



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

JUDGMENT

Not Reportable

Case no: 13787/2024

In the matter between:

RAUBEX BUILDING (PTY) LTD

APPLICANT

and

BITOU MUNICIPALITY

FIRST RESPONDENT

CARNIVORE CAPITAL (PTY) LTD

SECOND RESPONDENT

Neutral citation:

Coram: COOKE AJ

Heard: 5 August 2025

Delivered: 28 August 2025

Summary: Status of judgment in interim application – duty to exhaust internal remedies – test for non-responsiveness

ORDER

[1] Part B of the application is dismissed.

[2] The applicant shall pay the costs of the second respondent, including the costs of two counsel with senior counsel on scale C, and junior counsel on scale B.

JUDGMENT

Cooke AJ:

- [1] Alongside the N2 highway outside Plettenberg Bay, opposite the Formosa Bay Resort, lies an undeveloped parcel of land. Since just after the turn of the century this centrally located plot has been earmarked for a housing development. In October 2023, the first respondent ('the Municipality') called for proposals for a high-density residential development. The vision was to build affordable contemporary housing which would be offered to middle-income members of the community so they could, with the assistance of subsidies from the Department of Human Settlements, become homeowners for the first time. The development would include amenities typically found in modern housing estates, such as private open spaces, communal facilities, security and the like.
- [2] The applicant ('Raubex') and the second respondent ('Carnivore') both submitted proposals. In May 2024, the tender was awarded to Carnivore. Dissatisfied with this decision, Raubex brought an application for the review of the decision. As is often the case in such applications, the relief comprised two parts - Part A and Part B.

- [3] In Part A of the application, Raubex sought urgently to interdict the implementation of the tender pending the determination of Part B. In Part B, Raubex seeks the following substantive relief:
- a. The review and setting aside of the Municipality's decision to eliminate Raubex from the tender process.
 - b. The review and setting aside of the Municipality's decision to award the contract to Carnivore.
 - c. Directing that the contract be awarded to Raubex, alternatively remitted to the bid adjudication committee ('BAC') for reconsideration.
- [4] Both parts of the application were opposed by Carnivore. For its part, the Municipality abided by the decision of the court and over time delivered two explanatory affidavits. At the hearing before me, the Municipality was represented by counsel, although she recorded that she was only on a watching brief, and she made no submissions.
- [5] At the first hearing of Part A, the application was struck off the roll by Francis J for lack of urgency. Part A was then re-enrolled and heard by Bhoopchand AJ on 5 November 2024. A fortnight later, on 19 November 2024, the learned judge handed down judgment¹ in which the application for an interim interdict was dismissed with costs, including the costs of two counsel ('the interim judgment'). I highlight certain aspects of this judgment.
- [6] First, the judge made it clear that he was only dealing with the application for an interim interdict. He declined to read two bundles of documents obtained through the rule 53 procedure, noting that those documents are best reserved for the review

¹ Reported as *Raubex Building (Pty) Ltd v Bitou Municipality and Another* [2025] 1 All SA 472 (WCC).

court.² Later in the judgment he recorded that he was cognisant of the relief sought in the application and that a review remains in the offing.³

- [7] As regards Raubex's obligation to exhaust internal remedies, he held that the internal appeal had been submitted on time, and this had been confirmed by an email from a representative of the Municipality which stated that the closing date for appeals was 9 May 2024.⁴
- [8] On the substance of the application, he found that Raubex had failed to satisfy the requirements of an interim interdict, more particularly: (a) its prospects of success in the review application were poor or negligible because it had failed to comply with the design limitations (its proposal of a four-storey building with a height above 10.67m contravened the applicable by-law);⁵ (b) the balance of convenience was firmly against Raubex;⁶ (c) Raubex had failed to identify any current or imminent harm;⁷ and (d) Raubex provided credible alternative relief when it adverted to its intention to expedite the review process.⁸
- [9] After receiving the interim judgment, the attorneys for Carnivore addressed Raubex's attorneys on several occasions contending that - having regard to the findings on the merits of the review in the interim judgment - Raubex should withdraw Part B of the application. It appears from recent correspondence that Raubex was amenable to withdrawing the application, subject to there being no cost order against it. This proved to be a sticking point and in the result the parties proceeded with Part B of the application.
- [10] On 30 July 2025, shortly before the hearing, Raubex delivered a further affidavit in which it sought to set out 'new material information' and asked that the matter be

² Ibid para 25.

