



**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CIRCUIT LOCAL DIVISION, THEMBALETHU)**

Case No: 18144/23

In the matter between

DACK DEVELOPMENT (PTY) LTD

APPLICANT

AND

GEORGE

LOCAL

MUNICIPALITY

RESPONDENT

Date of Hearing : 28 August 2025

Date of Delivering : 02 February 2026

JUDGMENT

THULARE J

ORDER

- (a) The applicant is granted leave to file a supplementary replying affidavit as duly set forth under the founding affidavit and the supplementary replying affidavit is specifically and fully incorporated into the applicant's original replying affidavit and is admitted into the record as an integral and substantive part of the record.
- (b) The respondent, should it so decide, is afforded an opportunity to file an affidavit or affidavits, in response to the supplementary replying affidavit within 10 days from the date of this order.
- (c) The applicant to pay the costs occasioned by this application, including the costs of counsel on scale C.

[1] This is an urgent opposed application for condonation of the late filing of the replying affidavit and leave to be granted leave to file supplementary replying affidavit, that the supplementary affidavit be accepted by the court as if specifically and fully incorporated into the applicants original replying affidavit and that the supplementary affidavit be admitted into the official court record as an integral and substantive part thereof and that the respondent be afforded an opportunity, if required, to file an affidavit in response to the supplementary affidavit within a period to be determined by the court and that the costs of the application be costs in the cause of the review application save in the event of opposition in which event the respondent be ordered to pay the costs. The application was inadvertently marked as disposed of as opposed to outstanding on my personal records. This was occasioned by the initial intention to immediately issue the order with reasons to follow, and the later decision to reserve the judgment in total to deal especially

with the legal principles applicable which informed the decision at once soon thereafter. The delay occasioned thereby is regretted.

[2] The application arose after the applicant observed that there were substantive and procedural deficiencies in its original replying affidavit which failed to adequately and comprehensively traverse the material averments raised in the respondent's answering affidavit. According to the applicant the deficiencies were not attributable to any failure on the part of the applicant but rather stem from the incapacitation of the former legal representative, whose medical condition materially prejudiced the applicant's ability to place a complete and comprehensive response before the court. According to the applicant, no new factual allegations or evidence were introduced. The affidavit merely expanded and the respondent would not suffer any undue prejudice. The interests of justice demanded that the applicant be afforded a fair opportunity to place its full case before the court particularly where its failure to do so earlier was not due to its fault or delay but due to exceptional and unforeseen circumstances affecting its erstwhile legal representatives.

[3] The erstwhile attorney suffered from severe medical condition which limited communication and consultation with the applicant, was largely unreachable and unable to provide the necessary legal advice and guidance which had a material impact on the conduct of the applicant's case as the erstwhile legal representative was lately unresponsive and unavailable. When the new legal representatives made a review of the litigation record, they concluded that the answering affidavit did not meaningfully address the lawfulness of the administrative actions challenged, particularly the conversion of the lease application process into a competitive bid process; the procedural fairness of the respondents bid evaluation and tender

cancellation which was not adequately scrutinized in the original replying affidavit; the respondents inconsistent application of lease policies, particularly concerning similar lease applications granted without requiring a public bidding process and the respondents reliance on certain statutory provisions and policies to allegedly justify its administrative actions that were legally indefensible.

[4] In its reply, the applicant disputes the authority of the deponent of the respondents answering affidavit to engage in litigation. It points out that the respondent did not file a copy of the resolution of the municipal council authorizing the deponent to oppose the proceedings on the respondent's behalf. The applicant's case is that in the absence of a valid and lawful written proof delegation in terms of section 59(2)(b) of the Municipal Systems Act the deponent lacks the requisite authority. The deponent statement that he was delegated the authority is vague, unsupported and legally insufficient. It was also impermissible for a deponent to rely on second-hand information unless such information was substantiated by documentary evidence, direct involvement or confirmatory affidavits from those officials who provided the information. The confirmatory affidavit of Mr Gelderbloem did not confirm the accuracy of any broader factual assertions of the deponent as it confirmed only specific written communications that were attached to the answering affidavit and the founding affidavit. The confirmatory affidavit did not attest to the correctness of facts sourced from other municipal officials. The denial that the respondent acted unlawfully was a legal conclusion and not factual evidence. The basis of affidavits in motion proceedings must be direct, firsthand knowledge of the facts and where reliance is on information sourced from others, such sources must file confirmatory affidavits that provide substantive and detailed support. The portions of the deponent's affidavit

based on inadmissible hearsay stood to be disregarded for failing to meet the evidentiary threshold required for admissibility in motion proceedings. The respondent did not establish compelling justification for the admission of hearsay. The answering affidavits did not disclose the full and unredacted records, on the documents that the respondent sought to rely, records to which the applicant was denied access. The respondent lacked what was required in decision-making, to wit, being transparent and verifiable as part of the municipality's duty of accountability and procedural fairness, which was inconsistent with its obligations under section 195(1) of the Constitution which required it to be accountable, transparent and responsive.

