IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU NATAL DIVISION: PIETERMARITZBURG

Case No: **9432/24P**

In the matter between:

TACTICAL SECURITY SERVICES GAUTENG PROVINCE CC	**Applicant**

and

NEWCASTLE LOCAL MUNICIPALITY	**First Respondent**
THE MUNICIPAL MANAGER: NEWCASTLE LOCAL MUNICIPALITY	**Second Respondent**
FBL TRADING ENTERPRISES (PTY) LTD	**Third Respondent**
AMABUSO SECURITY SOLUTIONS (PTY) LTD	**Fourth Respondent**
MABOTWANE SECURITY SERVICES CC	**Fifth Respondent**
IZINHLOLI HOLDINGS (PTY) LTD	**Sixth Respondent**
CALVIN AND FAMILY SECURITY SERVICES (PTY) LTD	**Seventh Respondent**
WENZILE PHAPHAMA SECURITY UFLYTECH JV (PTY) LTD	**Eighth Respondent**
SIZOWAKHA SECURITY AND CLEANING SERVICES CC	**Ninth Respondent**
PRIME AFRICAN SECURITY (PTY) LTD	**Tenth Respondent**
UYABONWA SECURITY SERVICES CC	**Eleventh Respondent**
PRO-SECURE SECURITY (PTY) LTD	**Twelfth Respondent**
IMVULA QUALITY PROTECTION (AFRICA) (KZN) (PTY) LTD	**Thirteenth Respondent**
MZANSI SECURIFIRE KZN (PTY) LTD	**Fourteenth Respondent**
ANOTHA SECURITY (PTY) LTD	**Fifteenth Respondent**

KA-MYALUZA (PTY) LTD	**Sixteenth Respondent**
MI 7 NATIONAL GROUP (PTY) LTD	**Seventeenth Respondent**
MBOMA SECURITY SOLUTIONS (PTY) LTD	**Eighteenth Respondent**
VAST PROTECTION SOLUTIONS CC	**Nineteenth Respondent**
BAMBOLUNYE SECURITY SERVICES CC	**Twentieth Respondent**
MARSHAL NIGHTS SECURITY SERVICES (PTY) LTD	**Twenty-first Respondent**
WOLF TACTICAL SECURITY (PTY) LTD	**Twenty-second Respondent**
REAL SEC (PTY) LTD	**Twenty-third Respondent**
INSIKA SECURITY SERVICES (PTY) LTD t/a ALUNGA	**Twenty-fourth Respondent**
M-GUARD (PTY) LTD	**Twenty-fifth Respondent**
MEC FOR FINANCE, PROVINCE OF KWAZULU-NATAL	**Twenty-sixth Respondent**
HEAD OF DEPARTMENT, KWAZULU-NATAL TREASURY	**Twenty-seventh Respondent**

ORDER

The following order is made:

1. The first respondent's decision to allocate work to the third to sixth respondents in respect of Bid Number A013-2023/24 for the appointment of a panel for the provision of security guarding services at various Newcastle Municipality's premises, including VIP protection services, for a period of 36 months (the tender) is hereby reviewed and set aside.

2. It is declared that any contract/s or service level agreement/s concluded between the first and the third to sixth respondents pursuant to the decision in paragraph 1 above are invalid, unlawful, unconstitutional and void *ab initio*.

3. The first respondent's use of a panel for the appointment of security service providers is declared invalid, unlawful, and unconstitutional.

4. On an interim basis, and pending the first respondent's compliance with a valid tender process, the first respondent is directed to:

4.1 conduct a full adjudication on price, as required by the 80/20 preference points system stipulated in the tender, alternatively the 90/10 preference points system on the basis of the value of the tender; and thereafter

4.2 allocate work in a fair, transparent and cost-effective manner to all qualified tenderers in accordance with the tender.

5. The first respondent is ordered to pay the costs of the application on scale C.

JUDGMENT

Pillay AJ:

Introduction and brief background

[1] The first respondent is the Newcastle Local Municipality (the municipality), a local municipality established in terms of the Local Government: Municipal Structures Act 117 of 1998. The second respondent, Mr Zamokwakhe Wesley Mcineka (Mr Mcineka), is cited in his official capacity as the municipality's municipal manager. Where the context requires, I refer to the municipality and Mr Mcineka collectively as 'the respondents'.

[2] On 11 September 2023, an internal memorandum was sent by the municipality's community services department to its budget and treasury office, requesting approval to endorse the specifications for a tender. The memorandum outlined the scope of work, which identified two types of services, namely guarding services on a permanent basis and VIP services as and when required. The evaluation criteria stated that the tender would be scored on the 90/10 points scoring method.

[3] The memorandum identified three zones within the municipality, and, within each zone, the premises requiring guarding services and the security staffing and equipment required. It was clear that the specific services related to guarding services. It was also apparent from the memorandum that zone 4 was referred to as 'VIP

personnel protection services' and identified which VIP persons required security and the security equipment that was required.

[4] On 21 September 2023, and pursuant to two Bid Specification Meetings, the municipality advertised a tender with bid number A013-2023/24 for the appointment of a panel for the provision of security guarding services at various premises belonging to the municipality, and also included VIP protection services for a period of 36 months (the tender).

[5] On 30 October 2023, the municipality's supply chain management department compiled a bid administration compliance report, which was forwarded to the municipality's community services department. The report recorded that 80 tenders were received, with certain tenderers having been disqualified. The reasons were informed by the Bid Adjudication Committee (BAC) taking issue with the fact that some tenderers were disqualified on the basis that they provided a lease agreement but did not submit a letter from the landlord confirming that no levies are in arrears (the landlord's letter). Several tenderers were disqualified solely because of non-compliance with this requirement.

[6] On 16 January 2024, the Bid Evaluation Committee (BEC) evaluated the bids for functionality, and a decision was taken to disregard the mandatory requirement that tenderers submit an accreditation certificate to possess firearms. This decision was taken on the basis that the South African Police Service (SAPS) confirmed that they no longer issued accreditation certificates to companies. There is no indication on the record when this decision was made by SAPS, when this was communicated by SAPS to the municipality or whether this was communicated to the various tenderers. The mandatory requirement was nevertheless dispensed with.

[7] Whilst the fifteenth respondent, Anotha Security (Pty) Ltd (Anotha), was initially rejected on the basis that it had not met the administrative requirements of the tender in that it failed to provide the landlord's letter, the BEC, however, recommended that it be placed on the panel for guarding services. No explanation was provided in the record of the minutes. The respondents have in these proceedings alleged that Anotha was rejected in error and was thus compliant. The BEC further recommended that the

allocation of works would be done on a request for quotations basis, as and when required.

