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

Case No: 11175/2024

In the matter between:

**INGEROP SOUTH AFRICA (PTY) LTD
(Registration number 1995/002040/07)**

Applicant

and

MINISTER OF WATER AND SANITATION

First Respondent

**DIRECTOR-GENERAL, DEPARTMENT OF
WATER AND SANITATION**

Second Respondent

BIGEN AFRICA SERVICES (PTY) LTD

Third Respondent

Neutral citation: *Ingerop South Africa (Pty) Ltd v Minister of Water and Sanitation and Others* (Case no 11175/2024) [2025] ZAWCHC (06 August 2025)

Coram: LEKHULENI J and SIPUNZI AJ

Heard: 13 June 2025

Delivered: Electronically on 6 August 2025

Summary: Administrative law – Application to review a tender award – Applicant relying on s 21 of the Superior Courts Act 10 of 2013 as basis for insisting that this court has jurisdiction – Jurisdiction determined in terms of section 1 of the Promotion of Administrative Justice Act 3 of 2000 – Court lacks jurisdiction to hear the matter - Application dismissed with costs.

ORDER

1. This court lacks jurisdiction to hear the review application.
 2. The applicant's application to review the decision to award a tender to the third respondent is hereby dismissed.
 3. The applicant is ordered to pay the costs of this application on a party and party scale, including the cost of two counsel where so employed, on Scale C.
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JUDGMENT

SIPUNZI AJ (LEKHULENI J concurring):

Introduction

[1] This an opposed application for the review and setting aside of the decision of the Minister and/or Director General of the Department of Water and Sanitation to award the tender of raising the Clanwilliam Dam: Professional Multi-disciplinary Services to Bigen Africa Services. At the inception, the applicant sought relief as set out in the notice of motion in the following terms:

1. To the extent that this court may find it necessary, the Applicant's non-compliance with the provisions of Section 7 of the Promotion of Administrative

Justice Act, 3 of 2000, and in impugning the decision mentioned directly herein below, is condoned as being in the interest of justice.

2. To review and set aside the award of the tender under bid number: **DWS23-1222 WTE OLIFANTS-DORING RIVER WATER REOURCES PROJECT: RAISING OF CLANWILLIAN DAM: PROFESSIONAL MULTI-DISCIPLINARY SERVICES** (“The tender”) by the first and or second respondent to the third respondent.
3. That the contract concluded with the third respondent, if any, pursuant to and as a result of the award of the aforesaid tender be set aside.
4. An order in terms of s 8 of Promotion of Administrative Justice Act 3 of 2000 (*‘PAJA’*) in terms of which the tender be awarded to the applicant, *alternatively*, remitting the said order to the first and /or second respondent to be evaluated and adjudicated by the bid evaluation committee and the bid adjudication committee subject to the directions of this Honourable Court and/or with due considerations of the findings of the court in these proceedings.
5. That the first and/or second respondent be ordered to pay the costs, jointly and severally the one paying the other to be absolved, of this application on Scale C.
6. That the third respondent be ordered to pay the costs of this application if the application is opposed by the third respondent.
7. Further and/or alternative relief.’

[2] During the oral submissions, the applicant departed from its previous relief sought in the notice of motion and delivered a draft order, in terms of which it sought relief that varied that which was stated in their notice of motion. In the draft order, the applicants sought an order, as set out below:

1. ‘The applicant’s non-compliance with the provisions of section 7 of the Promotion of Administrative Justice Act, 3 of 2000 is condoned, and the time period cast in the said section is extended in terms of section 9 of this Act to the date upon which this application was issued, as being in the interests of justice.

