

**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)**

Case No. 100/09

In the main application between:

MOHAMMED ZUNADE LOGHDEY

Applicant

and

CITY OF CAPE TOWN

First Respondent

ADVANCED PARKING SOLUTIONS CC

Second Respondent

NUMQUE 20 CC

Third Respondent

In the counter-application (for a review and related relief) between:

ADVANCED PARKING SOLUTIONS CC

First Applicant

NUMQUE 20 CC

Second Applicant

and

CITY OF CAPE TOWN

First Respondent

CHAIRPERSON, SUPPLY CHAIN MANAGEMENT

BID ADJUDICATION COMMITTEE OF THE

CITY OF CAPE TOWN

Second Respondent

CITY MANAGER OF CAPE TOWN

Third Respondent

MOHAMMED ZUNADE LOGHDEY

Fourth Respondent

JUDGMENT DELIVERED ON 20 JANUARY 2010

BINNS-WARD J:

^{1]}On 3 July 2008, consequent upon the outcome of a competitive bidding process, the City of Cape Town (which is a municipality and an organ of state within the local sphere of government) awarded a contract to Mohammed Zunade Loghdey ('Loghdey'). It was for the provision of a kerbside parking management service over a three year period. Advanced Parking Solutions CC and Numque 20 CC have applied for the review and setting aside of the award of the tender contract to Loghdey. The review application was brought by way of a counter-application. The main application was an application by Loghdey to compel the City to proceed with the implementation of the tender contract. The implementation of the contract has not yet commenced. Initially this was as a result of an internal appeal against the award, and latterly as a consequence of an interim prohibitory interdict imposed pending the determination of the current application. The

parties were agreed that in the event of the counter-application succeeding it is unnecessary to consider the main application.

2]Loghdey trades as Street Parking Solutions. For convenience I shall refer to him and his business indiscriminately in this judgment by the acronym 'SPS'. I shall refer to the applicants for review as 'APS' and shall refer separately to Numque 20 CC as 'Numque', whenever it is necessary for the purpose of this judgment to distinguish it from Advanced Parking Solutions CC.

3]The application for review is brought in terms of s 6 of the Promotion of Administrative Justice Act 3 of 2000 (PAJA). PAJA is the legislation contemplated in s 33(3) of the Constitution to give effect to everyone's right to administrative action that is lawful, reasonable and procedurally fair. It is trite by now that the award of a tender contract by an organ of state is 'administrative action' within the meaning of PAJA.

4]It is convenient to preface the setting out of APS's grounds of review with a summary of the applicable statutory and regulatory provisions.

5]The procurement processes of organs of state have to comply with s 217 of the Constitution, which provides:

'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.'

6]As far as procurement by municipalities, in particular, is concerned, the import of s 217 of the Constitution has been fleshed out in Part I of Chapter 11 (ss 111-119) of the Local Government: Municipal Finance Management Act 56 of 2003 ('the MFMA').

7]In terms of s 111 of the MFMA, every municipality must have and implement a supply chain management policy which gives effect to the provisions of Part I of chapter 11 of the Act. Section 112 of the MFMA prescribes that a municipality's supply chain management policy must be fair, equitable, transparent, competitive and cost-effective, and it must comply with a prescribed regulatory framework for municipal supply chain management. The relevant framework has been prescribed in the Municipal Supply Chain

Management Regulations published under General Notice 868 in GG 27636, dated 30 May 2005 ('the regulatory framework').

8]Section 112 of the MFMA further prescribes that a municipality's supply chain management policy must 'cover' certain matters. These matters include the procedures and mechanisms for tenders, open and transparent pre-qualification processes for tenders or other bids, competitive bidding processes in which only pre-qualified persons may participate, bid documentation, advertising of and invitations for contracts, procedures and mechanisms for the evaluation of bids to ensure best value for money, procedures and mechanisms for the approval of bids, and procedures and mechanisms for negotiating the final terms of contracts and the delegation of municipal supply chain management powers and duties, including to officials.

9]The contract in question is a 'long term contract' as defined in the regulatory framework.¹ Accordingly, the services to be provided thereunder had to be procured through a competitive bidding process.² The regulatory framework requires that bid

¹ See reg. 1 of the regulatory framework.

² See reg. 19 of the regulatory framework.

documentation must, amongst other matters, include evaluation and adjudication criteria.³ The regulatory framework permits a municipality to allow in its supply chain management policy for the accounting officer to negotiate the final terms of a contract with bidders identified through a competitive bidding process as 'preferred bidders'. This measure of allowance is, however, subject to the proviso that such negotiation must not allow any preferred bidder 'a second or unfair opportunity' and may not be to the detriment of any other bidder.⁴

10]The regulatory framework allows for a municipality's supply chain management system to provide for a 'committee system' to deal with the competitive bidding process.⁵ A committee system is required to comprise of at least three committees; namely, a bid specification committee, a bid evaluation committee and a bid adjudication committee.⁶

³ See reg. 21 of the regulatory framework.

⁴ See reg.24 of the regulatory framework

⁵ See reg. 26 of the regulatory framework. See P. Bolton *The Committee System for Competitive Bids in Local Government* PER/PELJ 2009 12 (2) 57 (<http://www.saflii.org.za/za/journals/PER/2009/8.html>) for a useful summary and discussion of the regulatory framework's provisions in respect of the committee system.

⁶ See reg 26 of the regulatory framework.

11]In formulating the specifications for any procurement by a municipality of goods or services, a bid specification committee is required to provide for 'any accepted standards such as those issued by...the International Standards Organisation...with which the equipment or material or workmanship should comply'. Specifications should also 'where possible, be described in terms of performance required rather than in terms of descriptive characteristics for design'.⁷ A bid specification committee must be composed of one or more officials of the municipality, preferably including the manager responsible for the function involved. It may 'when appropriate' include external specialist advisers'.⁸

12]A bid evaluation committee is required in terms of the regulatory framework to evaluate bids in accordance with (i) 'the specifications for a specific procurement'⁹ and (ii) the applicable points system. In addition the evaluation committee must evaluate each bidder's ability to execute the contract.¹⁰

⁷ See reg 27 of the regulatory framework.

⁸ See reg. 27(3) of the regulatory framework.

⁹ See reg. 28(1)(a)(i) of the regulatory framework.

¹⁰ See reg. 28(1)(b) of the regulatory framework.

