



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED: YES

30/3/2026

DATE

[Redacted Signature]

SIGNATURE

CASE NO.: 099915/2025

In the matter between:-

CONTOUR TECHNOLOGY (PTY) LTD

Applicant

v

THE NATIONAL TREASURY

First Respondent

THE MINISTER OF FINANCE N.O.

Second Respondent

**THE MINISTER OF COOPERATIVE GOVERNANCE
AND TRADITIONAL AFFAIRS**

Third Respondent

KWADUKUZA LOCAL MUNICIPALITY	Fourth Respondent
THE MUNICIPAL MANAGER: KWADUKUZA LOCAL MUNICIPALITY	Fifth Respondent
AFRICAN METERING SOLUTIONS (PTY) LTD	Sixth Respondent
CIGICELL (PTY) LTD & UTILITIES WORLD (JV)	Seventh Respondent
CONLOG (PTY) LTD	Eighth Respondent
ISANDISO PROPERTIES & ENGINEERING	Ninth Respondent
LANDIS + GYR (PTY) LTD	Tenth Respondent
MTN (PTY) LTD	Eleventh Respondent
VODACOM (PTY) LTD	Twelfth Respondent
ONTEC (PTY) LTD	Thirteenth Respondent

Heard on: 10-11 February 2026

Delivered: 30 March 2026 - This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to the *CaseLines* system of the GD and by release to SAFLII. The date and time for hand-down is deemed to be 14:00 on 30 March 2026.

Summary:

1. Review in terms of PAJA not properly pleaded; non-joinder of the municipalities who have a direct and substantial interest in the matter is fatal; non-compliance with Section 7(2) of PAJA an application for exemption was compulsory, and *Biowatch* principle not applied.

ORDER

It is ordered:-

1. The application is dismissed.
2. The applicant is ordered to pay the cost of the respondents on Scale C, which costs are for two counsel, where so employed.

JUDGMENT

KOOVERJIE J**Review**

- [1] In this review, the applicant, Contour challenged the decision taken by National Treasury to utilize the transversal contract in respect of RT29-2024 ("RT29 contract") (concluded between National Treasury and the sixth to twelfth respondents (the successful bidders)).
- [2] Contour's case is that the decision to utilize the RT29 contract is unlawful and should be set aside.

- [3] For the purposes of this judgment the applicant will be referred to as “Contour”, the first and second respondents as “National Treasury”, the Vodacom Consortium would be referred to as “Vodacom” and the fourth and fifth respondents will be referred to as “the Municipality”.
- [4] As per the initial notice of motion, Contour sought both declaratory and interdictory relief, namely:
- 4.1 declaratory relief to the effect that the transversal contract (RT29 contract) may not be used by public entities in the national, provincial and local spheres of government to procure the impugned services;
 - 4.2 the review and setting aside of the following decisions were based on a declaration that the decisions are unlawful, irrational and are unconstitutional;
 - 4.2.1 National Treasury’s decision to permit the Municipality to use a transversal contract for the impugned services;
 - 4.2.2 the Municipality’s decision to utilize impugned services from Vodacom under the transversal contract; and
 - 4.2.3 any agreements concluded between the Municipality and Vodacom for purposes of utilizing the impugned services from Vodacom.
 - 4.3 An order interdicting and restraining the Municipality from concluding, implementing or further implementing any agreement with Vodacom for the utilization of the impugned services under the contract;

- 4.4 an order requiring National Treasury to instruct all public entities within 14 days of the court's order not to utilize the RT29 contract for procuring revenue management and prepaid electricity vending services;
- 4.5 an order suspending and setting aside the impugned decision for the period of 60 days to afford the Municipality to procure the prepaid vending services by any lawful means.

- [5] By virtue of its amended notice of motion, Contour further sought that the RT29 tender document be declared void for vagueness, unconstitutional, unlawful and should be set aside in respect of the procurement of revenue management and prepaid rendering services. In addition, it sought a declaratory order that the agreements with the Municipality and Vodacom or any other respondents to be unlawful, irrational and unconstitutional.
- [6] Vodacom took issue for being dragged into the litigation, specifically since no relief is sought against it. It took umbrage to the negative allegations made, *inter alia*, that Vodacom is reaping benefits from an unlawful appointment in terms of the unlawful procurement process.
- [7] Contour accepted the joinder of Macrocomm Group Limited ("Macrocomm"), Vodacom in submitting its bid, did so in partnership with Ontec Systems (Pty) Ltd (thirteenth respondent) and Macrocomm, known as the Vodacom Consortium. Cigicell (Pty) Ltd (seventh respondent) had partnered with Ontec as a third-party vending partner.

ISSUES FOR DETERMINATION

[8] After having considered the papers and having heard the arguments of all the parties, the issues for determination is distilled as follows:

- 8.1 whether a case on review has been properly pleaded;
- 8.2 whether there is merit on the non-joinder point;
- 8.3 whether Contour has standing to institute the review application;
- 8.4 whether Contour had complied with the requirements in terms of Section 7(2) of the Promotion of Administrative Justice Act 3 of 2000 (PAJA);
- 8.5 In the event that it is found the legal points are not unsustainable then the substantive issues for determination would include:
 - 8.5.1 whether the further affidavit of National Treasury is permitted;
 - 8.5.2 whether the review can be sustained on the merits and whether final interdictory relief has been made;
 - 8.5.3 whether the amendment effected by the applicant had lapsed.

Since the matter was subsequently heard as a third court matter I deem it unnecessary to make a pronouncement on urgency.

