IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

Case No: **213485/2025**

(1)	REPORTABLE: NO	
(2)	OF INTEREST TO OTHER JUDGES: NO	
(3)	REVISED:	
	[redacted]	30 JANUARY 2026
	SIGNATURE	**DATE**

In the matter between:

BIGEN AFRICA SERVICES (PTY) LTD Applicant

and

UMNGENI-UTHUKELA WATER BOARD First Respondent

ZUTARI (PTY) LTD Second Respondent

This judgment is prepared and authored by the Judge whose name is reflected as such and is handed down electronically by circulation to the parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for handing down is deemed to be 30 January 2026.

JUDGMENT

RETIEF J

INTRODUCTION

[1] The applicant brings an urgent judicial review in terms of the Promotion of Administrative Justice Act, 3 of 2000 [PAJA] seeking to set aside a decision of the first respondent to award a tender to the second respondent [impugned decision]. The nub of its attack is that the tender period [initial period] was not validly extended resulting in the decision to award the tender to the second respondent, the successful bidder, Zutari (Pty) Ltd, being made in a period when no tender process existed and thus, unlawful.

[2] According to the applicants papers it raised yet a further ground of attack, namely its permissibility to correct an arithmetical error post submission of its tender [correction ground]. However, the correction ground was not advanced in written argument nor by Counsel in his oral argument. At the hearing, the applicant's Counsel advanced, without withdrawing the correction ground, that the pivotal dispute was whether the tender was indeed validly extended. The pivotal argument was further nailed to the post when the applicant conceded that it too, was not going to persist with prayer 4 in its notice of motion. Prayer 4, the remedial relief subsequent upon a favourable finding of the correction ground.

[3] The first respondent in its papers raised a jurisdictional *in limine* point which it, at the commencement of the hearing, correctly abandoned. The second respondent did not oppose the application nor filed papers. Therefore, the remaining aspects to determine are urgency and the crisp validity extension ground. Before dealing with this crisp issue this Court deals with the urgency.

URGENCY

[4] The launching of a review application does not suspend the operation of the award. When a contract has been implemented it becomes difficult for a court to award an appropriate remedy. It is common cause on the papers that an award letter has been sent to the second respondent.

[5] The consequence of a delay in considering an attack of the lawfulness of a tender process when an award has already been awarded appears obvious and a need to move swiftly arises.[1] Therefore, the delay in setting the matter down, alternatively launching the application in the normal course becomes apparent. The applicant argues that if it is to proceed in the normal course, regardless of the finding of legality of the decision itself, the delay would result in an implemented contract over an extended period of time. In this way it would not be afforded substantial redress at a hearing in due course. In other words, if the application is not heard urgently then, the first respondent would continue to implement an unlawful agreement which is an untenable situation and, the applicant would not be afforded the opportunity to bid again in time to come.

[6] Procedurally, the applicant advanced that the first respondent was provided with adequate time to present their case. The first respondent did not advanced any argument to the contrary. In consequence, it submitted that there would be no prejudice to the first respondent if the matter was to heard as urgent.[2]

[7] The respondent in reply invited the Court to consider the prayers sought by the applicant to demonstrate that it would be entitled, in due course, to seek substantial redress. The respondent's argument is highly diluted on the basis that the tender has already been awarded to the second respondent, the applicant had already instituted an internal appeal and, the first respondent dismissed the appeal on the 29 October 2025. In other words, the first respondent was intent, notwithstanding the applicant's grievance not to suspend the implementation of the contract which, if implemented may result in a contract being awarded absent a lawful tender process. This Court is not amenable to delay the adjudication of a matter concerning the lawfulness of a tender process having regard to all the consequences which may follow including those attracted by the second respondent. This is stated regardless of the formulation of the prayers.

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1 See **Infinite Blue Trading 29 CC t/a Motau Projects v City Power Johannesburg (SOC) Limited and Others** [2019] ZAGPJHC 169 (30 May 2019) at par [27].

2 **Mogalakwena Municipality v Provincial Executive Council, Limpopo and Others 2016 (4) SA 99 (GP)** at par [64].

