IN THE HIGH COURT OF SOUTH AFRICA

[EASTERN CAPE DIVISION, MTHATHA]

Case No: CA 26/2025

In the matter between:

INGQUZA HILL LOCAL MUNICIPALITY **Appellant**

(First Respondent in the Court a quo)

and

PHARAOHS CONSTRUCTION JV KUZOBALULA **First Respondent**

(Applicant in the Court a quo)

MAONA CHIA JV **Second Respondent**

(Second Respondent in the Court a quo)

JUDGMENT

DAWOOD J

Introduction

[1] The appellant (The Municipality), with the leave of the court a quo, appeals against the judgment of the court a quo wherein the following orders were made: -

"1. The decision of the 1st respondent to withdraw the bid is hereby set aside,

2. The first respondent is hereby directed to discontinue any tendering and subsequent processes initiated in substitution for the bid,

3. The 1st respondent is hereby directed to implement the recommendation of the Bid Evaluation Committee to award the contract for the construction of new municipal offices in LUSIKISIKI (Ref No: ILHM/117/2022-roads) to the applicant and concluding the required Service Level Agreement with the applicant within 20 (twenty) days of the service of the order; and

4. The first respondent is hereby ordered to pay the costs of this application."

Brief background facts

[2] The first respondent (Pharaohs Construction) brought an application to review the decision of the appellant (The Municipality) and sought the following relief in the Notice of Motion:

" 1. **THAT** the decision of the Municipality to award the Bid for the construction of new municipal offices in Lusikisiki (Ref no: ILHM /117/ 2022-23 / roads) ("the Bid") to the Second Respondent be and is hereby set aside;

2. **THAT** the decision of the Municipality to withdraw the Bid be and is hereby set aside;

3. **THAT** the Municipality be and is hereby directed to discontinue the tendering process initiated in substitution for the Bid;

4. **THAT** the Municipality be and is hereby directed to implement the recommendations of its Bid Adjudication Committee with regard to the Bid by awarding the contract for the construction of new municipal offices in Lusikisiki (Ref no: ILHM / 2022-23 / roads) to Pharaohs Construction and concluding the required Service Level Agreement with Pharaohs Construction within 10 (ten) days of the order.

5. **THAT** the costs of this application, including the costs of Part A, are to be paid by the Municipality …"

[3] Bid No IHLM/117/2022 – 2023/Roads (the Bid) was published in the Daily Dispatch Newspaper on the 6 April 2023 by the Municipality for the construction of new municipal offices in Lusikisiki.

[4] Pharaohs Construction pleaded inter alia as follows: -

(a) The bid process followed the standard process in that bidders were required to meet certain requirements. The bidders which met those requirements were then scored for functionality and then scored for price and preference.
(b) Only bidders who had complied with the compulsory requirements were eligible to be scored for functionality.
(c) Only bidders registered with the Construction Industry Development Board ("CIDB") for an 8GB or higher class of construction work were eligible to have their tenders evaluated.
(d) In the second stage bidders were scored for functionality.
(e) In the third stage bids were scored on price and preference. In broad terms the Preferential Procurement Policy Framework Act ("the PPPFA") has established a preferential procurement policy framework which provides for a preference point system in which points are allocated for specific goals and for price. The bidder which achieved the highest score of the combined points is appointed as the successful bidder.
(f) In this case, the 90/10 preference point system was applied as the value of the contract exceeded R50 million. That is, a maximum of 10 points was allocated for specific goals and then the lowest acceptable tender would score the maximum of 90 points for price. Other "acceptable tenders" would score fewer points calculated in accordance with the prescribed formula.
(g) The closing date for the submission of bids was 23 May 2023 and 14 bids were received.

(h) The tender validity period was a period of 90 days which was extended and further extended to 6 October 2023.

(i) The Bid Evaluation Committee (BEC) recommended Pharaohs Construction as the preferred bidder and disqualified the second respondent, Maona Chia JV (Chia) as being non-compliant.

(j) The Bid Adjudication Committee (BAC) took the view that the requirement for 5 years of audited statements was unlawful since the supply chain regulations from National Treasury required such tender to insist on 3 years audited statements. The BAC's recommendation was that in light of the irregularity the tender must be cancelled and re-advertised with the correct requirements.

(k) The Bid was awarded to Chia even though it had not met the bid requirements, had not achieved functionality, and had been disqualified by the municipality's BEC.

