



**THE HIGH COURT OF SOUTH AFRICA
(NORTHERN CAPE DIVISION, KIMBERLEY)**

Reportable/Not Reportable

Case no: 2551/2024

In the matter between:

MAXIMUM PROFIT RECOVERY (PTY) LTD

Applicant

and

GA-SEGONYANA LOCAL MUNICIPALITY

First Respondent

MARTIN TSATSIMPE

Second Respondent

MNK TAX ADVISORY SERVICES (PTY) LTD

Third Respondent

Neutral citation: *Maximum Profit Recovery (Pty) Ltd v Ga-Segonyana Local Municipality & 2 Others (2551/2024).*

Coram: Tlaletsi JP et Coetzee AJ.

Heard: 9 March 2026.

Delivered: 8 September 2026.

Summary: Review – Promotion of Administrative Justice Act 3 of 2000 – Two separate administrative decisions – Public procurement – Tender for VAT recovery services – VAT recovery services on month-to-month basis – Local Government: Municipal Finance Management Act 56 of 2003 – Regulation 36 – Both decisions set aside – Just and equitable relief – Return of a portion of the profit made.

ORDER

1. The decision of the first respondent to award Tender 06/2023-24 for VAT recovery services to the third respondent, published on the first respondent's website on 11 September 2024, is declared constitutionally invalid, is reviewed and set aside.
2. The agreement concluded between the first respondent and the third respondent pursuant to the tender award in Tender 06/2023-24 is set aside.
3. The decision of the first respondent to appoint the third respondent on a month-to-month basis for VAT recovery services is declared constitutionally invalid, is reviewed and set aside.
4. The third respondent is ordered to repay to the first respondent 6% (six per cent) of the amounts received by the third respondent for VAT recovery services performed for the first respondent from 18 December 2023 to the date of this order.
5. The respondents are jointly and severally ordered to pay the applicant's costs on scale C, the one paying and the other to be absolved, which costs include the costs of two counsel.

JUDGMENT

The Court

- [1] In this judgment, references to the applicant will be “Maximum Profit”, to the first respondent “the Municipality”, to the second respondent “the Municipal Manager” and to the third respondent “MNK”.
- [2] Maximum Profit seeks the following relief:
- 2.1 That the Municipality’s decision to award tender TE 06/2023-24 for VAT recovery services to MNK be declared invalid, be reviewed and set aside;
 - 2.2 That the Municipality’s decision to appoint MNK in terms of a so-called month-to-month agreement from 18 December 2023 for VAT recovery services be declared invalid, be reviewed and set aside;
 - 2.3 That MNK be ordered to repay to the Municipality all amounts received by MNK for VAT recovery services for work performed from 18 December 2023 to the date of this order;
 - 2.4 That the tender TE 06/2023-24 for VAT recovery services be awarded to Maximum Profit;
 - 2.5 That the respondents, jointly and severally, be ordered to pay the costs of this application on an attorney and client scale.
- [3] Mr Motloun, on behalf of MNK, submits that Maximum Profit lacks *locus standi* to review the month-to-month contract. In this regard, he contends that Maximum Profit is pursuing its own commercial interests, despite also relying on section 38(d) of the Constitution. He further contends that section 217(1) of the Constitution, which Maximum Profit seeks to enforce, is in any event designed primarily to advance the public interest rather than the interests of individual tenderers. This submission is primarily based on the authority of *Esorfranki Pipelines (Pty) Ltd v Mopani District Municipality and Steenkamp NO v Provincial Tender Board, Eastern Cape*. Neither of these decisions supports

this submission, as they deal with delictual claims rather than review procedures.

- [4] The following undisputed facts are necessary to set out to adjudicate the administrative decisions set out in paragraphs 2.1 and 2.2 above. It is also necessary to provide some historical background to aid understanding of the dispute between the parties. We do so because Maximum Profit relies, *inter alia*, on that background to contend that the Municipality acted *mala fide*.

4.1 On 3 February 2023, MNK was awarded a tender (03/2022-23) to provide VAT recovery services to the Municipality at a fee of 10% of the amount refunded by the South African Revenue Service ("SARS"). MNK rendered services under the tender from February 2023. Maximum Profit was one of the parties that participated in the February 2023 tender.

4.2 Maximum Profit, who believed that MNK was not supposed to be awarded the tender, launched review proceedings in March 2023 in respect of the February 2023 tender. Various alleged irregularities were set out in both the founding and supplementary affidavits.

4.3 The review application, launched in March 2023, was heard on 31 July 2023, with the judgment delivered on 18 August 2023. The Municipality ultimately conceded that the tender award had to be reviewed and set aside, the parties were therefore *ad idem* on this issue. Further, the parties agreed that "the rendering of the VAT recovery services should continue, pending the award of a new tender" which meant that the order of invalidity ought to be suspended. However, they differed on the suspension period.

4.4 The Court ultimately made the following order:

- "1. The decision to award Tender 03/2022-23 Re: VAT Recovery Services to the third respondent is declared constitutionally invalid, reviewed and set aside;

2. The agreement concluded between the first respondent and the third respondent pursuant to the Tender 03/2022-23 Re: VAT Recovery Services is set aside;
3. The declaration of constitutional invalidity is suspended for a period of four months from the date of this order;
4. The first respondent is ordered to pay the applicant's costs on a party and party scale;
5. The counter application is dismissed; . . ."

4.5 The order of constitutional invalidity was suspended for four months, thereby affording the Municipality sufficient time to rerun the tender. The four-month period was to lapse on 17 December 2023. Therefore, the tender award and the contract concluded in terms thereof would be invalid as of 18 December 2023.

4.6 The Municipality published a tender in October 2023 (the November 2023 tender), with a closing date of 1 November 2023. The same tender number as that of February 2023 (03/2022-23) was used for this tender. Maximum Profit participated in the November 2023 tender and tendered for a fee of 4% of the amount recovered from SARS. MNK also participated, tendering at a fee rate of 10%.