³ Ibid para 42.

⁴ Ibid paras 16 and 24.

⁵ Ibid para 42.

⁶ Ibid para 43.

⁷ Ibid para 42.

⁸ Ibid para 44.

referred to oral evidence. The main gripe in this affidavit concerned Carnivore having been permitted to amend its site development plan. Carnivore delivered a response on 4 August 2025 in which it objected to the delivery of the further affidavit. Carnivore pointed out that Raubex's further affidavit had not been accompanied by an application in terms of uniform rule 6(5)(e). Carnivore also replied to the contents of the further affidavit and made detailed submissions regarding costs.

[11] At the hearing counsel for Carnivore submitted that the further affidavit fell to be regarded as *pro non scripto* (as if it had not been written). Reliance was placed on judgments such as *Sewpersadh*⁹ and *Hano Trading*.¹⁰ Counsel for Raubex, on the other hand, called in aid the recent judgment of Mabindla-Boqwana JA in *De Kock*.¹¹

[12] In my view, Raubex failed to provide a proper and satisfactory explanation for not having placed the new information before the court at an earlier stage. In particular, Raubex would have been aware that Carnivore's bid did not comply with the building line when it first received the bid evaluation committee report ('the BEC report'). It would have seen then that Carnivore had to apply for a relaxation of the building line or amend its proposed layout. If there was anything in this new point it could have been raised in the supplementary founding affidavit. I am also not persuaded that the new information is relevant or important. Having said that, the prejudice to Carnivore is largely ameliorated by it having filed a full reply. The further affidavit also purports to support the last-minute oral evidence application (discussed below). Having regard to all the circumstances, I am willing to admit the affidavit, and Carnivore's response, but only for the limited purpose of considering the application to refer the matter to oral evidence.

The status of the interim judgment

⁹ *Standard Bank of SA Ltd v Sewpersadh and Another* 2005 (4) SA 148 (C) para 13.

¹⁰ *Hano Trading CC v JR 209 Investments (Pty) Ltd and Another* 2013 (1) SA 161 (SCA) paras 7-14.

¹¹ *De Kock v Du Plessis and Others* 2024 JDR 3115 (SCA) paras 24ff.

[13] Before turning to the issues which arise in Part B, it is apposite to make a few observations regarding the status of the interim judgment. I do so in light of the insistence on the part of Carnivore's attorneys that Raubex withdraw the application because of the findings in the interim judgment, as well as an initial submission by Raubex's counsel at the hearing to the effect that I am bound by the interim judgment.

[14] The courts have approached judgments in interim proceedings in different ways although the effect of these decisions, for present purposes, is the same.

[15] In *National Gambling Board* the Constitutional Court held:¹²

'an interim interdict is by definition "a court order preserving or restoring the status quo pending the final determination of the rights of the parties. It does not involve a final determination of these rights and does not affect their final determination." The dispute in an application for an interim interdict is therefore not the same as that in the main application to which the interim interdict relates.'

[16] Consistent with the notion that the dispute is different, the courts have held that the principles of *res judicata* do not apply to the decision of the court which hears the application for interim relief.¹³ It has also been held that when courts in interim applications make findings which purport to determine the issues in the main application, such pronouncements should be regarded as obiter.¹⁴

¹² *National Gambling Board v Premier, Kwa-Zulu Natal and Others* 2002 (2) SA 715 (CC) para 49.

¹³ *Ward v Cape Peninsula Ice Skating Club* 1998 (2) SA 487 (C) at 502C-E; *Zulu v Minister of Defence and Others* 2005 (6) SA 446 (T) ('Zulu') para 42.

¹⁴ *Buthelezi and Others v Ditsobotla Local Municipality and Others* [2021] ZANWHC 37 (9 March 2021) para 17.

