



IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, EAST LONDON CIRCUIT COURT

Case No.: 2025-162579

In the matter between:

UTILITIES WORLD (PTY) LTD

Applicant

and

BUFFALO CITY METROPOLITAN MUNICIPALITY
THE MUNICIPAL MANAGER,

First Respondent

BUFFALO CITY METROPOLITAN MUNICIPALITY

Second Respondent

CONTOUR TECHNOLOGY (PTY) LTD

Third Respondent

CONLOG SOLUTIONS (PTY) LTD

Fourth Respondent

ONTEC SOLUTIONS (PTY) LTD

Fifth Respondent

MOSIMA IT SOLUTIONS CC

Sixth Respondent

IDEAL PREPAID (PTY) LTD

Seventh Respondent

MBL PAZONITE JV

Eighth Respondent

SYNTELL (PTY) LTD

Ninth Respondent

SPECTRUM UTILITY MANAGEMENT (PTY) LTD

Tenth Respondent

SANDULELA EASYPAY JV

Eleventh Respondent

JUDGMENT

COLLETT J:

Introduction

- [1] This is an application for the judicial review of decisions taken during a municipal procurement process. The applicant, Utilities World (Pty) Ltd, challenges its disqualification from *Tender CE580* (hereinafter referred to as the '*Tender*') issued by the first respondent, Buffalo City Metropolitan Municipality (first and second respondents are hereinafter referred to as the '*Municipality*'), for the supply, installation, management and maintenance of a prepayment electricity vending system incorporating third-party collection services. The third respondent, Contour Technology (Pty) Ltd, was ultimately awarded the *Tender*.
- [2] The applicant was not a newcomer to the services concerned. It had provided electricity vending services to the *Municipality* under *Contract CE266* since August 2017. It tendered for *CE580* when the *Municipality* sought to procure those services for a further period of three years. The applicant's bid did not progress beyond the functionality stage. It was informed that it had failed to achieve the prescribed functionality threshold.
- [3] The applicant contended that despite requests it was not at that stage furnished with the reasons for its disqualification or the evaluation record. When further material subsequently became available, including a ruling on what had been described as an '*objection and/or appeal*,' the applicant's disqualification was attributed to the alleged failure to provide customer registration material, a comprehensive business and project implementation plan inclusive of a Gantt chart. The applicant maintained that the relevant material had in fact formed part of its bid.
- [4] The *Municipality* contended that although material dealing with those subjects was contained in the applicant's bid, it did not substantively demonstrate compliance with the compulsory requirements of the *Tender*. The third respondent supported that position and contended that the material relied upon in respect of customer registration did not provide the detailed self-service registration procedure required by the criterion (c).

- [5] The distinction is important as the dispute is not confined to whether particular documents could be found amongst the pages of applicant's tender but extends to what the relevant decision maker actually decided, the reasons for that decision, whether those reasons were adequately disclosed, whether the decision rested upon a material error of fact or a failure properly to consider material before the *Municipality* and whether any irregularity was material to the procurement process.
- [6] A further complication arose from the *Municipality's* internal processes. The applicant was led by the *Tender* documentation and subsequent correspondence to pursue an objection and what it understood to be an appeal under *section 62* of the *Local Government: Municipal Systems Act 32 of 2000* (hereinafter referred to as the '*Systems Act*'). The *Municipality's* position is that there was no appeal under *section 62* because the award was made by the City Manager in the exercise of the accounting officer's original procurement powers. However, it accepted that *clause 35.2* of the *General Conditions of Tender* referred to a right of appeal but averred that this was subject to the availability of such an appeal under *section 62*.
- [7] These events generated several subsidiary disputes. They included an application by the applicant to amend the relief sought, an application to strike out portions of third respondent's answering papers, the legal effect of the internal objection and purported appeal, the adequacy of the reasons furnished for the applicant's disqualification and the applicant's separate challenge to aspects of third respondent's bid. Those issues are dealt with *infra* insofar as they remain necessary for determination.

Issues for determination

- [8] The papers are extensive and the litigation has acquired a degree of procedural complexity. However, the issues requiring determination are capable of being identified with some precision.
- [9] At the outset, there are two interlocutory matters. The first concerns the applicant's application to amend its notice of motion. The amendment corrects the date of the impugned decision and of greater significance, it formulates alternative relief depending upon whether an internal appeal in terms of *section 62* of the *Systems Act*

was available. The amendment also addresses the appropriate destination of any remittal

- [10] The second is the applicant's application in terms of *Rule 6(15)* of the *Uniform Rules of Court* (hereinafter referred to as the '*Rules*') It concerns allegations introduced by the third respondent relating to alleged additional deficiencies in the applicant's bid and allegations of collusive or non-independent bidding. The Court must determine whether the identified material should be struck out and to the extent that it is not so struck, whether there is any purpose for which it may legitimately be considered in these review proceedings.
- [11] The first substantive issue concerns the reasons for the applicant's disqualification. The applicant was initially informed only that it had failed to attain the required functionality threshold. The later ruling by Ms. Mashiya stated that the applicant had failed to provide the required customer registration material and a comprehensive business and project implementation plan inclusive of a Gantt chart. The *Municipality's* case in these proceedings is materially different as it is averred the documents were present but did not substantively satisfy the relevant *Tender* requirements.
- [12] This gives rise to the related question whether the applicant was furnished with adequate reasons as contemplated in *section 5* of *PAJA* and if not, whether the presumption in *section 5(3)* has been rebutted. In determining this issue, it will be necessary to consider what constitutes the administrative decision under review, who made it, whose reasons are relevant and whether the evidence subsequently given by Mr. Peter establishes the reasons which informed that decision or amounted to an impermissible *post hoc* rationalization. The applicant expressly advances inadequate reasons and *post hoc* rationalization as its first ground of review.
- [13] The second ground concerns an alleged material mistake of fact and failure to consider relevant material. The applicant contends that the customer registration material, implementation plan and Gantt chart were in fact contained in its bid and that insofar as its disqualification proceeded upon their non-submission, the decision rested upon an objectively incorrect factual premise. The *Municipality* disputes the characterization

of the original decision in those terms and contends that the material was considered but did not demonstrate substantive compliance.

- [14] This requires the Court where necessary, to examine the requirements of criteria (c) and (h) and the material submitted by the applicant. Criterion (c) concerned customer registration through the stipulated channels and a detailed customer registration procedure whilst criterion (h) required a comprehensive business and project implementation plan incorporating a Gantt chart. The question is not simply whether documents bearing those descriptions existed but what consequence followed from the evidence concerning their presence, consideration and substantive content.
- [15] The third ground is the alleged failure to seek clarification. The applicant relies upon *clause 14* of the *General Conditions of Tender* and contended that if the evaluators were uncertain either as to where the relevant material appeared in the bid or as to whether it adequately addressed the compulsory requirements, then in such circumstances, fairness and rationality required clarification to be sought before the bid was rejected. The *Municipality* and the third respondent dispute that the clause imposed such an obligation particularly if what was lacking was substantive compliance rather than clarification of material already submitted.
- [16] A separate issue concerned *section 62* of the *Systems Act* and the identity of the decision maker. This issue was significant during the proceedings because the applicant had initially proceeded on the basis that an internal appeal under *section 62* was available. It was subsequently clarified that the City Manager, acting as accounting officer, had made the award in the exercise of an original statutory power. By the time the matter was argued there was no longer any material dispute that a *section 62* appeal was accordingly not available. The issue remains relevant to the declaratory relief sought, the procedural course followed by the applicant, the purported objection and appeal process, and costs.
- [17] The *Municipality* further contended that the dispute between the parties was compromised by the agreement reached between them and embodied in the earlier Court Order. The Court must therefore determine whether that agreement constituted a compromise (*transactio*) of the underlying procurement dispute with the consequence

that the applicant is precluded from pursuing some or all of the review relief now sought, alternatively, whether the agreement was merely an interim procedural arrangement intended to regulate the position pending the determination of the objection and/or appeal and the review proceedings.

