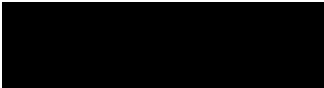




IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case No: 068611/2026

- (1) REPORTABLE: ~~YES~~/NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED.



08 JUNE 2026

.....
SIGNATURE

.....
DATE

In the matter between:

CERIMELE CONSTRUCTION COMPANY (PTY) LTD

Applicant

(Registration Number: 1979/003844/07)

and

MAGALIES WATER BOARD

First Respondent

SAFCRETE QUBEKELA-ENZANI JV

Second Respondents

SAFCRETE CONSTRUCTION (PTY) LTD

Third Respondent

QUBEKELA PROJECTS CC

Fourth Respondent

ENZANI TECHNOLOGIES (PTY) LTD

Fifth Respondent

JUDGMENT

LABUSCHAGNE, J:

[1] The applicant participated in a tender for the construction of the bulk water supply pipeline from Padda Junction to Thabazimbi Pump Station, that the first respondent (MWB) published. The tender was awarded to the second respondent, a joint venture consisting of the third, fourth and fifth respondents.

[2] The applicant's tender price was R 452 010 091.84, whilst the successful tender price of the second respondent was R 536 627 690.86.

[3] The applicant was excluded after the tender was found to be non-responsive as a letter from a manufacturer was neither signed nor directed at the applicant specifically.

[4] Following an urgent application for an interdict to stop the implementation of the tender, MWB agreed to an order on 16 April 2026. The tender would not be implemented pending an expedited review.

[5] It is the expedited review that serves before this court. The applicant seeks an order setting aside the award of the contract by MWB to the second respondent. In addition, it seeks an order substituting the order for an award in its favour, alternatively that the matter be remitted.

The facts

[6] MWB published the tender with reference number RFBMW-314-2025/26 for the aforesaid bulk water supply pipeline. The applicant and the second respondent submitted tenders. When MWB published its intention to award the tender to the joint venture, the applicant participated in an appeal, without any change in outcome.

[7] It was a mandatory requirement of the tender that a bidder's ability to source material from a manufacturing company be demonstrated. The bidder was required to submit either an agreement or a letter of intent, on the manufacturing company's letterhead, where the manufacturing company commits to providing materials upon the bidder's appointment.

[8] On 18 March 2026 the applicant was notified in writing of the reasoning why its bid was unsuccessful. The letter reads in part:

“The reason why your client was unsuccessful are as follows:

1. The reference letter from the manufacturer submitted by your client was not specific to whom it was addressed (either main reference to your client); and
2. Was not duly signed.”

[9] When MWB refused to give an undertaking not to implement the tender, the applicant proceeded with urgent relief, and an interim order was then granted by consent.

[10] The applicant's contention is that it was not a requirement of the mandatory condition that the letter had to be addressed to someone in particular, or that it had to be signed.

[11] The applicant therefore contends that its exclusion was procedurally unfair according to section 6(2)(c) of Promotion of Administrative Justice¹ (PAJA). Alternatively, it was contended that the decision was taken arbitrarily or capriciously, relying on irrelevant considerations in terms of section 6(2)(e)(iii) and (iv) of PAJA.

[12] Further alternatively, it is contended that the decision was not rationally connected to the information before the Administrator or the reasons given for it by the Administrator in terms of section 6(2)(f)(ii)(cc) and (dd) of PAJA.

¹ 3 of 2000.

[13] After the review record was provided by MWB, a supplementary founding affidavit was filed in terms of rule 53(4) of the Uniform Rules of Court.

[14] The grounds of review were extended to include the following:

14.1 Listed amongst the mandatory requirements was a requirement that read:

“(a) Only those Tenderers who have tendered the virtual compulsory briefing session.”

[15] The tender submitted by the joint venture includes certificates of attendance by the fourth respondent and the third respondent. However, the fifth respondent did not attend.

[16] The compulsory briefing session took place on 14 October 2025. The joint venture agreement between the third to sixth respondents was only signed two days later. The applicant contends that there was therefore non-compliance by the successful tenderer with one of the mandatory requirements.

