

REPUBLIC OF SOUTH AFRICA



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

Case Number: 2024-097301

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: NO
<u>1 May 2026</u>	
DATE	SIGNATURE

In the matter between:

MADIBENG LOCAL MUNICIPALITY	Applicant
and	
SIZWE AFRICA IT GROUP (PTY) LTD	First Respondent
ASPRO CONSULTING (PTY) LTD	Second Respondent
SKHOMO TECHNOLOGIES (PTY) LTD	Third Respondent
COMPUTER INK AND MEDIA	
SOLUTIONS (PTY) LTD	Fourth Respondent
MASHCORP 2008 (PTY) LTD	Fifth Respondent
GALEBOE PROFESSIONAL SERVICES	Sixth Respondent

JUDGMENT

PILLAY, AJ

INTRODUCTION

- [1] The central feature of this application is RFP 72/10/2023/2024, a tender issued by the applicant, for the appointment of a service provider to provide the applicant with managed ICT services, managed security operations centre services and solutions and the provision of end-to-end ICT infrastructure on a lease or rental basis (*“the RFP”*). The tender was awarded to the first respondent (*“the impugned decision”*) and the first respondent was subsequently appointed to render the service stipulated in the RFP.
- [2] The applicant seeks an order that the impugned decision is declared unlawful, unconstitutional and is reviewed and set aside. The applicant relies on five grounds, and alleges that:
- a. The contract price at which the tender was awarded exceeded the budgeted amount. This contravened the applicable provisions of the Municipal Finance Management Act (*“the MFMA”*) and is unlawful.
 - b. The Bid Evaluations Committee (*“BEC”*) that evaluated the bids disqualified bidders but failed to specify the alleged non-compliance. The result was that the first respondent was left as the only qualifying bidder. Further, during the course of evaluating the bids, the score sheets were not used by the BEC.
 - c. The Bid Adjudication Committee (*“BAC”*) failed to apply its mind and simply rubber-stamped the decision of the BEC which is set out in the report by the BEC.
 - d. The applicant sought to enter into a Master Service Agreement (*“the MSA”*) with the first respondent, after it was awarded the tender. The MSA

provided for an automatic renewal of the MSA, which contravened the applicable legislative provisions applicable to procurement, as well as the applicant's procurement policy.

- e. The RFP is framed in such a manner that the first respondent will leave with the ICT infrastructure and could prevent the applicant from accessing the ICT network, upon expiration of the contract period. The RFP was not rationally connected to the purpose of the Digitisation Strategy developed by the applicant.

[3] The first respondent is the only respondent that opposed the application.

FACTUAL BACKGROUND

[4] The applicant developed a Digitisation Strategy (***"the Strategy"***) to implement information, communication, and technology solutions (***"ICT"***) improve service delivery, enhance efficiency, and improve communication with residents within the jurisdiction of the municipality.

[5] The strategy served before the special mayoral committee meeting held on 28 June 2021 and the special council meeting held on 30 June 2021.

[6] Under the heading Financial Implications, the following was noted in the Strategy:

"The municipality is currently in a precarious position when it comes to the operational budget compounded by the recent development regarding the obligation to repay the PIC loan as confirmed by the Constitutional Court and further compounded by the huge payments for bulk services.

Therefore, the department proposes Asset Finance for a period of five (5) years as a solution to the constraints of municipal operational budget. The estimated budget for the implementation of this strategy is R 150 000 000.00 and full implementation is to be projected over a period of five (5) years. This must be done in an open tender in a national newspaper to call for Request for Proposals (RFPS)."

[7] Under legal implications, the following was stated:

“The municipality may only enter into a contract that will impose financial obligations beyond the three years covered in the annual budget for that financial year if section 33 of the MFMA has been fully complied with and section 33 of the MFMA is hereby extracted and attached as Annexure B.”