[8] This Court considers the matter to be urgent and in dealing with the crisp issue, considers the salient background facts.

BACKGROUND RELEVANT FACTS

[9] The first respondent issued a Tender RFC No. 2020/011/16 for the appointment of a professional service provider to review detailed feasibility studies and undertake the detailed design, contract administration, close-out stages of the Upper Umkhomazi Water Project for Phase 1 (156 ML reinforced concrete reservoir and ancillary works). The tender was issued on the 26 February 2025, with the compulsory briefing cession on the 6 March 2025 and a closing date of the 8 May 2025 at 12h00 [the tender]. The closing date of the tender was the 8 May 2025 and the tender bid validity period was for a period of 120 days from the closing date, expiring on the 5 September 2025.

[10] The applicant submitted a tender by the closing date. A day thereafter, on the 9 May 2025, the applicant notified the first respondent of an arithmetical error it identified in its bid document. The error occurred in that its pricing schedule in that the total stated therein was R1,214,476,290.40 however, the correct total should have been R647,114,759.98. The applicant requested that the error be corrected, providing a detailed breakdown and an explanation for this error in its correspondence.

[11] The first respondent decision was not to allow the correction, stating in its regret letter dated the 15 October 2025 that: "*The committee resolved that the tender offer of R1,214,476,290.40 shall govern and you cannot be allowed to change your tender offer after the publication of the tender results*".

[12] On the 4 September 2025 (one day before the lapsing of the tender validity period), the first respondent addressed an email to all the participating tenderers requesting their consent to extend the tender validity period to the 31 November 2025. The email was addressed for attention to all bidders, it was dated the 4 September 2025 and signed by the Senior Procurement Manager: Acquisition and Support, Mr S.Makhura. The email correspondence was headed

"***Urgent Message: Request for Extension of Tender Validity***". The relevant content of the request letter was the following:

> "*1. -*
>
> *2. The evaluation and the adjudication process for the abovementioned bid has been slightly delayed owing to various internal procedural constraints and challenges. It has therefore become necessary for the validity of the bids to be extended for a period up to and including 31 November 2025 in terms of the same conditions embodied in your initial tender.*
>
> *3. It is in this regard that you are hereby requested to indicate if your organisation still has an interest in this bid by giving consent* (own emphasis) *to extend the validity of your price proposal. Kindly indicate your response below by close of business* (own emphasis) *the 5th of September 2025.*
>
> *Is prepared to extend the validity of the bid and (own emphasis) will still be interested in bidding for the service.*
>
> *Is not prepared to extend the validity of the bid and (own emphasis) is no longer interested in bidding for the service.*
>
> *Other* ____________________________________
>
> *Represented by:* ______________ *Signature:* _____________
>
> *FULL NAME"*

[extension letter]

[13] The extension letter was drafted in such a way that it called upon the tenderers to inform the first respondent whether it consented to the extension of the period AND whether it accepted the consequences flowing from the elected consent. In other words, if they were still interested in the being part of the bid process. Such response was to be provided by an election tick box system. Each organisation was requested to make an election by ticking a box. The proposed

elections were whether they were prepared to extend the validity bid and willing to remain in the bidding process or if they were not prepared to extend the validity period and were no longer interested in remaining in the process or they could elect "*other*". "*other*" ostensibly then could be to consent to the extension of the period but elect not to remain in the bidding process or not to consent to the extension period but still elect to remain in the process. Either way "*other*" created further options other than what was set out.

[14] The extension letter included a place for the signature and full name of the organisation under the election boxes. In this way a tenderer could make its election as elicited by ticking a box, to sign and date and return the extension letter to the first respondent.

[15] Five (5) of the tenderers, including the applicant made their election and returned the duly completed extension letter back to the first respondent in time. Two tenderers, Gibb (Pty) Ltd and Royal Haskoning DHV (Pty) Ltd failed to respond at all [non-responsive tenderers].

[16] The first respondent proceeded with the evaluation and after the Bid Evaluation and Adjudication Committees' recommendations, and in October 2025, a letter of award was addressed to the second respondent.

