



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

Case Number: 2024-142404

REPORTABLE

In the matter between

RAALEBORG ENVIRONMENTAL (PTY) LTD

APPLICANT

and

CAPE WINELANDS DISTRICT MUNICIPALITY

FIRST RESPONDENT

CITY MANAGER OF

CAPE WINELANDS DISTRICT MUNICIPALITY

SECOND RESPONDENT

JUDGMENT

Date of hearing: 18 February 2025, 17 March 2025

Date of judgment: 5 May 2025

BHOOPCHAND AJ:

1. The Court heard the application and a counterapplication. The parties moved the urgent Court on 18 February 2025 to hear the matter. The applications did not

meet the threshold for urgency, but the hearing was expedited to 17 March 2025. The facts that inform the applications are largely common cause.

2. On 29 November 2024, Raalenborg Environmental (Pty) Ltd ('the Applicant') issued an urgent application to, among others, review and set aside the Cape Wineland's District Municipality's ("the Municipality") repudiation and withdrawal of the award of a tender (T2023/23) to the Applicant. The Applicant tendered for the operation and management of the Municipality's regional waste disposal facility at Worcester for approximately R270 million over ten years.

3. The Municipality advertised the tender on 28 July 2023. The Applicant submitted its bid on 6 October 2023. The Municipality received seven bids in total. The Municipality requested extensions of the bid validity period on three occasions: 26 February 2024 until 30 April 2024, 25 April 2024 until 30 June 2024, and 25 June 2024 until 30 August 2024. The bidders agreed to the extensions.

4. On 26 August 2024, the Applicant was informed by the Municipality's Supply Chain Management Practitioner ('SCM practitioner'), Ms Niemand ('Niemand'), writing for the Municipal Manager, that the Municipality had conditionally awarded the tender to the Applicant.¹ The unsuccessful bidders were notified simultaneously of the decision. The letter states, "Letters of notification were sent to all unsuccessful bidders during the week following the approval of this bid by the Bid Adjudication Committee" ('BAC'). The award of the tender was subject to a 14-day objection period as per the Supply Chain Management ('SCM') Regulation 49, as well as to 21 days for appeals as per section 62 of the Municipal Systems Act 32 of 2000 ('MS Act') against the decision made. The Applicant was informed that they would be officially notified as the successful bidder after the expiry of the relevant periods.

5. On 17 September 2024, Niemand, writing for the Municipal Manager, informed the applicant that the Municipality had awarded the tender to the Applicant. The award was further conditional on the Applicant complying with the conditions, requirements, and specifications as set out in the tender document (the contract). By

¹ This is how the letters written by Niemand were signed off, i.e., "For Municipal Manager"

signing the form of offer and acceptance, the Applicant agreed to perform all the obligations and liabilities under the contract and comply with all the terms and conditions of the contract. A fully completed copy of the contract was attached to the letter. The Applicant signed the contract on 18 September 2024.

6. Nine days later, on 27 September 2024, Niemand sent an email addressed to Leon Grobbelaar ('Grobbelaar'), the Applicant's director, regretting that the award letter had been withdrawn due to an administrative error. At the Applicant's request for an explanation, Siphokazi Manel ('Manel'), the Senior Manager of Acquisitions and a member of the BAC, responded on 30 September 2024. The email was copied to Ronel Leo, the Deputy Director of Supply Chain Management and sent to Grobbelaar and Niemand. The Municipal Manager was not copied on this email. Manel explained that the award letter was sent out prematurely and incorrectly due to an administrative error. Manel explained that the BAC considered and recommended the tender, but the Municipality's Accounting Officer did not award it. The validity period of the tender had lapsed on 30 August 2024. In terms of the applicable legislation, the Municipality could not legally proceed with making the award, as it would be unlawful and constitute irregular expenditure. Manel advised the Applicant that the Municipality was taking immediate steps to rectify the situation. The tender would be cancelled and readvertised as soon as possible. They were conducting a review to ensure that the correct procedures were followed.

7. On 1 October 2024, Grobbelaar wrote to the Municipal Manager. He emphasised that the correspondence of 26 August 2024 and 18 September 2024 emanated from the Municipal Manager, who is the Municipality's Accounting Officer. The contract was signed on behalf of the Municipality on 26 August 2024. Grobbelaar informed the Municipal Manager that the Applicant considered the letters a repudiation. The Applicant intended to accept the repudiation and recover damages of R61 778 838. The damages were calculated as 25% of the contract price. The Applicant invited the Municipality to reconsider its position by 4 October 2024 and suggested how the matter could be resolved. The Applicant preferred that the contract, signed on 16 August 2024, by F van Eck, the Municipality's Executive Director of Technical Services, before the expiry of the validation period, remain.

8. On 10 October 2024, the Municipal Manager, Henry Frederick Prins ('Prins'), responded to the Applicant and a letter sent to the Municipality by the Applicant's lawyers. Prins explained that the tender's validity period was 180 days.² The validity period is when the bidders' offers remain open for acceptance. Prins referred to caselaw that spoke of the validity period as one of the fundamental rules of tendering, the period within which the process should be finalised.³ He stated that by the time the tender's validity period had expired, the Accounting Officer had made no decision, and the validity period had not been extended for a second time.⁴ The Accounting Officer could no longer make an award as the tender process was complete, and resuscitating it was impossible. A new bid process had to be initiated to ensure that all interested parties were provided a further opportunity to tender.

9. Prins referred to further caselaw, which dealt with the legal consequences of a public body's failure to accept a tender within the stipulated validity period.⁵ He reproduced the four interrelated propositions the Supreme Court of Appeal referred to favourably in another case considered before deciding the issue.⁶ The decision to award a tender is an administrative action, and the Promotion of Administrative Justice Act 3 of 2000 ('PAJA') applies. Once a contract has been entered into following the award of the tender, the law of contract applies. A contract entered into contrary to prescribed tender processes is invalid. Even if no contract is concluded, all steps taken following a process which does not comply with the tender processes are also invalid.⁷

10. Prins referred to section 29(1)(b)(i) of the Supply Chain Management Regulations.⁸ He stated that a BAC must, depending on its obligations, make a final award or a recommendation to the Accounting Officer, who then makes a final

² Part B: General Conditions and Information of the tender document

³ *Tactical Security Services CC v eThekweni Municipality* 2017 JDR 1558 (KZD), *Defensor Electronic Security (Pty) Ltd v Centlec SOC Ltd and Another* (3372/2021) [2021] ZAFSHC 315 (3 December 2021)

⁴ Prins is incorrect, as the tender validity period was extended thrice. He seemed to distinguish the Municipal Manager from the Accounting Officer in his letter.

⁵ *City of Ekurhuleni Metropolitan Municipality v Takubiza Trading & Projects CC and Others* (846/2021) [2022] ZASCA 82; 2023 (1) SA 44 (SCA) (3 June 2022) ('*Takubiza Trading*')

⁶ *Telkom SA v Merid Training (Pty) Ltd and others; Bihati Solutions (Pty) Ltd v Telkom SA and others (Telkom SA)* [2011] ZAGPPHC 1

⁷ *Takubiza Trading* supra at para 9

⁸ General Notice 868, GG 27636, 30 May 2005

award. In terms of section 5(2) (a) of the Supply Chain Management Regulations, an Accounting Officer may not subdelegate the power to make a final award above R10 million (VAT included). A tender falling into that category serves in the BAC only for recommendation purposes.

11. Prins then explained that, unfortunately, partly due to an administrative oversight, it was mistakenly assumed that the BAC awarded the tender. The award letters were erroneously sent to the Applicant, and the subsequent agreement was signed. At the time, the Accounting Officer considered the recommendation by the BAC to make an award, the validity period had already expired, and the Accounting Officer was no longer entitled to make any award. Relying on *Takubiza Trading*, Prins informed the Applicant that the agreement entered into was invalid. The contract between the Municipality and the Applicant was contrary to the prescribed tender processes.