BACKGROUND

[9] The salient facts necessary to place the matter in perspective are summarized herein. Contour is in the business of providing actual vending systems that enables the vending of prepaid electricity to customers, which included the municipalities. Previously in 2022, Contour concluded a contract with the Municipality to provide prepaid vending and revenue management services.

- [10] At some point Contour learnt that National Treasury published the RT29 tender publication request for information on 14 March 2022. The closing date for this tender was 5 May 2022.
- [11] On 10 October 2023, RT29 contract was issued by National Treasury. Thereafter a briefing session was held and the closing date was 10 November 2023. The successful bidders in this tender were the sixth to twelfth respondents, namely African Metering Solutions (Pty) Ltd (AMS), CigiCell (Pty) Ltd, Conlog (Pty) Ltd, Isandiso Pipelines and Engineering (Pty) Ltd, Landis and Gyr (Pty) Ltd, MTN (Pty) Ltd and Vodacom (Pty) Ltd.
- [12] Contour was then advised by the Umgeni Municipality that it intended to use the RT29 contract to procure the same services that it had obtained from Contour. Contour nevertheless proceeded to submit its bid for the vending tender in 2024.
- [13] In parallel to the RT29 tender, the Kwadukuza Municipality issued its own tender in October 2024 to appoint a service provider for the supply, installation, and management of "An SDS Compliant Prepayment Electricity Vending System and Revenue Management" for a period of three years (the 2024 Vending Tender). Contour participated in its bid for the tender.
- [14] On 21 May 2025, the Municipality cancelled the bid pertaining to the 2024 vending tender. On 31 May 2025 Contour's contract with the Municipality to provide prepaid vending and revenue management services expired by the effluxion of time.

- [15] On 31 May 2025 became aware of the Municipality's announcement to use RT29 to procure services from Vodacom. On the same day Contour's contract with the Municipality to provide the vending and revenue, management services expired by the effluxion of time. Thereafter Contour, through various correspondences with the National Treasury's legal representatives, disputed the lawfulness of the RT29 contract and the procurement of the prepaid vending services.
- [16] On 1 June 2025 the Municipality appointed Vodacom as the service provider. On 19 June 2025, Contour issued a letter to National Treasury seeking confirmation that the RT29 tender did not include vending services, which were the very services that it was providing.
- [17] On 13 June 2025 Contour launched the Section 62 appeal against the Municipality's decision to use RT29 to procure prepaid vending services. On 30 June 2025, notwithstanding the internal appeal that had been instituted in terms of Section 62 of the Municipal Systems Act, Contour instituted this present application.
- [18] Its case is that the National Treasury acted unlawfully by utilizing the RT29 contract. It was not designed for the procurement of prepaid electricity vending services.
- [19] The respondents essentially contended that the procurement of electricity vending services was lawful and it formed part of the tender requirements to provide a smart meter solution and to offer value added services. National Treasury submitted that it was always its intention to procure an end-to-end smart metering solution that

was not just intended for the supply, delivery, installation and maintenance of a meter.

ANALYSIS

(i) Review in terms of PAJA

- [20] Contour's initial case was that National Treasury acted unlawfully in allowing the Municipality to utilize the RT29 contract, the Municipality further acted unlawfully in utilizing the RT29 for purposes for which it was not intended and the Municipality cancelled tender MN170/3034 so that it could utilize the RT29 contract. In so doing, the Municipality breached Contour's clear right to participate in a lawful tender process and enforce its right to just administrative action.
- [21] The respondents, particularly National Treasury, Vodacom, and the Municipality, have firstly taken issue with the relief sought by Contour. The thrust of their argument is that it is not clear whether Contour seeks judicial review of the decisions or declaratory relief that those decisions were unlawful. Although the relief is framed as declaratory relief, it is in effect a review in terms of PAJA. The specific prayer in the notice of motion seeking the suspension and setting aside of the impugned decisions implies that it seeks to review the decisions. Contour, in fact, acknowledged that the remedial provisions of PAJA can only be invoked once a ground of review under PAJA has been established.
- [22] Secondly, Contour has failed to plead a substantive case on review. It was argued that if Contour sought to review the administrative decisions of National Treasury

and the Municipality, it was required to make out a case in terms of PAJA. Contour attempts to remedy its case in its replying affidavit.

- [23] In particular it failed to plead the grounds of review under PAJA. Not a single ground in terms of Section 6 of PAJA was pleaded in order to sustain the review relief sought. It was argued that Contour cannot rely on general assertions of irrationality without properly pleading the review in terms of PAJA. Notably Contour attempted to remedy these inadequacies in its heads of argument.
- [24] It is trite that a litigant bringing motion proceedings before a court is required to make out its case in the founding affidavit, which infers that the factual and legal basis of the application is set out as well as the grounds of review. It cannot raise its grounds in the replying affidavit. The failure to make out a case in terms of PAJA is fatal. In such circumstances, Contour cannot be entitled to the relief on review.
- [25] The Supreme Court of Appeal in **Nwafor**¹ in upholding the proposition set out in **Tao Ying Metal Industry (Pty) Ltd v Pooe N.O. and Others** expressed:
- “Our courts do not allow applicants in review proceedings to raise new grounds of review in replying affidavits or from the bar during argument.”*
- [26] More recently, in **South African Farm Assured Meat Group CC**² the court affirmed the proposition set out in **Nwafor**. In the said matter it was faced with a

¹ Nwafor v Minister of Home Affairs and Others (1363/2019) [2021] ZASCA 58, paragraph 39

