



**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, BHISHO**

Case No: 930/2023

Of interest to other judges: YES

In the matter between:

SINCLAIR GERSAHN TROSKIE CONSTRUCTION CC

Applicant

AND

**MEMBER OF THE EXECUTIVE COUNCIL, PUBLIC WORKS
AND INFRASTRUCTURE, EASTERN CAPE PROVINCE**

First Respondent

**HEAD OF THE DEPARTMENT OF PUBLIC WORKS AND
INFRASTRUCTURE, EASTERN CAPE PROVINCE**

Second Respondent

SNZN CONSTRUCTION CC

Third Respondent

IMBUMBA DEVELOPMENTS CC

Fourth Respondent

RAPID BUILDERS AND CONTRACTORS (PTY) LTD

Fifth Respondent

P WISE PROJECTS (PTY) LTD

Sixth Respondent

MBOKOTHU INVESTMENTS CC t/a ZM CONSTRUCTION

Seventh Respondent

PHUMELELA DLOMO CONSTRUCTION (PTY) LTD

Eighth Respondent

RUWACON (PTY) LTD

Ninth Respondent

TEWO BUILDING & CIVIL CONTRACTORS

Tenth Respondent

ODWA & SOLIE TRADING CC	Eleventh Respondent
FEZ BUILDING CONSTRUCTION CC	Twelfth Respondent
LUPICON TRADING CC	Thirteenth Respondent
BUKULU TRADING (PTY) LTD	Fourteenth Respondent
MASSTON CONSTRUCTION PROJECTS (PTY) LTD	Fifteenth Respondent
ZABEST PROPERTIES (PTY) LTD	Sixteenth Respondent
UBE CONSTRUCTION (PTY) LTD	Seventeenth Respondent
BRAINWAVE PROJECTS 848 CC	Eighteenth Respondent
HDM CONSTRUCTION CC	Nineteenth Respondent
TAKELA GROUP (PTY)	Twentieth Respondent
PHARAOHS CONSTRUCTION (PTY) LTD	Twenty-First Respondent
MANONG CONSTRUCTION & PROJECTS (PTY) LTD	Twenty-Second Respondent
KONTINENTAL ENGINEERING (PTY) LTD	Twenty-Third Respondent

JUDGMENT

TSELE AJ:

INTRODUCTION

[1] This is an application brought under the Promotion of Administrative Justice Act 3 of 2000 (“PAJA”), read with section 217 of the Constitution of the Republic of South Africa, 1996 (“the Constitution”), and the Preferential Procurement Policy Framework Act 5 of 2000 (“the PPPFA”). The applicant seeks the review and setting aside of the award of a public construction tender.

[2] The applicant, an unsuccessful tenderer, also asks this Court to substitute its own decision for that of the decision-maker and to award the tender to it. In the

alternative, it seeks a remittal of the matter to the Department for a fresh consideration of the responsive bids.

[3] The tender, Contract No S[...], was for the construction of staff accommodation at the Taylor Bequest Hospital, Mount Fletcher. It was advertised on 19 May 2023 and closed on 27 June 2023. The award under challenge was made on 18 September 2023 in favour of the joint venture formed by the third respondent (SNZN Construction CC) and the fourth respondent (Imbumba Developments CC). I refer to them collectively as “the JV”.

[4] One feature of the litigation has shaped my approach and should be stated at the outset. Only the first and second respondents – the Member of the Executive Council and the Head of the Department (together, “the Department” and, where the context requires, “the State”) – oppose the application. The JV, which stands to lose the contract if the applicant succeeds, does not oppose. Nor does any of the further tenderers cited as the fifth to twenty-third respondents.

[5] The party with the most direct interest in resisting a substitution order is therefore absent from the contest. The Department is left to defend an evaluation process whose own record, as will appear, is in several material respects against it.

[6] The applicant was represented by *Mr Kotze*, the heads of argument having been prepared by Mr Heunis SC and Ms van Zyl. *Mr Mtshabe SC* and *Mr Dukada* appeared for the Department. I am indebted to all counsel for their helpful heads of argument and submissions.

THE PARTIES

[7] The applicant, Sinclair Gersahn Troskie Construction CC, is a close corporation conducting business in the construction industry. At the time its bid was submitted, its sole member was Mr Sinclair Gersahn Troskie, who deposed to the founding, supplementary and replying affidavits. The changes to the applicant's membership after that date, and their bearing on its authority to litigate, are dealt with below.

[8] The first respondent is the Member of the Executive Council responsible for the Department of Public Works and Infrastructure, Eastern Cape Province. The second respondent is the Head of that Department and its accounting officer within the meaning of the Public Finance Management Act 1 of 1999. He deposed to the answering affidavit and approved the award on 18 September 2023.

[9] The third and fourth respondents are the members of the successful JV. The remaining respondents are the other tenderers who responded to the invitation to bid. They are joined for any interest they may have in the outcome. As I have noted, none of them opposes the application.

THE FACTUAL BACKGROUND

The tender and its evaluation framework

[10] The procurement was conducted within the framework of section 217 of the Constitution and the PPPFA, on the 90/10 preference-point system. Ninety points were allocated for price and ten points for specific goals. Five points were allocated for ownership by historically disadvantaged individuals, two points for one-hundred-per-cent women ownership, two points for locality within the Eastern Cape, and a single point – the point at the centre of this case – for local-content compliance.

[11] The evaluation proceeded through a Bid Evaluation Committee (“the BEC”), which met on 20 and 21 July 2023, and a Bid Adjudication Committee (“the BAC”), which adopted a recommendation on 26 July 2023. The accounting officer approved the recommended award on 18 September 2023. A letter of regret to the applicant is dated 11 October 2023, and the applicant was notified by email in November 2023 that it had been unsuccessful.

The scoring: the decisive arithmetic

[12] The applicant tendered the lowest price of all the responsive bidders, at R176 174 474.25, against a departmental budget recorded in the Tender Evaluation Report (“ER2”) as R197 894 734.75. The JV tendered R178 660 900.52. The final points are not in dispute and are set out in the following table.