[8] At the first BAC meeting on 18 January 2024, the BAC recorded various discrepancies emanating from the BEC's report and further resolved to invite the BEC's chairperson to communicate the concerns of the BAC to them. These discrepancies were, however, not recorded.

[9] At the BAC continuation meeting held on 24 and 25 January 2024, the BAC recommended that the bids be remitted to the BEC to review and reconsider the tenderers who did not submit the landlord's letter. The BAC's view was that this was not a requirement. According to the minutes, the BEC's chairperson acknowledged the concerns raised by the BAC and recommended that these concerns be addressed and raised at the Bid Specification Meeting, ostensibly on the basis that it was a requirement set by them.

[10] At the BEC meeting of 1 February 2024, and in response to the BAC's views, the BEC maintained its earlier decision by making reference to the requirements of the tender document and recorded that its resolution of 16 January 2024 remained unchanged, ie that the proposed tenderers to be placed on both panels remain the same. Anotha, accordingly, remained on the recommended panels, despite disqualification at the administrative stage.

[11] The bid evaluation report dated 1 February 2024, which was submitted to the BAC, also recorded several tenderers who were disqualified for want of administrative compliance, who included Mbomba Security Solutions (Mbomba) and Bambolunye Security Services (Bambolunye).

[12] On 7 February 2024, the BAC convened to record its previous concerns raised at its meeting of 18 January 2024. The BAC then resolved to review the disqualified bids to ensure that they were fairly and legitimately disqualified, and to minimise unnecessary objections due to internal inefficiencies. At this meeting, the BAC also recommended that Mbomba and Bambolunye were administratively compliant and pointed out that the BAC had evaluated the two service providers and recommended

them for inclusion on the panel of service providers. It further recommended that Mr Mcineka consider and decide the matter. There is no indication on the record that Mr Mcineka gave consideration to this issue.

[13] The BAC also provided no reasons why only the two tenderers identified by the BAC were to be considered administratively compliant but the other tenderers who suffered the same deficiency were not considered. There is also no record of a functionality evaluation undertaken by the BAC for Mbomba and Bambolunye.

[14] On 22 February 2024, the applicant received an email confirming its appointment as a preferred tenderer, which letter made reference to a bill of quantities. A further email clarifying the applicant's provisional appointment was sent to the applicant on 23 February 2024, the contents of which read as follows:

'For the clarity, the appointment letter is based on (sic) category you got, we have 2 categories which is Guarding services and VIP Protection. Please carefully read the description (PANEL FOR PROVISION OF SECURITY GUARDING SERVICES AT VARIOUS NEWCASTLE MUNICIPALITY PREMISES INCLUDING VIP PROTECTION SERVICES FOR A PERIOD OF 36 MONTHS) is the project name.'

[15] It was apparent from the letter of 23 February 2024 that the tender entailed two categories, those being both guarding and VIP Protection Services and that there was no bill of quantities.

[16] On 1 March 2024, the applicant wrote to the municipality seeking clarity on which category it was awarded. It also required the municipality to provide a draft proposed contract, so as to consider the proposed terms and conditions of the contract. On 1 March 2024, the municipality responded with an email which read as follows:

'In response to your email below, this is a provisional appointment letter with 14 days period for objection. We have 2 categories which is Guarding Services and VIP Protection, so tactical Security was awarded in both items. However, the final confirmation of the award will be concluded once you sign the MBD7.1 and SLA.'

[17] On 14 March 2024, a memorandum from the budget and treasury office was sent to Mr Mcineka, recording the recommended bidders and stating that:

'the BAC at its meeting on the 7 February 2024 recommended to award the bid as per table in categories as per BOQ (including VAT) due to the fact that they met the requirements of the Supply Chain Management Policy and scored the highest preferential points.'

[18] On 15 March 2024, the applicant received an appointment letter for the provision of security services from the municipality, and, on 18 March 2024, the applicant communicated its acceptance of the award. The applicant's letter of appointment advised that:

'You are hereby advised that, TACTICAL SECURITY SERVICES has been appointed on PANEL FOR PROVISION OF SECURITY GUARDING SERVICES AT VARIOUS NEWCASTLE MUNICIPALITY PREMISES INCLUDING VIP PROTECTION SERVICES FOR A PERIOD OF 36 MONTHS to Newcastle Municipality as defined in terms of Supply Chain management Policy of the Newcastle Municipality and the Municipal Finance Management Act (56 of 2003). The panel appointment duration is 36 months effective from date of this letter of appointment. The scope of work is as per the terms of reference. Your services will be requested as and when required. However, the panel appointment does not guarantee the actual appointment to provide services.'

[19] On 26 March 2024, the municipality issued an erratum stating that the request for quotations was sent out on 22 March 2024 and that tenderers were to include four SUVs for VIP Protection Services. There is no indication as to how the municipality circulated such request, especially as such a request for quotations does not appear in the record and the applicant did not receive any such request. The bill of quantities also does not form part of the record nor does any scoring on price.

[20] On 28 March 2024, instruction letters for guarding services were sent to the third, fourth, fifth, sixth and seventeenth respondents. Both the third and fifth respondents were appointed for zone 4, Newcastle East, whilst no service provider was appointed for zone 1. It was also apparent from the instruction letter that the seventeenth respondent, Mi7 National Group (Pty) Ltd (Mi7), was allocated zone 5, despite zone 5 being for VIP services and to be allocated on an 'as and when basis'.

[21] On 1 April 2024, members of some of the third, fourth and sixth respondents, along with employees of the municipality, approached the applicant's employees, who were on site rendering security services in terms of an existing tender and service level agreement. They informed the applicant's employees that they have concluded contracts with the municipality to commence rendering security services on 1 April 2024. The applicant launched a high court interdict and obtained interim relief against any interference from these respondents.

[22] On 8 April 2024, and as a consequence of discovering that contracts were already concluded with selective tenderers, the applicant sent a letter to Mr Mcineka stating that the only member of the new panel that had not been allocated work was the applicant, and that the applicant had not been provided with a service level agreement. The applicant thus made a request for documents and details regarding the procurement process. The municipality undertook to bring the applicant's complaint to Mr Mcineka, but no response was received from him.

The review

[23] The applicant's review is premised on the claim that the municipality has not established that the appointment of the third to sixth respondents is cost-effective, as required by s 217 of the Constitution, along with the relevant procurement legislation. It alleged that the tender was not adjudicated on price in respect of all tenderers appointed to the panel. The applicant's further ground of review is based on the contention that the municipality's decision to utilise and appoint a panel for both guarding and VIP services is in contravention of procurement legislation, is unlawful and unconstitutional, and falls to be reviewed and set aside. Consequently, the applicant argued that the entire process of requesting quotes from some of the panel members only, and contracting with the third to sixth and seventeenth respondents, falls to be reviewed and set aside, including the contracts concluded with the said respondents.