² South African Farm Assured Meat Group CC and Others v Langeberg Municipality and Others [2023] ZAWCHC 165, paragraphs 176 to 180

scenario where the applicant attempted to rely on grounds of review and advanced same only in the heads of argument. It expressed:

"In the heads of argument the applicants induce several grounds in support of the review application which had not been relied upon on the founding and supplementary founding affidavits ... This is not permissible. An application for review must be instituted within the prescribed time periods set out in Section 7 of PAJA. These grounds were introduced long after the expiry of that time period. The respondents, moreover, did not have to meet any challenge based on the new grounds of review at the time of the delivery of their answering papers. It is unfair to raise the grounds in the heads of argument for the first time ...In the circumstances, I refrain from determining this matter on any of these bases."³

[27] Contour finds itself in a similar position. A case for review was only set out in its heads of argument. Contour in its founding and replying papers failed to make out a substantive case on review. Only fleeting references were made to PAJA. No grounds to challenge the decisions in terms of Section 6 were pleaded.

[28] Clearly the respondents were prejudiced. They were not afforded an opportunity to address the grounds raised in their respective answering papers and were not appraised with the case they had to meet.

[29] In its founding papers, Contour alleged that it enforced its rights in terms of Section 33 and Section 217 of the Constitution. It was correctly argued by Vodacom that

³ My emphasis

these provisions do not confer a right of review. Even if Contour contended that its administrative justice rights protected by Section 33 have been breached, it was obliged to have based its cause of action in terms of PAJA.⁴ Similarly Section 217 in itself does not confer any review rights. Contour was required to have instituted a review in terms of PAJA.

- [30] This is aligned to the subsidiary principle. In essence it prescribed that where legislation is enacted in order to give effect to a constitutional right, a litigant cannot bypass the relevant legislation and rely directly on the Constitution or on the common law, without challenging the validity of that legislation. PAJA is the constitutionally mandated legislation and designed to give effect to Section 33 on both substantive and remedial basis. Litigants cannot bypass the provisions of PAJA.⁵

⁴ S 33 reads:

- “1. Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.
2. Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.
3. National legislation must be enacted to give effect to these rights, and must
 - a. provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;
 - b. impose a duty on the state to give effect to the rights in subsections (1) and (2); and
 - c. promote an efficient administration.

S 217 reads

- “1. When an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective.
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 discrimination.
3. National legislation must prescribe a framework within which the policy referred to in subsection (2) must be implemented.”

⁵ Esorfranki Pipelines (Pty) Ltd v Mopani District Municipality 2023 (2) SA 31 CC at 44 - 50

- [31] It was highlighted that Contour only seeks to challenge decisions of National Treasury and the Municipality respectively. As there is no challenge to Vodacom's appointment, no legal basis was established for an order that the Municipality may not receive the services from Vodacom in terms of the RT29 contract.
- [32] The "vagueness" ground of review was only raised in the replying affidavit. As an alternative remedy, Contour argued that it did not participate in the RT29 tender process because the terms of the tender were vague and on its reading, the tender did not include the prepaid vending and the revenue management services.
- [33] Contour on its version alleged, "the vagueness ground" was necessary to meet the responses of the respondents to the effect that RT29 falls to be interpreted to include the services which Contour tendered for under MN170 tender. Notably this new ground is materially different to the challenge initially sought in its founding papers. The introduction of this belated ground, in my view, is illustrative of the fact that Contour attempted to develop its case as it went along in the proceedings.
- [34] The Municipality consequently pointed out that there was no need for the guesswork that Contour endured. If Contour had proceeded with the review in terms of Rule 53, it would have been better placed to determine its case on review as it would have had the benefit of the record, which would have included the reasons for the decisions taken.

- [35] It was further contended it was impermissible to review a tender document. PAJA is there to review administrative actions, which is the form of decisions. At the core of the definition of administrative action is the idea of action (a decision) of an administrative nature taken by a public body or functionary.⁶
- [36] Of significance is that during argument in reply, Contour, in appreciating that it had failed to properly plead its case on review, sought declaratory relief, namely- that the RT29 contract should not be utilized by public entities for the purpose of procuring revenue management and prepaid electricity vending services (Prayer 1 of the Notice of Motion).
- [37] I find the reasoning proffered and request to be fatally flawed. The declaratory relief sought can only be granted if the impugned decisions are set aside.⁷ Until then the decisions remain in existence. There may however be instances when declaratory orders can stand on their own. This is not such a case. In these circumstances the decisions have to be set aside on review before such declaratory relief can be granted.

⁶ Minister of Defence and Military Veterans v Motou and Others 2014 (5) SA 69 CC at 33
Bhugwan v JSE Ltd 2010 (3) SA 335 GSJ

⁷ Oudekraal Estates (Pty) Ltd v City of Cape Town and Others 2004 (6) SA 222 (SCA) at paragraph 20

The court expressed:

“Until the administrator’s approval (and this also the consequences of the approval) is set aside by a court in proceedings for judicial review it exists in fact and it has legal consequences that cannot simply be overlooked...”

[38] Clearly, Contour has failed to present a competent application on review. An applicant in a review is requested to identify the facts and the grounds upon which it relies in terms of PAJA.⁸ This was fatal for Contour.⁹

(ii) Non-joinder issue

[39] It was argued that the municipalities have a direct and substantial interest in these proceedings. Contour was, at all relevant times, well versed with this fact. Contour sought an order declaring that the RT29 contract may not be used by public entities in the national, provincial and local government spheres for the purposes of procuring revenue management and prepaid vending services. Contour further sought an order directing National Treasury to instruct other municipalities not to use the RT29 contract for the purposes it was intended for.

