



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 1094/2023

In the matter between:

TEKOA CONSULTING ENGINEERS (PTY) LTD

APPELLANT

and

ALFRED NZO DISTRICT MUNICIPALITY

FIRST RESPONDENT

THE ACTING MUNICIPAL MANAGER:

ALFRED NZO DISTRICT MUNICIPALITY

SECOND RESPONDENT

ZIINZAME CONSULTING ENGINEERS / CYCLE

PROJECTS / UBUNTU BAM JV

THIRD RESPONDENT

EMLANJENI JV

FOURTH RESPONDENT

OLON CONSULTING ENGINEERS JV

IPM PLANT HIRE

FIFTH RESPONDENT

BM INFRASTRUCTURE JV MAGNACORP

SIXTH RESPONDENT

Neutral citation: *Tekoa Consulting Engineers (Pty) Ltd v Alfred Nzo District Municipality and Others* (1094/2023) [2025] ZASCA 180 (28 November 2025)

Coram: HUGHES, UNTERHALTER, BAARTMAN, COPPIN JJA AND TOLMAY AJA

Heard: 23 May 2025

Delivered: 28 November 2025

Summary: Municipal law – tender – mootness – no practical effect – discrete legal issue of public importance – Review – standing – lateness - vagueness of tender.

ORDER

On appeal from: Eastern Cape Division of the High Court, Makhanda (Makaula ADJP, Norman J, and Cengani-Mbakaza AJ sitting as the full court):

1. Condonation is granted, and the appeal is reinstated.
2. The appeal is upheld. The first respondent is to pay the costs, including the costs consequent to the employment of two counsel.
3. The order of the full court is set aside and replaced with the following order:
'The appeal is dismissed with costs, including the costs of two counsel where so employed.'

JUDGMENT

Hughes JA (Unterhalter, Baartman and Coppin JJA and Tolmay AJA concurring):

[1] This is an appeal from the judgment of the full court of the Eastern Cape Division of the High Court, Makhanda (the full court), issued on 20 June 2023. On 5 October 2023, this Court granted the appellant, Tekoa Consulting Engineers (Pty) Ltd (Tekoa), special leave to appeal. In this Court, Tekoa failed to prosecute the appeal within the prescribed time and subsequently sought condonation and reinstatement. These were granted, along with an order directing Tekoa to pay the costs.

Background

[2] The appeal relates to the invitation to tender issued by the first respondent, Alfred Nzo District Municipality (the Municipality), under reference number ANDM/IDMS-WSA/148/04/05/20. The tender was issued to establish a panel of service providers, including consulting engineers and contractors, for the planning, design, and construction of projects funded by WSIG. This refers to a panel responsible

for planning, designing, and constructing Waste Services Infrastructure Grant projects within the Municipality over a three-year period. This would be executed using a turnkey approach. The project's duration was from 1 July 2020 to 30 June 2023. The purpose of the tender was to support the implementation of an intervention programme by Water Services Authorities (WSAs) to address water service backlogs and provide interim relief in hotspot areas within the WSA's jurisdiction.

[3] The tender in this case pertains to a turnkey project. A turnkey contract usually refers to a construction agreement where a contractor is hired to plan, design, and build a project or infrastructure, undertaking any other necessary development to make it fully functional or 'ready to use' by a set deadline and at an agreed price. Turnkey contracts usually involve a joint venture, bringing together different areas of expertise. The tender document anticipated this cooperation by defining what constitutes a joint venture or consortium: 'Joint venture or Consortium means an association of persons for the purpose of combining their expertise, property, capital, efforts, skill and knowledge in an activity for the execution of a contract'.

[4] The services required from successful bidders included preparing technical reports, business plans, and designs; constructing and supervising projects; and preparing close-out and compliance reports. Tekoa is a consulting engineering firm. Tekoa submitted its bid by the stipulated closing date. However, the Municipality's Bid Evaluation Committee (BEC) disqualified Tekoa's bid because it failed to provide proof of registration with the Construction Industry Development Board (CIDB) and the required grading, as specified in the tender documents. The BEC subsequently recommended the appointment of the third to sixth respondents, to whom the tender was ultimately awarded.