Tenderer	Price (R)	Price points	HDI	Women	Locality	Local content	Total
SGT (applicant)	176 174 474.25	90.00	5	0	2	0	97.00
SNZN/Imbumba JV (winner)	178 660 900.52	88.73	5	0.51	2	1	97.24
SGT if credited the local-content point	176 174 474.25	90.00	5	0	2	1	98.00

[13] Two consequences follow from those figures. First, the applicant lost the tender by 0.24 of a point (97.24 against 97.00) and not, as the founding papers had originally averred, by “half a point”. Nothing turns on this inaccuracy, except that it confirms how narrow the margin was.

[14] Second, and decisively, the single local-content point is outcome-determinative. Had the applicant been credited with that one point, it would have scored 98.00 and would have been the highest-scoring tenderer, ahead of the JV. The entire 0.24-point

gap is attributable to the withholding of the local-content point from the applicant.

The local-content position

[15] On the prescribed form SBD 6.1 a tenderer claims the local-content point by inserting a self-score in the box at page 30 of the bid. It is common cause that the applicant left that box blank. The applicant's case, however, is that the substance of local-content compliance was established beyond doubt elsewhere in its bid.

[16] Three parts of the bid are relied on. The applicant expressly recorded at page 32 that it met the one-hundred-per-cent local-content threshold. It completed the nine pages of local-content schedules at pages 33 to 41, setting out the nature and price of the local materials. It also completed and signed the Local Content and Production Declaration.

[17] Significantly, the BAC itself recorded the position. Its minute of 26 July 2023 noted that the lowest-priced bidder had not claimed the local-content point on SBD 6.1 "even though they have completed and signed the Local Content and Production declaration", with the result that the point was not allocated.

[18] This is not, therefore, a case of a decision-maker confronted with a wholly blank bid. The committee recorded, in terms, that it understood the applicant to be substantively compliant. It nonetheless declined the point on the basis that the self-score box had not been completed.

[19] The classification of that defect lies at the heart of the merits. The Tender Data placed the relevant condition within a phase headed "Other Conditions of Bid (Non-

eliminating unless expressly mentioned in the document)". The condition required a bidder to complete and sign SBD 6.1 in order to claim points, and provided that failure "will lead to the non-awarding of points for specific goals".

[20] A separate acceptance condition required that a tenderer have duly completed and signed the Declaration Certificate for Local Production and Content. On the record, the applicant did so.

The tax-compliance position

[21] A further issue concerns the tax status of the JV. Tax compliance was a condition the Department was obliged to verify, and the bid afforded a seven-day period within which a tenderer could correct a non-compliant status reflected on the Central Supplier Database ("CSD"). The BEC minute of 20–21 July 2023 recorded the JV as tax non-compliant on the CSD printout of the day, while recording the applicant as compliant.

[22] As I explain below, the fuller account placed before the Court in the answering affidavit does not cure the difficulty. It confirms that one member of the JV failed to regularise its tax status within the period prescribed by the tender.

The procedural chronology and the impugned decision

[23] The application was instituted on 19 December 2023. The rule 53 record was delivered on 14 February 2024. The applicant supplemented its founding affidavit on 12 March 2024. The answering affidavit, deposed to by the Head of Department, Mr T L Manda, was served on 28 June 2024, and the replying affidavit is dated 11 July

2024.

[24] Heads of argument followed, the Department's on 30 September 2025 and the applicant's on 17 December 2025. The Department gave an undertaking not to conclude a contract with the JV pending the determination of this application. There is no evidence before me that construction has commenced on site.

[25] There has been some confusion about which decision, and which date, is under review, and the Department relies on this confusion *in limine*. Three dates were mentioned. They are the accounting officer's approval of 18 September 2023, the letter of regret of 11 October 2023 and the date pleaded in the original notice of motion.

[26] The applicant indicated that it would seek to amend the notice of motion to align it with the decision disclosed by the record. I deal with the amendment and the linked objections below.

THE RELIEF SOUGHT AND THE GROUNDS OF REVIEW

[27] The applicant seeks, in substance, the review and setting aside of the award of 18 September 2023 and a declaration that any contract concluded pursuant to the award is invalid and falls to be set aside. It further seeks a substitution order under section 8(1)(c)(ii)(aa) of PAJA awarding the tender to it.

[28] In the alternative, the applicant seeks the setting aside of the adjudication and a remittal to the Department for fresh consideration of the responsive bids. It also seeks costs, including the costs of two counsel on Scale C in terms of rule 67A of the

Uniform Rules of Court.

[29] The grounds of review are drawn from section 6(2) of PAJA. The applicant relies on section 6(2)(b) (non-compliance with a mandatory and material condition, being the JV's tax status), section 6(2)(c) (procedural unfairness) and section 6(2)(e)(iii) (the taking into account of irrelevant considerations and the failure to take account of relevant ones, producing a reviewable error of fact).

[30] It relies further on section 6(2)(f)(ii) (irrationality), section 6(2)(h) (unreasonableness) and section 6(2)(i) (the decision being otherwise unlawful).

[31] The applicant relies principally on irrationality and the error-of-fact ground, invoking *National Energy Regulator of South Africa v PG Group (Pty) Ltd* 2020 (1) SA 450 (CC), *Hira v Booyesen* 1992 (4) SA 69 (A) and *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd* 2015 (5) SA 245 (CC). The Department resists every ground and raises a series of objections *in limine*, to which I turn first.

[32] I must stress that at the commencement of the hearing Mr Mtshabe SC informed me that the Department would not be persisting with most, if not all, of the points in limine, and that his address to me would accordingly be confined primarily to the merits of the case. I accordingly deal with the preliminary issues out of an abundance of caution and guided by the Constitutional Court's decision in *Spilhaus Property Holdings (Pty) Ltd and Others v Mobile Telephone Networks (Pty) Ltd* 2019 (4) SA 406 (CC), at paras 44-45.