[17] The applicant further contends that the bill of quantities provided as part of the joint venture’s tender submission was defective. The requirement was:

“(c) a rate/amount is to be insert against all items in the schedule of fees/bill of quantities, an item against which no rate/amount is entered will lead to immediate disqualification due to unfair price advantage.”

[18] The applicant contends that the bill of quantities of the joint venture was incomplete where an amount of R27 000 was tendered, but it was not reflected in the amount column. The applicant contends that this oversight renders the tender of the joint venture non-responsive.

[19] The applicant further contends that the tender of the joint venture failed to include a compliant letter of intent from a manufacturing company and was also non-responsive for that reason.

[20] The mandatory requirement in paragraph (f) of the tender reads:

“It is the bidder’s ability to source from the manufacturing company. The bidder submit an agreement or letter of intent on the manufacturing company letterhead, where the manufacturing company is committing to providing the materials when the bidder is appointed.”

[21] The applicant’s contention is that the tenderer was the joint venture and not its individual members, while the letter of intent was directed to the fourth respondent only.

[22] The letter relied upon by the joint venture is by LB Pipes, who describes itself as a manufacturer on its letterhead. However, the applicant’s deponent states that, by virtue of his over 46 years of experience in the industry, he has become aware of the specific products manufactured by different suppliers. He states that LB Pipes, to the best of his knowledge, does not manufacture the pipes and related products required for the present tender. If this were to be disputed by the joint venture, he challenged it to produce an affidavit from one of the directors of LB Pipes confirming with specific reference to the present tender, that it can manufacture all the pipes required and all the related products without sourcing it from any third party. The JV did not take up the challenge.

[23] The joint venture responds to the applicant’s contention by stating that the language of the mandatory requirement does not require each member of the joint venture to attend a virtual compulsory briefing session. The joint venture confirms that its agreement was only decided on 16 October 2025. Prior to that date, two of the joint venture members attended the briefing session, which took place on 14 October 2025. The second respondent contends that, as there was no prohibition against forming a joint venture after the date of the briefing session, the word “tenderer” who attended the meeting must merely include a member of the joint venture.

[24] The tender only requires four things of a tenderer that consists of a joint venture, namely:

24.1 A submission of tax compliance.

24.2 Registration on the Central Supplier Database. However, proof thereof could be submitted within a month from date of the closing date of the tender (i.e. it does not have to be in place at the time of submission of the tender).

24.3 CIDB registration.

24.4 A compulsory enterprise questionnaire had to be filled in.

[25] With reference to the failure to carry an amount of R 27 000 as part of the tender into the amount's column, the applicant makes mention of dozens of tenderers who were excluded because their bills of quantities were found to be non-compliant. Yet, the joint venture was given an opportunity, following a request to revise the selected item, by reducing it to nil.

[26] As far as the letter of intent on the letterhead of a manufacturing company's letterhead, the joint venture contends that the letter's purpose is to establish an ability to source material. A commitment to supply one of the members of the joint venture would establish that ability. The requirement was not that the letter had to be directed to the tenderer.

[27] The letter submitted by LB Pipes denotes that it is a manufacturer of pipes. Further, it gives an undertaking to supply the fourth respondent with pipes, referring expressly to the tender contract in question.

[28] In its supplementary founding affidavit, the applicant further contends that the joint venture failed to acknowledge the addendum. It therefore did not comply with the requirement that "the tenderer shall acknowledge receipt of the addenda to the tender documents. Failure to acknowledge receipt of the addenda will result in disqualification.

[29] The second respondent passed a resolution authorising the deponent, Mr Monteiro, as joint venture signatory, in his capacity as the Managing Director of Safcrete Construction (Pty) Ltd, to sign any documents in respect of the specific tender

on behalf of the joint venture. Safcrete, as the lead partner of the joint venture, together with Mr Monteiro in the aforesaid capacity as authorised representative of the joint venture, acknowledged the addendum.

Issues to be decided

[30] What needs to be determined in this application are the following:

30.1 As there is a challenge to the applicant's locus standi, firstly locus standi.

30.2 Whether the applicant's tender was non-responsive in respect of the supply letter from a manufacturer.

30.3 Whether the JV's tender was non-responsive in respect of the attendance of the compulsory briefing session of 14 October 2025.