[5] Tekoa brought an application in the Eastern Cape Division of the High Court (the high court) to review and set aside both the disqualification of its bid and the award of the tender to the third to sixth respondents. The high court (per Laing J) granted an order declaring that the tender process conducted by the Municipality was unlawful. It further reviewed and set aside the Municipality's decision to disqualify Tekoa's bid and to award the tender to the third to sixth respondents. The Municipality was granted leave to appeal to the full court. On 20 June 2023, the full court upheld their appeal,

set aside the high court's order, and replaced it with an order dismissing Tekoa's review, with costs.

[6] This Court granted Tekoa special leave to appeal the full court's order. In this Court, the Municipality sought and was granted leave to file a further affidavit. The primary purpose of the affidavit was to inform this Court that, due to the passage of time, the situation regarding the case had changed. Any decision made by this Court would now have no practical effect, as there is no live dispute between the parties. This is because the work related to this tender was completed by 30 September 2023.

[7] The relief sought by Tekoa in its review application is set out in its amended notice of motion as follows:

- '(a) An order reviewing and setting aside the Municipality's Bid Adjudication Committee decision rejecting Tekoa's bid and remitting the tender to the Municipality for a new decision.
- (b) Consequential relief sought as a result of the review, including the appointment of Tekoa as a service provider and the allocation of work related to the tender.'

Notably, none of these is currently feasible to implement.

[8] The full court concluded that 'the court a quo [the high court], erred in its finding that the tender was not clear about the CIDB registration being a requirement'. Consequently, Tekoa's bid could not be regarded as non-responsive, despite not being registered with the CIDB. Additionally, the full court determined that Tekoa did not submit an acceptable tender. To support this conclusion, the full court cited the following: Tekoa did not attach its CIDB certificate to its tender; Tekoa 'was not able to demonstrate both in its bid and in the review application that its tender was an "acceptable tender"'; it misunderstood the tender requirements; and it would not be able to conduct the construction work in line with the tender. Therefore, the full court found that the high court erred in reviewing and overturning the municipality's decision.

Submissions

[9] Tekoa conceded that 'if the work has been completed, [it] acknowledge[s] that a decision by this Court would not have a practical effect on this particular [t]ender'. However, it argues that mootness remains a contentious issue and further contends that the interests of justice require this Court to consider the merits of the appeal under

s 16(2) of the Superior Courts Act 10 of 2013 (Superior Courts Act). In advancing this assertion, it relies on the dicta of this Court in *Kruger v Joint Trustee of the Insolvent Estate of Paulos Bhekinkosi Zulu*.¹ Tekoa asserts that in this case, a discrete legal issue remains that requires this Court's pronouncement, so that certainty is attained.

[10] In its effort to emphasise that the full court's decision has a significant impact far beyond the confines of this case, Tekoa argued that this appeal, which concerns procurement issues, also involves the principle of legality. It contends that s 217 of the Constitution is implicated because tenders are subject to the principles of fairness, equity, transparency, competitiveness, and cost-effectiveness.

[11] Tekoa contended further that the tender does not satisfy the requirements of the Preferential Procurement Policy Framework Act 5 of 2000 (PPPFA), as it lacks provisions for assessing pricing. Tekoa also argued that it breaches the provisions of ss 4(f), 5(3)(c), and 5(4)(b) of the Construction Industry Development Board Act 38 of 2000 (CIDB Act), and the Construction Industry Development Regulations, specifically Regulation 24. Tekoa contended that the full court's decision ignores the CIDB's standards for uniformity in engineering and construction contracts. Further, the full court has endorsed a tender with vague requirements, thereby rendering the tender process procedurally unfair. This, according to Tekoa, could result in qualified participants being disqualified in the future due to a misinterpretation of the relevant legal framework.

[12] Before this Court, the Municipality argued that no subsisting contractual relationship exists between it and the third to sixth respondents due to the passage of time. Any declaration of unlawfulness issued by this Court will have no practical effect and will not comply with s 17(1)(b) of the Superior Courts Act. Accordingly, any order made by this Court will lack practical effect, and the appeal should be dismissed.