[18] The applicant also challenges the award to the third respondent. That challenge is distinct from the legality of the applicant's own disqualification. It concerned whether the *Municipality* applied the *Tender's* peremptory requirements consistently, the third respondent's reliance upon WireIT, the nature of the vending mechanism offered, real time online vending, the digital delivery of tokens and the prohibition against customer facing charges. The applicant characterized this as an unequal application of peremptory *Tender* requirements.

[19] The Court must determine the just and equitable remedy should one or more review grounds be established. This will include whether the impugned decision and consequential award should be set aside, the appropriate level within the *Municipality* to which the matter should be remitted for reconsideration and whether any transitional arrangement is necessary to preserve the uninterrupted provision of electricity vending and revenue collection services pending a lawful determination. Finally, the question of costs, including the costs occasioned by the interlocutory applications, the parties' respective conduct in the procurement dispute and subsequent litigation requires determination.

Factual matrix

[20] The applicant is a provider of prepaid electricity vending and related revenue collection services. Prior to the procurement process, being the subject of this review, it rendered such services to the *Municipality* under an existing contract. Accordingly, it was the incumbent service provider when the *Municipality* embarked upon a fresh procurement process for those services.

[21] The *Municipality* invited bids under *Tender CE580* (hereinafter referred to as the '*Tender*') for the provision of an electricity prepayment vending system and associated third party collection services. The *Tender* contemplated the appointment of a service

provider for a period of three years. The applicant submitted a bid as did the third respondent and other bidders.

- [22] The *Tender* prescribed a staged evaluation process and of relevance to this application was the functionality stage. Certain requirements were identified as ‘*Firm Requirements*’ and were compulsory. A bidder which failed to satisfy the prescribed functionality requirements would not proceed further in the evaluation process. Two of those requirements are of particular significance to these proceedings. *Criterion (c)* concerned customer registration and required written evidence relating to customer registration facilities and procedures and *Criterion (h)* required a comprehensive business and project implementation plan, including a Gantt chart addressing specified aspects of implementation. The precise content and proper application of those requirements are in dispute and are dealt with later in this judgment.
- [23] The applicant’s bid was evaluated by the *Bid Evaluation Committee* (hereinafter referred to as the ‘*BEC*’) and did not progress beyond the functionality stage. The evaluation material subsequently produced records a ‘*No*’ against the requirements upon which the applicant’s bid failed without setting out any reasoned analysis for that conclusion. The *BEC* made its recommendation to the *Bid Adjudication Committee* (hereinafter referred to as the ‘*BAC*’) who recommended to the accounting officer that the *Tender* be awarded to the third respondent for an amount of R91 683 530.05. A letter of appointment was issued to the third respondent on 24 July 2025. The third respondent accepted the appointment by signature on 30 July 2025. The letter provided that the contract would become effective upon acceptance by the successful bidder.
- [24] The applicant was not informed of its unsuccessful bid until 11 August 2025 when it was notified that it had failed to attain the required functionality threshold. The notification did not identify the requirement which had not been satisfied, the score allocated, any document considered absent or inadequate or the reasoning underlying the evaluation. On 13 August 2025 the applicant lodged an objection and requested reasons for its disqualification together with the relevant evaluation material. It also sought an undertaking that the award would not be implemented before its objection and any appeal had been determined. Further correspondence followed on 19 and 21 August 2025 none of which elicited a substantive response from the *Municipality*.

- [25] At that stage the applicant proceeded on the understanding derived, *inter alia*, from the *Tender* documentation that an appeal under *section 62* of the *Systems Act* was available. On 1 September 2025 being within 21 days of the notification of its unsuccessful bid, it lodged a document styled as a *section 62* appeal. In the absence of particularized reasons for its disqualification, the appeal addressed the functionality requirements broadly and sought to demonstrate criterion by criterion that its bid complied therewith.
- [26] It is noteworthy that at this stage the third respondent had already received and accepted its letter of appointment. The applicant states that it became aware through reports from other suppliers that the third respondent had been appointed. On 2 September 2025 the applicant addressed further correspondence to the *Municipality* seeking confirmation of whether a letter of appointment had been issued and, if so, when and to whom. The situation led to the institution of these proceedings with Part A directed at preserving the position pending the determination of the applicant's objection and/or appeal and the review in Part B. The proceedings thereafter developed through the production of the *Rule 53* record, supplementary affidavits and the interlocutory applications as referred to *supra*.
- [27] Significantly, the *Rule 53* record shed further light on the basis upon which the applicant had been excluded from the procurement process. The *BEC* documentation itself contained no detailed reasoning beyond recording non-compliance with the relevant requirements. A subsequent ruling by Ms. Mashiya delivered during the *Municipality's* objection process stated that the applicant did not as part of its bid provide the required customer registration material as well as the comprehensive business and project implementation plan, including a Gantt chart.
- [28] It is now common cause that documents relating to customer registration, an implementation plan and a Gantt chart were physically contained in the applicant's *Tender* submission. The significance of that fact remains sharply disputed. The applicant contended that its disqualification proceeded upon the erroneous premise that the documents had not been submitted. The respondents contend that physical inclusion of documents did not establish compliance as what was required was material which substantively satisfied the compulsory *Tender* criteria.

- [29] That distinction lies at the heart of a substantial part of the review. It is necessary before considering this to complete the procedural history because the way the applicant's objection and purported appeal were dealt with, the subsequent identification of the decision-maker and the interlocutory proceedings bear directly upon several of the issues identified *supra*.

The internal process and proceedings

- [30] The applicant thereafter approached this Court for urgent relief. On 25 September 2025, an Order was granted by agreement before *Kotze AJ* regulating the position pending the determination of Part A. In terms thereof the *Municipality* and the third respondent were restrained from implementing *Tender CE580* whilst the applicant was to continue rendering the existing prepaid electricity vending service in terms of *CE266*.
- [31] The Order did considerably more than preserve the *status quo*. It required the *Municipality* to determine all timeous objections and appeals within a reasonable time and to furnish written decisions with reasons to the objectors and the parties. Within ten days thereafter the *Municipality* was required to deliver the *Rule 53* record of the entire *Tender* process.
- [32] Significantly, the Order expressly contemplated the continuation of the litigation thereafter. The applicant was authorized to supplement its papers without seeking condonation, amend its notice of motion and seek the enrolment of Part A. Provision was also made for an abridged timetable for the delivery of answering and replying affidavits as well as heads of argument.
- [33] The preservation mechanism was similarly directed towards ensuring that the applicant could return to Court should the *Municipality*, before the determination of Part A, confirm, vary, substitute or withdraw an award relating to *CE580*. In that event, the *Municipality* was required to give the parties 20 days' written notice before taking implementation steps. If the applicant approached the Court during that period, including by supplementing Part A and seeking its re-enrolment, the standstill would continue pending the determination of Part A.

- [34] The Order further permitted the applicant to join interested and affected parties, required the preservation of the records relevant to CE580 and CE266 and expressly contemplated that directions could subsequently be sought for the enrolment of Part B. All questions of costs were reserved.
- [35] Pursuant to the Order of 25 September 2025, the *Municipality* appointed Advocate Z Nxazonke-Mashiya to consider and determine the applicant's objection and/or appeal. On 22 October 2025 the City Manager transmitted Mashiya's ruling to the applicant. The covering communication recorded that her appointment had been made consequent upon the Court Order requiring the *Municipality* to determine all timeous objections and to furnish written decisions with reasons.
- [36] Mashiya identified two compulsory requirements as the basis upon which the applicant's bid had been rejected, more particularly, customer registration, described as the '*primary customer interface*' and a comprehensive business and project implementation plan. In relation to the former, she recorded that the required interface comprised a website or portal, contact centers and walk-in centers supported by declarations from clients to whom the bidder had provided such services and a detailed customer registration procedure document.
- [37] As to the second requirement, Mashiya recorded that the required business and project implementation plan had to address the supply, installation and maintenance of the electricity prepayment vending system; the implementation of self-service, assisted service and payment gateway services; and the implementation of third-party collection services. The required evidence included a Gantt chart detailing those matters. Her ruling states that the applicant '*did not, as part of its bid, provide these*'.
- [38] Mashiya reasoned that it was for the *Municipality* as the organ inviting tenders to prescribe the prerequisites for a valid tender and that non-compliance with a prescribed condition ordinarily rendered a tender unacceptable unless the condition was immaterial, unreasonable or unconstitutional. She found nothing of that nature in the requirements with which she considered the applicant to have failed to comply. She accordingly upheld the *Municipality's* decision and dismissed the applicant's '*objection and/or appeal*'.

