IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MAKHANDA)

CASE NO.: 1086/2019

In the matter between:

MAXIMUM PROFIT RECOVERY (PTY) LTD	**Applicant**
And	
SAKHISIZWE LOCAL MUNICIPALITY	**1st Respondent**
ANDREWS INCORPORATED	**2nd Respondent**

JUDGMENT

ZONO AJ:

Introduction

[1] The applicant seeks in its amended notice of motion the following relief:

> *"1.1 That this application be heard as an urgent applicant in terms of the provisions of Rule 6(12) of the Uniform Rules of court and that the necessary condonation be granted to the applicant in respect of the non-compliance with the prescribed time limits, forms and service.*

> 1.2 *That the applicant be exempted, insofar as might be necessary, from any obligation of first exhausting any internal remedy as contemplated in section 7(2) (c) of the Promotion of Administrative Justice Act 3 of 2000;*
>
> 1.3 *That the decision of the first respondent to award Tender SLM/SCM/22/23: tender for the appointment of Service provider for the provision of revenue expert services for a period of three years ("Tender") to the second respondent be declared constitutional invalid and set aside.*
>
> 1.4 *That any service level agreement concluded between the first and second respondents be set aside.*
>
> 1.5 *That the Tender be awarded to the applicant.*
>
> 1.6 *That the first respondent be ordered to pay applicant's costs, alternatively and only in the event that the application is also opposed by the second respondent that the first and second respondent jointly and severally be ordered to pay the applicant's costs.*
>
> 1.7 *Further and/or alternative relief*". (sic)

[2] The application is opposed only by the first respondent, the Municipality. In so doing the Municipality has delivered its notice to oppose, answering affidavit and annexures. The applicant delivered its replying papers.

[3] On 17th September 2024 the matter came before court as an urgent application and the matter was consequently postponed to the opposed court for hearing on 10th October 2024. When the matter came before court on 10th October 2024, it came not as an urgent matter but as an opposed matter. It was in fifth of the four opposed matters on the day. The parties agreed that the matter would not be argued as an urgent matter but only as an opposed matter, as a result none of the parties argued urgency. The enrolment of the matter as an urgent matter was argued only in so far as it related to the costs.

[4] The Municipality published an invitation to tender under reference number SLM/SCM/22/2022/23. A successful tenderer would be appointed to provide revenue expert services to the Municipality. The applicant and the second respondent, Andrew Inc were among the tenderers who responded to the invitation. The Municipality ultimately appointed the second respondent Andrew Inc. The applicant holds a view that such appointment was constitutionally invalid, hence this application.

[5] The Municipality in its opposition of this application raised a point *in limine,* which it considered to be dispositive of the matter. The Municipality seeks dismissal of applicant's application on the basis that the applicant has failed to exhaust internal remedies contemplated both in section 7(2) of Promotion of Administrative Justice Act 3 of 2000 (PAJA) and section 62 of Local Government: Municipal Systems Act 32 of 2000 (Municipal Systems Act). I therefore wish to deal with this point before all else.

<u>Duty to exhaust internal remedies</u>

[6] The starting point should be the provisions of section 7(2)(a) of PAJA which provide as follows:

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

[7] The internal remedies provided for by PAJA often takes the form of an appeal and do not usually involve court of law, although there are certainly

exceptions to this[1]. Section 62 of Municipal Systems Act[2] provides for appeal process to be followed in deserving cases. Section 62(1) provides that:

> *"62. (1) A person whose rights are affected by a decision taken by a political structure, political office bearer, councillor or staff member of a municipality in terms of a power or duty delegated or sub-delegated by a delegating authority to the political structure, political office bearer, councillor or staff member, may appeal against that decision by giving written notice of the appeal and reasons to the municipal manager within 21 days of the date of the notification of the decision."*

[8] Whenever domestic remedies are provided by the terms of a statute or regulation it is necessary to examine the relevant provisions in order to ascertain how far, if at all, the ordinary jurisdiction of the court is excluded or deferred.[3] Court's jurisdiction may only be excluded if that conclusion flows, by necessary implications from the particular provisions under consideration. Necessary Implications can seldomly arise when the aggrieved person's very complaint is the legality or fundamental irregularity of the decision which he seeks to challenge[4].

[9] The Constitutional Court[5] remarked as follows about court's duty to interprete statutes:

> "*28. A fundamental tenet of statutory interpretation is that the words in a statute must be given their ordinary grammatical meaning, unless to do so would result in an absurdity. There are three important interrelated riders to this general principle, namely:*

[1] Cora Hoxter: Administrative Law in South Africa, 2nd Ed, Page 580-581.
[2] Local Government: Municipal Systems Act 32 of 2000.
[3] ***Welkom Village Management Board v leteno*** 1958 (1) SA 490 at 502; Yvonn Burns, Administrative Law under Constitution, 3rd Edition, Page 474.
[4] Yvonne Burns: Administrative Law under the 1996 Constitution, 3rd Ed Page 474.
[5] ***Cools Ideas 1186 CC v Hubbard and Another*** 2014 (4) SA474 (CC); 2014 (8) BCLR 869.

> (a) *that statutory provisions should always be interpreted purposively;*
>
> (b) *the relevant statutory provision must be properly contextualised; and*
>
> (c) *all statutes must be construed consistently with the Constitution, that is, where reasonably possible, legislative provisions ought to be interpreted to preserve their constitutional validity. This proviso to the general principle is closely related to the purposive approach referred to in (a).”*

[10] Application of Section 62 of the Systems Act is limited to a challenge of exercise of delegated and sub delegated power. It does not apply to the exercise of original power. The provision has to be examined side by side the legislative power exercised to give rise to the impugned decision. The provision or the enactment that is the source of the power needs scrutiny.