12. The Applicant contended that it was Prins who had extended the validity period to 30 August 2024. The Applicant referred to the extension letters that Niemand signed for the Municipal Manager. The Applicant asserted that it is unfathomable that Prins was not acquainted with the tender process and the roles and authority of the Accounting Officer and the BAC, under sections 5(2)(a) and 29(1)(b)(i) of the SCM regulations. The Applicant submitted that a municipality does not have the authority to correct its own administrative errors and acted unlawfully in doing so, to the Applicant's severe prejudice and detriment. The Respondents should have initiated a legality review of their administrative oversight, incorrect procedure, or decision.

13. The Applicant contended that Prins had a duty of care to ensure that the applicable procedural steps were properly taken and that the tender was properly awarded by 30 August 2024, which the Applicant maintained had been done. The Municipal Manager should have ensured proper compliance with the Municipality's procurement policies. The tender was properly awarded to the Applicant, and the terms of the subsequent agreement concluded should bind the Respondents. The Applicant submitted further that there had been substantial compliance on the

Respondents' part and that they should be bound by the subsequent agreement concluded.

14. Prins deposed to the Respondents' answering affidavit. The content accorded with the tenor of the correspondence between the Applicant, Niemand, Manel, and him with a few nuances. Prins contended that the BAC passed a resolution recommending that he, as Municipal Manager, award the Applicant the tender to operate and manage the Municipality's waste disposal facility. He contended that Niemand's conduct in erroneously informing the Applicant of the BAC's decision and providing the Applicant with a signed contract from the Municipality was unlawful, irrational, and *ultra vires* the applicable legislation governing the procurement of goods and services in the Municipality. He stated that the validity period had expired when the BAC's recommendation served before him.

15. Prins contended that the Applicant had insisted on specific performance despite the ostensible contract and the purported award being unlawful and invalid. The Municipality did not accept that the Applicant was entitled to institute the application as it was bad in law. The Municipality was determining the correct course of action when the Applicant launched this application. The Municipality had no option but to nullify Niemand's actions and/or review and set aside the ostensible tender award and all administrative acts purportedly concluded.

16. Prins explained that the Bid Evaluation Committee ('BEC') convened, considered the bids, and recommended to the BAC to consider and recommend to the Accounting Officer that this tender be awarded to the Applicant, subject to section 33 of the Municipal Finance Management Act ('MFMA'). Prins acknowledged that he is the Municipality's Accounting Officer under the MFMA and that the Applicant's bid offered the lowest market-related price. The BAC convened to consider the BEC's recommendation on 1 July 2024. The BAC directed the BEC to explain why it had excluded Khabokedi Waste Management (Pty) Ltd, another of the bidders, and recommended the Applicant. On 26 July 2024, the BEC, after considering the BAC's enquiry, recommended to the BAC once again that it award the tender to the Applicant, subject to section 33 of the MFMA and the Municipal Council adopting a resolution in which it approved the entire contract exactly as it was to be executed.

On 23 August 2024, the BAC convened and recommended that the tender be awarded to the Applicant, subject to section 33 of the MFMA.

17. On the day the BAC awarded the tender to the Applicant, it awarded five other tenders. After the meeting, Manel, who acted as the BAC's secretary, went to Niemand to inform her of the outcome of the BAC's deliberations. Niemand sits opposite the room where the BAC deliberates. Niemand handles most of the Municipality's supply chain management and administrative correspondence. Prins reiterates that due to an inadvertent administrative error, Niemand misunderstood Manel to mean that the tender be awarded to the Applicant rather than that it had to serve before the Municipal Manager who would award the tender. Niemand had explained that she did not know the BAC had not awarded the tender and could not do so as a matter of law. Prins asserted that Niemand's error was understandable given that the Municipality rarely awards tenders above R10 million. Niemand obtained Van Eck's signature to the contract based on the same error. The Municipality had not made the award, and there was no compliance with section 33 of the MFMA. Manel sent the BAC's signed approvals to Niemand on 17 September 2024. Manel informed Niemand on the same day that the tender still had to be approved by the Municipal Manager. Niemand confirmed that she did not see Manel's email advising her that the tender had to be approved by Prins. Niemand proceeded on 18 September to inform the Applicant that the Municipality had finally awarded the tender to it.

18. Prins alleged that a hard copy of the BEC and BAC recommendations was delivered to his office on 19 September 2024 for his final consideration and award. Prins stated he does not sit in the same building as Niemand and Manel. He is not privy to or involved in the BEC or BAC process. He relies on and acts upon written recommendations received from the two committees. He realised that the bid was only valid until 30 August 2024 when he began reading the recommendations. He sought a legal opinion by referring the documents to the Municipality's head of legal services, Sarah Sanders ('Sanders').

19. Sanders advised Prins on 26 September 2024 that there was no valid tender and the process had concluded, albeit unsuccessfully. She advised him that he could

not award the tender to the Applicant. Prins states that he was advised on 30 September by Ms du Raan-Groenewald, the Chief Financial Officer, that Niemand had erroneously sent out the award notifications to the Applicant. Manel's email of 30 September to the applicant followed. Prins states that his letter of 10 October 2024 was an attempt to avoid litigation and legal costs and to settle the issue with the Applicant.

20. In its replying affidavit, Grobbelaar reiterated that on each occasion a request for an extension was made, the requests were made by Niemand for and on behalf of the Municipal Manager. The Applicant contended that the documents were in template form, and although physically signed by Niemand, it was intended to be from the Municipal Manager. F Van Eck was part of the BAC committee, which on 23 August 2024, resolved that the Municipal Manager was required to award the tender to the Applicant. Grobbelaar challenged the Municipal Manager's contention that the Municipality rarely handled tenders over R10 million. He referred to a tender awarded to Burger & Wallace Construction for constructing a landfill in Worcester. The tender was awarded in March 2024, six months before the Applicant received its notification of the tender award. That letter was also signed by Niemand and not Prins.

21. The Applicant asserted that a Supply Chain Management Practitioner oversees, manages, and executes procurement and supply chain activities. Niemand is expected to have a sound knowledge of all relevant MFMA supply chain management regulations. Prins did not take issue with the letters sent to the unsuccessful bidders. The Applicant noted that the Municipality did not allege that Niemand acted outside the scope of her employment terms and conditions or that she acted 'on a frolic of her own'. The municipality's case is that the tender's award arose through an administrative error. The Applicant contended that Prins had employed Niemand as SCM practitioner and having allowed her to act in that manner she did and impliedly created and established the impression and made the representation to the parties including the Applicant that when Niemand purported to act in the way she did, her actions were the actions of the Municipal Manager. In the alternative, Niemand acted within the course and scope of her conditions of employment. In a further alternative, the Applicant contended that the Municipal

Manager having known the fact that the tender, a purported rarity in the Municipality could only be awarded by him, should have been more involved in the process, and ensured that any correspondence emanating from the Municipality in respect of the tender were prepared and signed by him, alternatively should have contained some disclaimer as to Niemand's lack of authority and should have approached the awarding of the tender with the required degree of urgency to ensure that the award of the tender was made before the termination of the tender validity period.

22. Having allowed Niemand to have acted in the manner that she did, the Municipal Manager created and established the representation that the Municipal Manager had awarded the tender to the Applicant and that all internal processes of the Municipality had been duly complied with, specifically regarding the tender validity period on 30 August 2024. The representations to the knowledge of the Municipal Manager were false in that he at all relevant stages was aware, alternatively should reasonably have been aware that Niemand signed the various documents and correspondence carrying with it binding legal consequences and that unless told otherwise, third parties such as the Applicant would assume and accept that the documents and/or correspondence emanated from the Municipal Manager and not from Niemand. The representation was designed and intended to mislead third parties such as the Applicant, alternatively had the intended or unintended consequences of third parties being addressed by Niemand and /or addressing correspondence to Niemand, received communications from and or were communicating with the Municipal Manager and not Niemand.