- [39] The terminology employed in the ruling is relevant to what followed. Neither the City Manager's covering letter nor Mashiya's ruling distinguished between the applicant's objection and its purported appeal with both repeatedly referred to an '*objection and/or appeal*' and neither did the ruling purport to identify Mashiya as the person who had taken the original decision to disqualify the applicant's bid. She was evidently appointed after the event to determine the challenge brought against that decision.
- [40] The *Rule 53* record subsequently disclosed the *BEC*'s report dated 23 June 2025. The report records that the evaluation process included an assessment of administrative, legal, technical, compliance, responsiveness and functionality requirements. The minimum requirements included that bidders demonstrate the requisite experience in providing the relevant prepaid electricity and third-party collection services and that they comply with all compulsory firm requirements.
- [41] The functionality assessment comprised several criteria expressly described in the report as '*all compulsory*' among which were customer registration described as the '*Primary Customer Interface*' and the provision of a comprehensive business and project implementation plan. The *BEC*'s functionality findings recorded the applicant as having failed both of those criteria. Against '*Customer Registration (Primary Customer Interface)*' the applicant was recorded as '*No*'. It was similarly recorded as '*No*' against the requirement to provide a comprehensive business and project implementation plan. Other bidders, including the third respondent, were recorded as compliant with those requirements.
- [42] This finding was consequential as the report expressly provided that bidders who failed to meet the compulsory functionality criteria would not proceed to evaluation on price and preference. The price and preference calculations appearing thereafter were prepared on the hypothetical basis that all bidders were responsive and were required to be adjusted to exclude those found to be non-responsive. The *BEC* ultimately recommended the award of the *Tender* to the third respondent as the highest point scorer under the applicable preference point system at an evaluated amount of R91 683 530.05.

- [43] In compliance with the Order of 25 September 2025, the *Municipality* filed the *Rule 53* record. The notice of filing identified the record as comprising the *Tender* documentation relating to *CE580* and listed, *inter alia*, the *Tender* advertisement, procurement plan, *Tender* evaluation criteria, technical report, functionality analysis, *Tender* evaluation methodology, *Tender* register, *BEC* appointments and recommendation, *BAC* attendance material, the bids submitted by all tenderers and the objections and/or appeals.
- [44] However, what the *Rule 53* record did not clearly identify was the operative final decision maker. The *BEC* recommendation was to the *BAC* and the *BAC* recommendation was directed to the accounting officer. The record relied upon by the applicant did not contain a separate written approval by the City Manager adopting that recommendation. The appointment letter referred to acceptance by the ‘*City Council*’. That uncertainty later became central to the dispute concerning *section 62* of the *Systems Act*.
- [45] The *Rule 53* record therefore did two things of particular significance. Firstly, it enabled the applicant to identify the two functionality criteria upon which its exclusion had rested and secondly it exposed uncertainty concerning the identity of the functionary who had ultimately made the award. Those matters informed the applicant’s supplementary case and later its application to amend the notice of motion.
- [46] Subsequent to the dismissal of the applicant’s objection, the *Municipality* gave notice on 16 January 2026, in accordance with the order of 25 September 2025, of its intention to proceed with implementation of the award to the third respondent within 20 days. On 29 January 2026, the applicant delivered a supplementary founding affidavit in respect of Parts A and B and reinstated the interim relief sought in Part A. The relief sought in Part B was also reformulated considering the *Rule 53* record and the developments which had occurred since the institution of the proceedings.
- [47] Part A came before *Mullins AJ* on 12 February 2026 but was not determined on its merits. The Court removed Part A from the roll and directed the parties to approach the Registrar for an expedited hearing date. A timetable was prescribed for the delivery of further affidavits and heads of argument and all questions of costs were reserved. The

significance of the Order is procedural. It did not dispose of Part A or determine any of the substantive disputes between the parties but preserved Part A for determination on an expedited basis whilst providing for the completion of the papers. The litigation therefore continued against the background of the standstill arrangement established by the Order of 25 September 2025.

- [48] On 22 April 2026, the applicant delivered a notice in terms of *Rule 28* seeking a further amendment of the notice of motion. The amendment arose essentially from the continuing uncertainty concerning the identity of the functionary who had made the operative award decision. The proposed amendment accordingly sought to cater for either possible conclusion concerning *section 62*. It corrected the date of the impugned notification from 9 August to 11 August 2025, pleaded alternative relief depending upon whether a *section 62* appeal was legally available, made the proposed remittal to the municipal bid structures conditional upon there having been no available internal appeal and in the alternative sought remittal to the appropriate appeal authority should the Court find that an appeal had been available but had not lawfully been determined.
- [49] The uncertainty concerning the decision maker was ultimately resolved only later in the proceedings. During July 2026 it was confirmed that the City Manager acting as the *Municipality's* accounting officer had made the award. The *Municipality* consequently accepted that no appeal under *section 62* existed against that decision and the third respondent withdrew its opposition to the amendment insofar as it reflected the identity of the decision maker and the resulting position under *section 62*.
- [50] That clarification altered an important part of the procedural landscape. Prior hereto, the *Tender* documentation, the applicant's correspondence, the Order of 25 September 2025 and the *Municipality's* subsequent handling of the matter had proceeded on the basis that there existed an '*objection and/or appeal*'. The applicant had in fact lodged a document expressly styled as a *section 62* appeal on 1 September 2025 and the Mashiya ruling furnished on 22 October 2025 was itself described as determining the applicant's '*objection and/or appeal*'.
- [51] However, once the City Manager was identified as the original decision maker the parties were substantially *ad idem* that the statutory premise for a *section 62* appeal was

absent. The dispute which remained concerned the consequences of the way the *Municipality* had represented and dealt with the internal process rather than whether the applicant was presently required to pursue a *section 62* appeal.

- [52] A further interlocutory dispute arose from the third respondent's answering affidavit. On 22 May 2026 the applicant filed an application in terms of *Rule 6(15)* seeking to strike out, alternatively to have disregarded, identified portions of that affidavit. The impugned material included allegations that the applicant's bid was non responsive because of an alleged failure to comply with a single aggregator requirement, allegations concerning the relationship between entities relied upon by the applicant in its bid, assertions of collusive or non-independent bidding, alleged deficiencies relating to financial statements, lease or debt clearance documentation and ISO certification.
- [53] The applicant's essential objection was that none of those matters formed part of the reasons for its disqualification recorded in the outcome notification, the *BEC* report or Mashiya's ruling. It contended that they were collateral grounds advanced by the successful bidder after the event and could not retrospectively be used to sustain the administrative decision under review. It further contended that their introduction expanded the litigation unnecessarily and risked influencing any reconsideration should the matter ultimately be remitted.
- [54] The third respondent resisted this characterization contending that the impugned evidence was relevant to the procurement process, to the relief sought by the applicant and that the applicant had itself placed the compliance of the competing bids in issue. Whether and for what purpose that evidence may properly be considered is one of the interlocutory questions which must be determined before the substantive review is addressed. The central review dispute remained whether the applicant's disqualification and the consequential award to the third respondent were lawful based on the administrative process undertaken.