[11] It is not in dispute that the decision taken by the Municipal Manager was taken in terms of Regulation 29(1)(b) of the Supply Chain Management Regulations. Supply Chain Management Regulations were made in terms of section 168 of Act 56 of 2003, (MFMA)[6]. They were made *inter alia* regarding *“any matter that may be prescribed in terms of this Act; Financial Management and internal control and .... A framework regulating the financial commitment of Municipalities and Municipal entities in terms of public- private partnership agreement.”* The decision regarding financial commitment of the Municipality and Financial Management and internal control relates to

[6] Local Government: Municipal Finance Management Act NO 56 of 2003.

Municipal Manager's duties and powers set out in section 64 and 97 of MFMA.

[12] Regulation 29(1) provides thus:

> *"29(1) A bid adjudication committee must—*
>
> *(a) consider the report and recommendations of the bid evaluation committee; and*
>
> *(b) either—*
>
> *(i) depending on its delegations, make a final award or a recommendation to the accounting officer to make the final award; or*
>
> *(ii) make another recommendation to the accounting officer how to proceed with the relevant procurement."*

[13] It is apposite to quote the following remarks made by Langa CJ[7]

> *"89. Fourthly, the nature and importance of the delegator and that of the delegee are also relevant. Before I turn directly to that matter, it is as well to note that accountability is a central value of our Constitution. This means that our law must be developed and interpreted in a manner that ensures that all bodies exercising public power are held accountable. However, to my mind, it also means that courts should be slow to infer the delegation of power to bodies that cannot be held directly accountable through ordinary political processes."*

[14] Delegation of power implies that there is a delegating authority (delegator) and the authority to whom the power is delegated (delegee). There is no textual or evidential suggestion that the Municipal Manager, when appointing a successful tenderer is exercising a delegated power. On the

[7] ***AAA Investment (Proprietary) Limited v Micro Finance Regulatory Council and Another*** 2006 (11) BCLR 1255 (CC); 2007 (1) SA 343 (CC) Para 89.

contrary, when the Municipal Manager is appointing the tenderer to provide revenue expert services he is exercising power of revenue management conferred upon him in terms of section 64 and 97 of MFMA. The Municipal Manager, as the accounting officer of the Municipality, when appointing a tenderer to provide revenue expert services is effectively ensuring that there are effective and implementable revenue collection systems in place[8].

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[8] Section 64 of Local Government: Municipal Finance Management Act 56 of 2003 provides that:

"*(1) The accounting officer of a municipality is responsible for the management of the revenue of the municipality.*

(2) The accounting officer must for the purposes of subsection (1) take all reasonable steps to ensure-

(a) that the municipality has effective revenue collection systems consistent with section 95 of the Municipal Systems Act and the municipality's credit control and debt collection policy;

(b) that revenue due to the municipality is calculated on a monthly basis:

(c) that accounts for municipal tax and charges for municipal services are prepared on a monthly basis, or less often as may be prescribed where monthly accounts are uneconomical;

(d) that all money received is promptly deposited in accordance with this Act into the municipality's primary and other bank accounts;

(e) that he municipality has and maintains a management, accounting and information system which-

(i) recognises revenue when it is earned;

(ii) accounts for debtors; and

(iii) accounts for receipts of revenue;

(f) that the municipality has and maintains a system of internal control in respect of debtors and revenue, as may be prescribed;

(g) that the municipality charges interest on arrears, except where the council has granted exemptions in accordance with its budget-related policies and within a prescribed framework: and

(h) that all revenue received by the municipality, including revenue received by any collecting agent on its behalf, is reconciled at least on a weekly basis."

[15] Accordingly, the powers exercised by the Municipal Manager as an accounting officer are in their nature original powers. MFMA and Supply Chain Management Regulations create original powers. By virtue of the fact that the Regulations aforesaid are made in terms of section 168 of MFMA they form part of the same Act. Regulations are legislative instruments[9].

[16] The Supreme Court of Appeal[10] had an occasion of considering the status of Regulations and rules on the one hand, policy determinations on the other. Harms JA had this to say:

> "7…… *I prefer to begin by stating the obvious, namely that laws, regulations and rules are legislative instruments whereas policy determinations are not. As a matter of sound government, in order to bind the public, policy should normally be reflected in such instruments. Policy determinations cannot override, amend or be in conflict with laws (including subordinate legislation). Otherwise the separation between legislature and executive will disappear. Compere Executive Council, Western Cape Legislature, and Others v President of the Republic of South Africa and Others [1995] ZACC 8; 1995 (4) SA 877 (CC) par 62. In this case, however, it seems that the provincial legislature intended to elevate policy determinations to the level of subordinate legislation, but leaving its position in the hierarchy unclear…"*

[17] There is plethora of authorities to the effect that the power of the Municipal Manager to award a tender to a successful tenderer is an original power, which is regulated by the MFMA and the regulations made in terms thereof[11]. Section 62(1) provides that an appeal is only available in circumstances where a decision is taken based on a delegated or sub delegated authority. The provisions of section 62 do not apply in the present

[9] ***Head of Department, Department of Education, Free State Province v Welkom of Education High School and Another; Head of Department, Department of Free State Province v Harmony High School and another*** 2013 (9) BCLR 989 (CC); 2014 (2) SA 228 (CC) Para 217

[10] ***Akani Garden Route (Pty) Ltd v Pinaccle Point Casino (Pty) Ltd*** 2001 (4) SA 501 (SCA) Para 4

[11] **Maximum Profit Recovery (Pty) Ltd v Inxuba Yethemba Local Municipality and others** (17/2020) [2021] ZAECGHC 11 (16 February 2021) Para 17-23

circumstances as the decision to appoint the second respondent was not taken under a delegated power[12]. Accordingly, Municipality's point *in limine* cannot be upheld and must therefore fail. This now paves way for determination of the merits of the case.