23. The Applicant, having laboured under the representations described above and understanding therefrom, acted to its detriment in that, bearing in mind the approaching expiry tender validity period on 30 August 2024, the Applicant did not question the correspondence of 26 August 2024 and was deprived of an opportunity to ensure that the required steps that the Municipal Manager should have undertaken were undertaken timeously.

24. The Applicant contended that the Respondents should be estopped from denying the tender award to the Applicant on 26 August 2024. The Applicant contended that the Municipal Supply Chain Management Policy of the Municipality,

specifically clause 5(2), and the purported non-compliance are of no moment and do not constitute a material deviation from the applicable legislative processes. The purported non-compliance did not compromise the fair, equitable, transparent and cost-effective requirements of section 217 of the Constitution. This is so given that the tender conditions provided that an award would be made to the highest scoring tenderer. As the Applicant scored the highest, the Municipal Manager had no discretion but award the tender to the Applicant. The Applicant contended that a refusal to abide by or carry out a deviation from the recommendations of the BAC and BEC would have resulted in a contravention of the provisions of section 217 of the Constitution.

25. The Applicant then addressed the Respondents' reliance on section 33 of the MFMA. There was no confirmation or resolution from the Municipal Council, nor had there been publication before the ostensible conclusion of the contract. The Applicant asserted that the purported irregularities, as far as Niemand and the confirmation provided by her on 26 August 2024, extend only to the granting of the award. Suppose the Court were to find that the tender was timeously awarded, i.e., before the expiration of the validity period. In that case, the non-compliance with section 33 does not invalidate the awarding of the tender. The tender validity period does not extend to the conclusion of the contract. The contract was not required to have been concluded within the 180 days initially set and extended to 30 August 2024. The only aspect that needed to have been concluded before 30 August 2024 was the acceptance of the Applicant's bid, i.e., the awarding of the tender. The conclusion of the contract would have been competent at any time after granting the tender and would still comply with, among others, section 33 of the MFMA.

26. The Applicant contended further that the intended contract and the terms and conditions would have been tabled before the council for public comment before the tender had been advertised. The Municipality would have had to budget for the expense and comply with section 33 of the MFMA before advertising the tender and inviting tenderers. As the Municipality did not refer to the compliance with section 33 by itself during the tender process, the Applicant contended it was an afterthought.

27. The Applicant states that the relief claimed by the Municipality, as far as the review is concerned, is sought without the Municipality having filed the record of proceedings. The Applicant states that examining every meeting in which the tender was an agenda item would be particularly interesting. The Applicant contends that under section 172 (1) (b) of the Constitution, the appropriate order would be to compel the Municipality to conclude the intended and required contract with the Applicant. Alternatively, the Applicant would be entitled to a review of the decision not to conclude the intended contract with the Applicant. If there were no compliance with section 33, then the Applicant would be entitled to an order compelling the Municipality to do all such things and take all the steps required to comply with section 33 of the MFMA and have the contract subsequently concluded.

28. The Applicant filed its amended notice of motion simultaneously with the replying affidavit. It contended that the proposed way forward suggested by the Municipality was untenable and unacceptable. The suggestion that a new tender process would be fair to all parties was risible. Nothing about the tender process remained a secret. One of the annexures records the Applicant's total bid price, including VAT. The competing bidders in the next round could adjust their tender amounts to match or even beat the Applicant's bid. The prejudice suffered by the Applicant is a clear and unequivocal violation of section 217 of the Constitution. An organ of state that contracts for goods and services must follow a fair, equitable, transparent, competitive and cost-effective system. The Applicant's tender was scrutinised twice by the BEC and once by the BAC, after which it was recommended to the successful bidder.

29. The Applicant asserted that an internal administrative failure did not automatically invalidate the awarding of a tender and contract that was concluded properly. It argued that there was substantial compliance with the prescribed legislation, and a procedural defect should not avoid enforcing the contract. A municipality cannot unilaterally declare its administrative actions void. An administrative decision, even if alleged to be defective, remains valid until set aside by a Court. The municipality's assertion that it could nullify Niemand's actions without a Court order is unlawful and constitutes impermissible self-help. If the Respondents genuinely believed that the award was unlawful, they were duty-bound to approach

the court immediately for a legality review rather than unilaterally withdrawing the award and attempting to invalidate a contract that had already been concluded. The Municipality only resorted to review proceedings after the Applicant instituted its application. The timing of the review indicates that The Respondents are pursuing a defensive measure, rather than a genuine concern about legality. The review application is not a *bona fide* attempt to rectify an administrative mistake, but rather an attempt to avoid compliance with an existing contract.

30. The Applicant sought multiple forms of relief in its amended notice of motion. The first included a declaration that the tender was duly awarded to the Applicant, the subsequent contract concluded between the Applicant and the Municipality is valid and binding on the Municipality, and the latter is directed to give effect thereto. The Applicant sought two alternatives to the declaratory order. The Respondents are directed to concerning the intended contract, take all such steps anticipated under section 33 of the MFMA, alternatively that the Municipality's failure to have considered and made a decision following the BAC's recommendations dated 23 August 2024, before the expiry of the tender validity period is reviewed and set aside under section 6(2)(g) of PAJA (the administrative action concerned consisted of a failure to take a decision). The Applicant then sought a remedy under section 8(1)(c)(ii) of PAJA for the Municipal Manager's failure to have acted and made a decision of replacement and substitution with a decision awarding the tender to the Applicant. As an alternative remedy under section 8(1)(c)(i) of PAJA, the Applicant sought the remittal of the tender to the Municipality for consideration and the making of a decision within a period to be determined by the Court. As a further alternative, the Applicant requested an extension of the tender validity period under section 172(b) of the Constitution.

31. In its counterapplication, the First Respondent pursued a declaration that the Municipality's ostensible award of the tender to the Applicant as per the Municipality's letters dated 26 August 2024 and 17 September 2024 is void, invalid, and of no effect, alternatively, reviewing and setting it aside. The Municipality also sought a further declaration that the contract concluded on 31 August 2024 is void, invalid, and of no effect, or to review and set it aside.

32. Prins deposed to the founding affidavit in the counterapplication. He was advised that the Municipality could challenge the application collaterally. The ostensible contract was concluded in breach of the procurement legislation. Prins labelled Niemand's actions as unauthorised, unlawful, and ultra vires the MFMA, and the Municipality's Supply Chain Management Policy, thus in breach of section 217 of the Constitution. Niemand's actions were void and unlawful. The BAC had not awarded the tender to the Applicant as it had no power to make the award. The conclusion of the contract was equally invalid as it followed Niemand's unlawful and invalid conduct relating to the tender award. There was no confirmation or resolution from the Municipal Council, nor was there publication before the ostensible conclusion of the contract under section 33 of the MFMA.

33. Prins explained that he never withdrew the tender or the award, as the Applicant alleged. The award never took place, and the tender process ended unsuccessfully. Prins contended that the Applicant is the incumbent service provider and will not be prejudiced financially. It will be entitled to submit a bid for a new tender process that the Municipality intends to commence once the matter is finalised.

34. The Applicant contended that the Municipality cannot collaterally challenge its own decision while simultaneously seeking judicial review. The Municipality should not have waited for the Applicant to bring its review application, nor wait for the Applicant to seek enforcement. The counterapplication was only initiated after the Applicant sought specific performance, indicating it is a defensive strategy rather than a *bona fide* review. A self-review must be brought within a reasonable time, and the Municipality failed to act promptly despite knowing of the alleged irregularities before litigation commenced. The Municipality cannot retroactively disown its own administrative actions to escape contractual obligations.

35. The Applicant contended that section 33 of the MFMA did not prohibit the contract from being awarded. It merely required additional oversight for financial planning. Any failure to comply with section 33 is an internal governance issue which does not automatically render the contract void. The Municipality should have remedied any non-compliance through proper internal procedures rather than

attempting a unilateral withdrawal of the tender. If there was a failure in delegation or internal approvals, it is solely the Municipality's responsibility. The legislative framework cannot support the Municipality's attempt to invalidate the contract. The award was properly concluded, and any procedural defects did not justify its withdrawal.