[8] On 21 June 2021, the Acting Municipal Manager, Mr. N Seanego, approved the recommendations by the Acting Director of Corporate Support Services, Mr. Xola Magwala and the Member of the Mayoral Committee, Corporate Support Services, Esther Modise. Mr. Seanego approved the following:

- (a) *That cogniscence be taken of the proposed Madibeng Local Municipality (MLM) Digitisation Strategy.*
- (b) *That the Municipality may only enter into a contract that will impose financial obligations beyond the three years covered in the annual budget for that financial year if section 33 of the MFMA has been fully complied with.*
- (c) *That the draft Madibeng Local Municipality (MLM) Digitisation be approved.*
- (d) *That the proposal for Asset Finance as an option to finance the implementation of the Draft Madibeng Local Municipality (MLM) Digitisation Strategy be approved.*
- (e) *The open tender be issued for Request for Proposals (RFP) for Asset Finance over a period of five (5) years be approved.*
- (f) *That section 33 of the MFMA process be implemented for compliance.*

[9] The applicant subsequently decided to acquire information and communication technologies by way of leasing or rental. Neither the factual nor the legal basis of this decision is explained.

[10] Adv. Mmbengwa, the Acting Director of Corporate Services submitted a report to the BSC (***“the Report”***), in which the *rationale* for opting to lease the infrastructure was stated as follows:

“The municipality has chosen to acquire information and communication technologies through leasing/rental to optimise and reduce the costs of the MLM ICT operations through OPEX model. This will save ICT division

on the costs of purchasing ICT infrastructure for the municipality. It would make the ICT infrastructure management lifecycle simpler, including purchasing, managing, disposing/decommissioning, and refreshing devices/ hardware. Leasing/rental will allow the municipality to effectively address the problem of obsolescence and disposal challenges it has with ICT equipment.”

[11] In the Report, it was noted further that the bid had been issued on two (2) prior occasions. On the first occasion, the validity period lapsed before the tender could be issued and on the second occasion, the tender was cancelled after it closed.

[12] In respect of the financial implications, the following was recorded in the Report:

“The ICT Division has confirmed that there is an available budget of R 19 million in the current financial year (2022/2023) to finance the project and thereafter a budget allocation will be done for 2023/2024 financial year and other outer years.

SITA was notified of the intention of the municipality to advertise a tender with a value of more than R 50 million.

Budget is available to commence the project for 2023/2024 financial year and thereafter the budget will be allocated annually for the other years.”

[13] On 30 March 2023, during a meeting of the BSC, Adv. Mmbengwa’s recommendation, as set out in his Report, was adopted by the BEC.

[14] On 8 October 2023, the advert for the tender was published and the closing date was specified as 7 November 2023.

[15] On 28 August 2023, the members of the BEC were appointed.

[16] On 16 November 2023, the BEC evaluated the tenders. All of the bidders, save for the first respondent, were disqualified.

[17] On 6 February 2024, the members of the BAC were appointed and signed declarations of interest. The BAC accepted the recommendation of the BEC and awarded the tender to the first respondent. On the same date, the applicant appointed the first respondent as the service provider for a period of 36 months, commencing on 1 March 2024 at the price of R 137,222,731.20.

[18] On 21 February 2023, the Municipal Manager, Mr. Oagile, signed the appointment letter.

[19] On 18 March 2024, the Divisional Manager, ICT, Mr. Xola Magwala addressed a request to the applicant's Legal Services Department requesting that the draft MSA is reviewed.

[20] On 4 April 2024, the Legal Services Manager, Adv. Elvis Mmbengwa responded to Mr. Magwala's request and raised concerns regarding the appointment of the first respondent for an amount higher than the amount budgeted for.

[21] On 28 August 2024, the present application for review was instituted by the applicant.

THE ISSUE FOR DETERMINATION

[22] The issue for determination is whether the award of the RFP to the first respondent, was unlawful and unconstitutional, and should be reviewed and set aside.

