, so the Applicants argued, acted in manner which was procedurally unfair when it implemented its new scoring system without regard to their legitimate expectation of being consulted before the new system was implemented. The Applicants alleged that by changing the methodology of the old scoring system to that focusing on the specific goals in the new scoring system, the City has all but ‘...eviscerated the value of a BEE level ranking under the B-BBEE Act.’

²¹ *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others* 2014 (1) SA 604 (CC) (*Allpay*) at para 43 – 44.

[124] This according to the Applicants, amounted to the City ‘...unilaterally destroying the value of the BEE level ranking for its scoring purposes, rendering that score negligible’ and in a manner which occurred without any consultation with affected parties in the construction sector. The first difficulty I have with this argument is that the City’s decision to devise and introduce the new scoring system was not administrative action but executive action formulating procurement policy. Procedural fairness is not a requirement for the lawful, rational and constitutionally compliant exercise of executive power. As Moseneke J explained in *Masetlha*:

“This does not, however, mean that there are no constitutional constraints on the exercise of executive authority. The authority conferred must be exercised lawfully, rationally and in a manner consistent with the Constitution. Procedural fairness is not a requirement. The authority in section 85(2)(e) of the Constitution is conferred in order to provide room for the President to fulfil executive functions and should not be constrained any more than through the principle of legality and rationality.”²²

[125] There are important separation of powers and public policy considerations as to why it is inappropriate to subject a process such as that followed by the City in devising and formulating its preferential procurement policy, to the exacting standards of review for procedural fairness under PAJA. In *Premier, Mpumalanga*, where O’Regan J put it thus:

“In determining what constitutes procedural fairness in a given case, a court should be slow to impose obligations upon government which will inhibit its ability to make and implement policy effectively (a principle well recognised in our common law and that of other countries). As a young democracy facing immense challenges of transformation, we cannot deny the importance of the need to ensure the ability of the Executive to act efficiently and promptly.”²³

²² *Masetlha v President of the Republic of South Africa and Another* 2008 (1) BCLR 1 (3 October 2007) at para 78.

²³ *Premier, Province of Mpumalanga and Another v Executive Committee of the Association of Governing Bodies of State Aided Schools: Eastern Transvaal* 1999 (2) BCLR 151 (2 December 1998) at para 41.

[126] This reasoning has been consistently applied by the Constitutional Court, which subsequently held in *Law Society*, that in the context of the exercise of executive powers and functions, the question to be answered is not one of procedural fairness but one of procedural irrationality. Procedural fairness and procedural rationality are conceptually different. Procedural fairness is about whether a party should have been consulted or given a hearing before an adverse decision was taken. Procedural rationality is about whether there is a rational connection between the exercise of power both in relation to the process and the decision itself and the purpose sought to be achieved by that exercise of power. It is not a question of '...whether anybody was heard or not heard or dealt with in terms of a fair or arbitrary and oppressive process.'²⁴ I will deal later in this judgment with the Applicants arguments in relation to process or procedural irrationality.

[127] The City's decision to devise and introduce a new preferential procurement scoring system did not in my view impose an obligation on the City ensure that the Applicants were heard before the new scoring system came into effect. In this regard, it must be borne in mind that in order to avoid a regulatory lacuna in its procurement system, the City was required to act urgently and expeditiously to bring its' procurement framework in line with the legal position provided for in the 2022 Procurement Regulations. Those regulations were due to come into effect on 16 January 2023. The City did so by taking urgent legal advice, conducting wide internal consultations and considering what specific goals would be advanced in its procurement policy. The process culminated in the legislative decision of its Municipal Council on 26 January 2023 to amend its existing Supply Chain Management Policy and the adoption of the 1 July 2023 Implementation Guideline which introduced the new scoring system.

²⁴ *Law Society of South Africa and Others v President of the Republic of South Africa and Others* 2019 (3) SA 30 (CC) at para 64 – 65.

[128] The City contended that it would be untenable to suggest that thousands of organs of state across the country would be required to embark on a process of public participation when devising or amending their preferential procurement policies. I agree. One can readily imagine the adverse consequences and delays which would result if on each occasion that an organ of state devises or amends its preferential procurement policy, all prospective bidder for tenders to be evaluated under such a policy were entitled to insist on being heard, consulted and to be able to make representations before such a policy is introduced or amended. Indeed, the Applicants make it clear that the course of action which they would have preferred would have been for the City to consult them, 'other stakeholders', and other bidders for construction tenders in advance of the decision being taken to change the previous scoring system. The Applicants say that this consultation process should also have involved an opportunity for them to make written representations in advance of the decision taken by the City.

[129] It is unclear whether the Applicants are going so far as to suggest that such a pre-decisional and consultation process would apply to every tender advertised by the City and would involve consultation on bid specifications before they are even published. That seems to be the implications of the argument advanced regarding the Applicants alleged entitlement to a pre-decisional hearing and consultation before the City even decides to apply specific goals for preference points and related bid specifications to tenders it intends advertising. The argument in my view has no merit and its consequences even if correct, will likely place an effective chokehold on the expeditious conduct of government procurement.

[130] In any event and as pointed out by the City, the National Treasury had in fact embarked on a process of public participation when the 2022 Procurement Regulations were promulgated.²⁵

²⁵ Publication of Draft Preferential Procurement Regulations, 2022 for Public Comment GNR 1851 GG46026, 10 March 2022.

[131] The Applicants had a right to participate in the notice and comment procedure for the draft regulations and to have a say in that process. This would include being able to make representations on the manner in which specific goals were to be determined by organs of state under the new regulations and the elimination of the compulsory award of preference points based solely on a bidders B-BBEE contribution level status. That right to public participation in a regulation making process does not in my view equally apply to a subsequent executive policy making decision of the City to formulate and introduce a new preferential procurement scoring system, based on regulations promulgated after that public consultation process has been completed.

[132] This conclusion renders it strictly speaking unnecessary to evaluate the Applicants' reliance on the principle of legitimate expectation as the basis of their procedural fairness ground of review. I shall nonetheless briefly consider the argument advanced on this aspect, which for the reasons set out below, I conclude is also unsustainable and without merit.

[133] The main legal requirement to establish a legitimate expectation which engages procedural fairness, is evidence of an express promise having been made by a relevant authority or a regular and well- established practice has arisen which a claimant could reasonably expect to continue. The test is objective, and it is applied on a case-by-case basis.²⁶ There must be a reasonable, clear and unambiguous representation underlying the alleged legitimate expectation. It is not good enough that subjectively speaking, such an expectation exists in the mind of the litigant.²⁷

²⁶ *National Student Financial Aid Scheme v Moloi and Others* (574/2022) [2024] ZASCA 66 3 May 2024) at para 47 to 48.

