IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION, EAST LONDON CIRCUIT COURT)

CASE NO: EL234/2025

In the matter between:

SNR ELECTRICAL CC **Applicant**

And

GEORGE LOCAL MUNICIPALITY **1ST Respondent**

COASTAL ARMATURE WINDERS & SUPPLIERS **2nd Respondent**

LUKHOZI CONSULTING ENGINEERS **3rd Respondent**

JUDGMENT

Zono AJ:

Introduction

[1] The applicant is a close corporation duly registered as such in accordance with the relevant legislation, also registered with Construction Industry Development Board (CIDB) with contractor grading categories of 4CE PE, 7EP,5EB and 7ME. The applicant approached this court for a relief that is two pronged: Part A entails an interim interdict against conclusion of any contract pursuant to the award of tender number T[...] for provision of mechanical and electrical maintanance and refurbishment of water and wastewater infrastructure (the tender). It further entails interdict against implementation and/or execution of any works contemplated in the tender. Part A was disposed of in terms of the Judgment of Pitt AJ which dismissed the application (interdict) and ordered each party to pay its own costs. Nothing further need to be said about Part A hereof.

[2] What served before me is Part B of the application, which in essence is a review application relating to, firstly, the award of the aforesaid tender to the second respondent, Coastal Armature Winders and Suppliers (Coastal); secondly, the third respondent's, Lukhozi Consulting Engineers (Lukhozi) report recommending to the first respondent's, (the Municipality) Bid Evaluation Committee (BEC) that the aforesaid tender be awarded to Coastal and simultaneously recommending the rejection of applicant's tender; thirdly, the decision of the Municipality's BEC taken on or about 6th November and 26th November 2024 and Bid Adjudicating Committee (BAC) recommending the award of the tender to Coastal and further recommending the rejection of the applicant's tender on the ground

that it is not responsive; fourthly the Municipality's decision to award the aforesaid tender to Coastal . The applicant seeks the aforesaid recommendations together with the decision to award the tender to be reviewed and set aside in accordance with the provisions of section 6 of Promotion of Administrative Justice Act 3 of 2000 (PAJA). There are other consequential and /or ancillary relief sought in the notice of motion, which shall be dealt with in due course, should need arises. The application is opposed by the Municipality and (Lukhozi).

[3] The applicant's case is that pursuant to tender invitation by the Municipality, the applicant submitted its tender. The applicant alleges that the tender complied with all the requirements i.e. mandatory conditions and specifications and its offer was in the amount of R136 1423 491.26, whereas Coastal submitted tender offer of R158 283 817.30. The applicant was scored 83 out of 100 points and Coastal was scored 79 out of 100 points in respect of functionality criteria. The minimum score requires to pass the functionality criteria was 70 points out 100 points. Both the applicant's and Coastal's tender would then be considered for stage 2, Price, Preference and specific goals.

[4] The applicant alleges that the BEC failed to award to applicant the 80 points for price, preference and specific goals as the lowest acceptable tender and that failure was a violation of conditions of tender, CIDB standard for uniformity, preferential Procurement Policy Framework Act 5 of 2000 and its regulations, the National treasury's SCMP regulations, the CIDB regulations. According to the applicant, an

invitation to tender required that tender be evaluated based on responsiveness at stage 1, and then on the functionality criteria, Bids that score less than 80 out of 100 points would be considered as non-responsive, which is stage 2. Bids which score less than 70 points out of 100 points on functionality would not be capable of being evaluated further in terms of section 2 of the PPPFA.

[5] On the 10th December 2024 the applicant received a letter from the Municipality advising it that its tender was unsuccessful. The reason proffered for that decision was that Coastal scored the highest points. The applicant alleges that it is impossible for Coastal to lawfully score more procurement points than the applicant in the light of the amounts tendered. According to the applicant the Municipality and Lukhozi substituted applicant's tender amount with their own when they do not have authority to do that. The applicant's tendered amount was substituted with R161 239 446.04. The applicant lodged an internal objection which became unsuccessful.

[6] The applicant further contends that the BEC did not evaluate the tender, but simply rubberstamped Lukhozi's report. The fact that the BEC adopted the remarks contained in Lukhozi's report is borne out by the similarities that are glaring between the BEC minutes and Lukhozi's report. The BEC minutes mirror the contents of Lukhozi's report. The applicant further contends that Lukhozi's report provided a misrepresentation of applicants rates used in the tender when considering the reasonableness of the applicant's rates and Bills of Quantities (BOQ). The applicant persists with the submission that the

rates presented to the BEC were not the applicant's revised rates. Lukhozi's rates, which were inherited by the BEC were completely off the market rates or not market related.

