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

Case number: 5729/2023

In the matter between:

CONTOUR TECHNOLOGY (PTY) LTD	Applicant
and	
THEEWATERSKLOOF MUNICIPALITY	First Respondent
UTILITIES WORLD (PTY) LTD	Second Respondent

Bench: Sidaki, T.S. AJ
Heard: 7 & 19 June 2024
Delivered: 23 October 2024

This judgment was handed down electronically by circulation to the parties' representatives via email and release to SAFLII. The date and time for hand-down is deemed to be 10h00 on Wednesday, 23 October 2024.

JUDGMENT

<u>SIDAKI, AJ</u>

Introduction

1. This matter concerns a review of a tender awarded by the first respondent (the Municipality) to the second respondent (Utilities), for the provision and administration of the electricity prepayment vending system.

2. The applicant (Contour) applied in its notice of motion for the following relief:

"… an order that:

2.1. the decision taken by the first respondent to award Tender FIN 03/2022/23 for the provision and administration of electricity prepayment uniform vending system for the period 1 July 2022 until 30 June 2025 (the tender), to the second respondent, is reviewed and set aside.

2.2. a substitution order is granted in terms of which the tender is awarded to the applicant.

2.3. the first respondent pays the costs of the application, alternatively, that the first and second respondent pay the costs jointly and severally should the latter oppose the review.

2.4. further and/or alternative relief."

3. The Municipality advertised the tender on 8 April 2022, with the 'tender notice and invitation to tender' document (tender notice), providing, *inter alia*, that:

3.1. "*Only tenderers who satisfy the eligibility criteria stated in the Tender Conditions and Tender Data (were) eligible to submit tenders*".

3.2. "*All bids received shall be evaluated in terms of the Theewaterskloof Municipality Supply Chain Management Policy, read with the*

Preferential Procurement Regulations of 2017. It is estimated that the 80/20 preference points system will be applicable. Tenders will be evaluated in terms of price and preference."

3.3. "*Council reserves the right to accept a tender in full, partially or not at all and is not obliged to accept the lowest tender received.*"

4. A compulsory clarification meeting hosted by the Municipality for prospective bidders was held on 21 April 2022. The closing date for the tender was 29 April 2022. Thereafter, the tender evaluation process unfolded.

5. The Bid Evaluation Committee (BEC) prepared a bid evaluation report (BEC Report/ Report), in which it set out its working process and recommended the award of the tender to Utilities. The BEC adopted the Report at its meeting held on 22 September 2022. That Report was tabled for consideration by the Bid Adjudication Committee (BAC) at its meeting held on 23 September 2022. The BAC, at the recommendation of the BEC, resolved to award the tender to Utilities.

6. The Municipality communicated the BAC resolution to Utilities by letter dated 10 October 2022. On that day the Municipality also wrote to Contour, advising it that its bid had been unsuccessful.

7. Contour lodged an internal appeal against the award of the tender to Utilities. The calculation and award of B-BBEE points in the tender evaluation process formed one of the grounds of appeal. The appeal was dismissed.

8. The Municipality communicated the dismissal of the appeal to Contour by letter dated 24 October 2022. I note that the Municipality's Appeal Authority did not deal with the issues raised as the grounds of appeal in its response.

9. Thereafter, Contour sought access to Utilities' bid documents, first by sending a request and later under the auspices of the Promotion of Access to Information Act 2 of 2000 (PAIA). The Municipality provided some of

Utilities' bid documents, including its B-BBEE sworn affidavit and an ISO 9001:15 certificate.

10. Contour subsequently instituted this review application.

Grounds of review

11. The first ground of review concerns compliance with the requirements for Broad-Based Black Economic Empowerment (B-BBEE) status. Contour asserts that the sworn statement that was produced to prove Utilities' B-BBEE status was invalid. As such, the Municipality ought not to have awarded any preference points for B-BBEE status level of contribution to Utilities.

12. The second ground concerns an alleged failure by Utilities to submit a valid ISO certificate 9001: 2015 in Quality Management Systems the necessary certification for its Revenue Collection and Management Tamper Systems.