(l) The award of the tender and the purported withdrawal was unlawful and irregular and should be set aside.

(m) The municipality's practice was to publish notices in the Daily Dispatch Newspaper which it did with the notice to bid on 6 April 2023, but the bid award was advertised in the Ikhwezi Newspaper, which is published in Kokstad, KwaZulu Natal and not in the Eastern Cape where the municipality is located.

(n) The notice was not published on the municipality's website.

(o) The enquiries they made revealed that the lead partner of JV was reflected as suspended from the CIBD and only had a grading of 7GB and the second member was not registered with CIBD and accordingly any award to it would be irregular. It fell to be disqualified since it did not comply with the CIBD regulations. Pharaohs Construction had achieved the highest points and should have been appointed as the preferred bidder.

(p) The Municipality had improperly not awarded the bid to it and had unlawfully awarded the bid to Chia.

[5] The Municipality in its answering affidavit deposed to by the Municipal Manager submitted inter alia: -

(a) That the BEC re-convened to consider the recommendation of the BAC after obtaining advice from the Provincial Treasury regarding the way forward and the Provincial Treasury also recommended that the tender be cancelled and be re-advertised.

(b) The BEC thereafter stood by its earlier recommendation of Pharaohs Construction.

(c) The BAC recommended to the Municipal Manager that he should rather cancel the tender process and re-advertise the same.

(d) The Municipal Manager stated that in terms of Municipal Systems delegation the BAC does not make the final award instead he as the accounting officer was at liberty to look at the recommendations and make a fresh decision which is based on neither of the recommendations placed before him.

(e) The Municipal Manager examined the tenders afresh and upon substituting the 5-year requirement with a 3-year requirement, Chia would have been the most compliant based on price and functionality.

(f) The Municipal Manager started two processes concurrently, firstly he issued a notice of intention to award the tender to Chia and secondly, he sought internal legal advice as to whether the 3-year requirement was in effect a material irregularity. He received objections and one specifically raised the issue of the 5-year audited financial statements and the internal advice also stated that the requirement for 5-year financial statements was contrary to the supply chain regulations and was a material irregularity. He accordingly decided to withdraw the tender prior to awarding the same.

(g) The notice of intention to award is not an award and was a test to see if bidders felt prejudiced by the 5-year requirement. There was nothing irrational about his decision and it was not a final award. He received objections and one of the bidders raised the 5-year audited statements. This was one of the motivating factors for him to take a decision to withdraw the tender prior to awarding of the same. On 20 October 2023 he wrote to all the bidders and advised them of his decision to cancel the tender process as well as his intention to issue an updated tender advertisement.

[6] Pharoahs Construction in its replying affidavit pleaded inter alia: -

(a) That the award of the tender and the purported withdrawal are unlawful and irregular and should be set aside.

(b) Chia was not a compliant bidder, but the bid process was manipulated to ensure that Chia was awarded the tender and its decision to withdraw the tender was based on reliance on defunct regulations and without giving compliant bidders the opportunity to be heard.

(c) Pharaohs Construction reiterated that Chia was not compliant in that the bid required the CIDB at 8GB or higher. Chia was suspended and has a 7GB level and neither partner had a CIDB grading of 8GB or higher with them having a grading of 7GB and 2GB. The MBD8 forms must be signed by both partners but this form was only signed by one partner. Chia should have been disqualified on that basis as well.

Issue for determination

[7] Despite numerous issues being raised in the notice of appeal the Municipality elected to focus exclusively on the tender validity period. The municipality conceded that, if it is not successful on this point, that the decision of the court a quo should stand. Pharaohs Construction equally conceded that if this point is decided against it, that it would not be entitled to the relief it was granted. The issue for determination which will be dispositive of the matter is accordingly whether or not the tender validity period was extended beyond the 6 October 2023.

Submissions by the parties

[8] The appellants submitted as follows:-

(a) The tender validity period was last extended to 06 October 2023.

(b) The court a quo found that as at that date the award had not been awarded to any party.

(c) There were objections to the notice of intention to award the tender, including an objection by Pharaohs Construction.

(d) Pharaohs Construction in its papers stated that '*if no appeal/objection is lodged, or if it is dismissed, then the municipality must proceed to award the bid as advertised*'.

(e) The award occurs after resolution of the objections.

(f) The concept of tender validity is central to the public procurement process. It is meant to ensure transparency, fairness and compliance with s 217 of the Constitution. Section 217 of the Constitution mandates that public procurement must, amongst other considerations, be competitive, fair and transparent.