13]The function of a bid adjudication committee is essentially to provide a final consideration by senior management officials of the municipality, with the assistance of a technical expert in the relevant field, of the bid evaluation committee's recommendation before the relevant contract is awarded. Certain formalities must be complied with if the bid adjudication committee decides that the contract should be awarded to any bidder other than that recommended by the bid evaluation committee. Notification is required in such circumstances to the Auditor-General, the relevant provincial treasury and the National Treasury.¹¹

14]The City of Cape Town's supply chain management policy ('the SCMP'), a copy of which was annexed to APS's founding papers in the review application, appears to comply in all relevant respects with the regulatory framework.

15]In particular, and insofar as relevant to the current matter, the SCMP –

16.1 stipulates (in clause 97) that '[B]id documentation must clearly indicate the terms and conditions of contract,

¹¹ See s 114 of the MFMA.

specifications, criteria for evaluation and adjudication procedures to be followed where applicable'. It provides (in clause 101) that '[T]he bid documentation and evaluation criteria shall not be aimed at hampering competition, but rather to ensure fair, equitable, transparent competitive and cost effective bidding, as well as the protection or advancement of persons as embodied in the City's Preferential Procurement Policy'.

16.2 provides (in clause 111) that if the estimated contract value exceeds R10 million the bidder must supply audited financial statements 'if the bidder is required by law to prepare annual financial statements'.

16.3 prescribes (in clause 112) -that '[B]id documentation shall state that alternative bids may be submitted provided that a bid free of qualifications and strictly in accordance with the bid documents is also submitted'. An alternative bid is required to be submitted on a separate complete set of bid documents. Evaluation of

alternative bids is permitted only if the requirements of clause 112 have been complied with – see clause 196.

16.4 provides, in clause 134, that ‘if an appeal is lodged in terms of clause 211’ all the bidders must be requested to extend the validity of their bids until the appeal is finalised.

16.5 requires, in terms of clause 158, ‘each bid [to be] in writing using non-erasable ink’. Related to this provision is clause 182.2, which provides that ‘[B]ids shall be considered invalid and shall be endorsed and recorded as such in the bid opening record by the responsible official...if the bid is not completed in non-erasable ink’.

16.6 provides that the evaluation of a bid shall note for inclusion in the evaluation report, a number of matters including the particulars of any bidder ‘whose bid is not in compliance with the specification’ (see clause 191)

- 16.7 provides that '[T]he evaluation of bids on an equitable basis may be considered during the evaluation process'. (As far as I have been able to determine, the SCMP does not appear to define exactly what evaluation 'on an equitable basis' comprehends.)
- 16.8 enjoins the bid evaluation committee, having considered 'the Responsible Agent's draft report, [to] submit a report, including recommendations regarding the award of the bid or any other related matter, to the Bid Adjudication Committee for approval or for further recommendation to the City Manager for approval' (clause 201).
- 16.9 allows (in terms of clause 216) the City Manager to 'negotiate the final terms of a contract with bidders identified through a competitive bidding process as preferred bidders provided that such negotiation does not allow any preferred bidder a second or unfair opportunity; [or] is not to the detriment of any other bidder'.

16.10 provides, in clause 276, for the 'ratification' by the City Manager of 'any minor breaches which are purely of a technical nature of the bid processes described in this Policy by an official or committee acting in terms of delegated powers'.

16]Clauses 210-214 of the SCMP provide as follows:

'2.10 If the Bid Adjudication Committee, City Manager or other delegated official has resolved that a bid be accepted, the successful and unsuccessful bidders shall be notified in writing of this decision.

211.The written notification referred to in clause 210 shall inform the parties:

211.1of their right to appeal such decision within 21 days of the written notification of that decision in terms of Section 62 of the Systems Act;

211.2of their right to request reasons for the decision in terms of the Promotion of Administration Act, 3 of 2000;

211.3that any appeal as envisaged by this clause must be submitted to the City Manager at the address stated in the notification; and

211.4that no award shall be made until either the successful expiry of the 21 day appeal period or confirmation in writing that none of the affected parties intend to appeal, or the satisfactory resolution of any appeals.'

212.Any appeal must state the reasons for the appeal, the way in which the person's rights are affected by the decision and the remedy sought.

213.The consideration of appeals and if necessary, the invalidation of any decision made, shall be dealt with in terms of the City's appeal process.

214 If, after the expiry of the prescribed 21 day appeal period there are no appeals, then a letter of acceptance/award shall be issued to the successful bidder.'

17]Implementation of the procurement policy of any organ of state, including a municipality, is furthermore required¹² to occur within the framework provided in terms of the Preferential Procurement Policy Framework Act 5 of 2000 ('the PPPFA'). This means that only 'acceptable tenders', as defined in the Act, may be scored.¹³ An 'acceptable tender' is 'any tender which, in all respects, complies with the specifications and conditions of tender as set out in the tender document'.¹⁴

18]Having sketched the applicable statutory and regulatory provisions it is time to turn to the grounds on which APS relies in the application for judicial review. Borrowing liberally from the description in APS's heads of argument, these may be summarised as follows:

- 18.1 that the decision of the City Manager (dated 12 October 2007) and the decision of the bid adjudication committee ('the SCMBAC'), dated 30 June 2008, and the resultant contract entered into between the City

¹² Unless determined otherwise by the Minister of Finance; see reg. 2(2) of the Preferential Procurement Regulations (published under GN R725 in GG 22549 of 10 August 2001).

¹³ Cf. *Chairperson, Standing Tender Committee and Others v JFE Sapela Electronics (Pty) Ltd and others* 2008 (2) SA 638 (SCA) at para. [11].

¹⁴ Section 1 of Act 5 of 2000.

and SPS on 3 July 2008 should be reviewed and set aside on the basis that they failed to comply with clause 211 of the City's Supply Chain Management policy and clause 13.9.1 of the Conditions of Tender¹⁵ ('the first review ground').

18.2 SPM's tender failed to comply with a number of formal responsiveness criteria and it should have been excluded from consideration ('the second review ground').

18.3 SPS's tender failed to comply with a number of 'pre-qualification criteria' and it should have been excluded from consideration ('the third review ground').

18.4 SPS's tender failed to comply with the bid specifications in the sense that it tendered a system which did not exist and the tender should have been

¹⁵ Clause 13.9.1 of tender invitation provided (insofar as relevant):

'13.9.1 Appeals

In accordance with Section 62 of the Municipal Systems Act (Act 32 of 2000), the award of this contract is subject to a 21-day appeal period.

*Any appeals **must** be submitted in writing to the City's Appeals office, accompanied by a copy of the letter about which the appeal is being lodged, addressed to the City Manager c/o Director: Legal & Administration, for the attention of ...*

*Any appeal **must** be submitted within 21 days of the notification of the contract award.'*

excluded from consideration ('the fourth review ground').