- [17] In *Tony Rahme*¹⁵ the court held that interlocutory decisions are not binding at later stages of the proceedings and should yield easily to persuasive arguments indicating error or oversight. A different perspective was expressed in *Zulu*¹⁶ where the court held that it is not an issue of the hierarchy of the courts and which of the two courts has the power to bind the other. Rather it is a matter of the two courts fulfilling different functions in the exercise of their judicial powers. The court considering final relief is seized with the full matter and is called upon to decide the issue finally. On the other hand, the court that considers interim relief only must decide the issues on a preliminary basis and having regard to the existence or non-existence of a prima facie right.
- [18] Having regard to the approach which was adopted in the interim judgment, in which it was specifically recorded that the court was only determining the interim relief, and having regard also to the authorities set out above, in my view I am not constrained to follow the approach which was adopted in the interim judgment in so far as the same issues arise in Part B of the application.
- [19] I now turn to assess Part B of the application. The interim judgment has been reported, and it is therefore not necessary to set out the background to this matter in detail. The first issue which must be determined is whether Raubex complied with the obligation to exhaust its internal remedy. If it failed to do so, and absent an exemption, I am precluded from reviewing the challenged administrative action.

Exhaustion of internal remedy

- [20] In terms of s 7(2) of the Promotion of Administrative Justice Act 3 of 2000 ('PAJA') it is compulsory for the aggrieved party in all cases to exhaust the relevant internal remedies unless exempted from doing so by way of a successful application under

¹⁵ *Tony Rahme Marketing Agencies SA (Pty) Ltd and Another v Greater Johannesburg Transitional Metropolitan Council* 1997 (4) SA 213 (W) at 216C.

¹⁶ Para 42.

s 7(2)(c) of PAJA.¹⁷ In *Dengetenge* the Constitutional Court explained that a review application that is launched before exhausting internal remedies is taken to be premature and the court to which it is brought is precluded from reviewing the challenged administrative action until the domestic remedies are exhausted or unless an exemption is granted. This means that the duty to exhaust internal remedies defers the exercise of the court's review jurisdiction for as long as the duty is not discharged.¹⁸

- [21] The decision taken by the Municipality to award the tender to Carnivore was conveyed to Raubex on 17 April 2024. The letter drew attention to a provision in the Bitou Municipality SCM Policy ('the SCM Policy') which affords affected bidders the right to appeal against the decision of the BAC or Accounting Officer by giving written notice of their appeal and the reasons for it to the municipal manager within 21 days of the receiving date of the letter. The SCM Policy was not attached to any of the affidavits, nor was it included in the record. The SCM Policy would, however, appear to mirror s 62(1) of the Local Government: Municipal Systems Act 32 of 2000 ('the Systems Act'). This section provides:

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

- [22] Raubex lodged its appeal on 9 May 2024. The days contemplated by the Systems Act are calendar days.¹⁹ The same must apply to the SCM Policy. Consequently, Carnivore argued that 21 calendar days, counted from 17 April 2024, is 8 May 2024.

¹⁷ *Nichol and Another v Registrar of Pension Funds and Others* 2008 (1) SA 383 (SCA) at para 15.

¹⁸ *Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining and Development Company Ltd* 2014 (5) SA 138 (CC) para 116.

¹⁹ *Amandla GCF Construction CC and Another v Municipal Manager, Saldanha Bay Municipality and Others* 2018 (6) SA 63 (WCC) para 7.

Therefore, so the argument ran, when Raubex lodged its appeal on 9 May 2024 it was out of time, albeit by just one day. The lapsing of the time for exercising the internal remedy would mean that the duty to exhaust internal remedies had not been satisfied.²⁰

[23] Although Raubex adopted various positions on this aspect through the course of the litigation, finally, in replying argument at the hearing, Raubex's counsel submitted that the 21-day period did not commence before 23 April 2024, being the date when the Municipality provided reasons for its decision. In my view, this belated submission was well-founded.

[24] In *Evaluations Enhanced Property Appraisals (Pty) Ltd v Buffalo Metropolitan Municipality*,²¹ Dukada J held that although s 62(1) of the Systems Act does not specifically state that the notification of the decision must be accompanied by the reasons for that decision, in our present Constitutional democracy, the maker of that decision is obliged to give reasons for it.²² The learned judge pointed out that the reasons for the decision were necessary to enable an aggrieved party to formulate properly the notice of appeal, which includes the provision of reasons, as required by s 62(1) of the Systems Act.²³ This judgment relied upon the approach adopted by the Constitutional Court in *Koyabe*, where the court found that reasons were important for the applicants' review of a decision finding them to be illegal foreigners, and they were entitled to reasons.²⁴

[25] In the Gauteng division, Keightley J (as she then was) adopted a similar approach in the matter of *FM v Minister of Home Affairs*.²⁵ This case concerned a decision by a Standing Committee on Refugee Affairs ('SCRA'). It was contended that the

²⁰ *Koyabe and Others v Minister for Home Affairs and Others (Lawyers for Human Rights as amicus curiae)* 2010 (4) SA 327 (CC) ('*Koyabe*') para 47.