2. The award of the tender under bid number DWS23-122 WTE OFIFANTS-DORING RIVER WATER RESOURCES PROJECT: RAISING OF CLANWILLIAM DAM: PROFESSIONAL MULTI-DISCIPLINARY SERVICES by First and/or Second Respondent to the Third Respondent is declared unlawful, is reviewed and set aside.
3. The contract concluded between the Respondents pursuant to and as a result of the award of the aforesaid tender is set aside.
4. The declaration of unlawfulness and the striking down of the service level agreement concluded between the Respondents is suspended for a period of 180 days, subject to the following directions:
 - 4.1. The First and Second Respondents are ordered to within this period embark upon a fresh process for the awarding of the said tender, which shall include the calling for: evaluation and awarding of a new tender and the conclusion of a new service level agreement with the successful tenderer.
 - 4.2. The First and Second Respondents are to take all necessary steps to ensure that there is not to be a delay in the examination of the construction related work consequent to the new tender process ordered above.
 - 4.3. The First and Second Respondents are ordered to take all necessary steps to ensure that the appointed successful tenderer will provide all necessary engineering related services upon the expiry of this period, which steps are to include (but are not limited to) the provision of an updated and augmented scope of the works by means of projections and estimations if necessary in relation to work the third Respondent is to perform within this time period, and the work the successful tenderer is to perform thereafter.
 - 4.4. All issues related to payment- and liability for work already done by the Third Respondent is to be dealt with further in terms of the service level agreement concluded between them, and on the basis that the agreement had terminated at the expiry of the time period mentioned supra.

5. The First, Second and Third Respondents are ordered to pay the costs of this application jointly and severally, the one paying the other to be absolved, with the costs of counsel to be on Scale C.'

[3] The application is opposed by all the respondents. According to the respondents, there had been undue and unreasonable delay on the part of the applicant, which should not be condoned. The respondents complained about the non-joinder of Tlou Integrated, a subcontractor to the third respondent. They contended that the review application had no substance as there were no irregularities in the award of tender to the third respondent. Notably, the third respondent also raised a point that this court lacked the necessary jurisdiction to adjudicate this dispute.

The parties

[4] The applicant is Ingerop South Africa (PTY) LTD ('Ingerop') (Registration number: 1995/002040/07), a private company with limited liability registered and incorporated in terms of the relevant Statutes of the Republic of South Africa. The applicant carries on the business of a professional consulting engineering firm with the main place of business located at 1st Floor, 61 Katherine Street, Sandton, Johannesburg, Gauteng Province.

[5] The first respondent is the Minister of Water and Sanitation ('The Department') in her capacity as such and whose address for purposes of the application is 1[...] P[...] Street, 15th Floor, Room 1 [...], Cape Town, Western Cape Province and The State Attorney, 4th Floor L[...] L[...] C [...], 2[...] L[...] Street, Central, Cape Town, Western Cape Province.

[6] The second respondent is the Director General: Department of Water and Sanitation in his capacity as such and whose address for purposes of the application is 1[...] P[...] Street, 15th Floor, Room 1 [...], Cape Town, Western Cape Province and The State Attorney, 4th Floor L[...] L[...] C [...], 2[...] L[...] Street, Central, Cape Town, Western Cape Province.

[7] The third respondent is Bigen Africa Services (Pty) Ltd ('Bigen'), a private company with limited liability registered and incorporated in terms of the relevant Statutes of the Republic of South Africa. The third respondent carries on the business of a professional consulting engineering firm and has its principal place of business located at 3rd Floor, N[...] B[...], A[...] Building, Carl Cronje, Bellville, Cape Town, Western Cape Province.

Facts

[8] On 13 December 2022, the Department through its website as well as various other e-tender portals published an invitation to bid for the professional multi-disciplinary services under bid number DWS23-1222 WTE Olifants-Doring River Water Resources Project: Raising of Clanwilliam Dam: Professional Multi-Disciplinary Services. The closing date for the tender was originally listed as 23 February 2023, which date was subsequently extended by way of addendums to 16 March 2023.