18.5 SPS's tender should have been excluded because it offered a system which did not comply with the ISO 14443A and ISO 14443B specification ('the fifth review ground').

18.6 SPS's tender should have been excluded because of Loghdey's weak past performance under an interim parking management contract in the Claremont area ('the sixth review ground').

18.7 SPS's tender was scored unreasonably high for a number of the functionality criteria ('the seventh review ground').

18.8 The manner in which the financial bids were scored was not competitive and produced an irrational result ('the eighth review ground'); and

18.9 Various procedures contained in Chapter 11, part 1 of the MFMA, the regulatory framework and the City's

SCMP had not been complied with ('the ninth review ground').

19] In view of the conclusion to which I have come in regard to the result of the application it is unnecessary to deal with all of the aforementioned grounds of review. Some of them in any event overlap – in this regard the second to fifth review grounds each essentially go to different aspects of alleged non-responsiveness.

20] Suffice it to say that I consider that there is no merit in the sixth ground. The invitation to tender made it quite clear that the City reserved to itself a discretion to reject any bid on the basis of the bidder's inadequate performance of previous contracts. In the current case, despite the fact that there is evidence that SPS's performance of the Claremont kerbside parking contract had given rise to complaints by municipal officials, it would appear that the problems that had initially manifested in this regard were considered by those in responsible authority to have been satisfactorily resolved. Whether this was objectively correct or not is of no relevance. There is nothing in the bid documentation which obliged the municipality to exercise its discretion against

SPS and accordingly no basis on this ground on which this court could impugn the City's decision to award the tender contract to SPS.

21]I would also be reluctant to be drawn into the detail of the evaluation committee's scoring of the competing tenders. Scoring is a technical function and there is no suggestion that there was any deficiency in the appropriate technical qualifications of the committee's members. In the absence of a starkly demonstrable misdirection or compelling evidence of arbitrariness on the part of the evaluation committee, engagement by the court in the scoring process would be an inappropriate intervention in the appointed functionaries' area of governmental operation and would run the danger of impermissibly blurring the distinction between review and appeal.

22]There is also no merit in APS's contention that SPS's tender should have been disqualified by reason of no audited financial statements having been attached to the tender submissions. Loghdey is a natural person and SPS is his trading name for present purposes. On a proper interpretation of the request for

proposals - which should occur with due regard to the context provided by the regulatory framework and the SCMP - it is apparent that only persons which are required by law to produce audited annual financial statements (e.g. companies) were subject to this requirement.

23]The City did indeed fail to comply with paragraphs 210-214 of the SCMP. It awarded the contract to SPS without any indication in the relevant notification letters, either to SPS or to the unsuccessful tenderers, of the matters set out in paragraph 211.1-211.4 of the SCMP. Whether this non-compliance was material in the sense of justifying an interference with the decision to accept the bid on judicial review depends on whether, but for the conclusion of the tender contract with SPS, APS would otherwise have enjoyed a right of appeal in terms of s 62 of the Local Government: Municipal Systems Act 32 of 2000 ('the Systems Act'). That poses a legal question the answer to which lies in an interpretation of the relevant statutory provision.

24]Mr *Joubert* SC, who appeared (together with Mr *Spamer*) for SPS submitted that the legal question had already been answered

for present purposes in a judgment by Le Grange J delivered early last year, now reported *sub nom. Loghdey v Advanced Parking Solutions CC and Others* [2009] ZAWCHC 15; 2009 (5) SA 595 (C). I do not agree.

25]In *Loghdey*; Le Grange J granted an application by SPS for an order declaring that APS had no right of appeal in terms of s 62 of the Systems Act against the decision by the City's Bid Adjudication Committee to award the tender to SPS. In arriving at this conclusion the learned judge found that the SCMP did not in itself afford a right of appeal,¹⁶ and he pointed¹⁷ to the distinction between the current case and that of *Syntell (Pty) Ltd v City of Cape Town and Another* [2008] ZAWCHC 120 (13 March 2008), relied upon by APS, in which the City had expressly made its award of the tender contract subject to a right of appeal by the unsuccessful tenderers.¹⁸ I am in respectful agreement with those findings.

¹⁶ See para. [31] of *Loghdey*, *supra*.

¹⁷ At para.s [27] and [32] of *Loghdey*, *supra*.

¹⁸ The distinction being that in *Syntell* the successful tenderer had been informed that the decision to award it the tender would not become effective until after the expiry of the 21 day period afforded for appeals to be brought in terms of the Systems Act and in the event of any such appeal being lodged, until after the determination of the appeal.

26] However, those findings did not address the issue of whether the City had been obliged in law to deal with the current matter consistently with paragraphs 210-214 of the SCMP, as it had dealt with the tenderers in *Syntell*. Le Grange J was not called on to deal with that aspect. The learned judge was clearly cognisant of that, as appears from the following remarks at para. [34] of his judgment: *‘Even if the City acted incorrectly in not notifying the relevant parties of a right of appeal, and the signing of the contract with the Applicant was legally flawed, unless and until the agreement is set aside by a court of law, it remains valid and enforceable. In this regard see **Oudekraal Estates (Pty) Ltd v City of Cape Town and Others** [2004 \(6\) SA 222](#) [SCA] at page 241 [26].*

27] It is plain that, applying *Oudekraal* principles, Le Grange J was unwilling in *Loghdey* to entertain the *collateral* challenge to the City’s decision evidently mounted by APS and the other respondents as part of their opposition to the application by SPS for declaratory relief. In the current matter, in distinction to its position as a respondent in the application before Le Grange J,

APS –now as applicant - has mounted a *direct* challenge to the legality of the City's decision. The challenge is based on the City's non compliance with paragraphs 210-214 of the SCMP. The first ground of review in the current application therefore calls for an answer to a question which, as mentioned, Le Grange J was not called on to determine.

28]Le Grange J's finding that paragraphs 210-214 of the SCMP do not, in themselves, afford anybody a right of appeal in terms of s 62 of the Systems Act is in my view correct. Clause 13.9.1 of the tender invitation does not add to the position: it merely purports to record an understanding (by the City) of the effect of s 62; not to afford rights under s 62. The City's non-compliance with those clauses can therefore be material only if APS enjoyed a right of appeal in terms of s 62 by reason of the provisions of that section read on its own. In such an event, by purporting to vest accrued rights in SPS before the lodging and determination of such an appeal, the City's non-compliance with paragraphs 210-214 of the SCMP would, while its result remained in place, unlawfully oust APS's ability to use s 62 of the Systems Act to obtain a viable internal remedy against the award of the tender contract to SPS.