Factual Background

[18] With regard to the merits of the case the applicant makes the following submissions: Pursuant to tender invitation the applicant submitted its tender. Preference point system 80/20 would be applicable to the tender under reference No. SLM/SCM/22/23. The tender would be evaluated in the following three stages:

18.1 Stage 1: Administrative requirements;

18.2 Stage 2: a functionality assessment where tenderers were required to score at least 70%; and

18.3 Stage 3: the point scoring in terms of the 80/20 preference point system.

[19] The applicant failed to comply with functionality criterion relating to a director who is a legal practitioner and a registered conveyancer. However, the applicant contends that such failure would not make any difference as it would be awarded full points on all the remaining functionality criteria. The applicant however makes a point that it would not score the full points in respect of Locality. It would be entitled to be awarded 4 out of 10 points. It further makes a point that even if it is assumed that the second respondent scored 10 out of 10 points in respect of Locality and 10 out of 10 points in

[12] ***Tekoa Consulting Engineers (Pty)Ltd v Alfred Nzo District Municipality and others*** 2022 (3) ALL SA 892 (ECG) Para 42.

respect of BBBEE requirements, the applicant would still have outscored the second respondent. The applicant concludes by saying it would have been awarded 94 points and the second respondent 60.72 points.

[20] The legal basis for applicant's claim is primarily section 217 of the Constitution and section 2(1)(f) of PPPFA[13]. Section 217 of the Constitution provides that:

> *"(1) When an organ of the 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 fair, equitable, transparent, competitive, and cost-effective*."

[21] PPPFA is the legislation contemplated in section 217 (3) of the Constitution. Section 2(1) (f) of the Act provides as follows:

> "(*1) An organ of state must determine its preferential procurement policy and implement it within the following framework:*
>
> .....
>
> *(f) the contract must be awarded to the tenderer who scores the highest points, unless objective criteria in addition to those contemplated in paragraphs (d) and (e) justify the award to another tenderer;"*

The applicant contends that a formular of 80/20 preference point system is in terms of Preferential Procurement Regulations, 2002. If the principles of Section 217 of the Constitution, Section 2(1)(f) of PPPFA and the Regulations were correctly applied, the applicant would have been awarded the tender.

[13] Preferential Procurement Policy Framework Act 5 of 2000.

[22] The letter communicating a decision awarding a tender to the second respondent was ultimately given to the applicant, but it does not embody the reasons for the decision. However, the Bid Evaluation Report respectively signed on 09th May 2024 and 21st June 2024 contains the reasons for Bidder being rejected. The rejected bidder referred thereto is the applicant. The reason for applicant's rejection is couched in the following terms:

> "*The bidder did not meet the minimum functionality of 70%.*"

[23] The Bid Evaluation Report demonstrates the following record:

Max Prof Maximum Profit Recovery	: 8.05%
Duchame Asset Management	:11.5%
Ntloedibe Attorneys Inc	:12%
Andrews Inc	:12%

These percentages represent the rate chargeable by the tenderer on the collected amount.

[24] With regard to the applicant, the same report shows the following as the basis for rejection or disqualification:

"*Company expertise*	*:25*
Team expertise	*:15*
Methodology	*:20*
Total	*:60*"

It is not in dispute that the tenderer would pass the functionality assessment if it scores 70 points. According to the above table the applicant scored 60 points, whereas the second respondent scored 90 points. The applicant accepts the point scoring in respect of the demonstrated criteria, namely company expertise, team expertise and methodology and approach. They gave the total points of 60 points.

[25] A point of dispute is with regard to functionality criterion 4 which required that at least one tax practitioner in the tendering company must have been registered with the recognised controlling body. The applicant was irregularly awarded (0) zero points out of 10 points in respect of his functionality criterion. The applicant's dissatisfaction arises from the fact that it has five (5) tax practitioners in its employ and they are all registered with the recognised controlling body. It is reiterated that at least one tax practitioner must be in the employ of the tenderer. The applicant contends that it should have scored the maximum of ten (10) points on this one.

[26] Functionality criterion 5 required that the service provider or tenderer to attach a methodology or implementation plan as part of tender documentation. For this, a tenderer could score 30 points. The applicant contends that it satisfied this requirement and therefore was entitled to 30 points for it. Surprisingly the applicant was awarded 20 points. No reasons are stated for a decision not to award 30 points to applicant. The record is silent about the reasons for not awarding the maximum points. The applicant concludes by saying that 10 points were irrationally deducted

from applicant in respect of functionality criterion 5. It was irrationally not awarded 10 points.

[27] The applicant contends that the Municipality was clearly bias against it or at least reasonably suspected of bias[14]. This point is based on the fact that all members of Bid Evaluation Committee (BEC) and Bid Adjudication committee (BAC) overlooked the five relevant documents included in the applicant's tender (functionality criterion 4) and there is no explanation or reasons for such conduct. That conduct is also procedurally unfair.[15] Relevant consideration in the form of applicant's documents relating to applicant's tax practitioners were not considered. Decision to award tender to the second respondent was taken in bad faith and/or arbitrarily or capriciously[16].

[28] As stated above the Municipality opposed the application. In his opposing affidavit, the Municipal Manager states that the scope of the tender was broad and it sought wide ranging expertise consisting of tax, debt collection and legal expertise. He confirmed that the tender was for revenue expert services. Two tenderers were disqualified for failure to comply with a specific tender condition.

[29] The applicant achieved 60 points on functionality criteria and its tender could not be considered further since 70 points was minimum score for

[14] Section 6(2)(a)(iii) of Promotion of Administrative Justice Act 3 of 2000.
[15] Section 6(2) (c) of Promotion of Administrative Justice Act 3 of 2000.
[16] Seton6(2) (e) (iii) (v) and (vi) of Promotion of Administrative 3 of 2000.

further consideration of the tender. Importantly the Municipality accepts that the applicant was entitled to 70 points on the functionality criteria not 60 points. However, the Municipality contends that its failure to award 70 points to the applicant was an honest mistake and further states that it was a mistake of fact. It further states that even if the applicant was awarded the minimum of 70 points, it would not have awarded the tender to the applicant because the applicant failed to meet the material requirement of the tender which is that, one of its directors had to be a legal practitioner and conveyancer, and also that its failure to award 70 points to the applicant was not material. The Municipality emphasised the importance of the legal expertise as if other requirements of the tender were less material and important than this one.

