

SAFLII Note: Certain personal/private details of parties or witnesses have been redacted from this document in compliance with the law and [SAFLII Policy](#)



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO.: 009727/2023

(1) REPORTABLE: YES / NO

(2) OF INTEREST TO OTHER JUDGES: YES / NO

(3) REVISED

DATE

SIGNATURE

In the matter between:-

THE BODY CORPORATE OF WONDERPARK ESTATE

Applicant

v

CITY OF TSHWANE METROPOLITAN MUNICIPALITY

Respondent

Heard on: 2 September 2025

Delivered: 5 December 2025 - This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to the *CaseLines* system of the GD and by release to SAFLII. The date and time for hand-down is deemed to be 14:00 on 5 December 2025.

Summary:

1. The decision of the respondent in refusing the applicant's Section 3(8) application in terms of the BY-LAWS is reviewed in terms of PAJA.
2. The exhaustion of the internal remedies "argument" has no merit. The point was belatedly raised long after the respondent acceded to litigating before court. The internal appeal process in terms of Section 62 of the Systems Act is no longer available to the applicant, no need to seek exemption from exhausting the internal appeal process.
3. Even if the supplementary record and supplemented reasons are permitted, the decision maker did not have regard thereto. On identifying the reasons proffered in the decision, there is no reference to the supplemented reasons. It is not permissible to add documents to the record when they are not considered, nor can they be intended to justify the initial reasons. See **National Lotteries Board v South African Education and Environment Project 2012(4) SA 504 SCA at par 27.**

4. The consideration of the Section 3(8) BY-LAW application was an error in law. The application has to be considered in the facts and not subject to limitations. The reasons proffered are therefore irrational and arbitrary.
5. The Municipality holds is executive authority to structure and manage its administrative affairs in terms of the Constitution. The provision of waste removal services is the Municipality's responsibility both under the Constitution and National Environmental Waste Management Act. It however does not exclusively render waste removal services. External service providers may do so provided that they obtain consent from the Municipality.
6. Exceptional circumstances in terms of Section 8(1)(c)(ii)(a) of PAJA are present for the court to substitute the decision of the Municipality. It is further just an equitable to make a decision. **Trencon Constitution v Industrial Development 2015 (5) SA 245 CC.**

ORDER

It is ordered:-

1. The decision of the 18 August 2022 of the respondent to refuse the application in terms of Section 3(8) of the City of Tshwane Metropolitan Municipality Waste Management BY-LAW for cancellation of the services in respect of account number 5[...] the decision is reviewed and set aside;
2. The application made by the applicant in terms of Section 3(8) of City of Tshwane Metropolitan Municipality Waste Management BY-LAW, for cancellation of the services in respect of account number 5[...] (the decision) Is granted and the Municipality is directed to give effect to the cancellation within 30 days of the order;
3. The respondent is directed to select an appropriate authorized external service provider and communicate same to the applicant within 30 days of this order;
4. The respondent is ordered to pay the costs related to this application on Scale C.

JUDGMENT

KOOVERJIE J

THE REVIEW

[1] This review application was instituted in terms of the Promotion of Administrative Justice Act 3 of 2000 (“PAJA”), alternatively in terms of a legality challenge against the decision of the respondent, the City of Tshwane Metropolitan Municipality (“the Municipality”). The Municipality refused the applicant’s application in terms of Clause 3(8) of the BY-LAW of the Municipality.¹ The applicant will be referred to as “Wonderpark”.

[2] Clause 3(8) of the BY-LAW reads as follows:

“A written request for cancellation or services from the occupier of the premises to which a service is rendered by the Municipality must provide reasons for the request. The Municipality must be satisfied that the request is justified and the Municipality reserves its right to decline cancellation where such requests are deemed unacceptable in the circumstances.”

¹ The City of Tshwane Metropolitan Municipality Waste Management BY-LAW published under LAN 1393 in Gauteng Provincial Gazette 274 at 20 August 2016. The preamble reads:

“The City of Tshwane Metropolitan Municipality Waste Management BY-LAW was published on 24 August 2016 in terms of LAN1393 in the Gauteng Provincial Gazette 274 (whereby the City Manager of the Municipality in terms of Section 7 of the Gauteng Rationalisation of Local Government Affairs Act 10 of 1998) and read with Section 13 of the Local Government Municipal Systems Act 2000 (32 of 2000) and Section 162 of the Constitution of the Republic of South Africa 1996 (Act 108 of 1996) and Section 9 of the National Environmental Management Waste Act 2008 (Act 59 of 2008) the BY-LAWS was approved by Council on 30 June 2016.

The objective of the BY-LAWS was to regulate and provide for waste management services, including collection and disposal of solid or other forms of waste, and to ensure that all practices concerning waste management are aligned to the Constitution, NEMWA, and the Systems Act, and in general to the forms, practices and procedures incidental thereto to ensure a sustainable, safe and healthy environment within the City of Tshwane jurisdictional area”.