[5] The applicant sought to amend its prayers to ensure greater specificity, clarity and alignment with the legal and factual basis of the application. The applicant was never informed that the lease would be subjected to a bidding process. The respondent failed to follow the correct statutory process before changing the procedure, and this caused the third-party interest in the matter. The applicants case is that the decision to initiate a bidding process was unlawful as it failed to comply with the requirement of section 14(2) of the Local Government Municipal Finance Management Act (LGMFMA) which required the respondent to demonstrate that a property was no longer needed for service delivery before it could be leased or disposed of; Regulations 34 of the Municipal Asset Transfer Regulations, 2008, which provided that municipal property may only be leased through a competitive process where it was in the best interests of the public and required a Council resolution justifying such a decision and the respondents Immovable Property Policy, which prescribed a clear procedure for leasing municipal property and allowed for direct lease applications under certain conditions. The applicant

alleged that it was the only party with a legally recognized interest in leasing the property at the time of its application. The respondent failed to finalise the lease application and instead arbitrarily converted the process into a public bid without lawful authority. This decision was procedurally unfair, irrational and inconsistent with the respondents own policies.

[6] Amongst others, the applicant also took issue with the answer of non-joinder. The applicant's case is that it was under no obligation to join tenderers as this application concerns the lawfulness of the respondents decision-making process and not the individual rights of the bidders. The central issue being the administrative conduct of the respondent and not the outcome of the tender. The tender was ultimately cancelled and no rights accrued to any bidder and no bidder has challenged the respondent's decision nor sought to intervene in these proceedings. The respondent itself did not seek that joinder.

[7] In opposition to the application, the respondent requested the court to allow evidence contained in the deponent to the respondent's affidavit relating to documentation in the municipal files under his control as the Acting Municipal Manager. The respondent is also of the view that the proposed supplementary replying affidavit constituted serious abuse of process by reason of its prolixity and that it is replete with legal argument, extensive quotations from legislation, revisited issues already dealt with in the replying affidavit, raised new issues including those pursuant to the amendment of its notice of motion which were not relevant anymore. The respondents are also of the view that the application had no reasonable prospects of success for a variety of reasons including that the applicant

did not immediately challenge the bidding process but participated in it until it lost and only then challenged it. The decision of council for a competitive bidding process was the exercise of executive powers and not administrative powers, and not reviewable under the Promotion of Administrative Justice Act, 2000 (PAJA) and that the application was time-barred.

[8] Rule 6(5)(e) of the Uniform Rules of Court provide:

“6 Applications

5 (e) Within 10 days of the service upon the respondent of the affidavit and documents referred to in sub-paragraph (ii) of paragraph (d) of subrule 5 the applicant may deliver a replying affidavit. The court may in its discretion permit the filing of further affidavits.”

For purposes of this judgment, I did not deem it necessary to deal with the totality of the reasons advanced by the applicant and the responses of the respondent thereto. An application for the filing of a supplementary replying affidavit must be approached in the light of all the issues raised and, with the quest to ensure a proper adjudication [*Dickison v South African General Electric Co (Pty) Ltd* 1973 (2) SA 620 (A) at 628F]. Proper adjudication would ordinarily require an answer by the applicant to all relevant matters raised by the respondent. Adjudication of an application of this nature blends two principles, to wit (1) that litigants on motion or in proceedings instituted by petition should not be encouraged to present their cases in a piecemeal fashion, and (2) a Court should not allow an adjudication of the real issues in a case to be partially frustrated by too rigid an adherence to what is essentially a rule of practice[*Bader and Another v Weston and Another* 1967 (1) SA 134 (C) at 138D]. The overriding consideration, in my view, is that the Court

which is ultimately called upon to adjudicate upon the merits of the dispute should have before it all the relevant facts [*Cohen No v Nel and Another* 1975 (3) SA 963 (W) at 970B]. The point taken by the applicant, of hearsay, and whether the court should admit the hearsay evidence required proper ventilation in the application for a court to do justice to the parties. The weight of the request by the respondent that the evidence upon which it relies, should find favour with the court in admission, turns the request into a substantive contribution in the factors that a court must consider, and that weight is in favour of the applicant. This court has already indicated its view on how a party intending to rely on hearsay evidence needed to approach its application in motion proceedings [*Compregen (Pty) Ltd v Lezmin 2021 (Pty) Ltd and Others* (866/2023) [2024] ZAWCHC 284 (27 September 2024 at para 11)]. The question whether the 26 November 2021 decision of the respondent that the lease of its premises should be dealt with by means of a competitive bidding process was administrative or was the exercise of executive power which was not reviewable under PAJA required careful attention. If it was an administrative decision, the next question is whether the respondent acted in the manner expected within our constitutional democracy. So is the meaning of the word approved. The question whether it related to the competitive bidding process or to the applicant's lease of the property, and the consequent disclosure of the necessary documents in relation thereto. I am persuaded that a proper ventilation of the issues demands the admission of the supplementary replying affidavit. For these reasons I am making the order.

DM THULARE

JUDGE OF THE HIGH COURT