²¹ 2013 JDR 1690 (ECG).

²² *Ibid* para 18.

²³ *Ibid* para 19.

²⁴ *Koyabe* paras 61-2.

²⁵ 2014 JDR 1732 (GP) at paras 111-123. See also the discussion in *Administrative Law in South Africa* at 654-5.

SCRA is under no duty in terms of the Refugees Act 130 of 1998 to provide reasons for its decision and if the applicant wished to be provided with reasons, her remedy lay in section 5(1) of PAJA, ie she should have requested reasons. The learned judge pointed out that in light of the particular facts that existed (the applicant was placed under notice to leave the country within 30 days), the resort to section 5(1) of PAJA by the applicant would have served no practical purpose.

[26] The judgment of Dukada J was overturned by a full court which reasoned, with reference to the principle of subsidiarity and the request-driven regime of s 5 of PAJA, that there was no automatic right to reasons, and the process prescribed by s 5 should be followed.²⁶

[27] The finding of the full court has been criticised by Steytler and de Visser.²⁷ According to these authors the full court's interpretation produces an unsatisfactory situation for those aggrieved parties who rely on the reasons given to decide whether to appeal. These authors note that the PAJA timelines extend far beyond the appeal deadline and by delaying the furnishing of reasons, a municipality may orchestrate the lapsing of the 21-day period. The authors submit that the 21-day period for lodging an appeal commences on the day that the aggrieved party receives the reasons for the decision.

[28] Although the full court did not agree that the decision-maker was obliged by s 62(1) to provide reasons with the notification, it did make the following important finding:

'It follows that the applicant had 90 days from 21 August 2012 to request reasons from the [municipality] (section 5(1) of PAJA). The [municipality] had 90 days to give reasons failing which, the decision would have been deemed to be unlawful and liable to be set aside (section 5(2) and (3) of PAJA). If the [municipality] gave reasons, the applicant had 21 days to give notice of its appeal and the reasons

²⁶ *Evaluations Enhanced Property Appraisals (Pty) Ltd v Buffalo City Metropolitan Municipality and others* [2014] 3 All SA 560 (ECG).

²⁷ N Steytler and J de Visser *Local Government Law of South Africa* Issue 17 (May 2025) §2.3.5.1.

therefor (section 62(1) of the Systems Act), and the appeal would then have been dealt with as provided in section 62. This is the procedure which should and could have been followed by the applicant.’²⁸

As I read the judgment, if a request for reasons is made, then the 21-day period only commences after the reasons are given. The differences of approach described above therefore only become relevant if the aggrieved party does not request reasons.

[29] In this matter reasons were requested and given. It is therefore not necessary to decide whether the approach followed by Dukada J and Keightley J is correct, or whether the approach adopted by the full bench is to be preferred. Even on the latter approach, if reasons are requested and given, the 21-day period does not start until the latter date.

[30] It follows, to my mind, that the 21-day period did not commence until the Municipality had provided the reasons for the decision. This only occurred on 23 April 2024 at the earliest. It follows that the appeal was lodged within the 21-day period.

[31] Carnivore has a further argument. It submits that if the appeal was lodged in time, then the appeal was never decided and Raubex should have brought an application to compel the Municipal Manager to decide the appeal. According to Carnivore, unless and until the appeal has been decided, Raubex has not exhausted its internal remedy. In my view, this argument is unrealistic. It appeared from the Acting Municipal Manager’s letter of 13 May 2024 that he did not consider that there were grounds for appeal. In his view, the decision was ‘in terms of the bid rules and applicable legislation’. The final sentence in this letter thanked Raubex for its time and interest in submitting an offer. As far as he was concerned, the matter was

²⁸ Para 45.

closed. On the same day the Acting Municipal Manager signed a memorandum of understanding and a sale agreement with Carnivore.