[24] The essence of the applicant's grounds of review relates to the absence of any reasons in respect of functionality scoring, the method of evaluating the bid using either the 80/20 or 90/10 points scoring system, and most importantly, why a panel was required for guarding services, when a panel appointment was precluded from a

conspectus of the tender document and prevailing legislation. The applicant argued that the municipality had cherry-picked from the panel those tenderers it wished to appoint, and had done so in a manner that is impermissible and unconstitutional. The applicant resultantly contended that the actions taken by the respondents contravened s 6(2)*(b)*, *(c)*, *(d)*, *(e)*, *(f)*, *(h)* and *(i)* of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) and fall to be reviewed and set aside as being unconstitutional and invalid.

The municipality's opposition

[25] In opposing the grounds of review, the municipality first raised a point *in limine* that the applicant did not exhaust the internal remedy provided for in terms of s 62 of the Local Government: Municipal Systems Act 32 of 2000 (the Municipal Systems Act). The applicant responded on the basis that Mr Mcineka's decision constituted an original power and not a delegated power, and that tenderers who concluded contracts with the municipality had accrued rights under their respective contracts, and, hence, s 62 of the Municipal Systems Act was not applicable.

[26] Following the applicant's reply to the respondents' point *in limine,* in its replying affidavit and the applicant's heads of argument, the respondents had wisely abandoned the point *in limine* in their heads of argument. The respondents then focused on the main review challenge by disputing that the use of a panel for security service providers was unlawful. The municipality further claimed that the applicant relied on an outdated supply chain management policy (SCMP), which was for the 2015/2016 financial year, whilst the policy which applied to the present tender was the one for the 2023/2024 financial year.

[27] The municipality placed reliance on clause 27 of what it contended was the applicable policy, which allegedly expressly authorised the municipality to utilise what is described as 'procurement through panels'. The municipality contended that the applicant has misconstrued reg 25 of the Municipal Supply Chain Management Regulations (the SCM Regulations).

[28] The municipality further alleged that whilst not all panel members were invited to submit quotations for the security contracts for the first year, at least three were

invited in respect of each contract. It maintained that it always intended to offer opportunities to every member of the panel at different points throughout the three-year term. The respondents accordingly argued that the selection process used for the service providers was entirely lawful.

[29] The municipality's rationale for the appointment of a panel is based on the principle of fairness. It argued that due to the high volume of bids received from numerous security firms, the municipality aimed to distribute opportunities more broadly, effectively giving more companies a 'slice of the cake'. Consequently, instead of appointing a single provider to a zone for the entire three years, the municipality decided to rotate providers every 12 months. It contended that this approach ensured that more businesses receive an opportunity to work, with the condition that each provider is allocated only one specific zone.

The legislative acquisition framework

[30] Section 217(1) of the Constitution specifically provides that where an organ of state 'contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective'.

[31] Section 217(2) provides that:

'(2) Subsection (1) does not prevent the organs of state or institutions referred to in that subsection from implementing a procurement policy providing for—

(*a*) categories of preference in the allocation of contracts; and

(*b*) the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination.'

[32] Section 217(3) states that '[n]ational legislation must prescribe a framework within which the policy referred to in subsection (2) must be implemented'.

[33] Section 2(1) of the Preferential Procurement Policy Framework Act 5 of 2000 (the PPPFA) requires, inter alia, the use of a preference points system and provides that the bidder who achieves the highest points must be awarded the tender, unless additional objective criteria, including those referred to in ss 2(1)*(d)* and *(e)* justify

awarding it to a different bidder. Any such objective criteria must be measurable, quantifiable, and subject to ongoing compliance monitoring.[1]

[34] Regulation 4 of the Preferential Procurement Regulations, 2022 (the PPR), is headed '80/20 preference point system for acquisition of goods or services with Rand value equal to or below R50 million' and sets out a specific formula for the calculation of points out of 80. Regulation 4(4) of the PPR also stipulates that '[s]ubject to section 2(1)*(f)* of the Act, the contract must be awarded to the tenderer scoring the highest points'.

[35] Section 112 of the Local Government: Municipal Finance Management Act 56 of 2003 (the MFMA) provides that the supply chain management policy of a municipality must be fair, equitable, transparent, competitive, and cost-effective, and that such policy must, in addition, comply with a prescribed regulatory framework for municipal supply chain management.

[36] The applicant's main complaint is premised on the municipality's decision to utilise a panel when the tender was not suited to a panel system and where the relevant regulations precluded the appointment of the panel. In light of this challenge, and apart from the statutory requirements, it is appropriate that the applicable municipal regulations are also considered. Bearing in mind that the tender was advertised on the 21 September 2023, I have considered the applicable SCM regulations prior to its amendment on the 14 December 2023. This is specifically in light of the applicant's challenge to the municipality's use of a panel system.

[37] Regulation 11(1) of the SCM Regulations provides that a supply chain management policy must provide for an effective system of acquisition management in order to ensure, inter alia, that goods and services are procured by the municipal entity in accordance with authorised processes only, and that the threshold values for different procurement processes are complied with.

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[1] Section 2(2) of the PPPFA.

[38] Regulation 12(1), which relates to the range of procurement processes, states that a supply chain management policy must, subject to reg 11(2), provide for the procurement of goods and services by way of formal written price quotations for the procurement of a transaction value over R10 000 up to R200 000 (VAT included), and a competitive bidding process for procurements above a transaction value of R200 000 (VAT included).[2]

[39] Regulation 12(3) provides that:

'(3) A supply chain management policy must state—

(*a*) that goods or services may not deliberately be split into parts or items of a lesser value merely to avoid complying with the requirements of the policy; and

(*b*) that when determining transaction values, a requirement for goods or services consisting of different parts or items must as far as possible be treated and dealt with as a single transaction.'

[40] It is also clear from reg 19*(a)* of the SCM Regulations that it is a requirement that a municipality's SCMP must specify that goods or services above a transaction value of R200 000 (VAT included) may be procured by the municipality only through a competitive bidding process. Regulation 19*(b)* expressly provides that goods or services above the said estimated transaction value may not 'deliberately be split into parts or items of lesser value merely for the sake of procuring the goods or services otherwise than through a competitive bidding process'.

[41] Regulation 25(1) provides for a two-stage bidding process and states as follows:

'Two-stage bidding process

(1) A supply chain management policy may allow a two-stage bidding process for-

(a) large complex projects;

(b) projects where it may be undesirable to prepare complete detailed technical specifications; or

(c) long term projects with a duration period exceeding three years.'