4.7 After a 30-day extension of the tender period, the November 2023 tender ultimately lapsed on 1 March 2024. Subsequently, the Municipality published an invitation to tender (BID NO 06/2024-24) on or about 3 May 2024 (the June 2024 tender). The general terms expressly stated that the tender validity period was 90 days. The closing date and time for the June 2024 tender were 12 June 2024 at 12:00. The material functionality criteria were set out as follows in the June 2024 tender:

"Experience and track record

- Statement from SARS in support of services rendered in recovering VAT.
 - Recoveries to be calculated for a single municipality based on monies received or due to the municipality from SARS.
- Above R90 million from a single client (only collections of grade 4 municipalities will be considered).
 - Select the biggest recovery from a single client and only one submission will be accepted.
 - The calculation will only be considered for recoveries from 2023 to date (no recoveries before 1 January 2023 will be considered for this calculation) - 50 points.
 - Between R70 million – R90 million from a single client (only collections of grade 4 municipalities will be considered).
 - Select the biggest recovery from a single client and only one submission will be accepted.
 - The calculation will only be considered for recoveries from 2023 to date (no recoveries before 1 January 2023 will be considered for this calculation) - 20 points.
 - Below R70 million from a single client (only collections of grade 4 municipalities will be considered).
 - Select the biggest recovery from a single client and only one submission will be accepted.
 - The calculation will only be considered for recoveries from 2023 to date (no recoveries before 1 January 2023 will be considered for this calculation) - 10 points.”

It is significant that the requirement limiting recoveries to the period from 1 January 2023 was not included in the November 2023 Tender, which had lapsed. As will be shown later, this requirement is one of the factors that has led to the dispute between the parties.

4.8 Maximum Profit and MNK were among the bidders in the June 2024 tender. In its tender submission, MNK relied on recoveries made on behalf of the Municipality between 1 January 2023 and 11 June 2024, totalling

R104,208,526.00. MNK relied on these recoveries because they relate to a single, grade 4 municipality. Maximum Profit relied on recoveries made on behalf of Fetakgomo Tubatse Local Municipality, also a grade 4 municipality. MNK's tender submission includes a letter from the municipal manager (second respondent) confirming the recoveries. It is common cause that Maximum Profit tendered at 4%, whereas MNK tendered at a 10% fee. These were the same rates tendered by the parties in the previous tender, which was awarded to MNK and became the subject of the litigation referred to above. The June 2024 tender was also awarded to MNK in September 2024.

4.9 Intending to institute this review and threatening to urgently interdict the implementation of the tender award, Maximum Profit successfully obtained the Municipality's written undertaking not to implement the June 2024 tender award pending the outcome of this review. From 18 December 2023 to date, MNK has continued to render VAT recovery services to the Municipality at a rate of 10% under the purported month-to-month contract.

[5] It is trite that both the decision to award a tender and the decision to conclude the month-to-month agreement for VAT recovery services are an exercise of public power by the Municipality. Consequently, the decisions constitute administrative action under the Promotion of Administrative Justice Act 3 of 2000 ("PAJA") and must therefore be lawful; reasonable; and procedurally fair. Indeed, the applicant brought the review application in terms of section 6(2) of PAJA.¹

¹ The relevant provisions state that:

"A court or tribunal has the power to judicially review an administrative action if-

- (b) a mandatory and material procedure or condition prescribed by an empowering provision was not complied with;
- (c) the action was procedurally unfair;
- (e) the action was taken-
 - (i) for a reason not authorised by the empowering provision;
 - (ii) for an ulterior purpose or motive;
 - (iii) because irrelevant considerations were taken into account or relevant considerations were not considered;
 - (iv) because of the unauthorised or unwarranted dictates of another person or body;
 - (v) in bad faith; or

- [6] The Constitutional Court in *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer, South African Social Security Agency, and Others*² set the approach to PAJA reviews as follows:

“ . . . The proper approach is to establish, factually, whether an irregularity occurred. Then the irregularity must be legally evaluated to determine whether it amounts to a ground of review under PAJA. This legal evaluation must, where appropriate, take into account the materiality of any deviance from legal requirements, by linking the question of compliance to the purpose of the provision, before concluding that a review ground and departure has been established.”

THE DECISION TO AWARD TENDER TE 06/2023-24, FOR VAT RECOVERY SERVICES TO MNK

Parties' submissions

- [7] Maximum Profit submits that it was irregularly disqualified by the Municipality for considering irrelevant factors in relation to the experience and track record criteria. In this regard, the Municipality is said to have considered the VAT return date (December 2022) for a single VAT recovery of R6,154,480.69, rather than the date on which the recovery was ultimately made (7 February 2023). By deducting this amount from the total recoveries made by Maximum Profit for Fetakgomo Tubatse Local Municipality, as shown in the table below, the Municipality allegedly scored Maximum Profit below the minimum threshold, resulting in Maximum Profit's disqualification, according to Maximum Profit.

(vi) arbitrarily or capriciously;
 (f) the action itself-
 (i) contravenes a law or is not authorised by the empowering provision; or
 (ii) is not rationally connected to-
 (aa) the purpose for which it was taken;
 (bb) the purpose of the empowering provision;
 (cc) the information before the administrator; or
 (dd) the reasons given for it by the administrator;
 (i) the action is otherwise unconstitutional or unlawful.”
² 2014 (1) SA 604 (CC) para 25.