29]The basis for the existence of paragraphs 210-214 of the SCMP does not arise out of any requirement of the statutory framework.¹⁹ Bearing in mind that the SCMP is a guideline document produced and adopted by the City itself, I think that it is relevant to have regard to the intended meaning and effect of paragraphs 210-214 thereof assessed against what one is able to infer²⁰ was a widespread misapprehension by municipalities throughout the country, including the City of Cape Town, that s 62 of the Systems Act afforded an internal appeal to anyone able to contend that their rights were affected by a decision made by a municipal functionary

¹⁹ Reg. 49 of the regulatory framework, which provides:

'Objections and complaints

The supply chain management policy of a municipality or municipal entity must allow persons aggrieved by decisions or actions taken by the municipality or municipal entity in the implementation of its supply chain management system, to lodge within 14 days of the decision or action a written objection or complaint to the municipality or municipal entity against the decision or action.'

does not appear to me to relate to s 62 of the Systems Act. Firstly, it refers to objections and complaints, not appeals; and secondly, it affords a time period for the lodging of such complaints or objections which is different from that allowed by the Systems Act for the lodging of appeals. To the extent that the judgment in *Total Computer Services (Pty) Ltd v Municipal Manager, Potchefstroom Local Municipality and Others* 2008 (4) SA 346 (T) at para.s [65]-[74] appears to hold differently, I respectfully differ. The case in *Total Computer Services* appears in any event to have proceeded on the basis of an acceptance that an appeal in terms of s 62 of the Systems Act was available, *ex lege*, to an unsuccessful tenderer.

²⁰ From the *Reader* case (2008 (2) SA 582 (C) and 2009 (1) SA 555 (SCA)) and from judgments in matters such as *Darson Construction (Pty) Ltd v City of Cape Town* 2007 (4) SA 488 (C) and *Total Computer Services* supra. If one has regard to the fact that the Systems Act predates the SCMP by a few years, as well as the inference which may be drawn from the content of judgments such as *Darson*, that the City had been routinely affording s 62 appeals to unsuccessful tenderers, the basis for the insertion of paragraphs 210-214 in the SCMP is readily understandable. The role of those paragraphs in the context of s 62 as it has been interpreted by the SCA and the Full Bench of this court in *Reader* is, in contrast, by no means sensibly apparent.

or political organ acting under delegated authority from the municipal council.

30]As I understand the judgment of the Full Bench in *Reader and Another v Ikin and Another* 2008 (2) SA 582 (C), it held that s 62 of the Systems Act is nothing more than a codification of the limited circumstances in which a decision-maker can, at common law, withdraw or alter its own decision without infringing the doctrine of *functus officio* (which determines that once a decision has been made the decision-maker cannot revisit it). See *Reader* especially at para.s [20]-[21] and [31]-[32]. In [Municipality of the City of Cape Town v Reader and Others \[2008\] ZASCA 130; 2009 \(1\) SA 555 \(SCA\)](#) at para. [36], the majority judgment in the Supreme Court of Appeal unreservedly and expressly endorsed the reasoning of the Full Bench in every respect.

31]Lewis JA referred to the *Syntell* judgment in a footnote to her majority judgment in *Reader* in the SCA. Identifying the factually distinguishing feature of that case, described above, the learned judge noted that the question of a tenderer's right to appeal as it emerged in that case was not before the court. As I have already

pointed out, the question in the form it emerged in *Syntell* is also not before this court.²¹

32]My own view is paragraphs 210 and 211 of the SCMP, properly construed, assume the existence of an established right of appeal in terms of s 62 of the Systems Act by any unsuccessful tenderer against the decision by the City to accept a bid, and make provision for a *spatium* between the notification of that decision and any conclusion of an agreement awarding the relevant contract in order to permit the assumed right of appeal to be effectively exercised. In my opinion the authoritatively declared proper interpretation of s 62 has shown up the impracticality of the scheme of those paragraphs of the SCMP. After all, the publically announced decision to award a tender is a final decision within the meaning of the *functus officio* doctrine.²² To attach to such decision a note that it is subject to appeal is not to derogate from its finality. Indeed it is only against an effective decision that an appeal ordinarily lies; and there can be no doubt that the appeal

²¹ The judgment in the *Syntell* matter determined that a municipality might, by framing its decision in a manner so as to suspend its effect pending an appeal in terms of s 62 of the Systems Act thereby, its own volition, effectively afford a right of appeal to a person who would otherwise not have had an appeal under that provision.

²² See Hoexter, *Administrative Law in South Africa* 247-8; De Ville *Judicial Review of Administrative Action in South Africa* 69-70.

contemplated in paragraph 211 of the SCMP is an appeal against the decision to award the tender - not the resultant conclusion of a contract. The successful tenderer's right to conclude the contract arises from the public procurement authority's announced decision to accept its bid.

33]In the result only the person who has asked or applied for the decision in question may appeal against it in terms of s 62 of the Systems Act, and any determination of such appeal may only alter such decision if the alteration will not derogate from any rights that may have accrued to the appellant, or third parties, as a consequence of the decision. Thus the availability and ambit of an appeal in terms of s 62 are extremely limited.

34]Section 62 is ineptly drafted²³ and has given rise to great difficulty and confusion. Some may regret the limiting interpretation given to the provision by the courts. Certainly the wider, albeit somewhat linguistically strained, interpretation previously given to it in practice by many municipalities was in

²³ This no doubt explains the SCA's determination in *Reader* that there was no 'viable' appeal remedy available; thereby reconciling, as far as it is possible to do sensibly, s 62(1), which appears in fairly wide terms to extend a right of appeal, and s 62(3), which excludes the appellate authority's ability to effectively determine any such appeal against a decision which has vested rights in any person other than the appellant.

conformance with the trend notable in certain other jurisdictions to enhance the quality of administrative justice by extending the availability of administrative appeals, thereby reducing the extent to which resort needs to be had by adversely affected parties to judicial review, which in many cases is not a satisfactory alternative to a merits appeal.²⁴ Be that as it may, the import of the provision has now been authoritatively declared and therefore, unless and until s 62 of the Systems Act is amended or substituted, it falls to be construed and applied accordingly.