[13] The Municipality contends further that there is no distinct legal issue of public interest that will affect future matters for this Court to exercise its discretion under

¹ *Kruger v Joint Trustees of the Insolvent Estate of Paulos Bhekinkosi Zulu* [2016] ZASCA 163; 2016 JDR 2102 (SCA); [2017] 1 All SA 1 (SCA) para 15.

s 16(2)(a) of the Superior Courts Act, as it would not be in the interests of justice to do so. The Municipality relies on *Agribee Beef Fund (Pty) Ltd and Another v Eastern Cape Development Agency and Another*² and *Western Cape Provincial Government and Others v D C Security (Pty) Ltd*.³ It submitted that the latter was a case similar to the present one, and that this Court rejected an argument akin to Tekoa's, declining to exercise its discretion. The Municipality argued that the full court's findings were solely based on the facts. No separate legal issue of public importance that could influence future tenders has been identified, which would justify the exercise of this Court's discretion under s 16(2)(a) of the Superior Courts Act.

Interests of justice and mootness

[14] I begin by restating s 217(1) of the Constitution, which is clear and unambiguous in respect of contracts for goods or services by a state organ:

'When an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system that is fair, equitable, transparent, competitive, and cost-effective.' This section establishes the constitutional framework relating to government tenders. Additionally, the statutory framework governing municipal procurement, such as the PPPFA, the Municipal Finance Management Act 56 of 2003, and the Public Finance Management Act 1 of 1999, among others, outlines the requirements of application to an organ of state when procuring goods and services. An organ of state must exercise its procurement powers within the limits of the law and as required by s 217(1).⁴

[15] I reiterate that the work for this tender was completed by 30 September 2023. Essential to these proceedings is the concession made by Tekoa in its heads of argument that, 'if the work has been completed, we acknowledge that a decision by this Court would not have [a] practical effect on this particular Tender'. With this concession, Tekoa nevertheless seeks declaratory orders of unlawfulness. To which

² *Agribee Beef Fund (Pty) Ltd and Another v Eastern Cape Development Agency and Another* [2023] ZACC 6; 2023 (5) BCLR 489 (CC); 2023 (6) SA 639 (CC) para 26. *Legal Aid South Africa v Magidiwana and Others* [2015] ZACC 28; 2015 (6) SA 494 (CC); 2015 (11) BCLR 1346 (CC) para 11.

³ *Western Cape Provincial Government and Others v D C Security (Pty) Ltd* [2025] ZASCA 35; 2025 JDR 1393 (SCA) paras 22-23.

⁴ *Airports Company South Africa SOC Ltd v Imperial Group Ltd and Others* [2020] ZASCA 2; [2020] 2 All SA 1 (SCA); 2020 (4) SA 17 (SCA) para 63.

the Municipality submits that this cannot be granted without an order in terms of s 172(1)(b) of the Constitution, which ought ‘to take into account the material realities on the ground’.⁵ That being said, the factual reality is that work has been completed with respect to the tender in question.

[16] In these circumstances, it is essential to remember that the fundamental principle is that if there is no live issue remaining between the parties, the court generally does not entertain the appeal and does not provide advisory opinions on abstract legal questions. It is well established that, in the interest of justice, a court has the discretion to hear a matter even if it is moot, especially when a specific legal issue of public interest necessitates adjudication.⁶ Innes CJ originated this principle above in *Geldenhuys Neethling v Beuthin*: ‘. . . Courts of Law exist for the settlement of concrete controversies and actual infringements of rights, not to pronounce upon abstract questions, or to advise upon differing contentions, however important’.⁷ This underscores the principle that judicial authority is generally confined to resolving real disputes rather than hypothetical or academic questions.

[17] Mootness is not a bar to deciding an appeal if it is in the interest of justice to hear the appeal notwithstanding its mootness. In such instances, a court is at liberty to exercise its discretion under s 16(2)(a) of the Superior Courts Act. In addition to exercising the court’s discretion in terms of s 16(2)(a) in the interest of justice, the Constitutional Court has indicated that several other considerations come into play. These include, but are not limited to: whether the court’s order will have a practical impact on either the parties or others; the nature and extent of that impact; the significance and complexity of the issue; the thoroughness of the arguments presented

⁵ Section 172(1)(b): ‘When deciding a constitutional matter within its power, a court –... (b) may make any order that is just and equitable, including – (i) an order limiting the retrospective effect of the declaration of invalidity; and (ii) an order suspending the declaration of invalidity for any period and any conditions, to allow the competent authority to correct the defect.’

