

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NUMBER: 2024-131114

DELETE WHICHEVER IS NOT APPLICABLE

1.REPORTABLE: NO

2.OF INTEREST TO OTHER JUDGES: NO

3.REVISED: NO

12 DECEMBER 2025

Judge Dippenaar

In the matter between:

LTC HOLDING CC

APPLICANT

and

JOHANNESBURG WATER SOC LTD
BUILTPRO CONSTRUCTION (PTY) LTD
NUTINOX (PTY) LTD

FIRST RESPONDENT
SECOND RESPONDENT
THIRD RESPONDENT

JUDGMENT

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail and uploading it onto the electronic platform. The date and time for hand-down is deemed to be 10h00 on the 12th of DECEMBER 2025.

DIPPENAAR J:

[1] This application concerns the review and setting aside of tender JW OPS 003/23 pertaining to *'the appointment of a panel of service providers for the supply and delivery of potable water on an as and when required basis for a period of thirty six (36) months'* ('the tender').

[2] The applicant, LTC Holding CC, an unsuccessful tenderer, seeks to review and set aside the tender which was awarded by the first respondent, Johannesburg Water SOC Ltd, a municipal entity as contemplated in the Local Government: Municipal Systems Act 3 of 2000. The first respondent awarded the tender to the second respondent, Builtpro Construction (Pty) Ltd and the third respondent, Nutinox (Pty) Ltd. The second and third respondents did not participate in the proceedings.

[3] In its notice of motion, the applicant sought substantive orders declaring the award of Tender JW OPS 003/23 to the second and third respondents and any service level agreement/s concluded between the respondents constitutionally invalid and setting them aside, together with costs. Pursuant to the provision of the record by the first respondent, the applicant amended its notice of motion to add certain ancillary relief. In its amended notice of motion, the applicant further sought an order declaring that the tender lapsed prior to the first respondent making any tender award. It further sought an order directing the first respondent to institute action against its accounting officer who made the tender

award and to recover all payments made by the first respondent to the second and third respondents pursuant to the tender award.

[4] The background facts were mostly not contentious. The first respondent published an invitation to tender during July 2023. The initial closing date and time of the tender was 31 August 2023 at 10h30. The first respondent published addendum 1 on 24 August 2023 extending the closing date to 7 September 2023 at 10h30. The validity period of the tender was 90 days.

[5] The applicant rendered services to the first respondent on a month-to-month appointment until 1 November 2024. The applicant and the second and third respondents each submitted responsive bids. Thereafter various extensions of the validity period were requested by the first respondent. On 22 November 2023, the applicant was requested to consent to an extension of the validity period until 6 December 2023. It consented in writing on the same date. According to the applicant the validity period expired on 6 December 2024.

[6] The first respondent on its version had sought further extensions up to 6 February 2024, 4 April 2024 and 4 May 2024 respectively. It held the view that the validity period was validly extended until 4 May 2024. Although the validity of those extensions was in dispute between the parties, it was undisputed that the last extension date expired on 4 May 2024.

[7] The dispute concerns whether the first respondent timeously requested consent from each of the 92 participating tenderers to agree to the extensions and whether the tender lapsed before it was awarded. The first respondent conceded that once a tender validity period lapses, the relevant accounting officer no longer has the authority to award any tender.

[8] It was undisputed that on Saturday 4 May 2024 the first respondent took a decision to award the tender to the second and third respondents. The letter confirming the award to the second respondent was signed by Mr Kgaugelo Mahlaba as Chief Financial Officer of the first respondent. A similar letter was addressed to the third respondent. It was evident from the record that the decision was internal and was not at the time published or communicated to the successful tenderers, the second and third respondents.

[9] It was undisputed that the first respondent only communicated the tender award to the second and third respondents on 24 June 2024 and that the tender award was implemented during November 2024. No list of the successful tenderers was published, but the applicant was informally informed of the award during June 2024. Another unsuccessful tenderer, Strategic Persuasion (Pty) Ltd ('SP') submitted an objection on 8 July 2024. In its outcome of objection dated 31 October 2024, the respondent contended that SP was evaluated and disqualified at the stage 2 functionality evaluation on 8 November 2023 and was disqualified before the extension of validity was requested. The first respondent adopted the stance that under its Supply Chain Management Policy ('SCP'), and specifically paragraph 29.3.4 thereof, it was not obliged to seek consent from disqualified tenderers as they were deemed to have withdrawn their tenders by not responding to the request for extensions of the bid validity period. That stance was maintained during the current proceedings.