- [3] The impugned decision in refusing the applicant's request was contained in the letter of 18 August 2022. The applicant argued that the decision is unlawful, irrational, arbitrary and unconstitutional.

THE ISSUES FOR DETERMINATION

- [4] On the procedural points raised, the issues for determination are:
- 4.1 whether Wonderpark was required to exhaust the internal remedies, more specifically in terms of Section 62 Systems Act;² and
 - 4.2 whether this court should permit the filing of the supplementary record, and the supplementary reasons;
 - 4.3 Whether the documents in the supplemented record could have been considered by the decision maker at the time the decision was made.
- [5] The main issue for determination is whether the provision of rendering waste removal services was the exclusive obligation of the Municipality.

THE BACKGROUND

- [6] Since the litigious history between the parties is extensive, I will only highlight the salient facts. The applicant, Wonderpark, is a large estate which constitutes 1480 units and has for over a decade been serviced by the Municipality in respect of

²Local Government Municipal Systems Act 32 of 2000 ("Systems Act")

the waste removal services. However, since 2015 there have been various disputes between the parties, particularly regarding the substandard services and inaccurate billing for the services that were actually rendered. It was alleged that the Municipality charged for bins that it had not collected, and it failed to render satisfactory services. It had got to a point where the bins were overflowing with excess waste and which waste was accumulating at various areas of the premises for days. Wonderpark had already instituted legal proceedings regarding the aforesaid issues. The matter was settled in May 2023 when the Municipality agreed to credit Wonderpark Estate in an amount of just over R1.75 million. Despite the settlement the issues still persist.

[7] During the litigation between the parties Wonderpark acquired the services from an alternative service provider at a much discounted rate where it claimed to have benefitted with a 75% cost saving.

[8] Wonderpark, still dissatisfied with the non-performance of the Municipality, applied to have the Municipality's waste removal services cancelled in terms of Section 3(8) of the BY-LAW. This was communicated in a detailed request where it motivated why the cancellation was justified.

EXHAUSTION OF INTERNAL REMEDIES

[9] In respect of this application before me, the Municipality raised the point that Wonderpark failed to exhaust the internal remedies in terms of Section 62 of the

Systems Act.³ This defence was raised belatedly in the second supplementary answering affidavit of January 2025.

[10] Wonderpark highlighted that Section 62 of the Systems Act provides for an appeal procedure which may be utilized by any person whose rights are affected by a decision taken in terms of a delegated power to appeal against that decision. A Section 62 appeal lies only against a decision taken by persons or structures to whom the powers have been delegated.

[11] The Municipality pointed out that since the administrative decision of the Municipality is challenged, Section 7(2) of PAJA finds application, which precludes a court from reviewing any administrative action until the internal remedies have been exhausted. Section 7(2)(a) of PAJA stipulates:

³ Section 62 of Systems Act 32 of 2000 reads:

- “(1) A person whose rights are affected by a decision taken by a political structure, political office bearer or counselor or staff member of a Municipality in terms of a power or duty delegated or sub delegated by the delegating authority to the political structure, political office bearer, counselor or staff member, may appeal against a 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.
- (2) The municipal manager must promptly submit the appeal to the appropriate Appeal Authority mentioned in subsection (4).
- (3) The Appeal Authority must consider the appeal and confirm they will revoke the decision but no such variation or revocation of a decision may detract from any rights that may have accrued as a result of a decision.
- (4) When an appeal is taken against a decision taken by
 - (a) a staff member other than the municipal manager, the municipal manager is the appeal authority;
 - (b) the municipal manager, the executive committee or executive mayor is the appeal authority or the municipality does not have an executive committee or executive mayor, the council of the municipality is the appeal authority; or
 - (c) a political structure, political office bearer or a counselor-
 - (i) the municipal council is the appeal authority where the council comprises of less than 15 counselors; or
 - (ii) the committee of counselors who were not involved in the decision and appointed by the Municipal Council for the purposes is the appeal authority where the council comprises of more than 14 counselors.
- (5) An appeal authority must commence with an appeal within 6 weeks and decide the appeal within a reasonable period ...”

“No court or tribunal shall review an administrative action in terms of this Act unless any internal remedy provided for in any other law has first been exhausted. If a court is not satisfied that any internal remedy has been exhausted.

[12] Section 7(2)(c) then stipulates:

“A court can in exceptional circumstances and on application by the person concerned exempt a person from the obligation to exhaust any internal remedy if the court or tribunal deems it in the interest of justice.”

[13] The thrust of the Municipality’s case was premised on **Koyabe**⁴ where the court emphasized the importance of having the internal remedies exhausted and highlighted that the judicial process would be premature as the higher administrative body should be given an opportunity to exhaust its own existing mechanism. It expressed:

“Internal remedies are designed to provide immediate and cost-effective relief, giving the executive the opportunity to utilize its own mechanisms, rectifying the irregularities first, before aggrieved parties resort to litigation. The courts play a vital role in providing litigants with access to justice, the importance of more readily available and cost-effective internal remedies cannot be gainsaid.