(g) Where, for whatever reason, the administrative processes concerned in the evaluation and adjudication of a tender are not completed within the initial tender validity period, the procuring entity may require bidders to agree to extend the lifespan of their offers due to the procuring entity's intention to extend the bid validity period.

(h) Where such a request is made, bidders will be afforded the opportunity to select one of two options, being to i) accept, or ii) reject the request for extension of the tender validity period.

(i) In *Telkom SA,*[1] the court ruled that once a tender's validity period has expired before an extension, the process is considered complete. No further negotiations or extensions can be made thereafter. This judgment highlights the finality of the

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

tender validity period and stresses that once it lapses, the procurement process must start afresh. Any attempts to alter or extend the terms without mutual agreement could lead to legal invalidation. In this regard, Southwood J held that:

> 'The question to be decided is whether the procedure followed by the applicant and the six respondents after 12 April 2008 (when the validity period of the proposal expired) was in compliance with section 217 of the Constitution. In my view it was not. As soon as the validity period of the proposals had expired without the applicant awarding a tender the tender process was complete – albeit unsuccessfully – and the applicant was no longer free to negotiate with the respondents as if they were simply attempting to enter into a contract. The process was no longer transparent, equitable or competitive. All the tenderers were entitled to expect the applicant to apply its own procedure and either award or not award a tender within the validity period of the proposals. If it failed to award a tender within the validity period of the proposals it received it had to offer all interested parties a further opportunity to tender. Negotiations with some tenderers to extend the period of validity lacked transparency and was not equitable or competitive.[2]

(j) In *SAAB Grintek*[3] the State Information Technology Agency ("SITA"), published a request for bids ("RFB") on behalf of the South African Police Service ("SAPS") in respect of the procurement of Integrated Mobile Vehicle Data Command and Control Solution. In terms of the RFB, the tender validity period was 90 days starting from the closing date for the tender, being 4 October 2010. SAAB Grintek Defence (Pty) Ltd ("SAAB") submitted a bid and was shortlisted as a potential supplier of the tender. On 2 February 2011, SITA advised SAAB that the validity of its bid had expired on 4 January 2011 and requested SAAB to extend the validity of its bid by 90 days to which SAAB agreed. SITA subsequently requested further extensions of the bid from SAAB, which SAAB granted. The Technical Evaluation Team and the Recommendation Committee recommended that the tender be awarded to SAAB. However, on 8 August 2012 the SAPS informed SAAB that it had cancelled the tender in a letter addressed to SITA on 28 May 2012.

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[2] Ibid, para 14.

[3] *SAAB Grintek Defence (Pty) Ltd v South African Police Service and Others* (25286/2013) [2015] ZAGPPHC 1 (16 January 2015) (*SAAB Grintek*).

(i) SAAB sought an order against the respondents to review and set aside the decision of the SAPS to cancel the tender and to review and set aside the decision of SITA not to award the tender to SAAB. The respondents argued that the bid expired 90 days after the submission closing date, unless it was timeously extended by agreement. The first extension only came 30 days after the bid had expired and, since the RFB did not provide for the revival of an expired bid, everything that had transpired after 4 January 2011 was ultra vires because there was no valid bid.

(ii) The court found that since the RFB did not provide any basis for bids to be revived once they had expired and did not provide for extensions to be granted retrospectively once the validity period of the bid had expired, and no extension had taken place before its expiry there was no valid bid in existence and an award could not be made. Because the SAPS and SITA are organs of the State, it is required in terms of section 217 of the Constitution, when they contract for goods and services, to do so in accordance with a system that is "fair, equitable, transparent, competitive and cost effective".

(ii) In *Joubert Galpin Searle Inc*,[4] the court reaffirmed that once the bid validity period expires, the tender process is closed, and a new process must be initiated if no decision has been made during the original validity period. The court emphasized that allowing a process to continue beyond the bid validity period without a proper extension undermines the fairness and transparency of the procurement system.