PRELIMINARY MATTERS

The impugned decision, the amendment and the objections of no cause of action and ripeness

[33] The Department raises a series of objections concerning the identity of the decision under review, contending that the application discloses no cause of action and is not ripe. It says, first, that no decision to award the tender was taken on 11 October 2023, the date pleaded in the original notice of motion.

[34] It says, secondly, that no contract has been concluded between the second respondent and the JV, so that there is nothing to declare void. It says, thirdly, that the award is no more than a recommendation of the BEC, supported by the BAC and approved by the accounting officer, so that the matter is premature.

[35] The first aspect is answered by the amendment. The confusion as to dates is a product of the record, which the applicant did not have when it launched. The decision that altered the parties' rights was the accounting officer's approval of the recommended award on 18 September 2023. The letter of regret of 11 October 2023 and the November notification merely communicated and gave effect to it.

[36] An applicant is entitled to amend its notice of motion to reflect the decision disclosed by the rule 53 record, provided no prejudice results that cannot be met by an order for costs. The Department identified no prejudice, and I can discern none. It has known throughout precisely which award is attacked. The amendment is granted, and the impugned decision is identified as the accounting officer's approval of 18 September 2023, the regret and award letters being consequential upon it.

[37] I hold that the complaint of prematurity fails on the law. The accounting officer's

approval of the award is itself final administrative action. It is the decisive exercise of public power that determines who receives the tender, and its reviewability does not depend on the subsequent conclusion of a written contract. The contract is a consequence of the award and not a precondition of the right to review it.

[38] The Department's attempt to separate the BEC's recommendation, the BAC's support of it and the accounting officer's approval is artificial. The applicant attacks the decision to award, and that decision was taken, on the Department's own account, on 18 September 2023.

[39] The contention that there is no contract to set aside is, on the Department's own papers, not as clear as it was put. The answering affidavit asserts that no contract was concluded, relying on the statement in annexure SGT4 that a contract had not been signed. Elsewhere it concedes that annexure SGT7 "seemingly confirms" that a contract was concluded with the JV.

[40] The Court need not resolve that contradiction. The applicant's prayer in this respect is conditional. It seeks to set aside any contract concluded pursuant to the award, and the relief I grant is framed accordingly.

[41] If no contract was concluded, the conditional order will have no operation. If one was concluded, the contract is dependent on the award and falls with it. The objection is accordingly no answer to the review of the award itself, and it is dismissed together with the complaint of prematurity.

Non-joinder and proof of service

[42] The Department objects that the applicant cited the third to twenty-third respondents but attached no proof that the application papers were served on them, so that there has been no proper joinder. The objection is without merit. A party with a direct and substantial interest must be joined, and the applicant has joined every tenderer by citation. The complaint is not one of non-joinder properly so-called, but of an alleged absence of proof of service, which is a curable matter and not a ground for dismissal.

[43] The Notice of Filing of the Department's own answering affidavit lists service addresses for each of the third to twenty-third respondents. That is difficult to reconcile with the suggestion that they are not before the Court. In any event, the Department cannot assert prejudice on behalf of parties who have not themselves complained.

[44] No personal costs order or coercive relief is sought against the third and fourth respondents. The setting aside of the award and of any dependent contract is relief directed at the impugned administrative action and its consequences. To the extent that confirmation of service is required, that is a matter the Court can address by direction. The objection is dismissed.

Delay and "superannuation"

[45] The Department's principal preliminary objection is one of delay. It contends that, after the replying affidavit was filed in July 2024, the applicant allowed some fourteen months to pass before enrolling the matter, that the delay is unexplained, and that it demonstrates an abuse of process and *mala fides*. The Department relied on *Cassimjee v Minister of Finance* 2014 (3) SA 198 (SCA) and *Gopaul v*

Subbammah 2002 (6) SA 551 (D), and framed the complaint as one of “superannuation”.

[46] The objection cannot succeed. Superannuation is a doctrine developed in relation to the want of prosecution of actions. It rests on the court’s inherent power, now underpinned by section 173 of the Constitution, to prevent abuse of its process, and it is exercised only in exceptional circumstances.

[47] Its extension to motion proceedings, and to a PAJA review in particular, is not apposite, because a review has its own framework for delay. That framework comprises the 180-day period in section 7(1) of PAJA for the institution of the review and the common-law principle that a review must in any event be brought, and prosecuted, without unreasonable delay (see *Gqwetha v Transkei Development Corporation Ltd* 2006 (2) SA 603 (SCA)).

[48] It is common cause that the applicant complied with the 180-day period in launching the review. This disposes of the bulk of the complaint.

[49] There remains the fourteen-month interval between the filing of the replying affidavit and enrolment. A complaint about delay in prosecuting a review, as distinct from launching it, is not answered merely by pointing to timeous institution, and a court is entitled to an explanation.

[50] Two considerations are nonetheless decisive against dismissal. The first is that the threshold for refusing to entertain an otherwise meritorious review on the ground of delay is a high one, and the Department has demonstrated no prejudice flowing from the interval. The second is that the discretion is to be exercised with the merits

and the public interest in lawful procurement firmly in mind. As will appear, the merits favour the applicant. The objection of delay is accordingly dismissed.

Authority and locus standi

[51] The Department challenged the authority of Mr Troskie to institute the proceedings, and the validity of the authorising resolution. The challenge requires closer attention than the founding papers give it. The replying affidavit asserts, in the present tense, that Mr Troskie “is the applicant’s sole member”.

[52] Annexure R3, a CIPC extract, reflects a different position. By the time of the reply Mr Troskie held 40 per cent of the member’s interest, with Ms Deidre Troskie and Mr Kyle Troskie each holding 30 per cent. The appointment dates reflected in R3 are 1 October 2023 and 1 November 2023, that is, before the application was instituted on 19 December 2023, although the change was filed at CIPC only on 22 January 2024.