First approaching a court before the higher administrative body is given the opportunity to exhaust its own existing mechanisms undermines the autonomy of the administrative process. It renders the judicial process premature, effectively usurping the executive role and function. The scope of administrative action extends over a wide range of circumstances, and the crafting of specialist administrative procedures suited to the particular administrative action in question enhances procedural fairness as enshrined in our Constitution. Courts have often emphasized that what constitutes a ‘fair’ procedure will depend on the nature of the administrative action and circumstances of the particular case. Thus, the

⁴ Koyabe & Others v Minister for home Affairs & Others (Lawyers for Human Rights as amicus curiae) 2010 (4) SA 327 (CC) at para 35,36 and 37

need to allow executive agencies to utilize their own fair procedures is crucial in administrative action...

Once an administrative task is completed, it is then for the court to perform its review responsibility, to ensure that the administrative action or decision has been performed or taken in compliance with the relevant constitutional and other legal standards.

Internal administrative remedies may require specialized knowledge which may be of a technical and/or practical nature. The same holds true for fact-intensive cases where administrators have easier access to the relevant facts and information. Judicial review can only benefit from a full record of an internal adjudication, particularly in the light of the fact that reviewing courts do not ordinarily engage in fact-finding and hence require a fully developed factual record.”

[14] In addition the Municipality argued that:

- 14.1 no exceptional circumstances have been proffered by Wonderpark to excuse them for exhausting the appeal process. There were no facts placed in the founding papers that set out such exceptional circumstances;
- 14.2 Wonderpark was required to bring a substantive application for exemption in terms of Section 7(2)(c) of PAJA. Absent such application it is impermissible for a court to deal with the merits.⁵
- 14.3 The exhaustion of the internal processes are paramount as the decisions that would have regard to the Municipality’s policy-laden objectives. Factors such as the inner cleaning of the City, the revenue knowledge taking into consideration the non-visible services, and the cross-subsidisation of municipal services provided to the indigent.

⁵ Nichol and Another v Registrar of Pension Fund and Others 2008(1) SA (3) SCA
See Asla Construction (Pty) Ltd v Buffalo City Metropolitan Municipality 894/2016 [2017] ZASCA 23 (25 March 2017)

14.3 Furthermore, it was not the Municipality's duty to advise Wonderpark of the appeal processes available to it.

[15] The applicant demonstrated that on the facts that the exhaustion of the internal processes argument was another ploy to postpone the matter. It argued:

15.1 firstly, the applicant was never informed that it could appeal the decision in terms of the Systems Act or that it had alternative remedies when the Municipality's decision was communicated. Moreover, when Wonderpark had enquired as to whether any internal processes had to be followed, the Municipality failed to respond. This enquiry was made way back on 11 November 2022 through the applicants attorney;

15.2 secondly, the identity of the decision-maker was not communicated to Wonderpark. The author of the letter was Ms Alice Mphahlele in her capacity as Acting Divisional Head: Waste Management Services. Section 62(1) of the Systems Act requires that appeals be lodged with the Municipal Manager who is required to submit the appeal to the appropriate appeal authority. The identification of the appropriate appeal authority is dependent on who initially took the impugned decision. It further challenged the authority of the decision maker. The decision can only be taken by a political structure⁶, political office-bearer, counselor or staff member, provided that they have the delegated authority. There was no proof of such delegated authorization despite the Municipality contending that she had such authority. Wonderpark, however, persisted with the

⁶ the term "political structure" is defined in the Systems Act as in relation to a Municipality means the council or the Municipality or any committee or any other collective structure of the Municipality elected, designated or appointed in terms of the specific provisions of the Municipal Structures Act

argument that even if they were delegated, the decision-making body was never identified;

15.3 thirdly, the Municipality waived its insistence in having the dispute resolved through the internal processes when it fully participated in the legal proceedings before court. The Municipality received the review application at the beginning of February 2023 and willingly filed no less than three answering affidavits, it supplemented the record twice, obtained a postponement and further indulgences from the court to allow it to ventilate issues, particularly constitutional issues. In ***Dengetenge Holdings***⁷ the Constitutional Court expressed that it would be extremely unfair to abandon the entire court litigation process when the parties opted to have their disputes heard in court;

15.4 fourthly, that even if the Municipality insisted on following through with the appeal process in terms of Section 62 of the Systems Act, the remedy is no longer available to Wonderpark. The time-period to lodge the appeal was 21 days. It was submitted that the period cannot be condoned by the Municipal Manager. Even this court does not have the discretion to condone a time limit set out in the statute.⁸

[16] I was referred to ***Amandla GCF Construction***⁹ where the court confirmed this proposition. It stated:

⁷ *Dengetenge Holdings Pty Ltd v Southern Sphere Mining and Development Co Ltd* 2014 (5) SA 138 CC at para 60

⁸ *Mohlomi v Minister of Defence* 1997 (1) SA 124 (CC) at par 77 where the court stated that a court has no jurisdiction to condone non-compliance with statutory time periods.