36. The Applicant contended that if the Municipality had concerns about the bid validity period, it should have extended it before disputing the award. The Municipality's request for declaratory relief is a reactive measure only pursued after the Applicant had sought enforcement of the contract. The Municipality mischaracterised the principle of legality. It does not allow a public authority to evade an award that was validly awarded and/or a binding contract concluded due to its own internal mismanagement. A just and equitable remedy must balance the rights of the parties. In this case, it favours upholding a legally concluded contract rather than allowing a government entity to escape liability due to alleged errors of its own making. The Municipality's reliance on the principle of legality is selective. It seeks to rely on legality to invalidate its own contract, but it ignores legality when it attempts to withdraw a valid administrative decision without due process unilaterally. The Applicant alleges that the Municipality had full access to legal remedies in the normal course. If the counterapplication were meritorious, it could have pursued it through ordinary review proceedings. The doctrine of substantial compliance applies, meaning that technical noncompliance does not negate a contract that was otherwise awarded.

37. In reply, Prins said that he could not be expected to prove that he did not make the award. There was no merit to the Applicant's argument that the Municipal Manager is not a person, but an 'office' in that Niemand was somehow authorised to award the tender to the Applicant as a part of that 'office'. The MFMA, Supply Chain Management Regulations and the SCM Policy require that an award over R10 million, including VAT, may not be delegated and may only be made by him. Prins commented on the Applicant's response to his assertion that the Municipality rarely awards tenders above R10 million. He explained that in the Burger & Wallace Construction tender award to construct the landfill in Worcester, he received a recommendation from the BAC and made the award. He attached a copy of the

award, signed by him. He gave the document to Niemand before she sent out the notifications. Prins asserted that the Applicant's reliance on estoppel is ill-conceived, as estoppel cannot be used to enforce illegality. He dismissed the Applicant's reliance on substantial compliance, which he reasoned could not circumvent or overcome conduct that was *ultra vires* the prevailing legislation.

38. The Court has attempted to capture the allegations made by both parties as comprehensively as possible, leading regrettably to a lengthy exposition of the application and counterapplication. The Applicant, in particular, endeavoured to interrogate the matter extensively and repetitiously. The Court turns to evaluate the cases of the Applicant and the Respondents.

EVALUATION

The Application

39. The same facts and the applicable law inform the application and the counterapplication. The Applicant relies on an award and the subsequent contract concluded for approximately R250 million over ten years, made by the Municipality to it. The Municipality has explained that the Supply Chain Management Practitioner, Niemand, made the award inadvertently and as an administrative error. The Applicant seeks validation of the award and the contract. The withdrawal of the letter of award occurred nine days after the contract was concluded. The Applicant instituted this application about six weeks after the Municipal Manager refuted any award or contract between the Municipality and the Applicant. The Applicant knew that the Municipality intended to review Niemand's actions when it instituted its application.

40. The Respondents premise their denial of the ostensible award made and contract concluded between the Municipality and the Applicant on four grounds. Neither the BAC nor Niemand were authorised to award the tender or conclude the contract. The Municipal Manager was the only person authorised to award the tender. The bid validity period had expired at least three weeks before the Municipal Manager considered the BAC's recommendation that he award the tender, provided

the section 33 requirements of the MFMA were met. The contract could not have been concluded without compliance with section 33 of the MFMA.

41. The material facts pertinent to the adjudication of the application are that the Municipality's BEC and subsequently the BAC recommended that the Applicant be awarded the tender to administer and operate its waste landfill in Worcester for approximately R250 million over ten years. The recommendation made by the BAC on 23 August 2024 was conveyed to Niemand, a Supply Chain Management Practitioner, who then conditionally awarded the tender to the Applicant on 26 August 2024, four days before the bid validity period for this tender expired. Niemand informed the unsuccessful bidders that the award had been made to the Applicant and that they had a right of appeal. Niemand facilitated the conclusion of the contract between the Applicant and the Municipality, which van Eck signed on 26 August 2024. On 17 September 2024, Niemand awarded the tender to the Applicant on behalf of the Municipality. Niemand withdrew her letter of award to the Applicant on 27 September 2024 due to an administrative error. These facts are common cause.

42. The Municipality's account of events that unfolded was that Manel, the Senior Manager of Acquisitions and secretary to the BAC, informed Niemand on 23 August 2024 of the BAC's deliberations on six tenders, which included the tender for the administration and operation of the landfill. The BAC had recommended that the Municipal Manager award the latter tender in his role as Accounting Officer, subject to compliance with the process prescribed under section 33 of the MFMA. Niemand misunderstood Manel and conditionally awarded the tender to the Applicant on 26 August 2024. Niemand also procured van Eck's signature for the contract. Manel reminded Niemand on 17 September that the tender had to be approved by Prins. Niemand did not see the email sent by Manel. Niemand notified the Applicant that the Municipality had awarded the tender to it on 18 September 2024. The Applicant denied knowledge of the other tenders approved by the BAC. It denied the communications and correspondence between Manel and Niemand and Niemand's administrative error in notifying it of the tender award and her error in securing van Eck's signature. The Applicant admitted that the bid validity period had expired but denied that the tender process had been completed unsuccessfully.

43. Prins stated that he received the BAC's recommendations on the tender from Manel on 19 September 2024. He is not involved in the BEC or BAC deliberations. Upon perusal of the recommendations, he noticed that the bid was only valid until 30 August 2024. He asked Binta to send the documentation to Sanders. Sanders informed him there was no valid tender, and he refused to award it. Groenewald informed him on 30 September 2024 that Niemand had erroneously sent award notifications to the Applicant. The Applicant denied these facts as they did not fall within its knowledge, are legally unsustainable, or are at odds with its averments in the founding affidavit.

44. The Applicant could not genuinely dispute the facts as related by Prins, nor could it provide any countervailing version. Niemand, Manel, Binta, and Groenewald provided confirmatory affidavits. Niemand provided a more comprehensive confirmatory affidavit later. If there had been any attempt to avoid awarding the tender *ex post facto* to the Applicant, there would have had to be collusion between five Municipal employees who would have sworn falsely under oath. Niemand withdrew her letter of award on 27 September 2024, days before Prins heard from the Municipality's legal department and from Groenewald, the Chief Financial Officer, who informed him of Niemand's error. The Applicant did not request a referral to oral evidence. There was no reason to refer any material or genuine dispute of fact to oral argument. The Court would not have permitted the Applicant to conduct an inquisition if it truly believed that a dispute was not foreseeable at the commencement of its application.

45. The Court is also not persuaded that the circumstances required separate and comprehensive affidavits from Niemand and Manel.⁹ It would not have taken their versions as related in the answering affidavit any further. The Court notes that the Respondents provided a more detailed confirmatory affidavit of Niemand in their reply to the counterapplication. The Applicant attached the correspondence from Niemand and Manel to its founding affidavit. Niemand's letter of withdrawal occurred on a Friday. Manel's response to the Applicant's enquiries about the meaning of Niemand's letter on the Friday occurred on the Monday. There was no opportunity to

⁹ *Drift Supersand (Pty) Limited v Mogale City Local Municipality and Another* (1185/2016) [2017] ZASCA 118; [2017] 4 All SA 624 (SCA) (22 September 2017) at paras 31, 36-38

stage a conspiracy to deny the Applicant an award, had there been compliance with the applicable legislation. The Applicant chose to proceed under Rule 6 rather than Rule 53. The latter may have unearthed or refuted the type of evidence it seemed to be looking for. The Applicant has not persuaded the Court that the Municipal Manager's account of events should be rejected.