13. Once the rule 53 record was produced, the applicant supplemented its grounds of review to include that: (a) the percentage of sub-contracting services (the online vending software tendered by Utilities which generates the prepaid electricity tokens) was above the allowed threshold of 25%; (b) Utilities' certificate of independent bid determination was defective; (c) compliance issues such as, (i) a failure to attach proof of public liability insurance, (ii) a defect concerning the signatory to Utilities' bid document, (iii) a defect in the Utilities' board resolution authorising the appointed signatory to sign all documents in connection with the bid.

14. The applicant seeks a review in terms of the Promotion of Administrative Justice Act 3 of 2000 ("PAJA").

Legal framework

15. Section 217 (3) of the Constitution refers to the national framework within which organs of state must implement their procurement policy. It provides:

> *"217. Procurement*
>
> 1. *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.*
>
> 2. *Subsection (1) does not prevent the organs 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. *National legislation must prescribe a framework within which the policy referred to in subsection (2) must be implemented."*

16. The national legislation prescribing the framework within which procurement policy must be implemented is the Preferential Procurement Policy Framework Act 5 of 2000 (Procurement Act),[1] and the regulations published thereunder.[2] The Broad-Based Black Empowerment Act 53 of 2003 (B-BBEE Act) is also relevant in this case.

17. In *Steenkamp* Moseneke DCJ (as he then was) stated:

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[1] Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others (CCT 48/13) [2013] ZACC 42; 2014 (1) SA 604 (CC); 2014 (1) BCLR 1 (CC) (29 November 2013) (Allpay), at para 33.
[2] Preferential Procurement Regulations, 2017.

"Section 217 of the Constitution is the source of the powers and function of a government tender board. It lays down that an organ of state in any of the three spheres of government, if authorised by law may contract for goods and services on behalf of government. However, the tendering system it devises must be fair, equitable, transparent, competitive and cost-effective. This requirement must be understood together with the constitutional precepts on administrative justice in section 33 and the basic values governing public administration in section 195(1)."[3]

18. The proper approach in review applications of this nature was enunciated in Allpay:

"[28] Under the Constitution there is no reason to conflate procedure and merit. The proper approach is to establish, factually, whether an irregularity occurred. Then the irregularity must be legally evaluated to determine whether it amounts to a ground of review under PAJA. This legal evaluation must, where appropriate, take into account the materiality of any deviance from legal requirements, by linking the question of compliance to the purpose of the provision, before concluding that a review ground under PAJA has been established.[4]

<u>Relevant terms and conditions and bid specifications</u>

19. The invitation to bid form included the following requirement:

"B-BBEE status level verification certificate/sworn affidavit (for EMES & QSEs) must be submitted in order to qualify for preference points for B-BBEE."

20. One of the relevant terms and conditions for bidding read:

[3] Steenkamp NO v Provincial Tender Board of the Eastern Cape (CCT71/05) [2006] ZACC 16; 2007 (3) SA 121 (CC); 2007 (3) BCLR 300 (CC) (28 September 2006) (Steenkamp) at para 33.
[4] Allpay at para 28.

"This bid is subject to the Preferential Policy Framework Act and the Preferential Procurement Regulations, 2017, the General Conditions of Contract and, if applicable, any other special conditions of contract."

21. When testing for administrative compliance, tenders would be found non-compliant (albeit these documents may be requested from the tenderer) if, *inter alia*:

 21.1. the tenderer has failed to submit a certified valid B-BBEE certificate, QSE or EME affidavit, whereas where points were claimed and a copy of the certificate or affidavit was supplied, a certified valid copy of the B-BBEE certificate, QSE or EME affidavit may be requested.

 21.2. the tenderer has failed to submit a valid ISO 9001:2015 certificate in Quality Management Systems, in respect of the provision of Revenue Collection, Tamper Management.