[40] Contour, on its own version, pleaded in paragraph 73:

“Contour has reason to believe that other municipalities and public entities may follow suit as well and utilize RT29 unlawfully for the procurement of prepaid vending services. For this reason, Contour seeks a declaration that the RT29 contract may not be utilized for purposes of procuring prepaid vending services. It also seeks an order directing National Treasury to issue an instruction to all public entities to that effect.”

⁸ Medihelp Medical Scheme v Minister of Finance NO JDR 1391 (SCA), par 28, the court expressed:

“The further problem is that the appellants have not indicated on these papers on which review ground they would rely ... A litigant is obliged to name the grounds unless it appears clearly from the papers.”

⁹ Cassim v Gauteng Provincial Legal Practice Council and Others (2025) ZAGPPHC 1277 (2 December 2025)

[41] In paragraph 81 it pleaded:

“Moreover the declaration will direct the conduct of other municipalities which may be considering the use of the RT29 contract to procure prepaid electricity vending services”

[42] The Municipality illustrated that the affected municipalities and/or the South African Local Government Association (SALGA) should have been joined in these proceedings.

[43] Contour's view is that SALGA does not have legal interest in the relief sought in this application as its role is to promote and protect the interest of local government in inter-governmental system, transform local government to enable it to fulfil its developmental role and so forth. Furthermore the non-joinder point has no merit since Vodacom has not explained the nature of the alleged interest that SALGA has. It merely states that SALGA has an interest in representing it.

[44] In my view, Contour's reasoning is flawed. SALGA is the umbrella body representing the interests of the municipalities. It was explained that SALGA represents some 257 municipalities in the country. It is a national voluntary association that represents municipalities and their interests among other things. SALGA is clearly mandated to represent municipalities in matters of this nature. It

has done so in various court proceedings, in its oversight role representing the interest of municipalities nationwide.¹⁰

[45] SALGA's role has been identified as follows¹¹:

"The South African Local Government Association (SALGA) is a constitutionally mandated organization responsible for local government oversight. SALGA performs true strategic roles within the system of government: as protector, robustly enforcing the rights of the local government sector and constructively disrupting areas of existing systems that make it impossible for local government to deliver on its mandates... In terms of its amended Constitution, SALGA is a unitary body that consists of a national association of 9 provincial offices. SALGA has a clear strategic role to play in representing the interests of local government within the system of government as a whole, on the one hand, and supporting its members to fulfil developmental obligations on the other"

[46] There can be no doubt that National Treasury's decision to procure the RT29 contract affected various municipalities. They have a direct interest in the matter and ought to have participated in these proceedings. The relief sought by Contour is undoubtedly far-reaching and cannot be granted in the absence of the municipalities who would be affected.

¹⁰ In *South African Local Government Association versus AfriForum NPC* (leave to appeal) 2024 JDR 3650 GP, 19 August 2024, where SALGA made representations that municipalities could not afford to supply electricity if they do not charge on the inflated tariffs.

¹¹ National Government of South Africa's website

- [47] The Constitutional Court in **SA Riding for the Disabled Association**¹² gave meaning to the word “direct and substantial interest” and expressed:

“What constitutes a direct and substantial interest is the legal interest in the subject-matter of the case which could be prejudicially affected by the order of the Court. This means that the applicant must show that it has a right adversely affected or likely to be affected by the order sought. But the applicant does not have to satisfy the court at the stage of intervention that it will succeed. It is sufficient for such applicant to make allegations which, if proved, would entitle it to relief.”

- [48] It has been disputed that there are over 52 municipalities who were approved to utilize the bundle services offered by Vodacom in terms of the RT29 contract, which included prepaid electricity vending services at no additional cost to them. Whether or not any of these municipalities had already exercised their rights does not detract from the fact that the relief sought and if granted would adversely impact their right to do so.

- [49] Contour reasoned that it does not seek relief against the other municipalities. The only municipality it seeks relief against is the fourth respondent, that is the Kwadukuza Local Municipality, which according to Contour, was the only Municipality using the RT29 contract unlawfully. It further explained, the letter from its attorney dated 19 June 2025, should not be taken to mean that Contour had knowledge of specific municipalities other than the KwaDukuza municipality.

¹² SA Riding for the Disabled Association v The Regional Land Claims Commissioner and Others 2017 (5) SA 1 (CC) 2008 (6) SA 533 SCA at paragraph 9

[50] I find Contour's reasoning to be in conflict with the relief it sought and in contradiction to its concession that other municipalities would also be utilizing the RT29 contract. The challenge regarding the RT29 contract is against National Treasury. Any court order made pertaining to National Treasury's decision to utilize the RT29 contract would most certainly affect the other municipalities, all 52 of them. Contour alleged that there may be other municipalities who may utilize the RT29 contract and therefore it seeks a mandamus compelling National Treasury to issue a directive to all public entities and instructing them not to do so.

[51] There is clearly merit on the issue of non-joinder and the failure to join the relevant parties, in this case SALGA alternatively the municipalities, is procedurally fatal to the application.

(iii) Contour's standing

[52] Contour's standing has been placed in dispute. It was argued that Contour only had standing to challenge the Municipality's decision to cancel the 2024 vending tender. It had no standing to impugn a tender process where it had not participated in.

[53] In its founding papers, Contour alleged that it has direct and substantial interest in the protection of its rights to participate in a fair, transparent, and competitive tender process. Its rights have been violated by the Municipality's unlawful utilization of the RT29 contract.