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[2] Regulation 12(1) of the Municipal Supply Chain Management Regulations GEN 868 OF 2005.

[42] Regulations 25(2) and (3) further provide that during the first stage, technical proposals on conceptual design or performance specifications should be invited, subject to technical as well as commercial clarifications and adjustments, whilst the second stage allows for the invitation of final technical proposals and priced bids. It is clear from the wording of reg 25 that the two-stage bidding process is utilised for more complex procurements with the aim of separately assessing technical/functional solutions from pricing and final offers, so that a municipality can refine requirements and receive more comparable final bids. This also ensures that it receives better pricing, in keeping with the requirement of competitiveness.

[43] Regulation 21*(a)*(ii) of the SCM Regulations, requires that bid documentation must take into account Treasury guidelines on bid documentation. The municipality received a circular from National Treasury dealing with panels, which also refers to framework agreements. It is clear that National Treasury permits a municipality to separate the supply chain management requirements for general goods and services from those for infrastructure delivery (for example, road, electrical supply, water supply). The relevant portion of the circular provides that:[3]

'Municipal Procurement that is unrelated to infrastructure delivery typically relates to goods and services that are standard, well-defined and readily scoped and specified...Services most often involve routine, repetitive services with well understood interim and final deliverables which do not require strategic inputs or require decisions to be made regarding the fitness for purpose of the service outputs...*The National Treasury Standard for Infrastructure Procurement and Delivery Management*, if adopted, enables a municipal council to separate the supply chain management requirements for general goods and services from those for infrastructure delivery.'

[44] There is no dispute that the SCMP of the municipality does indeed make provision for such a competitive bidding process, and further that the value of the tender does exceed R200 000. It is apparent that the change in the threshold values in the amended regulations to that of R300 000 does not impact in the applicant's challenge to the use of the panel system.

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[3] Model SCM Policy for Infrastructure Procurement and Delivery Management, MFMA Circular No 77, 26 October 2015 at 2.

The municipality's tender document

[45] In considering whether the process of the tender and eventual decision entailed any reviewable irregularities, it is necessary to also have regard to the tender document. The tender invitation comprised two distinct sections: Part A, which detailed compliance with the SCMP's administrative criteria, and Part B, which outlined the technical specifications and the pricing framework. The relevant portion of section 2 of Part A titled 'Bid Notice & Invitation to Bid' stipulated as follows:

'In terms of section 110 of the municipal finance management act, 2003 (no. 56 of 2003), tenders are hereby invited by Newcastle Municipality for panel for provision of security guarding services at various Newcastle Municipality premises including VIP protection services for a period of 36 months ... Multiple Service providers would be appointed to a panel agreement, therefore below indicated preferential scoring system will only be apply when sourcing quotations from the existing panel of qualifying security providers and thereon the acceptable/successful bidder will be required to execute the contract. Quotations will be adjudicated in terms of the Preferential Procurement Regulations, 2022 pertaining to Preferential Procurement Policy Framework Act, 5/2000 and other applicable legislations and will be based on 80/20 points scoring system…'

[46] The tender document also made provision for the functional evaluation and states that:

'Only bids that comply with all administrative requirements (Acceptable Bids) will be considered during the functionality evaluation phase and the allocation of points will be based on functional criterions as indicated in the Terms of Reference.'

The scoring method provided:

'Minimum functional requirement score: Service providers that submitted acceptable bids and that score at least 70% on functionality will qualify for enlistment on the panel agreement. Price and Preference (please refer to MBD 6.1) are to be considered during the quotation stage from the existing panel.'

[47] In terms of clause 1.3. of the terms and conditions under Part B of the tender document:

'This bid is subject to the Preferential Procurement Policy Framework Act and the Preferential Procurement Regulations, 2022, the General Conditions of Contract (GCC) and, if applicable, any other special conditions of contract.'

[48] The relevant clauses at section 3 of Part A headed 'General Conditions of Bid' recorded as follows:

'1. General conditions of Contract

This Bid is subject to the General Conditions of Contract (GCC) 2010 and, if applicable, any other Special Conditions of Contract. Whenever there is a conflict between the GCC and SCC, the provisions of the SCC shall prevail.

2. Pricing

2.1 Rates and prices offered by the bidder must be written onto the pricing schedule or form of offer of this document by hand, completed in full and signed by the duly authorised signatory.

...

2.3 Bid prices must include all expenses, disbursements and costs (e.g. transport, accommodation etc.) which may be required for the execution of the bidder's obligations in terms of the Contract. Bid prices shall cover the cost of all general risks, liabilities and obligations set forth or implied in the Contract, as well as overhead charges and profit (in the event that the bid is successful), unless otherwise specified.

2.4 All bid prices will be final and binding...'

[49] Section 5 of Part A, headed 'Special Conditions of Contract', recorded at the relevant part as follows:

'2. I/we agree that:

b) this bid and its acceptance shall be subject to Supply Chain Management Regulations, the Municipal Finance Management Act, No 56 of 2003, the Newcastle Municipality Supply Chain Management Policy and the General and Special Conditions of Contract, with which I/we am fully acquainted...'

[50] It is apparent that the tender document envisaged an 80/20 preference point system, which is to be used at the quotation stage in order to evaluate and adjudicate upon price. This is also apparent from what was stated under the heading at section 12 of Part A, titled 'MBD 6.1: Preference Points Claim Form in terms of the Preferential Procurement Regulations 2022', and which provided:

'General Conditions

1. The following preference point systems are applicable to all bids:

- the 80/20 system for requirements with a Rand value of up to R50 000 000 (all applicable taxes included); and

- the 90/10 system for requirements with a Rand value above R50 000 000 (all applicable taxes included).

The value of this bid is estimated to not exceed R50 000 000 (all applicable taxes included) and therefore the 80/20 preference point system shall be applicable or

2. Points for bid shall be awarded for:

(a) Price; and

(b) Specific contract participation goals, as specified in the attached forms.

...

8. Adjudication using a Point System

8.1 The bidder obtaining the highest number of points will be awarded the contract.

8.2 Preference points shall be calculated after prices have been brought to a comparative basis.

8.3 Points scored will be rounded off to 2 decimal places.

8.4 In the event of equal points scored, the bid will be awarded to the bidder scoring the highest number of points for specified goals.'

[51] The tender document, in section 15 of Part B, also defined what the scope of work would entail and stated that:

'The security service provider shall be required to execute the following services:
Provision of armed guarding services at identified Municipal owned premises to protect council assets namely people, property, and information against criminal intent by performing security related duties such as access control duties...'