46. The Applicant insisted that the tender award and contract were valid and enforceable. It considered the withdrawal of the letter of award a repudiation and threatened to sue the Municipality for damages. The Applicant informed the Municipality that it should have initiated a legality review of its administrative oversights, incorrect procedure and decision. It contended that the Municipality had substantially complied with the legislation, and it had already begun implementing the contract. The Applicant requested an undertaking from the Municipality that the funds earmarked for the tender be frozen. The Applicant intended to apply to compel specific performance on a lawfully awarded tender. The Respondents informed the Applicant that they would not freeze the tender amount and that they were in the process of initiating a review application.

47. The Court accepts that there are significant lacunae in the Municipal Manager's account regarding what transpired with this tender. He does not explain why he did not attend to the details of this tender, like the extension of the validity period, the coordination of the BAC recommendations that required his decision, and compliance with the provisions of section 33 of the MFMA. There is no explanation as to why the bid validity period for this tender was not further extended if the section 33 requirements were not met by 30 August 2024. To comply with section 33 of the MFMA, the bid validity period would have had to be extended for at least another sixty days. Prins does not explain why the BAC's recommendation was not sent to him before the expiry of the bid validity period. Prins denies that he is expected to prove he did not make the award.

48. The Municipality has raised three factors influencing the lawfulness and validity of the award and contract ostensibly made to the Applicant. The first relates to the authority to award tenders above R10 million. Neither the BAC, Niemand, nor van Eck was authorised to award the tender to or conclude the contract with the

Applicant. That is the law. Niemand's actions contravened section 5(2)(a) of the Supply Chain Management Regulations and the Municipality's Supply Chain Management Policy. All tenders above R10 million, including VAT, had to be awarded by the Municipal Manager. The evidence before the Court is that Prins, the Municipal Manager, and the Accounting Officer did not award the tender to the Applicant.

49. The second factor relates to the bid validity period. If the BAC was not authorised to award this tender, it could not instruct Niemand to do so, nor could Niemand on her own accord or through an error award a valid tender to or conclude a valid contract with the Applicant. In effect, no award was made or contract concluded during the bid validity period of this tender. A bid validity period ensures bidders remain committed to their offers in public procurement for a set time, preventing changes or withdrawals. It provides enough time for evaluation, ensuring government entities can assess bids fairly without alterations. This maintains fairness and transparency among all bidders. It helps in the smooth finalisation of contracts.

50. On the authority of *Takubiza Trading*, the tender process had been completed once a tender's validity period expired, even if the tender was not awarded.¹⁰ The evidence before the Court is that the bid validity period had expired without a valid award being made or a contract concluded. The legal consequences are that the tender lapsed. The tender award cannot be retroactively validated as the process is not open-ended and has to conclude with certainty. The procuring entity must readvertise the tender and initiate a new bidding process. Municipalities must adhere to the MFMA, which requires financial oversight and transparent procurement processes. Any attempt to revive an expired tender could be considered procedurally unfair.¹¹ The Municipal Manager lawfully declined to make the award. *Trencon* does not assist the Applicant in circumstances where an award has not been made during

¹⁰ *Takubiza Trading* supra

¹¹ *Telkom SA Limited v Merid Training (Pty) Ltd and Others; Bihati Solutions (Pty) Ltd v Telkom SA Limited and others* [2011] ZAGPPHC 1, *Joubert Galpin Searle Inc and Others v Road Accident Fund and Others* [2014] ZAECPHC 19; [2014] 2 All SA 604 (ECP); 2014 (4) SA 148 (ECP), *SAAB Grintek Defence (Pty) Ltd v South African Police Services and Others* [2015] ZAGPPHC 1; 2015 JDR 0080 (GP); *Tactical Security Services CC v Ethekwini Municipality* 2017 JDR 1558 (KZD); *Secureco (Pty) Ltd v Ethekwini Municipality and Others* [2016] ZAKZDHC 14 and *Ethekwini Municipality v Mantengu Investments CC and Others* [2020] ZAKZDHC 11, *Defensor Electronic Security (Pty) Ltd v Centlec SOC Ltd and another* [2021] ZAFSHC 315 para 8

the bid validity period. An unauthorised person making an award amount to no award being made during the bid validity period.¹²

51. The third reason why the ostensible award of the tender militates against its validity is that the peremptory provisions of section 33 were not met. No contract could be concluded with the Applicant until there was compliance with section 33. Section 33 of the MFMA concerns tenders having future budgetary implications. It imposes obligations on the Municipal Manager and the Municipal Council. The Municipal Manager had to provide certain information to the Municipal Council sixty days before the Council approved the contract. The Municipal Manager failed to explain this omission, but it is immaterial to determining the issues in these applications. Section 21A of the MSA required the Municipal Manager to publicise the draft contract, accompanied by an information statement outlining the Municipality's obligations under the contract. He had to consider the representations and comments of the local community and other interested persons. The Municipal Manager had to solicit the views of the National and relevant provincial treasury, the national department responsible for local government, and, where applicable, the national department responsible for overseeing the effects of the tender, like Environmental Affairs. There is no indication that the Municipal Manager performed any of these obligations. His responses indicate that he did not.

52. Section 33 requires the Municipal Council, among other things, to consider the projected financial obligations for each financial year covered by the contract, the impact on municipal tariffs and revenue, and the resolution to authorise the Municipal Manager to sign the contract on behalf of the Municipality. None of these obligations were met when the ostensible award was made and the contract concluded by Niemand. Awarding a multi-million contract over a protracted period requires meticulous attention to detail.

53. On the authority of *Merifon*, where the peremptory provisions of section 19 of the MFMA relating to capital projects were considered, the Supreme Court of Appeal

¹² *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 paras 79-81

determined that an agreement that did not comply with its prescripts was legally unenforceable. There is no reason why a failure to comply with the peremptory provisions of section 33 of the MFMA should not follow the same fate. The Municipal Manager and the Municipal Council did not comply with their obligations under the provisions of section 33 of the MFMA. Given the tenor of the provisions of sections 217 and 172 of the Constitution, issuing a retroactive order for the Municipal Manager and the Municipal Council to comply with section 33 of the MFMA is not feasible. Nor can the Court order specific performance of the ostensible contract, as it would offend the principle of legality.¹³

54. The Applicant's reliance on *Allpay* concerning the materiality of a deviation under section 217 of the Constitution is misplaced. The Constitutional Court specified that the correct approach is to factually establish whether an irregularity has occurred. This irregularity must then be legally assessed to determine if it constitutes grounds for review under PAJA. Where appropriate, this legal assessment should consider the materiality of any deviation from legal requirements by connecting the issue of compliance to the purpose of the provision before concluding that a review ground under PAJA has been established. The applicant asserted that the process was done according to the book. The BEC and BAC made their recommendations, and the other bidders lodged no appeals. The process was competitive, transparent, and cost-efficient. Prins did not say that he would not have awarded the tender. The Applicant contended that the irregularity was not material.¹⁴ The latter contention cannot be sustained. Niemand was not authorised to award the tender or conclude the contract. The bid validity period had expired before Prins considered the BAC's recommendation, and even if he were disposed to award the tender, non-compliance with the provisions of regulation 33 of the MFMA would have been fatal to concluding the contract in circumstances where the bid validity period had expired. The materiality of the deviation was significant for the reasons already canvassed.

55. *Allpay* reminded us that the strict mechanical approach to 'peremptory' and 'directive' provisions had been discarded, and the issue was whether the Applicant

¹³ *Merifon* at para 29
¹⁴ *Allpay* at para 28

complied with the statutory provisions viewed in the light of their purpose. The Applicant argued that it did what it had to do. The problem *in casu* was that the Respondents did not do what they were supposed to. There is no quarrel with that argument except to say that the Respondents have raised their non-compliance with the mandatory provisions as a defence to the Applicant's case and are before the Court to seek relief in that regard.