[10] The first respondent opposed the application on various grounds. Its central contention was that the tender had been validly extended to 4 May 2024 and was lawfully awarded to the second and third respondents on 4 May 2024. It submitted that there were no valid grounds to review the award of the tender. It contended that the tender was regulated by the Local Government: Municipal Finance Management Act 56 of 2003 ('MFMA') and the Municipal Supply Chain Regulations and the first respondent's SCP.

[11] The applicant in turn contended that the SCP was an internal document which did not form part of the tender and that the tender had lapsed on 6 December 2023 as the first respondent had not validly extended the tender beyond that date. It submitted that

the first respondent made the ultimate tender award after the tender finally lapsed on 4 May 2024, for purposes of that argument applying the first respondent's version.

[12] There are certain factual disputes on the papers, notably regarding the various extensions of the bid validity period. Accepting that the so-called Plascon Evans Rule applies and that a review under PAJA constitutes a constitutional matter,¹ the matter must be considered on the first respondent's version where factual disputes arise.² However, it is still necessary to consider the legal basis underpinning the factual averments to determine their cogency.

[13] The questions which arise on the papers are: (i) whether the tender was still valid on 24 June 2024 when it was communicated to the second and third respondents; (ii) whether the first respondent presented proof that the requests for extension were indeed communicated to all the participating tenderers; (iii) whether or not the first respondent had demonstrated that the tenderers who participated in the tender process were bound by its SCP policy; (iv) the effect of the failure to request a further consent from SP; and (v) whether the first respondent presented any evidence in respect of exceptional circumstances as referred to in its SCP and its effect.

[14] The relevant principles are well established. It is undisputed that when a tender is published the terms and conditions are stipulated in the tender document. After publication of a tender, an organ of state does not have the authority to condone the non-compliance with a tender condition.³ The same applies to the tender validity period.

[15] An organ of state such as the first respondent has no authority to unilaterally extend a tender validity period. As held in *Wattpower Solutions CC and Another v Transnet SOC Ltd*⁴: 'It is clear from the case authorities that a tender period can be

¹ *Competition Commission of South Africa v Group Five Construction Ltd* 2023 (1) BCLR 1 (CC); *Rail Commuters Action Group and Others v Transnet Ltd t/a Metrorail and Others* 2005 (2) SA 359 (CC).

² *Thint (Pty) Ltd v National Director of Public Prosecutions and Others* 2009 (1) SA 1 (CC) para 8.

³ *JS Maroka v Bertram (Pty) Ltd* [2014] 1 All SA 545 SA (SCA).

⁴ *Wattpower Solutions CC and another v Transnet SOC Ltd and Another* [2021] ZAKZDHC 46 at para 31.

extended, if firstly, the tender data or invitation made provision for an extension, and secondly, it is extended prior to the date on which it was due to lapse’.

[16] The tender document itself provides no authority for the first respondent to extend the tender validity period. Regarding a lapsed tender, Southwood J in *Telkom SA Ltd v Merid Trading (Pty) Ltd and Others; Bihati Solutions (Pty) Ltd v Telkom SA Ltd and Others*⁵ held that: ‘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 the 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...’ These findings were endorsed by Plasket J in *Joubert Galpin Searle Inc and others v Road Accident Fund and Another*.⁶

[17] In *Ekurhuleni Metropolitan Municipality v Takubiza Trading and Projects CC*⁷ (‘*Takubiza*’), the Supreme Court of Appeal confirmed that the validity period is indeed one of the fundamental ‘rules of the game’, being the period within which the process should be finalised. It held:

‘[13] ...To extend the tender validity period, the consent of all the participants to the tender process is required. Unless there is a timeous request and a favourable response from all the tenderers prior to the expiry of the tender, the tender comes to an end...’

⁵ *Telkom SA Ltd v Merid Trading (Pty) Ltd and Others; Bihati Solutions (Pty) Ltd v Telkom SA Ltd and Others* [2011] ZAGPPHC 1 at para 14.

⁶ *Joubert Galpin Searle Inc and others v Road Accident Fund and Another* 2014 (4) SA 148 (ECP) at paras 68-74.

⁷ *Ekurhuleni Metropolitan Municipality v Takubiza Trading and Projects CC* 2023 (1) SA 44 (SCA) paras 13 to 15.

[15] It goes without saying that a tender process cannot be open ended. Certainty has to be the touchstone, I can thus conceive of no reason why the principle so firmly established in Telkom SA and Searle does not find application here..'