30.4 Whether the tenderers were treated fairly and transparently in respect of the Bill of Quantities

30.5 Whether the JV acknowledged the addenda, a mandatory requirement.

30.6 Remedy

Locus standi

[31] The first respondent has denied the *locus standi* of the applicant. It contends that if the applicant cannot establish that it has complied with mandatory tender requirements, that it does not have standing to challenge the award of the tender to the joint venture.

[32] This position of MWB conflates *locus standi* with the establishment of a claim for relief. *Locus standi* and the merits in a matter such as the present are not to be conflated. The issue of *locus standi* is considered at the outset.

[33] In *Giant Concerts CC v Rinaldo Investments (Pty) Ltd*,² Cameron J stated at paragraph 32:

“And in determining Giant’s standing, we must assume that its complaints about the lawfulness of the transaction are correct. This is because in determining a litigant’s standing, a court must, as a matter of logic, assume that the challenge the litigant seeks to bring is justified. As Hoexter explains:

‘The issue of standing is divorced from the substance of the case. It is therefore a question to be decided *in limine* [at the outset], before the merits are considered’.”

[34] The contention in *Rodpaul Construction CC t/a Rods Construction v Ethekeeni Municipality and Others*,³ that only a compliant tender acquires the right to challenge an award, was expressly overturned by the SCA in *WDR Earthmoving Enterprises v Joe Gqabi District Municipality*,⁴ where the SCA said the following in paragraph 17:

“The full court accordingly erred in concluding that the standing of the appellants to challenge the award of the tender to the fourth respondent, was determined by the finding that the appellants’ bid was non-responsive. Its reliance upon Rodpaul Construction CC v Ethekeeni Municipality 2014 JDR 1122 (KZD) was misplaced. The statement in Rodpaul, at para 52, that:

‘... only a compliant tenderer acquires the right to challenge an award. At best a non-compliant tenderer may appeal to the authority before expiry of the tender notice to waive strict compliance.’

is too broadly cast and does not correctly reflect Canadian law, from which it was said to be derived.”

[35] It follows that the applicant’s *locus standi* has been established as it has an interest in the relief sought.

² *Giant Concerts CC v Rinaldo Investments (Pty) Ltd* 2012 (JDR) 2298 (CC).

³ *Rodpaul Construction CC t/a Rods Construction v Ethekeeni Municipality and Others* [2014] JDR 1122 (KZD) para 52.

⁴ *WDR Earthmoving Enterprises v Joe Gqabi District Municipality* 2018 JDR 1295 (SCA).

Proof of supply

[36] A decision maker exercising public power, like an organ of State, is bound by the reasons given for a decision at the time of the decision. In *Jicama 17 (Pty) Ltd v West Coast District Municipality*,⁵ the court affirmed the aforesaid principle, which has since been upheld by the SCA in *National Lotteries Board and Others v South African Education and Environmental Project*,⁶ at paragraph 24.

[37] The reasons for the disqualification of the applicant have been quoted *supra*. In the answering affidavit MWB sought to expand on its reasoning why it required the letter of intent to be signed, and why it sought a commitment to a specific tenderer. The motivation for reasons already provided is not admissible. The reasons as provided at the time of the decision are all that may be scrutinised.

[38] The African Pipes letter submitted by the applicant in support of its tender contains the reference to the tender on the first page where the following appears:

“The construction of the bulk water supply pipeline from Padda Junction to Thabazimbi Pump Station Contract Number: RFB/MM/314/2025-26.”

[39] On the following page the manufacturer states:

“Thank you for giving us the opportunity to offer our product to you. Our offer includes the general terms and conditions applicable to our offer.”

[40] It is a letter submitted by Cerimele with reference to the specific tender and it evidences a supply of pipes from Africa Pipe Industries to Cerimele. As a matter of context, the word “you” can only refer to Cerimele, in whose tender the aforesaid letter appears.

[41] The purpose of the mandatory requirement, i.e. an assurance of an available manufacturer who will supply the pipelines, had been achieved. The requirement that

⁵ *Jicama 17 (Pty) Ltd v West Coast District Municipality* 2006 (1) SA 116 (C) para 11.