35]In the result I have concluded that APS did not have a right of appeal in terms of s 62 of the Systems Act and that, consequently, the apparent non-compliance by the City's Bid Adjudication Committee with the provisions of paragraphs 210-214 of the SCMP was of no moment. (As mentioned, APS's case in this respect was advanced on the basis of alleged non-compliance with an applicable empowering provision, and not on the basis of any legitimate expectation on its part that the relevant provisions would be complied with. I have therefore not considered whether a case

²⁴ Compare the workings of the Administrative Review Tribunal in Australia and the two -tier tribunal system established in the United Kingdom under the Tribunals Courts and Enforcement Act 2007.

based on the doctrine of legitimate expectation could have succeeded, and express no opinion in that regard.)

36]The first review ground therefore fails.

37]Turning then to the grounds of review based on the alleged non-responsiveness of SPS's tender (as mentioned this aspect is comprehended in the second to fifth grounds of review). I have already noted the requirement of the PPPFA that a bid must be an 'acceptable tender', as defined, to qualify to be scored. In this connection clause 14.7.1 of the request for proposal document ('the RFP') issued by the City provided:

'ELIMINATION OF NON-RESPONSIVE BIDS

Received bids will be scrutinised for compliance with the conditions and specifications of this RFP by following the following steps. Non-compliant bids will be eliminated at each step:

- | | |
|----------|--|
| 14.7.1.1 | Compliance with the Responsiveness Criteria, Conditions of Tender and Instructions to Bidders. |
| 14.7.1.2 | Compliance with Pre-Qualification Parameters. |
| 14.7.1.3 | Compliance with requirements, standards and specifications as set in the rest of the RFP.' |

38]In view of the conclusion to which I have come it is not necessary to deal with each and every one of the many aspects of alleged non-responsiveness on which APS relied. Suffice it to say

that I was not persuaded that they all had merit. I propose to deal only with those aspects relied on by APS which I consider by themselves, and without regard to the other alleged deficiencies, should have resulted in the rejection by the City of SPS's tender.

39]The instructions to tenderers (which I have read as being synonymous with the '*Instructions to Bidders*' referred to in clause 14.7.1.1 of the RFP (quoted above) enjoined that '[t]he technical proposals should include the following documents:.....Details of the proposed Parking Management System. This **must** comply with minimum specifications).' (The underlining and emphasis in bold font come from the RFP itself.) The parking management system sought by the City was described in conceptual terms in clause 14.1.3 of the RFP. It was to comprise of two components described respectively as a 'Back Office' component and a 'Kerbside Parking Operation'. It is apparent that both components required technical equipment enabling the accommodation and management of a 'City Smartcard', including 'reloading and redemption equipment' and 'vending systems'. The RFP indicated that the system required had to enable the loading and updating of

‘City Cards’ via retail and other convenient outlets. It stated (in clause 14.2.8 (s.v. ‘Distribution Systems’)) that ‘*The proposed read/write units shall comply with ISO 14443A and ISO 14443B*’. The requirement of an integrated contact-less smartcard read/write unit ‘*complying with ISO 14443A and ISO 14443B*’ was re-iterated in clause 14.2.9 of the RFP (s.v. ‘Collection Systems (Parking Meters)’). Clause 14.2.12 of the RFP provided (s.v. ‘City Cards (Contact-less smartcard)’): ‘*The contact-less smartcard cards **must** comply with either ISO 14443A or ISO 14443B*’.

40]The significance of compliance with ISO 14443A and ISO 14443B is that the City wanted the streetside parking attendants to be equipped with handheld devices that would be able to read and write to the different formats of smartcards manufactured by the HID Corporation and by Phillips, respectively. (The stipulation of the required specification with reference to applicable codes of the International Standards Organisation (ISO) was consistent with the requirement of regulation 27 of the statutory framework and clause 97 of the SCMP.)

41]The equipment to be employed in terms of SPS's tender did not comply with the technical specification described in the RFP. SPS's tender proposed the use of a device called the OEM50 unit. In an evaluation report, dated July 2007, presumably to the Bid Evaluation Committee, by an independent expert consultant appointed by the City, it was pointed out that the equipment tendered by SPS '*clearly [did] **NOT**²⁵ comply with the requested standards in the tender request*'. In regard to SPS's responses to the requirements of clauses 14.2.8 and 14.2.9 of the RFP, the independent consultant reported as follows:

'SPS claims full compliance and have included a read/write device from HID. This device however can only read ISO 14443A and not write to an ISO 14443A card. This is therefore viewed as NOT compliant.

It must be noted that there is NO supporting documentation for this claim and it will therefore have to be verified.

It must further be noted that a legal opinion might be required here.'

42]It would appear that the initial assessment of the bids submitted resulted in the identification of three 'preferred bidders', to whom 'a number of clarification questions' were put. In the context of it being clear that equipment tendered in purported compliance with the requirements of clauses 14.2.8 and 14.2.9 had been

²⁵ The capital letters and bold print have been replicated from the report itself.'

unequivocally confirmed to be non-compliant with the technical specifications, the 'clarification question' put to SPS did not read sensibly. It went: '**Issue:** *The proposed read/write unit shall comply with ISO 14443A and ISO 14443B. **Clarification Required:** Please verify your claims that you have full compliance with your proposed read/ write device. It must be noted that there is no supporting documentation/ certification for this claim and this needs to be supplied and verified.'*

43]The independent consultant commented on SPS's response to this 'clarification question' as follows: '**Response:** *This bidder has submitted documents substantiating their claims of compliance. It should however be noted that the read/ write unit offered does not fully comply and if selected the City should insist on the use of the OEM 150 module with the plug in options giving the additional parts 3 and 4 of ISO 14443A. **Should this bidder be selected it is recommended that a live test be performed at the time of contract negotiations.***

44]The independent expert concluded the assessment of the answers given by the three 'preferred bidders' to the clarification

questions' by providing a summary in respect of each of them.

The summary in respect of APS concluded: '*Technologically this is a well thought out system that does comply with the technical requirements.*' In respect of SPS the summary went as follows:

'On the issue of advanced technology and the selection of the read/write device units this company has elected to use the OEM 50 unit from HID which is non-compliant, but is capable of performing the task. No mention of any innovative thinking has been demonstrated and hence this offer is considered non-compliant.

If the OEM 150 module from HID with the additional modules for the ISO 14443A parts 3 and 4 were used this bid would be compliant. The bidder has offered to use this module but has not indicated what effect this will have on the offer. This would also resolve the issue of compliance with the distribution and collection system.

The issue on Open systems has not been addressed but if OEM150 were used interoperability could be guaranteed and then open systems will develop.