22. The 80/20 preference point system would be used, in terms of which a maximum of 80 points is allocated for price, calculated in accordance with a set formula, and the remaining 20 points is awarded for B-BBEE status level of contribution. B-BBEE points are allocated on a sliding scale depending on status level of contribution, where Level 1 receives 20 points, Level 2 receives 18 points and non-compliant contributor receives 0 points.

23. A person awarded a contract may not sub-contract more than 25% of the value of the contract to any other enterprise that does not have an equal or higher B-BBEE status level that the person concerned, unless the contract is sub-contracted to an EME that has the capability and ability to execute the sub-contract.

<u>BEC Report</u>

24. The BEC Report is the key document in which the details of the assessment of the bidders are recorded. Its recommendation formed the basis of the BAC's resolution to award the tender to Utilities.

25. Seven tenders (including those of Contour and Utilities) were received at close of the bidding process. The procedure for the evaluation of the tenders involved four steps: step 1- test for eligibility; step 2- test for responsiveness; step 3- test for administrative compliance; step 4- scoring of financial offer, evaluation of points for preferencing and calculating total tender evaluation points to the lowest, ranking tender offers from the highest number of tender evaluation points to the lowest, recommending tenderer with the highest number of tender evaluation points for the award of the contract, unless there are compelling and justifiable reasons not to do so.

26. Table 3 of the Report sets out the criteria considered in the test for eligibility of the bidders. These were listed as, 'paid the tender participation fee payment'; 'STS Association certificate'; 'complies with pricing instruction'; 'attended compulsory clarification meeting'; 'ISO Certificate'; 'references'. The BEC concluded that all bidders met the test for eligibility and accordingly were eligible to proceed to the next stages of the evaluation process.

27. Quite what mechanism was used by the BEC to assess the validity of any of the ISO Certificates is unclear to me. The Municipality's answering affidavit says, "*the BEC was satisfied that the second respondent, by submission of its ISO certificate, had fulfilled the requirement of submitting an ISO certificate, that demonstrates its ability to measure internal process controls related to quality and the measuring of client satisfaction*".

28. The test for responsiveness in Step 2 of the evaluation process involved criteria such as, 'signed and completed form of offer'; 'compliance with eligibility'; 'compliance with the specifications'; 'compliance with the special conditions of contract'; 'compliance with point 1 of additional conditions of tender'.

29. The outcome of this section of the evaluation was recorded in Table 4 of the Report, which stated that all bidders were found to be responsive for further evaluation.

30. As regards the test for administrative compliance in Step 3, it is stated that tenders will be found to be non-compliant if, inter alia: the tenderer has failed to complete and sign and attach requested information to all schedules not excluded in the responsiveness criteria; the tenderer has failed to submit a municipal account of where the head office of the company is registered or in a case where the premise is leased, the tenderer has failed to provide a copy of the lease of the premise; the tenderer has failed to fully complete Schedule 1 and failed to submit a valid tax clearance certificate or tax compliance status pin; the tenderer has failed to submit a certified B-BBEE certificate, QSE or EME affidavit, whereas points were claimed and a copy of the certificate or affidavit was supplied, a certified copy of the B-BBEE certificate, QSE or EME affidavit may be requested.

31. The assessment of the administrative criteria is set out in Table 5 of the Report. It states under schedule 3 (preference points claim form in terms of the preferential procurement regulations of 2017 (MBD 6.1), that all the bidders complied. Utilities claimed 18 points and that Contour claimed 20 points. Schedule 12 of the table dealing with “B-BBEE proof”, records that Utilities had filed a valid B-BBEE sworn affidavit and Contour a valid B-BBEE certificate. Under Notice 2, it was recorded that Contour had submitted an expired tax compliance status pin, however it says this was immaterial for purposes of bid evaluation. Thus, all the bids were found to meet the administrative compliance leg of the evaluation process.

32. With the bidders having been found to be eligible, responsive and administratively compliant, a financial scoring was done in terms of the Preferential Procurement Regulations of 2017. The formula used factored the following: ‘points scored for price of bid under consideration; price of bid under consideration and price of lowest acceptable bid. In addition, each bidder was awarded B-BBEE points depending on its B-BBEE status,

resulting in Utilities receiving 18 points (as B-BBEE Level 2 contributor) and Contour 20 points (as B-BBEE Level 1 contributor). The B-BBEE contributor points were added to the overall scoring of each bidder. The BEC then used the total scores to rank the bids.