[17] The applicant lodged an internal appeal on the 24 October 2025, arguing that the process was irregular due to the refusal to correct its arithmetic error and the lapse of the validity period. The first respondent dismissed the appeal on the 29 October 2025, maintaining its position on both points.

[18] Procedurally, the applicant launched its urgent application on the 27 November 2025 in terms of rule 53, calling upon the first respondent to deliver the record pertaining to its decision by the 28 November 2025. It is common cause that the record was duly delivered by the first respondent and that the applicant supplemented its papers by filing it electronically with the Registrar on the 12 December 2025.

EXTRACT FROM THE FIRST RESPONDENT'S SUPPLY CHAIN MANAGEMENT POLICY [SCM POLICY]

[19] According to the record filed by the first respondent, the portion dealing with the extension of the validity period appears to be blank. A point taken by the applicant during argument, contending that when it filed its supplementary affidavit, it was none the wiser as to what the SCM policy factually stated on this point. The first respondent in its answering affidavit did not correctly address nor assist the applicant by referring to and/or attaching a copy of the correct page to complete the record. It merely responded with a bare denial.

[20] However, at the hearing, the Counsel for the first respondent confirmed that the correct policy which applied was that portion which was attached by the applicant to its supplementary affidavit referred to as "FA1" at paragraph 13.4.11 thereof.

[21] Paragraph 13.4.11 reads as follows:

"*13.4.11 Validity Period of Bids*

(1) The validity period must be in calendar days and must be reasonable considering the lead time for the award.

(2) This period must be sufficient to enable UW to complete their valuation of bids, review the recommendation and award the contract.

(3) An extension of bid validity must be requested in writing from all bidders before the expiration date.

(4) The extension must be for the minimum period required to complete the evaluation, to obtain the necessary approvals and to award the contract.

(5) Motivation for the extension of the validity period must be approved as per the SCM Manager."

APPLICANT'S ARGUMENT

[22] The applicant contends that the tender validity period serves two purposes. The first purpose is that it represents the period during which a tenderer is required to keep its tender offer open and, the second purpose is that it is the period within which the organ of State should finalise the tender process itself. In other words, when the first respondent should make a final award. The applicant in advancing its argument relied on both the Takubiza Trading & Projects CC v Ekurhuleni[3] [Takubiza *a quo*] and as confirmed by the Supreme Court of Appeal [SCA].[4] The SCA in the Takubiza matter on appeal stated at paragraph [13] that:

> *"[13] Fourth, as was held by the High Court, the validity period is indeed one of the fundamental 'rules of the game', being the period within which the process should be finalised. To extend the tender validity period, the consent of all the participants to the tender process is required (own emphasis). Unless there is a timeous request and favourable response from all the tenderers (own emphasis) prior to the expiry of the tender, the tender comes to an end."*

[23] The applicant by advancing the findings in the Takubiza matter in the SCA, by relying on the common cause fact that not all the participants responded signalling their consent and, by advancing that the first respondent's SCM policy did not provided for an exclusionary stipulation argued that the position in Takubiza matter as confirmed in the SCA applied to the facts in this application.

[24] In consequence, it argued that the tender period came to an end on the 5 September 2025. The recommendation to award and the letter of award to the second respondent occurred after the validity period. Therefore, during a period when no lawful tender process existed.

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3 Unreported case number 14382/2021 at par [63] and [64].

4 **Ekurhuleni Metropolitan Municipality v Takubiza Trading & Projects CC and Others** 2023 (1) SA 44 (SCA) at par [13].

FIRST RESPONDENT'S ARGUMENT

[25] The first respondent argues that it complied with its SCM policy in that it, on the 4 September 2025, requested all tenderers to extend the validity period to the 31 November 2025. It argues that the two (2) non-responsive tenderers did not bring an end to the tender process but an end to those non-responsive tenderers' bids. For this proposition, the first respondent's Counsel invited the Court to consider the matter of Aventino Ecotroopers Joint Venture and Others v MEC, Department of Roads and Infrastructure and Transport, Gauteng, and Others [Aventino matter].[5]

[26] In the Aventino matter the SCA considered the wording of the appellant's own SCM policy which stated that *"[B]idders may either accept or reject the extended validity period and those who do not wish to extend the validity period would be regarded as non-responsive and would be excluded from further assessment."* [exclusionary stipulation].