[30] The Municipality strangely shifts the blame to the Bid Evaluation Committee (BEC) which did not note applicant's documents relating to tax practitioners registered with a recognised tax controlling body. It states that members of the BEC did not individually and separately examine applicant's tender bundle. They examined the documents collaboratively. It is not clear what difference will that make, as their independent individual minds and exercise of discretion or power was required. The Municipality acknowledges the perpetuation of BEC failure by the Bid Adjudication Committee (BAC).

[31] The Municipality disputes that it was bias when it was considering applicant's tender application. Its failure to consider applicant's documents relating to tax practitioners does not establish bias. Failure is a conduct

motivation of which is not dealt with or explained by the Municipality. On the other hand, the Municipality categorically states that the applicant was not entitled to be awarded a tender for the same reason that the applicant did not satisfy or meet the material condition relating to the legal practitioner and conveyancer. It is in dispute that if the applicant was scored correctly it would achieve more than 70 points in respect of the functionality assessment. The Municipality states that if scored correctly the applicant would have been awarded exactly 70 points in respect of functionality assessment. The Municipality denies that the decision referred to above was procedurally unfair. The mistake was one of fact not a procedural fairness irregularity.

[32] The applicant was scored 20 points in respect of methodology and approach aspect of functionality criteria. The Municipality states that applicant's methodology was limited to the tax and debt collection and it omitted to deal with the legal advisory aspect of the tender. It was on this basis that the applicant was awarded 20 points. The fact that the award of a tender to the applicant is a foregone conclusion if the Municipality had correctly evaluated applicant's tenders is denied. No exceptional circumstances had been shown by the applicant that would entitle it to a substitution relief. The Municipality contends that for this court to award a tender to the applicant would mean that the court would be deleting a material condition relating to legal expertise and would be remaking the tender specifications.

Discussion

[33] It is common cause that applicant's documents relating to tax practitioners registered with the recognised controlling body were not considered. It is also a common cause that at least one tax practitioner registered with a recognised controlling body was required. The maximum points to be awarded for this functionality criterion was 10 points. This functionality criterion is a condition or requirement of the tender. It therefore became a relevant consideration of the tender.

[34] The facts reveal that the applicant was scored zero (0) points in respect of this criterion whereas it had submitted (5) five certificates of its members or employees who are tax practitioners registered with the recognised controlling body. The Municipality states that the omission of applicant's documentation relating to tax practitioners registered with the recognised controlling body was a mistake. A person who attests to that mistake is the Municipal Manager who was neither a member of BEC nor BAC. He was clearly not involved when the so-called mistake was taking place. He did not commit the mistake. However, Ms Kholiwe Nogaga who is a member of BEC repeats Municipal Manager's words that failure to note applicant's documents aforesaid was a bona fide mistake. She, like the Municipal Manager, does not take the matter any further. It is unknown how that mistake occurred; how applicant's documents escaped all four members of the BEC etcetera. Other members of BEC did not depose to any affidavits. It is unknown why they overlooked applicant's documentation aforesaid. No member of BAC has deposed to any affidavit to explain their failure to consider applicant's documents. The allegations in this regard are purely

inadmissible hearsay evidence[17]. It was expected of all members of BEC and BAC to give their account of their failure to consider applicant's relevant documents. The reason they were more than one is simply that their individual independent minds were fundamentally important to eliminate corruption and these kinds of unexplained and inexplicable mistakes.

[35] In *Kalil NO*[18] Leach JA had this to say:

> *"30……Thus where, as here, the legality of their actions is at stake, it is crucial for public servants to neither be coy nor to play fast and loose with the truth. On the contrary, it is their duty to take the court into their confidence and fully explain the facts so that an informed decision can be taken in the interests of the public and good governance. As this court stressed in Gauteng Gambling Board and another v MEC for Economic Development, Gauteng, our present constitutional order imposes a duty upon state officials not to frustrate the enforcement by courts of constitutional rights."*

[36] The organs of state are constitutionally enjoined to assist and protect the courts to ensure their effectiveness[19]. The explanation given by the Municipality for its failure to consider relevant documents of the applicant amounts to no explanation at all and offers no reasons for such failure. The Municipality has failed to take this court into its confidence about their failure to consider applicant's documents relating to tax practitioners. The Municipality as an organ of state[20] has dismally failed to discharge its constitutional duty to assist this court to ensure its effectiveness. In the final analysis I come to a conclusion that no explanation at all has been given

[17] Section 3 of Law of Evidence Amendment Act 45 of 1988.
[18] ***Kalil NO and others v Mangaung Metropolitan Municipality and others*** 2014 (3) ALL SA 291 (SCA); 2014 (5) SA 123 (SCA) Para 30.
[19] Section 165(4) of the constitution provides that: "*Organs of state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts.*
[20] Section 239 of the Constitution.

for Municipality's failure to consider applicant's documents relating to its tax practitioners. There is no explanation or reason given as to how the so-called mistake occurred. It must be borne in mind that the primary reason for members BEC to be at least four (4) is that there should not be corruption and mistake of this nature occurring. If one member of the committee does not see, at least the other members must see it. Their duty is to complement each other. If they fail to perform their core duty of collating tenderers documents, members are enjoined to explain such failure.