[7] The applicant impugns the lawfulness of Lukhozi's report, hence it seeks same to be reviewed and set aside. Pursuant to its appointment, Lukhozi transmitted a letter dated 27th September 2024 to the applicant informing that its tender had arithmetic errors and low rates. Based on the errors and low rates, applicant's tender was some R25 096 954.78 too little which resulted in the actual tender amount being R 161 239 446.04. The applicant categorically denies in its founding affidavit that an amount of R161 239 446.04 is the actual tendered amount. The applicant was given an opportunity to report and consider two options: firstly, that the applicant unconditionally withdraws its offer; secondly that the applicant confirms its offer and demonstrates its ability to execute the works inclusive of the evidence in that record. The applicant considers Lukhozi's letter of 27th September 2024 to be *void ab initio* as it has no standing in law. However, the applicant, notwithstanding its complaint about the letter's invalidity, unlawfulness and voidness, transmitted a response thereto on 04th October 2024 enclosing the revised and balanced BOQ; balanced section (section K) of the BOQ thereof; and the summary of subsections of the BOQ separately showing all totals for labour and material. The revised and balanced BOQ contained no arithmetic errors and that all arithmetic errors which were flagged by Lukhozi were addressed in the revised BOQ which is properly balanced. The applicant denies that it owed any explanation to Lukhozi with regard to the contents of its tender. The applicant insists

that it owed the explanation to the Municipality, once its tender had been deemed the highest scoring, acceptable or responsiveness tender.

[8] The applicant denies in its founding affidavit that its tender, taken as a whole is not market related, unduly low and poses commercial risks upon the Municipality. Lukhozi misled the Municipality by providing unreasonable estimates of prices. According to Lukhozi's report, the applicant was awarded 98 points for price and preference whereas Coastal scored 80.36 points in this criteria. The PPPFA dictates, in circumstances like the present, that the tender must be awarded to the tenderer that scores the highest points unless the objective criteria is followed[1]. The applicant criticizes the Municipality for not following this legislation. Lukhozi unlawfully changed applicant's tender to R161 239 446.04.

[9] The applicant impugns Lukhozi's report for a further reason that it is not authorised by any procurement laws. The Municipality's own supply chain management policy does not authorize persons who are not its officials to participate in the procurement process or the process of evaluation of tenders. Only Municipality's BEC appointed by the accounting officer evaluates bids and evaluates each bidder's ability and capacity to execute the contract[2]. The applicant concludes by saying Lukhozi usurped the powers strictly reserved for the BEC and evaluated applicant's tender. Other reasons for impugning Lukhozi's report are that, firstly it is biased and unfair against the applicant and its tender; secondly, the report contained disparaging

[1] Section 2(f) of Preferential Procurement Policy Framework Act 5 of 2000.
[2] Clause (4) (3) and Clause 28(1) of the Supply Chain Management Policy.

remarks that are false, that consciously impugns applicant's standing in the tender and strongly or solely influenced Municipality's decision to reject applicant's tender; thirdly, the report is not authorised by Municipality's SCMP; and fourthly, Lukhozi usurped the BEC's power to evaluates the tender by evaluating applicant's tender.

[10] The applicant seeks in terms of section 8(1) (c) (iii) of PAJA a substitution order in terms of which this court considers the tender itself and grants an order declaring applicant's tender to be a responsive tender and direct the Municipality to award the tender to the applicant. In the alternative, the applicant seeks an order remitting the matter back to the BEC for evaluation of applicant's tender in accordance with the evaluation criteria set out in the tender.

[11] As stated above, the Municipality strenuously opposed this application at all stages. The Municipality successfully opposed the interdictory relief sought in Part A of the notice of motion. With regard to Part B of the notice of motion which is a review application, the Municipality generally denies that the impugned decisions had been taken unlawfully and that they deserve to be reviewed and set aside. The Municipality makes a point that it had already concluded an agreement with Coastal, pursuant to an award of tender to it, with effect from 1st February 2025. It effectively means that such an agreement had been enforced, acted upon, and implemented for approximately nine (9) months when the matter was heard in this court for determination of the review application. It contends that the interruption of the maintanance and upgrades to critical water and

sewer infrastructure services currently rendered by the Coastal to the Municipality in terms of the awarded tender, if interrupted even for a single day shall have catastrophic consequences as far as the Municipality's constitutional duty to provide critical services to and the needs of its constituency are concerned. The public interest demands that the services currently rendered by Coastal pursuant to the award of the tender and conclusion of the contract be kept intact.