[53] The Department relied on this to argue that Mr Troskie was not the sole member when he resolved to launch, and that the authorising resolution is therefore in doubt. I am not persuaded that the point avails the Department.

[54] The authority to institute legal proceedings on behalf of a juristic person is established once it appears that the entity has in fact authorised the litigation. A defective or informal resolution may be ratified. The modern approach is that courts are reluctant to allow technical objections to authority to defeat proceedings that the entity plainly supports (cf *Ganes v Telecom Namibia Ltd* 2004 (3) SA 615 (SCA)).

[55] The applicant has prosecuted this matter to a hearing. Nothing on the papers suggests that the corporation, however its membership is now constituted, repudiates the litigation. Mr Troskie was a member at all material times and holds the largest single member's interest. In the absence of any member coming forward to disavow the proceedings, the challenge is without substance. The applicant has established its authority and standing to seek the relief. In any event, I reiterate that Mr Mtshabe SC disavowed any persistence with these points in limine. I have dealt with them for the sake of completeness.

The application to strike out

[56] The Department applies to strike out certain allegations in the founding affidavit which, it says, impute corruption to it without substantiation. This can be disposed of briefly. Allegations of corruption are serious and must be pleaded with particularity. To the extent that the founding affidavit makes bare and unsubstantiated imputations of that kind, they are inadmissible and I have disregarded them.

[57] The review succeeds on grounds that have nothing to do with corruption, and the striking out of the offending allegations does not affect the outcome. To that limited extent the application to strike out is granted, with no separate order as to its costs.

THE MERITS OF THE REVIEW APPLICATION

Eliminating defect or lost points?

[58] The Department's defence is based on a single premise, namely that the

applicant's failure to self-score on SBD 6.1 went to the responsiveness of its bid, so that the bid ought to have been eliminated altogether. From that premise flow the Department's collateral challenge, its repeated characterisation of the applicant's bid as "non-responsive" and its *ultra vires* attack on the resolution. If the premise fails, much of the defence fails with it.

[59] In my view, the premise fails on the Tender Data's own terms. As set out above, the relevant condition was located in a phase expressly classified as non-eliminating, and the stipulated consequence of a failure to complete and sign SBD 6.1 was the non-awarding of points for specific goals. The plain and intended consequence of not self-scoring was therefore the forfeiture of points, not disqualification.

[60] A bid is not rendered non-responsive by a defect which the tender document itself designates as non-eliminating and to which it attaches the discrete and lesser consequence of lost points. To characterise such a defect, after the fact, as one going to responsiveness is to rewrite the conditions of tender to the prejudice of the bidder who relied on them.

[61] There was a factual contest about the precise wording of the relevant sub-paragraph of the Tender Data, the Department contending that it should read differently from the version in the bid document annexed as SGT2. Because much turns on the non-eliminating classification, the wording matters. The contest, however resolved, produces the same result, and the Department's own answering affidavit puts the matter beyond doubt.

[62] In answering the founding affidavit, the Department accepts the relevant condition save that, on its version, sub-paragraph 6 should read that "a bid will not

be awarded points for specific goals allocated for local content if this declaration certificate is not completed, signed and submitted as part of the bid documentation". Elsewhere it quotes the Tender Data as providing that failure to complete and sign SBD 6.1 "will lead [to the] non-awarding of points for specific goals".

[63] On the Department's own pleaded version, therefore, the consequence of the defect is the forfeiture of points, not the loss of responsiveness. The acceptance condition, as noted, required only that the Declaration Certificate for Local Production and Content be duly completed and signed, which it was. What was absent was the self-score entry at page 30, a matter going to points and not to responsiveness. I find that the local-content defect was non-eliminating.

The withholding of the local-content point: a reviewable error

[64] That the bid remained responsive does not, of itself, entitle the applicant to the point. The question is whether the Department's refusal to award it was reviewable. In my judgment it was, for the reasons that follow.

[65] The purpose of the self-score on SBD 6.1 is to establish a local-content entitlement. That entitlement was independently established on the record, by the declaration at page 32 of one-hundred-per-cent compliance, by the nine pages of priced local-content schedules and by the signed Local Content and Production Declaration.

[66] The BAC minuted that compliance. The point was nonetheless withheld on the mechanical ground that the box at page 30 was blank. That is an elevation of form over substance.

[67] The question is one of materiality. In this regard, I refer to *Allpay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer, South African Social Security Agency* 2014 (1) SA 604 (CC) at paras 30 and 58, where Froneman J said:

‘Assessing the materiality of compliance with legal requirements in our administrative law is ... unencumbered by excessive formality... the central element is to link the question of compliance to the purpose of the provision. ... the question ... [is] whether what the applicant did constituted compliance with the statutory provisions viewed in the light of their purpose’... ‘The materiality of irregularities is determined primarily by assessing whether the purposes the tender requirements serve have been substantively achieved.’

[68] Thus, the materiality enquiry asks whether the purpose of the requirement was substantively achieved notwithstanding the non-compliance. On these facts it plainly was. The Department had before it everything the self-score was designed to elicit, and said as much in its own minute. The non-compliance was, in the *Allpay* sense, immaterial.

[69] To withhold the point in those circumstances was to take into account an irrelevant consideration (the empty box) and to disregard a relevant one (the demonstrated and minuted compliance). This produced a reviewable error of fact within the meaning of section 6(2)(e)(iii) and a decision that was irrational within the meaning of section 6(2)(f)(ii).

[70] This conclusion is fortified by two further matters. The first is the line of authority of which *Millennium Waste Management (Pty) Ltd v Chairperson, Tender Board: Limpopo Province* 2008 (2) SA 481 (SCA) and *Metro Projects CC v Klerksdorp Local Municipality* 2004 (1) SA 16 (SCA) are the leading examples.

Those cases hold that an obvious *bona fide* omission, readily curable and not affecting the competitive position of other bidders, should not be treated as fatal.

[71] The present case is stronger than either. The committee did not merely overlook the position. It recorded that it understood the applicant to be substantively compliant and chose form over that substance.