⁹ *Amandla GCF Construction CC and Another v Municipal Manager, Saldanah Bay Municipality and others* 2018 (6) SA 63 WCC at par 32 to 39

“there is no general power afforded to the Municipality to extend a statutory time-period, except if that power is conferred on it as allowed in that particular section of the statute”.

There would be no purpose then to institute an appeal in terms of Section 62 when the decision-making body has no power to extend the time-period.

[17] Having heard both parties, I find that that this belated point of law does not have merit for the following reasons:

17.1 I reiterate that internal remedies are designed to provide immediate and cost-effective relief given and allows for the administrators to utilize its own mechanisms and rectifying irregularities first before aggrieved parties resort to litigation;

17.2 The parties resorted to litigating before a court for a number of years without the Municipality ever raising this legal point. It raises this point at the tail end in its second supplementary affidavit. Its duty to exhaust internal remedies fell away when it consented to have the matter ventilated in court;

17.3 Furthermore, in law, the remedy is no longer available to Wonderpark. The Section 62 appeal had to be instituted within 21 days. The decision taken was dated 18 September 2022. The Municipality has not addressed this defence in the papers.

[18] The court in **Koyabe**¹⁰ expressed that the requirement to exhaust internal remedies should not be rigidly imposed and it should not be used to frustrate the efforts of an aggrieved person or to shield the administrative process from judicial scrutiny. PAJA recognizes the need for flexibility, acknowledges in Section 7 (2)(c) that exceptional circumstances may require that a court condone the non-exhaustion of the internal process and proceed with the judicial remedies. The requirement is therefore not absolute.

[19] I have noted that Wonderpark could only address this point in its answer to the Municipality's second supplementary affidavit. In my view, there was no need to request an exemption as no internal remedies were available to the applicant. Moreover, there was no response when Wonderpark inquired if there were such external processes that it had to comply with.

SUPPLEMENTED RECORD AND SUPPLEMENTED REASONS

[20] The Municipality explained that the need to file an additional record came about during a consultation with counsel in July 2024 where certain documents were identified that should have been included in the record. The Municipality's legal team realized that the original record of 24 July 2023 was inadequate.

[21] As a result, on 19 August 2024 the Municipality was granted leave by the court to augment its record and the parties were directed to file further supplementary

¹⁰ Koyabe , Paragraph 38

affidavits. On 10 September 2024 the Municipality then filed its complete record together with supplemented reasons.

[22] It was submitted that the documents are not new but were in existence at the time that the impugned decision was taken and was in the mind of the staff members. Consequently, the documents are relevant and were considered by staff members who arrived at the decision to decline Wonderpark's cancellation application in terms of Section 3(8) of the BY-LAW.

[23] The Municipality pointed out that a full record makes provision for a fair hearing.¹¹ With the supplemented record Wonderpark would be able to fully and properly assess the lawfulness of the decision-making process. Hence the supplemented record was for the benefit of Wonderpark and more importantly for the benefit of the court. The Municipality further pointed out the true reasons behind the Municipality's decision in rejecting the cancellation application is contained in the supplemented reasons.

[24] The supplemented reasons shed light on the policies on indigent non-billable and budgetary constraints are material to the matter. They are not ex post facto reasons provided in isolation to the case but reasons to reflect the policy considerations of the City.

¹¹ Helen Suzman Foundation v Judicial Service Commission 2018 (4) SA 1 (CC)

It is only when the full record is filed will the court be able to perform its constitutionally entrenched review function and a litigant will have its rights in terms of Section 34 of the Constitution to have a justiciable dispute decided in a fair public hearing before a court with all the issues being ventilated.

[25] It was explained that the Municipality took into account the non-billable municipal service such as litter picking operations, clearance of illegal dumping, management and operation of gardening disposable sights and inner city cleansing. It was also highlighted that due the increased number of indigent and informal settlements which has significantly stretched the budget of the City. The City relies on the affluent to subsidize some of the municipal services to the poorest of the poor. Therefore, the City took a decision not to allow any withdrawal of municipal services in areas which the City has capacity, Wonderpark falls within those areas.

[26] It is common cause that the reasons were supplemented on the advice of senior counsel. According to senior counsel's advice, the review raised a very important constitutional issue with wide-ranging implications and therefore it would be unjust to consider the review application on the papers as they stand. These allegations were set out in the Municipality's postponement application.