(iii) The *Searle* judgment further underscores the significance of adhering to deadlines within the procurement process. Plasket J, who took the view that the judgment in *Telkom SA* was 'essentially on all fours with *Searle* observed:

'[68] As with this case, what had to be decided, according to Southwood J, was "the legal consequence of a failure by a public body to accept, within the stipulated validity period for the (tender) proposals, any of the proposals received." In deciding this issue, Southwood J's

[4] *Joubert Galpin Searle Inc & Others v Road Accident Fund* (3191/2013) [2014] ZAECPEHC 19; [2014] 2 All SA 604 (ECP); 2014 (4) SA 148 (ECP) (25 March 2014) (*Searle*).

starting point was four inter-related propositions. They are that: (a) the decision to award a tender is an administrative action and PAJA therefore applies; (b) generally speaking, once a contract has been entered into following the award of a tender, the law of contract applies; (c) but a contract entered into contrary to prescribed tender processes is invalid; and (d) consequently, "even if no contract is entered into, all steps taken in accordance with a process which does not comply with the prescribed tender process are also invalid."

...

[70] I am in agreement with Southwood J for the reasons given by him. As a result, it is my view that, in this case, once the tender validity period had expired on or about 20 November 2012, the tender process had been completed, albeit unsuccessfully.'

(iv) In *Takubiza*,[5] the court ruled that an extension of the bid validity period must be communicated within the original validity timeframe. Failure to request or notify bidders of an extension before the validity period expires renders the process invalid. This judgment reinforced the principles of fairness and transparency by stating that any actions outside the validity period would violate procurement regulations.

(v) Mr Bodlani accordingly argued that the findings of the Court *a quo,* that 'the notice of intention to award the tender was effective so that beyond 6 October 2023 the tender would not have been withdrawn at will or the procurement process came to an end,'[6] and that 'the notice of award interrupted the period of validity of the tender, it having been made on the date the tender would have expired'[7] – are not sustainable in law.

(vi) He argued that once it was found that beyond 06 October 2023 there was no tender to award, it follows that:

(a) there was, in law, no decision to withdraw a tender;

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[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).

[6] Judgment – para 51 Vol 4, p 321 (lines 17 – 20).

[7] Judgment – para 51 Vol 4, p 321 (lines 22 – 24).

(b) the Municipality was correct, whatever its reasons, in deciding to restart the tender process;

(c) there was no recommendation of the BEC, in law, still viable to give or be given effect to; and

(d) no tender still to award to Pharaohs Construction.

[9] Mr *Schaup* on behalf of Pharaohs Construction submitted inter alia as follows:-

(a) Pharaohs Construction, in its affidavit, alleged that the tender validity period had been extended to 6 October 2023.

(b) The Municipality admitted this allegation in its answering affidavit.

(c) At no stage did the Municipality allege that there was any expiry of the tender validity period.

(d) It is accordingly common cause, on the papers, that the tender validity had been extended until 6 October 2023 and it is therefore not open to the Municipality to contend otherwise.

(e) With regard to the contention by the Municipality that the notice of intention to award is not 'a decision' which interrupted the expiry of tender validity, he argued that:

(i) A 'decision 'qualifies as 'administrative action'(in terms of its definition in PAJA) if:

(a) it is of an administrative nature;

(b) it is taken by an organ of state;

(c) such organ of state exercises public power or performing a public function;

(d) the decision is taken in terms of any legislation or an empowering provision;

(e) the decision adversely affects right;

(f) the decision has a direct, external legal effect; and does not fall under any of the listed exclusions.

(ii) that the notice of intention to award the tender to Chia satisfies the above requisites and accordingly constitutes 'administrative action'.

(iii) It is trite that the tender validity period is interrupted by a decision made within the period of tender validity.

(iv) A decision to award a tender, publicly announced, is a final decision within the meaning of the functus officio doctrine (even though a municipality may alter its decision pursuant to an appeal in terms of section 62 of the Local Government: Municipal Systems Act, 32 of 2000).

(v) A distinction which the Municipality wishes to draw between a publicly announced decision to award a tender and a notice of intention to award is more imaginary than real and is without substance for the following reasons:

(a) There exists no legal authority for such a distinction to be drawn.

(b) On the contrary, and applying the reasoning in *Trencon*, tender validity is interrupted once a decision-maker performs an act that might result in legal challenges that will inevitably run longer than the tender validity period.

(c) The distinction contended for by the Municipality holds no practical effect in that, in both instances, unsuccessful bidders would be entitled to mount a challenge which was exactly what was contemplated by the publication, namely to test whether the bidders felt prejudiced thereby inviting challenges based on prejudice.

(d) The publication of the notice of intention to award would, at the very least, have created a legitimate expectation in the mind of the second respondent and it was therefore not open to the Municipality to withdraw the notice without following fair procedure.