[27] This argument was advanced and persisted with notwithstanding the first respondent Counsel's concession that the wording in the SCM policy in the Aventino is distinguishable from the wording in the first respondent's SCM policy.

[28] In an attempt to possibly overcome a perceived hurdle or to extend the reach of its defence on the papers the first respondent's Counsel contended that if a tenderer did not respond to the extension letter then an inference could be drawn that it, by its omission, could be regarded as non-responsive and excluded from the process. No authority other than the Aventino matter was provided for this proposition nor was this Court taken to the papers to demonstrate that this basis was underscored by the evidence. The outcome of this proposition will be expanded in the discussion below.

DISCUSSION

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[5] (1233/2023) [2025] ZASCA 32.

[29] Bearing the content of the SCM policy in mind, namely without an exclusionary stipulation clause, one must accept that the SPM, Mr MS Makhura who was authorised to draft the urgent message of request for extension of tender of the 4 September 2025 on behalf of the first respondent did so, with the knowledge of its content, scope and of the time constraints it placed on all the tenderers who received it.

[30] In drafting the letter it appears that the SPM wished to inform the tenderers of an urgent need to extend the validity period, to gauge whether they consented to it and, to ascertain from each tenderer whether they accepted the consequences of the consent. In other words did they want to remain in the process. This is why the enquiry is not only confined to the two enquiries but includes a further open-ended option.

[31] Without expanding on the obvious fact that the exclusion letter is not the first respondent's SCM policy and therefore does not replace nor amend the provisions of the first respondent's SCM policy, the exclusion letter itself too, does not support the first respondent's reliance on the Aventino matter.

[32] According to the exclusion letter a tenderer would only tick a box if it also agreed to the outcome attached to its decision to consent or not. Failing which it could elect *"other"* and expand in the place provided. Therefore, no automatic exclusion existed nor could it be inferred. The first respondent's reliance on the Aventino matter as it speaks to its own SCM policy and as advanced in respect of the exclusion letter must fail as too, the unsupported argument advanced during argument. There is no automatic opt-out.

[33] In light thereof and on the facts the reasoning of the SCA in the Takubiza matter as advanced stands. Section 217 of the Constitution through which the facts of this matter must be viewed also weighs in favour of a fair procurement system for all 7(seven) tenderers. No timeous request nor a favourable response, or simply a response from all the tenderers prior to the expiry of the tender is demonstrated. This Court finds that the tender process was not validly extended and that it came to an end on the 5 September 2025.

[34] The Court also notes that the second respondent did not enter the arena, notwithstanding prayer 3 in which the applicant seeks that the agreement between the first and second respondent as a direct result of the declarator relief in prayer 2, is to be set aside.

[35] There is no reason why costs should not follow the result and none was argued.

The following order:

1. The application be heard as an urgent application in terms of the provisions of 6(12) of the Uniform Rules of Court and that the necessary condonation be granted to the Applicant in respect of the non-compliance with the prescribed time limits, forms, and service.

2. The decision of the First Respondent to award Tender RFC No. 2020/011/16 for the appointment of a PSP to review the detailed feasibility studies and undertake the detailed design, contract administration, and close-out stages of the Upper Umkhomazi Water Project Phase 1:156ML reinforced concrete reservoir and ancillary works [the tender] to the Second Respondent be declared unconstitutional, is reviewed and is hereby set aside.

3. The agreement concluded between the First and Second Respondent pursuant to the tender award is set aside.

4. The First Respondent is ordered to pay the Applicant's costs, taxed scale C.

[redacted]

L.A. RETIEF
Judge of the High Court
Gauteng Division

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Date of argument:	28 January 2026
Date of judgment:	30 January 2026