[32] Although Raubex's attorneys sent a letter on 16 May 2024 requesting confirmation that Raubex's appeal would be noted, and the implementation of the award stayed, on 3 June 2024 Mr Damonds informed Raubex's attorneys that 'the appeal period has lapsed and no further matters falling outside the period will be considered'. Raubex's attorneys sent a response to Mr Damonds on the following day, 4 June 2024, raising various issues. Later that day, Mr Damonds sent an email to Raubex's attorneys, recording that the personal assistant to the Municipal Manager would provide their letter to the Municipal Manager. Notwithstanding this undertaking, no further correspondence was received from the Municipality, and the application was then launched on 13 June 2024.

[33] In my view, the correspondence from the Municipality shows that either it had already decided the appeal, or it would not be doing so. Either way the door had been closed on Raubex, and there was no longer any 'available, effective and adequate'²⁹ remedy which Raubex could pursue. Raubex was therefore entitled to turn to the courts for relief. Whether its review is well-founded is considered in the next section.

The lawfulness of the decision

[34] In its founding affidavit, Raubex identified two grounds of complaint. First, Raubex should have been awarded 90 points for its financial offer, rather than 83.55 points. Second, in so far as it was declared to be non-responsive, Raubex alleged that its tender conformed to all the terms, conditions and specifications of the tender documents, without material deviation or qualification. As to the non-compliance with the height restrictions, Raubex alleged that the Municipality knew that (a) Raubex was willing and able to build the housing units on a three-level construction

²⁹ *Koyabe* paras 41-45.

model and (b) this adjustment would not affect the bid price as Raubex had bid on a per unit basis.

- [35] Based on these complaints, Raubex contends that the impugned decisions were unlawful in terms of s 6 of PAJA, including s 6(2)(e)(iii) (the action was taken because irrelevant considerations were taken into account, or relevant considerations were not considered) and s 6(2)(f) (the action was irrational etc).
- [36] In the supplementary founding affidavit, Raubex developed its second complaint. It alleged that the Municipality had regarded Raubex's bid as responsive and scored its tender on that basis. Raubex pointed out that tenderers that submitted a site development plan for a three-storey building were awarded a score of 0.25, while Raubex was scored 0. According to Raubex, the fact that it was specifically scored in relation to this functionality dismantles any notion that its bid was treated as non-responsive on the basis that the building plans submitted exceeded three-storeys.
- [37] Furthermore, Raubex alleged, with reference to clause F.3.8.2 of the CIDB Standard Conditions of Tender, that its tender had none of the attributes that would qualify as a material deviation. In support of this argument, Raubex put up an affidavit from a quantity surveyor who contended, amongst other things, that altering the design from a four-storey building to a three-storey building will have no impact on the overall costing per unit.
- [38] Raubex's first complaint may be disposed of briefly. Although certain documents indicated that it had initially only been scored 83.55 points for its financial offer, the final iteration of the BEC report showed that it had been scored 90 points for its financial offer. It appears from this report that Raubex was considered

‘unacceptable’³⁰ because it submitted a plan for four floors and thus exceeded the Bitou Zoning Scheme By-law (‘the By-law’).

[39] The BEC report was in due course adopted by the BAC, whereafter the final decision was made by the Municipal Manager. The finding by the BEC that Raubex’s tender was ‘unacceptable’ was followed without demur by the BAC and the Municipal Manager. Ultimately, the decision went against Raubex because it had not complied with the height restriction, not because of its financial offer.

[40] As regards the second complaint, the BEC report contained several anomalies:

- a. It states that there were four ‘responsive’ tenders, one of these four being Raubex. It listed tenderers which were found to be ‘non-responsive for evaluation and therefore eliminated’. This list did not include Raubex. The report also had a section headed ‘Reference/Risk checks on responsive tenders’, under which the bidders who had not complied with the height restrictions were listed (including Raubex). A further section was headed ‘Risk checks on responsive tenders’. Once again, Raubex was described under this heading. All of this indicates that the BEC considered Raubex to be a ‘responsive’ tender. The Municipality did not explain why Raubex’s tender was simultaneously described as ‘responsive’ and ‘unacceptable’.
- b. The BEC report also recorded that ‘quality’ shall be scored by evaluating, amongst other things, ‘Compliance with Land Development Parameters’ – for which 1.25 points were allocated. Of these 1.25 points, 0.25 points were for ‘Compliance with Height 10.67m & 3 Storey’. Again, the Municipality did not explain why it scored bidders for compliance with the height restrictions (a meagre 0.25 points), only to exclude them for non-compliance with that same requirement.