⁶ *National Lotteries Board and Others v South African Education and Environmental Project* 2012 (4) SA 504 (SCA).

the letter had to be signed is not a requirement in the mandatory requirements of the tender. The letter, as well as its content and purpose, is self-evident, namely, to provide an assurance of supply. The requirement imposed by MWB, that the letter had to be directed specifically to Cerimele and had to be signed, is not set out in the particular mandatory requirements.

[42] If there were any uncertainty, this is the type of matter where fairness dictates the making of a simple enquiry on the part of MWB. It could have clarified any uncertainty under which it may have laboured.

[43] What is fair is dictated by the facts at hand. There is, however, an obligation on decision makers to be flexible, when the situation demands it, in order to protect the fairness of the tender process.

[44] In *Metro Projects CC v Klerksdorp Local Municipality*,⁷ Conradie JA said:

“[12] There is another reason that the tender procedure of a local authority must be fair. Invitations to tender by organs of State and the awarding of tenders where it is done in the exercise of public power is an administrative process (see *Logbro Properties CC v Bedderson NO and Others* 2003 (2) SA 460 (SCA) para [5] at 465F - 466C, where the leading cases are collected). Section 3(2)(a) of the Promotion of Administrative Justice Act 3 of 2000 requires the process to be lawful, procedurally fair and justifiable. But primarily, in the case of a local authority, the process must be fair because s 10G(5)(a) of the Local Government Transition Act 209 of 1993 requires it.

[13] In the *Logbro Properties* case *supra*, paras [8] and [9] at 466H - 467C, Cameron JA referred to the 'ever-flexible duty to act fairly' that rested on a provincial tender committee. Fairness must be decided on the circumstances of each case. It may in given circumstances be fair to ask a tenderer to explain an ambiguity in its tender; it may be fair to allow a tenderer to correct an obvious mistake; it may, particularly in a complex tender, be fair to ask for clarification or details required for its proper evaluation. Whatever is done may not cause the process to lose the attribute of fairness or, in the local government sphere, the attributes of transparency, competitiveness and cost-effectiveness.”

⁷ *Metro Projects CC v Klerksdorp Local Municipality* 2004 (1) SA 16 SCA at paras 12 and 13.

[45] The duty to implement a fair procurement system is a constitutional imperative that is reflected in national procurement legislation. Fairness is not a defined concept, but it is subliminal to the process. It bears noting that the fundamental constitutional imperative of fairness in the process of procurement permeates all levels of procurement. In this instance fairness was not assessed in dealing with the applicant's tender. It failed to make an enquiry from the applicant when circumstances called for it.

[46] MWB consequently erred in excluding the applicant from further consideration. The facts of this matter indicate that MWB had excluded dozens of tenderers for incomplete compliance with BOQ specifications. Yet, it offered the successful joint venture an opportunity to clarify whether the R27 000.00 it had tendered in the BOQ, but had not transferred to a totals column, could be disregarded or not. This is an indication that the second respondent was offered an opportunity to clarify whilst the applicant was not. Similarly, the fairness which MWB extended to the joint venture, should have been extended to tenderers whose letters of intent, or Bills of Quantity entries could be clarified by means of a simple enquiry.

[47] Not all deviations from mandatory requirements are fatal. In appropriate circumstances where there may be ambiguity, such as the present, fairness calls for clarification (rather than supplementation). Even correction of an obvious error is permissible when the circumstances so dictate. Compliance with mandatory requirements, unless otherwise specified, is tested at the time of consideration, and this may be after clarification. This is not to be seen as a second bite at compliance, but to confirm compliance through clarification.

[48] Where a signature of the letter was not required, MWB could ask for a signed copy to satisfy itself. That would not be supplementation, as a signed letter was not required. Although there is usually a strict test to be applied to mandatory requirements, it is apparent in this instance that MWB was prepared to afford the second respondent leeway in respect of the Bill of Quantities, which it would not extend to the applicant or to other tenderers whose BOQ's or letters of intent required clarification. That is unfair.

[49] The purpose of the mandatory requirement pertaining to a manufacturer, was to ensure certainty of supply.