²⁷ *South Africa Veterinary Council and Another Szymansk* 2003 (4) SA 42 (SCA) at 49 E – H.

- [134] The Applicants allege that based on the past conduct and practices of the City and the Applicants' and other bidders' involvement in such work for the City over many years, the Applicants had a reasonable legitimate expectation that they would be heard by the City before it would implement a new scoring system that drastically affects them. The factual basis alleged by the Applicants for their alleged legitimate expectation, is that they and other bidders were scored on their BEE level rankings in the past and had spent substantial sums to maintain their BEE level rankings for purposes of being able to score preferential procurement points in tenders.
- [135] That the Applicants previously participated in City tender processes under the old scoring process, does not without more establish a regular process which the Applicants could reasonably have expected to continue. The Applicants participation in such tender processes would have been no different to any other tenderer who had submitted a bid and was scored based on their B-BBEE certificate. It can hardly be suggested that every bidder who participates in a tender process thereby acquires a legitimate expectation of being heard and consulted on every occasion when an organ of state amends its preferential procurement policy. It is certainly not in my view reasonable for the Applicants to have expected the position which pertained under the City's old scoring system to continue in perpetuity notwithstanding the promulgation of the 2022 Procurement Regulations.
- [136] It was in response to changes in the regulatory environment that the City embarked on the process of amending its supply chain management policy, a process which culminated in the Council adopting the ASCMP and developing the Implementation Guideline for public procurement in the City. The City was required to amend its supply chain and preferential procurement policy in response to the *Afribusiness* judgment and the promulgation of the 2022 Procurement Regulations.

[137] Policy making in the executive sphere of government can reasonably be expected to be a flexible, dynamic process that is responsive to changing needs and circumstances. This would apply especially in the complex regulatory environment of public procurement which is critical to effective service delivery. Imposing a pre-amendment prior consultation requirement on such a process in respect of bidders, whose very business involves expending costs and resources to participate in and benefit from tender processes, would in my view be impractical and stymie the effective operation of government procurement. In any event, it has not in my view been established on the facts that any express promise had been made by the City to the Applicants which reasonably supports their claim of a legitimate expectation to a prior hearing before the City decided to introduce its new scoring system.

[138] In support of their procedural fairness ground of review, the Applicants called in aid the judgment of the Supreme Court of Appeal in *Bateleur Books*²⁸. The judgment does not in my opinion support the Applicants procedural fairness argument. Firstly, the case is distinguishable because it dealt with administrative action not the exercise of executive policy formulation powers. Secondly, the facts do not demonstrate that the City made the Applicants '...a close part of the procurement process' as was the case in *Bateleur Books*. In that case, a provincial department of education had intricately involved a group of publishers a book-ordering procurement process only to summarily exclude them from it without warning. The facts here do not establish that the City intricately involved the Applicants in its procurement processes or that they were treated any differently or more specially than any other bidders for tenders advertised by the City.

²⁸ *MEC for Education, Northern Cape v Bateleur Books (Pty) Ltd* (298/08) [2009] ZASCA 33; 2009 (4) SA 639 (SCA); [2009] 3 All SA 127 (SCA) (31 March 2009).

[139] For these reasons, I am of the view that the Applicants procedural fairness argument is without merit and that the review ground advanced on this basis must fail.

Process irrationality

[140] In addition to their procedural fairness ground of review, the Applicants contend that the process which preceded the issuing and subsequent publication of the tenders with the new scoring system, was itself irrational. Two contentions are advanced in this regard. Firstly, the Applicants argue that the City acted on the basis of errors of law which materially tainted and rendered the entire process irrational. Secondly, the Applicants allege that the new scoring system was produced by an irrational process which was not underpinned by any research, consultation, advice or input from experts or key stakeholders in the construction sector.

[141] It is clear that that the requirement for the exercise of public power to be rational includes the procedure followed in reaching a decision. The procedure followed must be rationally connected to the purpose for which the power was conferred.²⁹ Rationality whether under PAJA or the principle of legality relates to both the decision made and the procedure followed in reaching that decision.³⁰ In short, the test for process rationality requires that the procedure followed be such that it results in the achievement of the purpose for which the power was conferred.³¹

²⁹ *Minister of Water and Sanitation v Sembcorp Siza Water (Pty) Ltd and Another* (CCT 300/19) [2021] ZACC 21; 2021 (10) BCLR 1152 (CC); 2023 (1) SA 1 (CC) (23 July 2021) at para 45.

³⁰ *National Energy Regulator of South Africa v PG Group (Pty) Ltd* [2019] ZACC 28; 2020 (1) SA 450 (CC); 2019 (10) BCLR 1185 (CC) (NERSA) at para 48 – 50.

³¹ *Democratic Alliance v President of South Africa* [2012] ZACC 24; 2013 (1) SA 248 (CC); 2012 (12) BCLR 1297 (CC), *Albutt v Centre for the Study of Violence and Reconciliation* [2010] ZACC 4; 2010 (3) SA 293 (CC); 2010 (5) BCLR 391 (CC).

[142] Procedural rationality does not mean relate to the fairness of the process and the absence of a hearing does not in itself amount to procedural irrationality. The requirement that the exercise of public powers be procedurally rational is only breached where the purpose for which the power was exercised, could not be achieved without a pre-decision hearing.³²

[143] Section 217(2) of the Constitution empowers the City to implement a procurement policy which provides for categories of preference in the allocation of contracts and the protection or advancement of persons or categories of persons, disadvantaged by unfair discrimination. The City is also empowered by section 2(1) and section 2(1)(d) of the Procurement Act to determine and implement its preferential procurement policy which provides for the specific goals listed in section 2(1)(d)(i) and (ii) of the Procurement Act. Madlanga J explained the purpose for which these powers are to be exercised as follows in *Afribusiness*:

‘As I indicated earlier, from the long title of the Procurement Act, it is plain that this Act is the national legislation envisaged in section 217(3) of the Constitution and – as provided for in that section – the object of the Act is to achieve what is contained in section 217(2) of the Constitution. So, *what is necessary for purposes of the Procurement Act and, by extension, for purposes of section 217(2) of the Constitution, is provided for in section 2(1) of the Procurement Act: in terms of section 2(1) a preferential procurement policy must be determined by each individual organ of state; and it must be implemented within the framework set out in the same section*³³ (my emphasis).

³² *Minister of Water and Sanitation v Sembcorp Siza Water (Pty) Ltd and Another* (CCT 300/19) [2021] ZACC 21; 2021 (10) BCLR 1152 (CC); 2023 (1) SA 1 (CC) (23 July 2021).

³³ *Afribusiness* at para 113

[144] The question then is whether the purpose for which this power was conferred on the City, that purpose being the determination of a preferential procurement policy to be implemented within the framework set out in section 2(1) of the Procurement Act, could not be achieved without affording the Applicants a pre-decision hearing.