[54] In its replying papers it extrapolated that:

- 54.1 it has standing by virtue of Section 38 of the Constitution, which gives a broad standing in enforcing its rights in terms of the Constitution.¹³ Any party acting in its own interest may approach a competent court, for the appropriate relief;
- 54.2 Contour alleged in terms of Section 21(1)(c) of the Superior Courts Act, it participates in this litigation as an interested person who is entitled to the declaratory relief sought. Section 21(1)(c) makes provision for any interested person to ask the court to enquire into and determine any existing, future or contingency right or obligation even if such person cannot claim any relief consequential upon the determination;
- 54.3 consequently as an own interest litigant, it merely has to show that the decision it sought to attack had the capacity to affect its own legal rights or interest.¹⁴ It has standing because the decision taken by the Municipality to award the tender to Vodacom had a direct impact upon its interest. The issue of standing must be determined without regard to whether the impugned decisions were valid or not;¹⁵
- 54.4 at the very least it has a prospective or contingent right – contingent upon the Municipality making a determination whether any grounds for deviation from the open bidding process exists. It further alleged that its interest transcend that which the public in general may have in a tender;¹⁶

¹³ Section 38 stipulates”

“Anyone listed in this section has the right to approach a competent court alleging that a right in the Bill of Rights has been infringed or threatened, and the courts may grant appropriate relief, including a declaration of rights. The persons who may approach a court are:

a) anyone acting in their own interest;
b) anyone acting on behalf of another person who cannot act in their own name.”

¹⁴ Hoexter and Penfold Administrative Law in South Africa, 3rd Edition, page 665

¹⁵ WDR Earthmoving Enterprises v Joe Gqabi District Municipality & Others [2018] ZASCA 72 (30 May 2018) at paragraph 15

¹⁶ In terms of Regulation 19 of the MFMA SCM Regulations

54.5 Contour contended that though this application is intended to protect its commercial interest, that its case was also to put a stop to the Municipality's unlawful conduct in utilizing the RT29 contract.

[55] The respondents argued to the contrary. In essence they contended that:

55.1 Firstly Contour certainly had the standing to challenge the Municipality's cancellation decision. It participated in the 2024 vending tender and followed the necessary legal processes to have its contractual relationship with the Municipality preserved. The cancellation decision remains valid until set aside. However, Contour elected not to challenge the decision of the Municipality to cancel the 2024 vending tender and its failure to do so infers that the Municipality's decision is taken to be lawful and final. One of the main components of an administrative action is that the challenged decision "adversely affects the rights of any person."¹⁷ Contour always had the right under administrative law in respect of the Municipality's 2024 tender. Since the contract had expired by the effluxion of time, Contour held no legal interest in the Municipality's procurement decision since the expiry;

55.2 Secondly Contour's challenge in respect of the RT29 contract does not give it standing. Contour retained no legal interest in the decisions of National Treasury to allow the Municipality to participate in the RT29 contract or the decision of the Municipality to seek permission to use the RT29 contract. It has no right or legitimate expectation to participate in any future tender process in relation to revenue management and prepaid electricity vending services. It never submitted a bid. In the RT20 tender;

¹⁷ Section 1 of PAJA

- 55.3 Thirdly Contour's application has always been one based on its own commercial interest. Contour never alleged in its founding affidavit that the interest standing arose by virtue of it being an interested person in terms of Section 21(1)(c) of the Superior Courts Act or Section 38 of the Constitution;
- 55.4 Fourthly even if it intends to feature as an own interest litigant, it has to demonstrate that its interest or potential interests are directly affected by the unlawfulness sought to be impugned;¹⁸
- 55.5 Fifthly Contour's "vagueness argument" was an afterthought and belatedly raised only in the replying affidavit. Contour had not even attempted to lead evidence to show that it would have tendered for RT29 if it had not been misled by the description of the tender in public notifications and advertisements;
- 55.6 Lastly it never asserted that it had a public interest standing.

[56] Section 38 of the Constitution provides for standing in constitutional matters. The Constitutional Court in **Giant Concerts** confirmed that the correct approach is to read the provisions of section 38 into PAJA. In effect, a ground of review in PAJA has been triggered to vindicate the Section 33 rights and this attracts the protection of Section 38.¹⁹

[57] More specifically, in respect of Section 38(a) of the Constitution, the majority judgment in **Ferreira**²⁰ effectively did away with the requirement that the interest must be personal to the complainant. It recognised the applicants interest in challenging a

¹⁸ Giant Concerts CC v Rinaldo Investments (Pty) Ltd 2013 (3) BCLR 251 (CC) at paragraphs 33-34

¹⁹ Hoexter and Penfold, supra page 665

Giant Concerts CC v Ronaldo Investment Pty Ltd 2013 (3) BCLR 251 CC at paragraph 29

²⁰ Ferreria v Levin NO 1996 (1) SA 984 CC (Ferreira)

statutory provision that, viewed objectively, infringed the right to a fair trial, even though the applicants were not themselves accused persons being tried.