(e) The publication on 6 October 2023 accordingly interrupted the period of tender validity.

Findings

[10] It is common cause that the tender was extended until 6 October 2023. An intention to award was published within that period, the first respondent claiming that that interrupted the period of tender validity. The Municipality, however, could not make any award at the time it expressed its intention to award. Such a decision could only be taken after the period for objections had lapsed or after considering any objections that

were lodged. The intention to award never became an award in this case. There were objections and ultimately the tender was withdrawn. There was no award made on the 6 October 2023. The tender validity period expired, and the tender process was completed as at that date, albeit unsuccessfully.

[11] The bid could not be revived once it had expired, the bid came to an end on the 6 October 2023. Even if an award had been made after the expiration of the objection period it would have been invalid and unlawful and of no force and effect. The decision would have been made after the validity period of the bid had expired. There was no evidence that the bid was extended beyond 6 October 2023, or that there was a request to the bidders to agree to the extension of the lifespan of their bids due to the procuring entity's intention to extend the bid validity period. There was nothing in Pharaohs Construction papers to suggest that any such request was made nor was there any contention by the Municipality that it had requested an extension beyond the 6 October 2023.

[12] In *Trencon*[8] it was held:

"[80] This case is distinguishable from Telkom and Joubert. The IDC awarded the tender within the validity period. In those cases, there was no award. Consequently, a substitution order here would not require the tender validity period to be extended because this period is held in abeyance pending the finalization of the matter. [81] This must be so. Once an award has been challenged, the litigation process will inevitably run longer than the 120-day tender validity period … "

[13] In *Takubiza*[9] Ponnan JA held inter alia:

"[13] … as was held by the High Court, the validity period is indeed one of, the fundamental rules of the game, being the period within which the process should be finalized. To extend the tender validity period, the consent of all the participants to the tender process is required.

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[8] *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 199 (CC) (26 June 2015).

[9] *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).

Unless there is a timeous request and favourable response from all the tenderers prior to the expiry of the tender, the tender comes to an end. …[15] It goes without saying that a tender process cannot be open-ended. Certainty has to be the cornerstone. I can thus conceive of no reason why the principle so firmly established in Telkom SA and Searle does not find application here. It follows that the appeal must fail."

[14] Pharoahs Construction's argument unfortunately finds no application in this matter as there has to be an actual award within the validity period applying the principle enunciated in *Trencon*, for the validity period to be extended. There was no award in this case and accordingly no extension of the validity period. The process was not finalised by the publication of the intention to award. It could only be finalised by the actual award, which would constitute the decision.

[15] In considering the issue of costs, my view is that costs should follow the results. The Municipal Manager was not at liberty to simply ignore the recommendations of both the BEC and the BAC and unilaterally making a decision to award the tender to a non-compliant tenderer without even checking if it met the grading requirement. His action of advertising in a different newspaper his intention to award, from the notification of the tender, publishing in another province also raises alarm bells. He was obliged to motivate his deviation from the BEC and BAC's recommendations which he failed to do so.

[13] Pharoahs Construction has raised many more troubling aspects in the manner this tender was handled particularly by the municipality manager who attempted to defend the undefendable. Their launch of the application was based on legitimate concerns. The Municipality further ought to have raised the tender validity period as a defence in their papers, despite it being a defence available to them at any stage since it is a point of law. Pharoahs Construction's approach to the matter may have been different if it was raised timeously by the Municipality in its answering papers. It is inter alia for these reasons that in the exercise of my discretion I propose to make no order as to costs.

Order

[14] The appeal is upheld with no order as to costs.

[15] The decision of the court a quo is set aside and replaced with the following order:

The application is dismissed with no order as to costs.

FBA DAWOOD

JUDGE OF THE HIGH COURT

I agree:

L R BRAUNS

JUDGE OF THE HIGH COURT (Acting)

I agree:

N CENGANI-MBAKAZA

JUDGE OF THE HIGH COURT (Acting)

APPEARANCES

For the Appellant:	Adv Bodlani SC with Adv Maswazi, instructed by Jolwana Mgidlana Inc. No. 19 Park Road, Mthatha
For the 1st Respondent:	Adv Schaup, instructed by c/o Smith Tabata Inc, 34 Stanford Terrance, Mthatha
Date of hearing:	04 August 2025
Date of delivery of judgment:	06 November 2025