[27] The supplemented reasons were *inter alia* to the effect that in terms of its cross subsidation policy, it provides services to the indigent, and these expenses are subsidized from those who can afford. Hence it concluded that it would be difficult for the City to render waste management services to its clients and to meet its environmental objectives if the property owners like those in Wonderpark Estate withdraw from the City's collection services as the City relies on the affluent to subsidize some of its municipal services to the poorest of the poor.

[28] I raise my concern with the belated advice and the preparation of the supplemented record which includes the supplemented reasons. The core enquiry remains - whether or not the decision-maker, when communicating in the impugned decision of 18 August 2022, had regard to the supplementation which included the cross subsidation policy. The question that has to be answered is- What documents did the decision-maker consider when arriving at the decision of 18 August 2022.

[29] On my reading of the 18 August 2022 letter, the reasons provided therein are crisp and clearly set out. None of the reasons therein give light to the supplemented reasons. It is not permissible to add documents to the record if they were not considered. The purpose of the record is to indicate what was before the decision-maker at the time the decision was made. Any justification after the reasons were communicated cannot be regarded as true reasons for the decision.¹²

[30] Prior to the supplementation, the record only constituted of the following, namely:

¹² National Lotteries Board and Others v South African Education and Environment Project 2012(4) SA 504 SCA at par 27

“27 The duty to give reasons for an administrative decision is a central element of the constitutional duty to act fairly, and the failure to give reasons, which includes proper or adequate reasons, should ordinarily render the dispute position reviewable. In England, courts have said that such a decision would ordinarily be void and cannot be validated by different reasons given afterwards - even if they show that the original decision may have been justified. For in the truth the later reasons are not the true reasons for the decision, but rather in *ex post facto* retaliation of a bad decision.

- 30.1 Wonderpark's Section 3(8) application;
- 30.2 The BY-LAWS, and;
- 30.3 Landfill Consult's respective permits.

[31] The supplemented record constituted of the following documents, namely:

- 31.1 a Mayoral Committee report dated 5 October 2022 in disclosing the indigent policy;
- 31.2 minimum requirements for disposal of waste by landfill;
- 31.3 minimum requirements for water monitoring at waste management facilities;
- 31.4 draft national standard for disposal of waste;
- 31.5 landfill sites operational plan;
- 31.6 tariff schedule;
- 31.7 Soshanguve landfill site permit; and
- 31.8 Soshanguve project report.

[32] Wonderpark highlighted that certain documents, such as the Mayoral Committee Report of 5 October 2022 and the tariff schedule of 19 June 2024 came into existence after the impugned decision was communicated and could therefore not have been considered. It was further argued that the rest of the documents could also not have been the source for the decision taken. This becomes evident when considering the reasons provided by Ms Mphahlele.

[33] Furthermore, Ms Mphahlele's only confirmed that "the documents have always been part of the policies of the City". She further alleged that the documents

existed, but nowhere does she state that she took these policies and factors into account when making the decision. Surely if she had regard to the supplemented documents, she would have at least recorded its obligation in terms of the cross subsidation policy.

- [34] In my view, the supplemented reasons were clearly intended to justify the initial reasons given. They clearly do not constitute the reasons for the decision taken. Moreover, no mention is made as to how the supplemented reasons came about and whether the decision maker was the author of these new reasons.

THE IMPUGNED DECISION

- [35] It is appropriate to set out the contents of the 18 August 2022 letter where the impugned decision was set out. The relevant extract reads:

The Environment and Agriculture Management Department Waste Division would like to respond as follows:

“The City of Tshwane continues to be committed in delivering services to its communities in the most sustainable manner as well as to promote a safe and healthy environment. The provision of waste removal services is the Municipality’s responsibility as delegated by the Constitution and the National Environmental management Waste Act, of 2008. The City of Tshwane therefore provides waste removal services to all premises that are in its jurisdiction, with the exception of some businesses and residential complexes that make use of private waste removal services that are approved by the City.

In assessing your request, the Waste Management Division of the City of Tshwane has taken into consideration the legislative responsibility of the municipality in the provision of basic services.

We would therefore like to draw your attention to the following legislative provisions:

Section 152(b) and (d) of the Constitution of South Africa states the objects of the municipality as follows:

- (b) to ensure the provisions of services to communities in a sustainable manner;*
- (d) to promote a safe and healthy environment.*

We also like to draw your attention to the following provision of the National Environmental Management Waste Act, of 2008 “Waste Act”, Section 24 which states the following:

No person may collect waste for removal from premises unless such a person is-

- (a) a municipality or municipal service provider;*
- (b) authorized by law to collect that waste, where authorization is required.*

Based on the above, it is the Division’s view that the provision of a waste removal-service is a responsibility of the Municipality as delegated by the Constitution and the National Environmental Management Waste Act, of 2008.

All regular waste collection services will be provided by the Municipality through its internal mechanism or on contracted external mechanism as may be deemed appropriate by the Municipality in terms of Section 76 of the Municipal Systems Act 32 of 2000.