⁶ *Qoboshiyane N O and Others v Avusa Publishing Eastern Cape (Pty) Ltd and Others* [2012] ZASCA 166; 2013 (3) SA 315 (SCA) paras 5-6.

⁷ *Geldenhuys & Neethling v Beuthin* 1918 AD 426 at 441. See also *Public Protector of South Africa v Chairperson of the Section 194(1) Committee and Others* [2024] ZASCA 131; [2024] 4 All SA 693 (SCA); 2025 (4) SA 428 (SCA) para 32.

by the parties; and whether, in exercising its discretion, the court's decision would benefit the public at large and promote legal certainty.⁸

[18] The current matter warrants consideration despite its mootness, and I proceed below to address some of the factors mentioned above. Determining this moot appeal is necessary, amongst others, because it relates to the need for organs of state, including municipalities, to comply with the prescripts and obligations imposed by s 217 of the Constitution when dealing with public procurement policies and procedures. Tenders should be clear and unambiguous so as not to offend public policy and the principle of legality. Pertinently, this is not the first nor the last time that municipalities and prospective public bidders will encounter tenders of this nature, especially considering the scarcity of water in our country. To reiterate the purpose of the tender and highlight its importance to the public, the municipalities, and our procurement laws: The tender process was intended to support the implementation of an intervention programme by WSAs to address water service backlogs and provide interim relief in hotspot areas within the WSAs' jurisdiction.

[19] An important consideration is that the project was of a turnkey nature, which meant that the development involved, for an agreed sum, the contractor's obligation to deliver a fully operational facility by a specified date. The contractor is therefore at risk if the deadline is not met or if there are any defects in the design or construction.⁹ The Municipality argued that, as the contract was 'turnkey', they could 'conclude one contract with an entity, with the latter providing both professional services and construction works.' They maintained that this approach avoids delays caused by the procurement process for the consultant and subsequent contractors, especially since the project relies on a grant and needs a quick turnaround.

[20] Tekoa clarified that the nature of the contract is where 'one service provider assumes total responsibility for all aspects of the project and delivers the full end

⁸ *Normandien Farms (Pty) Limited v South African Agency for Promotion of Petroleum Exportation and Exploitation (SOC) Limited and Others* [2020] ZACC 5; 2020 (6) BCLR 748 (CC); 2020 (4) SA 409 (CC) paras 46-50.

⁹ See *Manong and Associates (Pty) Ltd v City of Cape Town and Another* [2010] ZASCA 169; 2011 (2) SA 90 (SCA); 2011 (5) BCLR 548 (SCA); [2011] 2 All SA 383 (SCA) para 9 where a turnkey project is defined as 'design, develop and deliver'.

product/services required by the contract'.¹⁰ It was further noted that consideration would be given to either a consulting entity or a construction entity. This did not assist tenderers, as it meant that, as a consultant, one could not enter into a joint venture with a contractor, nor could a contractor enter into a joint venture with a consultant. This is evident from the Municipality's opposing affidavit, which refers to the tender document that allows for the separate evaluation of either a consultant or a contractor as an applicant tenderer, and is contrary to the prescripts of the CIDB. The Municipality's tender document and evidence misconstrued what a turnkey contract encompassed. As such, the evaluation process for the consultant and the contractor, viewed as separate entities, compromised the tender evaluation process.

[21] The full court misunderstood the concept of a turnkey contract, as it concluded that it 'involve[d] appointing a contractor through a public tender for all work related to the completion of a project. . .that included the planning of the approved land, the township establishment process and the design and the installation of internal reticulation services up to the construction of houses.'¹¹ This incorrect conclusion formed the basis of the full court's decision, and therefore, and requires us to exercise our discretion.

[22] Following up on the above, the source of funding for the Municipality's turnkey projects was a grant, specifically the Water Services Infrastructure Grant (WSIG). The WSA's intervention programme was designed to provide water services as prescribed by the Water Services Act.¹² Because of water scarcity, these grants are a valuable aid for municipalities to meet their constitutional obligation to expand access to reliable, safe drinking water and sanitation services.¹³ (Outcomes Statement). Therefore, it is reasonable to conclude that the use and interpretation of these tenders will continue, and there may be misinterpretations. This underscores the need for exercising our discretion.