RECOVERY AMOUNT	CLAIM SUBMISSION DATE	RECOVERY DATE
R 6,154,480.69	24 January 2023	07 February 2023
R 4,584,727.42	23 February 2023	23 February 2023
R 4,554,585.84	24 March 2023	26 March 2023
R 2,219,631.63	24 April 2023	25 April 2023
R 1,898,396.61	24 May 2023	24 May 2023
R 5,040,390.01	22 June 2023	16 August 2023
R 4,804,987.24	25 July 2023	25 July 2023
R 4,663,086.16	23 August 2023	23 August 2023
R 4,090,602.13	22 September 2023	26 September 2023
R 5,504,092.44	25 October 2023	25 October 2023
R 3,210,275.38	24 November 2023	18 December 2023
R 7,786,312.37	21 December 2023	09 January 2024
R 6,046,653.83	24 January 2024	24 January 2024
R 9,676,227.49	23 February 2024	25 February 2024
R 8,355,980.46	25 March 2024	25 March 2024
R 6,408,230.59	25 April 2024	25 April 2024
R 6,353,443.14	24 May 2024	26 May 2024
R 91,352,103.43		

- [8] According to Maximum Profit, the municipal manager insisted that Maximum Profit had failed to attach a letter of appointment for VAT recoveries for Fetakgomo Tubatse Local Municipality and relied on that absence to further ground the disqualification. The argument is that such a letter was not part of the experience and track record criteria, and that the Municipality either improperly considered an irrelevant factor or irregularly amended the criteria.
- [9] In light of the alleged consideration of irrelevant factors, Maximum Profit invokes section 6(2)(e)(iii) of PAJA to review the Municipality's decision. It concludes that the consideration of the above-mentioned irrelevant factors subjected it to an unfair tender process and therefore invokes section 6(2)(c) of PAJA in this regard. Further, Maximum Profit contends that the incorrect

scoring which led to its disqualification meant that the Municipality's decision was not rationally connected to the information before it. Reliance is placed on section 6(2)(f)(ii)(cc) of PAJA in this regard.

- [10] Maximum Profit also relied on section 6(2)(e)(ii) of PAJA, alleging that the Municipality's decision not to award it the June 2024 tender was made for an ulterior purpose or motive, namely, to ensure that MNK was awarded the tender. To ground this argument and demonstrate mala fides on the Municipality's part, Maximum Profit avers that the Municipality deliberately allowed the November 2023 tender to lapse; thereafter created new criteria for the June 2024 tender intended to favour MNK; and even provided MNK with a letter confirming recoveries.
- [11] On the other hand, the Municipality and the Municipal Manager's case is that Maximum Profit was correctly scored and disqualified. The Municipal Manager maintains that the deducted recovery falls outside the relevant period set out in the experience and track record criteria. Mr Manala, on behalf of the Municipality and the Municipal Manager, submits that merely considering the amount recovered by Maximum Profit would determine whether the Municipal Manager's assessment was factually correct.
- [12] Regarding Maximum Profit's letter of appointment for VAT recoveries for Fetakgomo Tubatse Local Municipality, the Municipality is adamant that the letter played no role in Maximum Profit's disqualification. It avers that the letter was used only to link Maximum Profit's recoveries to Fetakgomo Tubatse Local Municipality, since the Bid Adjudication Committee ("BAC") could not otherwise establish the link.
- [13] MNK submits that the interpretation of tender conditions is best left to the Municipality as the functionary that established them in light of its needs, as long as the interpretation is not unreasonable or arbitrary. The Court is urged to invoke the principles in *Plascon-Evans Paints Ltd v Van Riebeeck Paints*

(Pty) Ltd³ in dealing with the disputes on the interpretation of the criteria in so far as the stipulated time period for the VAT recoveries is concerned.

Analysis

- [14] It is necessary to trace the reasoning of the Bid Evaluation Committee ("BEC"), the BAC and the Municipal Manager to determine whether Maximum Profit was irregularly disqualified. In a BEC Report dated 15 July 2024, it was stated that, regarding the recoveries made by Maximum Profit in respect of the Fetakgomo Tubatse Local Municipality:

"Fetakgomo Tubatse Local Municipality R76,058,309.38

No appointment letter was attached from the above-mentioned municipality".

It is common cause that, under the functionality criterion referred to above, it was not a requirement of the June 2024 tender that a tenderer include an appointment letter in its submission. In addition, there is no information regarding the origin of the figure R76,058,309.38 or its calculation.

- [15] On 25 July 2024, the BAC (the document incorrectly describes the committee as the BEC) produced a report in which, inter alia, it recommended awarding the bid to Maximum Profit at an inclusive rate of 4% for 36 months. It further recommended that an offer be sent to Maximum Profit for acceptance or rejection, and that a Service Level Agreement ("SLA") be entered into thereafter.
- [16] The Municipal Manager did not approve the BAC's recommendation. He remarked, inter alia, that "Maximum Profit did not meet the threshold; there is no reference letter for the VAT recovery of R91.3m (refunded) (Fetakgomo Tubatse Municipality)". The Municipal Manager referred the matter back to the BAC.

³ 1984 (3) SA 623 (A) at 634E-635C.

[17] The BAC reconvened on 31 July 2024. Its report contains the following response to the remarks made by the Municipal Manager regarding Maximum Profit:

17.1 The BAC noted the Municipal Manager's comments that the reference letter from the Fetakgomo Tubatse Local Municipality was not attached.

17.2 The BAC reaffirmed its position that the reference letter from the Fetakgomo Tubatse Local Municipality was not required for experience and track record and therefore cannot be considered for adjudication purposes.

17.3 The BAC noted that it was unable to link the SARS statement issued by the Fetakgomo Tubatse Local Municipality to Maximum Profit.

17.4 The committee also noted that during the meeting, a telephone call was made to Maximum Profit to request the reference letter of the Fetakgomo Tubatse Local Municipality for a purpose other than adjudication.

[18] On 7 August 2024, the BAC held yet another meeting. In the minutes of that meeting, the BAC, without providing any explanation for its sudden change, recommended to the Municipal Manager that the June 2024 tender be awarded to MNK at a 10% rate. The Municipal Manager did not approve this recommendation but added the following:

"Referred to BAC considerations of Maximum Profit for functionality scoring for additional information received."