For some reason this bidder has the answers and capabilities but appears to have chosen to omit these requirements stating that their offer is more than adequate to perform the task.

If this bidder deployed the OEM 150 unit I would be happy to say that they comply, failing this, this bid has to remain a non-compliant technology offer.'

45]The contract subsequently concluded between SPS and the City indeed provided for the use of '*An integrated HID OEM150 with plug-in module or equivalent ISO14443A/B Smartcard Reader.*'

46]APS contend that the tender submitted by SPS was non responsive in that it did not offer the use of equipment qualifying with the technical specifications and that it should have been

rejected as failing to qualify as an '*acceptable tender*', as defined in the PPPFA. This was an issue that it advanced as one of its grounds of appeal in proceedings APS purported to bring in terms of s 62 of the Systems Act. That appeal was, for reasons to which I shall return in a different connection later in this judgment, not heard. Unidentified officials of the City had, however, submitted written submissions in regard to the appeal. Those submissions suggested that SPS's non-compliant tender had been tolerated because of what the officials considered had been an ambiguity in the RFP. In this regard reference was made to the difference in wording between clauses 14.2.8 and 14.2.9 on the one hand and clause 14.2.12 (all of which have been quoted above). It was stated that '*Given this ambiguity in the RFP, it would have been unfair to exclude a bidder on the basis of non-compliance with this requirement.*' It has to be pointed out that having initially indicated an intention to oppose the application, the City thereafter decided rather to abide the judgment of the court. The City Manager at that stage indicated that an affidavit explaining the City's position would be filed for the assistance of the court. In the event there is no affidavit in the papers explaining the City's position. The

submissions from which I quoted earlier in this paragraph obviously do not necessarily reflect the City's attitude; they do however seem to give some insight into the approach of those officials concerned with the evaluation and adjudication of the bids.

47]It is plain from what I have already set out that SPS's bid was non-compliant with the technical specifications. The City has not contended otherwise; nor could it have. To the extent that written submissions by unnamed City officials, referred to earlier, might suggest an explanation why SPS's bid was not excluded for non-compliance on that basis I find it unacceptable. There is no real ambiguity in the specification requirements of the RFP. This much is apparent when one considers the superficial apparent difference between clauses 14.2.8 and 14.2.9 on the one hand and clause 14.2.12 on the other in the context of the RFP as a whole. The intended interoperability of the smartcard is clearly and repeatedly stated in the RFP. It is plain that the device units required would have to be able to both read from and write to both HID and MIFARE cards. The OEM 50 devices tendered by SPS did not meet this requirement and, in the end, a contract was concluded by the City with SPS providing for the use by SPS of a device

materially different from that which they had included in their tender.

48]In failing to evaluate SPS's bid, according to its tenor, against the requirements of the bid specifications, the bid evaluation committee acted at odds with regulation 28 of the regulatory framework, discussed in para. [, above, and therefore in breach of s 112 of the MFMA. Furthermore, by proceeding to score the tenders on the basis of allowing SPS tender to be treated as if it had tendered a different device, the evaluation committee scored a tender that was not 'acceptable' within the meaning of the PPFA. In my view the further consideration of a tender that was manifestly non-complaint with a material requirement of the RFP stripped the process of one of the essential characteristics of the public procurement process; transparency. A procurement process that entails the issue of requests for proposals compliant with x , but considers proposals manifestly not compliant with x ; in the process allowing a tenderer who tenders y (y being less than x) the opportunity be awarded a contract compliant with x cannot be regarded as transparent, fair or competitive within the meaning of s 217 of the Constitution, or the provisions of the other legislation

with the same object referred to in the introductory section of this judgment.

49]The offer by SPS that was eventually accepted by the City was not the one made in SPS's tender (cf. *Metro Projects CC and Another v Klerksdorp Municipality and Others* 2004 (1) SA 16 (SCA) at para. [15]). In my view the process went awry in this respect when, instead of excluding the SPS tender from consideration when it became apparent from the independent technical expert's report of July 2007 that the tender did not comply with the stated technical specifications, the City instead engaged in a so-called clarification process. In the course of the process SPS was permitted (if not encouraged) to offer to provide something materially different from that which had been offered in its tender; and thereby, quite irregularly, given a second opportunity.

50]APS contended that the consideration of SPS's tender in the circumstances just mentioned had knock on effects; more particularly it allowed SPS's financial tender to be evaluated in the context of use of equipment that was cheaper than which SPS was

eventually required to provide. This was not the usual sort of procurement contract, in terms of which the City's interest would be in the price it had to pay for goods or services. It was a contract in terms of which the City's financial interest was the share it was looking to receive of the revenue to be generated by the service provider appointed. It is conceivable that the percentage of turnover that a tenderer would be able to offer would be affected by the tenderer's margins and that the cost of equipment to be used might have a bearing on this. However, in view of the conclusion to which I have come on a purely procedural basis about the constitutional and statutory non-compliance of the process followed it is unnecessary for me to enter into the parties' respective contentions on the costs question and its possible effects.

51]For the same reason it is also unnecessary to consider the allegations that the SPS tender failed to comply with formal responsiveness criteria, most particularly that it was not completed using indelible ink.

52]While it would also not have been necessary to deal with the allegations about SPS's non-compliance with the pre-qualification criteria, I do nonetheless consider it worthwhile to say something in this regard.

53]Clause 14.6 of the RFP went as follows:

“14.6 PREQUALIFICATION PARAMETERS

Evidence of ability to perform – furnish supporting information

Potential Bidders must take note that only those proposals that meet (furnish supporting information) the following pre-qualification parameters, shall receive further consideration. The stipulated requirements must be appropriately satisfied within one or more of the entities (Consortium, Joint venture) comprising the bid.

Past experience and past Projects: Where these terms are used, bidders **must** only list experience and projects where the bidder had been totally responsible for all planning and operational aspects of the project. This shall include amongst others strategic planning, financial control, sourcing of material, personal matters, operational planning and execution. False or inaccurate claims may lead to bid being rejected.

The Bid Evaluation Team will evaluate whether the proposed systems are acceptable or not.

Parameters:

14.6.1 Proof of available credit of at least R2 million (Two million Rand) from a registered financial institution acceptable to the City or unencumbered employable assets to a higher value for the specific use of the Kerbside Management Parking system.

14.6.2 Bidders may in addition to the above, submit proof of current ownership of all required equipment or provide a letter of commitment from suppliers.