56. To the extent that the Applicant invoked estoppel, *Merifon* repeated the general rule that estoppel cannot be invoked in circumstances where upholding it would be tantamount to a court giving its *imprimatur* to not one but a few illegalities that permeated the process after the BAC made its recommendation.¹⁵ The Constitutional Court, in upholding the Supreme Court of Appeal's decision in *Merifon*, stated the trite principle that void acts cannot be resuscitated through the *Turquand* rule. The rule is a species of estoppel and therefore cannot be raised to cure an *ultra vires* action, as opposed to *intra vires*, within one's legal powers, but suffers from some other defect. The doctrine of legality is applicable and decisively trumps the Applicant's reliance on the rule because it lacks knowledge of the internal processes of the Municipality.¹⁶

57. The Applicant contended in a rambling argument that regulation 5(2)(a) which is repeated verbatim in the clause 5(2)(a) in the Municipality's supply chain management policy which requires the Municipal Manager to award the tender as it was above R10 million, cannot defeat the prescripts of section 217(1) of the Constitution. The argument is directed at why *Merifon* and *RPM Bricks* are not applicable to the Applicant's reliance on estoppel.¹⁷ The Applicant concludes this argument by asserting that the Municipal Manager's 'experience of personal attacks' may lead to a refusal to confirm the award of the tender in a rerun process. It is unclear whether the Applicant referred to personal attacks on its part against the Municipal Manager or any emanating from him. Apart from no evidence being placed

¹⁵ *Merifon* at para 26, *Qaukeni Local Municipality and Another v FV General Trading CC*, [2009] ZASCA 66; 2010(1) SA 356 (SCA)

¹⁶ *Merifon (Pty) Limited v Greater Letaba Municipality and Another* (CCT 159/21) [2022] ZACC 25; 2022 (9) BCLR 1090 (CC) (4 July 2022) ('*Merifon CC*')

¹⁷ *City of Tshwane Metropolitan Municipality v RPM Bricks Proprietary Ltd.* (177/2006) [2007] ZASCA 28; [2007] SCA 28 (RSA); 2008 (3) SA 1 (SCA) (27 March 2007)

before the Court of any personal attacks made by the Municipal Manager, it is unclear how the Court can go beyond the dicta in the cited cases.

The relief sought by the Applicant

58. The Applicant sought multiple forms of relief in its amended notice of motion. The first order it sought was a declaration that the tender was duly awarded to it, and the subsequent contract concluded between it and the Municipality was valid and binding on the Municipality. The Applicant prayed that the Municipality be directed to give effect thereto. This prayer must fail as Niemand was not authorised to award the tender or conclude the contract. The tender's award and the contract's conclusion were unlawful, *ultra vires*, invalid, and void. In making this finding, the Court accepts that the sequence of events involving Manel and Niemand from when Manel informed Niemand of the BAC's deliberations, the award of the tender, the conclusion of the contract, and Niemand's withdrawal of the award letter, as outlined by the Respondents, is credible. The award of the tender, which was one of six that were determined on 23 August 2024, thereby confused Niemand as to which tenders the BAC had the authority to award and which it did not. It is a reasonable explanation. The Court also accepts that the Municipal Manager did not have sight of the tender after the BAC awarded it until a hard copy was presented to him on 19 September 2024, when the bid validity period had expired. No other version was placed before the Court, and the Applicant was unable to counteract any of this evidence with facts.

59. The second prayer is premised upon a valid award and contract emanating from Niemand's actions. As the Court has found that no lawful award had been made, and the award and contract was invalid, *ultra vires* and void, the second prayer, as an alternative to the first, where the Applicant requested that the Respondents be directed to take all steps anticipated under section 33 of the MFMA contract, has to fail.

60. The following order sought was premised upon the Applicant failing to persuade the Court that Niemand's award notifications and the contract were valid. In the alternative, it asked the Court to review and set aside the Municipal Manager's

failure to consider and decide the BAC's recommendation of 23 August 2024 before the expiry of the bid validity period. The Applicant relied upon section 6(2)(g) as amplified by section 6(3)(a) of PAJA for this relief. The Applicant thus asserted that the Municipal Manager had a duty to take a decision in circumstances where the period within which the decision had to be taken is not prescribed by law, and he failed to take the decision. The Applicant is thus before the Court as far as this order is sought, for a review of the Municipal Manager's failure to make the decision on the grounds that there has been an unreasonable delay in making the decision.

61. The Applicant acknowledged the Respondent's case that the Municipal Manager was the only person with the authority to make the final award of the tender.¹⁸ Applicant again, relying on the Respondent's version, asserts that the Municipal Manager failed to consider or make any decision concerning the final award of the tender and instead allowed for the tender validity period to expire on 30 August 2024. The Applicant contends that the Municipal Manager allowed the tender validity period to expire. The factual basis sketched by the Applicant for the order sought does not accord with the Respondents' evidence. The Municipal Manager stated in the answering affidavit that he received a hard copy of the BEC and BAC recommendations from Manel on 19 September 2024 for his consideration and award. When he began to peruse the recommendations, he noticed the bid was valid until 30 August 2024. He asked for a legal opinion, which indicated that there was no valid tender, and the process had been concluded. He could not award the tender and "refused to award the tender to the Applicant."¹⁹ The evidence in the answering affidavit is that the Municipal Manager made a decision: he refused to award the tender to the Applicant.²⁰ The Applicant's reply to the Municipal Manager's answer was that it did not fall within the Applicant's personal knowledge, was at odds with what the Applicant stated in the founding affidavit, or was legally unsustainable. That would have been the end of the request for judicial review, but for the content of the Municipal Manager's letter of 10 October 2024. In his letter to the Applicant dated 10 October 2024, the Municipal Manager stated that he was no longer entitled to make

¹⁸ The Applicant resorted to linguistics to escape acknowledging that the SCM regulations and policy mandate the Municipal Manager with the exclusive task of making the final award in the tender involved in this case. The Applicant stated that it was common cause that this is what the Respondent contended.

¹⁹ Paras 41-44 of the Respondents' answering affidavit

²⁰ Para 44, answering affidavit

any award after considering the BAC's recommendation, as the bid validity period had expired. The evidence in the letter would suggest a contrary view, i.e., that he did not make any decision about the tender.

62. The Court shall proceed on the Applicant's assumption that the Municipal Manager failed to make a decision. The Applicant summarised the consequences of the Municipal Manager's alleged inaction. The costs of the tender process, which included the employment of Consulting Engineers, were wasted. The BEC and BAC recommendations served no purpose. The Applicant progressed from being the successful bidder with the unsuccessful bidders being notified, to having to compete again in a fresh bidding process. The Municipal Manager did not explain his failure to act and to allow the tender validity period to expire. The Applicant cited section 62(1)(a) of the MFMA that requires the Municipal Manager to ensure that the Municipality has and maintains an efficient and transparent supply chain management system. Regulation 5(2) provides that the Municipal Manager must implement the supply chain management policy fairly, equitably and transparently. The Applicant provided extensive written argument as to why the Municipal Manager should have acted before the bid validity period had expired.

63. The Municipal Manager's functions include ensuring compliance with procurement laws, overseeing the tender process, and approving tenders above certain thresholds. He must ensure that the tender process adheres to principles of fairness, transparency and competitiveness as outlined in section 217 of the Constitution. The Municipal Manager contended that he was not privy to or involved in the BEC and BAC process. He relies on and acts upon written recommendations received from the BAC. The Applicant does not seek a review of the Municipal Manager's failure to extend the bid validity period. It had made out a case that the Municipal Manager had extended the previous bid validity periods. Still, it does not rely on this aspect for judicial review under the order it seeks. Section 22(h)(ii) of the Municipality's Supply Chain Management policy requires the SCM Department to extend the bid validity period provided the original period had not expired, and all bidders are allowed to participate. Section 22 (h)(v) states that if the validity of all bids expired without it being awarded within the bid validity period, including any extensions allowable in terms of applicable legislation, the bid must be cancelled and

published in the same media in which the original bid invitation appeared. Section 53(1) and (3) states that successful and unsuccessful bidders shall be notified in writing by the Supply Chain Management once a bid has been accepted and awarded. A supply chain management unit of a municipality operates under the supervision of the Chief Financial Officer

64. There is no evidence before the Court that the Municipal Manager was obliged to ensure that he obtained the BAC recommendations immediately after the BAC's deliberations. The Municipal Manager's evidence is that he obtained the recommendations from Manel, who served as the secretary of the BAC. He received the documents twenty days after the bid validity period expired. According to the Municipality's supply chain management policy, the Municipal Manager is not responsible for extending the bid validity period. There is thus no breach of any legal duty. The Municipal Manager acted within the law when he declined to make the award. Furthermore, there is no evidence to suggest that the Municipal Manager did not act when he obtained the recommendations. His actions were neither procedurally unfair, unlawful, nor unreasonable. To the contrary, his actions were lawful.