[19] A further meeting of the BAC was held on 4 September 2024, and the following was noted:

- "The Bid Adjudication Committee considered the Accounting Officer's comments and agreed that the comments be considered for scoring the Maximum Profit (Pty) Ltd.

- The Committee reaffirmed its position that the reference letter was not part of the criteria to adjudicate Bid No. 06/2023-24.
- The Committee agreed that the letter served to confirm that Maximum Profit (Pty) Ltd was awarded the VAT recovery bid by the Fetakgomo Tubatse Local Municipality.
- It also served to determine the period of appointment.
- The letter further served to confirm that the SARS refund presented in the bidding document by the Maximum Profit (Pty) Ltd matches the period of appointment of Maximum Profit (Pty) Ltd by Fetakgomo Tubatse Local Municipality.
- The Committee noted part of the submitted SARS refund document is outside the period of the scope of the bid.
- The Committee scoring Maximum Profit (Pty) Ltd considered only the relevant criteria set in the Bid document. The aforesaid period being the 01st January 2023 to June 2024.
- The Committee noted that reference letter from Fetakgomo Tubatse Local Municipality, dated 14th March 2024, refers to period from January 2023 to January 2024 in which Maximum Profit (Pty) Ltd helped with the VAT Recovery.
- After viewing the Fetakgomo Tubatse Local Municipality website on the contract period of Maximum Profit (Pty) Ltd, the Committee took a view that the contract period ended in August 2024.
- The Committee used SARS refund statement in the Bid Document to score Maximum Profit (Pty) Ltd." (*Sic.*)

The BAC awarded only 20 points to Maximum Profit in respect of the relevant functionality criterion because, based on the BAC's findings, Maximum Profit recovered less than the required R90 million for the Fetakgomo Tubatse Local Municipality. It was noted that the correct amount recovered was R85,197,622.80. The difference between this amount and R91,352,103.43 is exactly R6,154,480.63. This is the amount reflected as the first recovery made by Maximum Profit on behalf of the Fetakgomo Tubatse Local Municipality. No explanation was given in the minutes or in the record as to why this amount had to be excluded.

- [20] It was only in the Municipality's answering affidavit that the following allegation was made by the Municipal Manager:

“140. The applicant was disqualified because when assessing its bid, the amounts for VAT recovered for the period 1 January 2023 to June 2024 amounted to R85 197 622.80 and was well below the required R90 000 000.00. It was discovered that the amount of R6 154 460.69 claimed as part of the amounts collected within the period scope fell outside of the period scope. The applicant was resultantly disqualified on that basis.”

- [21] The real dispute between Maximum Profit on the one hand and the Municipality and the Municipal Manager on the other concerns the interpretation of the criteria, especially the meaning of: *“Recoveries to be calculated for a single municipality based on monies received or due to the municipality from SARS. . . The calculation will only be considered for recoveries from 2023 to date (no recoveries before 1 January 2023 will be considered for this calculation).”* The question is whether the limit in the period concerns the VAT recovery date or the VAT period to which the recoveries made/expected relate. (Own emphasis.)
- [22] The legal principles surrounding acceptability and non-responsiveness of bids are well established. It is for the tender issuer, the Municipality in the present matter, to define the prerequisites and conditions for a valid tender.⁴ A failure to comply with prescribed conditions would result in a tender being disqualified unless those conditions were immaterial, unreasonable or unconstitutional.⁵ A tender should not easily be invalidated on the basis that it contains minor deviations that do not materially alter or depart from the characteristics, terms, conditions and other requirements set out in the tender.⁶
- [23] The Municipal Manager’s stance is rather difficult to fathom, merely at a logical level, even if this Court exercises deference. There is nothing complex with the criteria. Indeed, as Maximum Profit submits, VAT recoveries are by nature in respect of VAT returns which are for a past VAT period. The Municipal Manager

⁴ *Dr JS Moroka Municipality and Others v Betram (Pty) Ltd and Another* [2014] 1 All SA 545 (SCA) para 10; *WDR Earthmoving Enterprises and Another v Joe Gqabi District Municipality and Others* (392/2017) [2018] ZASCA 72 (30 May 2018) paras 29, 30 and 40.

⁵ *WDR Earthmoving Enterprises and Another v Joe Gqabi District Municipality and Others* (*Supra*) para 30.

⁶ *Overstrand Municipality v Water and Sanitation Services South Africa (Pty) Ltd* [2018] 2 All SA 644 (SCA) para 50.

simply failed to properly consider the contents of the tender documents and merely concluded that Maximum Profit's SARS statement accounts for a longer period than prescribed in the criteria. This is different from an instance where a bidder has not met a bidding condition, say, tendering to build a four-storey building when the conditions are for a three-storey building, as in *Raubex Building (Pty) Ltd v Bitou Municipality and another*⁷, for example. In that case, the deviation was material as it offended the very purpose of the tender.⁸ In the present matter, the Municipality simply failed to properly and purposively consider Maximum Profit's documents.

[24] The BAC's initial recommendation to award the tender to Maximum Profit was correct. The Municipal Manager refused to accept the recommendation and insisted on irrelevant factors that were not part of the tender under consideration. Only after the Municipal Manager's repeated stance was the recommendation changed by the BAC in favour of MNK. The June 2024 tender award to MNK falls to be set aside on this basis alone.

[25] It is trite that "[o]nce a ground of review under PAJA has been established there is no room for shying away from it. Section 172(1)(a) of the Constitution requires the decision to be declared unlawful. The consequences of the declaration of unlawfulness must then be dealt with in a just and equitable order under section 172(1)(b). Section 8 of PAJA gives detailed legislative content to the Constitution's 'just and equitable' remedy."⁹ The decision to award the tender to MNK falls to be set aside, and it is unnecessary to consider the remainder of the review grounds.¹⁰

THE DECISION OF THE MUNICIPALITY TO APPOINT MNK IN TERMS OF A SO-CALLED MONTH-TO-MONTH AGREEMENT FROM 18 DECEMBER 2023

⁷ [2025] JOL 69692 (WCC).