The Municipality's SCMP

[52] The applicant referred to the SCMP published on the municipality's website, which was adopted in May 2015. The applicant alleged that it was aware of other documentation pertaining to a SCMP of 2022 or 2023 but which was not located on the website. The municipality alleged that the applicant has referred to an outdated policy and attached to the answering affidavit what it referred to as the applicable policy for the financial year 2023/2024. It is not in dispute that the applicable policy was not incorporated in the record of proceedings or the supplementary bundle.

[53] Clause 18.1 of both SCMPs are identical and provide that:

'The accounting officer must implement the system of acquisition management set out in this Part in order to ensure –

(a) that goods and services are procured by the Newcastle Municipality in accordance with authorized processes only;

(b) that expenditure on goods and services is incurred in terms of an approved budget in terms of section 15 of the Act;

(c) that the threshold values for the different procurement processes are complied with;

(d) *that bid documentation, evaluation and adjudication criteria, and general conditions of a contract, are in accordance with any applicable legislation;* and

(e) that any Treasury guidelines on acquisition management are properly taken into account.' (My emphasis.)

[54] The applicant has referred to clause 27 of the SCM Policy, which provides for competitive bids. The said clause also mirrors clause 26 of the SCMP attached to the municipality's answering affidavit and states that:

'27.1. Goods or services above a transaction value of R200 000, 00 (VAT included) and long-term contracts may only be procured through a competitive bidding process, subject to paragraph 18(2) of this SCM policy.

27.2. No requirement for goods or services above an estimated transaction value of R200 000,00 (VAT included), may deliberately be split into parts or items of lesser value merely for the sake of procuring the goods or services otherwise than through a competitive bidding process.'

[55] The one apparent difference and new inclusion in the SCMP attached to the municipality's answering affidavit is clause 27, which now makes provision for 'Procurement through panels', and which provides as follows:

'27. Procurement through panels

27.1. The Municipality may appoint service providers to form a panel up to a maximum of 36 months in the respective area of specialisation.

27.2. In the panel procurement system, bids are only evaluated up to the functionality stage and all bidders who obtained set minimum functionality points threshold are enlisted in the panel.

27.3. Price is not considered in the evaluation of bids through a panel procurement method.

27.4. Service providers in the approved panels are appointed through request for quotation process as and when work become available and Price are only applied at this stage;

27.5. The Municipality in agreement with service providers in the approved panel may negotiate fixed market related rates for all service providers in the approved panel and appoint service providers on rotational basis as and when work become available.'

[56] The court has however noted that the municipality's reliance on its undated SCMP and the threshold values contained in clauses 19 and 26 of the SCMP are consistent with the threshold values required in terms of regulations 12(1) and 19 of the SCM Regulations prior to the amendments.

Legality of the respondents' procurement through a panel system

[57] Procurement disputes involve the application of s 217 of the Constitution and thus raise constitutional issues. Where the organ of state acts contrary to the dictates of s 217, then this court is empowered to review such administrative action and grant orders which are just and equitable in the circumstances. Panel appointments constitute administrative action that is subject to judicial review under PAJA, especially where such appointments are found to be contrary to statutory provisions and/or procedurally flawed.

[58] Following the BEC's initial meeting, the minutes of which are dated 16 January 2024, the BEC recommended that 23 tenderers be placed on the panel for the provision of security guarding services and nine tenderers be placed on the panel for the provision of VIP Security Services. Although Anotha was initially disqualified for being administratively non-compliant, it nonetheless appeared in the BEC's recommendation.

[59] The BEC minutes do not explain why Anotha was still recommended. The municipality now contends that Anotha was compliant, and in support of this belated contention, the municipality attached an account from Anotha dated 31 October 2023, being a date after the tender closing date of 25 October 2023. There is no explanation for this discrepancy. The municipality acknowledged that AK Security Services (Pty) Ltd was also recommended for the guarding-services panel, despite being finally deregistered on 21 January 2024. It provided no explanation for the inclusion of a deregistered company.

[60] After the BEC completed its first evaluation, the BAC recommended on 25 January 2024 that the tenders be re-evaluated, specifically to reconsider those tenderers who provided signed lease agreements but had not submitted the landlord's

letter. At the BEC meeting on 1 February 2024, the BEC noted that this was an express requirement of the tender documents and resolved that, because the requirement was unambiguous, the list of recommended panel members would remain unchanged.

Analysis

[61] It is evident from the record that the BAC subsequently conducted its own assessment of the submitted tenders. On 7 February 2024, it recommended that Mbomba and Bambolunye be added to the panel. The record does not show that Anotha, Mbomba, or Bambolunye complied with the administrative requirements. The municipality conceded that Mbomba and Bambolunye did not meet the administrative requirements. I am of the view that the BAC's recommendations, and their apparent arbitrary acceptance of these tenderers, disclose a process lacking in fairness and transparency.

[62] Whilst it is accepted that an appointment to a panel entails a two-stage bidding process, reg 25(6) prescribes the circumstances in which such a process may be used. The tender satisfies none of those conditions, as it is not complex, and the municipality's requirements are fully set out. It is also apparent from the tender document that the duration of the contract does not exceed three years.

[63] National Treasury allows municipalities to distinguish between supply chain management requirements applicable to general goods and services, and those applicable to infrastructure delivery (such as roads, electricity, and water supply). Security services do not constitute infrastructure delivery. The relevant Treasury circular defines 'infrastructure' as immovable assets that are acquired or constructed (or arise from construction operations), as well as movable assets that cannot operate independently of purpose-built immovable assets.

[64] It is apparent from the municipality's response that it accepted both the circular's content and that the security services required of this tender, fall outside of this definition. In addition, reg 21*(a)*(ii) of the SCM Regulations requires bid documentation to reflect Treasury's guidelines on bid documentation.

[65] Counsel for the applicant, Ms *Olsen*, argued that the use of panels must be expressly authorised and must comply with the relevant enabling legislation and regulations, and that public bodies may not bypass competitive procurement requirements merely because a panel-based process is more convenient or less regulated. I am in agreement with these contentions, especially because panels and quotation processes are permissible only to the extent that they are authorised by and comply with the peremptory requirements of applicable legislation. The municipality's action thus constitutes a failure to comply with a mandatory and material procedure or condition and falls to be reviewed in terms of s 6(2)(b) of PAJA.[4]

[66] Whilst there may be circumstances which warrant a municipality appointing a panel of service providers for the rendering of services where a panel appointment may improve efficiency and service delivery, and to avoid inviting fresh tenders each time a service is required, or where a service provider lacks sufficient capacity, the respondents have not established that the appointment of a panel was statutorily compliant. The respondents' belated reliance on an undated SCMP does not assist in validating a statutorily flawed process, especially where such policy appears to be inconsistent with the SCM Regulations.