¹⁰ Clause 1.28 General Conditions of Contract vol.2 -p307.

¹¹ *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd* [2019] ZACC 15; 2019 (6) BCLR 661 (CC); 2019 (4) SA 331 (CC) para 4.

¹² Water Services Act 108 of 1997.

¹³ Framework for Conditional Grants to Municipalities GG 43495 of 3 July 2020.

[23] The full court concluded that because Tekoa had conceded it did not possess a CIDB certificate, it could not assert any rights, as it did not qualify. Furthermore, as a professional service provider and not qualified to undertake construction work, it was not a contractor. This was another misconception, which is also linked to the misunderstanding of what a turnkey contract entails. Consequently, we are enjoined to exercise our discretion to prevent Tekoa from being prejudiced.

Discussion

[24] I commence with the issue of standing. Tekoa was disqualified due to a vague tender document. As aptly stated by the Constitutional Court in *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others*:¹⁴

‘Vagueness and uncertainty are grounds for review under section 6(2)(i) of PAJA. Certainty in legislation and administrative action has been linked to the rule of law. . . In *Affordable Medicines*, this Court explained the doctrine in the following terms:

“[L]aws must be written in a clear and accessible manner. What is required is reasonable certainty and not perfect lucidity. The doctrine of vagueness does not require absolute certainty of laws. The law must indicate with reasonable certainty to those who are bound by it what is required of them so that they may regulate their conduct accordingly.”¹⁵ (Footnotes omitted)

[25] In light of the above, Tekoa clearly had standing, having demonstrated its connection to the harm caused by the vague tender document; it could therefore pursue the review proceedings in the high court. Thus, the full court wrongly concluded that Tekoa had no right to assert its claim.

[26] Lastly, there is the issue of the alleged lateness of Tekoa’s review application, because it was (allegedly) brought beyond the 180-day period referred to in s 7(1) of PAJA. The full court concluded that the high court erred in finding that Tekoa initiated the review proceedings within the required 180 days. Consequently, the full court held that, in the absence of Tekoa seeking an extension in terms of s 9(1)(b) of PAJA of the

¹⁴ *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others* [2013] ZACC 42; 2014 (1) SA 604 (CC); 2014 (1) BCLR 1 (CC).

¹⁵ *Ibid* para 87.

180-day review period, the review was indeed out of time and should not have been entertained. Additionally, the full court held that Tekoa had no agreement with the Municipality regarding an extension of time to file and determined that, since Tekoa filed its review application before receiving the reasons it had requested, ‘the clock started ticking [for Tekoa] from 16 October 2020.’

[27] Before this Court, Tekoa contended that the above conclusion of the full court was incorrect. It maintained that there was no evidence before the full court showing that it became aware of the reasons for its rejection by the Municipality before the order of 8 June 2021. Tekoa contended that in terms of s 7(1), there was no delay in launching its review application on 5 May 2021. Notably, the Municipality did not address the delay in launching the review in this Court.

[28] It is apt to restate what s 7(1) of PAJA requires:

‘7 Procedure for judicial review

(1) Any proceedings for judicial review in terms of section 6(1) must be instituted without unreasonable delay and not later than 180 days after the date-

(a) subject to subsection (2)(c), on which any proceedings instituted in terms of internal remedies as contemplated in subsection (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...’

[29] It is established that Tekoa became aware that its bid was unsuccessful on 16 October 2020, and on the same day, ‘registered [its] formal objection’ and requested reasons for the rejection of its bid and its non-appointment in terms of s 62 of the Local Government: Municipal Systems Act 32 of 2000. Section 62 gives an unsuccessful bidder the right to appeal against the rejection of its bid and its non-appointment. In this notice of 16 October 2020, Tekoa sought the Municipality's acceptance of its notification under s 62.