THE LEGAL POSITION

[23] An administrative decision remains valid and binding until it is reviewed and set aside. In *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others*, the court articulated the position as follows:

"For those reasons it is clear, in our view, that the Administrator's permission was unlawful and invalid at the outset... But the question that arises is what consequences flow from the conclusion that the Administrator acted unlawfully. Is the permission that was granted by the Administrator simply to be disregarded as if it had never existed? In other words, was the Cape Metropolitan Council entitled to disregard the Administrator's approval (and thus 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. The proper functioning of a modern State would be considerably compromised if all administrative acts could be given effect to or ignored depending on the view the subject takes of the validity of the act in question. No doubt it is for this reason that our law has always recognised that even an unlawful administrative act is capable of

*producing legally valid consequences for so long as the unlawful act is set aside.”*¹

[24] This position was reaffirmed in various decision of the Constitutional Court.²

[25] An organ of state that seeks to review its own decision should not institute the review on the basis of the Promotion of Administrative Justice Act 2 of 2002 but should instead proceed on the basis of legality.³

(i) *The legislative framework*

[26] Any procurement by the State must comply with the provisions of section 217 of the Constitution of the Republic of South Africa Act 108 of 1996 (**“the Constitution”**), which provides as follows:

“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.”

[27] The suite of legislation that gives effect to the provisions of Chapter 7 of the Constitution includes the Local Government: Municipal Finance Management Act 53 of 2003 (**“the MFMA”**).

[28] In the context of local government, any expenditure of funds by a municipality is regulated by the legislative provisions contained in the MFMA. Section 15 of the MFMA provides as follows:

A municipality may, except where otherwise provided in this Act, incur expenditure only-

(a) *in terms of an approved budget; and*

(b) *within the limits of the amounts appropriated for the different votes in an approved budget.*

¹ Oudekraal Estates (Pty) Ltd v City of Cape Town and Others 2004 (6) SA 222 (SCA) at para 48

² MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd t/a Eye and Lazer Institute 2014 (3) SA 481 (CC); Merafong City v AngloGold Ashanti Ltd 2017 (2) SA 211 (CC)

³ State Information Technology Agency SOC Ltd v Gijima Holdings (Pty) Ltd 2018 (2) SA23 (CC); Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd 2019 (4) SA 331 (CC); Govan Mbeki Municipality v New Integrated Credit Solutions (Pty) Ltd 2021 (4) SA 436 (SCA)

[29] Section 16 of the MFMA provides as follows:

- (1) The council of a municipality must for each financial year approve an annual budget for the municipality before the start of that financial year.*
- (2) In order for a municipality to comply with subsection (1), the mayor of the municipality must table the annual budget at a council meeting at least 90 days before the start of the budget year.*
- (3) Subsection (1) does not preclude the appropriation of money for capital expenditure for a period not exceeding three financial years, provided a separate appropriation is made for each of those financial years.*
- (4) A municipality may enter into a contract to incur expenditure for more than three (3) years, provided the requirements set out in section 33 of the MFMA are complied with.*

[30] In *Zeal Health Innovations (Pty) Ltd v Minister of Military Veterans and Another*,⁴ the Supreme Court of Appeal found that the Acting Director General did not have the power to award a tender in circumstances where the contract price exceeded the amount budgeted by the Department.

[31] The Court stated as follows:

*“The Acting Director-General did not have the power to commit the Department to a liability for which money had not been appropriated. That is exactly the conduct that s 38(2) of the PFMA prohibits. The Acting Director-General had the responsibility of ensuring that the Department did not overspend its budget. He acted unlawfully when he breached the provisions of s 38(2). The awarding of the tender to Zeal Health, in circumstances where the provisions of s 38(2) were breached, was clearly unlawful and invalid.”*⁵

[32] Although *Zeal Health* dealt with the PFMA, it finds application in the present matter.

⁴ *Zeal Health (Pty) Ltd v Minister of Military Veterans* 2025 JDR 0042 (SCA)

⁵ *Zeal Health (Pty) Ltd v Minister of Military Veterans* 2025 JDR 0042 (SCA) at para 20

[33] Following from such an illegality, section 172 of the Constitution found application. It provides as follows:

(1) *When deciding a constitutional matter within its power, a court-*

(a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and

(b) may make any order that is just and equitable, including-

(i) an order limiting the retrospective effect of the declaration of invalidity; and

(ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.