General legal framework

- [55] The genesis of State procurement is *section 217(1) of the Constitution*¹. When an organ of state contracts for goods or services, it must do so in accordance with a system that is fair, equitable, transparent, competitive and cost-effective. The requirements governing a public tender are not merely internal administrative arrangements particularly where they form part of the constitutional and legislative procurement framework compliance with *section 217* is legally required. The award of a tender constitutes administrative action and is subject to judicial review under the *Promotion of Administrative Justice Act 3 of 2000* (hereinafter referred to as '*PAJA*').²
- [56] In *AllPay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer, South African Social Security Agency and Others*,³ the Constitutional Court explained the proper approach to irregularities in a procurement process. The Court must first determine factually whether an irregularity occurred and thereafter evaluate it legally to determine whether it constitutes a ground of review. Where materiality arises, compliance is assessed with reference to the purpose served by the requirement in question. The enquiry into lawfulness is distinct from the consequences which may follow if invalidity is established.
- [57] That approach is important because not every defect in a tender process necessarily vitiates the resulting administrative action. Equally, an irregularity cannot be dismissed as inconsequential merely because the same outcome might ultimately have been reached. Procedural requirements serve, *inter alia*, the equal treatment of bidders and the integrity and transparency of the procurement process.
- [58] A judicial review is not an appeal⁴ and a reviewing court does not determine whether it would itself have evaluated a bid differently or preferred a different outcome. Its function is to determine whether the decision taken was lawful, reasonable and procedurally fair within the parameters of *PAJA*.

¹ Act 108 of 1996

² *Steenkamp NO v Provincial Tender Board, Eastern cape* 2007 (3) SA 121 (CC) at paras 21; 33-35

³ 2014 (1) SA 604 (CC) at para 28-29; 40

⁴ *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* 2004 (4) SA 490 (CC) at para 45

[59] Nonetheless, it is for the organ of state inviting tenders to prescribe the prerequisites with which bidders must comply. The bidder cannot ordinarily require an organ of state to disregard a material compulsory tender condition merely because it considers itself otherwise capable of performing the contract.⁵ That principle does not operate independently of *AllPay* and the character and purpose of the requirement remain important as does equality between bidders.

The amendment

[60] The general approach to amendments is permissive. An amendment should ordinarily be allowed where it facilitates the proper ventilation of the real dispute between the parties and does not cause prejudice which cannot appropriately be addressed by an order as to costs or an opportunity to respond. The discretion is exercised judicially, with the interests of justice and the proper determination of the dispute in mind. The enquiry is not simply whether the amendment alters the formulation of the case but whether it introduces an impermissible new cause of action or causes irremediable prejudice to the opposing party.⁶ The fact that an amendment follows information emerging from the *Rule 53* record is also relevant in review proceedings where *Rule 53* expressly contemplates supplementation after production of the record.

[61] This Court deals firstly with the applicant's application to amend its notice of motion. Although the amendment was of some significance during the earlier stages of the proceedings, by the time the matter was argued the controversy surrounding it had substantially narrowed. The amendment was precipitated by information which emerged from the *Rule 53* record and the subsequent clarification of the identity of the functionary who made the impugned award.

[62] *Rule 53* expressly contemplates that an applicant for review may, after receipt of the record, supplement its founding papers and adjust the relief sought. That entitlement is

⁵ *Dr JS Moroka Municipality and Others v Betram (Pty) Ltd and Another* [2013] ZASCA 186; [2014] 1 All SA 545 (SCA) at para 10

⁶ *Moolman v Estate Moolman, Trans-Drakensberg Bank Ltd (under judicial management) v Combined Engineering (Pty) Ltd* 1927 CPD 27 at 29

of particular importance where information material to the formulation of the review was within the peculiar knowledge of the administrator and only became apparent from the record.

[63] When the proceedings were instituted, the documents emanating from the *Municipality* did not speak with one voice as to the identity of the final decision maker. The procurement record reflected recommendations passing from the *BEC* to the *BAC* and thereafter to the accounting officer whereas the notification of the award referred to acceptance by the '*City Council*'. The applicant thereafter pursued what it understood to be an objection and/or appeal under *section 62* of the *Systems Act*. That process was entertained and determined without the *Municipality* taking the point that no such appeal was competent.

[64] It was only subsequently established that the award had in fact been made by the City Manager in the exercise of her powers as accounting officer. The applicant's amendment sought, *inter alia*, to accommodate that position and to formulate alternative relief depending upon the Court's determination of the issue.

[65] Accordingly, this Court is not persuaded that the amendment impermissibly introduced a new cause of action. The essential subject of the litigation remained the same being the lawfulness of the applicant's disqualification and the consequential award of the *Tender* to the third respondent. The amendment refined the relief and the legal consequences contended for in the light of information which had emerged during the review proceedings. It did not substitute a different administrative decision for the decision originally challenged.

[66] Moreover, no cognizable prejudice was demonstrated which could not be cured by permitting the respondents an opportunity to meet the amended case. They were aware of the factual and legal issues to which the amendment related and had the opportunity to address them fully.

[67] In the circumstances and applying the established approach that amendments should ordinarily be permitted where they facilitate the proper ventilation of the real dispute without irremediable prejudice, the amendment ought to be allowed. To refuse it would

elevate the form in which the review was initially framed above the substance of a dispute with the contours becoming clearer precisely through the *Rule 53* process.

- [68] The remaining question is costs. The third respondent initially opposed the amendment but subsequently withdrew that opposition. This Court does not consider the mere fact of that withdrawal sufficient to justify a punitive costs order. The amendment was necessitated in substantial measure by the evolving procedural history and the belated clarification of matters which ideally ought to have been apparent from the administrative record. The costs occasioned by the amendment are appropriately determined together with the costs of the review.

The Rule 6(15) application

- [69] *Rule 6(15)* permits a court to strike from an affidavit matter which is scandalous, vexatious or irrelevant provided that the applicant for striking out will be prejudiced if the matter remains. Both requirements must ordinarily be established. Matter is not irrelevant merely because it is disputed or ultimately unpersuasive. Relevance is determined by its relationship to an issue properly arising on the papers.⁷
- [70] The applicant also seeks the striking out of portions of the third respondent's answering affidavit in terms of *Rule 6(15)*. The application is directed largely at allegations which seek to identify additional respects in which, according to the third respondent, the applicant's bid was non-responsive. These include the allegations concerning the aggregation arrangement, the independence of bids and the further deficiencies identified by the third respondent.
- [71] It is common cause or at least apparent from the administrative record that these were not the grounds upon which the *Municipality* disqualified the applicant. The administrative record identifies the applicant's non-compliance with criteria (c) and (h) as the basis upon which its bid failed the functionality stage. The additional matters

⁷ *Beinash v Wixley* 1997 (3) SA 721 (SCA) at 733A-B

Vaatz v Law Society of Namibia 1991 (3) SA 563 (Nm) at 566J-567B

Swissborough Diamond Mines (Pty) Ltd v Government of the Republic of South Africa 1999 (2) SA 279 (T) at 324F-G

now relied upon by the third respondent did not form part of the reasons for that decision.

- [72] This distinction is significant. The question on review is whether the administrative decision taken is lawful. A successful tenderer cannot sustain an otherwise reviewable decision by *ex post facto* identifying a different basis upon which the unsuccessful tenderer might also have been disqualified. To permit that would shift the enquiry from the legality of the decision made by the administrator to a hypothetical enquiry into whether another lawful basis for the same result might subsequently be constructed.
- [73] Whilst the third respondent is entitled to defend the award made in its favour and to place relevant evidence before the Court in that regard, such entitlement does not convert it into a '*quasi decision maker*' nor does it permit reasons which played no part in the administrative decision to retrospectively become the reasons for that decision.
- [74] However, it does not follow that every impugned allegation must necessarily be struck from the affidavit. *Rule 6(15)* requires that the matter be scandalous, vexatious or irrelevant and that its continued presence causes prejudice. There is a distinction between evidence which provides legitimate context to an issue arising on the papers and evidence advanced for the impermissible purpose of supplying a new justification for the administrative decision.
- [75] Accordingly, insofar as the impugned allegations are relied upon to establish additional grounds upon which the third respondent contends that the applicant ought to have been disqualified, this Court regards them as irrelevant to the determination of the lawfulness of the decision under review. They cannot be employed to supplement the *Municipality's* reasons or to rescue the award if the reasons upon which the *Municipality* acted do not withstand review.
- [76] This conclusion does not require the Court to make findings of dishonesty, collusion or quasi-criminal conduct against the applicant or associated entities. Those allegations were not findings of the administrator which produced the impugned decision and it is neither necessary nor appropriate for the purposes of this review to determine them.

Their determination would enlarge the review into a collateral dispute which is not necessary to decide the lawfulness of the procurement decision before Court.