33. The outcome of this exercise was that based on the total scores, which were influenced by the B-BBEE points awarded, Utilities ranked first and Contour came second. Consequently, the BEC recommended that the tender be awarded to Utilities, "*for scoring the highest points in terms of preferential procurement regulations contained in the Theewaterskloof supply chain policy*".

34. Acting on the BEC recommendation, the BAC resolved to award the tender to Utilities on the same basis.

Discussion

Compliance with B-BBEE requirements

35. A company's B-BBEE status is one of the factors to be weighed in a bid evaluation process. The B-BBEE score earned by a bidder contributes materially towards the determination of the outcome of a tender process.

36. According to the BEC Report, all the bidders for this tender claimed preferential points for B-BBEE. All the bidders submitted B-BBEE certificates to prove their status, except Utilities which submitted a sworn affidavit.

37. A Qualifying Small Enterprise (QSE), which means a measured entity under the QSE scorecard regime with an annual total revenue of between R10 million and R50 Million, is subject to a B-BBEE verification process (conducted by an accredited verification agency or professional) in order to obtain a B-BBEE certificate.

38. By contrast, a 51% black owned QSE qualifies for a Level 2 B-BBEE status without having to undergo a verification process, but on the strength of a self-assessment produced in the form of a sworn affidavit, on an annual basis, confirming, firstly, its annual total revenue of between R10 million and R50 million and, secondly, its level of black ownership.[5]

39. Utilities took the option to submit a sworn affidavit to prove its B-BBEE credentials for this bid.

40. Contour avers that Utilities' B-BBEE affidavit was invalid and, as such, the Municipality erred in awarding Utilities any preference points for B-BBEE.

41. I have indicated above the proper approach, which is first to establish, factually, whether an irregularity occurred, and thereafter the irregularity must be legally evaluated to determine whether it amounts to a ground of review under PAJA.[6]

42. Upon surveying the sworn affidavit, the following becomes apparent.

43. The deponent to the affidavit is Mr Brian Hill, who declares, *inter alia*, that:

    43.1. he is a "member" of Utilities, a proprietary limited company;

    43.2. the company is 54% black owned as per Amended Code Series 100 of the Amended Codes of Good Practice issued under section 9(1) of the B-BBEE Act;

    43.3. based on the financial statements/management accounts and other information available on the latest financial year-end of 2020, Utilities' annual total revenue was between R10 000 000.00 (ten million rand) and R50 000 000.00 (fifty million rand)

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[5] Codes of Good Practice on Broad-Based Black Economic Empowerment, 2019.
[6] Allpay at para 28.

43.4. the company is at least 51% black owned, thus qualifying it as a Level 2 B-BBEE Level Contributor.

43.5. the sworn affidavit will be valid for a period of 12 months from the date signed by the commissioner of oaths.

44. It is not immediately clear whether the date of 22 April 2022 which appears below the deponent's signature is the same date on which the sworn affidavit was signed by the commissioner of oaths.

45. It is common cause that as a consequence of this declaration, Utilities was awarded 18 points for its B-BBEE status level of contribution.

46. A sworn affidavit of this nature is meant to serve the same purpose as a B-BBEE certificate, which is to provide an assurance of B-BBEE compliance, but without having to incur the cost of a verification agency or professional. This is a special dispensation given to black owned QSEs.

47. Contour avers that given the substantial savings in preparing a B-BBEE affidavit instead of obtaining independent verification, municipalities should be astute when evaluating a bidder's self-assessment for B-BBEE compliance. I agree.