⁸ *Ibid* paras 43-50.

⁹ *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer, South African Social Security Agency, and Others* 2014 (1) SA 604 (CC) para 28.

¹⁰ See for example *SA Post Office Ltd v Nowosenetz NO & Others* (2013) 34 ILJ 1604 (LC) para 34; *FM v Minister of Home Affairs* 2014 JDR 1732 (GP) para 161.

Parties' submissions

- [26] Mr Els submits that the declaration of invalidity was suspended for four months under the 18 August 2023 judgment, thereby allowing the Municipality to implement the irregular tender award to MNK for up to four months. Maximum Profit's case is that the Municipality ignored this Court's August 2023 order and enforced an invalid SLA.
- [27] Maximum Profit contends that nothing prevented the Municipality from finalising the November 2023 tender process and making a lawful tender award. Instead, the Municipality repeatedly sought extensions while simultaneously extending an invalid SLA. Maximum Profit concludes that the Municipality intentionally sidestepped this Court's 2023 order. The Municipality's letter of extension explicitly states that the SLA is extended on the same terms and conditions, and the invoices from MNK make it clear that they are in terms of the SLA. Counsel submits that, in essence, the Municipality acted as if it were a private party, utilising its own funds to procure goods and services, contrary to section 217 of the Constitution, which requires, inter alia, that organs of state procure goods and services on a competitive basis. Maximum Profit further submits that it was unaware that the Municipality and MNK continued to enforce the SLA after the institution of these proceedings.
- [28] To the extent that the Municipality may rely on Regulation 36 of the Regulations issued under the Local Government: Municipal Finance Management Act 56 of 2003 ("MFMA"), Maximum Profit submits that any emergency would have been self-created. Regulation 36 provides:

"Deviation from, and ratification of minor breaches of, procurement processes

- (1) The supply chain management policy may allow the accounting officer-
 - (a) To dispense with the official procurement processes established by the policy and to procure any required goods or services through any convenient process, which may include direct negotiations, but only-
 - (i) In an emergency situation;

...

(v) Did any other exceptional case where it is impractical or impossible to follow the official procurement processes;”

- [29] The applicant therefore seeks to review and set aside the decision to enter into a month-to-month alleged continuation of the invalid contract, on the basis that the purported urgency justifying the deviation was self-created, thereby rendering the decision unlawful. Mr Els drew this Court’s attention to the fact that, in any event, it is MNK, not the Municipality, that avers the purported month-to-month contract was concluded in accordance with Regulation 36 processes.
- [30] The Municipality concedes that implementing the 2023 SLA after 18 December 2023 would be unlawful. It avers that in December 2023 it was foreseeable that the tender process would not be finalised. To avoid losing the income source that VAT recoveries provide, it contracted with MNK on a month-to-month basis, pending the finalisation or rerunning of the tender after it had lapsed. The Municipality vehemently denies having extended the 2023 SLA.
- [31] Mr Manala submits that the starting point for the inquiry should be the provisions of Regulation 36. He further submits that the Regulations do not define what constitutes an emergency or an impractical or impossible situation. Accordingly, as Counsel concludes, a determination of whether a situation meets the threshold of an emergency or an impractical or impossible situation lies within the accounting officer’s discretion.
- [32] MNK stands with the Municipality and avers that Regulation 36 was invoked to conclude the month-to-month agreement. However, MNK also concedes that there was non-compliance with Regulation 36, thereby making its appointment irregular. MNK further avers that Maximum Profit cannot review the contract because it relied on it to support its request for the Municipality’s undertaking not to implement the June 2024 tender award pending the finalisation of this review.

Analysis

- [33] The Municipality's denial that it extended the 2023 SLA defies understanding in light of the overwhelming evidence before this Court. First, invoices from MNK dated from 17 January 2024 to 6 September 2024 clearly state that they are in terms of the SLA. Second, the Municipality's letter to MNK dated 14 May 2024, extending the SLA from January 2024 to June 2024, clearly states that the SLA is extended on the same terms and conditions. Third, the Municipality failed to furnish the purported month-to-month agreement despite being called upon to do so by Maximum Profit. Accordingly, the only agreement in existence is the 2023 SLA. Nonetheless, insofar as the Municipality insists that the extension in its letter gave rise to a new or independent contract, the central issue is whether the Municipal Manager was entitled to invoke Regulation 36 on the basis of urgency, or whether that urgency was self-created, thereby invalidating the deviation.
- [34] Regulation 36 permits deviation from competitive bidding processes only in exceptional circumstances, including where it is impracticable or impossible to follow official procurement procedures. Regulation 36(2) requires the accounting officer to record and report the reasons for the deviation, and to do so at the next Council meeting.¹¹
- [35] Our courts have repeatedly emphasised that deviations from public procurement processes are exceptional and must be narrowly construed, and that Regulation 36 provisions must be interpreted restrictively and may be invoked only where genuine exceptional circumstances render compliance with ordinary procurement procedures impractical or impossible.¹²
- [36] No cogent facts or circumstances have been set out by the Municipality or the Municipal Manager to show that the month-to-month agreement was entered into as a result of any exceptional circumstances, or that it was an impracticable or impossible situation warranting a deviation in terms of Regulation 36. No

¹¹ See also *Kgoale v Taba Chweu Local Municipality and Others* (JR19/22) [2024] ZALC 33 (12 December 2024) para 24.