14.6.3 Operating a 24 hour a day, all year toll free call centre. This service may be outsourced, but the proposed call centre **must** be identified. The call centre, whether provided by the Contractor or outsourced, **must** have been in operation for at least 1 (one) years. Examples of typical reports produced, which demonstrate compliance with the Specification. (See Draft Memorandum of Agreement, Clause 4 Contractors Responsibilities), **must** be included. The proposed call centre may not be changed to another without prior approval of Council.

14.6.4 Past experience in **Kerbside Parking Management or similar**. Examples of past projects **must** be given, listing location, brief description, type of operation, names and contact persons (include Telephone Numbers) of clients.

Projects **must** include at least one example that comprises of not less than 1000 (one thousand) parking bays or a major project of similar proportion.

Examples of previous management reports (including financials) **must** be submitted.

14.6.5 Past experience in the operation **and maintenance of a substantial smartcard based payment system**. Examples of past projects **must** be given, listing location, brief description, type of operation, annual turnover, and size of card base, period of operation, names and contact persons (include telephone numbers) of clients.

14.6.6 Past experience in the operation of a substantial **Management Information System and Accounting System**. Information as per previous point to be provided. In addition, examples of actual past Management Reports to be included. Identification can be removed if considered confidential.

14.6.7 Past experience in **management of multi-million Rand contracts**. Examples of past projects **must** be given, listing location, brief description, type of operation, annual turnover, number of staff, period of operation, names and contract persons (include telephone numbers) of clients.

14.6.8 Description of proposed **Management Information Systems (MIS)**. Examples where this system is operational as well as copies of typical management reports to be included, as well as contact details of client bodies.

- 14.6.9 Description of proposed **Accounting System**. Examples where this system is operational as well as copies of typical management reports to be included.
- 14.6.10 Description of proposed **kerbside parking management system**.
- 14.6.11 Proposals should minimise fixed street furniture/equipment.
- 14.6.12 Description of proposed City Card and pre-paid credit vending system.
- 14.6.13 Description of proposed system to minimise harassment of motorists by informal parking attendants. Proof that the proposed system was implemented elsewhere and that it resulted in a substantial reduction of harassment **must** be submitted.
- 14.6.14 Description of proposed system to create a safer urban environment ie petty crime.
- 14.6.15 Description of proposed MIS to be used. The system should provide relevant statistics as per the requirements of Section 14.2. Pg29.
- 14.6.16 Statement on how many jobs will be created (in each of the managed areas for which a bid was submitted), if the proposed bid is accepted.
- 14.6.17 Detailed description of proposed Accounting system to be used. The system should contain adequate audit control.
- 14.6.18 Confirmation that the current City Cards (as held by the public), any new City Cards as issued by the Contractor, and cash will continue to be used as payment medium in the proposed systems.
- 14.6.19 Confirmation that the public will receive a printed Tax Invoice when concluding a parking transaction.
- 14.6.20 Names, particulars and CV's of the staff that will be employed at management level.
- 14.6.21 Confirmation that, at the end of a contract period, any new City Cards issued during the contract, will be re-useable by any new contractor, without any further reliance on or involvement of the Contractor or his/her agents, and without any intellectual property rights being retained by the Contractor or any other party to enable such use.
- 14.6.22 Confirmation that, at the end of the contract period, the following will be transferred to the City, at no cost, in a format acceptable to the City,

without any intellectual property rights being retained by the Contractor or any other party:

- 14.6.22.1 All security keys
- 14.6.22.2 The complete database of all parking bays
- 14.6.22.3 The complete database of all parking transactions during the contract”

54]Careful consideration of clause 14.6 reveals that many of its provisions do not bear on what would ordinarily be regarded as pre-qualification parameters, properly so-called. The requirement that a tenderer must have previous experience in large contracts of a similar nature might properly be a pre-qualification criterion, but a description of the systems to be used in the project goes to the content of the proposal to be submitted rather than any pre-qualifying parameter establishing a tenderer’s qualification to competently make a submission. I have mentioned this aspect because it is but an example –one of many that can be found - which highlights the poor quality of the RFP document. This is something that the City should consider in the context of any decision as to how it should move forward with the project in the context of the order that is to be made setting aside the award to SPS. Any procurement decision made on the basis of a process set in train by a badly flawed request for proposals document is

significantly more vulnerable to impugnement by dissatisfied parties than one based on a request competently composed by the bid specification committee. A badly put together request for proposals compromises the ability of bidders to submit 'acceptable tenders' as well as the ability of bid evaluation committees to perform their tasks in a manner that accords with the demands of the applicable legal framework.

55] Before moving on from the so-called prequalification parameters, it remains only to note that the SPS tender was not supported by an example of any previous contract in which SPS had been involved comprising of not less than 1000 (one thousand) parking bays or a major project of similar proportion. SPS's tender should also have been disqualified on this account had the process been conducted faithfully in accordance with the stipulated requirements in the RFP.

56] APS applied to strike out parts of the answering papers of SPS. The essential nature of the complaint underlying this application was the prejudicial nature of SPS's adoption by reference and incorporation into its own affidavit of the content of the written

submissions by unnamed City officials in the s 62 appeal proceedings mentioned earlier.²⁶ As by now apparent I was able to determine this application on the basis of the evident failure by the SPS tender to comply with the technical specifications. The written submissions of the City officials, which were annexed to APS's founding papers in the review application, were referred to in this connection, but, as pointed out, they did not derogate from the conclusion impelled by a consideration of the evidence of the deviation between the RFP and the proposal submitted. In the circumstances, and as both sides argued it *en passant* the merits of the principal application, I have found it unnecessary to deal with the striking out application. There was also an application by SPS to strike out some unfortunately expressed, and it would appear inaccurate, remarks about Mr Loghdey's qualification as an 'historically disadvantaged individual' as defined in the Preferential Procurement Regulations. Reliance on these averments was disavowed at the commencement of the hearing and I therefore also find it unnecessary to deal further with that.

²⁶ See para. [, above.

57]The last matter to be addressed is an issue which ordinarily would have been addressed at the outset; that is whether APS's application should be entertained at all regardless of its merit. I am dealing with this issue at the end rather than the beginning of the judgment because it is more convenient to explain my decision in respect of it against the background of the preceding discussion of the merits of the application, most particularly in regard to the first review ground. Indeed I dealt with the first review ground more fully than I would otherwise have done because of my apprehension of a connection of the issues entailed in it with the delayed institution by APS of the review application itself.