48. Insistence on compliance with process formalities fulfils various purposes including ensuring fairness to participants in the bid process and enhancing the likelihood of efficiency and optimality in the outcome.[7]

49. In terms of the B-BBEE Practice Guide,[8] a non-binding guide issued by the B-BBEE Commission to assist with the interpretation to ensure consistency in the application of the B-BBEE Act, a B-BBEE sworn affidavit is evidence of a measured entity's compliance with the B-BBEE Act over a particular

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[7] Allpay at para 27.

[8] Practice Guide 01 of 2018 published by the B-BBEE Commission entitled, "Determining the validity of a Broad-Based Black Economic Empowerment Verification Certificate, B-BBEE Certificate and Sworn Affidavit" (the B-BBEE Practice Guide"/ "Guide").

period. According to the Guide, such compliance is based on B-BBEE related information of a measured entity in line with the applicable Codes as envisaged in section 9(1) of the B-BBEE Act.

50. The B-BBEE Practice Guide offers some pointers which it considers as key when determining the validity of a sworn affidavit, such as:

50.1. the designation of the deponent as either the director, owner or member must be indicated in order to know that person is duly authorised to depose of an affidavit;

50.2. it should indicate the total revenue for the year under review and whether it is based on audited financial statements or management accounts;

50.3. the date the deponent signed and date of commissioner of oaths must be the same.

51. Utilities' sworn affidavit does not bear distinct dates indicating when each of the respective signatures of the deponent and that of the commissioner of oaths were appended. In its answering affidavit, the Municipality asserts that the BEC had noted that the affidavit had been deposed to before a commissioner of oaths on 22 April 2022. On the face of it, it is unascertainable whether the date that appears on the document was the date on which the deponent signed the affidavit or the date when the affidavit was commissioned or both.

52. Utilities' financial year-end is at end of February. Accordingly, the relevant latest financial year-end would have been 2022. The financial information used to measure the total annual revenue which qualified the company as a Level 2 B-BBEE contributor QSE, in respect to this bid, was sourced from financial year-end of 2020, some two financial years prior.

53. The sworn statement does not say whether financial information referred to was sourced from financial statements (whether audited or not) or management accounts or some other information.

54. At this juncture of the factual enquiry, it is apposite to ask what information Utilities' sworn affidavit was required to convey at the relevant time and whether it did it in fact convey that information.

55. In my estimation, the purpose of the sworn affidavit is to give an assurance of B-BBEE compliance at the relevant point, either at the closing time for receipt of tenders, which in this case was 12h00 on Friday 29 April 2022, or, at the time of the awarding of B-BBEE points, or both. Either way, were Utilities to undergo a B-BBEE verification process, based on the information sourced from the 2020 financials, be found to be B-BBBEE compliant? I think not.

56. What of the warranty in the sworn affidavit that it was valid for a period of 12 months from the date signed by the commissioner?

57. To the extent that the impugned sworn affidavit sought to give an assurance, based on unidentified 2020 financials, that Utilities satisfactorily met the B-BBEE related tender requirements for eligibility, responsiveness and/or administrative compliance, at the relevant point in time, this was misleading.

58. The limited time span of the utility of the sworn affidavit is suggestive of a recognition of the ever-changing nature of the financial information which should underpin B-BBEE compliance.

59. The Municipality acknowledges that, "*the BEC did not go behind these statements in the affidavit*"; that, "*there was no apparent reason for it to have done so*"; and that, "*the second respondent's representations that it was a qualifying QSE (i.e. that its revenue was within the prescribed parameters) were accepted at face value as being true and correct.*"

60. It is small wonder then that the BEC and the rest of the Municipality's supply chain management system failed to pick up the anomalies in the sworn affidavit.

61. In its answering affidavit, Utilities simply says, without more, that "*at the time of the bid submission, only the 2019/2020 annual financial statements were available. The 2020/2021 annual financial statements were signed off only after submission of the bid. Moreover, referring to the 2020/2021 annual financial statement would have made no difference as Utilities' turnover did not exceed R50 million in 2020/2021*".

62. This response does not address the many facets to a B-BBEE sworn affidavit and how these were met at the relevant point in time. None of the financial statements referred to were produced. It is not explained why other, more current, financial information, such as management accounts, was not used. In any event, this explanation was not before the decision-maker at the time of the bid evaluation and was not considered by it.