[12] The Municipality insists that applicant's tender was unsuccessful, firstly because of its under-pricing by R25 096 954.78 and its failure to provide substantive evidence corroborating (i) its ability to absorb the amount of R 25 096 954 78, and (ii) its ability to honour the out of proposition and unrealistically low tender rates. Secondly because the applicant was only registered for a single phase electrical installations. Nonetheless, the applicant indicated in its tender that it would itself attend to the 3.3kv electrical installation required in terms of the tender. For the reason aforestated the applicant's tender was found to be non-responsive, *albeit* that the offer amount was less than that of Coastal. The Municipality criticises the applicant for not addressing those deficiencies in its founding affidavit. The Municipality categorically denies that applicant's tender was changed. It only pointed out the errors. After the applicant's revised BOQ submitted on 04th October 2024, the applicant's tender amount premised on the rates and prices contained in the revised BOQ should infact have been R161 239 46.04, an amount substantially higher than the tender amount of R136 142 491.26. Applicant's tender was under-priced by R 25 096 954.78. The Municipality denies that applicant's contention

that its tender taken as a whole is market related and is not low or unduly low. It contends that such a proposition is in conflict with the correct calculation of or amounted to R161 239 446.04.

[13] The Municipality contends that applicant's tender was also subjected to the CIDB standard conditions of tender (2019), in this instance the sustainability of the applicant to be able to properly execute the tender. The fact that the offer was substantially lower than that of Coastal caused the Municipality to seek assurance from the applicant of the absorption of R25 096 954.78 short fall, which the applicant dismally failed to explain or address. The discrepancies in the applicant's BOQ and the difference between the applicant's tender offer amount and the true amount of its revised BOQ submitted pursuant to the queries in respect of the rates in the original BOQ had been picked up and dealt with during the pre-evaluation process and before any award had been made.

[14] The applicant, having been given an opportunity to explain the discrepancies between its tender amount, the rates or prices and the shortfall of about R25 096 954.78, by means of revised BOQ, the applicant attempted to reconcile the arithmetic shortfall, but however leaves the same total tender amount unaffected, whereas it should have been R161 239 449.04. That exacerbated the already problematic issue concerning its out of proposition rates and consequently amplifying the risk posed in this regard. Applicant's unrealistic and non-market related rates or prices were not only unexplained, no measures were provided to mitigate them. That failure concerning the

sustainability placed serious doubt in applicant's ability to complete the *ad hoc* works sufficiently and effectively within three (3) years contemplated in the tender without incurring significant financial losses. That would most likely lead to significant and reoccurring claims and disputes with the Municipality during the course of the anticipated contract. The discrepancies on the applicant's tender were incapable of resolution by negotiation and balancing of BOQ as envisaged in CIDB standards. They could only occur after the award of a tender and for the purpose of rectifying errors. The Municipality also contends that clause 24.4 of its SCM policy applies only in respect of the downward adjustment of a tender amount and not to upward adjustments.

[15] The Municipality denies that Lukhozi had produced an invalid and unlawful report. The report complied with the relevant regulation, and is rational and reasonable. Lukhozi duly acted on behalf of the Municipality; its appointment being in compliance with the Municipality's SCM Policy for infrastructure delivery and procurement Management. Lukhozi's report forms part of the process that culminated in the proceedings before BEC. Lukhozi's report served before the BEC where only the evaluation of the applicant's tender and that of Coastal had been undertaken. The Municipality denies that Lukhozi's report can validly be reviewed and set aside in terms of PAJA. The Municipality denies that the decision embodied in the minutes of the BEC and BAC dated 6, 26 and 29 November 2024 stands to be reviewed and set aside. No prospects of success have been demonstrated in the applicant's affidavit.

[16] The third respondent, Lukhozi opposed the application and delivered its answering affidavit. Lukhozi makes common cause with the Municipality and it goes at great lengths to expatiate and lay basis for their actions. All parties make common cause that the tender was subject to a two-stage evaluation, namely, firstly, functionality in terms of CIDB standard conditions. At this stage only tenders meeting a minimum standard of functionality are evaluated further at stage 2, *to wit*, price, preference and specific goals. The applicant scored above the minimum threshold. The parties seemingly lock horns around stage two (2) which is, price, preference and specific goals. Lukhozi, like the Municipality vehemently denies that applicant's tender was changed in any way. Numerous arithmetic errors were noted and evaluated according to the CIDB standard conditions of tender. It was pointed out that the BOQ as submitted at tender closing, the applicant's tender amount premised on the rates and prices contained in the original BOQ should have been R161 239 446.04 an amount substantially higher than the tender amount of R136 142 491.26 if the actual rates as originally tendered are used. The errors resulted in under-pricing of the tender offer in the amount of R25 096 954.78.

[17] Lukhozi relies on Clause 4.2 of the tender condition, which is worded thus:

> *"**<u>Unreasonable or out of proposition rate</u>***
> *A tender may be rejected if the rates for any of the items in the bills of quantities are, in the opinion of the employer, unreasonable or out of proposition. The tender will be given a period of seven (7) days after*

having been notified in writing by employer to adjust the rate for the relevant items. Should the tenderer fail to agree to adjust the rates or provide substantive evidence that, in the opinion of the employer, justifies the unreasonable or out of proposition rates, the tender will be declared non-responsive".