- [58] The applicants in the said matter did not have to show that their offending statutory provision actually infringed their constitutional rights. They were directly affected in the sense that the provision had a direct bearing on their common law rights and because non-compliance with it had possible criminal consequences.
- [59] In **Giant Concerts** the court confirmed Ferreira and outlined that to establish own interests standing under Section 38 a litigant must show that its interest or potential interest are directly affected by the law or conduct being challenged. In this instance, Contour persisted that because of the decision taken by the Municipality to award the tender to Vodacom it had a direct impact upon its interest.
- [60] In broaching this subject, I am mindful that it is in the interest of justice by virtue of the Constitution, that courts should be hesitant to dispose of cases on “standing” alone *“where broader concerns of accountability and responsiveness may require investigation and determination on the merits”*. It may be that the interest of justice or the public interest might compel a court to scrutinise action even if the applicant standing is questionable.²¹
- [61] It cannot be gainsaid that our courts have enjoined a generous interpretation to Section 38(a) in that it does not require a litigant to demonstrate that its own constitutional right

²¹ Giant Concerts supra paragraph 35 2022 (1) SA 424 SCA at paragraph 34

has been infringed. What the section requires is that the person should make the challenge in its own interest.

- [63] In the present circumstances, Contour makes it's bed in terms of Section 38 and further contended that its interest "*transcended that which the public in general may have in the tender*".
- [63] Contour in relation to the vagueness of review relied on the proposition set out in **All 4 Security**²² where the court held that the applicant who had not submitted the bid nevertheless had standing to challenge the tender on the grounds that the advertisement did not clearly simply specify the nature of the services to be acquired. Similarly, it is Contour's case that the RT29 tender did not sufficiently clarify that the services it was rendering were included in the tender.
- [64] I am of the view that, it would be inappropriate to dispose of this issue in *toto*. Contour may have standing if the ground of void for vagueness is found to have merit. The decision if it has "standing" will ultimately be dependent on the outcome of the merits, which I did not proceed to interrogate due to the fatal procedural irregularities identified in this matter.

(iv) Internal remedies

- [65] It is common cause that Contour instituted an appeal in terms of Section 62 of the Municipal Systems Act which was not followed through, Contour instead proceeded with this review application. National Treasury raised the point that this application was

²² All 4 Security Services *supra* at paragraph 45

instituted prematurely as the applicant was required to exhaust the Section 62 internal remedy in terms of Section 7(2) of PAJA.

[66] Contour's defence in the main was that:

66.1 it never challenged the cancellation decision of the Municipality, either in these proceedings, or in the Section 62 appeal process. There was therefore no obligation for it to exhaust the internal appeal process regarding the cancellation decision. The relief sought on appeal was firstly that the decision to procure prepaid electricity vending services in terms of the RT29 contract be revoked, and secondly, that the Municipality be directed to furnish written reasons for its decision to cancel Tender MN170;

66.2 with reference to **Koyabe**,²³ Contour's view remained that a court may permit a litigant to approach the court directly and that the availability, the effectiveness, and the adequacy of the existing internal remedies are vital factors in determining when an applicant was obliged to first exhaust the internal remedies.²⁴

[67] The provision of Section 7(2) of PAJA, creates an obligation on applicants to exhaust all internal remedies before a court or tribunal may review any administrative action. It stipulates:

"(2)(a) Subject to paragraph (c), no court or tribunal shall review an administrative action in terms of this Act unless any internal remedy provided for in any other law has first been exhausted."

²³ Koyabe v Minister of Home Affairs 2010 (4) SA 327 (CC) at paragraphs 38 & 39

²⁴ Koyabe *supra* paragraph 45

- (b) *Subject to paragraph (c), a court or tribunal must, if it is not satisfied that any internal remedy referred to in paragraph (a) has been exhausted, direct that the person concerned must first exhaust such remedy before instituting proceedings in a court or tribunal for judicial review in terms of this Act.*
- (c) *A court or tribunal may, in exceptional circumstances and on application by the person concerned, exempt such person from the obligation to exhaust any internal remedy if the court or tribunal deems it in the interest of justice."*

[68] The salient guidelines outlined in the seminal judgment of **Koyabe**²⁵ are that:

- 68.1 a review is prohibited if the internal remedies prescribed legislatively have not been exhausted. The court is obliged to turn the applicant away if it is not satisfied that internal remedies have been exhausted;
- 68.2 an exemption can be granted in exceptional circumstances and only where it is in the interest of justice to do so;
- 68.3 the requirements in terms of Section 7(2) should not be rigidly imposed nor should administrators use it to frustrate the effects of an aggrieved person or to shield the administrative process from judicial scrutiny.

[69] It is evident that Contour had not sought the prescribed exemption. It merely, in passing informed this court that Section 62(3) of the Systems Act made it impermissible for it to persist with the internal appeal process.

[70] The propositions in law are settled. Internal remedies have to be exhausted before the matter can proceed on review, and exemption from exhausting the internal processes

²⁵ Koyabe v Minister of Home Affairs 2010 (4) SA 327 CC paragraph 34-47

may only be granted in exceptional circumstances. An exemption may be permissible if two requirements are met, namely the circumstances must be exceptional and the exemption must be in the interests of justice.²⁶

[71] What constitutes “exceptional circumstances”, would depend on the facts of the case and the nature of the administrative action. Courts must consider the availability, effectiveness and adequacy of the existing remedies.

[72] In my view, Contour fell short of meeting these jurisdictional requirements. It not only failed to plead a case for exceptional circumstances but failed to request the necessary relief for such exemption. Contour was obliged to seek this court's leave to be exempted from following through with the internal appeal. It can further not be disputed that the relief sought in the Section 62 appeal is effectively the same relief (together with additional relief sought).