Therefore, all users of refuse collection services will receive services through the Municipality or its service providers and will pay service charges to the Municipality for such a service.

With the legislative responsibility to ensure provision of services, the municipality cannot terminate a provision of service to a customer where there is no other lawful mechanism of providing the service.

Furthermore, Landfill Consult (Pty) Ltd might be a holder of a valid authorization issued by the City of Tshwane – they are not authorized to provide waste services to City’s clients, who is currently being billed by the city for the same service. The private contractor’s permit conditions (conditions 4 & 6) as issued by the City, which prohibit them from providing the City of Tshwane clients with waste removal services.

Considering the above, your request for termination of refuse removal services by the City of Tshwane, for Wonder Park Estates, premise acc no. 5003706734 which is currently being billed by the Municipality for refuse removal services is not approved...”

[36] In summary the reasons proffered for declining the application were:

- 36.1 The provision of waste removal services is the Municipality’s responsibility under the Constitution and the National Environment Waste Management Act (NEWMA);
- 36.2 The Municipality provides waste removal services to all premises within its jurisdiction (the city area);
- 36.3 The Municipality however is aware that certain business and residential complexes make use of private waste removal services approved by the Municipality;
- 36.4 The Municipality bears a legislative responsibility to ensure the provision of services and therefore cannot terminate the services where there is no lawful mechanism of providing the service;
- 36.5 Since Wonderpark is being billed by the Municipality for the same services, the application cannot be granted;
- 36.6 Landfill Consult was not authorised to provide waste services to existing clients of the Municipality, who are billed by the City for the same service.

[37] After hearing both parties, it is necessary to clarify the Municipality’s responsibilities. The Municipality does not dispute the fact that apart from it providing direct services, there are also external service providers authorized by the Municipality who can also render services refuse services. The contention the

Municipality however persists with is that it has the executive and legislative authority to administer local government matters in terms of the Constitution.

[38] The Municipality correctly submitted that:

- 38.1 the executive and legislative authority of the Municipality vest in its Municipal Council. The Municipality has a right to govern, on its own initiative, the local government affairs of its community subject to National and Provincial Legislation as provided for in the Constitution;
- 38.2 the National or a Provincial Government may not compromise or impede a Municipality's ability to exercise its powers or perform its functions;
- 38.3 Section 152 sets out the objects of local government, which *inter alia* is to provide democratic and accountable government for local communities and to ensure the provision of services to the communities in a sustainable manner;
- 38.4 the National and Provincial Governments are required to support and to capacitate the Municipalities to manage their own affairs, to exercise their powers and to perform their functions;¹³
- 38.5 Section 156 sets out the powers and functions of the Municipality. Section 156(1) provides that the Municipality has executive authority in respect of and has a right to administer local government matters listed in Part B of Schedule 5;

¹³ Section 151 (2) of the Constitution

38.6 In this manner, the refuse removal and waste disposal is within the exclusive authority of the City;

[39] This misunderstanding is centered on the reasons given in the Section 3(8) refusal. Firstly, Wonderpark contested the Municipality's understanding that consent in terms of Section 3(8) of the BY-LAWS is only granted in exceptional circumstances and in instances where the services are required outside of the municipal area. It was contended that the Municipality cannot claim the exclusive rights to render services in the city. Moreover, the Municipality erred in that it could never have been intended that Section 3(8) consent can only be granted in those limited circumstances. The wording of Section 3(8) of the BY-LAW does not impose this limitation.

[40] No issue is taken regarding the importance of the financial viability of the municipalities for the fulfilment of their constitutional mandate, the obligations on municipalities as highlighted by the applicant in terms of Section 152, 153 as well as 156 of the Constitution, more particularly Section 156(5) gives a municipality the right to exercise its power reasonably to ensure the effective performance of its functions or that the municipality is also authorised to impose rates on property.

[41] The Municipality by virtue of the Section 76 (1)(b) of the Systems Act may allow for municipal services to be provided through an external mechanism by entering

into service delivery agreements with the external service providers *inter alia* the municipal entity, another municipality, an organ of state or any other institution, entity or person legally competent to operate a business activity.¹⁴ The Municipality in fact acknowledged that there are some businesses and residential complexes that make use of private waste removal services that are approved by the City.

[42] A permit holder is defined in the BY-LAW as:

“A private service provider who has submitted the information required in Schedule 1 of this BY-LAW to the Municipality and who is in possession of a written confirmation and carries on his person a positive identification, nametag or card, as the case may be, issued by the Municipality that the particulars of such service provider was registered on the Municipal Register of private service providers and who are authorised to provide waste removal services in the area of jurisdiction of the Municipality in terms of the written permit issued by the Municipality.”