[145] I have earlier in this judgment set out and evaluated the process followed by the City in formulating the amendments to its Supply Chain Management Policy and reaching its decision to implement the new scoring system in the Implementation Guideline. The main purpose of that process was to ensure that the City formulated and had in place a preferential procurement policy which was consistent with the 2022 Procurement Regulations. The City's preferential procurement policy at that stage reflected the position provided for in the 2017 Procurement Regulations, which had been declared invalid in *Afribusiness*.

[146] The process followed by the City to address this, was in my view a careful, considered and rational process. It was a process which commenced immediately after the promulgation of the 2022 Procurement Regulations, involved extensive and wide internal consultation within the City's various departments and the mayor's office, consideration of the views of National Treasury and the BEE Commission and consideration of detailed external legal advice from senior and junior counsel. Importantly, it was also a process which had to be conducted and completed by the City under significant time constraints in view of the looming deadline of 16 January 2023 when the new 2022 Procurement Regulations were scheduled to come into effect.

- [147] The power conferred on the City by section 2(1)(d) of the Procurement Act required the City to engage in a polycentric assessment of its own policy objectives and how these would be advanced in the determination of specific goals for which preference points would be awarded. It is precisely for this reason that the discretion to create such a system of preference in its procurement policy is one that vests in an organ of state, as the Constitutional Court held in *Afribusiness*. The Applicants have not demonstrated why such a policy formulation process by the City could not be rationally advanced without input from and prior consultation with the Applicants and other bidders.
- [148] The Applicants *real complaint* in this case is the effect of the 2022 Procurement Regulations, which removed the provisions of the 2017 Procurement Regulations which automatically awarded of preference points based solely on a bidders B-BBEE contributor status. The Applicants are aggrieved with this effect of the new regulations, and it is their complaints about its alleged detrimental consequences for the Applicants, which in my view is the theme underlying each of their main review grounds.
- [149] The 2022 Procurement Regulations were however subject to a notice and comment public consultation process when they were published in draft form as early as 10 March 2022. The Applicants were entitled to be consulted and have a say in that process. The City was in my view not obliged to consult with and obtain input from the Applicants and all other bidders for City procurement work, when it subsequently amended its SCM policy and formulated a new scoring system to prevent any inconsistency with the new 2022 Procurement Regulations.
- [150] For these reasons, I am of the view that the absence of a pre-decision hearing being afforded to the Applicants in the process which the City followed in introducing its new scoring system, does not establish a review ground on the basis of process irrationality.

[151] The Applicants also argue that process irrationality has been established because the City acted on the basis of errors of law which materially tainted the entire process. The errors of law are contended to be that the City's new scoring system was introduced in breach of the B-BBEE Act and Codes and that it puts in place exclusionary provisions declared unlawful by the SCA and the Constitutional Court in *Afribusiness*.

[152] It is so that where the correct legal basis on which to arrive at a decision has been misconstrued, the decision cannot be rationally connected to the purpose for which the power to decide is granted and such a decision is vitiated by irrationality.³⁴ However, for the reasons set out later in this judgment, the Applicants argument that the City acted on the basis of material errors of law in construing the import of the B-BBEE Act and Codes on its new scoring system, is without merit. I have also earlier explained earlier that there is no factual evidence, apart from speculation, that the City's new scoring system establishes exclusionary thresholds as alleged by the Applicants.

[153] As to the contention that the process followed by the City was irrational due to the alleged absence of 'research, consultation, advice or input from experts or key stakeholders in the construction sector', the argument is not sustainable. I have already set out and evaluated the process followed by the City in the formulation of the ASCMP and new scoring system. The alleged absence of consultation with un-named 'key stakeholders in the construction sector' does not render the process irrational and incapable of achieving the purpose for which powers were conferred on the City to determine and implement its own procurement policy.

³⁴ *African Transformation Movement v Speaker of the National Assembly and Others* (643/2021) [2021] ZASCA 164; [2022] 1 All SA 615 (SCA); 2022 (4) SA 409 (SCA) (2 December 2021) at para 13.

[154] In assessing the rationality of the process adopted by the City in introducing the new scoring system, the concerns which had to be addressed and the policy imperatives which the City considered, a court should in my view be cautious not to substitute its own view of what may have been more rational and better choices, for those which the City in fact made.

[155] An analogy of policy choices made by Parliament in the legislative process is in my view apposite here. In the context of such legislative choices, the Constitutional Court observed in *NICRO* that these choices are not always subject to courtroom fact-finding and may be based on reasonable inferences unsupported by empirical data. It may not be possible to provide that a particular policy will be effective however it does not necessarily follow from this, that the policy is not reasonable and justifiable. If the concerns are accorded sufficient importance and there is sufficient connection between means and ends, that may be enough to justify action taken to address them.³⁵

[156] The Applicants process rationality argument is for these reasons without merit and fails on each of the grounds on which it has been advanced.

Review Ground 2: Illegality: non-compliance with the B-BBEE Act and Codes

[157] The Applicants allege that the City's decision to introduce the new scoring system as replacement for the old scoring system, is unlawful and invalid because it does not comply with section 10 of the B-BBEE Act and the Construction Sectoral Code.

³⁵ *Minister of Home Affairs v National Institute for Crime Prevention and the Re-Integration of Offenders (NICRO) and Others* (CCT 03/04) [2004] ZACC 10; 2005 (3) SA 280 (CC); 2004 (5) BCLR 445 (CC) (3 March 2004) at para 35.

- [158] Section 10(1)(b) of the B-BBEE Act requires every organ of state and public entity to apply any relevant code of good practice issued in terms of the Act in *inter alia* determining qualification criteria for the issuing of licences, concessions or other authorisations in respect of economic activity in terms of any law and developing and implementing a preferential procurement policy. In terms of section 10(3) and subject to section 9(6), an enterprise in a sector in respect of which the Minister has issued a sector code of good practice in terms of section 9, may only be measured for compliance with the requirements of broad-based black economic empowerment in accordance with that Code. Section 3(2) of the B-BBEE Act states that "...in the event of any conflict between this Act and any other law in force immediately prior to the date of commencement of the Broad - Based Black Economic Empowerment Amendment Act, 2013, this Act prevails if the conflict specifically relates to a matter dealt with in this Act"
- [159] The Applicants contended, in reliance on ACSA, that in deciding on a preferential procurement policy, primary consideration is given to the applicable sector code. The City's failure to apply the the scoring system set for the construction industry in terms of the Construction Sectoral Code, so the argument went, rendered the City's decision to implement the new scoring system unlawful and invalid. The argument is unpersuasive.
- [160] Firstly, the Applicants contentions are based on a misapprehension of the import of the applicable statutory provisions. Section 10(1)(b) of the B-BBEE Act requires organs of state to apply the B-BBEE Codes when developing and implementing a preferential procurement policy. The section does not however prescribe to an organ of state *how* the B-BEE Codes are to be so applied in the development and implementation of a procurement policy by an organ of state.