[50] In argument the requirements of an outright commitment to the specific tenderer were postulated on behalf of MWB. This is placing the bar too high. One must bear in mind that the manufacturer is unaware whether the tenderer will be awarded the contract. In that sense, it would not be an outright commitment that is required, but a willingness and an ability to supply in the event of the tenderer being successful. In my assessment, no more is required in terms of the mandatory requirement. The African Pipes letter ticks the boxes required to achieve this purpose. Its willingness and ability to supply its pipes need not be stated in effusive terms, as postulated by MWB.

The compulsory briefing session

[51] The requirement that tenderers had to attend the compulsory briefing session was to ensure that all tenderers were aware of the scope of the project and would be in a position to determine whether, and in what format, they would participate or not. The compulsory briefing took place approximately two weeks before the closing date for the tender.

[52] In the context of a joint venture, the interpretation advanced by the applicant is that the joint venture should have been established before the compulsory briefing session, i.e. before all tenderers were in a position to assess whether they could comply with the scope of the project. This is an impractical approach as there is nothing in the tender requirements that would exclude from the word “tenderer”, a representative of a tender vehicle, like a joint venture, to be formed subsequent to the briefing session itself. Two of the constituent members of the joint venture attended the compulsory briefing session and the joint venture was established two days later. The purpose of the briefing session had been achieved by representatives being present and enabling the JV participants to determine in which format they would participate in the tender. To place a literal interpretation upon the word “tenderer”, i.e. meaning the joint venture, in establishing compulsory attendance, would not have business efficacy.

[53] The requirement was therefore met by the tenderer's representatives, even pre-incorporation, being present at the compulsory briefing. The tender submission included the certificates of attendance of two JV participants, which, as a legal construct, indicates an adoption of such attendance as attendance on behalf of the JV. It is not tantamount to the adoption of pre-incorporation acts by a subsequently formed company but is akin thereto in the tender context. This is not offensive to a fair and competitive tender process and may very well enhance competition. There is consequently no merit in this objection.

Completion of the bill of quantities

[54] The mandatory condition in respect of completion of the bill of quantities reads:

“(c) A rate/amount is to be entered against all items in the schedule of fees/bill of quantities, an item against which no rate/amount is entered will lead to immediate disqualifications due to unfair price advantage.”

[55] The joint venture failed to include an amount of R 27 000 in respect of Item 12.5 of the Bill of Quantities in the amount column. On the strict wording, the joint venture should have been disqualified in this regard. The joint venture was offered an opportunity to clarify the issue and reduced its tender by R 27 000. This opportunity was offered to the second respondent, but there is no evidence that it was offered in similar circumstances to those tenderers who were excluded on the grounds of incomplete bills of quantities. There are about 21 out of the 44 tenderers who were excluded on this basis alone. An opportunity to clarify such an issue, would in fairness have to be extended to other tenderers who were in a similar position to that as the second respondent. The fact that such an opportunity was extended also had to be communicated to all tenderers to ensure transparency. That was not done in this instance. In such circumstances the treatment extended to the second respondent does not meet the requirements of fairness and transparency as far as other tenderers like the applicant are concerned.

Was the JV's letter from a manufacturing company compliant?

[56] The applicant contends that LB Pipes, who provided a letter to the fourth respondent indicating its willingness to supply, does not comply with the mandatory requirement. The applicant contends that, according to his 46 years' experience, and to the best of his knowledge, LB Pipes does not manufacture the type of pipes required by the tender. The letter of LB Pipes, however, expressly states that it is a manufacturer of pipes. In such circumstances, it would not be incumbent on Magalies Water Board to go behind the particular letter in respect of whether the author thereof was a supplier, rather than a manufacturer of pipes. This would be different if the information provided on the letter itself was false and constituted a misrepresentation. That, however, would not be apparent during the screening phase and would become apparent at a later stage. The applicant does not assert a statement of fact in respect of LB Pipes, but a tentative opinion, based on the deponent's subjective perception. On the face of it, and on the basis on which the applicant advances this as non-compliance, there is no substance in the applicant's contention. It is a tenuous criticism intended to provoke a reaction.