65. The following order sought by the Applicant is premised upon the Court finding that the Municipal Manager failed to make a decision. The Applicant relied upon section 8(1)(c)(ii) of PAJA for the Court to replace and substitute the Municipal Manager's decision awarding the tender to the Applicant. The second part of paragraph 5 of the notice of motion seeks orders in the alternative under section 8(1)(c)(i) of PAJA to remit the matter to the Municipal Manager to consider and make a decision within a period to be determined by the Court. In the third alternative, the Applicant seeks an extension of the bid validity period under section 172(1)(b) of the Constitution.²¹

²¹ 'However, under section 172(1)(b) of the Constitution, a court deciding a constitutional matter has a wide remedial power. It is empowered to make "any order that is just and equitable". So wide is that power that it is bounded only by considerations of justice and equity.' *Gijima* at para 53

66. The Applicant relied on *Trencon* for substituted relief.²² A Court has a discretion under section 8(1)(c)(ii)(aa) of PAJA to make a substitution order in exceptional circumstances. If the Court is satisfied there are exceptional circumstances, it must still determine whether it would be just and equitable to make the order.²³ Exceptional circumstances comprise a three-stage enquiry. The first is whether the outcome would be a foregone conclusion, and it would be a waste of time to order the tribunal or functionary to reconsider the matter. The latter applies where a delay would prejudice the Applicant in circumstances where time is valuable, and any time lost would be significant. The second consideration is whether the tribunal or functionary has exhibited bias or incompetence to such a degree that it would be unfair to require the applicant to submit to the same jurisdiction again.²⁴ The third is whether the Court is in as good a position as the administrator to make the decision.

67. The Court is not in as good a position as the Municipal Manager or the Municipal Council to decide on the tender award and the contract. The final decisions are polycentric and policy-laden. The outcome depends upon the Municipality's financial obligations, tariffs and revenue, and feedback from the public participation program. National and provincial interests, like budgets and environmental issues, are invoked in the final decision-making. The remedy sought in circumstances where the Municipal Manager has made a decision, albeit unfavourable to the Applicant, is not competent. Even if the Court were to suppose that the Municipal Manager did not make a decision, the outcome would not have been a foregone conclusion, as the Municipal Manager's decision on whether to award the tender would have been influenced by the obligations inherent in section 33 of the MFMA. Section 33(c) of the MFMA stipulates that the Municipal Council must adopt a resolution in which it authorises the Municipal Manager to sign the contract on behalf of the Municipality.

²² *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)

²³ *Trencon* supra at paras 34 and 35

²⁴ *Trencon* at para 38, *Livestock and Meat Industries Control Board v Garda* 1961 (1) SA 342 (A), *Johannesburg City Council v Administrator, Transvaal, and Another* 1969 (2) SA 72 (T)

68. The Municipal Manager refused to award the tender to the Applicant as the bid validity period had expired. The Applicant is the incumbent service provider administering and operating the Municipality's landfill site. The Applicant argued that it would be prejudiced if required to bid once again. Its tender price is no longer a secret, as it is revealed in the papers, and would be exploited by other bidders. The Applicant revealed its tender price in one of the annexures to its founding affidavit, and any prejudice suffered is of its own making. The Applicant has not proven that the Respondents are biased towards it or incompetent to such a degree that it would be unfair to submit it to the same jurisdiction again. It does benefit from working with the Municipality. The Applicant has not found any fault with the evaluation and adjudication of its bid. The Municipality has explained that it does not handle bids over R10 million often and has explained how the error occurred. The Court accepts that explanation.

69. The remedy sought by the Applicant in the alternative, i.e., to remit the matter to the Municipal Manager to consider and make a decision requires the Court to go beyond *Takubiza Trading* regarding the retrospective extension of the bid validity period, *Merifon* relating to non-compliance of a mandatory statutory provision, and the unlawfulness of Niemand's actions. The relief sought by the Applicant must suffer the same fate as its request for judicial review under section 6(2)(g) of PAJA. There is nothing to substitute, replace, or remit in circumstances that would transgress the law. There are no grounds for the Court to entertain the remedies sought or the alternative to the latter, i.e., to extend the bid validity period under section 172(1)(b) of the Constitution.

70. The further orders sought by the Applicant that in the event this Court remit the matter to the Municipal Manager, and he awards the tender to the Applicant, the Respondents are directed to give effect to the provisions of section 33 of the MFMA and that the purported withdrawal of the tender on 27 September 2024 is reviewed and set aside, cannot be granted. The Court declines the invitation to direct the Municipality to give effect to section 33 of the MFMA as an order of that nature, which risks offending the separation of powers doctrine.

The Counterapplication

71. The Respondents raised the counterapplication to review and set aside Niemand's 'series of administrative errors' and actions because they were unauthorised, unlawful, and *ultra vires* of the MFMA and Municipalities Supply Chain Management Policy and thus breached section 217 of the Constitution. The Respondents sought a legality review.²⁵ The Respondents submitted that seeking such relief as a reactive challenge to the application is appropriate.²⁶ Niemand's decisions were in breach of the SCM policy and thus in breach of sections 1(c) and 217, as well as section 195²⁷ of the Constitution. A local government may only act within the powers lawfully conferred on it.²⁸ The exercise of public power which is at variance with the principle of legality is invalid.²⁹ An organ of state may seek a review of its own decision through the principle of legality.³⁰ The provisions of the MFMA ensure proper fiscal management of municipalities.³¹ The Respondents contend that they correctly raised a reactive challenge to the Applicant's attempt to enforce an otherwise unlawful contract.³² Out of an abundance of caution and given the large and irregular expenditure of public funds, the Municipality seeks in its counterapplication, declaratory, or review relief of Niemand's conduct and the contract concluded with the Applicant. The Municipality alleges that since 30 October 2024 and 29 November 2024, it has had to decide how best to address the administrative error, given that the state organs generally cannot proceed with the review under PAJA.

²⁵ *State Information Technology Agency SOC Limited v Gijima Holdings (Pty) Limited* (CCT254/16) [2017] ZACC 40; 2018 (2) BCLR 240 (CC); 2018 (2) SA 23 (CC) (14 November 2017) ('*Gijima*') at para 41

²⁶ A reactive challenge is typically invoked by a party seeking to defend itself against the enforcement of an administrative decision or action.

²⁷ *Steenkamp v Provincial Tender Board, Eastern Cape* 2007 (3) SA 121 (CC)

²⁸ *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* [1998] ZACC 17; 1999 (1) SA 374 (CC); 1998 (12) BCLR 1458 (CC) (*Fedsure*) at para 58

²⁹ *Pharmaceutical Manufacturers Association of SA: In re Ex Parte President of the RSA* 2000 (2) SA 674 (CC) at para 17

³⁰ *Gijima* at para 41

³¹ *Merifon* at paras 15-22

³² *Merifon* at para 43-46, *Gobela Consulting CC v Makhado Municipality* (910/19) [2020] ZASCA 180 (22 December 2020) at paras 17-22, *Kunene Rampala Inc v North West Province Department of Education and Sport and Development* (460/2022) [2023] ZASCA 120 (15 September 2023) at paras 21-27

72. The Applicant pointed out that the Respondents should have sought a legality review.³³ Surprisingly, it opposed the counterapplication. The Applicant contended that the Municipality, as the original decision maker, cannot collaterally challenge its decision while simultaneously seeking a legality review.³⁴ The Municipality should have applied for a legality review and not waited for the Applicant to seek enforcement. The Applicant contended that the counterapplication was only initiated after the Applicant sought specific performance, indicating that it is a defensive strategy rather than a *bona fide* review application. The Municipality failed to act promptly despite knowing of the alleged irregularities before litigation commenced. The Municipality could not disown its own administrative actions to escape contractual obligations.