[9] The tender evaluation methodology consisted of five phases. The phases followed each other chronologically in the following order:

1. **Phase 1:** The Mandatory requirements. According to Clause 10.3.1, at page 23 of the Tender Document, failure to comply with this phase requirements would lead to immediate disqualification of a bid. There are three specific requirements for bidders, namely, firstly, attendance of the compulsory on-site/physical briefing session and the bidders name must appear on the attendance register; Secondly, the lead professional engineer must submit an active and valid certified copy of professional registration with the Engineering Council of South Africa (ECSA) and a comprehensive curriculum vitae; Lastly, a bidding company had to submit proof of valid and current professional indemnity insurance to the value of bid price.
2. **Phase 2:** Pre-qualification criteria, being the 30% mandatory sub-contracting of the value of the bid to a specific EME OR QSE. The agreement between the bidder and the sub-contracting company must be submitted along with the bid. The documents must include a valid B-BBEE status level certificate, or a

sworn statement or affidavit of the sub-contractor; proof a sub-contractor's Central Supplier Database (CSD) registration; Tax Compliant status PIN page from SARS and pro-forma sub-contracting agreements signed by both parties.

3. **Phase 3:** Functionality/ Technical evaluation. Bidders had to score at least 70% for functionality, otherwise they will be disqualified as technically incompetent, unacceptable and non-responsive. These relate to the technical experience of the bidder, their methodology or functionality, inclusive of their proposed work programme and capacity to overcome challenges.
4. **Phase 4:** Administrative Compliance. the bidders were required to be registered with the National Treasury database; tax compliance, active registration with Companies & Intellectual Property Commission and they must furnish letters of good standing with professional regulators. The bidders must have completed and signed all prescribed forms and in an overall administrative compliance; and
5. **Phase 5:** Price and B-BBEE status level of contribution. Where the price will be determined in terms of the preferential procurement regulations. Each bidder would be required to submit original valid B-BBEE status level certificate.

[10] There were four (4) bids received, one from Bigen the third respondent; the second bid was from Ingerop who is the applicant; the third and fourth bid were received from Isao and Knight Piesold/Gibb JV respectively. The applicant became disqualified at the Phase 2 level which the applicant described as unlawful, unjustifiable and without equitable reasons. Isao was disqualified at phase 1 due to its failure to attend the compulsory briefing, which was the first requirement of phase 1 level.¹ Knights Piesold/Gibb JV was disqualified at phase 1 due to its failure to submit a valid professional indemnity insurance policy along with its bid.

[11] When the applicant was disqualified at phase 2, it was deemed to be non-responsive. This was occasioned by the alleged failure of the applicant to submit a proforma sub-contract agreement of 30 % of the value of the contract, to an at least 51% black owned company, a mandatory condition of the tender. The applicant

¹ BEC report in paragraph 6.2.1

contended that it had filed a letter, the essence of which undertook that an agreement would be entered into if the tender was granted to the applicant and not an actual agreement.

[12] The bid price of the third respondent was R199 981 898 61. However, they submitted the proof of professional insurance for R100 million.² In terms of the third requirement of phase 1 level, they would have been non-compliant. The applicant contended that, for this reason, they ought to have been disqualified for failure to submit proof of a valid professional indemnity insurance to the value of the bid price, namely R199 981 898.61. The applicant asserted that notwithstanding the failures to comply with the third requirement of phase 1, and an inconsistency on the part of the Department, the third respondent and Knight/Gibb JV were allowed to progress to phase 2.

[13] On 22 May 2023, the applicant was advised that it had been disqualified. The reasons for this decision were provided on 16 June 2023. On 17 August 2023, the applicant launched an urgent application in which it sought to interdict the implementation of the tender award at the Gauteng Division, Pretoria. This application was struck off the roll for lack of urgency.

[14] On 9 October 2023, when the Gauteng High Court provided its reasons, and amongst others, it remarked that:

‘[11] I cannot understand why this information caused the launch of the urgent application. The applicant had known since 22 May 2023 that the applicant’s bid had been unsuccessful. It stands to reason that at the time the tender had been awarded and the applicant would have made enquiries at that stage as to whom the entity was to who the tender had been awarded. The applicant could have launched a review application at the time but chose to engage with the first respondent in correspondence. I cannot find that it was the first respondent’s duty to advise as to which steps to be taken in the circumstances.