¹² On similar regulations, see generally *Department of Transport and Others v Tasima (Pty) Ltd* 2017 (2) SA 622 (CC) paras 22, 23, 99 and 100.

process preceding the conclusion of this alleged month-to-month contract was disclosed. Therefore, the alleged emergency cannot be characterised as unforeseen or unavoidable. It is, rather, the product of poor planning and internal inefficiency. The very absence of the process followed demonstrate that Regulation 36 was either not invoked or not complied with. Allowing an after the fact reliance on Regulation 36 in such circumstances would undermine the entire procurement framework and create a perverse incentive for organs of state to bypass competitive processes by deliberate or negligent delay. This Court must guard against such an outcome.

- [37] It is therefore clear that, contrary to the provisions of section 217(1) of the Constitution, the conclusion or extension of the SLA with MNK and MNK's month-to-month appointment were not fair, equitable, transparent, competitive and cost-effective. We therefore find that the month-to-month appointment was illegal, as it is not permitted under section 217 of the Constitution read with the relevant procurement legislation. The month-to-month agreement stands to be set aside. What remains to be considered is the appropriate remedy.

JUST AND EQUITABLE RELIEF

Parties' submissions

- [38] As stated above, apart from the setting aside of the two decisions, Maximum Profit sought substitution in relation to the tender award and an order for MNK to repay to the Municipality the money it had paid to MNK in relation to the purported month-to-month contract.
- [39] Maximum Profit relies on the following grounds to seek substitution:
- 39.1 The Court has been provided with the tender and bidding documents, meaning it has all the relevant information;
 - 39.2 Once it is accepted that Maximum Profit was incorrectly scored and irregularly disqualified, it is a forgone conclusion that it ought to have been awarded the June 2024 tender in terms of section 2(1)(f) of the

Preferential Procurement Policy Framework Act 5 of 2000¹³ ("PPPFA") which makes it peremptory for the Municipality to award the tender to the highest scoring bidder;

- 39.3 There are no polycentric issues *in casu*, the Court is in as good a position to adjudicate the tender;
- 39.4 The Municipality demonstrated incompetency and/or bias as illustrated by it considering irrelevant factors after having let the November 2023 tender lapse without providing cogent reasons;
- 39.5 Further delays ought to be avoided, on the Municipality's own version, there is a need for VAT recovery services.

[40] To further bolster the contention that it was supposed to be awarded the June 2024 tender, Maximum Profit submits that a portion of MNK's recoveries (amounting to R32,772,232.88) was obtained in direct breach of the existing court order and/or through unlawful invocation of Regulation 36, and therefore that MNK was not entitled to rely on them.

¹³ Section 2 of the PPPFA provides:

Framework for implementation of preferential procurement policy

- (1) An organ of state must determine its preferential procurement policy and implement it within the following framework:
 - (a) A preference point system must be followed;
 - (b) (i) for contracts with a Rand value above a prescribed amount a maximum of 10 points may be allocated for specific goals as contemplated in paragraph (d) provided that the lowest acceptable tender scores 90 points for price;
 - (ii) for contracts with a Rand value equal to or below a prescribed amount a maximum of 20 points may be allocated for specific goals as contemplated in paragraph (d) provided that the lowest acceptable tender scores 80 points for price;
 - (c) any other acceptable tenders which are higher in price must score fewer points, on a pro rata basis, calculated on their tender prices in relation to the lowest acceptable tender, in accordance with a prescribed formula;
 - (d) the specific goals may include-
 - (i) contracting with persons, or categories of persons, historically disadvantaged by unfair discrimination on the basis of race, gender or disability;
 - (ii) implementing the programmes of the Reconstruction and Development Programme as published in *Government Gazette* No. 16085 dated 23 November 1994;
 - (e) any specific goal for which a point may be awarded, must be clearly specified in the invitation to submit a tender;
 - (f) the contract must be awarded to the tenderer who scores the highest points, unless objective criteria in addition to those contemplated in paragraphs (d) and (e) justify the award to another tenderer; and
 - (g) any contract awarded on account of false information furnished by the tenderer in order to secure preference in terms of this Act, may be cancelled at the sole discretion of the organ of state without prejudice to any other remedies the organ of state may have.
- (2) Any goals contemplated in subsection 1(e) must be measurable, quantifiable and monitored for compliance.

- [41] Maximum Profit bases its claim for the return of the monies received by MNK from the Municipality under the purported month-to-month contract on the ground that MNK was not entitled to receive them. The argument is that MNK is not an innocent party and should therefore not benefit from an unlawful contract. This is so far as MNK was a party to the proceedings that declared the 2023 SLA invalid, yet proceeded, together with the Municipality, to implement it. Maximum Profit submits that this is a clear disregard for the rule of law, which would be rewarded if MNK is not ordered to repay the money it received under the purported month-to-month contract.
- [42] On the other hand, the Municipality submits that substitution would be inappropriate for the following reasons. The contract for the June 2024 tender award ends in September 2027, as it was for 36 months only. Awarding the tender to Maximum Profit for 36 months at this stage would amount to an extension of the contract, which can only be done in terms of section 33 of the MFMA. Mr Manala also submits that the Court would effectively be called upon to assume two positions; first, to act as the BAC and adjudicate the tender and make a recommendation, as Maximum Profit was disqualified at that level, and second, to act as the accounting officer and award the tender. In any event, the Municipality argues that the BAC's recommendation is not absolute, as the accounting officer may consider other relevant factors and not award the tender to the highest-scoring bidder.
- [43] In relation to the relief sought for the return of the money received by MNK under the purported month-to-month contract, the Municipality draws this Court's attention to the principle of no profit and no loss. The principle is said to favour MNK, as it cannot be found to have acted with extreme culpability. MNK also argues that the Municipality, and by necessary implication the public, has benefited from its VAT recovery services. MNK calls upon the Court to adopt a balanced approach.
- [44] To bolster the argument that it is an innocent party, MNK submits that once the Municipality made the decision to extend/conclude the SLA which then gave

rise to the purported month-to-month contract, MNK could not simply ignore that decision. Reliance is on *Oudekraal*,¹⁴ *Kirland*¹⁵ and *Gijima*¹⁶ for the conclusion that the decision remained with legal consequences until set aside by a court of law.