[18] Lukhozi aligns itself with the contents of paragraph 20.5 of Municipality's answering affidavit in that applicant's tender was under-priced and that the applicant was only registered for single phase electrical installations. Respondents deny that the applicant has necessary expertise to attend to 3.3kv electrical installations in terms of the tender. Because of the aforesaid deficiencies, applicant's tender was found to be non-responsive and accordingly rejected. The applicant was given an opportunity to explain the discrepancies between its tender amount and the rates or prices contained in its BOQ to which it had responded by means of a revised BOQ. However, the revised BOQ failed to provide reasons or mitigation measures justifying its numerous unrealistic and non-market related rights included in its tender.

[19] Lukhozi makes a point that they are consulting engineers appointed by the Municipality as their consultant, to technically evaluate all tenders received for tender. Mr K Potgieter was appointed as a technical adviser/ specialist in an advisory capacity and non-active member. Mr Potgieter is Lukhozi's project manager. Lukhozi insists that it was lawfully appointed to technically advise the Municipality.

Decision and Analysis

[20] In the first instance, the applicant seeks to review and set aside the following recommendations:

20.1 Lukhozi's evaluation report dated 07th October 2024 recommending to the Municipality's BEC that the tender be awarded to Coastal.

20.2 The BEC's decisions taken respectively on 06th November 2024 and 26th November 2024 recommending the award of the tender to Coastal and further recommending the elimination or rejection of the applicant's tender.

20.3 The BAC'S decisions recommending the award of the tender to Coastal and further recommending the elimination or rejection of the applicant's tender. Although the BAC minutes reveal that the meeting of the committee was held on 29th November 2024, the recommendation was signed on 04th December 2024.

20.4 The recommendations aforesaid are sought to be reviewed and set aside in terms of section 6 of Promotion of Administrative Justice Act 3 of 2000 (PAJA). PAJA deals with reviews of administrative decisions or actions. I intend to deal with the recommendations in *one fell swoop* as the legal principle dispositive of the recommendations is the same.

[21] PAJA[3] defines "*administrative action*" to mean

> *"any decision taken, or any failure to take a decision, by-*
> *(a) an organ of state, when-*
> *(i) exercising a power in terms of the Constitution or a provincial constitution; or*
> *(ii) exercising a public power or performing a public function in terms of any legislation; or*
> *(b) a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision, which adversely affects the rights of any person and which has a direct, external legal effect…"*

[22] The same provision defines a "*decision*" to mean

> "*any decision of an administrative nature made, proposed to be made, or required to be made, as the case may be, under an empowering provision, including a decision relating to-*
> *(a) making, suspending, revoking or refusing to make an order, award or determination;*
> *(b) giving, suspending, revoking or refusing to give a certificate, direction, approval, consent or permission;*
> *(c) issuing, suspending, revoking or refusing to issue a licence, authority or other instrument;*
> *(d) imposing a condition or restriction;*
> *(e) making a declaration, demand or requirement;*
> *(f) retaining, or refusing to deliver up, an article; or*
> *(g) doing or refusing to do any other act or thing of an administrative nature, and a reference to a failure to take a decision must be construed accordingly".*

[23] The Constitutional Court[4] explained the definition of administrative action as follows:

> *"[33] The concept of "administrative action", as defined in section 1(i) of PAJA, is the threshold for engaging in administrative-law review. The rather unwieldy definition can be distilled into seven elements: there must be (a) a decision of an administrative nature; (b) by an organ of state or a natural or juristic person; (c) exercising a public power or performing a public function; (d) in terms of any legislation or an empowering provision; (e) that adversely affects*

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[3] Section 1 of Promotion of administrative Justice Act 3 of 2000

[4] ***Minister of Defence and Military Veterans v Motau and Others*** 2014 (8) BCLR 930, 2014 (5) SA 69 (CC) Para 33

rights; (f) that has a direct, external legal effect; and (g) that does not fall under any of the listed exclusions. In the present matter there are two elements in dispute: whether the Minister's decision under section 8(c) of the Armscor Act is of an administrative nature (element (a)) and whether it falls under any of the listed exclusions (element (g)). Both can be answered by interrogating the nature of the power.