[161] The reason for this is to my mind plain and consistent with the overall constitutional scheme for public procurement and Black economic empowerment. The two legislative instruments to give effect to that scheme, i.e. the Procurement Act and the B-BBEE Act, are meant to operate harmoniously, consistently and in a manner which gives effect to the objectives of both. The law requires that complementary statutes be construed as such and in a manner which respects the comity, and the autonomous powers of functionaries established for the spheres in which each respective statute operates.³⁶

[162] Section 10(1)(b) of the B-BBEE Act recognises, it is for an organ of state to determine how the B-BBEE Codes are to be applied in the development and implementation of its procurement policy. As was held in *Afribusiness*, it is however for the organ of state and that organ of state alone, to create a system of preference in terms of a preferential procurement policy which section 2(1) of the Procurement Act obliges that organ of state to determine and implement. Similarly, the competence to prescribe industry specific B-BBEE Codes and the factors to be determined in the evaluation of a measured entity's B-BBEE score, lies with the Minister, not an organ of state. The scope of operation of the powers and functions conferred by the Procurement Act and the B-BBEE Act are in my view conceptually distinct by deliberate design.

[163] Secondly, it is difficult to understand on what basis and in what precise respect it is contended by the Applicants that the Procurement Act conflicts with the B-BBEE Act, such a conflict being a pre-condition for the engagement of the trumping provision provided for in section 3(2). The Applicants must demonstrate such a conflict and that it is a conflict between the B-BBEE Act and '...any other law in force immediately prior to the date of commencement of the [B-BBEE Act]'.

³⁶ *Ruta v Minister of Home Affairs* 2019 (2) SA 329 (CC) at para 43.

- [164] The Applicants' reliance on section 3(2) of the B-BBEE Act appears to be the springboard for their main argument. That is the contention that the B-BBEE Act and the Construction Sectoral Code "require" that a bidder's BEE level ranking under that Act and Code be used by an organ of state / public entity "...for purposes of scoring preferential procurement as part of its public procurement processes."
- [165] The difficulty though is that the B-BBEE Act and the Construction Sectoral Code do not so require. The two instruments do not provide for any mandatory obligation or requirement for organs of state to the use of B-BBEE scorecard contributor level ranking for the purposes of scoring preference points in a public procurement process. As the City pointed out, unlike the 2017 PPPFA Regulations, the B-BBEE Act and its codes do not set out the manner in which preference points are to be awarded at all.
- [166] Nor for that matter do the B-BBEE measurement principles specified in the Construction Sectoral Code prescribe any binding scoring system which organs of state are required to use for preferential procurement in the construction sector. The scope of application of the Construction Sectoral Code, by virtue of section 3.1 thereof, is to B-BBEE compliance measurement of entities that fall within the construction sector.
- [167] In terms of section 11.1 of the Construction Sectoral Code, such verification is performed by B-BBEE verification professionals or rating agencies accredited by SANAS or when applicable a B-BBEE Verification Professional Regulator appointed by the Minister for the accreditation of verification agencies or the authorisation of B-BBEE verification professionals. The Code is directed at verification of B-BBEE compliance by inter-alia B-BBEE rating agencies, not prescription of preferential procurement scoring systems to be applied by organs of state.

- [168] Had it been the intent of the Construction Sectoral Code to prescribe and set a preferential procurement scoring system to be applied by organs of state for the construction sector, the obvious place for it to do so would be in Amended Code Series CSC400, which deals with the measurement of the preferential procurement and supplier development element of B-BBEE in the construction sector.
- [169] The provisions of this element of the Construction Sectoral Code, deal however with the standardization of industry wide procurement methodologies i.e. procurement of goods and services by the construction sector *from* suppliers. They do not regulate procurement by organs of state at all.
- [170] In relation to large enterprises for example, section 7.4 of the Construction Sectoral Code records that the preferential procurement element measures the extent to which entities buy goods and services from empowering suppliers with minimum B-BBEE recognition levels. The key measurement principles provided for in the Construction Sectoral Code and Amended Code Series CSC400 do not include *any* reference to the setting of requirements binding on an organ of state, to use a bidders B-BBEE level ranking for the purposes of scoring preference points in public sector construction procurement.
- [171] The Applicants relied extensively on the judgment of the Supreme Court of Appeal in *ACSA* in support of their argument that in relation to the procurement of construction works, the Construction Sectoral Code enjoys primacy over earlier legislation such as the PPPFA. In my view, *ACSA* is not authority for this proposition.

[172] In ACSA, it was the minority judgment, per Molamela JA (Tshiqi JA concurring, which held that it was impermissible for an organs of state to be allowed to, without the Minister's input, design its own unique criteria that deviate from those laid down in the sector codes, as to do would render the uniformity sought to be achieved by the strategies envisaged in the B-BBEE Act, nugatory.³⁷ The majority judgment per Ponnann JA (Cachalia and Wallis JJA concurring), expressly did not reach this conclusion. The majority held that it was unnecessary to consider the other grounds that had been held by the High Court to be decisive against ACSA, one of which was that the impugned Request for Bids ("RFB") was in breach of B-BBEE Act and the Tourism Sector Code of Good Practice.³⁸

[173] For these reasons, I conclude that the Applicant's argument that the City's decision to introduce the new scoring system was unlawful and in breach of the B-BBEE Act and the Construction Sectoral Code, is without merit.

[174] My conclusion in this regard is dispositive of the Applicants second ground of review. I therefore consider it unnecessary to address the City's alternative argument that in any event, the B-BBEE Act does not prevail over the PPPFA by virtue of the principle *generalia specialibus non derogat lex*.

Review ground 3: Irrationality

[175] The Applicants third major ground of review relates to the rationality of the City's new scoring system. The Applicants base their rationality attack on two main grounds. Firstly, they contend that the weighting of the specific goals identified in the new scoring system for the allocation of preference points, is irrational and arbitrary.

³⁷ ACSA at paragraph 38.

³⁸ ACSA at para 73.

[176] Secondly, the Applicants contend that the new scoring system is irrational because it fails to achieve the City's own transformation objectives. To assess these arguments, which are in large measure the main plank of the Applicants entire challenge to the rationality of the new scoring system, it is necessary to set out the contentions advanced in some detail.

Irrational weighting of the specific goals

[177] The Applicants allege that the new scoring system selectively accords a privileged and skewed weighting to ownership by women, Black people and disabled people and sub-contracting to Black owned entities. According to the Applicants, the new scoring system irrationally re-scores elements which have already been accorded certain weightings in the Construction Sectoral Code. In addition, it is contended that this irrational re-scoring mechanism was the result of a process which was itself irrational as it was conducted by the City without any market research or investigations by the City. The Applicants submit that there is no rational reason for the weightings assigned by the City's new scoring system to different levels and categories of ownership and that the weightings so adopted by the City are therefore arbitrary and capricious.