² BEC report on page 4, point 3

[12] In the consequences I found the application not to be urgent, as the applicant had since 22 May 2023 that the applicant's bid for the tender was unsuccessful and had not acted immediately by either approaching the Court for the interim interdict at the time *or launching a review application on an urgent basis*.³ (my emphasis)

[15] Subsequent thereto, the applicant instituted a second application in which it sought to interdict the operations that had already commenced at Clanwilliam Dam. In March 2024, the second application was argued before the Gauteng Division of the High Court. This application was dismissed on 11 December 2024. On 24 May 2024, the applicant issued review application in this court to challenge the decision to award the tender to the third respondent. The main complaint raised by the applicant was that its elimination at phase 2 evaluation was unfair and/or wrongful. The applicant also complained that the third respondent was non-responsive at phase 1 evaluation and ought to have been disqualified on that reason.

Preliminary Issues

[16] Before the determination of the merits of the challenge to the appointment of the third respondent, various preliminary questions arose for the court to consider, namely:

- 1) Whether this court had the necessary jurisdiction to determine the merits of this application;
- 2) Whether the application by the third respondent to file a further affidavit in accordance with Uniform Rule 6(5)(e) of the Uniform Rules for the court to receive the latest update on the work performed on site should be granted;
- 3) Whether non-compliance with section 7 of PAJA, which prescribes specific timeframes within which a review application must be issued should be condoned;
- 4) Whether, Tlou Integrated Tech CC, a BBEE company that was sub-contracted by the third respondent ought to have been joined in the review application;

³ *Ingerop South Africa (PTY) LTD v Department of Water and Sanitation and Others* (Case number 82093/2023) GHC, 9 October 2023, paras 11 and 12

5) Whether certain specified averments in the applicant's replying affidavit should be struck-out. I turn to deal with these issues ad seriatim.

[17] I must mention that the third respondent's application in terms of Rule 6(5)(e) was not opposed and was granted by agreement at the commencement of the hearing. I turn to consider the preliminary issue relating to jurisdiction.

Jurisdiction

[18] The respondents impugned the jurisdiction of this court. The respondent contended that this court does not have the requisite jurisdiction to hear this matter. Interestingly, the applicant did not include an averment to allege that this court had the requisite jurisdiction over this application in its founding affidavit. The applicant traversed matters relating to jurisdiction in its reply to the point *in limine* raised by the third respondent.⁴

[19] The applicant relied on the provisions of s 21(1) of the Superior Court Act⁵ and the common law in asserting that these provisions conferred the necessary jurisdiction to this court and on matters that arose within its territorial jurisdiction particularly in that the Clanwilliam Dam is situated in the area of jurisdiction of this court. This became apparent when the applicant replied to the point in limine that was raised by the third respondent. However, when the matter was heard, Mr Grobler SC, counsel for the applicant departed from that version and relied on the definition of 'Court' in s 1 of PAJA particularly, the phrase 'within whose area of jurisdiction the administrative action occurred or administrator has his or her or its principal place of administration or the party whose rights have been affected is domiciled or ordinarily resident or the adverse effect of the administrative action was, is or will be experienced'. He submitted that the adverse effect of the administrative

⁴ Third respondent's answering affidavit, 7.1 and 8

⁵ 'Superior Courts Act, 10 of 2013, S 21(1) A Division has jurisdiction over all persons residing or being in, and in relation to all causes arising and all offences triable within, its area of jurisdiction and all other matters of which it may according to law take cognizance, and has the power- (a) to hear and determine appeals from all Magistrate Courts within its area of jurisdiction; (b) to review the proceedings of all such courts; (c) in its discretion, and at the instance of any interested person, to enquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon the determination.'

action would be felt by the applicant at the Clanwilliam Dam if the administrative action awarding the tender to the third respondent was not set aside.