- [45] MNK goes further, contending that Maximum Profit instigated the continuation of the month-to-month contract after September 2024 by seeking to suspend the implementation of the tender award. In its heads of argument, MNK urges this Court to review and set aside that suspension as unlawful, and to substitute the purported month-to-month contract with the June 2024 SLA, with effect from 11 September 2024.

Analysis

- [46] We consider the appropriate remedy in terms of section 217 of the Constitution and section 8 of PAJA which empower this Court with a discretion to grant relief it considers just and equitable. At this stage, we must consider the effects of the declaration of invalidity on the parties to whom the order applies. The interests of those parties are carefully examined for the purpose of making an order that is just and equitable in the circumstances.¹⁷ In *Steenkamp NO v Provincial Tender Board, Eastern Cape*¹⁸, Moseneke DCJ for the majority elucidated:

"It goes without saying that every improper performance of an administrative function would implicate the Constitution and entitle the aggrieved party to appropriate relief. In each case the remedy must fit the injury. The remedy must be fair to those affected by it and yet vindicate effectively the right violated. It must be just and equitable in the light of the facts, the implicated constitutional principles, if any, and the controlling law. It is nonetheless appropriate to note that ordinarily a breach of administrative justice attracts public-law remedies and not private-law remedies. The purpose of a public-

¹⁴ *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2004 (6) SA 222 (SCA).

¹⁵ *MEC for Health, Eastern Cape and another v Kirland Investments (Pty) Ltd t/a Eye and Laser Institute* 2014 (3) SA 481 (CC).

¹⁶ *State Information Technology Agency SOC Ltd v Gijima Holdings (Pty) Ltd* 2018 (2) SA 23 (CC).

¹⁷ *MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd* 2014 (3) SA 481 (CC) para 61.

¹⁸ 2007 (3) SA 121 (CC) para 29.

law remedy is to pre-empt or correct or reverse an improper administrative function. In some instances the remedy takes the form of an order to make or not to make a particular decision or an order declaring rights or an injunction to furnish reasons for an adverse decision. Ultimately the purpose of a public remedy is to afford the prejudiced party administrative justice, to advance efficient and effective public administration compelled by constitutional precepts and at a broader level, to entrench the rule of law.”

- [47] It is trite that substitution is granted in exceptional circumstances in light of the principle of separation of powers.¹⁹ While there is no closed list of circumstances under which substitution would be appropriate, it is well established that two key considerations are whether the court is in as good a position as the administrator and whether the result is a foregone conclusion and it would be a waste of time to remit the matter to the original decision maker.²⁰
- [48] It is common cause that MNK submitted recoveries of R104,208,526.00 in their bid, including recoveries of R32,772,232.88 for the period from 16 January 2024 to 11 June 2024, being the month-to-month contract period. Given that the previous irregular appointment (the 2023 tender) finally lapsed on 18 December 2023, when the suspension of the declaration of invalidity expired and there was an unlawful purported invocation of Regulation 36, the recoveries made by MNK from January 2024 to June 2024 were on a plainly illegal basis. As a consequence, it is clear that MNK could never have demonstrated that they had recovered more than R90 million for the Municipality during the relevant period. At best, MNK recovered R71,436,293.12.
- [49] Accordingly, *in casu*, not even the original administrator can be said to be in the same position as when the decision had to be made. First, as held above, the VAT recoveries made in terms of the invalid contract relied upon by MNK can

¹⁹ *Gauteng Gambling Board v Silverstar Development Ltd and Others* 2005 (4) SA 67 (SCA) paras 28-29.

²⁰ *Intertrade Two (Pty) Ltd v MEC for Roads and Public Works, Eastern Cape and Another* 2007 (6) SA 442 (CK) para 43; see also *National Union of Metalworkers of SA v Commission for Conciliation, Mediation & Arbitration & Others* (2022) 43 ILJ 530 (CC) paras 64-73.

no longer be considered due to the setting aside of the purported month-to-month contract. Second is the time factor as there is just above a quarter of the tender period remaining. In *Intertrade Two (Pty) Ltd v MEC for Roads and Public Works, Eastern Cape and Another*²¹, Plasket J held that:

“ . . . The availability of proper and adequate information and the institutional competence of the Court to take the decision for the administrative decision-maker are necessary prerequisites that must be present, apart from ‘exceptional circumstances’, before a court can legitimately assume an administrative decision-making function. This, it seems to me, is a minimum requirement of rational decision-making, a fundamental requirement of the rule of law. In this case . . . because of the flaws in the evaluations of the tenders and because of the unknown consequences on the tenders of the inexcusable passage of time, both prerequisites are absent. If this Court was to award the tenders to Intertrade, it would act arbitrarily and in conflict with the rule of law because it would not have a rational basis for concluding that the award of the tenders would be ‘fair, equitable, transparent, competitive and cost-effective’, as required by s 217(1) of the Constitution.”

[50] Ultimately, substitution is inappropriate if not impossible under the circumstances. But so is remittal in the strict of senses because, as already observed above, a portion of MNK’s VAT recoveries is no longer appropriate information to be considered in the tender process. Indeed, the month-to-month contract is void *ab initio* and one may be tempted to reason that the Municipality may therefore be deemed to have received only one responsive bid, being Maximum Profit’s. However, that would seem inappropriate as this Court would effectively be assuming that MNK could not rely on VAT recovery services it may have provided to other grade 4 municipalities and still satisfy the R90 million threshold. Suffice to say that there are no competing tenders for reconsideration by the Municipality, thus, remittal would serve no purpose.²²

[51] In relation to the purported month-to-month contract, the remaining issue is whether it would be just and equitable to order the return of the commission

²¹ 2007 (6) SA 442 (Ck) para 43.