[72] The second is the Department's own evaluation policy. Item 3.2 of ER2 obliged the Department, where a tender was incomplete, to indicate the steps it would take to make it complete "where this does not affect the competitive position of the tenderer". Correcting an incomplete self-score against a fully documented and minuted entitlement does not affect the competitive position of any tenderer.

[73] The Department's own process therefore contained the very mechanism it now says it lacked. Its failure to apply item 3.2 is a procedural and rationality defect within the meaning of section 6(2)(c) and (f) of PAJA.

[74] The Department's answer – that the applicant was warned that a failure to self-score would cost it the point, and signed to acknowledge the warning – does not meet the difficulty. The warning explains why the point was not awarded automatically. It does not explain why the Department declined to apply item 3.2 and correct an omission that it knew, from its own minute, to be immaterial.

[75] Nor does the submission that it was not for the Department to complete the bid for the bidder assist. Applying item 3.2 to recognise a minuted and fully documented entitlement is not completing the bid, but giving effect to its substance.

[76] There is countervailing authority which places the burden of claiming preference points on the bidder and is cautious about the correction of defective bids. It has its force where a decision-maker faces a genuine blank with no other indication of entitlement, which is not this case.

[77] I find that the withholding of the point was procedurally unfair under section 6(2)(c), rested on a material error of fact under section 6(2)(e)(iii) and was irrational under section 6(2)(f)(ii). On this ground alone the award cannot stand.

The SBD 4 and unsigned-declaration objections

[78] Unlike the local-content self-score, some conditions of the tender were expressly eliminating, and the Department invokes two of them, raised for the first time in the answering affidavit. The first is SBD 4, the declaration of interest. Phase One provided that an incomplete, unsigned or poorly completed SBD 4 would lead to a bidder being declared non-responsive. The Department alleges that the applicant neither signed nor initialled its SBD 4, so that the bid should have been eliminated on that ground alone.

[79] The second is the allied allegation that the page of the bid containing the local-content declaration and the self-score of two points for locality was itself unsigned or not initialled, so that the two locality points should also be deducted from the applicant's score. If that were accepted, the applicant's total would fall below 97.00.

[80] Both allegations are matters of fact, and both are answered on the documents. As to SBD 4, the applicant produced, in reply, annexure R1, which reflects the form as completed and signed, and the form itself is part of the bid in the rule 53 record.

[81] Where final relief is sought on motion, a genuine dispute of fact is ordinarily resolved on the respondent's version. That principle does not, however, oblige the Court to accept an assertion contradicted by the very document to which it relates (cf *Wightman t/a JW Construction v Headfour (Pty) Ltd* 2008 (3) SA 371 (SCA)). On the document, the SBD 4 was completed and signed.

[82] As to the local-content declaration, the answer lies in the Department's own minute. The BAC recorded that the applicant had "completed and signed the Local Content and Production declaration". The Department cannot rely on that minute to fix the applicant with knowledge of its omission and, at the same time, disown it where it establishes that the declaration was signed.

[83] There is a more fundamental difficulty with both objections. Each is a challenge by the Department to its own ruling, at Phase One, that the applicant's bid was responsive. The Department attributes that ruling to "human error" and "oversight" on the part of its committee, and asks the Court to correct it now, with the benefit of hindsight.

[84] For the reasons given below in relation to the collateral challenge, an organ of state may not undo its own decision in that manner, in argument and without a counter-application, on defects of this kind. The SBD 4 and unsigned-declaration objections are rejected.

The collateral challenge and the ultra vires attack

[85] The Department's most elaborate argument is that the applicant's bid was never validly authorised. The close corporation's resolution, it says, empowered Mr

Troskie only to sign documents. The answering affidavit develops the point at length, listing upwards of twenty acts – the completion of the various SBD forms, the securing of the tax clearance and letter of good standing, the attendance of the compulsory briefing, the appointment of subcontractors and the making of the offer itself – each of which, it contends, fell outside that mandate.

[86] On this basis the Department contends that those acts were performed *ultra vires*, so that the bid was void for want of *animus contrahendi* and should not have passed Phase One. The Department invited the Court, by way of collateral challenge, to declare its own earlier responsiveness ruling invalid, relying on *Oudekraal Estates (Pty) Ltd v City of Cape Town* 2004 (6) SA 222 (SCA), *MEC for Health, Eastern Cape v Kirland Investments (Pty) Ltd* 2014 (3) SA 481 (CC) and *Merafong City Local Municipality v AngloGold Ashanti Ltd* 2017 (2) SA 211 (CC).

[87] The argument is unsound for several reasons. It is inconsistent with the Department's own reliance on *caveat subscriptor* and *pacta sunt servanda*. The Department cannot maintain both that the signature bound the corporation to the tender rules and that the signatory lacked authority to bind it.

[88] The argument is also contradicted by the very authorities the Department cites. The rule in *Turquand's case* (*Royal British Bank v Turquand* (1856) 6 E&B 327), together with *Mathebula v University of the North* (cited in the Department's heads as [1998] 3 All SA 477 (T)), permits a *bona fide* counterparty to assume that internal authorisation exists.

[89] To treat a close corporation's own nominated representative as a stranger to it is artificial. The argument depends, in any event, entirely on the responsiveness

premise that I have already rejected.

[90] The point is also at odds with the Department's treatment of the winning bid. The applicant complained that the rule 53 record contained no certificate of authority for the JV's signatories, no joint-venture authority certificate and no curricula vitae for the project team. The Department has now produced those documents, but attached to its answering affidavit and not as part of the record of what served before the decision-maker.

[91] The contrast is significant. Documentary authority was treated with indulgence, and supplemented after the event, in the case of the winning bid, while the applicant's bid was to be invalidated in hindsight for acts said to exceed a signing mandate.

[92] As to the collateral challenge itself, a collateral attack on an apparently valid administrative act is competent in principle. *Kirland* does not, however, assist the Department. Its central holding is that the State may not simply ignore or reverse its own decision without having it set aside by a court.