[73] The principles enunciated in **Koyabe** have been endorsed by our courts over the years. In **Dengetenge** the court expressed:

“[119] In clear and peremptory terms, section 7(2) prohibits courts from reviewing “an administrative action in terms of this Act unless any internal remedy provided for in any other law has first been exhausted”. Where, as in this case, there is a provision for internal remedies, the section imposes an obligation on the court to satisfy itself that such remedies have been exhausted. If the court is not satisfied, it must decline to adjudicate the matter until the applicant has either exhausted internal remedies or is granted an exemption. Since PAJA applies to

²⁶ Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining and Development Company Ltd 2014 (5) SA 138 (CC) at paragraph 120

every administrative action, this means that there can be no review of an administrative action by any court where internal remedies have not been exhausted, unless an exemption has been granted in terms of section 7(2)(c)."

[74] The Constitutional Court in **Gavric**,²⁷ at paragraph 59 expressed:

"The applicant did not make an explicit application for exemption. However, his application in the High Court and in this Court, was brought under PAJA and sought to make out a case for exceptional circumstances that warrant this Court making a substitution order under section 8(1)(c)(ii) of PAJA."

[75] Even though **Gavric** expressed that there may be instances where the circumstances of the case is sufficiently exceptional to relax the requirements of a formal application, it reiterated that condonation had to be granted by the court and such condonation should in principle be sought.²⁸

[76] More recently, in the Supreme Court of Appeal in **Pine Glow**²⁹ once again pronounced:

"An internal remedy is effective if it offers a prospect of success and can be objectively implemented, taking into account relevant principles and values of administrative justice present in the Constitution and our law. It is available if it can be pursued without any obstruction, whether systemic or arising from unwarranted administrative conduct. It is adequate if it is capable of redeeming the complaint. Such an application to be exempted from the provision of PAJA is compulsory."

²⁷ Gavric v Refugee Status Determination Officer 2019 (1) SA 21 (CC) at paragraph 56 and 57

²⁸ Koyabe paragraphs 47, 48 and 56 Gavric v Refugee Status Determination Officer 2019 (1) SA 21 (CC) at paragraph 56 and 57

²⁹ Pine Glow Investments (Pty) Ltd v Minister of Energy 2025 (6) SA 474 SCA at paragraphs 62 and 63

- [77] Presently there is a pending internal appeal that has not been finalized. Contour has not sought leave of this court to be exempted, neither has it pleaded exceptional circumstances nor has it requested the necessary condonation relief. The authorities are clear that a determination of its matter on the merits should not be proceeded with if the exemption is not granted.
- [78] I have noted that Contour's main reason for not following through with the appeal process is that Section 62 of the Systems Act does not provide Contour with an effective or adequate remedy. On its interpretation, the appeal authority in the Section 62 process, in law, is not permitted to divest Vodacom as the successful tenderer in terms of the RT29 contract. Section 62(3) stipulates:
- "The appeal authority must consider the appeal, and confirm, vary or revoke the decision, but no such variation or revocation of a decision may detract from any rights that may have accrued as a result of the decision."*
- [79] Contour was required to properly address this exclusion as part of its exceptional grounds and further seek exemption. It is impermissible for this court to decide the merits before a condonation application seeking exemption from Section 7(2)(c) of PAJA is presented. I find that this application is procedurally defective on this ground alone.
- Conclusion**
- [80] This application was ill-fated since its inception. An attempt to develop its case throughout the proceedings illustrated that the review was wanting, procedurally in terms of PAJA. Even Contour's attempt, to seek the declaratory relief - that the RT29

contract should be utilized by public entities in respect of the specific vending and revenue management services, has been found not to be good in law.

[81] Contour has lamentably failed to plead a proper case for judicial review. It appears that Contour initially proceeded with an incompetent review application on an urgent basis and then sought to develop its case later in its respective affidavits. At least four affidavits were filed by Contour, which included the founding, replying, supplementary replying, and a further affidavit. Even after being cautioned for not failing to comply with Section 7(2) of PAJA, Contour persisted with this application.

[82] The non-joinder point has merit. It was always Contour's case to challenge National Treasury on the RT29 contract. On its own version, it was aware that other municipalities had also engaged with the RT29 contract. Contour was made aware in these papers that over 50 municipalities were utilizing the RT29 contract.

[83] In my view, the procedural defects pointed out are fatal. I deem it unnecessary to engage with the merits of the matter.

COSTS

[84] Contour submitted that this application was a genuine and *bona fide* attempt on its part to vindicate its constitutional and legal rights. Consequently, there is no reason for the court to express its displeasure by means of an adverse costs order. It contended that each party should be ordered to pay its own costs in the event that Contour is

unsuccessful. This is in accordance with the **Biowatch** principle.³⁰ The respondents, on the other hand, persisted with their view that if they are successful, costs should be awarded in their favour.

[85] Vodacom contended that the **Biowatch** principle should not assist Contour for the following reasons, namely:

- 85.1 it has not pleaded its case in terms of the **Biowatch** principle and neither does it plead the circumstances that should it be insulated from a cost order against it;
- 85.2 on the facts, **Biowatch** does not find application. This review was initiated to advance Contour's own commercial interests;
- 85.3 the review was fatally defective, did not comply with procedural and substantive requirements and constituted an abuse in the urgent court;
- 85.4 Vodacom is a private party and was forced to defend these proceedings. The **Biowatch** principle cannot find application in the circumstances.

[86] The Municipality aligned itself with Vodacom's submissions and took specific issue with the fatally defective application. It, however, sought punitive cost on an attorney and client basis. African Metering Systems also sought punitive cost order. I have noted that the six to thirteenth respondents were cited in their capacities as the successful bidders, and on the basis that they have a direct and substantial interest in the matter.

