IN THE HIGH COURT OF SOUTH AFRICA,
MPUMALANGA DIVISION, MIDDELBURG (LOCAL SEAT)

CASE NUMBER: A59/2024

(1) Reportable: NO
(2) Of interest to other Judges: NO
(3) Revised Yes

30 June 2026 LESO AJ
Date Signature

In the application between:

GERT SIBANDE DISTRICT MUNICIPALITY Appellant

And

BONGINKOSI TECHNOLOGIES (PTY) LTD t/a NASHUA Respondent

JUDGMENT

LESO AJ (PHAHLAMOHLA J AND MATIME AJ CONCURRING)

INTRODUCTION

[1] This is an appeal against the judgment and order of Langa J ("the court a quo") handed down on 4 November 2024. The court a quo dismissed the appellant's application for self-review and granted the counterclaim in the amount of R2 465 252.21 in favour of the respondent. The appeal is with leave of the court a quo.

[2] In this appeal, the municipality will seek an order reversing the orders of Langa J in their entirety, including the counterclaim, which was granted in favour of the respondent.

PRELIMINARY ISSUE

Whether the appeal has lapsed

[3] The respondent raised a point *in limine* that the appeal had lapsed on account of the late filing of the notice of appeal, record and security.

[4] It is common cause that the notice of appeal was filed one day outside the prescribed period. The appellant applied for condonation and furnished an explanation for the delay. The appellant further filed an application for condonation in respect of the late filing of the appeal record and security.

[5] The judgment of the court a quo was delivered on 4 August 2025. The notice of appeal was filed on 2 September 2025. Although the record was subsequently filed, security was only furnished on 10 February 2026.

Condonation

[6] The filing of security was not in strict compliance with Rule 49. However, the irregularity did not result in the lapsing of the appeal and caused no demonstrable prejudice to the respondent.

[7] In the circumstances, condonation was granted and the point *in limine* falls to be dismissed.

FACTUAL BACKGROUND

[8] The dispute arises from a tender awarded by the appellant to the respondent for the supply and installation of a vehicle tracking system.

[9] The tender was awarded for a period of thirty-six (36) months and was approved within a budget allocation of R1 580 480.49.

[10] The Bid Evaluation Committee ("BEC") and Bid Adjudication Committee ("BAC") recommended the appointment of the respondent. Following the award of the tender, the parties concluded a service level agreement consistent with the tender

specifications and bill of quantities. On 9 December 2021 the respondent signed a further appointment letter.

[11] That Nashua does not dispute the BAC conditional recommendations for renegotiating pricing to R 600 per vehicle.

[12] The Bid Adjudication Committee conditions were not complied with, notwithstanding the fact that the Municipal Manager, on the following day, approved the recommendations of the BAC subject to the conditions imposed,

[13] The appellant initiated an internal investigation after a discrepancy was found in the second appointment letter. The municipal manager was directed not to honour the invoices submitted subsequent to the second appointment letter.

GROUNDS OF APPEAL

[14] The appellant contends that the court *a quo* erred by:

14.1 not finding that the respondent ought not to have been awarded the tender in the first instance because the respondent failed to meet the minimum threshold and was awarded points incorrectly.

14.2 not finding that the respondent did not comply with the conditions of the BAC and the Municipal Manager for the price to be renegotiated at R600 per vehicle.

14.3 not finding that the respondent did not provide the three traceable project experiences as required.

14.4 not finding that the budget for this tender is R 1 580 480, 49 provided for under budget vote: 099263750.

14.5 Failing to declare the material amendment of the contractual terms after the award of the tender unlawful.

14.6 Granting the respondent's counterclaim in its entirety, notwithstanding the alleged unlawfulness of the amended contractual arrangement; and

14.7 Making a punitive costs order against the appellant.

SUMMARY OF SUBMISSIONS

Appellants submission

[15] Adv Maphutha, appearing for the appellant, submitted that the revised contractual arrangement concluded between the parties fell outside the scope of the original tender award, was never subjected to a competitive procurement process, and was consequently inconsistent with the requirements of section 217 of the Constitution.