[20] Mr Els SC, counsel for the third respondent, impugned the jurisdiction of this court to hear the matter and asserted that the head offices of the respondents were both within the Gauteng Division jurisdiction, and all the administration; evaluation, adjudication and decision of the tender was carried out in Pretoria. He argued that the High Court Gauteng Division had the jurisdiction over this review application. In support of his argument Mr Els SC relied on s 1 of PAJA which regulates the conferring of jurisdiction on administrative action disputes. Furthermore, counsel relied on *TMT Services & Suppliers (Pty) Ltd t/a Traffic Management Technologies v The MEC: Department of Transport, Province of KwaZulu Natal and Others*,⁶ to the extent that it clarified the determination of jurisdiction on PAJA matters, the exclusion of the Superior Court and common law applications to such matters.

[21] To give context to the view I take in this matter and to the order made hereinbelow, I deem it wise to traverse the law and the relevant authorities on jurisdiction in matters falling within the application of PAJA. For that reason, I turn to consider the law on jurisdiction on PAJA cases.

The Law

[22] For the purposes of administrative action, a 'Court' means-

‘a High Court or another court of similar status;

Within whose area of jurisdiction the administrative action occurred or the administrator has his or her or its principal place of administration or the party whose rights have been affected is domiciled or ordinarily resident or the adverse effect of the administrative action was, is or will be experienced.’⁷

⁶ 2022 (4) SA 583 (SCA).

⁷ Promotion of Administrative Action Act 3 of 2000, s 1 , Definitions

[23] In *TMT Services & Suppliers (PTY) LTD v MEC: Department of Transport (supra)*, the court clarified four instances in which a court would have jurisdiction in PAJA review proceedings, as:

- ‘1. The high court within whose area of jurisdiction the administrative action occurred;
2. The high court within whose area of jurisdiction the administrator who took the administrative action has the principal place of administration;
3. The high court within whose area of jurisdiction the person whose rights have been affected by the administrative action is domiciled or ordinarily resident; and
4. The high court within whose area of jurisdiction the adverse effects of the administrative action was, is or will be experienced.’⁸

[24] In *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others*,⁹ the court emphasised that, ‘the provisions of section 6 divulge a clear purpose to codify the grounds of judicial review of administrative action as defined in PAJA. The cause of action for the judicial review of administrative action now ordinarily arises from PAJA, not from the common law as in the past. And the authority of PAJA to ground such causes of action rests squarely on the constitution. It is not necessary to consider here causes of action for judicial review of administrative action that do not fall within the scope of PAJA. As PAJA gives effect to s 33 of the Constitution, matters relating to the interpretation and application of PAJA will of course be constitutional matters.’

[25] In the case of *Gcaba v Minister of Security* 2010 (1) BCLR 35 (CC),¹⁰ the court held that, ‘Jurisdiction is determined on the basis of the pleadings, as Langa CJ held in *Chirwa*, and not the substantive merits of the case. The court observed that in the event of the court’s jurisdiction being challenged at the outset (*in limine*), the applicant’s pleadings are the determining factor. They contain the legal basis of the

⁸ *TMT Services & Supplies (PTY) LTD t/s Traffic Management Technologies v MEC: Department of Transport, Province of KwaZulu Natal and Others* (Case no. 1059/2020) [2022] ZASCA 27 (15 March 2022) para 14

⁹ *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* [2004] ZACC 15; 2004 (4) SA 490 CC, para 25

¹⁰ *Gcaba v Minister of Safety and Security* 2010 (1) BCLR 35 CC, para 75

claim under which the applicant has chosen to invoke the court's competence. The court further noted that while the pleadings - including in motion proceedings, not only the formal terminology of the notice of motion, but also the contents of the supporting affidavits - must be interpreted to establish what the legal basis of the applicant's claim is, it is not for the court to say that the facts asserted by the applicant would sustain another claim, cognisable only in another court.'

Discussion of Jurisdiction

[26] At the outset, I must stress that there is a difference between the jurisdiction founded on s 21 of the Superior Courts Act as against that found in s 1 of PAJA. Until the challenge to the jurisdiction of this court, it was abundantly clear from the papers that the applicant was ignorant of the definition of a 'court' for purposes of PAJA judicial review. In its initial answer to the point *in limine* raised by the third respondent, the applicant expressly relied on the provisions of s 21(1) of the Superior Courts Act and the common law, as the basis for insisting that this court had the necessary jurisdiction.