[30] To provide a brief overview of the timeline before the review was initiated. By 8 March 2021, Tekoa had not received a response from the Municipality and officially requested a reply to its October 2020 enquiry. Despite these two requests, no response

was received from the Municipality. On 29 March 2021, Tekoa, through its attorney, sent further correspondence to the Municipality. In this letter, Tekoa indicated that it intended to explore additional options, such as a review, and required certain 'information pertaining to the adjudication and evaluation of the tender'. The information was requested to be provided by the close of business on 8 April 2021, and Tekoa noted that if there was no compliance it would embark on court action. On 14 April 2021, the Municipality responded to Tekoa's attorneys, stating that their request 'is vague[st] and does not comply with [the] Promotion of Access to Information Act'.

[31] On 5 May 2021, Tekoa launched an application in the high court, compelling the Municipality to provide it with reasons. Part B covered the review application and the declarations sought by Tekoa. This culminated in Tekoa obtaining, by agreement, a court order on 8 June 2021 regarding specific orders in Part A.

[32] The full court records in its judgment that the review application was 'delivered on 25 August 2021 with an amended notice of motion'. In my view, the review—Part B of the application—could only be sought or pursued after Tekoa had obtained the reasons from the Municipality. Bearing in mind that the notice of motion, which included Part A, ie the declarations, as discussed above—was issued and filed on 5 May 2021, and that the order, by agreement, was granted on 8 June 2021. In fact, the full court recorded that the record sought from the Municipality was supplied on 17 June 2021. Furthermore, as stated above, Part B, amended, together with a condonation application—which the high court incidentally granted—was filed in court on 25 August 2021. In my view, the earliest the clock could have started ticking was on 17 June 2021. The full court clearly erred in its determination of that issue. On my finding there was no unreasonable delay in launching the review application.

[33] Tekoa's bid was deemed non-responsive by the Municipality because it lacked a certificate of registration from the CIDB. This decision became the central issue in the dispute and the main reason for the respondents' disqualification of Tekoa. Its legality is crucial to the broader questions in this case, particularly regarding whether the tender process adhered to the principles of fairness, transparency, and legality as mandated by relevant procurement laws. Moreover, it is uncertain whether Tekoa

could seek a review of the tender process due to its failure to comply with the CIDB registration requirement, which it did not possess. Linked to the issue of standing is whether there was compliance with s 7(1) of PAJA in initiating the review proceedings within a reasonable timeframe, and no later than 180 days as required. Therefore, it was necessary to determine this moot appeal, as it relates to the obligation of organs of state, including municipalities, to comply with the obligations imposed by s 217 of the Constitution when dealing with public procurement policies and procedures, ensuring tenders are unambiguous to avoid offending public policy and the principle of legality, which I discuss below.

[34] I believe a single decisive issue concerning these tender documents triggers this Court's discretion to entertain and rule on this appeal, as it involves a distinct legal matter of public importance that could influence future tenders. In such instances, this Court has generally exercised its discretion in favour of considering the issues on appeal, even though their consideration may have no practical effect.

[35] As alluded to earlier, the tender contract required a turnkey approach. The key issue was whether the turnkey contract was unambiguous in its structure. Tekoa argues that the tender documents in this case were unclear and did not comply with the CIDB requirement that procurement documents for engineering and construction contracts should generally be presented clearly and unambiguously.¹⁶ It also argued that the appeal involves not only principles of legality but also 'issues that are fundamental to the procurement of goods and services by organs of state'.

[36] The full court dismissed Tekoa's argument that the tender was unclear regarding the CIDB and resolved that it should have been aware of the requirement. It bears mention at this stage the relevant requirements and scope of work as set out in the tender document:

'Scope of Work

¹⁶ Standard for Uniformity in Engineering and Construction Works Contract GN 423 of 2019 GG 42622 of August 2019 at 4.2.2.1(a)(ii):

'(a) Procurement documents for engineering and construction works contracts shall in general:

...'

(ii) set out, in a clear and unambiguous manner, the criteria by which tenders are to be evaluated;'

1.1 Water Services Infrastructure Grant is an interim to intermediate water supply intervention programme that is implemented by Water Services Authorities (WSAs) to address water services backlogs as well as to provide interim relief to hot spot areas within the WSA's area of jurisdiction. The scope of works includes:

Preparation of Technical Reports and Business Plan;
 Source verification (including drilling and testing of boreholes);
 Preparation of designs;
 Construction of projects;
 Construction supervision of projects;
 Preparation of close out reports;
 Preparation of compliance reports in line with funder requirements.'