[16] Counsel argued that, following the recommendation of the Bid Adjudication Committee ("BAC"), the Municipal Manager, Mr Habile, was specifically requested to negotiate the respondent's pricing from between R700 and R800 per unit to an amount of R600 per unit. In his approval of the BAC recommendation on 5 October 2021, Mr Habile expressly recorded that the respondent's appointment was subject to the successful negotiation of the price to R600. According to the appellant, this condition was necessitated by budgetary constraints, as the municipality could not afford the pricing reflected in the respondent's original bill of quantities.

[17] The appellant contended that the Service Level Agreement concluded on 18 November 2021 did not give effect to the negotiated pricing contemplated by the BAC recommendation and the Municipal Manager's approval. Instead, it was concluded on the basis of the respondent's original bill of quantities, contrary to the condition upon which the award had been approved.

[18] A further complaint relates to the second letter of appointment signed by the Municipal Manager on 9 December 2021. The appellant submitted that this letter introduced material terms which were inconsistent with and substantially departed from the original award. It allegedly altered the procurement model from an outright purchase arrangement to a rental-based model, expanded the scope of the contract, and introduced a revised pricing structure. The result, according to the appellant, was a dramatic escalation of the contract value from approximately R1.58 million to R7 024 752.00, contrary to both the BAC recommendation and the negotiated pricing condition.

[19] The appellant argued that the conduct of the Municipal Manager and the respondent in implementing the revised arrangement was unlawful and amounted to a material deviation from the approved procurement process. The appellant further complained that the respondent did not provide the three traceable project experiences as required. It was argued that such conduct tainted the procurement process, entitling the municipality to review and set aside its own decision.

[20] In support of this contention, reliance was placed on the decision of the Constitutional Court in *AllPay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of SASSA [2014] ZACC 12*, where it was held that compliance with constitutional and statutory procurement requirements is indispensable and that material irregularities render administrative action susceptible to judicial review.

[21] The appellant further submitted that the negotiated pricing constituted an indispensable condition of the award. Absent agreement on the negotiated price, no valid contract could lawfully arise. Consequently, the respondent's appointment on the basis of its original bill of quantities, which exceeded the approved budget, was unlawful, not cost-effective, and inconsistent with section 217 of the Constitution.

[20] It is further submitted that by participating in and advancing a post-award escalation of pricing contrary to the bid value and the BAC conditions, Nashua aligned itself with conduct that transgressed the principles of fairness, transparency, competitiveness, and cost-effectiveness enshrined in section 217 of the Constitution

[22] It was further contended that the respondent rendered invoices and claimed payment in accordance with the revised and unlawful arrangement rather than the procurement terms approved by the municipality. The appellant accordingly maintained that both the impugned award and the subsequent contractual arrangements offended the principle of legality and fall to be reviewed and set aside.

Respondent's Submissions

[23] On behalf of the respondent, Adv Swart submitted that the municipality itself implemented and gave effect to the impugned arrangements. Counsel pointed out that the appellant continued to accept and utilise the services rendered and made payment until January 2022, being approximately one month after the second letter of

appointment had been issued. According to the respondent, the municipality induced the respondent to act on the apparent validity of the appointment.

[24] Counsel further submitted that, even if the contract were ultimately declared invalid, the respondent would nevertheless be entitled to remuneration for services actually rendered between October 2021 and February 2023. In this regard, the respondent persisted with its counterclaim in the amount of R2 465 252.21 for services allegedly rendered during that period.

[25] Regarding the validity of the tender process, the respondent contended that neither the tender documents nor the applicable procurement framework prohibited reliance on franchise experience. It was therefore submitted that the evaluation committee was entitled to take such experience into account when assessing the respondent's bid.

[26] The respondent further argued that expenditure exceeding a projected or allocated budget does not, without more, invalidate a tender award. Reliance was placed on section 70 of the Municipal Finance Management Act, which permits overspending in certain circumstances. It was submitted that the appellant had failed to establish that the alleged budget limitation formed part of an approved municipal budget within the meaning of the applicable legislative framework.

[27] The respondent accordingly maintained that the tender award and subsequent contractual arrangements were lawful and valid and that the appellant had failed to establish any basis for the review and setting aside the tender award.