73. The Municipality asserted that it was entitled to raise a reactive challenge to the application. The law relating to reactive and collateral challenges is settled.³⁵ The facts of each case determine whether a reactive challenge should be available where justice requires it to be.³⁶ The Respondents raised their reactive challenge as a defence to the application to validate a patently unlawful award and contract, as a precaution against an invalid award and contract remaining valid.³⁷ The Respondents complied by initiating the counterapplication as due process.³⁸ The evidence does not support the Applicant's assertion that the Respondents reacted as a defensive strategy. The Applicant also suggested that the Municipality did not institute the self-review within a reasonable time. The Applicant's reliance on *Gijima* to support the delay that ensued before the Municipal Manager considered the BAC's recommendations is misconceived. The court in *Gijima* had to deal with a lengthy delay when 'the ability to evaluate an allegation of illegality fully is

³³ The Applicant's attorney suggested this in a letter to the Municipal Manager on 22 October 2024

³⁴ Collateral challenges allow a party to argue the invalidity of an administrative action without formally applying for its review

³⁵ *Merafong City Local Municipality v AngloGold Ashanti Limited* (CCT106/15) [2016] ZACC 35; 2017 (2) BCLR 182 (CC); 2017 (2) SA 211 (CC) (24 October 2016), *Gobela Consulting CC v Makhado Municipality* (910/19) [2020] ZASCA 180 (22 December 2020), , *Department of Transport and Others v Tasima (Pty) Limited* [2016] ZACC 39; 2017 (1) BCLR 1 (CC); 2017 (2) SA 622 (CC) para 140

³⁶ *Merafong* at paras 43-45

³⁷ *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2004 (6) SA 222 (SCA)

³⁸ *Gijima* at para 50, *MEC for Health, Eastern Cape v Kirland Investments (Pty) Ltd t/a Eye and Lazer Institute* [2014] ZACC 6; 2014 (3) SA 481 (CC); 2014 (5) BCLR 547 (CC) (Kirland)

impaired'.³⁹ That is not the case in this matter. On 28 October 2024, the Respondents informed the Applicant that they were initiating a 'judicial' review.

74. The Applicant accused the Municipality of selectively relying on the applicable legislation to justify an unlawful attempt to undo a valid and binding tender award. Section 33 did not prohibit the award of a contract, as it merely required additional oversight for financial planning. Any failure to comply with section 33 was an internal governance issue which did not automatically render the contract void. The Municipality should have remedied any non-compliance through proper internal procedures rather than attempting a unilateral withdrawal of the tender. The Municipality alleged a breach of section 217 of the Constitution but failed to explain how the procurement process was unfair, inequitable or non-transparent. A mere procedural lapse did not equate to a constitutional violation. It should have been corrected internally without seeking to nullify a validly concluded contract. The rule of law did not permit the Municipality to evade its obligations under the guise of financial concerns or administrative errors.

75. Again, the submissions made by the Applicant do not reflect the evidence. Both the BEC and BAC recommended the Applicant as the successful tenderer, subject to the process under section 33 of the MFMA. The award of the contract remained in abeyance until the Municipal Manager and the Municipal Council discharged their obligations under section 33 of the MFMA. The Municipal Council could have only resolved to pass the contract on completion of the process, as the BEC specifically reminded it to approve the contract as it is to be executed.⁴⁰ Without compliance with section 33, there was and is no valid contract.

76. The Applicant argued 'substantial compliance' with the applicable legislation to avoid the cancellation of the ostensible award and the contract. A tender process tainted by unlawfulness and lack of authority is invalid and not compliant with section 217 of the Constitution.⁴¹ Niemand's ostensible award of the tender and the contract by Niemand and van Eck were unauthorised, unlawful, *ultra vires*, void and invalid.

³⁹ *Gijima* at para 43

⁴⁰ See the deliberations of the BEC at 009-93

⁴¹ *Gobela supra*, *Quakeni supra*

The Court has no hesitation in making the declaratory orders sought by the Respondents.

Miscellaneous Matters

77. The application and counterapplication were enrolled as urgent applications and proceeded under Rule 6(12) of the Uniform Rules of Court. The Court rejected the submissions that the application and the counterapplication were urgent, but agreed to hear them expeditiously. Neither party sought the record under Rule 53 but criticised the other for failing to do so. The Applicant sought amendments to its notice of motion twice. The Respondents objected to the amendments. The Court has allowed the Applicant's second set of amendments as Respondents' Counsel acknowledged he had prepared to argue the matter based on the second set of amendments. This is not to say that the Court accepted the Applicant's explanation for the late notice of intention to amend or was oblivious that the Applicant had materially changed its case from that initially formulated. The Respondents were justified in objecting to the amendments, and as the outcome is in their favour, they will be entitled to the costs of their objection.

78. As for the costs, there is no reason why they should not follow the result. The order that follows will reflect this.

CONCLUSIONS

79. The Applicant tendered to administer and operate the First Respondent's regional waste disposal facility. The First Respondent's BEC and BAC recommended the Applicant as the favoured bidder, subject to the award being made by the Second Respondent following the section 33 process prescribed by the MFMA. The Municipal Manager was the only authorised person who could have made the award.

80. The BEC and BAC recommendations were submitted to the Second Respondent beyond the bid validity period. However, in the interim between the BAC's recommendation and before the bid validity period expired, the First Respondent's Supply Chain Management Practitioner awarded the tender

conditionally to the Applicant. The practitioner subsequently confirmed the award after notifying the unsuccessful tenderers and securing the signature of the First Respondent's Executive Director of Technical Services and BAC member to conclude the contract on behalf of the First Respondent. Neither the practitioner nor the director was authorised to perform any of these administrative actions. The practitioner withdrew the letter of notification of the award once she realised her error.

81. The Second Respondent referred the tender for legal opinion once he realised that the tender's bid validity period had expired. In the correspondence that ensued after the Supply Chain Management practitioner withdrew her letter of notification of the award, the Applicant insisted that the award and contract were validly made and demanded specific performance of the contract. The Respondents explained that the award and contract were erroneously made as the practitioner and Director were not authorised to do as they did, and that the tender process was completed unsuccessfully once the bid validity period had expired. The Applicant threatened litigation to enforce the contract. The Respondents informed the Applicant that they intended to review the tender's award and the contract's conclusion to set them aside.

82. The Court has considered and declined the relief pursued by the Applicant but has granted that sought by the Respondents with costs.

ORDER

In the premises, the order is as follows:

1. The Application is dismissed.

2. The Counterapplication:

- 2.1 It is declared that the First Respondent's ostensible award of the tender T2023/023 for the operation and management of the regional waste disposal facility to the Applicant as per the First Respondent's

letters dated 26 August 2024 and 17 September 2024 is void, invalid, and of no effect.

2.2 It is declared that the ostensible contract concluded on 31 August 2024 between the Applicant and the First Respondent is void, invalid, and of no effect.

3. The Applicant shall pay the Respondents' taxed or agreed party and party costs and Counsel's taxed or agreed fees on scale C for the application and counterapplication.
4. The parties shall bear their own costs for the hearing scheduled for 18 February 2025.

Bhoopchand AJ
Acting Judge
High Court
Western Cape Division

Judgment was handed down and delivered to the parties by e-mail on 5 May 2025

Applicant's Counsel: S Aucamp

Instructed by: Jacques Classen Inc.

Respondent's Counsel: L W Ackermann/ DM Lubbe

Instructed by Rufus Dercksen Inc.