[67] This court has already pronounced on the requirement that a municipality is obliged to follow the statutory public procurement scheme.[5] In *Maximum Profit*, Shapiro AJ had pertinently summed up the obligations on the part of a municipality seeking to rely on internal policies, by stating as follows:

'[37] However, a municipality cannot absolve itself of compliance with the statutory public procurement scheme for reasons either of efficiency or because it determines that its internal policies permitted to do so. If a practice is permitted where tenders are awarded not on the basis of cost effectiveness, competition or transparency, but instead on opaque, internal decisions, then a system designed for fairness and accountability collapses. Organs of state will be able to pay lip service to section 217 of the Constitution and the peremptory provisions of the procurement laws and nevertheless award a tender to a bidder whose bid otherwise would have failed.

[4] Section 6(2)(b) of PAJA provides for a review of administrative action if a mandatory and material procedure or condition prescribed by an empowering provision was not complied with.
[5] *Maximum Profit Recovery (Pty) Ltd v Umkhanyakude District Municipality and Another* [2025] ZAKZDHC 32 *(Maximum Profit*).

[38] Neither municipal policies nor standard operating procedures can expressly or by implication condone non-compliance with the law. Cost effectiveness, transparency and competition cannot be sacrificed on the altar of efficiency or convenience. These imperatives can coexist, but this must occur lawfully. Otherwise, the door to corruption is forced open.

[39] Therefore, and even if a panel of service providers is appointed by an organ of state, that entity must nevertheless comply strictly with the provisions of the public procurement laws when awarding bids or allocating work. Even if bidders are appointed to a panel, the respective bids must still be assessed in terms of the PPPFA and ranked accordingly. Depending on the value of the contract, either 80 or 90 points must continue to be allocated for price, and the remaining points must still be allocated in accordance with statutory transformation and empowerment imperatives.'

[68] I have also taken into account the municipality's lack of transparency when information or an explanation was sought from the applicant. This was apparent when the municipality requested quotes from only certain panel members and then selectively entered into contracts with the third to sixth and seventeenth respondents. The tender documents provide that work will be allocated on a quotation basis using the 80/20 preference points system, and when the applicant sought an explanation from the respondents as to how work was allocated and how it would be allocated going forward, no reply was received.

[69] It is apparent from a conspectus of the applicable legislation and the SCM Regulations, that the 80/20 preference points system is to be used for the acquisition of goods and services valued at R50 million or less. In the present tender, the municipality applied the 80/20 system by dividing the tender into three one-year contracts and then split it again by creating five separate zones. The procurement legislation does not allow for such splitting. Had the municipality properly applied the tender requirements and the requirements of the MFMA, the tender should have been evaluated as a three-year procurement having a value of R220 million, to which the 90/10 points system should be applied.

[70] The flawed tender process extended to the functionality criteria. The functionality criteria are used to measure whether a tenderer has the capability and resources to perform the contract successfully, and the criteria included the tenderer's

track record, experience, financial position, technical competence, and staffing capacity. Neither the third respondent, FBL Trading Enterprises (Pty) Ltd (FBL), nor Alunga demonstrated such capability, which is disclosed in their PSIRA certificates, and which indicate that each has only one employee, namely its director. It is therefore apparent that the respondents failed to take into account relevant criteria in the selection process and such action is reviewable in terms of Section 6(2)(e)(iii) of PAJA.[6]

[71] The municipality disputed that it was required to evaluate pricing for every tenderer appointed to the panel and conceded that it did not adjudicate price in respect of all panel members. It maintained that its intention was to apply the 80/20 preference points system at the quotation stage. The respondents' concession in this regard is telling and discloses the arbitrary manner in which the municipality chose to deal with the tender. The applicant and the court are left with no explanation as to why the municipality elected not to adjudicate price in respect of all panel members. The arbitrary conduct and lack of transparency extend to the lack of information in the record as to how and when the 80/20 preference points system at the quotation stage was used, if it was utilised at all. The respondents action is thus also reviewable in terms of Section 6(2)(c) and (e)(vi) of PAJA, as such action was procedurally unfair and taken arbitrarily.[7]

[72] The evidence in the record also disclosed that for zone 1, the twelfth respondent's quote was less than FBL's quote, but FBL's quote was accepted, showing a R3 million difference between the two quotations, which is another example that the contract was not given to the panellist scoring the highest points. It is also apparent that, in considering FBL's quotation for zone 5, it was disqualified because it submitted a lease agreement without the landlord's letter. However, when assessing FBL for zone 1, the requirement was dispensed with, and FBL was given the contract. The municipality failed to explain this arbitrary decision.

[6]Section 6(2)(e) (iii) provides for a review of administrative action taken because irrelevant considerations were taken into account or relevant considerations were not considered; ..."
[7]Section 6(2)(c) provides for a review of administrative action which is procedurally unfair, whilst Section 6(2)(e)(vi) provides for a review of administrative action which was taken arbitrarily.

[73] Even assuming the municipality is entitled to apply the 80/20 preference points system, it is not in dispute that it did not assess the prices of all tenders. As a result, it could not have determined whether the ultimate appointments of the service providers were cost-effective. There is no evaluation report in respect of price in the record. The municipality was obliged to demonstrate that the process of the tender was fair, equitable, transparent and cost-effective, especially in light of the challenge on review. It has failed to do so.

[74] In *Pharmaceutical Manufacturers Association of SA and Another: In re Ex Parte President of the Republic of South Africa and Others,*[8] the court stated as follows:

'It is a requirement of the rule of law that the exercise of public power by the Executive and other functionaries should not be arbitrary. Decisions must be rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary and inconsistent with this requirement. It follows that in order to pass constitutional scrutiny the exercise of public power by the Executive and other functionaries must, at least, comply with this requirement. If it does not, it falls short of the standards demanded by our Constitution for such action.' (Footnote omitted.)

[75] The municipality asserted that VIP protection requirements are variable and depend on threat and risk assessments. Whilst it is accepted that additional VIP services may in certain circumstances be necessary, the municipality had elected to contract with only one tenderer for VIP services, namely Mi7. The applicant raised this issue in its supplementary founding affidavit, but in true form, the municipality failed to explain its decision to select only one tenderer.

[76] The procurement legislation is designed to ensure that appointments and contracts concluded are not done at random but in accordance with that legislation. The legislation is designed to ensure compliance with the requirements of s 217 of the Constitution, which includes the requirement that the process by which tenders are awarded is fair and objective. The municipality was obliged to demonstrate that its process of evaluation was at least objective, and it failed to do so.