ISSUES FOR DETERMINATION

[28] The central issues for determination are:

1. Having found the relief incompetent, whether the Court erred in dismissing the application on the merits.

2. Whether the appointment letter of 9 December 2021 constituted a material amendment of the tender award;

3. Whether the decision to award the tender and related decisions should be reviewed as provided for based on the principle of legality.

4. Whether the respondent is entitled to payment under its counterclaim and;

5. Whether the court a quo erred in granting a punitive costs order against the appellant.

ANALYSIS

The appeal

[29] The appellant seeks an order setting aside the judgment of the court *a quo* and substituting it with an order reviewing and setting aside the decisions relating to the awarding of the tender and the extension of the tender scope and the amended pricing structure introduced after the award of the tender.

[30] Appeals are governed by section 17 of the Superior Courts Act[1], the general rule is that appeals lie against judgments or orders, not against the reasons or factual findings of the court itself.

[31] To the extent that the parties devoted substantial argument to the functionality scoring, reference letters and alleged misrepresentations during the bid evaluation process, those issues are not decisive of the present appeal. And to the extent that the appellant sought an order that the tender award be declared null and void based on the bill of quantities not in line with the budget of the appellant, the appellant does not persist with the alleged fraud or material misrepresentation to invalidate the original tender award and the first appointment letter.

[32] Similarly, the court's findings on the unreasonable delay from September 2021, the finding that the functionality evaluation was irregular and ultra vires and the finding that prayers 1–4 were "incompetent" and "vague", are findings by the court *a quo* that are not subject to appeal and need not be considered further.

[33] The appellant did not assist the court because the grounds of appeal were not easily crystallised or succinctly set out. I have highlighted the conflated issues

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[1] See section 17 of the Superior Courts Act, 10 of 2013.

in paragraphs 32 and 33. Consequently, I will proceed with the grounds of appeal as we could establish from the submissions by both parties.

Dismissal of the application on the merits

[34] It is apparent from the judgment that the court *a quo* fully engaged with and determined the substantive merits of the review application. In doing so, the court considered and analysed, inter alia, the issues relating to the alleged budgetary constraints, the reference letter, the second appointment letter, and the procurement process that culminated in the award of the tender.

[35] Having embarked upon and pronounced on the merits of the dispute, the court nevertheless dismissed the application on the basis that the relief sought was incompetent. In these circumstances, the question arises whether the court was entitled to dismiss the application outright, rather than striking the matter from the roll or affording the appellant an opportunity to seek appropriate relief. The distinction is significant, as a dismissal ordinarily constitutes a final determination of the dispute, whereas a striking-off order generally leaves the litigant at liberty to pursue the matter afresh upon rectifying the procedural or jurisdictional defect.

[36] Having considered and determined the substantive issues raised in the review application, the court *a quo* effectively adjudicated the merits of the dispute. In those circumstances, it was incompatible to dismiss the application solely on the basis that the relief sought was incompetent. If the defect lay only in the formulation of the relief, the appropriate course would have been either to strike the matter from the roll or to consider whether competent relief could be fashioned on the facts before the court.

[37] *MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd*[2] emphasises that courts should decide disputes on their substance and fashion effective relief consistent with legality and justice. In *AllPay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others*[3], It was stated that courts must focus on the lawfulness of the impugned administrative process rather than on technicalities.

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[2] See *MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd* [2014] ZACC 6.

[3] See *AllPay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others*

[38] The dismissal of the application, after full consideration of the merits, had the effect of finally disposing of the dispute without determining whether the impugned administrative action was lawful, reasonable and procedurally fair. Such an approach is inconsistent with the constitutional preference for the resolution of disputes on their substantive merits rather than on technical procedural grounds.

[39] In *AllPay Consolidated Investment*, the court found that the tender award was unlawful but did not immediately decide the appropriate remedy. Instead, the Court requested further argument on what would be "just and equitable," recognising that cancelling the contract outright could interrupt social grant payments to millions of beneficiaries. Similarly, the court a quo should have granted the municipality an opportunity to amend the prayers in the Notice of Motion.