Irrational failure to achieve transformation objectives.

[178] The Applicants contend that by "singling out" women owned, Black-owned and disabled owned business for 30%, 30% and 10% respectively of the preference points, the City's new scoring system fails to achieve its own stated transformation objectives. The Applicants argue that the new scoring system irrationally disadvantages entities such as the Applicants whose "black-owned" shares are owned by beneficiaries of a workers trust and does so without providing a mechanism to determine how points are to be allocated to such a worker's trust.

[179] The Applicants contend that the disadvantage suffered by the Applicants is that they are therefore unable to compete on price because they start with a points deficit, simply because the extent to which their equity is owned by women, Black and disabled persons cannot be measured under the new scoring system. According to the Applicants, under the new scoring system they will both only get 2 out of 6 points for ownership by women and Black people. The Applicants allege that this means that for price, they would need to get 6 points out of a 100 to be level and compete with a 100% female black owned company. The disadvantage of this, so the Applicants argue, is that they would have to incur a substantially reduced margin just to be able to compete on price and in an industry where they say the margins are already slim. The Applicants allege that if they were compelled to cut their profit margins to so compete, they would not be able to present a viable bid. Their situation, the Applicants say, "...is even more dire when one adds the scoring of the subcontracting component." I interpose at this juncture to note that no factual details are provided of the alleged low margins or financial basis on which any bid by the Applicants for the tenders would not be viable because of the new scoring system.

[180] Returning to the Applicants contentions on irrationality, a further aspect relied on by the Applicants, which they claim is evidence of the new scoring system irrationally failing to achieve transformation objectives, is the application of the new scoring system to public companies. The Applicants allege that although the actual ownership of a public company by Black people may in fact be lower than that of a private company, the application of the new scoring system will irrationally and misleadingly result in the ownership of that public company by Black people, appearing to be higher.

[181] This, according to the Applicants, is because the institutional shareholding of a listed company is not measured under the Construction Sectoral Code when determining the Black ownership element of B-BBEE. The Applicants claim that the new scoring system would thus irrationally result in a situation where a public company with what appears to be a high level of Black ownership, would be preferred above a private company which has a larger percentage of Black South African worker ownership through an employee trust, such as the HIBBET.

The principles relating to rationality review.

[182] Before evaluating the grounds advanced by the Applicants in support of their rationality challenge, I shall outline and restate the key principles applicable to the review of exercises of public power on the grounds of irrationality.

[183] The rule of law is a foundational value of our Constitution, and the principle of legality lies at its centre. As explained in the well-known statement by Chaskalson CJ in *Fedsure*, the principle of legality expresses the fundamental rule of our constitutional order that the 'exercise of public power is only legitimate when it is lawful.'³⁹ The exercise of public power in a manner which is irrational, arbitrary or capricious, is inconsistent with the rule of law and the principle of legality which is at its centre. The content of rationality as a minimum threshold requirement for the constitutional validity of the exercise of public power was expressed as follows in *Pharmaceutical Manufacturers Association*⁴⁰:

³⁹ *Fedsure* at para 38.

⁴⁰ *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others* 2000 (3) at paras 88 to 90.

'It is a requirement of the rule of law that the exercise of public power by the Executive and other functionaries should not be arbitrary. Decisions must be rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary and inconsistent with this requirement. It follows that in order to pass constitutional scrutiny the exercise of public power by the Executive and other functionaries must, at least, comply with this requirement. If it does not, it falls short of the standards demanded by our Constitution for such action.

[89] ...What the Constitution requires is that public power vested in the Executive and other functionaries be exercised in an objectively rational manner.

[90] Rationality in this sense is a minimum threshold requirement applicable to the exercise of all public power by members of the Executive and other functionaries. Action that fails to pass this threshold is inconsistent with the requirements of our Constitution and therefore unlawful. The setting of this standard does not mean that the Courts can or should substitute their opinions as to what is appropriate for the opinions of those in whom the power has been vested. As long as the purpose sought to be achieved by the exercise of public power is within the authority of the functionary, and as long as the functionary's decision, viewed objectively, is rational, a Court cannot interfere with the decision simply because it disagrees with it or considers that the power was exercised inappropriately.

A decision that is objectively irrational is likely to be made only rarely but, if this does occur, a Court has the power to intervene and set aside the irrational decision."

[184] The test in rationality review is directed at assessing the relationship between the means chosen and the ends sought to be achieved by the decision-maker. The test is whether there is a rational relationship between the decision and the purpose for which the power was conferred. Objective irrationality is required, a finding which is likely to be rare and out of the ordinary.

[185] And in applying this test to the facts of a given case, it is not open to Courts to interfere with the means selected by the decision maker simply because they do not like them or consider that there are better means that could have been utilised. As Ngcobo J explained in *Albutt*⁴¹:

“The executive has a wide discretion in selecting the means to achieve its constitutionally permissible objectives. Courts may not interfere with the means selected simply because they do not like them, or because there are other more appropriate means that could have been selected. But, where the decision is challenged on the grounds of rationality, courts are obliged to examine the means selected to determine whether they are rationally related to the objective sought to be achieved.

What must be stressed is that the purpose of the enquiry is to determine not whether there are other means that could have been used, but whether the means selected are rationally related to the objective sought to be achieved.”

[186] Rationality review affords a high degree of deference to the decision-maker, the question to be asked being merely whether there is a rational connection between the decision and the process followed in reaching it and a legitimate purpose. Rationality is thus not about justification nor the cogency of reasons.⁴²

[187] Rationality review, however, has its limits. It is not a mechanism which litigants may permissibly deploy to second-guess, by way of judicial review, decisions and exercises of public power which they do not like, decisions which they think could have been made better or decisions which they consider to be irrational because a different option ought to have been chosen by the decision-maker.

⁴¹ *Albutt v Centre for the Study of Violence and Reconciliation and Others* (CCT 54/09) [2010] ZACC 4; 2010 (3) SA 293 (CC); 2010 (2) SACR 101 (CC); 2010 (5) BCLR 391 (CC) (23 February 2010) at para 51

⁴² *Nu-Africa Duty Free Shops (Pty) Ltd v Minister of Finance and Others* (CCT 29/22; CCT 57/22; CCT 58/22) [2023] ZACC 31; 2023 (12) BCLR 1419 (CC); 2024 (1) SA 567 (CC) (3 October 2023) at para 114

[188] The Constitutional Court cautioned against this in the following terms in *Electronic Media Network*⁴³:

"It needs to be said that rationality is not some supra-constitutional entity or principle that is uncontrollable and that respects or knows no constitutional bounds. It is not a uniquely designed master key that opens any and every door, any time, anyhow. Like all other constitutional principles, it too is subject to constitutional constraints and must fit seamlessly into our constitutional order, with due regard to the imperatives of separation of powers. It is a good governance-facilitating, arbitrariness and abuse of power-negating weapon in our constitutional armoury to be employed sensitively and cautiously."