58]Section 7 of PAJA prescribes that applications for the judicial review of administrative action must be instituted within a reasonable time and, where no internal remedies exist, no later than 180 days after the date on which the person concerned was informed of the administrative action, became aware of the action and the reasons for it, or might reasonably have been expected to have become aware of the action and the reasons. It is common ground that the current application was instituted outside that time. APS therefore applied in terms of s 9(b) of PAJA for an extension

of that time. The court is empowered to grant the relief sought by APS 'where the interests of justice so require'.

59]SPS opposes the grant of any order in terms of s 9 of PAJA. The opposition is based on a number of grounds; essentially, (i) that the application should have been made at the outset either before or at the same time as the application for review; (ii) the length of the delay and (iii) the public interest in finality.

60]The relevant provisions of ss 7 and 9 of PAJA codify the rule of administrative law at common law commonly known as the 'delay rule'. Cf. *Ntame v MEC for Social Development, EC and Two Similar Cases* 2005 (6) SA 248 (E); ([2005] 2 All SA 535) at para. [13]. Accordingly the considerations that would be weighed in the second leg of the delay test expounded in cases like *Wolgroeiens Afslaers (Edms) Bpk v Munisipaliteit van Kaapstad* 1978 (1) SA 13 (A) and *Setsokosane Busdiens (Edms) Bpk v Voorsitter, Nasionale Vervoerkommissie, en 'n Ander* 1986 (2) SA 57 (A) at 86-7 are the same as those which fall to be weighed in determining what 'the interests of justice require' within the meaning of s 9 of PAJA.

61]The late institution of the application for judicial review was essentially as a consequence of the misdirected view taken by APS that it enjoyed an appeal in terms of s 62 of the Systems Act. It persisted in this view notwithstanding written advice from the City that on the latter's understanding of the import of the Full Bench judgment in *Reader* an internal remedy in terms of s 62 was not available. The City was inconsistent in its attitude, however. This was evidenced by the City subsequently agreeing to entertain an appeal, apparently in contradiction of its advised understanding of the *Reader* judgment. The City's change in stance might have been due to the effect of the judgment in *Syntell*, which was delivered after the Full Bench judgment, but before the SCA judgment in *Reader*. The SCA judgment in *Reader* might in turn have been read to expressly leave open the question of whether an unsuccessful tenderer enjoyed a right of appeal in terms of s 62 of the Systems Act. Suffice it to say there was evidently - and perhaps understandably - widespread uncertainty and confusion on the issue.

62]The forensic history of the treatment of s 62 of the Systems Act reviewed earlier in this judgment is such that it would be unfair to

hold APS's belief that it enjoyed an appeal under the provision against it. Section 7 of PAJA forbids the institution of judicial review proceedings before internal remedies have been exhausted. An exception to the prohibition is only allowed in exceptional circumstances. See *Nichol and Another v Registrar of Pension Funds and Others* [2005] ZASCA 97; 2008 (1) SA 383 (SCA). This is also a factor that weighs in the balance in favour of an understanding of APS's delay. APS certainly did not tarry after Le Grange J granted the declaratory relief in *Loghdey*, supra, which made it clear that in the peculiar circumstances it could not viably pursue an internal appeal under s 62 of the Systems Act. I mention in passing that I do not consider that APS can be criticised for not instituting proceedings earlier to set aside the selection of SPS as 'preferred bidder'. The selection was part of the tender adjudication process and it would have been inappropriate in my view for SPS to institute proceedings in respect of an inchoate administrative process, which would not necessarily, at the stage of the selection of a preferred bidder, have resulted in the award of the tender contract to SPS.

63]There has been no cognisable prejudice entailed as a consequence of the delay. The City has put in place interim measures in terms of which both SPS and APS have been awarded kerbside parking management contracts in various parts of the municipal area on a month to month basis pending the final resolution of the pending dispute concerning the legality of the award of the tender contract to SPS. Another factor that has to be taken into account is that APS succeeded in obtaining an interim interdict from this court (per Maqubela AJ) prohibiting the implementation of the tender contract pending the determination of this review.

64]In all the circumstances I am satisfied that the interests of justice require that paramount consideration should be given to the upholding of the objects of s 217 of the Constitution and the principle of legality.

65]SPS's counsel contended that the application for relief in terms of s 9 of PAJA had been brought too late. In this regard it needs to be mentioned that a notice of application formally seeking the relief was delivered only at argument stage. Mr *Joubert* submitted that

this court should follow the approach of the Eastern Cape High Court in [*Directory Solutions CC v TDS Directory Operations \(Pty\) Ltd and Others* \[2008\] ZAECHC 22 \(4 April 2008\)](#). In that matter Jansen J held that it was ‘wholly untenable’ for an applicant which had brought judicial review proceedings outside the time limit laid down in s 7 of PAJA to deal with the delay only in reply and to make application in terms of s 9 only at that stage. This approach is consistent with the approach in some judgments dealing with the delay rule under the common law; see e.g. *Scott and others v Hanekom and others* [1980 \(3\) SA 1182](#) (C) at 1192G-1193G. While I agree that any leave required in terms of s 9 of PAJA should in general be sought in the notice of motion, there is no need for a fixed rule in this regard – any more than there was in analogous circumstances under the common law. In the current matter APS did deal with the delay in its founding papers and did indicate therein that an application in terms of s 9 would be made at the hearing. This matter is therefore in any event factually distinguishable in the relevant respects from *Directory Solutions*.

66]The following orders will issue:

- (i) The main application in case No. 100/09 for an order directing the City of Cape Town to proceed with the implementation of the kerbside parking management contract concluded with the applicant on 3 July 2008 is dismissed.
- (ii) An order is granted in terms of s 9 of the Promotion of Administrative Justice Act 3 of 2000 extending the period within which the applicants in the counter-application might institute proceedings for the judicial review and setting aside of the decisions by the City of Cape Town to accept the bid of Mohammed Zunade Loghdey trading as Street Parking Solutions ('SPS') in tender BID 311 S/2006/07 and to conclude the tender contract with him to the date on which the counter-application was instituted.
- (iii) The decision by the City of Cape Town to accept the bid of SPS in tender BID 311 S/2006/07 and to conclude the tender contract with SPS for the provision

of kerbside parking management services is reviewed and set aside.

- (iv) SPS is ordered to pay the counter-applicants' costs of suit, including the costs of two counsel.
- (v) The costs referred to in paragraph (iv) shall include the counter-applicants' costs of suit in the main application (if any) and the costs reserved for later determination in terms of the order made by the late Mr Acting Justice Maqubela on 16 February 2009.
- (vi) No order is made in respect of the costs of the striking out applications.

A.G. BINNS-WARD

Judge of the High Court