[40] Although the appellant failed to distinguish between the original tender award and the subsequent appointment letter of 9 December 2021, it was clear that the review application was in relation to both decisions. The court ought not to have dismissed the application on the basis that such a distinction is not apparent from the appellant's papers.

Review application

[41] The appellant sought the order to set aside and the review of the alleged unlawful expenditure consequent to the second appointment letter of December 2021. It cannot be gainsaid that the applicant instituted a review application under PAJA and this matter involves the exercise of public power.

[42] The *Kirland Investments*[4] case is a major South African Constitutional Court decision. It was stated that, "*even if a government decision is wrong, the state cannot simply ignore it or cancel it internally. The government must apply formally for a court to set aside the defective decision, so that the court can properly consider its effects on those subject to it.*"

[43] The question is whether the conversion of the procurement model from an outright purchase to a rental model was lawful and whether the amended pricing structure complied with section 217 of the Constitution;

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[4] See Footnote 2 for full citation.

[44] The Municipality's procurement powers are expressly regulated by the Municipal Finance Management Act[5](MFMA), including section 112(1)-(2), which requires a supply chain management system that gives effect to the constitutional procurement values and prohibits deviations that undermine fairness, transparency and competitiveness.

The appointment letter of 9 December 2021

[45] The true dispute concerns the legality of the subsequent amendment embodied in the appointment letter dated 9 December 2021. The dispute goes to the heart of the review application which was brought by the applicant and which the court a quo did not deal with.

[46] *In Altech Radio Holdings (Pty) Ltd and others v Tshwane City*[6] the court stated that "*When government errs by issuing a defective decision, the subject affected by it is entitled to proper notice, and to be afforded a proper hearing, on whether the decision should be set aside. Government should not be allowed to take shortcuts. Generally, this means that government must apply formally to set aside the decision. Once the subject has relied on a decision, government cannot, barring specific statutory authority, simply ignore what it has done. The decision, despite being defective, may have consequences that make it undesirable or even impossible to set it aside. That demands a proper process, in which all factors for and against are properly weighed.*"

[47] This court is therefore not concerned with the validity of the original award itself. The position is however materially different in relation to the appointment letter issued on 9 December 2021. The letter introduced a substantially different commercial arrangement from that contemplated by the tender documentation.

[48] In *Pepcor Retirement Fund and Another v Financial Services Board*[7] the Supreme Court of Appeal held that administrative decision has to be taken on an accurate factual basis as a result of which a material mistake of fact renders an administrative decision subject to review. The court held at paragraph 32 that:

"Judicial intervention has been limited to cases where the decision was arrived at arbitrarily, capriciously or mala fide or as a result of unwarranted adherence to a fixed principle or in order to further an ulterior or improper purpose; or where the functionary misconceived the

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[5] See Municipal Finance Management Act No.56 of 2003, supported by the Annual Division of Revenue Act.

[6] See *Altech Radio Holdings (Pty) Ltd and others v Tshwane City 2021 (3) SA 25 (SCA) para 65,*

[7] See *Pepcor Retirement Fund and Another v Financial Services Board* 2003 (6) SA 38 *(SCA).*

nature of the discretion conferred upon him and took into account irrelevant considerations or ignored relevant ones; or where the decision of the functionary was so grossly unreasonable as to warrant the inference that he had failed to apply his mind to the matter...".

The conversion of the procurement model

[*49*] The evidence demonstrates that the original purchase model was replaced with a rental model and that the financial implications of the contract increased substantially beyond the approved tender budget. No evidence exists that this material variation was subjected to a fresh competitive procurement process or approved through the procedures required for public procurement. Consequently, the conversion from an outright purchase to a rental model was unlawful,

[50] A material amendment of a public contract after its award may not be used to circumvent the constitutional requirements governing public procurement. Section 217(1) of the Constitution requires procurement systems to be fair, equitable, transparent, competitive and cost-effective.

[51] The material amendment to the tender makes a decision subject to review because the decision has been made in ignorance of the true facts material to that decision or for not considering relevant material.