[189] A court is also well-advised to carefully avoid the 'slippery path' that can easily take one inadvertently from an enquiry into rationality into the realm of reasonableness. As stated earlier in relation to process irrationality and the Applicants failure to establish such, the factual enquiry in rationality review as to whether a decision is rationally related to its purpose. This enquiry requires the court to be cautious not to stray into executive territory.⁴⁴ To re-iterate again, decisional rationality is only directed at the link between means and purpose and whether the means chosen to achieve the purpose are reasonably capable of achieving that purpose. It is not an enquiry concerned with whether the best or only means was chosen through which the purpose may be attained.⁴⁵

Evaluation of the Applicants decisional rationality challenge

⁴³ *Electronic Media Network Limited v e.tv (Pty) Limited* [2017] ZACC 17; 2017 (9) BCLR 1108 (CC) at para 89.

⁴⁴ *Minister of Home Affairs and Others v Scalabrini Centre, Cape Town and Others* 2013 All SA 571 (SCA) at para 65 to 66.

⁴⁵ *Minister of Constitutional Development and Another v South African Restructuring and Insolvency Practitioners Association and Others* (CCT13/17) [2018] ZACC 20; 2018 (5) SA 349 (CC); 2018 (9) BCLR 1099 (CC) (5 July 2018) at para 55.

[190] The City submitted that the Applicants' decisional rationality challenge is not pleaded with sufficient precision. The submission does carry some force. In one instance, the Applicants decisional rationality challenge is directed at the specific goals chosen by the City, in another it is directed at the overall new scoring system and then in another is directed at the application of the new scoring system to the specific tenders. In addition, the decisional rationality challenge is brought on grounds which overlap between legality review and PAJA.

[191] Insofar as reliance on PAJA is concerned, the Applicants' irrationality challenge, as set out in their heads of argument, is said to be that the City's decision to adopt the new scoring system for construction tenders is 'not rationally connected to the purpose for which it was taken; the purpose of the empowering provision (in this case the PPPFA read with the B-BBEE Act and the Sector Code); the information before the administrator; or the reasons given for it by the administrator (see the reasons given at the time by Mr Lewis).'

[192] This, at least on the face of it, appears to be a reliance on section 6(2)(f)(ii) of PAJA.⁴⁶ While it is so that where PAJA applies a review applicant may not sidestep PAJA by relying directly on the principle of legality, in this case there are components of the impugned decisions which, for the reasons set out earlier, do not constitute administrative action. These include the City's decision to adopt the ASCMP and the decision to introduce the new scoring system in the City's Implementation Guideline.

⁴⁶ Section 6(2)(f)(ii): 'A court or tribunal has the power to judicially review an administrative action if-...the action itself... is not rationally connected to (aa) the purpose for which it was taken; (bb)the purpose of the empowering provision; (cc) the information before the administrator; or (dd) the reasons given for it by the administrator'.

- [193] The main thrust of the Applicants decisional rationality challenge is directed at the weighting which the new scoring system accords to ownership by women, Black people and disabled people and the alleged irrationality of the manner in which the new scoring system deals with sub-contracting to Black owned micro and small enterprises. A further contention advanced is that these weightings irrationally re-score elements which have already been accorded certain weightings in the Construction Sectoral Code and that the weightings themselves are bereft of rational reason.
- [194] For the reasons set out below, I fail to see how the way in which the City's new scoring system has chosen specific goals relating to and assigned weighting of ownership of tendering entities by Black people, women and disabled people, can objectively speaking, be said to be irrational.
- [195] Section 2(1)(d) of the PPPFA is the empowering provision for the City's new scoring system and preferential procurement policy. The provision expressly permits the City to determine and implement a procurement policy which creates a system of preference for advancing individuals who have suffered from past patterns of discrimination on the basis of race, gender and disability. It can hardly be suggested that Black people and women do not fall within the categories of persons directly subjected to unfair historic discrimination, the elimination of which is the central tenet underlying section 217(2) of the Constitution.
- [196] I must in this regard immediately dispose of a contention by the Applicant that the City's new scoring system is irrational because it "[sets] black female ownership of the bidding entity as a threshold requirement allocating some 6/10 of the score to these two criteria."

[197] Firstly, the evidence does not establish that the City has set such a threshold. No facts are advanced to support this contention by the Applicants.

[198] Secondly, it is difficult to understand how the City's creation of a system of preference in its public procurement policy for Black people, women and the disabled, is either objectively irrational or results in a failure of the City to meet its transformation objectives. Notably and following the introduction of the City's new scoring system, the City has already concluded numerous contracts based on the new scoring system and paid many contractors for their goods and services. The City's demand plan as of 20 March 2024 indicates that 27 tenders have been awarded for the period 2023 to 2026, to the value of approximately R1 618 303 217.54.

[199] The Applicants contend that by "singling out" women owned, Black-owned and disabled owned business for 30%, 30% and 10% respectively of the preference points, the City's new scoring system irrationally fails to achieve its own stated transformation objectives. The argument is without merit. The rationality of remedial measures to develop and implement specific goals for preferential procurement from individuals falling within the categories of persons set out in section 2(1)(d)(i) of the Procurement Act, cannot in my view be assessed without regard to the historical and social context in which the Act operates. This applies more so when remedial measures adopted by an organ of state as specific goals to promote economic transformation and address the present-day consequences of historical unfair discrimination based on gender and race, are impugned as being irrational.

[200] In considering this context, the Constitutional Court has emphasised the need to understand the historical and intersectional nature of race and gender discrimination. In *Mahlangu*⁴⁷, Victor AJ said the following:

[96] It is often said that Black women suffer under a triple yoke of oppression based on their race, gender and class. The racial hierarchy established by apartheid placed Black women at the bottom of the social hierarchy. During apartheid, Black women were oppressed both by codified apartheid laws and a patriarchal form of customary laws and norms, which rendered them perpetual minors who were at the mercy of White men and women as well as Black men.

[97] This Court has on a number of occasions stressed the importance of “the need to make a decisive break from the ills of the past”. This constitutional imperative stems from the Constitution’s commitment to establishing a non-racist and non-sexist society based on human dignity, equality and freedom. At the heart of the constitutional project is an aspiration to achieve substantive equality and undo the burdens of our past.