[18] In *Aptitude Trading Enterprise (Pty) Ltd and others v City of Tshwane Metropolitan Municipality and others*,⁸ it was held that the bid validity period cannot be validly extended without the consent or rejection of the parties prior to the lapse of the validity period. The process of bid validity extension must be complete before the bid evaluation process lapses if it is indeed allowed at all. If the extension is not agreed to before the lapse of the validity period, it is the end of the tender. It was emphasised that it is necessary for the organ of state to present evidence of the actual consent given by the tenderers.

[19] The first respondent sought to overcome this hurdle by relying on paragraph 29.3 of its SCP. Paragraph 29.3.1 of the first respondent's SCP provides: *'Bid validity may be extended if justified under exceptional circumstances. All bid validity extensions shall be requested in writing from all bidders before the bid validity expiry date'*. Paragraph 29.3.4 of the SCP contains a deeming provision that should any bidder fail to respond to the validity extension request within the stipulated period, relevant bidders would be deemed to have voluntarily withdrawn their bids. According to the first respondent of the 92 bidders from whom an extension was requested, 52 consented whilst 40 did not respond thus triggering the deeming provision that they had voluntarily withdrawn their bids. The first respondent contended that the relevant provisions of the SCP were referred to in the extension letters and that at the time the award was made on 4 May 2024, the bid valuation period had been validly extended.

[20] Relying on paragraph 29.3.4, the first respondent submitted that *Takubiza* does not apply to it given the deeming provision in its SCP, which entitled it to ignore a tenderer if such tenderer failed to respond timeously to a request for an extension. This contention does not pass muster. The broad contention that the SCP formed part of the tender

⁸ *Aptitude Trading Enterprise (Pty) Ltd and others v City of Tshwane Metropolitan Municipality and others* [2022] ZAGPPHC 924 para 26.

because it is referred to in section dealing with evaluation process, is not supported by the tender documents. The reference relied on is oblique and does not state that the bid is subject to the SCP. The tender documents expressly provide that the bid was subject to the Preferential Procurement Policy Framework Act 2000 and the preferential Procurement Regulations, 2022, the general conditions of Contract (GCC) and, if applicable, any special conditions of Contract. The provision does not refer to the SCP.⁹

[21] No cogent evidence was provided that the SCP policy was expressly incorporated by reference into the tender documents. The first respondent further did not establish that the SCP was indeed properly communicated to the tenderers. A bald reference thereto in an extension letter is insufficient. The SCP was also not provided by the first respondent as part of the record. Instead, it was attached to the answering papers. The first respondent further presented no evidence of exceptional circumstances as is referred to in its SCP. The policy expressly refers to exceptional circumstances.

[22] No basis was thus established for the proposition that the principles enunciated in *Takubisa* do not apply. It was further also not established that the principles in *Aurecon*¹⁰ and *Aventino*¹¹ are applicable as submitted by the first respondent. They are factually distinguishable as in both instances it was undisputed that the respective state entities' supply chain management policies applied to the tenders in issue. In the present instance, the applicability of the first respondent's SCP is contested and the first respondent did not on its version establish that it is applicable to the tender in issue.

[23] The first respondent's SCP thus does not avail it. The SCP in its terms further confirms that the first respondent was required to seek all bidders' consent to an extension. The facts did not establish that it had done so and the first respondent's affidavit fell short of the mark. Although it presented screen shots of emails to various

⁹ Para 1.3, Part B terms and Conditions for Bidding.

¹⁰ *Aurecon South Africa (Pty) Ltd v Cape Town City* [2015] ZASCA 209; 2016 (2) SA 199 (SCA).

¹¹ *Aventino Ecotroopers Joint Venture and Others v The MEC for the Department of Roads and Transport, Gauteng Province and Others* [2025] ZASCA 32.

email addresses, no evidence was provided that these emails were correct or that the first respondent complied with the requirements of its own SCP. No formal (CSD) printouts were provided by the first respondent or included in the record. A CSD report reflects the official email address of each participating tenderer. The confirmatory affidavit of Mr Karabo Musa fell far short of the mark and did not establish any cogency to the averments.¹² In order for the first respondent to establish its version regarding notification of the bidders, it was incumbent on it to provide cogent proof of such notification, more so as it relied on the deeming provision in its SCP. The mere *ipse dixit* of the first respondent is insufficient and does not withstand scrutiny.

[24] Regarding the disputed extensions, the first respondent provided no sufficient evidence that all the bidders were notified. The notification of the requests for extension required confirmation from all the bidders, which was not provided.¹³ There is no proof that the requests for extension was communicated to the bidders prior to the expiry of the bid periods or that the bidders consented to the extension of the period prior to the expiry thereof. In the absence of proof that there was, after the expiry date no longer any valid tender process and the tender falls to be set aside for this reason alone.