[27] As it was pointed out in *Gcaba v Minister of safety and Security*, 'that jurisdiction is determined on the basis of the pleadings, and not the substantive merits of the case. In the event of the court's jurisdiction being challenged at the outset, the applicant's pleadings are the determining factor, as they contain the legal basis of the claim under which the applicant has chosen to invoke the court's competence.'¹¹The applicant mainly tied its case on the geographical location of the Clanwilliam Dam, which is within the Western Cape Province and within the jurisdiction of this court. It argued that the entire project was executed at the Clanwilliam Dam, located in the Western Cape and therefore within the jurisdictional area of this Court.¹²

[28] Belatedly, during oral arguments, the applicant's counsel was in agreement that jurisdiction herein could only be determined in terms of s 1 of PAJA and as also outlined in the *TMT Services & Supplies* decision. With reference to the *TMT*

¹¹ *Gcaba v Minister of safety and security* 2010 (1) BCLR 35 (CC), para 75

¹² Applicant's replying affidavit, para 24-26

Services Supplies case, the applicant acknowledged that, parties affected by and those who made the administrative decision were domiciled and their ordinary or principal business residents fell within the jurisdiction of the Gauteng Division of the High Court. The applicant however argued that this court found jurisdiction on the basis that the adverse effects of the administrative action would be experienced at the Clanwilliam Dam which fell within the territorial area of the Western Cape, and thereby conferring the jurisdiction to this Court.

[29] On the other hand, the respondents were emphatic in that, the adverse effects of the administrative decision or action of the first and second respondents were felt by the applicant, whose residence fell outside the jurisdiction of this court and within the area of jurisdiction of the Gauteng High Court, where the applicant was resident.

[30] The fact that the dam which was the subject matter of the dispute between the parties was located within the territorial boundaries of the Province of the Western Cape remained a neutral factor because it was not necessary to consider the location of the cause of action for judicial review of administrative action.¹³ The location of the dam did not turn on any significance because jurisdiction prescribed in terms of PAJA was not based on the location of the cause of action.

[31] Noteworthy, the applicant launched this application in this court despite the fact that there was a pending application for interdictory relief in the Pretoria High Court at the time this application was issued. Clearly, on these facts, it can be reasonably inferred that the applicant believed that the court with the necessary jurisdiction in this matter was the Pretoria High Court. It seems that the applicant chose to institute review proceedings in this court for convenience purposes. However, such decision conflicts with s 1 of PAJA. Furthermore, it should be borne in mind that questions of convenience do not arise when a high court decides whether it has jurisdiction in terms of PAJA.¹⁴

¹³ *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* (supra)

¹⁴ *TMT Services & Supplies (Pty) Ltd t/a Traffic Management Technologies v MEC: Department of Transport, Province of KwaZulu-Natal and Others* (Case no. 1059/2020) [2022] ZASCA 27 (15 March 2022), para 35

[32] When all the decisive jurisdictional factors listed in *TNT Services and Supplies*, together with the provisions of s 1 of PAJA are construed correctly and applied to the facts at hand, the applicant's choice of this Court lacked in all respects. Most importantly, the decision makers in the administrative decision had their principal place of business in Pretoria; the third respondent and the applicant who were directly affected by the administrative decision both had their principal places of business within the territorial jurisdiction of the Gauteng Division; the administrative decision was taken in Pretoria. From these facts it is abundantly clear that the court having the necessary jurisdiction in terms of s 1 of PAJA is the court in Gauteng.

[33] Therefore, there could be no basis upon which this Court found jurisdiction over this dispute. Indeed, this court lacked the necessary jurisdiction.

[34] Even if I am wrong on the question of jurisdiction, I am still of the view that the applicant failed dismally to make out a case for condonation for the late filing of its review application as envisaged in s 9 of PAJA. Section 7(1) of PAJA provides that

'any proceedings for judicial review in terms of s 6(1) must be instituted without unreasonable delay and not later than 180 days after the date –

(a) subject to subsec (2)(c), on which any proceedings instituted in terms of internal remedies as contemplated in subsec (2)(a) have been concluded; or
(b) where no such remedies exist, on which the person concerned was informed of the administrative action, became aware of the action and the reasons for it or might reasonably have been expected to have become aware of the action and the reasons.