63. It is uncontroversial that the evaluation of bids by public entities must be done in accordance with the specifications for the particular procurement and the points system as set out in the tender notice and the prescripts of the Procurement Act. A proper evaluation of the contents of a sworn affidavit is essential in order to ensure B-BBEE compliance and equal treatment of all bidders.

64. The role that procedural requirements play in ensuring even treatment of all bidders was dealt with as follows in Allpay:

> *"[23] To the extent that the judgment of the Supreme of Court of Appeal may be interpreted as suggesting that the public interest in procurement matters requires greater caution in finding that grounds for judicial review exist in a given matter, that misapprehension must be dispelled. So too the notion that even if proven irregularities exist, the*

inevitability of a certain outcome is a factor that should be considered in determining the validity of administrative action.

[24] This approach to irregularities seems detrimental to important aspects of the procurement process. First, it undermines the role procedural requirements play in ensuring even treatment of all bidders. Second, it overlooks that the purpose of a fair process is to ensure the best outcome; the two cannot be severed. On the approach of the Supreme Court of Appeal, procedural requirements are not considered on their own merits, but instead through the lens of the final outcome. This conflates the different and separate questions of unlawfulness and remedy. If the process leading to the bid's success was compromised, it cannot be known with certainty what course the process might have taken had procedural requirements been properly observed."

65. I conclude that the contents of the sworn affidavit did not reflect the true B-BBEE status of Utilities at the time of its measure. It failed to fulfil the purpose of a B-BBEE sworn affidavit which, in this case, would have been a self-assessed qualification as an eligible black owned QSE.

66. It follows that the basis upon which the B-BBEE status points were awarded to Utilities was flawed.

67. Consequently, the award of any B-BBEE points to Utilities on the strength of the sworn affidavit constituted a material irregularity which, when legally evaluated, amounts to a ground of review under PAJA.

68. I find the applicant has established that when the BEC and the supply chain management conducted an evaluation of Utilities' B-BBEE sworn affidavit:

    68.1. a mandatory and material condition prescribed by an empowering provision was not complied with (section 2(b) of PAJA);

68.2. relevant considerations were not considered (section 2(e)(iii) of PAJA).

69. The Municipality's failure in the evaluation process renders the decision unconstitutional (section 2(i) of PAJA).

70. Given the conclusion I have reached, that there was a failure of compliance with B-BBEE requirements, it is not necessary to determine the remainder of the issues or the additional grounds in the review application. The finding I have set out above in relation to sections 2(b), 2(e)(iii) and 2(i) of PAJA is dispositive of the matter.

Remedy

71. Contour seeks an order reviewing and setting aside the decision to award the tender to Utilities.

72. It is well recognised that once a ground of review under PAJA has been established, section 172(1)(a) of the Constitution requires the decision to be declared unlawful.[9] I have concluded that a ground of review has been established and the decisions taken consequent thereto to be unlawful.

73. The consequences of the declaration of unlawfulness must then be dealt with in a just and equitable order under section 172(1)(b).[10] Allpay reiterated that section 8 of PAJA gives detailed legislative content to the Constitution's "just and equitable" remedy.[11]

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[9] Allpay at para 25.
[10] Id; Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others [2010] ZACC 26; 2011 (4) SA 113 (CC); 2011 (3) BCLR 229 (CC) (Bengwenyama) at paras 81-3. See also Minister of Health and Another v New Clicks South Africa (Pty) Ltd and Others [2005] ZACC 14; 2006 (2) SA 311 (CC); 2006 (8) BCLR 872 (CC) (New Clicks) at para 19 and De Lange v Smuts NO and Others [1998] ZACC 6; 1998 (3) SA 785 (CC); 1998 (7) BCLR 779 (CC) at para 104.
[11] Section 8(1) of PAJA provides:
"The court or tribunal, in proceedings for judicial review in terms of section 6(1), may grant any order that is just and equitable, including orders—
(a) directing the **administrator**—
(i) to give reasons; or
(ii) to act in the manner the court or tribunal requires;

74. An application was mooted during the hearing to amend the notice of motion in order to seek further relief reviewing and setting aside the resultant contract. This was however not pursued.