- [77] To the extent that the identified passages identified in annexure A to the applicant's *rule 6(15)* application serve no purpose other than to advance those additional grounds of disqualification they are irrelevant to the determination of the review and fall to be struck out. The costs occasioned by the *Rule 6(15)* application will likewise be considered when determining the overall question of costs.

The alleged compromise

- [78] A compromise or *transactio* is an agreement by which parties finally settle disputed or uncertain rights or obligations. The essential characteristic is consensus to bring the dispute or an identified part of it to an end. Unless its terms provide otherwise, the compromise replaces the disputed rights with the rights and obligations created by the compromise.⁸
- [79] In *Eke v Parsons*,⁹ the Constitutional Court explained that a settlement agreement is the product of compromise and 'give and take'. Once embodied in an order of court, it changes the status of the parties' rights and obligations and to the extent of the dispute settled, brings finality to the *lis*. The scope of that finality necessarily depends upon what the parties agreed to settle.¹⁰ Whether a compromise was concluded and the extent of what was compromised is determined objectively from the agreement construed in its context.
- [80] In considering the *Municipality's* contention that the Order of 25 September 2025 constituted a compromise which precluded the applicant from pursuing in material respects the review now before Court, the enquiry is not merely whether the Order was taken by agreement but of what the parties agreed to compromise.

⁸ *Road Accident Fund v Ngubane* [2007] ZASCA114; 2008(1) SA 432 (SCA) at para 12

⁹ [2015] ZACC 30; 2016 (3) SA 37 (CC) at para 22-25

¹⁰ *Road Accident Fund v Taylor* [2023] ZASCA 64; 2023 (5) SA 147 (SCA) at paras 36, 40-41

- [81] The Order must be read as a whole and in the context in which it was made. At that stage the applicant complained that it had been informed of its disqualification without adequate reasons, it had lodged an objection and/or appeal, the *Municipality* had not yet implemented the process and review proceedings had already been instituted. The Order regulated what was to occur while those processes unfolded.
- [82] Significantly, the Order did not provide that the review proceedings were withdrawn, abandoned or finally settled. On the contrary, it expressly contemplated their continuation. It provided for the *Rule 53* record, afforded the applicant an opportunity to supplement its papers and contemplated the subsequent adjudication of the relief sought in the proceedings. Those provisions are difficult to reconcile with an intention finally to extinguish the underlying review dispute.
- [83] The *Municipality's* argument in effect treats the agreed procedure for dealing with the applicant's objection and the preservation of the position pending that process as a settlement of the applicant's substantive review rights. The terms of the Order do not support that construction. A procedural accommodation intended to regulate the dispute whilst preserving the parties' positions is not a compromise of the dispute itself.
- [84] The further difficulty is that the waiver of or compromise concerning a right to challenge the legality of public procurement is not lightly inferred. The applicant had already approached the Court to vindicate rights arising from a procurement process governed by *section 217* of the *Constitution*. If it intended to abandon that challenge in exchange for the internal process embodied in the Order, one would expect that consequence to emerge with reasonable clarity from the agreement which it does not and the contrary is apparent. The continued provision for the *Rule 53* record, supplementation of the review papers and further adjudication demonstrates that the dispute was being kept alive, not being terminated. What was compromised was the immediate procedural position between the parties, implementation was held in abeyance while the objection and/or appeal was dealt with and the review was permitted to proceed in an orderly fashion.
- [85] The *Municipality* relies upon *Eke*, *Taylor* and *Ngubane* for the established proposition that a compromise extinguishes the disputed rights and obligations which are its subject

and substitutes new rights and obligations in their place. The proposition is not in dispute. However, the anterior question is what was compromised. A compromise can have no wider effect than the dispute which the parties intended it to settle.

[86] On a proper construction of the Order, what was compromised was the immediate procedural dispute concerning implementation of the *Tender* whilst the applicant's objection was being determined. The Order regulated the interim position, afforded the *Municipality* an opportunity to determine the objection, and prescribed what would occur thereafter. It did not purport to determine the lawfulness of the original procurement decision or to extinguish the review proceedings already instituted.

[87] This is reinforced by the subsequent conduct contemplated by the Order itself. The applicant was entitled to reinstate its Part A relief upon notification that the *Municipality* intended to implement the award and the *Rule 53* process, supplementation of the papers and ultimate adjudication of Part B remained contemplated. The *Municipality's* own heads of argument record that the applicant subsequently reinstated Part A and supplemented its founding papers in respect of both Parts A and B.

[88] Nonetheless, there is a narrower point in the *Municipality's* submission which must be distinguished. To the extent that the applicant's original complaint was simply that adequate reasons had not been furnished, the Order provided a mechanism by which that complaint was to be addressed. The objection was to be entertained and reasons were to be furnished thereafter. The applicant cannot ignore that subsequent development when advancing the review. However, that does not mean that the reasons ultimately furnished or the administrative decision which they purported to explain are insulated from scrutiny on review.

[89] Accordingly, this Court rejects the contention that the Order of 25 September 2025 constituted a compromise which precluded the present review. Its effect was procedural and interim and it did not compromise or extinguish the applicant's substantive right to challenge the lawfulness of the procurement decision.

Section 62 and the identity of the decision maker

- [90] *Section 62* of the *Systems Act* provides an internal appeal against a decision taken by a political structure, political office bearer, councillor or staff member pursuant to a power or duty delegated or sub-delegated by a delegating authority.¹¹ The existence of the remedy therefore depends upon the source of the decision maker's authority. Where the decision is made by the Municipal Manager in the exercise of an original statutory power as accounting officer rather than pursuant to delegated authority, the jurisdictional basis for a *section 62* appeal is absent.
- [91] The applicant initially proceeded on the footing that a *section 62* appeal was available and that understanding was not unreasonable. The *Tender* conditions and the notification of 11 August 2025 contemplated internal remedies, the applicant lodged what it expressly described as a *section 62* appeal on 1 September 2025, the agreed Order of 25 September required the *Municipality* to determine all timeous '*objections and appeal*' and Mashiya's subsequent ruling was itself expressed to determine the applicant's '*objection and/or appeal*'.
- [92] The *Rule 53* record did not initially resolve the matter. It reflected a recommendation by the *BEC* to the *BAC* and a recommendation by the *BAC* dated 14 July 2025 addressed to the accounting officer. However, the appointment letter stated that the '*City Council*' had accepted the *Tender* yet no Council resolution appeared in the record.
- [93] The position was ultimately clarified in July 2026. The *Municipality* confirmed that the City Manager acting as accounting officer had made the award. The third respondent thereafter withdrew its opposition to the amendment and accepted that the City Manager exercised an original procurement power rather than a delegated or sub-delegated power. By the time the matter was argued, there was accordingly no longer any material dispute that an appeal under *section 62* was not available.
- [94] That conclusion is correct as the statutory jurisdictional requirement for an appeal under *section 62* was absent. Mashiya's ruling could therefore not constitute a determination

¹¹ *Maximum Profit Recovery (Pty) Ltd v Inxuba Yethemba Local Municipality* [2021] ZAECHGHC 11 at para 23

of a statutory *section 62* appeal merely because it was repeatedly described as an ‘*objection and/or appeal*.’ It can only be properly construed as the outcome of the separate SCM objection process.

- [95] Accordingly, the applicant was not required to exhaust a *section 62* remedy before approaching this Court. The alternative relief formulated on the assumption that such an appeal existed has since become academic. However, the history explains the applicant’s procedural course and the amendment which ultimately became necessary.

The substantive review

- [96] *Section 33(2)* of the *Constitution* affords a person whose rights have been adversely affected by administrative action a right to written reasons and *section 5* of *PAJA* gives effect to that right. *Section 5(2)* provides for the furnishing of adequate written reasons upon request. *Section 5(3)* provides that where an administrator fails to furnish adequate reasons for administrative action it must, in any proceedings for judicial review and in the absence of proof to the contrary, be presumed that the administrative action was taken without good reason.
- [97] Adequacy is regarded as contextual and in *Koyabe and Others v Minister for Home Affairs and Others*,¹² the Constitutional Court explained that reasons need not traverse every factual consideration or explain the weight attached to every item of evidence. However, the reasons must be sufficiently informative to explain why the decision was taken and enable the affected person to meaningfully challenge it. The nature of the decision, its complexity and the circumstances in which it was made are relevant to that enquiry.
- [98] In *the Municipal Manager: City of Johannesburg Metropolitan Municipality v San Ridge Heights Rental Property (Pty) Ltd*,¹³ the Supreme Court of Appeal considered the operation of *section 5(3)* of *PAJA* where adequate reasons have not been furnished.