[52] The conversion of the procurement model and the introduction of substantially revised pricing fell outside the parameters of the original tender and offended these constitutional principles. To that extent, the conduct embodied in the appointment letter of 9 December 2021 was unlawful and falls to be reviewed and set aside. Section 33(1) of the Constitution of the Republic of South Africa, 108 of 1996, gives anyone a right to administrative action that is procedurally fair. Section 6(2)(c) of PAJA allows review of an administrative action on the ground that the action was procedurally unfair.

[52] The appellant cannot rely on the negotiations which were not finalised. It must apply formally for a court to set aside the defective decision, so that the court can properly consider its effects on those subject to it. The conditions imposed by the Bid Evaluation Committee and the Municipal Manager's instruction to negotiate the price to R600 per vehicle amounted to a suspensive condition. The conduct is incompatible with the principles and values enshrined in section 195(1) of the Constitution.

The Counterclaim

[53] Even if the contract were ultimately declared invalid, the appellant accepts that the respondent is entitled to reasonable compensation for services actually rendered. MFMA[8] provides that," *Any entitlement to payment must in any event be approached through the scope of the* MFMA, including sections 15(a)-(b) and 32, which regulate and restrict payment *of unauthorised, irregular or fruitless and wasteful expenditure."*

[54] The difficulty with the order of the court is that it awarded the respondent the full amount claimed under a contractual arrangement that was itself tainted by unlawfulness.

[55] Once the amended contractual arrangement is found to be unlawful, the appropriate remedy is not the enforcement of the amended pricing structure rather, the respondent's entitlement must be determined on a just and equitable basis, having regard to the value of the services rendered and the pricing framework contemplated in the original tender documentation.

[56] The court *a quo* accordingly erred in granting the full amount claimed by the respondent in the counterclaim.

Costs

[57] The court *a quo* ought not to have granted a punitive costs order against the appellant. Although aspects of the appellant's conduct may be criticised, the legality review raised genuine constitutional and the procurement-law issues deserve judicial determination.

[58] The punitive costs order is disproportionate and conflates the Municipality's litigation conduct with its administrative conduct. While the Municipality's administrative handling was poor, the review application raised genuine questions of fraud and "ultra vires" conduct that warranted judicial determination. The costs order effectively penalizes the Municipality for exercising its constitutional right to seek legality review.

[8] See Municipal Finance Management Act (MFMA) [Act 56 of 2003. Section 15 restrict spending. A municipality can only incur expenditure if it is in accordance with an approved budget, and section 32 Dictates how municipalities must handle prohibited spending. It mandates that if an expenditure falls outside the bounds of the law, the municipality must investigate, recover the money from the person liable, or write it off.

[59] In the circumstances, a punitive costs order was not justified.

WHEREFORE, THE FOLLOWING ORDER IS PROPOSED:

1. The appeal succeeds.

2. The order of the court a quo is set aside and is replaced with the following:

   1. The decision embodied in the appointment letter dated 9 December 2021, together with the amended pricing structure and related contractual arrangements arising therefrom, is reviewed and set aside.

   2. The respondent is declared entitled to reasonable compensation for services rendered to the appellant, such compensation to be determined on a just and equitable basis having regard to the original tender framework.

   3. The appellant shall, within 30 days, furnish the respondent with a written computation of the reasonable compensation due. In the event that the parties fail to agree on the amount within 30 days thereafter. The parties are directed to endeavour to reach an agreement on the quantum of such compensation within 60 days of this order.

   4. Failing agreement within the stipulated period, either party may approach this Court, on supplemented papers if necessary, for the determination of the quantum of compensation.

3. Each party shall pay its own costs of the review proceedings.

[redacted]

J LESO AJ
ACTING JUDGE OF HIGH COURT,
MPUMALANGA DIVISION, MIDDELBURG

I agree

[redacted]

MATIME AJ

ACTING JUDGE OF HIGH COURT,

MPUMALANGA DIVISION, MIDDELBURG

I agree. It is so ordered.

[redacted]

K F PHAHLAMOHLAKA

JUDGE OF THE HIGH COURT,

MPUMALANGA DIVISION, MIDDELBURG

(The judgment was handed down electronically and by circulation to the parties and or their representatives by e-mail and by uploading to Caseline. The date of hand down is the date when the judgment was signed.)

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Date of Hearing: 27 February 2026

Date of Judgment: 30 June 2026