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[8] *Pharmaceutical Manufacturers Association of SA and Another: In re Ex Parte President of the Republic of South Africa and Others* [2000] ZACC 1; 2000 (2) SA 674 (CC) para 85.

[77] In *South African National Roads Agency Ltd v Toll Collect Consortium,*[9] the court stated that:

'As to objectivity, which is an aspect of the constitutional requirement that the public procurement process be fair, it requires that the evaluation of the tender be undertaken by means that are explicable and clear and by standards that do not permit individual bias and preference to intrude. It does not, and cannot, mean that in every case the process is purely mechanical. There will be tenders where the process is relatively mechanical, for example, where the price tendered is the only relevant factor and the competing prices are capable of ready comparison ... The evaluator must decide how to weigh each factor and determine its significance in arriving at an appropriate decision. Where that occurs it does not mean that the evaluation is not objective. *Provided the evaluator can identify the relevant criteria by which the evaluation was undertaken and the judgment that was made on the relative importance and weight attached to each, the process is objective and the procurement process is fair.*' (Footnotes omitted and my emphasis.)

[78] It becomes apparent that if this was genuinely a panel arrangement, the municipality would have invited all panel members to submit quotations when VIP services were required and appoint providers for as long as the need persisted. That is not what occurred. Instead, the municipality issued quotation requests with specified requirements to only some tenderers and then contracted with a single panel member. The municipality has not provided any reasonable or justifiable basis for favouring certain tenderers to the exclusion of others. I am, accordingly, of the view that the implementation of a panel system in this tender is inconsistent with procurement legislation, unlawful and unconstitutional, and should be reviewed and set aside.

[79] The Constitutional Court in *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer, South African Social Security Agency, and Others* has held that:[10]

'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 [the tender awarding body] may disregard at whim. To hold otherwise would undermine the demands of equal treatment, transparency

[9] *South African National Roads Agency Ltd v Toll Collect Consortium* [2013] ZASCA 102; 2013 (6) SA 356 (SCA) para 20.
[10] *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer, South African Social Security Agency, and Others* [2013] ZACC 42; 2014 (1) SA 604 (CC) (*Allpay*) para 40.

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 in place or that deviations will necessarily result in procedural unfairness. But it does mean that, where administrators depart from procedures, the basis for doing so will have to be reasonable and justifiable, and the process of change must be procedurally fair.' (Footnotes omitted.)

[80] The municipality conceded 'that most, if not all' of the requirements in the tender document were not complied with and that the appointments of the service providers were not valid. The municipality has admitted that the seventh, fifteenth, sixteenth, eighteenth, twentieth and twenty-second respondents ought never to have been appointed to the panel, and also conceded that the appointments of the third, fourth, fifth, sixth and seventeenth respondents as service providers are unlawful and invalid.

[81] Mr *Rall*, appearing for the respondents, argued that although certain tenderers were incorrectly appointed to the panel, such irregularity did not result in the entire process being unlawful. I do not agree with this contention. It was apparent throughout the tender process that fairness, transparency and objectiveness were simply ignored. These irregularities were material and commenced with the BAC usurping the functions of the BEC, then continued with the respondents' failure to justify several of the appointments onto the panel, and the respondents' failure to justify the use of a panel when the value of the tender for security services exceeded R200 000, and where such services were always known. It is clear that the respondents have failed to justify the use of a panel, albeit that it belatedly relied on an unsigned internal SCMP in answer.

[82] The respondents' reliance on the SCMP could have been put forth at any time before the application was launched and through correspondence or through the record of review proceedings. The respondents provided no reason why it did not form part of the record. I find, in any event, that its reliance on such a policy is misplaced in circumstances where the SCMP it places reliance upon is not consistent with the peremptory requirements of section 112 of the MFMA read together with the SCM Regulations.

[83] The applicant also argued that innocent parties are not permitted to benefit from an unlawful contract.[11] It contended that where a contract is set aside, two principles apply: the corrective principle, which states that neither party should benefit from what was performed under the contract and the 'no-profit-no-loss' principle, which states that parties should neither benefit nor suffer a loss because of the invalidation of an unlawful contract.

[84] In support of this contention, Ms *Olsen* sought to place reliance on *Allpay,* where the Constitutional Court held:[12]

'There is a further consideration...deviations from fair process may themselves all too often be symptoms of corruption or malfeasance in the process. In other words, an unfair process may betoken a deliberately skewed process. Hence insistence on compliance with process formalities has a threefold purpose: *(a)* it ensures fairness to participants in the bid process; *(b)* it enhances the likelihood of efficiency and optimality in the outcome; and *(c)* it serves as a guardian against a process skewed by corrupt influences.'

[85] I have taken into account the municipality's attempts to minimise the extent of its admitted errors when it placed reliance on the expiry of the contracts. The applicant contends that the law requires that no party should benefit from an unlawful agreement. The applicant contended that the appropriate remedial action is to set aside the contracts and order the recovery of profits earned by the unlawful beneficiaries. I do not agree that there should be an order for recovery of profits. The claim for recovery of profits arose for the first time in the applicant's heads of argument. I am therefore in agreement with Mr *Rall's* argument that the applicant is not permitted to seek relief for the first time in its heads of argument where such relief affects the other respondents who chose not to oppose the application based on the relief sought in the initial notice of motion and the subsequently amended notice of motion. Based on the aforesaid reasons, I do not find that it is a just and equitable remedy to order

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[11] *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer, South African Social Security Agency and Others* [2014] ZACC 12; 2014 (4) SA 179 (CC) para 67; *Siyangena Technologies (Pty) Ltd v Passenger Rail Agency of South Africa and Others* [2022] ZASCA 149; 2023 (2) SA 51 (SCA) para 44; *Central Energy Fund Soc Ltd and Another v Venus Rays Trade (Pty) Ltd and Others* [2022] ZASCA 54; 2022 (5) SA 56 (SCA) (*Central Energy Fund*) para 42.

[12] *Allpay* para 27.

the recovery of profits earned by tenderers who performed in terms of the respective contracts.

[86] In addition, there is no evidence that those tenderers who provided quotations and whose quotations were accepted did not provide the required security services and fulfil their respective obligations under the contract. There is, further, no evidence that the tenderers who did render services were complicit in the invalid tender process.

[87] In *Central Energy Fund*,[13] the court also emphasised that:

'The law draws a distinction between parties who are complicit in maladministration, impropriety, or corruption on the one hand, and those who are not, on the other. The category into which a party falls has a significant impact on the appropriate just and equitable remedy that a court may grant. Parties who are complicit in maladministration, impropriety or corruption are not only precluded from profiting from an unlawful tender, but they may also be required to suffer losses.'