[34] To determine what constitutes administrative action by asking whether a particular decision is of an administrative nature may, at first blush, appear to presuppose the outcome of that enquiry. But the requirement has two important functions. First, it obliges courts to make a "positive decision in each case whether a particular exercise of public power . . . is of an administrative character". Second, it makes clear that a decision is not administrative action merely because it does not fall within one of the listed exclusions in section 1(i) of PAJA. In other words, the requirement propels a reviewing court to undertake a close analysis of the nature of the power under consideration"

[24] A conduct that complies with the definition of administrative action requires that it must translate and lead to direct and immediate consequences for individuals or group of individuals. I am not alone on this. This court in the *RPCSA*[5] quoted with approval the sentiments of Nugent JA in *Grey Marine Hout Bay (Pty) Ltd and Others v Minister of Public Works and others*[6]*:*

> *"24….. Administrative action is rather, in general terms, the conduct of the bureaucracy (whoever the bureaucratic functionary might be) in carrying out the daily functions of the State, which necessarily involves the application of policy, usually after its translation into law, with direct and immediate consequences for individuals or groups of individuals.*"

[5] ***Reformed Presbyterian Church in Southern Africa v Minister of Police and another*** 2018 (2) LL SA 260 (ECM) Para 26

[6] ***Greys Marine Hout Bay (Pty) Ltd and Others v Minister of Public Works and others*** 2005(3) ALL SA 33 (SCA);2005 (6) SA 313 SCA;2005 (10) BCLR 931 (SCA) Para 24

[25] The ordinary grammatical meaning of the words used in the definition of administrative action must be adhered to and can only be departed from if that leads to an absurd result[7]. The words *"direct external legal effect"* constituting the sixth element of the definition of administrative action must grammatically be interpreted as that construction is consistent with the dictum of Nugent JA in *Greys Marine*[8]. The decision must have a direct and immediate consequence or effect for the individual to whom it applies. South African Concise Oxford Dictionary defines the words *"direct"* in the following ways*:*

> *"1. going from one place to another without changing direction or stopping, (of apparent plenary motion) proceeding from west to east in accord with actual motion*
> *2. Straightforward; frank. clear; unambiguous.*
> *3.Without intervening factors or intermediaries…. Proceeding in continuous succession from parent to child…"*

This list of definition of the word *direct* is not exhaustive. The following synonyms are apposite.

Straightforward and *undeviating.*

[26] A decision to qualify or comply with the definition of administrative action must proceed directly to be applied to the targeted individual(s) without any intervening factors. It must come from the decision maker directly to the targeted individual(s) and without changing direction or stopping at a particular point before arriving at the targeted individual or group of individuals. It should not deviate to any other point other than its target destination.

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7 ***Natal Joint Municipal Pension Fund v Endumeni Municipality*** 2012 (4) SA 593 (SCA) Para 17-18.
8 ***Greys Marine Hout Bay (Pty) Ltd and Others v Minister of Public Works and others*** *(*Supra) Para 24.

[27] From the facts of this case it is plain that the recommendations in question were directed to the BEC, BAC and to the Municipality itself. None was directed to the applicant. It is seemingly not gainsaid that Lukhozi ‘s report was placed before the BEC, and when the BEC was considering its recommendation it considered Lukhozi’s report. The BEC made its recommendation not to anybody else, but to Municipality’s BAC. When the BAC was in the process of making its own recommendation it considered the BEC report. The BAC made its recommendation to the Municipality’s accounting officer. It is, therefore, categorically clear from these undisputed facts that the recommendations adverted to above have “*no direct legal effect”* to the applicant. For it to satisfy the requirement of *direct legal effect*, a decision, must have direct and immediate effect or consequence on the applicant without changing direction or stopping somewhere else for consideration. There should not be any intervening point for its application other than the intended destination.

[28] Both BEC minutes of 06th November 2024 and 26th November 2024 contain a similar remark that reads thus:

“*Ds concluded the meeting, and all the members with the recommendation to be submitted to the next BAC meeting.”*

The BAC minutes of 29th November 2024, recommendations of which are contained in paragraph (a) and (b) under the heading “*Resolved to Recommend to the Accounting Officer.”*

However, paragraph (d) is recorded as follows:

"(d) that the items in (a) and (b) above be referred to the accounting officer for approval."

[29] Clause 6.1.1.4.3(b) of George Municipality Supply Chain Management (SCM) Policy Framework for Infrastructure Delivery and Procurement Management (LGFIDPM) 2024/2025 (SCMP) provides thus:

"6.1.1.4.3 The Bid Adjudication Committee shall:
(a)……
(b) refer the report back to the Bid Evaluation Committee for their reconsideration or make a recommendation to the accounting officer on the award of a tender, with or without conditions together with reasons for such recommendations" (my underlining).

[30] In the case of Lukhozi's recommendation, as I have alluded to above, the intended destination was the BEC, not the applicant. Lukhozi's report was intended to stop and end with the BEC. It was intended only for the eyes and the mind of the BEC. The BEC embarked on a process of preparing its report. Its report was for consideration only by the BAC, not by the applicant. It means that between the BEC and the applicant, there were numerous intermediaries like BAC. The BAC report was directed, not to the applicant, but to the Municipality's accounting officer. Obviously, the Municipality's accounting officer serves as an intermediate factor between the Municipality and the applicant. There was no straight forwardness and directness of the Lukhozi, BEC and BAC recommendation to the applicant. All these recommendations were subject of consideration by the next committee or body.