[34] The applicant contends that the award was unlawful and bears the onus of proof on a balance of probabilities.⁶

APPLICATION OF THE LAW

[35] The main ground of review relied on by the applicant is that the tender was awarded for an amount that exceeded that amount budgeted by the applicant.

[36] It is common cause that the applicant awarded the tender to the first respondent for a period of 36 months for a contract price of R 137,222,731.20. This amount clearly appears on the appointment letter issued on 6 February 2024. The applicant contends that this amount exceeds the budgeted amount for the three-year period.

[37] What is disputed between the parties is what the budgeted amount is and whether the applicant has discharged the onus to prove the amount.

[38] In the founding affidavit, the applicant alleged that it budgeted an amount of R 19 million for IT services for the 2021/2022 and 2022/2023 financial years. The applicant alleged further that it budgeted an amount of R 41 million for the

⁶ MEC for Public Works and Infrastructure, Free State Provincial Government v Mofomo Construction CC at para 49

2023/2024 financial year. This is set out in a brief tabulated form, attached to the founding affidavit, which the applicant alleges is an extract of the applicant's approved budget for these years.

[39] During the hearing, counsel for the applicant handed up a detailed spreadsheet. She stated that the table was an extract from this spreadsheet. It was provisionally accepted. The procedure that ought to have been followed is that a further affidavit should have been filed and the spreadsheet ought to have been annexed thereto. The leave of the Court should have been sought, in terms of rule 6(5)(d) of the uniform rules of court. This was not done. Counsel for the first respondent objected to the admission of the spreadsheet. I am in agreement that the spreadsheet should not be accepted, and this document has not been considered.

[40] In the Report of the BSC, it is stated that there is a budget of R 19 million available for the 2022/2023 financial year and that the budget for the 2023/2024 financial year will have to be determined.

[41] In the letter from Adv. Elvis Mmbengwa, the Manager of Legal Services employed by the applicant, he states that after reviewing the proposed service level agreement, it is clear that the annual budget for all ICT related services in the municipality is far below the amount indicated in the appointment letter and will result in a situation where the municipality will be unable to pay the service provider. While he does not specify the amount of the budget, it is clear that he found that the contract price of the awarded tender exceeded the budget amount.

[42] Of grave concern is his statement that:

"Clause 8.1 of the agreement states that the service provider will install and de-install the server room, which we find odd because the municipality owns a server which has already been installed."

[43] While the applicant bears the overall onus of proof, the first respondent alleges that the applicant failed to satisfy the evidentiary burden of proving that the contract price exceeded the budgeted amount. The distinction between the burden of proof and the evidentiary burden is explained in the decision of **South**

Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd

by Corbett JA (as he then was):

*"As was pointed out by Davis AJA in **Pillay v Krishna and Another 1946 AD** at 952-3, the word onus has often been used to denote, inter alia two distinct concepts:(i) the duty which is cast on the particular litigant, in order to be successful, of finally satisfying court that he is entitled to succeed on his claim or defence, as the case may be; and (ii) the duty cast upon a litigant to adduce evidence in order to combat a prima facie case made by his opponent. Only the first of these concepts represents the onus in its true and original sense. In **Brand v Minister of Justice and Another 1959 (4) SA 712 (A)** at 715 Ogilvie-Thompson JA called it 'the overall onus'. In this sense the onus can never shift from the party upon whom it originally rested. The second concept may be termed, in order to avoid confusion, the burden of adducing evidence in rebuttal ('weerleggingslas'). This may shift, or be transferred in the course of the case, depending upon the measure of proof furnished by the one party or the other."*