¹⁴ Section 76(1)(b) of the Systems Act reads:

“A municipality may provide a municipal service in its area or part of its area through-

An external mechanism by entering into a service delivery agreement with:

- (i) a municipal entity;
- (ii) another municipality;
- (iii) an organ of state including
 - (aa) a water services committee established in terms of the water;
 - (bb) a licensed service provider registered or recognized in terms of the National Legislation; and
 - (cc) a traditional authority;
- (v) a community-based organisation or any other non-governmental organisation legally competent to enter into such an agreement, or to have any other institution, entity or person legally competent to operate a business activity.”

[43] Wonderpark's understanding of the Municipality's obligations are:

43.1 the Municipality does not have an exclusive obligation to render waste removal services and that it can be executed by alternative service providers;

43.2 Section 152(2) recognises that a Municipality may not be able to achieve the objectives due to various challenges, both administrative and financial. Therefore, provision was made for authorised parties to provide the waste management services. Even in terms of Section 24 of NEMWA the waste collection removal can be executed by authorised parties other than the Municipality.

43.3 Section 156 of the Constitution empowers a Municipality to administer waste removal in terms of its obligations in terms of Section 152(1)(b) and (d). and that the Municipality is ultimately responsible for the administration of waste collection, and to promote a safe and healthy environment.

[44] On a proper interpretation of the provisions in the Constitution, there can be no doubt that the Municipality has executive authority through its Municipal Council to structure and manage its administration including the budgeting and planning processes in order to prioritize all the needs of the community.¹⁵

¹⁵ Section 153 of the Constitution

[45] Wonderpark's main gripe is that the Municipality could not insist on providing the services directly to Wonderpark. Its application to utilize an alternative service provider in light of the motivation should have been granted. Section 3(8) of the BY-LAW makes provision for a party to request the cancellation of the direct services of the Municipality. There was no reason for the Municipality to decline the cancellation particularly in light of the case Wonderpark presented.

[46] In its request Wonderpark provided a detailed motivation for the services of an external service provider that is registered with the City, which is in compliance with Section 76(b) of the Systems Act. However, the Municipality in its reasons did not deal with issues raised by the Wonderpark, particularly that its waste removal services remains inadequate and is often disrupted without notice, that Wonderpark had spent additional amounts for the waste to be removed through other service providers, that the refuse is not collected as per the scheduled dates in terms of the Municipality's roster and that only half of the 200 bins are collected, and despite the insufficient services Wonderpark is still charged for all the services which the Municipality claims it is entitled to.

[47] The Municipality was further informed that there had been various disputes lodged with the City, Wonderpark pointed out that the continued use of the City as Wonderpark's refuse removal service provider is no longer feasible. Moreover, there is pending litigation with regard to the City's incorrect billing methods and Wonderpark has incurred ongoing legal costs as a result.

[48] Wonderpark acknowledged that Section 32 of the BY-LAW made provision for waste management services by authorised service providers. It therefore motivated that it would acquire the services of Landfill Consult (Pty) Ltd and attached the permit of this entity to the application. It is not in dispute that Landfill Consult was in fact a registered external service provider of the Municipality.

[49] In response the Municipality in refusing the application relied on two general grounds, namely:

49.1 it has an obligation to provide waste collection services, either internally or through an external provider;

49.2 secondly since Wonderpark is on the Municipality's billing list, it cannot utilise the services of Landfill Consult.

[50] I reiterate these reasons are given without addressing the particular facts presented by Wonderpark. In addition, the incorrect billing to Wonderpark was a real concern which eventually led to litigation. Clearly these are arbitrary as they do not deal with the contentions of Wonderpark's request. Moreover, the purpose of section 3(8) application could never have been limited to parties who are not on the municipalities billing list or parties who are not located in the municipal area.

[51] Every action taken in the exercise of public power must be underpinned by plausible reasons. Such reasons must justify the action taken. If the action is taken for no reason or no justifiable reason it is arbitrary.¹⁶

[52] The conclusion remains arbitrary and reads:

“Considering the above, your request for termination of refuse removal services by the City of Tshwane for Wonderpark Estates, premise account number 5003706734 which is currently being billed by the Municipality for refuse removal services is not approved...”

[53] Moreover, each application must be assessed in its own merit. It was argued there would be no point in affording the parties a remedy in terms of the BY-LAW for cancellation of the Municipality’s services, but then to refuse it based on a general principle.

[54] In **Democratic Alliance**¹⁷ the court set out a three-stage inquiry in order to determine if a decision is rational.