³⁰ An acceptable tender is defined in section 1 of the Preferential Procurement Policy Framework Act 5 of 2000, as: ‘any tender which, in all respects, complies with the specifications and conditions of tender as set out in the tender document’.

- c. The report ranked three of the bidders, albeit 'for indicative purposes only'. Raubex occupied the top spot. If Raubex was to be excluded for non-compliance with tender conditions, why place it in a ranking list, even if the list was only for indicative purposes? Generally, only responsive bidders are ranked.³¹

- [41] Carnivore mounted a strong defence of the Municipality's decision. However, its position was undermined by the fact that the Municipality failed to respond to certain allegations made by Raubex. In particular, the Municipality did not deny that it knew that Raubex was willing and able to build the housing units on a three-level construction model and this adjustment would not affect the bid price. Nor did the Municipality address the allegations made by Raubex's quantity surveyor.
- [42] Although the BEC report contains the several anomalies described above, properly construed it is apparent that Raubex's non-compliance with the height restrictions constituted the ground for rejecting Raubex's bid. The anomalies, while unfortunate and confusing, are not fatal to the decision.
- [43] In relation to responsiveness and acceptability, there is a helpful discussion of the legal principles in *Norland Construction*.³² According to Govindjee J there is no formula for evaluating responsiveness and acceptability and the consequences of non-compliance may vary depending on factors such as the purpose and materiality of the bid requirement in question and the extent of compliance.³³ The learned judge referred to an article by Volmink,³⁴ who opined that the courts must enquire

³¹ Compare *Ndodana Consulting Engineers (Pty) Ltd and Another v South African National Roads Agency SOC Limited and Others* 2025 JDR 1066 (GP) ('*Ndodana*') where Van der Schyff J found it curious that tenders were declared non-responsive after being ranked according to the points system. He observed that generally only responsive tenders are ranked and remarked that this contributed to the court's discomfort with the process followed by SANRAL (para 20).

³² *Norland Construction (Pty) Ltd v Chris Hani Development Agency (SOC) and Another* [2024] ZAECMKHC 10 (23 January 2024) ('*Norland*').

³³ *Ibid* para 11.

³⁴ P Volmink 'Legal consequences of non-compliance with bid requirements' (2014) 1 *African Public Procurement Law Journal* 41.

into the underlying objective and materiality of a bid requirement to ascertain whether its purpose was in fact met despite less than perfect compliance. A decision whether to exclude a non-compliant bidder from a bid process will depend on a variety of factors including: the wording of the request for proposal, the materiality of the unfulfilled requirements, the degree of non-compliance and the purpose of the requirement. Govindjee J noted further that a failure to comply with prescribed conditions would result in a tender being disqualified as an acceptable tender, unless those conditions were immaterial, unreasonable or unconstitutional. Whether or not a deviation or qualification is material is a question to be determined by the bid evaluation committee in its discretion, taking into account the set eligibility criteria.³⁵

- [44] Raubex submitted that the reliance upon the height deviation was an afterthought, and the officials misconstrued their powers and made an error of law. I do not agree. The subsequent BAC minutes show that the BAC endorsed the BEC's view that Raubex's bid was 'unacceptable' and concurred that there was only one responsive bid. The Municipality therefore adopted the view that Raubex's bid was non-responsive prior to awarding the tender to Carnivore. This is not one of those cases where a decision-maker justifies his or her decision with reasons concocted after the decision has been challenged.
- [45] Raubex also contended that the tender documentation did not state explicitly that a bid would be disqualified if it proposed something beyond the existing zoning. The tender notice did provide, as its first rule, that tenders are to be completed in accordance with the conditions and tender rules contained in the tender document. The Tender Specifications stated that the By-law and the Rezoning Approval formed part of the applicable 'standards, specifications and regulations'. Furthermore, under the heading 'specifications / requirements', it stated '(t)he development shall adhere to the development parameters of the relevant zoning and Town Planning approval, as well as the conditions of the rezoning approval

³⁵ *Norland* para 13.

date 17 June 2020.’ (Emphasis added.) The Rezoning Approval, which was annexed, stated that a departure to allow for four, rather than three, storeys, and for the overall height restriction to be increased from 10.6 m to 12.64 m, had been refused. In my view, bidders should have appreciated that the height restrictions were mandatory.