Acknowledging an addendum

[57] The evidence supra establishes that the representative of the joint venture, Mr Monteiro, as authorised JV representative, and the lead member of the joint venture, acknowledged the addendum. There was therefore compliance with this mandatory requirement.

Conclusion on the review

[58] The applicant has established grounds for a review on two grounds. Firstly, the taking into account of irrelevant considerations in excluding the applicant's tender from further consideration in terms of section 6(2)(c) of PAJA. Secondly, procedural unfairness in terms of section 6 (2) (e)(iii) of PAJA. The review therefore succeeds.

Remedy

[59] The basis on which the applicant has succeeded commends a setting aside of the award. As the project has been on hold pending these proceedings, there are no changed circumstances that may influence the exercise of a judicial discretion in review proceedings when formulating relief. This too points to the award being set aside.

[60] Lack of transparency and lack of fairness has permeated the assessment bodies who assessed the tenders. The Bid Evaluation Committee, as constituted, has acted irrationally in excluding the applicant from consideration in respect of a supply letter from a manufacturer. The letter, on the face of it complies with the purpose for which it was required. If it was necessary to determine to whom the letter was addressed (i.e. who the “you” is in the letter of intent), this is a matter that could have been clarified by means of simple enquiry. MWB erred in failing to make the enquiries necessary in this regard.

[61] The aforesaid criticism also attaches to the Bid Adjudication Committee. What compounds the unfairness is that the second respondent was offered an opportunity of correcting an oversight in its bill of quantities, whilst the same opportunity was not offered to other tenderers. This is an indicator of a lack of transparency in dealing with tenderers and clarifications arising from tenders submitted. This falls foul of the constitutional imperatives in section 217 of the Constitution. The imperatives that are immediately at the forefront of consideration are those pertaining to fairness and transparency. In these circumstances the applicant has established a basis for the review and setting aside of the award to the second respondent. MWB formulated reasons that incorporate irrelevant considerations, i.e. considerations not falling within the express terms of the mandatory requirement in respect of a letter confirming supply by a manufacturer.

[62] The applicant’s request for a substitution order fall to be considered next. The applicant contends that, as it was the tenderer with a price significantly less than the

successful tenderer, it should have been awarded the tender in terms of the provisions of section 2 of the Preferential Procurement Policy Framework Act⁸⁸ (PPFA Act).

[63] The difficulty with this proposition is that the applicant was excluded and disqualified in a sifting process at the commencement of the consideration of tenders and was not evaluated for functionality and other components of the tender.

[64] In such circumstances the court, even if exceptional circumstances were present, would be loath to intervene by means of a substitution order.

[65] To remit the matter to the Bid Evaluation Committee and the Bid Adjudication Committee, as previously constituted, would be unacceptable by virtue of the lack of transparency and the unfairness evidenced in their previous conduct regarding their tender assessment obligations.

[66] In these circumstances it would be inappropriate to remit it to the Board for reconsideration via its procurement structures as previously constituted.

[67] However, having considered the submission made by all parties, a remittal for reconsideration would be appropriate. The Bid Evaluation Committee and the Bid Adjudication Committee, however, need to be constituted differently, by even-handed persons versed in the constitutional imperatives imposed by section 217 of the Constitution.

Order

[68] The following order is issued:

1. The review application succeeds with costs

2. In terms of section 8 of PAJA, the award of the tender to the second respondent is set aside.

⁸⁸ 5 of 2000.

3. The assessment of the tender is remitted to the Magalies Water Board with the following directions:

3.1 The tender is to be reconsidered by a Bid Evaluation Committee and Bid Adjudication Committee differently constituted, excluding all previously participating members.

3.2 The Magalies Water Board is directed to appoint to those structures, persons versed in the constitutional imperatives of section 217 of the Constitution.

3.3 MWB's aforesaid assessment should permit clarification on mandatory requirements capable of simple clarification.

3.4 The clarification may include correction of obvious errors.

3.5 MWB is to pay the costs of the application, including the costs of the second to fifth respondents, such costs to include the costs of two counsel on Scale C.

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LABUSCHAGNE J
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Appearances:

Applicant: Adv APJ Els

Instructed by: Weavind & Weavind

First Respondent: Adv Shadung

Second to Fifth Respondent: Adv Martins