[37] The full court, having considered the above as part of the record before it, concluded that although the contract was on a turnkey basis, Tekoa, a consultancy firm of engineers, would not have been able to demonstrate all the required competencies for such a contract, because it was not involved in construction and as such was not registered with the CIDB in terms of s 18 of the CIDB Act.¹⁷ Section 18 of the CIDB Act requires a contractor to be registered with the CIDB to undertake or complete construction work for public sector contracts awarded through competitive tender or quotation. Failure to comply can result in sanctions such as fines or removal from the register. This is particularly relevant given that the scope of work entailed construction.

[38] As we are aware, Tekoa's bid was disqualified because it failed to submit proof of registration with the CIDB. Notably, the requirement for the compulsory submission of a CIDB registration certificate is not reflected in the tender document. The items on the checklist are the following:

¹⁷ Section 18 of the Construction Industry Development Board (CIDB) Act states:

'(1) A contractor may not undertake, carry out or complete any construction works or portion thereof for public sector contracts, awarded in terms of competitive tender or quotation, unless he or she is registered with the Board and holds a valid registration certificate issued by the Board.

(2) Any contractor who carries out or attempts to carry out any construction works or portion thereof under a public sector contract and who is not a registered contractor of the Board in terms of this Act, is guilty of an offence and liable, on conviction, to a fine not exceeding ten per cent of the value of the contract so carried out.

(3) A contractor referred to in subsection (2) must, upon receipt of a written notice by the Board served on him or her in the prescribed manner, cease to continue any public sector construction work.

(4) A contractor who receives a notice referred to in subsection (3), during the currency of a contract, may be permitted to complete the construction works or portion thereof, as determined by the Board.'

- '1. Authority to sign a bid;
- 2. Tax Clearance Certificate;
- 3. Declaration of Interest;
- 4. Preference Points Claim Form;
- 5. Declaration of Past Supply Chain Practice;
- 6. Certificate of Independent Bid Determination;
- 7. Certificate of Payment of Municipal Accounts;
- 8. Experience of Tenderer;
- 9. Scope of Works/Terms of Reference;
- 10. Functionality Test;
- 11. Assessment Forms;
- 12. Form of offer;
- 13. Central Supplier Database.'

[39] The items do not include proof of registration with the CIDB. However, elsewhere in the tender document it is stated that the company's profile should include proof of registration with professional bodies, 'if applicable'. One example of such a body was the CIDB. The relevant portion reads as follows:

'COMPANY PROFILE

Bidders are required to submit a company profile that records evidence of previous work to substantiate their ability to undertake specific tasks.

The company profile must include the following:

...

Proof of registration with professional bodies (e.g. CIDB, LGSETA) – if applicable.'

Furthermore, although the checklist included with the tender invitation, under the section 'documents to be submitted', clearly specifies the mandatory documents that ought to be submitted, and that a failure to submit them would disqualify a bidder's tender, it does not include the CIDB certificate.

[40] The Municipality argues that it is a matter of interpretation and that Tekoa has misunderstood the tender document. According to the Municipality, the tender requirements clearly stated that registration with the CIDB was mandatory. Furthermore, the municipality argues that Tekoa was aware that the services required the involvement of consulting engineers and constructors, for the construction of

works, which could only be performed by those holding a CIDB certificate issued under the CIDB Act.

[41] The Municipality maintained that it is not the role of the courts to determine what constitutes a valid tender, but rather the Municipality's decision. Tekoa conceded this, but emphasised that the requirements ought to be clearly set out and unambiguous. I agree with Tekoa: failing to do so in a public tender process would not eliminate uncertainty and could result in an unfair assessment.

[42] The tender document outlined explicitly what was required. It states as follows: 'Proposals are hereby invited from suitably qualified and experienced professional service providers to be included in the panel of consortium services providers (Professional and Consulting entity and contractors) for the planning, design and construction of WISG funded projects in the Alfred Nzo Municipality for a period of three (3) years.' It is only in the minute of the BEC, where the required grading is stated. The minute states: 'Proposals for the panel of service providers (Professional and Consulting Entity and Contractors) for the planning, design, and construction of WISG (using a turnkey strategy) ... CIDB Grading: a minimum of 5CEPE or 6CE or higher'.