[98] But ensuring that the vestiges of our racist past are eradicated, also requires an exploration of the lingering gendered implications of apartheid’s racist system. The combination of influx control laws and the migrant labour system also had a particularly onerous effect on Black women. Taken together, they restricted the ability of Black women to seek and obtain employment opportunities, thus rendering them dependent on absent husbands or sons. Essentially, this all sedimented a gendered and racialised system of poverty, that was particularly burdensome for Black women.”

[201] The decisional rationality challenge directed by the Applicants at what they allege is an irrational, skewed and privileged re-scoring of ownership by women, Black people and disabled people, is misplaced for two additional reasons.

⁴⁷ *Mahlangu and Another v Minister of Labour and Others* (CCT306/19) [2020] ZACC 24; 2021 (1) BCLR 1 (CC); [2021] 2 BLLR 123 (CC); (2021) 42 ILJ 269 (CC); 2021 (2) SA 54 (CC) (19 November 2020) at para 95 to 98.

[202] Firstly, for the reasons set out earlier, I have concluded that the City was not legally obliged in its discretionary determination of the specific goals of its procurement policy, to apply and include the weighting and elements provided for in the B-BBEE Act and the Construction Sectoral Code.

[203] The City was empowered to determine and implement its own procurement policy and specific goals for a system of preference. That the City decided not to incorporate wholesale the approach and framework of the Construction Sectoral Code in its new scoring system, does not render its decision irrational. Secondly, the argument postulated by the Applicants amounts in effect to a contention that the weightings provided for in the new scoring policy, are not rational because they do not correspond with what the Applicants consider to be the better and more desirable weightings set out in the Construction Sectoral Code.

[204] The contention cannot be sustained. It is not for the court to second guess and set aside the scoring and weighting of the specific goals chosen by the City unless it can be demonstrated that they are objectively irrational and not rationally related to the purpose of the power to determine specific goals conferred on the City by section 2(1)(d) of the PPPFA.

[205] It is well-established that where a functionary is entrusted with discretion powers, the weight to be attached to particular factors, or how far a particular factor affects the eventual determination of the issue, is a matter for the functionary to decide and provided that she acts in good faith, reasonably and rationally, a court will not interfere.⁴⁸

⁴⁸ *MEC for Environmental Affairs and Development Planning v Clairisons CC* (408/2012) [2013] ZASCA 82; [2013] 3 All SA 491 (SCA); 2013 (6) SA 235 (SCA) (3ay 2013) at para 22.

- [206] The Applicants further contend that the new scoring system is irrational because it results in the Applicants being unable to compete on price with a 100% Black female owned company in circumstances where profit margins in the construction sector are already slim.
- [207] I do not see how this apparent effect of the new scoring system even if it were established on the papers, which is far from clear, is either unlawful or that it renders the City's new system irrational. It is an obvious feature of the tender process that bidders compete in the submission of bids and in their pricing offering for the goods and services which form the subject of the tender.
- [208] Some bidders may anticipate obtaining lower points for preference and adjust their tenders to be more competitive on the 90 or 80 points allocated for price. Other tenderers, such as the 100% Black women owned company postulated by the Applicants as an example, may obtain higher points for preference but be either unable to win on price or compelled to accept very low margins precisely because of the competitive advantage enjoyed by entities whose owners had the benefit of past economic privilege and were not subjected to historical gender and racially based discrimination. The different permutations which may arise are ultimately matters of business and commercial risk assessment and choices faced when a bidder participates in a government procurement process.
- [209] The possibly adverse economic consequence of such choices for any particular bidder, arises from the competitive nature of the tender process itself. They are not consequences which render the procurement process irrational or unlawful.

- [210] The Applicants appear to buttress this argument with the contention that their price disadvantage and preference points deficit arises from the failure of the new scoring system to provide for, unlike the position in the B-BBEE Act and the Constructional Sectoral Code, a mechanism to measure their ownership equity which is held by a workers trust. I have difficulty accepting the contention that this alleged consequence of the new scoring system, renders the system irrational.
- [211] It is so that the Sectoral Code provides for a measurement mechanism in respect of the economic interest of Black participants in employee share ownership programmes. But it is also clear from Statement CSC100 of the Code, that in addition to economic interest, the ownership element is also indicated by evaluating direct equity ownership through exercisable voting rights in the hands of Black people. The Implementation Guideline, in relation to the evidence required for the claiming of preference points for specific goals relating to ownership by women and Black people, permits bidders to provide not only a B-BBEE certificate but company registration certificates and their CSD reports.
- [212] The question for decisional rationality is not whether a better or more desirable preference points assessment mechanism should have been chosen by the City in its new scoring system.
- [213] The question is whether the means so chosen is rationally related to the purpose for which the City was conferred powers to determine and implement a preferential procurement policy. The new scoring system provides for specific goals relating to direct equity ownership of the bidding entity by women, Black people and disabled people. That it does not make express provision for a measurement mechanism for a worker's trust, a mechanism which the Applicants consider desirable, does not in my view render the City's new scoring system irrational.

[214] There is final aspect of the Applicants rationality challenge which I shall consider briefly.

[215] This is the argument regarding what was asserted to be an unfair and irrational advantage to public companies flowing from the application of the ownership element calculation provided for in City's new scoring system. The argument advanced in this regard was that because of the method which the City uses in the new scoring system to calculate Black ownership, a situation could result where the actual ownership of a public company held by Black people, may be lower than that of a private company, yet, because institutional shareholders are excluded, it may appear to be higher.

[216] This, according to the Applicants, is because the institutional shareholding of a listed company is not measured under the Construction Sectoral Code when determining the Black ownership element of B-BBEE. The Applicants claim that the new scoring system would thus irrationally result in a situation where a public company with what appears to be a high level of Black ownership, may be preferred above a private company which has a larger percentage of Black South African worker ownership through an employee trust, such as the HIBBET.

[217] The main bases of this argument were advanced by the Applicants for the first time in reply and referred to various public companies in the construction sector, none of which have sought to challenge the City's new scoring system. It was on this somewhat tenuous basis that the Court is invited to to infer prejudice, irrationality and unfairness from examples postulated by the Applicant, including that of a British institutional investor owning 0.3581% of a listed construction company, who it is alleged could be favoured over the Applicants broad based black shareholders because of the City's new scoring system. The contention on which the whole argument is based is entirely hypothetical.

[218] in the absence of evidence of such prejudice or irrationality in the actual application of the new scoring system, there are in my judgment no grounds to impugn the new scoring system as being irrational based on the abstract and hypothetical grounds relied on by the Applicants in relation to listed companies.

[219] In relation to the specific goal identified in the new scoring system relating to promotion of small and micro-enterprises, it is clear that the promotion of small and micro-enterprises is an objective of the RDP. The RDP in general terms and similarly to the B-BBEEE Act and the Construction Sectoral Code, seeks to promote economic inclusion by addressing historical barriers of entry and ownership of productive economic assets.