[31] Lukhozi, BEC and BAC played only advisory roles to assist the ultimate decision maker. They were to establish facts and advise the Municipality's accounting officer through the making of recommendations. The Municipality's accounting officer is neither bound to accept the recommendation nor is he or she bound to follow its recommendation[9].

[32] This brings me to the word in the definition *external legal effect.* An administrative action must have external legal effect for it to be reviewable. All these recommendations had only internal effect as they were intended to influence internal processes. Lukhozi's report was intended to influence the BEC. BEC recommendation was intended to influence the BAC. The work of the BAC was intended to affect only the Municipality's accounting officer. All of these are internal functionaries endevouring to propel their internal processes. The requirement of external legal effect is deficient in the recommendations in question.

[33] I am alive to the authorities which propound that the word direct in the definition of administrative action implies finality[10]. Hoexter[11] espouses the following views of the authors Plaff and Schneider:

> "*If for example, a decision requires several steps to be taken by different authorities, only the last of which it is directed at the citizen, all previous steps taken within the sphere of public administration lack direct effect,*

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[9] ***President of the Republic of South Africa and others v South African Rugby Football Union and others*** 2000 (1) SA 1; 1999 (10) BCLR 1059 (cc) Para 146; ***National Treasury v Kubukeli*** 2016 (1) ALL SA 30 (SCA); 2016 (2) SA 507 SCA Para 25.
[10] Cora Hoexter Administrative Law in South Africa, 2nd Edition, Page 229.
[11] Hoexter (Supra) Page 228.

and only the last decision may be taken to court for review……. Therefore, all the preparatory decisions are in principle not reviewable by the administrative courts"

[34] It can hardly be said that a recommendation by an advisory body for the decision maker to take an informed decision constitutes an administrative action that adversely affects the rights of a person, in a manner that has a direct and external legal effect. It is what the organ of state decides to do and actually does with the information it has become aware of, which could potentially trigger the applicability of PAJA[12]. I am unable to agree with applicant's contention that the recommendations of Lukhozi, BEC and BAC are capable of being reviewed. PAJA provisions do not apply to their recommendations. The relief relating to the setting aside of the aforesaid recommendation cannot succeed.

[35] Doctrine of ripeness is applicable herein. The idea behind the requirement of ripeness is that a complainant should not go to court before the offending action or decision is final or at least ripe for adjudication[13].

[36] Lukhozi's report is sought to be reviewed and set aside on a further ground that Lukhozi was unlawfully appointed. Save for this bare allegations, no further detail is set out in the founding affidavit. It is a common cause or at least not seriously disputed that Lukhozi and its

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[12] ***Viking Pony Africa Pumps (Pty) Ltd t/a Tricom Africa v Hidro and Tech Systems (Pty) Ltd and another*** 2011 (6) SA 327 (CC), 2011 (2) BCLR 207 (CC) Para 38.

[13] Cora Hoexter (Supra Page 58; Yvonne Burn: Administrative Law under the 196 Constitution, 3rd Edition, Page 469.

Project Manager were appointed by the Municipality as its consultant, technical advisor and specialist to technically evaluate and advise on the technical aspects of the tender. A point is made that Lukhozi and its Project Manager were appointed in terms of Municipality's Supply Chain Management Policy Framework for infrastructure delivery and Procurement Management. The Municipality's Policy Framework provides for the appointment of agents. An agent is defined as "*a person or organization that is not an employee of the George Municipality that acts on the George Municipality's behalf in the application of the document*" (Clause 2.1 of SCM Policy Framework). Clause 6.1.1.1.3 also provides that persons appointed in writing as technical advisors and subject matter experts may attend any committee meeting. I therefore cannot agree that Lukhozi's appointment was unlawful. Technical advisors are envisaged in the SCM Policy Framework.

Dispute of Fact

[37] Motion proceedings, unless concerned with interim relief, are all about the resolution of legal issues based on common cause facts. Unless the circumstances are special they cannot be used to resolve factual issues because they are not designed to determine probabilities[14]. It is well established under the *Plascon Evans Rule* that where in motion proceedings disputes of fact arise on affidavits, a final order can be granted only if the facts averred in the applicant's affidavits, which have been admitted by the

[14] ***Plascon Evans Paints Ltd v Van Riebeek Paints (Pty) Ltd*** 1984 (3) SA 623 (A) 634-5.

respondent, together with the facts alleged by the latter, justify such order[15].