[87] **Biowatch** enunciated the general rule in litigation between a state and a private party seeking to vindicate its constitutional rights is that- if the state loses, it should pay the

³⁰ *Biowatch Trust v Registrar Genetic Resources and Others* 2001 (6) SA 232 CC

costs of the private party and if the state succeeds, each party should bear its own costs.³¹ However the principle is not rigid. There may be circumstances where a departure from this general principle is justified, particularly in instances where the litigation is frivolous or vexatious.

[88] **Biowatch** further cautioned that when genuine constitutional challenges are raised, a court should be cautious in awarding cost against a private party. But **Biowatch** also emphasized that the mere labeling of litigation as constitutional matters is not enough to avoid a cost order. The issues raised must be genuine, substantive and truly raised constitutional considerations relevant to the adjudication.

[89] In **Lawyers Forum for Human Rights**³² the Constitutional Court appreciated that courts should ultimately exercise their judicial discretion. It expressed:

"The Biowatch rule, of course does not mean risk free constitutional litigation. The court in its discretion might order costs. Biowatch said, if the constitutional grounds of attack are frivolous or vexatious- or if the litigant has acted from improper motives or there are circumstances that make it in the interest of justice to order costs. The High Court controls its process, it does so with a measure of flexibility, so a court must consider the "character of the litigation and [the litigants] conduct in pursuit of it" even when the litigant seeks to assist constitutional rights."

[90] In **Kini Bay Village Association**³³ at paragraph 17, Maya JA (as she then was) reiterated that:

³¹ Biowatch supra paragraph 22, and 24

³² Lawyers for Human Rights v the Minister in the Presidency and Others 2017 (1) SA 645 CC paragraph 18

³³ Kini Bay Village Association v The Nelson Mandela Metropolitan Municipalities 2009 (2) SA 166 SCA
My emphasis

“Whilst the Constitutional Court sometimes find it inappropriate to make cost awards lest they have as challenging effect on remedies of society wishing to vindicate their constitutional rights there is nonetheless no rule of thumb that a cost order will not be made in constitutional litigation.

In Affordable Medicines Trust v The Minister of Health Ngcobo J reiterated this position as follows:

“The general rule in constitutional litigation that an unsuccessful litigant ought not be ordered to pay cost... is not an inflexible rule. There may be instances that justify departure from this rule... the ultimate goal is to do that which is just having regard to the effects of the circumstances of the case. Indeed authorities abound in which both this court and the Constitutional Court, in keeping with the trite principle that cost should ordinarily follow the result, have made costs awards in matters in which the parties sought to invoke constitutional rights. Significantly in a number of those cases, private individuals were ordered to pay the cost of public authorities. Having due regard to the facts of this case and the principles of equity and fairness, there seems to be no reason in justifying a departure from the usual rule.”

- [91] Contour submitted that even if this court finds that it has a commercial interest in vindicating its constitutional rights, it should be afforded the protection in terms of **Biowatch**. In support for its proposition it relied on **SMEC**, where the court essentially held that **Biowatch** finds application even where the applicant has a strong commercial interest in vindicating its constitutional right. In **SMEC**³⁴ the court expressed:

³⁴ SMEC South Africa Pty Ltd v City of Cape Town [2022] ZAWCHC 131 23 June 2022, paragraph 143

"In addition to the constitutional dimensions inherent in all PAJA reviews, this case (like all tender reviews) concerns Section 217(1) of the Constitution and various enactments and municipal policies designed to give effect to it."

- [92] In exercising my judicial discretion, I am mindful that it must be exercised with the principles of equity and fairness in mind. **Biowatch** cautions the court to take cognisance of the fact that parties are entitled to vindicate their genuine constitutional rights.
- [93] The general rule is however not inflexible in circumstances where cost orders against a party is warranted. In **Fezi**³⁵ the court reaffirmed that the **Biowatch** principle does not deprive the courts of their discretion in awarding costs. Rather it serves as a guiding principle in constitutional litigation and the application of the principle is dependant on the circumstances of each case.
- [94] For the reasons set out above, I find reason to depart from the general principle enunciated in **Biowatch**. The various procedural irregularities have been addressed by the respondents in their respective papers, and which have merit. Contour nevertheless persisted with the hearing of the application.
- [95] It is just and equitable that Contour foots the bill. Ultimately the purpose of awarding costs to a successful party is to indemnify it for the expenses it incurred for defending this litigation.

³⁵ Fezi Consultants and Auditors (Pty) Ltd v Centlec (SOC) Ltd and Another (1318/2022) [2023] ZAFSHC 503 (5 December 2022), paragraph 13

- [96] The successful bidders in the tender, cited as the sixth to the thirteenth respondents, are private parties and are successful in this matter. There is no reason why the respondents, who participated in this litigation should not be entitled to their costs. However I do not deem it appropriate to grant punitive costs.
- [97] Similarly with regard of the state institutions, namely the National Treasury and the Municipality, the first, second, fourth and fifth respondents, Contour is ordered to pay the costs. The appropriate costs order is Scale C with costs of two counsel, where so employed.
- [98] In the premises, the review is dismissed with costs (as set above).


H. KOOVERJIE
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Appearances:

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Instructed by:

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Adv. J Temmet

Instructed by:

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Adv. I Veerasamy

Instructed by:

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Attorneys for the eighth respondent:

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Adv. NS Qwabe

Instructed by:

Adams & Adams, Pretoria

Date heard:

10-11 February 2026

Date of Judgment:

30 March 2026