[37] As a parting shot, it is hard to comprehend how is it possible that five (5) certificates in applicant's tender documents were missed to be seen by members of BEC and BAC respectively; when second respondents tax practitioner's certificates were seen by all of them without any hustle. I therefore find merit in applicant's complaint about Municipality's failure to consider applicant's tender documents relating to tax practitioners. This now drives me to the relevant provisions of PAJA.

[38] Section 6(2)(e) (iii) of PAJA provides that:

"(2) A court or tribunal has the power to judicially review an administrative action if—

> …….
>
> *(e) the action was taken—*
>
> > *(iii) because irrelevant considerations were taken into account or <u>relevant considerations were not considered;"</u>*

[39] On the facts of this matter, the sole jurisdictional fact, precondition or condition precedent to the taking of decision reviewing an administrative action by this court is that - there must be an action taken because "*relevant considerations were not considered.*" What triggers the power of this court to judicially review an administrative action is the existence of relevant considerations that were not considered by the administrator. I have outlined above that certificates of tax practitioners showing that they are registered with the recognised controlling body, were a relevant consideration for determination of applicant's and all tenderers' tender applications or documents. Those certificates were a condition or requirement of tender.

[40] I have alluded above to the fact that there is no explanation given by the Municipality to explain their conduct to overlook applicant's relevant documents or to explain the mistake that led to the documents to be overlooked. The court is in the dark as to what caused the mistake and how the mistake has been caused. That would assist this court to assess honesty, bona fides or otherwise of the mistake. In the absence of an explanation as to its occurrence the court is hamstrung to arrive at a decision that the mistake was an honest or bona fide mistake.

[41] The decision on the success or otherwise of the tender, in the absence of an explanation as to how and what caused the relevant documents to be overlooked, which is applicant's tax practitioners certificates, was not only capricious but also arbitrary[21]. Capriciousness and arbitrariness of the

[21] Section 6(2)(e) (iv) of PAJA.

decision is yet another ground of review of administrative action. The grounds of review provided for in section 6(2) (e) (iii) and 6(2) (e) (vi) of PAJA are intertwined in these circumstances. One feeds off the other.

[42] I conclude that applicant's application succeeds on the ground that Municipality's failure to consider applicant's documents relating to tax practitioners is reviewable under section 6(2)(e)(iii) of PAJA. As a consequence of that a decision on the tender, obviously disqualifying the applicant and contemporaneously qualifying the second respondent was taken arbitrarily and capriciously and such decision is reviewable under section 6(2)(e) (vi) of PAJA. In the light of the fact that Municipality's decision is offensive to the above statutory provisions, it is as a corrollary unlawful and deserves only one fate, a fate of being reviewed and set aside.

[43] There is yet another reason for Municipality's decision to be reviewed and set aside. The applicant was scored 20 points and not the maximum points of 30 points on the functionality criterion 5 dealing with methodology and approach. No reasons at all accompanying that decision were provided. It must be borne in mind that a decision is rationalized and justified by the reasons that underpinned it.[22] Furnishing of reasons for administrative action is a necessary condition for the determination of whether or not the administrative action is authorised by law, is reasonable, rational and not arbitrary[23]. Jafta JP (as he then was) in *Mafongosi*[24] had this to say:

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[22] ***Sikutshwa v Member of Executive Council for Social Development Eastern Cape*** 2009 (3) SA 47 Para 67-69.
[23] ***Transnet v Goodman Brothers (Pty) ltd*** 2002 (1) SA 583 at 869.
[24] ***Mafongosi & others v United Democratic Movement and others*** 2002 (3) SA ALL SA 271 (TK) Para 15.

> *"15. An administrative decision can only be justified by the reasons underpinning it. It is those reasons which would show whether the decision is rational or not. If it is not, it cannot be allowed to stand and must be set aside."*

[44] A decision without reason underpinning it are irrational and cannot be allowed to stand and it must accordingly be set aside. On the facts of this case the applicant was, without any reason, disentitled of 10 points in respect of functionality criterion 5 dealing with methodology and approach. It is that irrational decision that led to a decision to award the tender against the applicant. Synergy between the two decisions clearly demonstrates that a decision not to award the applicant 10 points has a direct bearing on the decision not to award the tender to the applicant. The two decisions are connected or rebated. That all happens without reasons.

[45] However, the Municipality attempts to furnish reasons in its answering affidavit. Those are *"ex post facto"* reasons. New reasons are not true reasons for the decisions[25]. It would be unfair, and in any event be defective, to allow *"ex post facto"* reasons to be part of a review application that was brought on narrow grounds. The applicant came to court with the reason which was conveyed to it as being the basis on which the decision not to award the tender to the applicant was taken[26].

[46] The reason for Municipality's decision not to ward the tender to applicant is that *"the bidder did not meet the minimum functionality of 70%."* The

[25] ***Van Zyl and Others v Government of Republic of South Africa and others*** 2008 (1) ALL SA 102 (SCA); 2008(3) SA 294 (SCA) Para 53.
[26] ***Jamica 17 (Pty) Ltd v West Coast District Municipality*** 2006(1) SA 116 (C) at Para 11-12.

effect of that is that the applicant did not score or reach on functionality assessment the minimum threshold of 70% for it to proceed to the next stage, which is point scoring in terms of 80/20 preference point system. The applicant was disqualified at functionality assessment stage. It stands to reason that the applicant did not participate or compete at stage 3 which is point scoring stage. I have found above that Municipality's failure to award full points in respect of functionality criterion 5 relating to methodology and approach was irrational and reviewable under section 6(2) (e) (iv) of PAJA. Had the applicant been duly awarded full point in respect of functionality criterion 5 relating to methodology and approach, it would have proceeded to the final stage of point scoring.

[47] As a result of the Municipality's failure to appropriately award points to the applicant, the second respondent did not compete with anyone at stage 3. The second respondent was awarded tender at 12% rate. It is important to mention that the applicant tendered at 8.5% of the amount collected. This brings into sharp focus the provisions of section 217 of the Constitution.