75. Contour seeks a substitution order in terms of which the tender is, instead, to be awarded to itself. It argues that this court is in as good a position as the BEC or the BAC to award the tender. It argues further that once the B-BBEE points awarded to Utilities are deducted from the total score, Contour, which was ranked second, scores the highest. It is on that plain basis that Contour seeks the substitution order.

76. *Steenkamp* adopted the following approach towards a consideration of an appropriate remedy in public law:

> *"It goes without saying that every improper performance of an administrative function would implicate the Constitution and entitle the aggrieved party to appropriate relief. In each case the remedy must fit the injury. The remedy must be fair to those affected by it and yet vindicate effectively the right violated. It must be just and equitable in the light of the facts, the implicated constitutional principles, if any, and the controlling law. It is nonetheless appropriate to note that ordinarily a breach of administrative justice attracts public law remedies and not private law remedies. The purpose of a public law remedy is to pre-empt or correct or reverse an improper administrative function. In some instances the remedy takes the form of an order to make or not to make a particular decision or an order declaring rights or an injunction*

(b) prohibiting the administrator from acting in a particular manner;
(c) setting aside the **administrative action** and—
(i) remitting the matter for reconsideration by the administrator, with or without directions; or
(ii) in exceptional cases—
(aa) substituting or varying the administrative action or correcting a defect resulting from the administrative action; or
(bb) directing the administrator or any other party to the proceedings to pay compensation;
(d) declaring the rights of the parties in respect of any matter to which the administrative action relates;
(e) granting a temporary interdict or other temporary relief; or
(f) as to costs."

to furnish reasons for an adverse decision. Ultimately the purpose of a public remedy is to afford the prejudiced party administrative justice, to advance efficient and effective public administration compelled by constitutional precepts and at a broader level, to entrench the rule of law."[12]

77. Section 8 of PAJA provides some "*[e]xamples of public remedies suited to vindicate breaches of administrative justice*"[13], but this is not an exhaustive list. However, section 8 confers on a court a "*generous jurisdiction to make orders that are 'just and equitable'*".[14]

78. Relying on Allpay 2 and other related cases,[15] Utilities submitted that were the court to find one of the grounds of review to have been established, it should not set aside the tender, citing reasons of practicality, the seriousness of the illegalities, prejudice to third parties and the passage of time.

79. Utilities contends that Contour's own bid which was only attached to its replying affidavit, after Utilities and the Municipality had taken the point in their answering papers, was also susceptible to some criticism. The allegation is that Contour's bid documents were either incomplete or replete with irregularities, such that substitution without having ventilated these issues would be inappropriate.

80. The Municipality's stance is that should the court find that a ground of review has been established, the proper course to follow would be a remittal, noting

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[12] Steenkamp at para 29.
[13] Steenkamp at para 30.
[14] Id. Quoted with approval in Bengwenyama Minerals (Pty) Limited and Others v Genorah Resources (Pty) Ltd and Others 2011 (4) SA 113 (CC) at para 83.
[15] Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others (No 2) [2014] ZACC 12; 2014 (6) BCLR 641 (CC); 2014 (4) SA 179 (CC) (17 April 2014) (Allpay 2); Chairperson: Standing Tender Committee and Others v JFE Sapela Electronics (Pty) Ltd and Others (511/2004) [2005] ZASCA 90; 2008 (2) SA 638 (SCA) ; [2005] 4 All SA 487 (SCA) (26 September 2005) at para 29; Esorfranki Pipelines (Pty) Ltd v Mopani District Municipality (CCT 222/21) [2022] ZACC 41; 2023 (2) BCLR 149 (CC); 2023 (2) SA 31 (CC) (30 November 2022) at para 24; Millennium Waste Management (Pty) Ltd. v Chairperson of the Tender Board: Limpopo Province and Others (31/2007) [2007] ZASCA 165; [2007] SCA 165 (RSA); [2008] 2 All SA 145; 2008 (2) SA 481; 2008 (5) BCLR 508; 2008 (2) SA 481 (SCA) (29 November 2007) at para 27.