[35] The applicant issued its application for review of the decision to disqualify it on 23 May 2024. As foreshadowed above, on 22 May 2023, the applicant was informed of the decision to disqualify it from the tender. The reasons for the disqualification were furnished on 3 June 2023. The review application was issued in about twelve (12) months after the applicant was advised of the decision to eliminate it from the bid by the Department, and some eleven (11) months after the applicant was furnished with the reasons for its elimination.

[36] The review application was preceded by two other applications that served before the North Gauteng Division of the High Court, Pretoria. The first application was on an urgent basis, it sought to prevent the third respondent from commencing with the work at the Clanwilliam Dam. After it was struck off the roll for lack of urgency, the applicant pursued the another application, seeking to interdict the operations at the Clanwilliam Dam, pending the finalisation of its review litigation process. This second application was dismissed on 11 December 2024.

[37] The applicant submitted that its failure to institute the review proceedings within the prescribed time period was occasioned by various factors. Such factors included that, after receipt of the reasons for their disqualification from the tender on 3 June 2023, it also engaged in correspondence with the Department in relation to its elimination. The Department furnished applicant with the complete record of the tender on 11 September 2024. Further that, due to the fact that the applicant was an engineering company, it was not necessarily aware of the legal requirement to issue the review application within a prescribed time period. According to the applicant, and on the advice of Tiefenthaler Attorneys, it was also under the mistaken belief that the prescribed period of 180 days was to start running upon receipt of the outcome of the internal investigation that was conducted by the Department.¹⁵

[38] Mr Grobler SC for the applicant also submitted that, at some point, the applicant was under the impression that the prescribed timeframe for the initiation of the review proceedings would start running after the litigation which was unfolding before the Gauteng Division of the High Court had completed its course. The applicant submitted that if due regard was given to its cause of complaint, it was in the interests of justice for the merits of the review application to be decided. According to them, the delay was 180 days and it was not exorbitant.¹⁶

¹⁵ Founding affidavit , para 19

¹⁶ Founding affidavit , para 23

[39] Relying on *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd*,¹⁷ the applicant argued that, when assessing delay the court had to consider if it was unreasonable. Further that the court should be guided by *South African National Roads Agency Ltd v Cape Town City*,¹⁸ to be able to fairly conclude if it was in the interests of justice to condone a delay that was longer than 180 days. On the application of these techniques, the applicant argued that it had good prospects of success when regard was had to their cause of complaint against the awarding of the tender to the third respondent and that the interests of justice permitted condonation of their lateness.¹⁹

[40] The respondents, on the other hand, highlighted that when the applicant's urgent application failed before the Gauteng High Court, the court warned that the correct process for it would have been to pursue a review application. However, the applicant made a different selection. The respondents also pointed out that the work at the Clanwilliam Dam had commenced and is at an advanced stage. Implying that any interference with the ongoing operations would be disastrous in many respects, and blamed that on the sluggish conduct of the applicant's litigation, which according to them was inexcusable. They submitted that the delay in instituting proceedings was deeply prejudicial with huge safety to the communities in close proximity to the dam and financial loss risks to the fiscus.²⁰

Discussion of Condonation

[41] Starting with the *classicus* legal principle that *ignorantia non excusat* or *ignorantia legis neminem excusat*, it is unavoidable to agree with the respondents' assertion that this excuse is unconvincing. Let alone that it does not qualify as an explanation for delay in the given circumstances. Therefore, the excuse that their erstwhile counsel gave them bad advice cannot hold.