[88] The approach I take is consistent with that followed in *Special Investigating Unit v Phomella Property Investments (Pty) Ltd and Another*:[14]

'A careful and contextual reading of *Allpay 2* thus shows that the Constitutional Court did not hold that a party could derive no benefit from an unlawful contract. The approach in *Allpay 2* of allowing a party to retain payments, and thus to benefit, under an unlawful contract has been echoed in a number of matters. One such example is found in *Buffalo City*, where the majority in the Constitutional Court held:

> "I therefore make an order declaring the Reeston contract invalid, but not setting it aside so as to preserve the rights to [which] the respondent might have been entitled. It should be noted that such an award preserves rights which have already accrued but does not permit a party to obtain further rights under the invalid agreement."

There, too, the contractor had performed its obligations under the contract. The Constitutional Court held that the contractor was entitled to payment for the work which had been done.' (Footnotes omitted.)

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[13] *Central Energy Fund* para 42.

[14] *Special Investigating Unit v Phomella Property Investments (Pty) Ltd and Another* [2023] ZASCA 45; 2023 (5) SA 601 (SCA) para 18.

[89] It is clear that the municipality's conduct during the tender process, after the tender process and in this review application, has been inadequate and dilatory. It constantly failed to respond to the applicant's request for documents. It filed an approximately 8 000-page record two months after the review application was delivered. It should have considered the documents in its possession, which disclosed glaring material irregularities and should have brought an application to review its decisions. Although the municipality was requested to produce its SCMP both in an April 2024 letter and in the founding affidavit, it only provided an unsigned copy when it filed its answering affidavit. It then submitted a supplementary record without any condonation application, which is not permitted in terms of the Uniform rule 53.

[90] Rule 53(1)*(b)* provides that a decision maker must file the record of the decision made within 15 days of receipt of the notice of motion. Thereafter, the applicant is entitled to amend the notice of motion and file a supplementary founding affidavit. I agree with the applicant's submissions that compliance with the time frames in rule 53 and providing a complete record are not merely procedural processes but are substantive requirements, which are aimed at ensuring that the substance of the decision under review is available at an early stage of the review process.[15] The municipality ignored the rules of court and its conduct had frustrated the process of review.

[91] The obligation on the part of the State to respect the law equally applies to an organ of state. The duty to comply with procedural requirements is aptly outlined in *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd*,[16] where the court stated:

'[60] This court has repeatedly stated that the state or an organ of state is subject to a higher duty to respect the law. As Cameron J put it in *Kirland*:

> "(T)here is a higher duty on the state to respect the law, to fulfil procedural requirements and to tread respectfully when dealing with rights. Government is not an indigent or bewildered litigant, adrift on a sea of litigious uncertainty, to whom the

[15] *Helen Suzman Foundation v Judicial Service Commission* [2018] ZACC 8; 2018 (4) SA 1 (CC) paras 13-17.

[16] *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd* [2019] ZACC 15; 2019 (4) SA 331 (CC).

> courts must extend a procedure-circumventing lifeline. It is the Constitution's primary agent. It must do right, and it must do it properly."

[61] In *Khumalo*, it was explained that the standard against which a state litigant's conduct is measured is high and ought to accord with the prescripts of the law. In *Merafong*, it was stated that it is the duty of state litigants to rectify unlawful decisions:

> "This court has affirmed as a fundamental principle that the state should be exemplary in its compliance with the fundamental constitutional principle that proscribes self-help. *What is more, in Khumalo, this court held that state functionaries are enjoined to uphold and protect the rule of law by, inter alia, seeking the redress of their departments' unlawful decisions. Generally, it is the duty of a state functionary to rectify unlawfulness.* The courts have a duty to insist that the state, in all its dealings, operates within the confines of the law and, in so doing, remains accountable to those on whose behalf it exercises power. Public functionaries must, where faced with an irregularity in the public administration, in the context of employment or otherwise, seek to redress it."' (Footnotes omitted and formatting as in the original text.)

Costs

[92] It was clear that the respondents failed in their duty to follow a fair, transparent and objective procurement process. It persisted with its opposition on the basis of an internal policy, belatedly raised after the filing of the review record, knowing that such policy pertaining to appointments of panels was inconsistent and contrary to enabling legislative provisions of s 112 of the MFMA and the SCM Regulations.

[93] In addition, the respondents also attempted to be obstructive in raising a point *in limine* in opposition, which was without merit, and which necessitated the applicant having to deal with it in reply and in written argument. The most glaring aspect of the municipality's unbecoming conduct, acting as an organ of state, was its refusal to attend to the applicant's queries during and after the tender appointments. The spate of errors in the tender process is indicative of a complete lack of efficiency on the part of the municipality. The respondents' conduct in failing to explain and properly justify material irregularities in the tender process and appointments is more than evident in the responses provided in the answering affidavit.

[94] Whilst I have considered the respondents' many failures as aforesaid, their non-compliance with the rules, and the delays in providing a full record, there is no

evidence that the municipality's conduct was wilful, grossly negligent or that it was motivated by bad faith. I accordingly exercise my discretion against granting a punitive costs order. In the circumstances, I am nevertheless satisfied that the nature of the issues was complex, and that there is no reason to deviate from the principle that costs should follow the result in the circumstances of this matter.

Order

[95] In the result, I make the following order:

1. The first respondent's decision to allocate work to the third to sixth respondents in respect of Bid Number A013-2023/24 for the appointment of a panel for the provision of security guarding services at various Newcastle Municipality's premises, including VIP protection services, for a period of 36 months (the tender) is hereby reviewed and set aside.

2. It is declared that any contract/s or service level agreement/s concluded between the first and the third to sixth respondents pursuant to the decision in paragraph 1 above are invalid, unlawful, unconstitutional and void *ab initio*.

3. The first respondent's use of a panel for the appointment of security service providers is declared invalid, unlawful, and unconstitutional.

4. On an interim basis, and pending the first respondent's compliance with a valid tender process, the first respondent is directed to:

4.1 conduct a full adjudication on price, as required by the 80/20 preference points system stipulated in the tender, alternatively the 90/10 preference points system on the basis of the value of the tender; and thereafter

4.2 allocate work in a fair, transparent and cost-effective manner to all qualified tenderers in accordance with the tender.

5. The first respondent is ordered to pay the costs of the application on scale C.

[redacted]

D PILLAY AJ

Heard on: 7 November 2025
Delivered on: 13 March 2026

Appearances

For the applicant: Ms LK Olsen
Instructed by: Calitz Crockart & Associates Inc.
Locally represented by: Austen Smith Attorneys

For the first and second respondents: Mr A Rall SC
Mr JW Temlett
Instructed by: TJ Mphela Attorneys Inc.
Locally represented by: Yashica Attorneys