that a case implicating an order of substitution requires courts to be mindful of the need for judicial deference,[16] and their obligations under the Constitution.[17]

81. The Constitutional Court in *Trencon* provided the following guidance:

> *"[48] A court will not be in as good a position as the administrator where the application of the administrator's expertise is still required and a court does not have all the pertinent information before it. This would depend on the facts of each case. Generally, a court ought to evaluate the stage at which the administrator's process was situated when the impugned administrative action was taken. For example, the further along in the process, the greater the likelihood of the administrator having already exercised its specialised knowledge. In these circumstances, a court may very well be in the same position as the administrator to make a decision. In other instances, some matters may concern decisions that are judicial in nature; in those instances – if the court has all the relevant information before it – it may very well be in as good a position as the administrator to make the decision."*

82. In this case, the reasons advanced by both the Municipality and Utilities for substitution included the following:

82.1. the nature of this bid is highly technical, complex and polycentric;

82.2. the decision requires expertise and technical knowledge;

82.3. although Contour's bid came second in the scoring, it did not follow that it would have been awarded the tender;

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[16] Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others (CCT 27/03) [2004] ZACC 15; 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC) (12 March 2004) at para 46, citing with approval: C Hoexter "The Future of Judicial Review in South African Administrative Law" (2000) 117 *SA Law Journal* 484 at 501-2.

[17] Trencon Construction (Pty) Limited v Industrial Development Corporation of South Africa Limited and Another (CCT198/14) [2015] ZACC 22; 2015 (5) SA 245 (CC); 2015 (10) BCLR 1199 (CC) (26 June 2015) (Trencon) at para 46.

82.4. Contour's bid documents may themselves be subject to criticism. I note that the BEC did flag that Contour's tax compliance certificate had expired on 8 June 2022, although this was not deemed to be material enough to exclude the bidder from the evaluation process. I would not be in a position to assess this aspect, for instance, on available information.

83. I am cognisant of the conditions in the tender notice, *inter alia*, that tenders would be evaluated in terms of price and preference, and that the Municipality was not obliged to accept the lowest tender. These would be best assessed by the relevant functionary.

84. The Municipality acknowledged in its heads of argument the limited timespan of the Utilities' contract, which commenced on 1 December 2022 and is due to run until 30 June 2025, and that remittal would still, at this juncture, be a just and equitable remedy for the Municipality to make a fresh decision.

Conclusion

85. I conclude that the allocation of B-BBEE points to Utilities on the strength of the sworn affidavit that was presented to the Municipality was irregular. The resultant decision to award the tender to Utilities stands to be reviewed and set aside.

86. This court is not in as good a position as the administrator to finally decide the award of the tender. Having regard to the reasons set out above, I hold the view that the decision of the administrator is not a foregone conclusion. Accordingly, remittal is the appropriate course to follow.

Order

1. The decision taken by the first respondent to award Tender FIN 03/2022/23 (the tender) to the second respondent, is reviewed and set aside.

2. The tender is remitted back to the Theewaterskloof Municipality for reconsideration in terms of the provisions of section 8 (1)(c)(i) of PAJA, within a period of 90 days.

3. The first and second respondents shall be jointly and severally liable for the applicant's costs of suit, on the "C" scale.

T.S. SIDAKI
Acting Judge of the High Court

APPEARANCES

For the Applicant:	Adv JG Dickerson SC et
	Adv J Nicholson
Instructed by:	Shepstone Wylie Attorneys, Durban
For the First Respondent:	Adv N de Jager
Instructed by:	Fairbridges Wertheim Becker, Cape Town
For the Second Respondent:	Adv V Maleka SC et
	Adv E Cohen
Instructed by:	Smit Sewgoolam Inc, Johannesburg
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