“There is therefore a three-stage inquiry to be made when a court is faced with an executive decision where certain factors were ignored. The first is whether the factors ignored are relevant and the second requires to consider whether the failure to consider the material concerned (the means) is rationally related to the

¹⁶ Minister of Justice and Another v SA Restructuring and Insolvency Practitioners Association and Others 2018 (5) SA 349 (CC) at paragraph 49

¹⁷ Democratic Alliance v President of South Africa and others 2013 1 SA 248 CC at para 39

purpose for which the power was conferred; and the third which arises only if the answer to the second stage of the inquiry is negative, is whether ignoring relevant facts is of a kind that colours the entire process with irrationality and thus renders the final decision irrational”

SUBSTITUTION OF DECISION

- [55] The Municipality contends that an important constitutional issue on specific powers and functions entrusted to the Municipalities has been raised and this court should not usurp its powers and functions by making a decision of its preference that would frustrate the balance of power implied in the principle of separation of powers. It is especially so where the decision was policy laden.
- [56] Section 3(8) of the BY-LAW makes provision for cancellation of services where reasons can be advanced to justify cancellation. Section 32 of the BY-LAW further makes provision for the appointment of an external service provider.
- [57] Wonderpark submitted that there are exceptional circumstances in this matter that warrants substitution of the Municipality’s decision. Section 8(1)(c)(ii)(a) of PAJA provides that the court may grant a just and equitable order including in exceptional cases substituting its own decision for that of an administrator.

[58] In ***Trencon Construction***¹⁸ the Constitutional Court considered the exceptional circumstances enquiry in terms of the said provision and held:

“In our Constitutional framework, a court considering what constitutes exceptional circumstances must be guided by an approach that is consonant to the Constitution.”

And it further emphasized:

*“The exceptional circumstances enquiry require the examination of each matter on a case-by-case basis that accounts for all relevant facts and circumstances.”*¹⁹

[59] Further at para 47 the court stated that in conducting an inquiry as to whether substitution of an administrator's decision is warranted two main factors have to be considered, namely whether a court is in a good position as the administrator to make the decision and secondly whether the decision of the administrator is a foregone conclusion. The two factors must be considered cumulatively. Thereafter other factors may be considered such as delay incompetence and bias but the ultimate consideration is whether the substitution order is just and equitable. This will involve a consideration of fairness to all parties.²⁰

[60] Having regard to facts of this matter, I am of the view that this court has met the threshold to substitute the decision of the Municipality. The factors taken into account are that:

¹⁸ *Trencon Construction v Industrial Development Corporation of South Africa Ltd and Another* 2015 (5) SA 245 (CC)

¹⁹ *Trencon* at par 46

²⁰ *Trencon* at Para 47

- 60.1 Wonderpark has lost all trust in the Municipality's ability to render appropriate services to it. It had to request its security personnel and estate manager to keep daily records of the date on which the Municipality arrives to render its services and the details of the services rendered by the Municipality such as bins on site, details of the bins not collected, bins left damaged and bins left unclean;
- 60.2 Wonderpark cannot be expected to remain in a relationship with the Municipality where it will continue to provide inadequate services;
- 60.3 it would serve no purpose to remit the matter to the Municipality for a decision given the relationship between the parties as well as the history of the litigation;
- 60.4 the Municipality considers Wonderpark to be an affluent entity which is on its billing list, and makes it possible to carry out cross subsidation,
- 60.5 The issues before the court are crisp, namely that there is a lawful mechanism in terms of Section 3(8) of the BY-LAW to request the cancellation of the Municipality's direct services and the court is required to determine if the request should be granted.
- 60.6 It was further submitted that justice and equity demanded the court to exercise its power to substitute the Municipality's decision.

[61] In its defence the Municipality pointed out that the court is not in a position to determine the identification of alternative service provider. In response the applicant submitted that firstly that the choice and selection of an alternative

service provider was not a consideration that is prescribed and to be taken into account in terms of Section 3(8) of the BY-LAWs. Secondly, in the event that the court does grant cancellation, Wonderpark would have to appoint an alternative service provider that will be authorized to conduct the waste removal services in the municipal area where Wonderpark is situated.

[62] The said factors listed in my view constitute exceptional circumstances which requires this court to grant an order that would be just and equitable and with the due consideration of fairness to both parties.

[63] The facts motivated by Wonderpark in its Section 3(8) application justifies Wonderpark to receive the services of an external service provider who is authorized by the Municipality. In fact, the Municipality proposed this consideration but gave no undertaking.

[64] Particularly in its supplementary affidavit, the Municipality had proposed that Wonderpark utilize the services of an external service provider. I am therefore inclined to firstly set aside the decision of the Municipality and grant the Section 3(8) application. Secondly remit only the aspect – that the Municipality provides a list of permitted service providers who can render the refuse removal services to Wonderpark. Wonderpark will then select a suitable provider therefrom.

COSTS

[65] In exercising my discretion, there is no reason why the general principle that cost should follow the result should not apply. Wonderpark has been successful in this application and is entitled to its costs. The respondent is thus ordered to pay the cost of this application, on a Scale C.

H. KOOVERJIE
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Appearances:

Counsel for the applicant: Adv. MJ Engelbrecht SC

Instructed by: Adams & Adams

Counsel for the third respondent: Adv. JA Motepe SC

Adv. B Lukhele

Instructed by: Ncube Incorporated Attorneys

Date heard: 2 September 2025

Date of Judgment: 5 December 2025