[48] Section 217 of the Constitution deals with the Procurement. Subsection 1 provides that:

> "*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.*"

[49] Had the applicant been allowed to compete at stage 3 which is point scoring stage, second respondent's tender would not have been costs-effective.

Second respondent's tender was at 12% whereas applicant's tender was at 8.5%. As already adumbrated above, the applicant was unfairly disqualified at stage 2 which is functionality assessment stage and did not participate in stage 3 which is point scoring stage. The tender process was unfair and not competitive especially at stage 2 & 3. The applicant was not advised of the processes leading up to the decision awarding tender to the second respondent and the decision not to award the tender to the applicant. The applicant did not know the reason for it not to be awarded the full point on methodology and approach until that decision was taken. The applicant pertinently sought the Municipality's decision and same was not given immediately after it was requested. It was given after numerous requests had been made. This clearly demonstrates that the process of tender was not transparent.

[50] Consistently with the provisions of section 217 of the Constitution, Section 2(1)(f) of PPPFA provides that:

> "*(1) An organ of state must determine its preferential procurement policy and implement it within the following framework:*
>
> …….
>
> *(f) the contract must be awarded to the tenderer who scores the highest points, unless objective criteria in addition to those contemplated in paragraphs (d) and (e) justify the award to another tenderer."*

The formular to be applied is provided for by section 2 PPPFA[27]. The formular was correctly applied. However, a determination on the tenderer who is scored the highest points is not founded on reason, alternatively it is not borne out by a proper examination of facts, information or documents

[27] Section 2(1)(b)(i) and (iii) of PPPFA.

that served before BEC and BAC. Accordingly, the process of awarding the tender was irrational.

[51] The tender process was perceived to be bias. This perception arises from the Municipality's failure to consider applicant's documents relating to tax practitioners. The Municipality's response to the fact that a clear information relating to applicant's tax practitioners was overlooked, was that the mistake to overlook the information about applicant's tax practitioners was immaterial and could not have led to the applicant having been awarded the tender. The applicant would not be awarded the tender because it did not meet a material requirement of the tender, namely that one of its directors had to be a legal practitioner and registered conveyancer. The requirement of a legal practitioner was a requirement of a tender in the same way as the requirement of the tax practitioner. The Municipality avers in the founding affidavit as follows:

> *"9. It is clear from the above that the scope of the tender was broad and it sought wide ranging expertise consisting of tax, debt collection and legal expertise. The objectives of the tender and the scope of work appear at page Rule 53 record"* sic.

There is absolutely no less important requirement between the tax practitioner's requirement and legal practitioner requirement.

[52] The Constitutional Court[28] had an opportunity of saying the following:

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[28] ***Head of Department, Department of Education, Free State Province Welkom High School and another, Head of Department, Department of Education, Free State Province v Harmony High School and another*** 2013 (9) BCLR 989 (CC); 2014 (2) SA 228 (CC) Para 86.

> *"86. The rule of law does not permit an organ of state to reach what may turn out to be a correct outcome by any means. On the contrary, the rule of law obliges an organ of state to use the correct legal process."*

The process must be fair and it must ensure that all the relevant information is taken into account. Unfortunately, the same documents that were overlooked by the Municipality when dealing with applicant's tender were considered when the Municipality was dealing with second respondent's tender. That conduct is unfair and it offends the provisions of section 217 of the Constitution.

[53] Whilst the process was tainted with unfairness it was also perceived to be bias[29] and for that reason it is reviewable. Section 217 of the Constitution contemplates a competitive process. Fairness and competitiveness of the process entails treating of the participants on the same footing. Fairness and competitiveness of the process entails equal treatment of the participants.[30]The power had to be exercised without fear, favour or prejudice. Failure to adhere to these principles more often than not can lead to a reasonable apprehension of bias on the part of the organ of stage. There is an inescapable synergy between the principles of fairness, competitiveness and bias. Lack of fairness and competitiveness in the process can ineluctably be linked to the element of bias by an organ of state.

[54] On the facts of this case I have found above that the Municipality drove an unfair and uncompetitive process. Lack of fairness and competitiveness in

[29] Section 6(2)(a)(iii) of PAJA.
[30] Section 9 of the Constitution.

the process gave rise to a reasonable apprehension of bias on the part of the Municipality. It is so especially that the Municipality is unable to explain how the failure to award points in relation to the functional criterion dealing with applicant's methodology and approach on the one hand, on the other tax practitioners registered with the controlling body occurred. The application for review and set aside of the Municipality's decision to award tender for provision of revenue experts services succeeds.

[55] If an award is tainted by illegality, it may not be made an order of court and may not be enforced in our courts. It is a basic principle of our law that a court can never land its aids to the enforcement of an illegal act. An act that has been performed in violation of a statutory prohibition may generally, have no legal consequences.[31]All unfair processes in Procurement matters offend the provisions of section 217 of the Constitution. Unfairness taints the legality of the process. Therefore, this court cannot enforce such an unfair act. Condoning an illegal act and failure to set it aside is tantamount to the enforcement of the same illegal act.

[56] The law does not countenance an ongoing illegality. Courts have a duty to ensure that the doctrine of legality is upheld. The state organ and its officials should obey the law to ensure good and fair administration. Accordingly, this court must refuse to countenance an ongoing illegality.[32]Judicial review is concerned with determining whether the impugned acts were made within the ambit of the empowering legislation, and in accordance with the precepts of such law, in particular and

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[31] ***Cools Ideas 1186 CC v Hubbard and another*** 2014 (4) SA 474 (CC) Para 77.
[32] ***Lester v Ndlambe Municipality*** 2014 (1) ALL SA 402 (SCA); 2015 (6) SA 283 (SCA) Para 23, 26, 27 and 28.