- [46] Raubex submitted further that it should have been afforded an opportunity to clarify its design and its failure to do so was procedurally unfair. The circumstances in which a bidder is entitled to be given such an opportunity are discussed by Hoexter and Penfold in *Administrative Law in South Africa*.³⁶ They note that if the bid is to be rejected on extraneous grounds, then an opportunity to respond should be given. One example is where a disparaging report from a third party casts doubt on the competence of the bidder, in which case the bidder should be heard on the alleged basis for rejecting its bid. This is not such a case.
- [47] Where a bidder is rejected on account of non-compliance with tender conditions different considerations arise. Hoexter and Penfold express the view that in such an instance there will generally be no obligation to allow that bidder to make further representations before rejecting its bid. I agree. There was accordingly no procedural unfairness on this count.
- [48] As to materiality, *WDR Earthmoving Enterprises v The Joe Gqabi District Municipality*³⁷ is authority for the proposition that regulatory non-compliance is axiomatically material. Similarly, in *Ndodana* the court held that a tenderer who disregards mandatory bid requirements cannot complain if its bid is declared non-responsive.³⁸ A study of the case law reveals several instances where non-compliance with tender requirements, even of a relatively insignificant nature,

³⁶ 3 ed (2021) at 517-519.

³⁷ 2018 JDR 1295 (SCA) para 34 (bidder only submitted two years of annual financial statements instead of the three which had been prescribed).

³⁸ Para 51.

justified the bid being regarded as non-responsive.³⁹ In my view, the requirement that proposals comply with the height restriction is not ‘immaterial, unreasonable or unconstitutional’.

[49] Furthermore, even if Raubex was able to cure the defect in its bid, as it contends, I do not think the Municipality was obliged to indulge Raubex by providing it with such an opportunity. This would not be fair on the other bidders. It follows that even if the Municipality did know that Raubex could adjust its design without altering the bid price, it was not required to allow Raubex an opportunity to do so.

[50] For all these reasons, and notwithstanding the anomalies and weaknesses identified above, I am not satisfied that Raubex has shown that the Municipality acted unlawfully in so far as it determined that Raubex’s bid was unacceptable or non-responsive. The application thus falls to be dismissed.

[51] For the sake of completeness, I note that Raubex asserted in its supplementary founding affidavit that the Municipality had failed to consider relevant information in evaluating Carnivore’s tender. In argument Raubex’s counsel advised that his client was not persisting with this attack on Carnivore’s tender.

[52] I note further that Carnivore raised other grounds of opposition to the application. Having regard to my findings above, I do not consider that it is necessary to address these further grounds.

Oral evidence

³⁹ Examples include *Sizabonke Civils CC v OR Tambo District Municipality* 2010 JDR 1174 (ECM) (certified copies of documents not provided); *Dr JS Moroka Municipality v Betram (Pty) Limited* 2013 JDR 2728 (SCA) (original tax clearance certificate not submitted); *Afriline Civils (Pty) Ltd v Minister of Rural Development & Land Reform* 2016 JDR 1206 (WCC) (failure (a) to furnish tax-certificate of a proposed sub-contractor and (b) to show that its CIDB registration was valid); and *Prosec Guards CC v Department of Public Works and Infrastructure and Others* 2024 JDR 2197 (WCC) (did not submit a copy of a valid registration certificate issued by the National Bargaining Council for the Private Security Sector).

[53] There is one further matter that needs to be addressed. This is the application made by Raubex at the hearing for the matter to be referred for oral evidence. The issue which Raubex sought to have determined by way of oral evidence was 'whether (Carnivore) complied with a responsive bid in relation to the tender of (Raubex) which was found to be non-responsive'.

[54] When pressed in argument, Raubex's counsel was unable to point to any evidence in the papers which supported an argument that Carnivore's bid had been non-responsive.

[55] The following principles are germane:

- a. A litigant should, as a general rule, apply for referral to oral evidence as soon as the affidavits have been exchanged.⁴⁰
- b. Courts should be astute to prevent an abuse of its process where it is evident that a litigant is intent on a fishing expedition to ascertain whether there might be a case without there being any credible reason to believe that there is one.⁴¹
- c. A party may not seek to lead oral evidence to make out a case for the first time, by way of such oral evidence, where its case is not already made out by it on the papers.⁴²
- d. Similarly, a party may not seek a referral to oral evidence in the hope that the persons to be cross-examined may make admissions helpful to that party.⁴³

⁴⁰ *Mamadi v Premier, Limpopo and Others* 2024 (1) SA 1 (CC) para 44.