¹² 2010 (4) SA 327 (CC)) at para 63-64

¹³ [2023] ZASCA 109 at paras 16-21, 23-24

The presumption is rebuttable with the enquiry being whether the administrator has established that the administrative action was nonetheless taken for good reason.

[99] A related but distinct principle concerns reasons advanced after the event. In *National Lotteries Board v South African Education and Environment Project*,¹⁴ the Supreme Court of Appeal held that it is ordinarily impermissible for a decision maker, who was required to give reasons to meet a review, to advance new reasons for the first time in an answering affidavit. This does not render all subsequent explanatory evidence inadmissible and a distinction must be drawn between evidence which explains or elucidates the reasoning that informed the decision and a new rationale devised subsequently to sustain it.¹⁵ The former may assist a court in understanding the administrative record whilst the latter cannot retrospectively transform the basis upon which the administrative power was exercised.

[100] Administrative action may also be susceptible to review where a material mistake of fact informed the exercise of the power or where relevant considerations were not considered. A review based upon mistake of fact does not permit the Court simply to prefer one assessment of disputed evidence to another. The error relied upon must concern a fact which is objectively ascertainable and sufficiently material to the exercise of the administrative power.¹⁶

[101] The central issue of the applicant's case is that it was excluded at the compulsory functionality stage on a factual basis which cannot be reconciled with the *Tender* it submitted. The *Municipality* answers that this formulation misconceives the decision. It accepts that documents dealing with customer registration, implementation and a Gantt chart were physically contained in the applicant's bid but contended that the evaluators considered them and found their content substantively inadequate.

[102] It is critical to consider the distinction at this stage. If the decision was that the required documents had not been submitted, the common cause presence of those documents in

¹⁴ 2012 (4) SA 504 (SCA)) at para 27-28

¹⁵ *National Energy Regulator of South Africa and Another v PG Group (Pty) Ltd and Others* [2019] ZACC 28; 2020 (1) SA 450 (CC) at para 39

¹⁶ *Dumani v Nair and Another*. 2013 (2) SA 274 (SCA)) at paras 29-32

the bid raises an obvious factual difficulty. However, if the decision was that the documents were considered but failed substantively to satisfy criteria (c) and (h), the dispute has an evaluative character and the Court must exercise caution not to substitute its assessment for that of the municipal evaluators.

- [103] The starting point must be the administrative record. The *BEC* report records a ‘No’ against the two criteria without any explanation. It does not contemporaneously disclose whether the evaluators regarded the required material as absent or whether they identified and considered the material submitted but found it to be inadequate. That omission is important because it is the original evaluation which must be reviewed not an evaluation reconstructed during the litigation.
- [104] The first articulated explanation emerges from Mashiya’s ruling. In relation to the customer registration requirement and the comprehensive business and project implementation plan including the Gantt chart, her ruling records that the applicant ‘*did not, as part of its bid, provide these*’. The applicant understandably relies heavily upon that formulation because its case is that the factual premise is demonstrably incorrect because the relevant material formed part of its *Tender*. The *Municipality* now accepts the latter fact
- [105] The third respondent submits that this does not establish that the original evaluators made the same factual error. Mashiya did not participate in the original *BEC* functionality assessment and delivered her ruling months later in the SCM objection process. It contends that an inaccuracy in her description of the reason cannot merely establish the factual premise upon which the *BEC* acted.
- [106] There is a distinction between Mashiya’s later ruling and the original *BEC* evaluation. Whilst it would be incorrect simply to attribute every word of her ruling retrospectively to the *BEC*, that does not resolve the difficulty confronting the *Municipality*. The *BEC* itself gave no reasons beyond recording ‘No’. Mashiya’s ruling was subsequently furnished pursuant to a Court Order requiring the *Municipality* to determine the applicant’s objection and provide a written decision with reasons and the explanation which emerged from that process was one of non-provision. The *Municipality’s* present explanation that the material was indeed before the evaluators but that it was considered

substantively inadequate is not recorded in the contemporaneous decision-making material identified to this Court.

[107] The issue is therefore not whether the applicant can prove that every member of the *BEC* subjectively believed that the documents were physically absent. The fundamental question is whether the *Municipality* has established from the administrative record and reasons properly attributable to the decision maker that the reason now advanced of the material being considered and found to be substantively inadequate, was in fact the basis upon which the applicant was disqualified. This question cannot be answered by allowing reasons first formulated during litigation to retrospectively supply what is absent from the administrative record.

[108] The notification of 11 August 2025 did not identify criteria (c) and (h). It informed the applicant only that it had failed to attain the functionality threshold. The applicant immediately requested reasons and the evaluation record and followed up that request. Moreover, it had to formulate its internal challenge without knowing which functionality requirements had caused its exclusion. Its founding affidavit describes the resulting appeal as having been pursued ‘*in the dark*’.

[109] That information was plainly insufficient to enable the applicant to understand why its bid had failed. In a procurement process containing multiple compulsory functionality criteria, simply telling a bidder that it failed ‘*functionality*’ does not explain the path by which the decision was reached. The subsequent *BEC* record identified the two unsuccessful criteria but again provided no reasoning for the negative findings.

[110] In this Court’s view, the applicant was not furnished with adequate reasons for the original administrative decision when it requested them. *Section 5(3)* of *PAJA* is consequently engaged. The question then becomes whether the *Municipality* has placed sufficient evidence before this Court to rebut the statutory presumption that the decision was taken without good reason.

[111] The *Municipality* essentially relies upon its answering evidence to explain that the relevant documents were not overlooked. Its case is that they were considered and found wanting in substance. There is nothing inherently impermissible in evidence

which elucidates a terse administrative record. A *Rule 53* review would become artificial if an administrator were never permitted to explain technical shorthand or identify material considered by an evaluation committee.

[112] However, there is a boundary between explanation and reconstruction. The applicant correctly points out that Mr. Peter's evidence, although competent insofar as it concerns matters within his own knowledge as a participant in the evaluation process, cannot retrospectively supply reasons which the administrative record does not demonstrate to have informed the decision. The question is therefore not whether his evidence was given after the event but whether it elucidates the decision taken or supplies a materially different reason for it.

[113] The position is complicated by Mashiya's subsequent ruling. That ruling cannot simply be disregarded. It was the *Municipality's* formal determination of the applicant's objection pursuant to the agreed process and must necessarily have been based upon material placed before the decision maker. In relation to criteria (c) and (h), the reason recorded was that the applicant '*did not, as part of its bid, provide these.*' That statement was unequivocal in its terms and on its ordinary meaning conveyed that the required material had not been provided as part of the bid. However, what is not apparent from the record is the material upon which that conclusion was reached or whether Mashiya understood the deficiency to lie in the physical absence of the relevant documents or in their failure substantively to provide what the criteria required.

[114] That distinction is particularly significant because it is now common cause that material directed at both requirements physically formed part of the applicant's bid. The *Municipality's* present case is that the material was considered by the evaluators but was substantively inadequate. That explanation may ultimately be capable of reconciliation with Mashiya's ruling if her reference to the applicant having failed to '*provide*' the requirements was intended substantively rather than literally. The difficulty is that the contemporaneous *BEC* record does not reveal that reasoning and Mashiya's ruling does not explain it.

[115] Accordingly, the Court must guard against both extremes. It cannot infer merely from Mashiya's choice of words that the *BEC* necessarily proceeded upon the mistaken

premise that the documents were physically absent nor can it assume without support in the administrative record that her ruling embodied the substantive assessment now advanced by the *Municipality*. The enquiry remains whether the record read together with permissible explanatory evidence establishes the actual basis upon which the applicant failed criteria (c) and (h).