Constitution, in general. The merits are only relevant to the extent that they establish procedural failure. It is immaterial whether or not the decision was wrong[33]. There is, therefore, no excuse that the Municipality has acted unfairly and in contravention of section 217 of the Constitution.

Substitution Order

[57] The remaining relief I need to deal with is the one that seeks this court to award the tender to the applicant. Whether or not this court does have power to award the tender is subject of the discussion herein below.

[58] The applicant seeks a specific order that this court awards a tender to it. This order is sought without any relief relating to point scoring. Assuming that this court has power to award tender, but tenders are awarded to the highest scoring tenderers[34]. Precedent to awarding a tender is a step of point scoring. Point scoring is a precondition that must exists before a power to award tender is exercised. It is that step that the Municipality has not correctly and legally taken. That is an administrative step in the doorman of the Municipality. A tender cannot be awarded unless this step has properly been taken.

[59] Under common law, necessary preconditions that must exist before an administrative power can be exercised are referred to as jurisdictional facts. In the absence of such preconditions or jurisdictional facts the

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[33] ***MEC for Environmental Affairs and Development Planning v Clarison's CC*** 2013 (6) SA 235 Para 18.
[34] Section 2(1)(f) of PPPFA.

administrative authority effectively has no power to act at all[35]. Jurisdictional Facts refer broadly to preconditions or conditions precedent that must exist prior to the exercise of the power and procedure to be followed, or formalities to be observed, when exercising the power: substantive jurisdictional facts in the case of preconditions, and procedural jurisdictional facts in the case of procedural requirements and formalities. These facts are jurisdictional because the exercise of the power depends on their existence or observance as the case may be[36].

[60] Having stated above that an award of tender necessarily requires that the authorised authority must have awarded the deserving tenderer highest points before an award of tender is made. Awarding of points is a condition precedent to the exercise of power to award a tender. Put differently, one cannot award a tender without the necessary scores having been awarded. No tender can validly be awarded without points having been properly awarded to the tenderer. If authority is needed for this proposition, I rely on section 2(1)(f) of PPPFA.

[61] The central complaint by the applicant is that it was not awarded the points which were duly deserved by it. The failure to award the points was at the instance of the Municipality. Those points remained not awarded. In some instances, the applicant contends that it was not correctly scored by the Municipality. Had it been correctly scored it would have scored or obtained higher points. During argument of this case it transpired that the applicant

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[35] ***Kimberly Junior School and another v Head of the Northern Cape Education Department and others*** 2010 (1) SA 217 (SCA); 2009 (4) ALL SA 135 (SCA) Para 11.

[36] ***MEC for Health, Eastern Cape and another v Kirland Investments (Pty) Ltd*** 2014 (5) BCLR 547 (CC); 2014 (3) SA 481 (CC) Para 98; Cora Hoaxter : Administrative Law in South Africa, 2nd Edition, Page 290.

had not been correctly scored in the aspects complained of. It will therefore be premature of this court to award a tender without points being properly awarded to the applicant. It is the duty of the organ of state to correctly award points. This is an administrative function that has to be undertaken by the Municipality. Courts are vested only with the judicial authority[37].

[62] Awarding of tender without proper scoring of points would be very much unlawful. It would be unlawful because it would be antithetical to the imperative provisions of section 2(1) (f) of PPPFA. The use of the word "*Must*" in the provision is a strong indication that the provision is peremptory. The provision is couched in peremptory terms and it requires exact compliance[38].

[63] This court was only asked to award the tender to the applicant. No relief is sought for the scoring of points to tenderers. Even if there was such a relief sought I would remain without authority to score or award points to the tenderers. This court would not have power to award points to the tenderers. This court would not be limited to the applicant's tender for a proper consideration of an award of tender, it would also have to consider what points other tenders, especially the second respondent, would have been entitled to for a proper determination of the tender award. It is important to note that the Municipality contends that the applicant would not have been entitled to an award of tender on account of Municipality's failure to consider applicant's documents relating to tax practitioners

[37] Section 165(1) of the Constitution.

[38] ***Maguma v Station Commander Fleet Street Police Station and others*** (EL683/2023) [2024] ZAECELLC 8 (19 March 2024) Para 51.

registered with the recognised controlling body[39]. The relief relating to the award of a tender can therefore not succeed.

[64] The applicant concede that it would not have scored the points in respect of Locality. In the same vein the applicant alleges that in this area the second respondent would have scored the maximum points. The record reveals that the second respondent scored 90 points. The Municipality contends that the applicant would not have been entitled to the tender as it would have obtained only 70 points. Applicant's suggestion that the second respondent would have scored 60.72 points whereas the applicant would have scored 94 points is contradicted. Effectively point scoring is in dispute. It is a different case where the parties are of the same mind regarding the points that the parties would have been entitled to. Accordingly, substitution order is not competent if the points the parties are entitled to are in dispute.

[65] Baxter: Administrative Law page 305 puts it thus:

> "*Without statutory authority, the court may not venture to question the merits or wisdom of any administrative decision that may be in dispute. If the courts were to do this, it would be usurping the authority that has been entrusted to the administrative body by the empowering legislation.*"

The primary duty of the courts is to ensure that those who are charged with the duty to perform public functions in terms of the law act within the parameters of the law. Beyond the common law, Separation of powers is an even more vital tenet of our Constitutional democracy. This means that

[39] ***Plascon-Evans Paints Ltd v Van Riebeek Paints (Pty) Ltd*** 1984 (3) SA 623 (A) 634-5.

the Constitution requires courts to ensure that all branches of government act within the law. However, courts in turn must refrain from entering the exclusive terrain of the executive and the legislative branches of government unless the intrusion is mandated by the Constitution itself[40].