[43] However, given what has been said above about a turnkey contract, I view the tender as neither clear nor unambiguous. In reaching this conclusion, that the tender was vague, I take cognisance of the fact that the BEC had to insert the following to award the tender: '[t]he committee decided to disqualify Bidders that have not entered into joint venture agreement as it impose[s] high risk to the employer and does not reflect trace of agreement between the consultant and the contractor, *even though this was not specified in the TORs*'. (Emphasis added.)

[44] Further, the tender made no provision for a specific design licence as would be required for water projects. Consequently, and arbitrarily, the BEC 'decided to allocate maximum points for any design licence proof attached that relates to civil works (PROKON, ALLCAD, CIVIL DESIGN, AUTO DESK, AUTO PADDs, EPANET and AUTOCAD)'. Even though this was not requested or specified in the tender document, Bidders who did not attach a tax invoice listing a design package for any of those mentioned by the BEC were to be penalised.

[45] In my view, it was not unreasonable for Tekoa, as it did in this instance, to conclude that, given how the Tender document was structured, the absence of a mandatory requirement for CIDB, and the placement of 'NB!! All Bidders must be registered with CIDB with a minimum of 5CEPE or 6CE OR higher' under the construction section—implying that it does not apply to consulting engineers like Tekoa, but to construction companies—left questions unanswered. From the Tender document, one is led to ask: is the CIDB required 'if applicable', or must it be submitted by all bidders in the construction industry, or, as the Municipality wishes this Court to conclude, should it have been inferred from the tender document?

[46] What I also find notable, as discussed in detail above, is the BEC meeting on 5 August 2020. The concerns were clearly evident from the minutes of that meeting. It is important to note that this BEC outlined the CIDB grading requirements. Furthermore, they emphasised that bidders were either contractors or consultants, not both, and aimed to disqualify those not part of a joint venture. However, this was not a requirement of the tender. Additionally, the need to hold a specific design licence was mentioned, but the BEC omitted that requirement from the tender document.

[47] In summary, the disqualification of Tekoa for failing to submit a CIDB certificate, as outlined above in relation to a vague tender document, warranted this Court's consideration, as the method of disqualification will impact other parties in future tenders of this kind. An additional consideration is that the full court has upheld the Municipalities' conduct in the disqualification decision.

Remedy

[48] What remains for consideration is the question of appropriate relief or remedy. It is well established that the order of the full court is the subject of appeal, and therefore, if the appeal is successful, the order made by Laing J would remain in place. However, since the Municipality had already entered into contracts with the successful tenderers and the work had already been completed, enforcing parts of the order could lead to 'catastrophic consequences' for innocent tenderers who were successful and for the public. In my opinion, after considering the competing interests, it is evident that the entire order of the high court cannot be upheld and should be modified to prevent these consequences.

[49] Significantly, in this case, the high court did not refuse to grant the sought declaratory orders, given that it is the court of first instance. Furthermore, Tekoa, the party seeking the declaratory relief, has an interest in the grant of the declarations sought, as implementing an intervention programme by WSAs to address water backlog issues and provide interim relief in hotspot areas within the WSAs' jurisdiction is a project that would clearly take place in the future within that municipal area. Hence, the presence of a discrete legal issue that required adjudication by this Court despite mootness.

[50] In respect of costs, Tekoa has been substantially successful in the full court and this Court. Therefore, costs are to follow the result.

[51] Consequently, I make the following order:

1. Condonation is granted, and the appeal is reinstated.
2. The appeal is upheld. The first respondent is to pay the costs, including the costs consequent to the employment of two counsel.
3. The order of the full court is set aside and replaced with the following order:
'The appeal is dismissed with costs, including the costs of two counsel where so employed.'

W HUGHES
JUDGE OF APPEAL

Appearances

For the Appellant: S Khumalo SC with N Stein and X Nyangiwe

Instructed by: Glynnis Cohen Attorneys

Webbers Attorneys, Bloemfontein

For the first and second Respondents: S Maliwa with L Mhambi

Instructed by: Christelis Artemides Attorneys, Johannesburg

Maduba Attorneys, Bloemfontein.