[38] Firstly, the Municipality and Lukhozi make common cause that the applicant discloses in its tender that it is only registered for single phase electrical installations. The applicant, however, indicated that it would attend to the 3.3kv electrical installation required in terms of the tender. Accordingly, the Municipality and Lukhozi, express an opinion that applicant's inability to undertake 3.3kv work itself disqualified the applicant. Lukhozi, takes this point even further to contend that the applicant's tender document reflected only Mr Braai, Mr Maxaza and Mr Khayalethu as relevant personnel, none of whom was qualified to do 3.3kv installations. The tender was considered on the basis of personnel capacity presented to the Municipality by means of a tender document. The name of Mr William Modise Masiko was never part of the information forming part of the tender.

[39] It does not appear to have been gainsaid that the requirement of a personnel armed with the requisite capacity to undertake 3.3kv installations was a mandatory requirement. Although the applicant seems to be suggesting in its replying affidavit that it had the necessary capacity to undertake 3.3kv installation, that case is made out in the replying affidavit, which practice is generally impermissible. In any event applicant's failure to demonstrate in its tender document the names of its personnel equipped with the

[15] ***National Director of Public Prosecutions v Zuma*** 2009 (2) SA 277 (SCA) Para 26.

requisite capacity to undertake such kind of work renders applicant's version to be consisting of bald and uncreditworthy denials or allegations which also renders it to be palpably implausible, farfetched or so clearly untenable and in that case this court is justified in rejecting that denial or allegation merely on the papers[16].

[40] Mandatory requirements of the tender are a determining factor and they have an intrinsic value to the tender process. Once there is non-compliance therewith, the court should look no further and find no fault in the tender process and ultimately dismiss the application with costs[17]. The best time to comply with mandatory requirements is when the tenderer submits its tender on the closing date. In *Steenkamp*[18] the Constitutional Court stated that tender process require strict compliance by all competing tenderers on the closing day for submission of tenders. In *Allpay*[19] Constitutional Court held that :

> "*[40] Compliance with the requirements for a valid tender process, issued in accordance with the constitutional and legislative procurement framework, is thus legally required. These requirements are not merely internal prescripts that SASSA may disregard at whim. To hold otherwise would undermine the demands of equal treatment, transparency and efficiency under the Constitution. Once a particular administrative process is prescribed by law, it is subject to the norms of procedural fairness codified in PAJA. Deviations from the procedure will be assessed in terms of those norms of procedural fairness. That does not mean that administrators may never depart from the system put into place or that deviations will necessarily result in procedural unfairness. But it does mean that, where administrators depart from procedures, the basis for*

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[16] ***Plascon Evans Paints (Pty) Ltd v Van Riebbek Paints (Pty) Ltd*** 1984 (3) SA 623 (a) 634-5; ***National Director of Public Prosecutions v Zuma*** 2009 (2) SA 277) (SCA) Para 26

[17] ***Sithathu Funding (Pty) Ltd v Road Accident Fund and others*** (124/2022) [2025] ZARCMKC 36 (15 April 2025) Para 65

[18] ***Steenkamp No v Provincial Tender Board Eastern Cape*** 2007 (3) SA 121 Para 60

[19] ***Allpay Consolidated Investments Holdings (Pty) Ltd and others v Chief Executive Officer of the South African Social Security Agency and others*** 2014 (1) SA 604(CC); 2014 (1) BCLR (CC) Para 40

doing so will have to be reasonable and justifiable, and the process of change must be procedurally fair".

[41] In *Norland Construction*[20]

> *"[12] It is nevertheless accepted that compliance with bid requirements is necessary and has intrinsic value. Equal bid requirement observed by all bidders enhances the fairness of the process, so that bid requirements simply cannot be discarded at the drop of a hat. It must, by contrast, also be noted that there are inherent dangers in adopting an unduly rigid approach to the issue of responsiveness, and that courts must guard against the elimination of bidders based on administrative considerations as opposed to issues of substance. Such an approach could defeat the objectives of fairness, transparency, competitiveness and cost effectiveness. The Constitutional Court has eschewed both an overly rigid as well as an overly flexible approach and instead adopted a purposive approach to the issue of bid responsiveness. On this approach, there are instances where substantial compliance with the tender terms and conditions (as opposed to perfect compliance) would suffice. As Volmink has indicated:*
>
> > *'A process of fair-minded reasoning requires that bids be assessed on their merits and not be excluded for relatively minor breaches. Such an approach gives effect to the values of fairness, equity, transparency, competitiveness and cost effectiveness enshrined in section 217(1) of the Constitution. Thus, the courts are required to enquire into the underlying objective and materiality of a bid requirement, to ascertain whether its purpose was in fact met despite less than perfect compliance. A decision whether or not to exclude a non-compliant bidder from a bid process will depend on a variety of factors including: the wording of the RFP, the materiality of the unfulfilled requirements, the degree of non-compliance and the purpose of the requirement.'*
>
> *[13] Importantly, it is for the department, as employer or institution inviting the tender, to decide the prerequisites for a valid tender. A failure to comply with prescribed conditions would result in a tender being disqualified as an acceptable tender under the PPPFA, unless those conditions were immaterial, unreasonable or unconstitutional. Put differently, a tender should not easily be invalidated on the basis that it contains minor deviations that do not materially alter or depart from the characteristics, terms, conditions and other requirements set out in tender documents. Whether or not a deviation or qualification is*

[20] ***Norland Construction (Pty) Ltd v Chris Hani Development Agency (SOC) Limited and another*** (18/2022) [2024] ZAECMKC 10 (23 January 2024) Para 12-13.

material is a question to be determined by the BEC in its discretion, taking into account the set eligibility criteria.