[66] The Constitutional Court in the Economic Freedom Fighters (EFF)[41] quoted with approval the Certification case[42] where it was said:

> "*The principle of separation of powers, on the one hand, recognises the functional independence of branches of government. On the other hand, the principle of checks and balances focuses on the desirability of ensuring that the constitutional order, as a totality, prevents the branches of government from usurping power from one another. In this sense it anticipates the necessary or unavoidable intrusion of one branch on the terrain of another. No constitutional scheme can reflect a complete separation of powers: the scheme is always one of partial separation".*

[65] In *Doctors for life*[43] the Constitutional Court propounded the principle of separation of powers as follows:

> "37. *The constitutional principle of separation of powers requires that other branches of government refrain from interfering in parliamentary proceedings. This principle is not simply an abstract notion; it is reflected in the very structure of our government. The structure of the provisions entrusting and separating powers between the legislative, executive and judicial branches reflects the concept of separation of powers. The principle "has important consequences for the way in which and the institutions by which power can be exercised." Courts must be conscious of the vital limits on judicial authority and the Constitution's design to leave certain matters to other branches of government. They too must observe the constitutional limits of their*

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[40] ***National Treasury and Others v Opposition to Urban Tolling Alliance and Others*** 2012 (6) SA 223 (CC); 2012(11) BCLR 1148 (CC) Para 44.

[41] ***Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and others*** 2016 (5) BCLR 618 (CC); 2016(3) SA 580(CC) Para 91.

[42] ***Certification of the Constitution of the Republic of South Africa,*** 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC) Para 161.

[43] ***Doctors for Life International v Speaker of the National Assembly and others*** 2006 (12) BCLR 1399 (CC); 2006 (6) SA 416 (CC) Para 37.

authority. This means that the judiciary should not interfere in the processes of other branches of government unless to do so is mandated by the Constitution."

[67] In any event, this court would not have had power to award tender to the applicant. It is so that the competency to award tender is a preserve of the organ of state[44]. On the authority OUTA and Doctors for Life International referred to above a substitution order can be granted if it is mandated by the Constitution. Section 8(1) (c) of PAJA provides:

"8. (1) 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—

………

(c) setting aside the administrative action and—

(i) …….

(ii) in exceptional cases—

(aa) substituting or varying the administrative action or correcting a defect resulting from the administrative action;"

[68] On the facts of this case there is nothing exceptional to lead this court to grant an order substituting a decision of the administrative body. It will not be just and equitable to usurp the powers of the Municipality in this regard. However, I am inclined to remit this matter for proper point scoring exercise and fresh decision taken by the Municipality.

[44] Section 217 of the Constitution; Section 2(1)(f) of the PPPFA.

Conclusion

[69] Having dismissed Municipality's point *in limine,* I considered the merits of the case. I have found that the impugned Municipality's decision to award tender to the second respondent is reviewable and should be set aside. Although the relief relating to the award of tender could not be granted, the applicant remained substantially successful.

[70] The practical effect of setting aside only the decision is that the proceedings from which the decision emanates are still extant before the Municipality's committees. It is so because they have not been challenged in the instant proceedings or at all. The best order to make in those circumstances is to remit the matter for a lawful decision to be taken.[45] This court is the repository of a remedial power to remit the matter for reconsideration by the Municipality and its committees with or without directions[46]. This approach is not unusual in the courts of this country.[47]This court has power to make just and equitable relief[48]. The adverse effect of not giving directions to the Municipality and its committees is that it will stymie the proceedings before it. The tender process has to be concluded expeditiously.

Costs

[71] With regard to costs I have found that the applicant has been substantially successful. I see no reason why the general rule that costs follow the result

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[45] ***Boqwana v Road Accident Fund Appeal Tribunal and others*** (3823/2018) [2019] ZAECMHC 67 (12 November 2019) Para 16.

[46] Section 8(1) (c) (i) of PAJA.

[47] ***RAF v Duma and others*** 2013 (6) SA 9 (SCA); ***May v Health Professor's Council of South Africa and others*** (1996/2016) [2017] ZAGPHC 739 (28 November 2017).

[48] Section 172(1)(b) of the Constitution.

cannot be applied. Accordingly, the Municipality is liable to pay all applicant's costs, such costs to include costs of two Counsel where employed.

[72] The applicant approached this court on urgent basis and the matter was enrolled for hearing on 17th September 2024. On 17th September 2024 the matter was postponed by consent between the parties and the date of 10th October 2024, which was the date of hearing of this matter as an opposed matter, was arranged in consultation with the Senior Judge. Apparently, it was the choice of both parties that the matter be heard as an opposed matter on an "*so called expidited date*" of 10th October 2024. No other reason is apparent from the papers before me, save to state that Municipality's answering affidavit was served upon the applicant's attorneys on 02nd September 2024; and the Municipality's record in terms of Rule 53(3) of the Uniform Rules of Court (URC) was filed on 12th September 2024. The parties apparently considered a holistic and convenient hearing of the matter. I consider it expedient that those costs should follow the result.

<u>Order</u>

[73] In the circumstances I would make the following order:

73.1 The first respondent's decision to award Tender SLM/SCM/22/2022/23: for the appointment of service provider for the provision of revenue expert services for a period of three years, to the second respondent is hereby declared constitutionally invalid and accordingly set aside.

73.2 That any service level agreement concluded between the first and second respondent (if any) is hereby set aside.

73.3 The matter is hereby remitted back to the first respondent for reconsideration.

73.4 The first respondent is directed forthwith to reconsider its scores and points awarded to the applicant and appropriately award to applicant correct points in all the cases it has not appropriately awarded points, such to include but not limited to the functionality criterion relating to applicant's tax practitioners registered with the recognised controlling body on one hand, and methodology and approach on the other hand.

73.5 The first respondent is hereby ordered to pay costs of this application which costs shall include costs of the 17th September 2024 and costs of two Counsel where employed.

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A.S ZONO

ACTING JUDGE OF THE HIGH COURT

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Matter heard on	**:**	**10 October 2024**
Delivered on	**:**	**18 March 2025**