[116] It is common cause that material directed at customer registration, an implementation plan and a Gantt chart formed part of the applicant's *Tender*. That fact does not establish that the applicant necessarily complied with criteria (c) and (h). The third respondent submission is correct that the *Tender* did not merely require documents carrying labels but it required substantive information demonstrating compliance with the prescribed requirements but that observation cannot cure the anterior difficulty.

[117] If the *Municipality* considered the material inadequate then the legality of that evaluative conclusion must be capable of being assessed against the record of the decision. There must be some discernible basis upon which the Court can determine what deficiency was identified, whether it related rationally to the *Tender* requirement and whether the compulsory criterion was applied consistently.

[118] The Court cannot undertake that assessment for the first time neither can it decide that in reading the applicant's documents now a possible deficiency might be identified and that deficiency must have been the basis upon which the *BEC* recorded 'No'. This approach would substitute judicial reconstruction for administrative reasoning which is impermissible.

[119] In those circumstances, the common cause presence of the documents is not decisive because it does not prove substantive compliance but rather because it exposes the disjunction between the reason subsequently furnished through the objection process and the contemporaneous administrative record. Coupled with the absence of contemporaneous reasons demonstrating the alternative substantive assessment now relied upon, it leaves the *Municipality* unable to establish that the decision rested upon the reason presently advanced.

[120] Therefore this Court concludes that, considered cumulatively, the applicant has established a reviewable irregularity in the manner that its compliance with criteria (c) and (h) was determined. The decision is affected by the failure to adequately account for relevant material which was before the evaluators and by the absence of a rationally ascertainable connection on the administrative record between that material and the negative findings recorded against the applicant. Accordingly, this Court is of the view that the *Municipality* has also failed to rebut the presumption arising under *section 5(3) of PAJA*.

[121] Fairness in public procurement requires bidders to compete on an equal footing. A bidder cannot ordinarily be afforded an opportunity after closure to supplement or improve its tender to cure a material deficiency which other bidders were required to address when submitting their bids. That is not necessarily the same as seeking clarification of information already contained in a bid particularly where the tender conditions themselves permit clarification. The enquiry is whether what is sought merely explains existing material or would permit the bidder to alter, supplement or improve its tender.

[122] The applicant advances a further ground based upon the *Municipality's* failure to seek clarification under *clause 14* of the *Tender* conditions. In view of the conclusion reached *supra*, it is unnecessary to determine whether that failure constituted an independent ground of review. Nonetheless, the issue warrants consideration because upon reconsideration, the *Municipality* may again be required to determine whether any identified deficiency is capable of clarification under *clause 14* without permitting supplementation of the applicant's bid.

[123] The applicant does not contend that *clause 14* after *Tender* closure entitled it to repair its bid by introducing substantive material which had not been submitted but adopts a narrower approach. The applicant's contention is that if the evaluators had the relevant documents but were uncertain whether or where the compulsory requirements had been addressed, then in those circumstances, clarification could and should have been sought. The *Municipality's* response is that no clarification was required because the material was considered and found substantively deficient. That answer again depends upon a factual premise which the administrative record does not adequately establish.

- [124] There is an important distinction between clarification and supplementation. Procurement fairness ordinarily prohibits a bidder from being afforded a post-closing opportunity to improve a materially deficient bid. It does not follow that an evaluator may never seek clarification of information already contained in a tender particularly where the tender conditions themselves contemplate such a process.
- [125] Nonetheless, this Court will not go so far as to hold that *clause 14* imposed an inflexible duty upon the *Municipality* to seek clarification whenever an evaluator considered a document inadequate. Whether clarification is permissible or appropriate depends upon the nature of the perceived deficiency. If what is required would introduce new substantive material then in those circumstances clarification would cross the line into supplementation. If the issue is merely the location, meaning or relationship of material already submitted to the criterion under consideration, the position may be different.
- [126] In assessing whether clarification is permissible or appropriate in any reconsideration is accordingly a matter for the *Municipality* having regard to the nature of any deficiency identified and the terms of *clause 14*. The review succeeds not because this Court finds that the applicant complied with criteria (c) and (h) or ought to have been declared responsive but because the administrative process by which it was declared non-responsive cannot be sustained on the record.

The challenge to the award of the third respondent

- [127] The applicant advances an independent challenge to the award made to the third respondent. It contended that irrespective of the lawfulness of its own exclusion, the third respondent was itself non-responsive because its *Tender* failed to comply with compulsory requirements relating to real-time vending, the generation and digital delivery of tokens and charges to customers. The third respondent disputes that its *Tender* was non-compliant.
- [128] Much of the dispute concerns WireIT. The applicant relied upon material describing WireIT as a beneficiary-payment or EFT facility and contended that it did not itself constitute the real-time vending channel contemplated by the *Tender*. It also relied upon

references to the delivery of tokens by SMS or email and to charges associated with certain WireIT transactions.

- [129] However, that argument does not establish that the third respondent's *Tender* failed a compulsory requirement. The third respondent's case is that WireIT was an optional customer facing payment facility and not the exclusive means by which its vending solution operated. Its *Tender* provided for other vending channels including banking integrations, ATMs, retail outlets and cash vending facilities. The applicant has not established that the optional WireIT facility was itself required to satisfy every compulsory requirement applicable to the central vending solution.
- [130] The same applies to token generation and delivery. The third respondent's evidence is that once a transaction is authenticated the encrypted token is generated centrally and in real time ordinarily within approximately 15 seconds. The fact that a token may thereafter be transmitted by SMS or email and displayed digitally on the customer's device does not establish non-compliance with the requirement that the token be digitally displayed. Furthermore, the applicant has not produced evidence demonstrating that the central token generation process could not operate in the manner described by the third respondent.
- [131] The applicant's reliance upon references in the WireIT material to possible fees or charges fares no better. The third respondent's *Tender* specific case is that neither it nor its agents would levy registration, subscription or token purchase charges upon customers under the *Tender*. The generic WireIT material does not establish that charges prohibited by the *Tender* formed part of the third respondent's tendered service.
- [132] The prescribed client declarations relied upon by the third respondent did not relieve the *Municipality* of its obligation properly to evaluate compliance. However, these formed part of the material before the evaluators. The applicant does not contend that they were forged or knowingly false and did not demonstrate that they were contradicted by the third respondent's tender specific offering in a manner which rendered the finding of responsiveness irrational.

[133] The applicant has accordingly not established its independent review challenge to the third respondent's responsiveness. Its criticisms identify disputed aspects of the third respondent's technical solution but do not establish that the third respondent failed a compulsory *Tender* requirement.

[134] Regardless, this conclusion does not preserve the award to the third respondent which followed upon the applicant's exclusion from further evaluation. Having found that exclusion unlawful the Court must separately determine the consequence of that invalidity and the appropriate remedy.

Remedy

[135] If administrative action is found to be unlawful, *section 8* of *PAJA* and *section 172(1)(b)* of the *Constitution* require the Court to fashion relief which is just and equitable. As was enunciated in *AllPay*, the enquiry into remedy follows and must not be conflated with the antecedent enquiry into lawfulness. Ordinarily, where a procurement decision is set aside the matter is remitted to the administrator for reconsideration with substitution remaining exceptional.¹⁷

[136] The setting aside of the applicant's exclusion does not simply establish that it was entitled to the award. The Court must establish a remedy which is just and equitable having regard to the consequences of the unlawful exclusion and the proper role of the municipal decision maker.

[137] The award to the third respondent cannot appropriately be preserved in the circumstances of this case. The applicant was excluded before its *Tender* proceeded to comparative evaluation. Its tendered price was approximately R78.69 million whilst that of the third respondent was approximately R91.68 million. That difference does not establish that the applicant ought to have received the award but it does demonstrate why the Court cannot conclude that its unlawful exclusion could have had no bearing upon the ultimate outcome.

¹⁷ *Allpay supra*; *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd and Another* 2015 (5) SA 245 (CC) at paras 42–47.