[25] Moreover, the further insurmountable hurdle facing the first respondent is the answer to the question whether the tender was still valid at the time it was communicated to the second and third respondents on 24 June 2024.

[26] The first respondent provided no explanation why any communication was not sent to the second and third respondents earlier. It was not the first respondent's case that the 4 May 2024 internal decision was published in any way.

[27] The first respondent contended that it was sufficient that the decision was made within the bid validity period. Reliance was placed on the definitions contained in the

¹² *Drift Supersand (Pty) Ltd v Mogale Local Municipality and another* [2017] 4 All SA 624 (SCA) para 31.

¹³ *Takubisa* para 11, para 13.

regulations to the Local Government: Municipal Finance Management Act 56 of 2003 (the 'MFMA') which defines 'final award' in relation to bids or quotations submitted for a contract as the final decision on which it accepts a bid or quote. I am not persuaded that such reliance avails the first respondent. This approach disregards that it is the communication by the first respondent of its acceptance of the tenderer's offer which is important.

[28] As held in *MEC for Health Eastern Cape v Kirland Investments*¹⁴: 'The fact that decisions were not communicated to or otherwise made known has an important effect, because they were not final, they were subject to change without offending against the *functus officio* principle...More generally Hoexter sums up the position as follows: 'In general the *functus officio* doctrine applies only to final decisions, so that a decision is revokable before it becomes final. Finality is a point arrived at when the decision is published, announced or otherwise conveyed to those affected by it'.¹⁵ The Constitutional Court did not take issue with this exposition of the law.¹⁶ The same sentiment was echoed in *Manok Family Trust v Blue Horizon Investments*.¹⁷

[29] Even if the first respondent's contention that the bid period was validly extended to 4 May 2024 were to have been accepted (notwithstanding the deficiencies already referred to) it does not avail it, given that the communication of the award only took place on 24 June 2024. The first respondent's contention that the decision was finally taken, absent communication of that decision before the tender validity period lapsed, does not bear scrutiny.

[30] The first respondent submitted that in *Kirland* the Constitutional Court recognised that the administrative decision taken by the acting superintendent, although not communicated to Kirland before falling ill, was valid in holding that the approval of the

¹⁴ *MEC for Health Eastern Cape v Kirland Investments* 2014 (3) SA 219 (SCA) (*Kirland*) paras 14 and 15.

¹⁵ Hoexter and Penfold *Administrative Law in South Africa* (3rd edition) at 382.

¹⁶ *MEC for Health Eastern Cape v Kirland Investments* [2014] ZACC 6.

¹⁷ *Manok Family Trust v Blue Horizon Investments* 2014 (5) SA 503 (SCA) para 14.

acting superintendent was unconstitutional and invalid. I am not persuaded that this submission has force. Read in context, the minority judgment does not provide authority for the submission.¹⁸ The debate in the Constitutional Court centered around whether a formal review application was required to set such decision aside and whether the validity of the approval was one of the issues raised before the High Court. The majority decision took no issue with the principles enunciated by the Supreme Court of Appeal already referred to.¹⁹

[31] It was undisputed that the bid validity period was not extended beyond 4 May 2024. Applying the relevant principles set out above, the tender process only comes to an end when the decision is published or communicated to the successful tenderers. Once the tender validity period had expired, the tender process had been completed, albeit unsuccessfully. As at 5 May 2024, when the tender validity period on the first respondent's own version lapsed, the process was not complete. Although the decision had been made, it was not communicated. Accordingly, the tender lapsed prior to an award being made. The bid validity period could not be extended by agreement after it had expired.²⁰

[32] That is dispositive of the review, which must succeed, given that it constitutes a reviewable irregularity under s 6(2)(a)(i), s 6(2)(b), s 6(2)(d) and/or s 6(2)(i) of the Promotion of Access to Justice Act 3 of 2000 ('PAJA'). It is thus not necessary to deal in any detail with the remaining issues raised on the papers as detailed in paragraph 13 above.

[33] It follows that as the tender had lapsed and the award was unlawful, the subsequent award to the second and third respondents was unlawful. Section 8 of PAJA, read with s 172 of the Constitution, empowers a court to prevent injustice by making a just and equitable order. Under s 172(1)(a) of the Constitution the award must be declared

¹⁸ Kirland fn 11 supra, para 36.

¹⁹ Paragraph 28 supra.