[93] The Department invites the Court to undo, retrospectively and in argument, its own ruling that the applicant's bid was responsive, a ruling the Department itself attributes to oversight and human error. That is not a sound basis for the relief sought. I decline the invitation. The collateral challenge and the *ultra vires* attack both fail.

The tax-compliance ground

[94] The applicant's remaining principal ground concerned the tax status of the JV. On the founding papers the position appeared plain. The BEC minute of 20–21 July 2023 recorded the JV as tax non-compliant, the documents evidencing compliance post-dated the recommendation and were absent from the rule 53 record, and there was no apparent invocation of the correction period the bid allowed.

[95] The applicant contended, on the authority of *Dr JS Moroka Municipality and Others v Betram (Pty) Ltd* [2013] ZASCA 186; [2014] 1 All SA 545 (SCA), that tax non-compliance rendered the JV's bid non-responsive and incapable of condonation.

[96] The Department concedes that both members of the JV were tax non-compliant as at 20–21 July 2023. It explains, and documents, what followed. The bid did not treat tax compliance as an absolute, non-condonable condition assessed once and for all at evaluation.

[97] On the Department's pleaded version, the conditions classified tax compliance as non-eliminating, required that tax matters be in order before award, allowed a non-compliant bidder seven days to rectify its status and provided that only a bidder which failed to rectify would be declared non-responsive. That materially distinguishes the present tender from the position in *Moroka*, where no such correction was permitted.

[98] The evidence shows that the Department wrote to the JV on 25 July 2023 requiring it to regularise its tax status. SNZN Construction became compliant on 27 July 2023, within the seven days. Imbumba Developments did not. It requested an extension of time to 15 September 2023 and became compliant only on 24 August 2023.

[99] The Department's case is that tax compliance fell to be assessed at the date of the accounting officer's approval and that both members of the JV were compliant by 18 September 2023, as the September CSD printouts show. It contends that the indulgence extended to Imbumba was a reasonable and justifiable departure, given the urgency of the project, of the kind contemplated by section 3(2) of PAJA.

[100] I am unable to accept that the indulgence extended to Imbumba was lawful. The consequence is that the JV's bid fell to be declared non-responsive. The correction period was a finite one of seven days, fixed by the Department's own letter of 25 July 2023 as expiring on 31 July 2023, "failing which your bid will be invalidated".

[101] SNZN met that deadline. Imbumba did not. What Imbumba did instead was to nominate its own extended date of 15 September 2023 and to regularise its status on 24 August 2023, some three to four weeks after the seven days had run.

[102] A tender condition of this kind does not confer an open-ended discretion to extend the correction period, still less to extend it to a date of the bidder's own choosing. To permit one tenderer to set its own deadline is to rewrite the condition in its favour and to confer on it an advantage not available to the others. That is contrary to the equal treatment that section 217 of the Constitution requires.

[103] Section 3(2) of PAJA does not assist the Department. Section 3 is concerned with the procedural fairness owed to a person whose rights or legitimate expectations are materially and adversely affected by administrative action. Section 3(2)(b) sets the minimum content of a fair procedure, and section 3(4) permits a departure from those requirements where it is reasonable and justifiable.

[104]The section is a guarantee of fair process to the affected party. It is not a source of power to relax a mandatory eligibility condition of a tender or to condone a bidder's failure to meet it. To invoke it to justify the extension of Imbumba's deadline inverts its purpose.

[105]A departure made in favour of one tenderer's eligibility is not a measure of fairness towards the other tenderers but a derogation from it. The urgency of the project, even if real, could not authorise the Department to suspend, for one bidder, a condition imposed on all.

[106]Nor does the Department's contention that compliance was to be assessed at the date of approval assist it. The tender prescribed its own sequence – verification at evaluation, a seven-day correction period and a declaration of non-responsiveness on failure to correct – and that sequence fixes the operative moment.

[107]A bidder that has not corrected its status within the seven days has, on the tender's own terms, become non-responsive. Compliance achieved only after an unauthorised extension cannot operate retrospectively to validate a bid that should already have been excluded.

[108]The point is one of law, on facts that are common cause and drawn from the Department's own documents. The approach of a motion court to disputed fact therefore presents no obstacle. Whether or not the Department formally acceded to Imbumba's request – the record contains the request but no clear grant – the result is the same. If the extension was refused, Imbumba simply failed to correct its status in time. If it was granted, it was granted without power.

[109] It follows that Imbumba, and with it the composite JV bid of which it formed part, ought to have been declared non-responsive for want of tax compliance. The acceptance of that bid was a failure to comply with a mandatory and material condition of the tender, reviewable under section 6(2)(b) of PAJA, and it was in addition irrational and procedurally unfair. The tax ground accordingly provides an independent basis, alongside the local-content ground, on which the award must be set aside.

The disparity of treatment and section 217 of the Constitution

[110] The two grounds I have upheld are reinforced by a want of even-handedness which the fuller record has confirmed. Towards the applicant the Department applied strict formalism. It withheld a single, outcome-determinative point despite the applicant's demonstrable and minuted substantive compliance, declined to apply its own item 3.2 correction mechanism, and now seeks to invalidate the bid in hindsight for unsigned forms and an allegedly inadequate signing mandate.

[111] Towards the winning JV the Department was markedly more lenient. It issued a letter inviting the correction of a mandatory tax default, granted Imbumba an extension well beyond the seven days the tender allowed, and accepted authority documents and curricula vitae that do not appear in the record.

[112] The State cannot apply form against one bidder and substance in favour of another. Whichever standard governs, the impugned award cannot stand. If form governs, the winning bid's tax default, corrected outside the stipulated period, is fatal. If substance governs, the applicant's local-content compliance must be recognised.

[113] That inequality of treatment is, in addition, a failure of the requirement in section 217(1) of the Constitution that procurement be conducted in a manner that is fair, equitable, transparent, competitive and cost-effective. It confirms that the process was both procedurally unfair and irrational.