- [44] Although the first respondent correctly contended that the advertisement of the tender did not specify the budgeted amount, it was not necessary to do so.
- [45] Furthermore, even if the contract price was included in the advert, it is alleged that it exceeded the budgeted amount and it breached section 38(2) of the PFMA and was unlawful. Assuming that this was correct, the inclusion of the amount in the advert would not have rendered an unlawful act, lawful.
- [46] While motion proceedings are designed for the resolution of disputes of law and not disputes of fact, an applicant is required to seek a referral of an application to trial if he or she foresees a dispute of fact arising. The powers of the court are set out in rule 6(5)(g), which provides as follows:

"Where an application cannot properly be decided on affidavit the court may dismiss the application or make such order as to it seems meet with a view to ensuring a just and expeditious decision. In particular, but without affecting the generality of the foregoing, it may direct that oral evidence be heard on specified issues with a view to resolving any dispute of fact and to that end may order any deponent to appear personally or grant leave for him or any other person to be subpoenaed to appear and be examined and cross-examined as a

witness or it may refer the matter to trial with appropriate directions as to pleadings or definition of issues, or otherwise.”

- [47] While it is not the usual practice for a court *mero motu* to refer a matter to oral evidence, it has the power to do so, and it has a wide discretion in this regard.⁷
- [48] Considering the material disputes of fact on this significant issue, the application is referred to oral evidence, in terms of rule 6(5)(g) to determine this issue.
- [49] It is necessary to briefly deal with the further grounds of review relied upon by the applicant.
- [50] The second ground of review raised by the applicant is that the other five bidders were disqualified without proper reasons being provided and no score sheets were used. In respect of the reasons for the disqualification, these are tabulated and set out in the Report of the BEC. The applicant contends further that no score sheets were used, however the respondent correctly pointed out that the applicant did not provide any evidence, such as affidavits from the members of the BEC, to support this allegation. Although no score sheets are attached, it does not prove that they were not completed. Furthermore, in the Report of the BEC, the scores are tabulated. Accordingly, this ground must fail.
- [51] The third ground of review is that the BAC merely rubberstamped the recommendation of the BEC and did not interrogate the reasons for the disqualification of the other bidders, thereby failing to apply its mind. This argument is also not supported by any factual foundation and must be dismissed.
- [52] The fourth ground of review is that the BEC and BAC were biased. The applicant relies on the automatic renewal clause in the proposed service level agreement and the disqualification of the bidders, as factors that support this contention. However, the proposed service level agreement was not concluded, and it was not contemplated at the time of the award. Therefore, it does have any merit.
- [53] The fifth ground of review is that the decision was not rationally connected to the purpose for which it was taken. The applicant alleges that the appointment of a

⁷ Santino Publishers CC v Waylite Marketing CC 2010 (2) SA 53 (GSJ) at 56F-57B

service provider for an exorbitant contract price, who will leave with the ICT equipment upon expiration of the contract is irrational. However, the applicant does not provide sufficient facts to prove this ground, and failed to discharge the onus.

[54] The further ground of review is that the appointment amounts to a public private partnership. This ground is devoid of any merit. The legal requirements for a public private partnership are distinct from public procurement of goods and services. The applicant has failed dismially to set out any facts or legal basis to justify its contention.

RULING

[55] Upon a conspectus of all of the facts, it is clear that there is a material dispute of fact regarding whether the impugned RFP exceeded the budgeted amount, thereby contravening section 38(2) of the MFMA. Considering that the award of the tender constitutes the expenditure of public funds, it is necessary that this issue be referred to oral evidence.

ORDER

[56] The application is referred to oral evidence to determine the issue of whether the contract price at which the tender was awarded, exceeded the amount budgeted for by the applicant.

[57] The costs of the application are reserved for determination at the conclusion of the oral evidence hearing.

K. PILLAY
ACTING JUDGE OF THE HIGH COURT
PRETORIA

For the Applicant:

Adv. SM Manganye instructed by KLM
Maja Attorneys Incorporated

For the Respondent:

Adv. V Mabuza instructed by CR Law
Incorporated