[42] Having found that this application cannot succeed on the ground that the applicant had failed to comply with a mandatory requirement of the tender relating to the necessary capacity, I gratuitously deal with the point relating to pricing and preference. Municipality and Lukhozi contend that applicant's tender contained numerous arithmetic errors and such errors resulted in the applicant's tender having been under-priced by R25 096 954 .78. Allied to that was the applicant's inability to show how it would absorb such an amount. The applicant was unable to honour out of proposition rates. The prices or rates were remarkably and unrealistically low and the tender was not market related. Upon having been advised of the arithmetic errors alluded to above, the applicant adjusted its rates and prices and produced/ submitted revised BOQ. Ironically the tender amount of R136 142 491.26 did not change. According to the Municipality and Lukhozi, had the applicant properly attended to the arithmetic errors besetting its tender, the tender amount would have come up to R161 239 446.04. While the applicant accepts that it submitted a revised BOQ, it denies that the tender amount, when properly calculated, would have increased to R161 239 446.04**.**

[43]. What is fundamentally unclear is the nature, extent and effect of the adjustments made by the applicant which resulted in the revised BOQ

being submitted. In law, content is everything[21]. The BOQ were revised and submitted in the context of an awareness having been made by Lukhozi on behalf of Municipality that there are arithmetic errors relating to rates or prices. The words *arithmetic* suggests that errors related to the calculation of numbers or figures contained on the BOQ. In fact, the applicant was clearly advised that arithmetic errors relate to the rates or prices. Therefore, if the rates or prices were really adjusted, how does it happen that such adjustments cannot affect the tender amount, whether negatively or positively. If the BOQ were indeed revised, the natural consequence of such adjustments would be to increase or decrease the tender amount. It is palpably implausible, far-fetched and clearly untanable that adjustments and revision of rates and prices in the BOQ cannot affect the original tender amount. The revision and adjustment of the rates or prices was a clear acknowledgement and recognition that there were errors and inaccuracies in the BOQ which required adjustment, revision and fixing. Unfortunately, the applicant failed to disclose to this court how the BOQ were revised.

[44] It is common cause that applicant's BOQ were revised. That relates to prices/rates. The ordinary meaning relevant to this matter of the verb *"revise" is to examine and make corrections or alterations to written or printed matter."* If price rates were corrected, altered or amended, that would obviously have an effect on the total of the tender amount.

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[21] ***Minister of Home affairs and others v Sclabrini Centre and Cape Town and others*** 2013 (6) SA 421 (SCA), 2013 (4) ALL SA 571(SCA) Para 89.

[45] In the amalgam of all this, I come to a conclusion that applicant's application deserves only a fate of dismissal. I have not been advised of any reason why costs should not follow the result. The costs shall follow the result.

Order

[46] In the result I make the following order:

46.1 **The application is dismissed**.

46.2 **The applicant shall pay costs of the application on a party and party scale (scale A)**

A.S ZONO

JUDGE OF THE HIGH COURT (ACTING)

APPEARANCES:

Counsel for the Applicant : Adv Nyangiwe

Instructed by **: MOLETSANE PN ATTORNEYS**

Section 33 Tacoma Arcade

6-8 Chamberlain Road

Berea

East London

Tel:043 051 0608 or 079 944 0440
Email: paballom@mpnlaw.co.za

Counsel for the 1st Respondent	: Adv Van Der Merwe
Instructed by	: **GOUSAARD ATTORNEYS**
	33 Victoria Street
	George
c/o	**CONLON LAW ATTORNEYS**
	2 Clevedon Road
	Serborne
	East London
	Tel: 043 555 4000
	E-mail: **admin@malusiec.co.za**
	Ref: ca@conlonlaw.co.za

Counsel for the 2nd Respondent	: Adv Watt
Instructed by	: **PAGDENS ATTORNEYS**
c/o	**BATE CHUBB & DICKSON INC**
	Sute 2 Norvia House
	34 Western Avenue
	Vincent
	East London
	Tel: 043 701 4500
	Email: lisa@batechubb.co.za

Date heard	: 18th September 2025
Date Delivered:	: 10th February 2026