⁴¹ *Minister of Land Affairs and Agriculture and Others v D & F Wevell Trust and Others* 2008 (2) SA 184 (SCA) para 56.

⁴² *Ibid* paras 57-59.

⁴³ *4 Africa Exchange (Pty) Ltd v Financial Sector Conduct Authority and Others* 2020 (6) SA 428 (GJ) para 10.

- e. In exercising its discretion to order that oral evidence be heard on any issue, this court should be guided to a large extent by the prospects of the oral evidence tipping the balance in favour of the applicant for such relief.⁴⁴

[56] Raubex's application falls short on all these counts. It was not brought as soon as the affidavits were exchanged. Furthermore, it seems to me that it constitutes a search for a case which does not exist on the papers. Moreover, Raubex has not come close to showing that the oral evidence envisaged would tip the balance in its favour. In the circumstances no case has been made out for a referral to oral evidence, and I therefore decline the belated application for such relief.

Costs

[57] Carnivore advanced a cogent case for the costs to be awarded against Raubex on a punitive scale. I agree that this litigation has been conducted by Raubex in a haphazard fashion. Furthermore, several allegations made in its affidavits were inaccurate. In addition, some of the steps taken were ill-advised. I do not think, however, that the way the proceedings have been conducted is so egregious as to warrant a punitive costs order.

[58] As regards the decision not to withdraw the application, I do not think it was reasonable of Carnivore's attorneys to persistently demand that the application be withdrawn on the basis that the judges hearing the initial urgent application and then Part A, had made adverse findings in relation to the merits of the application. For the reasons set out above, the court hearing Part B was not obliged to follow the approach indicated by the earlier judges.

⁴⁴ *Kalil v Decotex (Pty) Ltd and Another* 1988 (1) SA 943 (A) at 979H-J. See also *Minister of Environmental Affairs and Tourism and Another v Scenematic Fourteen (Pty) Ltd* 2005 (6) SA 182 (SCA) para 29.

- [59] The stance adopted by Carnivore also displayed a logical inconsistency. Whereas it demanded that Raubex take heed of the findings in the interim judgment in relation to it being non-responsive, the finding in the same judgment that the internal appeal had been lodged within the 21-day period did not deter Carnivore from arguing that the internal appeal had been late, and the application should not be entertained on this ground alone.
- [60] Furthermore, one of the grounds upon which the interim interdict was refused was that an expedited review process constituted an alternative remedy. Having succeeded in Part A in part on the basis that the final relief could be determined expeditiously, it was inappropriate for Carnivore to then demand that Part B be abandoned on account of obiter dicta in the interim judgment.
- [61] In addition, I do not think the decision by the Municipality to reject Raubex's bid was unquestionably lawful. As set out above, there were several anomalies in the BEC report. The correspondence sent by the Municipality to Raubex also contained mixed signals as to the basis for the impugned decision. Although I have found that the decision was lawful, Raubex's wish to subject the decision to judicial review was not unreasonable.
- [62] I therefore do not agree that Raubex's application was 'hopeless', nor that it was an abuse and a waste of judicial resources. I am also not persuaded that the application was frivolous or vexatious. This is not an exceptional case where a punitive costs order is warranted.

Conclusion

- [63] To sum up: I agree with Raubex that it did not fall foul of the obligation to exhaust its internal remedies. I am not persuaded, however, that the decision to eliminate Raubex and award the contract to Carnivore was unlawful. Raubex having not

complied with the height restrictions, the Municipality cannot be faulted for declaring it to be non-responsive.

[64] In the result, Part B of the application falls to be dismissed with costs. In my view it is appropriate to award Carnivore the costs of two counsel, with senior counsel's fees to be taxed on scale C, and junior counsel's fees to be taxed on scale B.

DJ COOKE
ACTING JUDGE OF THE HIGH COURT

Appearances

For applicant: N Cassiem SC and W van Aswegen

Instructed by: Peyper Attorneys

For first respondent: D Murote
HDRS Attorneys Inc

For second respondent: KW Lüderitz SC and LGM Minné
Instructed by: Adams & Adams