The rule 53 record and disputes of fact

[114] Two procedural observations complete the merits. The first concerns the rule 53 record. A number of the documents on which the Department now relies – the tax-compliance printouts and the authority documents – are attached to the answering affidavit rather than appearing in the record of what served before the decision-maker. The Department explains their omission from the record as “human error”.

[115] The record defines what was before the functionary. A respondent who supplements it after the event by affidavit must expect the Court to weigh the documents with that in mind. I have done so above. The point informs, without by itself determining, the weight of the tax and authority material.

[116] The second concerns disputes of fact. The applicant seeks final relief on motion. On the issues that decide this case – the classification of the SBD 6.1 condition, the contents of the committees’ minutes, the applicant’s price and the arithmetic of the scores – there is no genuine dispute. Each is established by the Department’s own record.

[117] Several of these matters are expressly admitted in the answering affidavit. The Department admits that the applicant tendered the lowest price, that the committees knew the applicant had completed and signed the local-content declaration, and that

there were no objective criteria justifying an award to any tenderer other than the highest scorer. Applying *Wightman* (above), the Department's denials on these matters are argumentative rather than real, and the applicant's version, anchored in the record, stands.

CONCLUSION ON THE REVIEW

[118] For these reasons the accounting officer's approval of 18 September 2023 falls to be reviewed and set aside. The applicant succeeds on two independent and mutually reinforcing grounds.

[119] The first is the wrongful withholding of the local-content point, a point the applicant had substantively earned, which the Department's own committee knew it had earned, and which, once credited, made the applicant the highest scorer. The second is the JV's tax non-compliance, a default that the tender required to be corrected within seven days and that, in Imbumba's case, was not, so that the JV's bid ought to have been declared non-responsive.

[120] Both grounds are reinforced by the Department's failure to apply its own correction mechanism in the applicant's favour, by the marked inequality of treatment between the applicant and the winning JV, and by the resulting breach of section 217 of the Constitution.

THE APPROPRIATE REMEDY

Setting aside and the validity of any contract

[121] It follows that the decision of 18 September 2023 must be reviewed and set

aside. The applicant also seeks a declaration that any contract concluded pursuant to the award is void *ab initio*.

[122] The correct course, on the authority of *Allpay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer, South African Social Security Agency* 2014 (4) SA 179 (CC) (the remedy judgment), is not to make a bare declaration of nullity but to address the consequences of invalidity within the framework of section 8 of PAJA and section 172(1)(b) of the Constitution.

[123] As noted, the Department asserts that no contract was concluded while conceding that annexure SGT7 suggests the contrary. I have framed the order conditionally to meet either position. To the extent that a contract was concluded pursuant to the award, it is dependent on the award and is set aside with it. To the extent that none was concluded, the order will have no operation.

Substitution or remittal

[124] There remains the question whether to substitute the Court's decision for that of the Department or to remit the matter for fresh consideration. A court approaches that question with circumspection. The governing authority is *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd* 2015 (5) SA 245 (CC).

[125] *Trencon* confirms that substitution remains an exceptional remedy and that the default position is remittal, in deference to the separation of powers. Two principal factors must be weighed, namely whether the Court is in as good a position as the administrator to make the decision and whether the outcome is a foregone

conclusion. Bias or incompetence, and considerations of delay and fairness, also bear on the discretion. To similar effect is *Gauteng Gambling Board v Silverstar Development Ltd* 2005 (4) SA 67 (SCA).

[126] The Department pressed the separation-of-powers caution strongly, urging that the award of tenders is entrusted to it and not to the courts. I have not reached the conclusions that follow lightly. Several features take this matter out of the ordinary run of tender reviews and, cumulatively, satisfy me that a substitution, in the conditional form I explain below, is both warranted and the appropriate order.

[127] *First*, the Court is in as good a position as the Department. The dispute is narrow and the record is complete. What remains is not a polycentric evaluative judgment but an arithmetical exercise on figures that are not in dispute. No re-scoring of the field is required.

[128] *Second*, the outcome is a foregone conclusion, and it is so on either of two independent routes. On the local-content route, once the point is credited the applicant scores 98.00 and is the highest-scoring tenderer, ahead of the JV. On the tax route, once the JV's bid is excluded as non-responsive, the applicant's 97.00 is the highest score among the remaining responsive bidders, the next being the Mintirho joint venture at 96.34. The applicant therefore prevails even without the local-content point.

[129] Section 2(1)(f) of the PPPFA requires that the tender be awarded to the highest-scoring tenderer in the absence of objective criteria justifying a departure. There are none. The Department expressly admits, in answer to the supplementary affidavit, that no objective criteria existed which would justify awarding the tender to

any tenderer other than the highest scorer, and it admits the correctness of the applicant's tabulation of the points.

[130] On the Department's own concessions, there is only one lawful outcome, and a remittal could produce no other. The Department's contention that a fresh evaluation would simply return the JV as the highest scorer assumes that the applicant's local-content point remains withheld and that the JV's non-responsive bid remains in contention. Neither assumption is open to it.

[131] *Third*, the usual source of resistance to substitution is absent. The JV does not oppose and has delivered no affidavit to rebut the case against the award. None of the other tenderers opposes. The third-party prejudice that ordinarily counsels caution is therefore not present, and the practical disruption of a substitution order is correspondingly slight.

[132] *Fourth*, delay favours finality on the question the Court can decide. The Department itself characterised the project as important and warned that further delay would imperil the fulfilment of its mandate. A remittal for a fresh evaluation, with the prospect of further litigation on the Department's own prediction, would not be just and equitable.

[133] Whatever else the order does, it should not re-open the question of who, as between the bidders, is entitled to the contract. That question has been fully ventilated, and the answer follows from the findings in this judgment.