¹⁷ *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd* (CCT 91/17) [2019] zacc 14 (16 April 2019) ; [2019] ZACC 15

¹⁸ *The South African National Road Agency v City of Cape Town* 2016 (4) All SA 332; 2017 (1) SA 468 (SCA)

¹⁹ Applicant's heads of arguments, Paras 21-26

²⁰ First and second respondents' heads of arguments , paras 30-32

[42] Noteworthy, the operation at Clanwilliam Dam commenced in August 2023, as at 10 October 2024, 16% of the work had been done and up to R15mil had been spent.²¹ At the hearing of this application, up to 25% of the work at the dam had been completed.²² From this, it seems that there has been significant progress in execution of the impugned tender. As the applicant acknowledged this reality, it resiled itself to the potential complications in regard to the work already performed by the third respondent in terms of the service level agreement. But, with the same breath insisted that such should be resolved in terms of the contractual terms between the respondents.

[43] As discussed in paragraph 14 of this judgment, on 9 October 2023, when the Gauteng High Court handed down its reasons to the judgment on the urgent application for an interim interdict, it remarked that the applicant had known since 22 May 2023 that the applicant's bid had been unsuccessful. The court also stated that the applicant could have launched a review application at the time but chose to engage with the first respondent in correspondence. The court also found that the applicant's application was not urgent, as the applicant had since 22 May 2023 that its bid for the tender was unsuccessful and had not acted immediately by either approaching the Court for the interim interdict at the time or launching a review application on an urgent basis.²³

[44] These remarks were restated by the Gauteng High Court on 11 December 2024, when it handed down its judgment and dismissing the interim interdict application that was at the instance of the applicant. The court further said that, 'Instead of launching the review application as it should have done, Ingerop launched an urgent application.' ²⁴

[45] Notwithstanding these compelling remarks of the court on 9 October 2023, it still took the applicant until 13 May 2024 to launch this review application. Even if it could be accepted for once that the applicant, as an engineering firm, was ignorant

²¹ First and second respondents' answering affidavit, dated 10 October 2024

²² Uniform Rule 6(5) Affidavit of Dr. Le Grange

²³ Ingerop South Africa (PTY) LTD v Department of Water and Sanitation and Others (Case number 82093/2023) GHC, 9 October 2023, Paras 11-12

²⁴ Ingerop South Africa (PTY) LTD v Department of Water and Sanitation and Others (Case number 82093/2023) GHC, 11 December 2024, Para 7

about the applicable legal timeframes, it could not provide a plausible explanation for the delay after the court explicitly directed it to rather pursue a review application, as early as 9 October 2023.

[46] In my respectful view, the applicant failed to make out a case for condonation for the late filing of its application. This conclusion is fortified by the following factors, namely: (a) the applicant was unable to provide a reasonable explanation for its failure to issue the review application within the time period set out in s 7(1) of PAJA; (b) the applicant did not demonstrate that it was entitled to the extension of the prescribed timeframe in terms of s 7(2) of PAJA. (c) the applicant's excuse that their delay was occasioned by bad legal advice is not a competent explanation to justify the condonation; (d) failure of the applicant to heed the advice of the court when they were furnished with reasons why the urgent application was struck off the roll was fatal to the applicant's bid to have the condonation granted.

Conclusion

[47] In light of the findings and conclusions above, the question of jurisdiction became dispositive in this matter. Consequently, this court stood precluded from traversing the remainder of preliminary issues raised; the merits of the review application, and the draft order that was proposed by the applicant at the time of hearing this application.

Costs

[48] The legal representatives of all the parties were in agreement on the course of how costs should be determined. This was in that there was no reason for a departure from the norm that costs should follow the results, with which I agree.

Order

1. This court lacks jurisdiction to hear the review application.
2. The applicant's application to review the decision to award a tender to the third respondent is hereby dismissed.

3. The applicant is ordered to pay the costs of this application on a party and party scale, including the cost of two counsel where so employed, on Scale C.

Sipunzi AJ
Acting Judge of the High Court

I agree

And it is so ordered.

Lekhuleni J
Judge of the High Court

Appearances

For the Applicant: Adv. Grobler SC.
Instructed by: York Attorneys INC.

For the first and second respondents:
Instructed by: The State Attorney, Johannesburg

For the third respondent: Weavind & Weavind Inc. Pretoria