[220] Chapter 3 of the RDP records that insofar as the objectives of the RDP are concerned, '...greater participation in the economy and less concentrated, more racially and gender inclusive ownership patterns are essential. Small, medium, and micro enterprises need to play substantially larger part in economic activity. The RDP must ensure that the legacy of inequality is addressed.' In this regard, I agree with the submission advanced by the City that the achievement of this objective by way of its inclusion as a specific and weighted goal in the City's new scoring system, is an objective which is rationally connected to the purpose of section 2(1)(d)(ii) of the PPPFA.

[221] For these reasons, the Applicants decisional rationality challenge is in my view without merit and fails on each of the individual grounds on which it has been advanced.

The Applicants further review grounds and challenges to the new scoring system

[222] For the reasons set out above, I conclude that the main contentions and challenges by the Applicants to the City's new scoring system on the basis that it is irrational and in breach of the B-BBEE Act and Codes, are without merit and fail on each of the bases on which they have been advanced. These contentions by the underpinned each of their main grounds of review. Their failure is largely dispositive of the Applicants challenge as a whole. I will nonetheless briefly deal with the additional grounds of review, each of which we have considered and find both cumulatively and individually, to be without merit.

Non-compliance with the Implementation Guideline

[223] The Applicants contention that the new scoring system is unlawful and in breach of the Implementation Guideline is based on two propositions. Firstly, the absence from the Rule 53 review record of evidence that the City conducted prior research and investigations for the specific tenders before determining the specific goals listed in the tender specifications. Secondly, it is argued that no actual decision was taken by the BSC to determine the specific goals for the tenders concerned. As stated earlier, the main basis for the argument is the Applicants seizing on a sentence in the Implementation Guideline which states that the role of the BSC is to '...determine which HDI or Specific Goal will be best suited for that specific tender based on market research, analysis or historical data in the disposal of the City and advertised accordingly for evaluation criteria to be fairly applied.'

[224] I am in agreement with the argument advanced by the City that given the need for the guideline to establish uniformity in procurement processes, the guideline was binding and was accepted by the City officials implementing it, to be binding. The Implementation Guideline must also be interpreted practically and in line with its purpose.

[225] It can hardly in my view be sustainably argued that having determined specific goals and a weight allocation for preferential procurement, it would nonetheless then be open to the City to determine different goals and points and weight allocations depending on the identity of the tenders and nature of the tender. It may be open to the BSC to determine what specific goals would be 'best suited' for a particular tender, but it was not a mandatory requirement of the Implementation Guideline that the BSC consider deviation of point values and different specific goals when it applied the new scoring system.

[226] The City was required to implement the new scoring system within the framework of the Procurement Act, the guideline and the ASCMP. Where a decision-maker such as the City has devised policies, directives or guidelines, it was recognized by the Constitutional Court in *Ahmed* that such policies, directives or guidelines which determines how administrative officials are required to act, those policies and guidelines are binding and disciplined by the principle of legality.⁴⁹ In the absence of a challenge to the legality of the guideline itself, of which there is none, the Implementation Guideline must be accepted as being a lawful and valid policy instrument of the City.

[227] Insofar as the contentions for this argument based on the content of the Rule 53 record is concerned, it does not necessarily follow that the absence of evidence of deliberations of the BSC on the specific goals for the tenders, demonstrates that no decision was taken by the BSC or that the new scoring system falls to be set aside on this basis. The City issued Tender Notice No. 3 setting out the specific goals that would apply to the first tender. It is clear from this that consideration was given to the specific goals and that the provisions of the implementation guideline were being applied.

[228] The challenge based on alleged non-compliance with the Implementation Guideline is for these reasons unfounded and without merit.

⁴⁹ *Ahmed and Others v Minister of Home Affairs and Another* 2019 (1) SA 1 (CC) at para 37 to 45.

Slavish adherence to the position of National Treasury

- [229] The Applicants contended that the City 'holus boluses' adopted the position on specific goals articulated by National Treasury and slavishly adhered to the Treasury's interpretation of the specific goals to be included in the City's procurement policy. There is no factual evidence that reasonably establishes that the City rubber stamped the views of Treasury on the application of the B-BBEE Act and the manner in which organs of state were to determine their procurement policies in light of the Afribusiness judgment. The contention by the Applicants that the City 'kowtowed' to the 'dictates of National Treasury' and that it did so under threat of a qualified audit, is a speculative allegation and is advanced bereft of any factual basis. The challenge based on capricious decision-making in the formulation of the new scoring system is in my view wholly without merit.

Specific goals not measurable

- [230] The Applicants contended that the new scoring system is irrational and unlawful in that it awards points awarded for gender and micro and small enterprises, which are not measurable. It is clear from the evidence required for the claiming of preference points that the City is able to determine the percentage of female ownership of a company from a Company Registration Certificate or Central Supplier Database report. These documents provide objective evidence about the percentage of female ownership in a company. The evidence also show that the City will be able to determine the micro or small enterprise specific goals from the financial statements of the micro and small enterprise, or its B – BBEE status level.
- [231] Regulation 9 of the 2022 Regulations provides a mechanism to address false information in bids and deters the possibility of fronting. In addition, paragraph 450 of the SCM Policy provides for penalties for where sub-contracting subcontracting takes place without the knowledge of the City. There is no substance to this challenge, and it is without merit.

Conclusion and costs

[232] For the reasons set out above, the grounds advanced by the Applicant in support of their amended relief are without merit. No basis has in my view been established by the Applicants to set aside the new scoring system nor for the extraordinary proposition that it is open to this Court to grant relief directing the City to return to and implement its previous scoring system.

[233] The Applicants did not seek to claim the protection of *Biowatch* in their challenge and indeed sought a punitive costs order against the City in the event they succeeded. *Biowatch* does not countenance risk free constitutional litigation aimed at protection of commercial interests. In my view, costs must follow the result. It was not suggested that the scale of costs should be other than on scale C.

Order

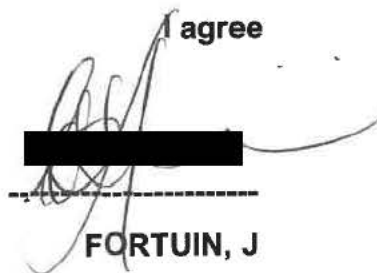
[234] The application is dismissed with costs.

[235] The application in case no. 59/24 in relation to the Macassar interdicts ('Part C') is dismissed with costs.

[236] The Applicants are ordered to pay the costs of the applications on scale C jointly and severally including the costs of two counsel where so employed.


MAGARDIE, AJ

I agree



FORTUIN, J

I agree and it is so ordered



ERASMUS, J

APPEARANCES

Date of Hearing 21-22 May 2024

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