[134] There is, however, one consideration that the passage of time has placed squarely before me and that the *Trencon* factors do not, on their own, resolve. The

award under review was made in September 2023 and several years have passed. The Court does not know whether the Department still intends to proceed with the project at all. Budgets are reallocated, needs are reassessed and infrastructure programmes are revised. Those are decisions within the executive domain.

[135] The question whether the staff accommodation at the Taylor Bequest Hospital is still to be built is not before me, was not argued, and is not one a court should answer by implication through an unconditional substitution order.

[136] An order that simply awarded the contract to the applicant would, in form at least, oblige the Department to procure works it may no longer need or be funded to undertake. That would intrude into the executive domain, contrary to the very principle of the separation of powers on which the Department relied.

[137] The two questions must therefore be separated. Whether the project proceeds is a question for the Department. That question is remitted to it, and nothing in this judgment compels it to proceed. Who performs the work if the project proceeds is, by contrast, a question the findings in this judgment have answered. Nothing would be gained by remitting it.

[138] In terms of remedy, a court must make a just and equitable order. I consider it apposite to refer to what the Constitutional Court has said in this regard in the EFF II case (see *Economic Freedom Fighters and Others v Speaker of the National Assembly* 2018 (2) SA 571 (CC) para 211):

“The power to grant a just and equitable order is so wide and flexible that it allows courts to formulate an order that does not follow prayers in the notice of motion or some other pleading. This power enables courts to address the real dispute between

the parties by requiring them to take steps aimed at making their conduct to be consistent with the Constitution.”

[139] In this case, the just and equitable remedy under section 8(1) of PAJA, read with section 172(1)(b) of the Constitution, is accordingly a substitution subject to a proviso. Should the Department elect to proceed with the project, it must do so on the basis of the outcome of this application, and the contract must be awarded to the applicant. Should it elect not to proceed, that is a decision within its own competence, and the substitution will not take effect.

[140] This structure gives the applicant the full measure of the relief to which the findings entitle it, while leaving undisturbed the executive's prerogative over the existence of its projects. It also prevents the unlawfulness found in this judgment from being repeated by means of a fresh evaluation.

[141] I am mindful of the residual considerations. The present state of the works on site, if any, bears on the just and equitable enquiry, and a court will not order substitution, even conditionally, where to do so would be unworkable or would visit injustice on innocent parties. On the papers there is no evidence that performance has progressed at all. The Department undertook not to conclude the contract pending the application, and the party that would be displaced does not resist.

[142] Weighing all of these matters, I am satisfied that the exceptional threshold in *Trencon* is met in respect of the question that is being decided, and that the conditional form of the order is the most just and equitable disposition. The parties will have liberty to approach the Court, on the same papers duly supplemented, should any genuine practical difficulty in implementing the order arise.

COSTS

[143] In the context of this case, costs must follow the result. The applicant has substantially succeeded and is entitled to its costs. Given the value of the matter and the constitutional and procurement complexity of the issues, the employment of two counsel, which both sides engaged, was reasonable. Costs on Scale C under rule 67A of the Uniform Rules of Court are appropriate.

[144] Each side sought a punitive order against the other. The Department's request, founded on the delay and abuse contentions and on the suggestion that the applicant deliberately concealed the SBD 4 defect, falls away with the dismissal of its objections. It does not approach the threshold of egregious conduct required for a punitive scale.

[145] The applicant's request for punitive costs, founded on the Department's delay in delivering its answering affidavit, is understandable but, in my view, not justified. Ordinary, if dilatory, State opposition is not lightly branded as deserving of censure. I decline both punitive prayers. The costs will be on the party and party scale, on Scale C, and will include the costs of two counsel.

ORDER

[146] In the result, I make the following order:

- 1. The applicant is granted leave to amend its notice of motion so as to identify the decision under review as the decision of the accounting officer of the second respondent, taken on 18 September 2023, to award Contract No S[...].*

2. *The first and second respondents' preliminary objections, including those relating to delay, no cause of action, ripeness, non-joinder, proof of service, SBD 4 and the signing of declarations, are dismissed.*
3. *The first and second respondents' application to strike out the allegations of corruption in the founding affidavit is granted to the extent set out in this judgment, with no separate order as to costs.*
4. *The decision of the accounting officer of the second respondent, taken on 18 September 2023, to award Contract No S[...] (the construction of staff accommodation at the Taylor Bequest Hospital, Mount Fletcher) to the third and fourth respondents as a joint venture is reviewed and set aside.*
5. *To the extent that any contract was concluded pursuant to the award referred to in paragraph 4, it is declared invalid and is set aside.*
6. *The question whether to proceed with the project to which Contract No S[...] relates is remitted to the second respondent for decision. Nothing in this order obliges the first and second respondents to proceed with the project.*
7. *If the first and second respondents elect to proceed with the project, whether in whole or in substantially the same form, the decision referred to in paragraph 4 is substituted with a decision awarding Contract No S[...] to the applicant.*
8. *The second respondent must convey the decision contemplated in paragraph 6, in writing, to the applicant's attorneys within thirty (30) days of the date of this order.*

9. *Any party may, on the same papers duly supplemented, approach this Court for such further or ancillary directions as may be necessary to give effect to this order.*

10. *The first and second respondents are ordered, jointly and severally, the one paying the other to be absolved, to pay the applicant's costs, such costs to be on the party and party scale, on Scale C in terms of rule 67A(3) of the Uniform Rules of Court, and to include the costs of two counsel where two counsel were employed.*

M TSELE
ACTING JUDGE OF THE HIGH COURT

EASTERN CAPE DIVISION

Appearances:

For the applicant: *Mr C Kotze*; heads of argument having been drawn by *Mr J C Heunis SC* and *Ms P S van Zyl*, instructed by Bossr Inc Attorneys c/o Gordon McCune Attorneys.

For the first and second respondents: *Mr N R Mtshabe SC* and *Mr P Dukada*, instructed by the State Attorney, East London c/o State Attorney, Bhisho.

Hearing Date: 23 April 2026

Date of Judgment: 31 August 2026