[138] The approach in *Millennium Waste Management (Pty) Ltd v Chairperson, Tender Board: Limpopo Province*¹⁸ is instructive. Where a tenderer has been unlawfully excluded, setting aside the consequential award and remitting the matter may be necessary to permit the procurement process to be completed lawfully. Whilst the fact that the third respondent has not been shown to have committed a reviewable irregularity is relevant to remedy it does not render the consequential award immune from review. The difficulty lies not in wrongdoing by the third respondent but in the fact that the award emerged from a competitive process from which the applicant had been unlawfully excluded.

[139] The applicant's disqualification and the consequential award to the third respondent must accordingly be set aside. This conclusion is not a finding that the applicant's *Tender* was responsive or that it ought to have been awarded the *Tender*. Those remain matters for determination through the lawful procurement process.

[140] Remittal is therefore appropriate. The procurement process must be restored to the stage at which the applicant was unlawfully excluded and remitted to the *BEC* for reconsideration of the applicant's *Tender*. Thereafter, the process must proceed through the appropriate municipal structures in accordance with the *Tender* and the applicable procurement framework.

Interim preservation of services

[141] A further question arises from the need to ensure continuity of electricity vending and municipal revenue collection while the reconsideration takes place. The applicant seeks continuation of the existing arrangement until a lawful award has been made and, if another tenderer succeeds, for an orderly transition thereafter. The third respondent opposes any relief which would confer upon the applicant an indefinite entitlement to continue rendering the service.

[142] Success in the review neither revives nor extends the applicant's expired contractual rights nor does it entitle the Court effectively to award the *Tender* to it pending

¹⁸ 2008 (2) SA 481 (SCA) paras17-23

reconsideration. The interim position must therefore be regulated only to the extent necessary to avoid disruption while giving effect to the review remedy.

[143] The *Tender* has not yet been implemented and the applicant presently continues to provide the vending service under the arrangements maintained during the litigation. In those circumstances, requiring an immediate change of service provider under an award which is being set aside only for the procurement process to be reconsidered would serve no useful purpose and may itself cause disruption.

[144] The preservation relief sought by the applicant is not properly characterized as substitution. It does not seek an award of the *Tender*. Its purpose is to maintain the existing service whilst the *Municipality* undertakes the reconsideration required by this Order. That distinction is material even though the relief must remain strictly limited in duration and purpose.

[145] Accordingly, a limited preservation arrangement is just and equitable. The existing vending arrangement should remain in place pending completion of the reconsideration. If another tenderer is lawfully selected, the applicant should thereafter be afforded a period of 30 days to facilitate an orderly transition. This does not revive the applicant's expired contractual rights, confer upon it an entitlement to the *Tender* or predetermine the outcome of the reconsideration.

Costs

[146] Costs require separate consideration. The issues are the costs of the main review, the applicant's unsuccessful independent challenge to the third respondent's responsiveness, the *Rule 6(15)* application, the amendment, the costs reserved on 25 September 2025 and 12 February 2026, the employment of two counsel and the appropriate scale.

[147] The applicant has achieved substantial success in the main review. Its disqualification and the consequential award are to be set aside and the matter remitted for reconsideration. The litigation followed upon the *Municipality's* failure to adequately communicate the basis and status of its decision-making process to the applicant despite

requests for clarity. The *Municipality* should accordingly bear the applicant's costs of the main review.

- [148] The position of the third respondent is distinguishable. It was entitled to protect the award made in its favour and successfully resisted the applicant's independent challenge to the responsiveness of its *Tender*. It did not cause the *Municipality's* reviewable decision. In those circumstances and subject to the discrete interlocutory matters dealt with *infra*, there should be no order as to costs between the applicant and the third respondent in the main proceedings.
- [149] The *Rule 6(15)* application stands on a different footing. The third respondent went beyond defending the *Municipality's* stated grounds of disqualification and introduced additional allegations including allegations bearing upon collusion or non-independent bidding which had not formed part of the *Municipality's* reasons for disqualification. The applicant succeeded in having the collateral material struck out. The third respondent should accordingly bear the costs of the *Rule 6(15)* application.
- [150] The Court is not persuaded that a separate costs order against the third respondent is warranted in respect of the amendment. Its initial opposition arose from uncertainty on the *Rule 53* record as to the identity of the final decision maker and was withdrawn once that issue was clarified. The costs of the amendment should therefore form part of the costs payable by the *Municipality* whose record and subsequent clarification occasioned the uncertainty.
- [151] The costs reserved on 25 September 2025 should be borne by the *Municipality*. The hearing did not proceed because the *Municipality* disclosed that its internal objection process had not been completed. The applicant had repeatedly sought clarity concerning that process and the implementation of the *Tender*. In circumstances where the absence of effective communication was attributable to the *Municipality*, the applicant's approach to Court cannot fairly be characterized as unnecessary.
- [152] The same applies to the costs reserved on 12 February 2026. By then the applicant had reinstated Part A following notification that the *Municipality* intended to implement the award. Against the background of the unresolved review and the preservation

arrangement, its return to Court was not unreasonable. Those costs should likewise be borne by the *Municipality*.

[153] The Court is satisfied that the employment of two counsel by the applicant was warranted by the volume of the procurement record, the technical *Tender* requirements, the interlocutory proceedings and the overlapping issues arising under *PAJA*, the *Systems Act* and municipal procurement legislation. Where two counsel were in fact employed, their costs should be allowed.

[154] In the circumstances, the following order is issued:

1. The applicant's application to amend its notice of motion is granted.
2. The applicant's application in terms of *Rule 6(15)* is granted, and the matter identified in Schedule A to the applicant's notice of application is struck out.
3. It is declared that the applicant had no effective internal remedy in terms of *section 62* of the *Local Government: Municipal Systems Act 32 of 2000* in respect of the decision to disqualify its bid under *Tender CE580*.
4. The decision to disqualify the applicant's bid under *Tender CE580* is reviewed and set aside.
5. The consequential award of *Tender CE580* to the third respondent and the contract concluded pursuant thereto are reviewed and set aside.
6. The procurement process under *Tender CE580* is remitted to the first and second respondents for reconsideration from the stage at which the applicant's *Tender* was disqualified through the *Municipality's* lawful procurement structures and in accordance with the *Tender* conditions, the applicable procurement framework and this judgment.

7. Pending completion of the reconsideration contemplated in paragraph 6:
 - 7.1 the existing electricity vending and municipal revenue collection arrangement with the applicant shall continue solely to ensure continuity of municipal services;
 - 7.2 such continuation shall not confer upon the applicant any contractual entitlement beyond the terms of this order, nor any entitlement to the award of *Tender CE580*.
8. The *Municipality* shall complete the reconsideration contemplated in paragraph 6 within 60 days of the date of this order.
9. If, pursuant to that reconsideration, *Tender CE580* is lawfully awarded to a bidder other than the applicant, the *Municipality* shall implement that award within 30 days thereof and in a manner designed to avoid interruption to electricity vending and municipal revenue collection.
10. The first and second respondents shall pay the applicant's costs of the review, jointly and severally, the one paying the other to be absolved, such costs to include the costs of two counsel where so employed, including:
 - 10.1 the costs reserved on 25 September 2025;
 - 10.2 the costs reserved on 12 February 2026;
 - 10.3 the costs of the amendment application.
11. The third respondent shall pay the applicant's costs of the *Rule 6(15)* application.
12. Save as provided in paragraph 11, there shall be no order as to costs between the applicant and the third respondent.

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JUDGE OF THE HIGH COURT

APPEARANCES:

For the applicant	:	<i>Adv. U.K. Naidoo</i>
Instructed by	:	Smit Sewgoolm Inc. c/o Stirk Yazbek 18 Vincent Road EAST LONDON
For the first & second respondent	:	<i>Adv. A Bodlani SC</i>
Instructed by	:	Jolwana and Mgidlana Inc. 9B Derby Road Berea EAST LONDON
For the third respondent	:	<i>Adv. N.C. De Jager SC with Adv. D.M. Lubbe</i>
Instructed by	:	Kirk Kotze Attorneys c/o Smith Tabata Attorneys 12 St Helena Road Beacon Bay EAST LONDON
Date heard	:	30 July 2026
Date judgment delivered	:	3 September 2026