²⁰ Takubisa para 12 and the authority referred to therein.

unlawful. The consequences of the declaration of unlawfulness must then be met with a just and equitable order under s 172(1)(b).²¹

[34] Considering all the relevant factors, a just and equitable order would be that all the service level agreements which may have been concluded pursuant to the award fall to be set aside. Despite being challenged to provide those service level agreements and the invoices of the second and third respondents, the first respondent elected not to do so. The agreements and the terms on which they were concluded as well as the payments made to the second and third respondents, thus remain shrouded in mystery. The applicant submitted that given this failure, it would be appropriate to simply set aside those agreements from inception and that this would constitute a just and equitable remedy.

[35] Despite the question marks which surround the agreements concluded between the first respondent and the second and third respondents, there is an important issue which requires consideration, namely the continuity of services to the communities served by the first respondent. The water issues experienced by consumers are well documented and require no repetition. Continuity of supply of the services forming the subject matter of the tender is of great importance to the public at large and specifically to the communities involved.

[36] During argument, the applicant conceded that a retrospective setting aside of the award would not be appropriate, given that the tender concerned important services which should not be interrupted. Accepting the realities involved, the applicant proposed that as in *Takubisa*, the declaration of invalidity be suspended to afford the first respondent to embark on a new tender process and to make arrangements for emergency services under regulation 36 in the interim. The first respondent did not take issue with

²¹ *AllPay Consolidated Investment Holdings (Pty) Ltd and others v Chief Executive Officer, South African Social Security Agency and Another* 2014 (1) SA 604 (CC) para 25.

such proposal but contended that a period of 180 days, rather than the 120 days proposed by the applicant would be suitable.

[37] In considering a just and equitable remedy it is necessary to take the past history of the matter into account. The first respondent had to seek various extensions of the bid validity period. For present purposes it is irrelevant whether those extensions were validly sought or not. History has proved that the 90 day bid period was insufficient. It would ultimately leave vulnerable recipients of the potable water services at risk if an unrealistic period for completion of the tender process is set. On the other hand, the first respondent cannot simply be afforded the luxury of time, given the conclusion that the process was unlawful.

[38] Taking all the factors into account, specifically the needs of those members of the communities who are dependent on the services, a period of 150 days should be afforded to the first respondent to complete a further tender process. Given the upcoming Festive Season, it is more appropriate than the 120 day period suggested by the applicant. This would afford the first respondent a reasonable time within which to complete the tender process and conclude an agreement with a successful bidder to provide the services and afford it sufficient time to make alternative arrangements to ensure continuous supply of the services under regulation 36, in emergency situations.

[39] The applicant did not persist with relief aimed at directing the first respondent to institute action against its accounting officer who made the tender award and to recover all payments made to the second and third respondents pursuant to the tender award. In my view, such concession was correctly made. The first respondent is well aware of its statutory and other obligations and should be left to take appropriate steps. This judgment should be brought to the attention of the relevant functionaries of the first respondent.

[40] Costs follow the result. The parties agreed that considering the issues and intricacies involved, costs on scale C were justified. I am satisfied that such order would be appropriate.

[41] I grant the following order:

[1] It is declared that tender JW OPS 003/23 (the tender) lapsed prior to the first respondent, Johannesburg Water SOC Ltd, making any tender award;

[2] The decision of the first respondent to award Tender JW OPS 003/23 to the second respondent, Builtpro Construction (Pty) Ltd and the third respondent, Nutinox (Pty) Ltd, is reviewed and set aside and declared constitutionally invalid;

[3] All and any service level agreements concluded between the first respondent and the second respondent as well as between the first respondent and the third respondent pursuant to award of the tender are declared constitutionally invalid and set aside;

[4] The declarations of invalidity in 2 and 3 above are suspended for a period of 150 calendar days to enable the first respondent to commence with and conclude a new tender process for the appointment of service providers;

[5] The first respondent is directed to pay the costs of the application, including the costs of senior counsel on scale C.

[6] The first respondent is directed to bring this judgment to the attention of its relevant functionaries and to provide them with a copy.



EF DIPPENAAR
JUDGE OF THE HIGH COURT
GAUTENG JOHANNESBURG

HEARING

DATE OF HEARING : 03 NOVEMBER 2025

DATE OF JUDGMENT : 12 DECEMBER 2025

APPEARANCES

APPLICANT'S COUNSEL : Mr APJ ELS SC

APPLICANT'S ATTORNEYS : ALBERT HIBBERT ATTORNEYS

RESPONDENT'S COUNSEL : Mr WR MOKHARE SC
Mr I E TSHOMA

RESPONDENT'S ATTORNEYS : BUTHELEZI VILAKAZI INC