²² See for example *Premier, Province of Mpumalanga and Another v Executive Committee of the Association of Governing Bodies of State Aided Schools: Eastern Transvaal* 1999 (2) SA 91 (CC) para 52.

paid to MNK by the Municipality. An innocent party would be a party that was not involved in any of the irregularities that were committed when the irregular decision was made.²³

[52] Given that there is simply no evidence detailing how the decision to conclude the month-to-month agreement came about, it is difficult to establish exactly how MNK contributed towards the irregularity. Be that as it may, it cannot be denied that MNK, as one of the parties to the proceedings in 2023, knew that the 2023 SLA was invalid. In so far as the “extension” is said to be a new contract, MNK is not arguing that it did not know that the Municipality had not followed due processes. Even if it is accepted that Regulation 36 places positive obligations on the Municipality and not MNK as an external party, the letter of extension should have raised concerns especially because it purports to extend the 2023 SLA (without stating anything about a new or independent contract) which MNK knew was declared unlawful and invalid. As already mentioned, MNK concedes that its month-to-month appointment was irregular. Had MNK intended not to be party to the implementation/enforcement of a contract concluded following irregular processes, nothing stopped it from raising the irregularities with the Municipality upon receipt of the letter purporting to extend the 2023 SLA.²⁴ MNK had no duty to bind itself to an unlawful contract; its reliance on *Oudekraal*, *Kirland* and *Gijima* is misplaced. Ultimately, the fact that MNK knowingly participated in the implementation of a contract arising from an irregular appointment demonstrates impropriety which would be rewarded if MNK were to retain the full 10% commission made/received for the services rendered.

[53] Finally, the new case advanced in MNK’s written submissions on this issue does not stand in light of this Court’s ruling setting aside the June 2024 tender award. The unlawfulness or otherwise of the Municipality’s undertaking to suspend the implementation of the award cannot revive the tender award or

²³ *Passenger Rail Agency of South Africa v Swifambo Rail Agency (Pty) Ltd* [2017] 3 All SA 971 (GJ) para 93.

²⁴ See for example *State Information Technology Agency SOC Ltd v Gijima Holdings (Pty) Ltd* 2018 (2) SA 23 (CC) paras 53-54.

cure its unlawfulness. Similarly unhelpful is the argument that, but for the undertaking, the Municipality would not have continued enforcing the purported month-to-month agreement after 11 September 2024. It might as well be that, after 11 September 2024, the Municipality would have enforced the June 2024 tender award instead. In our view, the fact that Maximum Profit successfully sought the undertaking to suspend the implementation of the tender award takes nothing from the fact that MNK made 6% extra commission from an unlawful contract. Maximum Profit gained nothing. Having rejected the locus standi challenge in this regard, it is unclear what apportioning blame to Maximum Profit ought to yield, especially because this is not a delictual claim.

- [54] It defies logic for the Municipality to continuously contract MNK at a 10% rate when other service providers would have offered the same services at a far lower rate. Nonetheless, MNK did render the VAT recovery services and the Municipality and the public benefitted. Any tenderer or party to subsequently offer VAT recovery services to the Municipality would take over from where MNK has left, it cannot re-recover what MNK has already recovered. Khampepe J in *Department of Transport and Others v Tasima (Pty) Ltd*²⁵ enunciated:

“In crafting an appropriate remedy . . . the interests of the public must remain paramount. This extends beyond considerations of the immediate consequences of invalidity. As *Allpay II* expresses—

‘(t)he primacy of the public interest in procurement . . . matters must also be taken into account when the rights, responsibilities, and obligations of all affected persons are assessed. This means that the enquiry cannot be one-dimensional. It must have a broader range.’”

- [55] It therefore seems just and fair to afford MNK the retention of 4% of the commission it received in rendering the services. Ordering MNK to return the full amount would mean that the Municipality (and the public it serves) would be allowed to benefit from an unlawful contract while MNK is left to suffer having rendered the services. It is appropriate to, as we hereby do, direct the Registrar of this Court to provide the Premier of this province and the Executive Mayor of

²⁵ 2017 (2) SA 622 (CC) para 205.

the Municipality with copies of this judgment to monitor compliance with the order we make hereunder.

- [56] There is no reason why costs should not follow the result. This approach aligns with the parties' submissions.

ORDER

- [57] In the above premises, the following order is made:

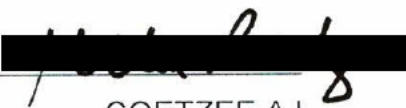
1. The decision of the first respondent to award Tender 06/2023-24 for VAT recovery services to the third respondent, published on the first respondent's website on 11 September 2024, is declared unconstitutionally invalid, is reviewed and set aside.
2. The agreement concluded between the first respondent and the third respondent pursuant to the tender award in Tender 06/2023-24 is set aside.
3. The decision of the first respondent to appoint the third respondent on a month-to-month basis for VAT recovery services is declared constitutionally invalid, is reviewed and set aside.
4. The third respondent is ordered to repay to the first respondent 6% (six percent) of the amounts received by the third respondent for VAT recovery services performed for the first respondent from 18 December 2023 to the date of this order.
5. The respondents are jointly and severally ordered to pay the applicant's costs on scale C, the one paying and the other to be absolved.



LP TLALETSI
JUDGE PRESIDENT

NORTHERN CAPE DIVISION

And


COETZEE AJ

ACTING JUDGE OF THE HIGH COURT
NORTHERN CAPE DIVISION

Appearances

For the Applicant:
Instructed by:

Adv. A.P.J. Els SC
Albert Hibbert Attorneys
c/o Haarhoffs Inc.

For the First & Second Respondents:
Instructed by:

Adv. M.E. Manala
Kganare & Khumalo Attorneys
c/o Van de Wall Inc.

For the Third Respondent:
Instructed by:

Mr. I. Motloung
Maluleke Seriti Makume Matlala Inc.