



CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 11/25

In the matter between:

BRAIN GEAR INVESTMENTS (PTY) LIMITED

Applicant

and

BUHLE WASTE (PTY) LIMITED

First Respondent

**MUNICIPAL MANAGER, CITY OF
MBOMBELA MUNICIPALITY**

Second Respondent

**CHAIRPERSON, COUNCIL OF THE CITY
OF MBOMBELA MUNICIPALITY**

Third Respondent

CITY OF MBOMBELA MUNICIPALITY

Fourth Respondent

**SEMBCORP SILULUMANZI (RF)
(PTY) LIMITED**

Fifth Respondent

**SOUTH AFRICAN WATER WORKS
(PTY) LIMITED**

Sixth Respondent

**SEMBCORP UTILITIES SOUTH AFRICA
(PTY) LIMITED**

Seventh Respondent

SEMBCORP UTILITIES (NETHERLANDS) NV

Eighth Respondent

Case CCT 12/25

And in the matter between:

**SEMBCORP SILULUMANZI (RF)
(PTY) LIMITED**

First Applicant

**SOUTH AFRICAN WATER WORKS
(PTY) LIMITED**

Second Applicant

**SEMBCORP UTILITIES SOUTH AFRICA
(PTY) LIMITED**

Third Applicant

and

BUHLE WASTE (PTY) LIMITED

First Respondent

**MUNICIPAL MANAGER, CITY OF
MBOMBELA MUNICIPALITY**

Second Respondent

**CHAIRPERSON, COUNCIL OF THE CITY
OF MBOMBELA MUNICIPALITY**

Third Respondent

CITY OF MBOMBELA MUNICIPALITY

Fourth Respondent

BRAIN GEAR INVESTMENTS (PTY) LIMITED

Fifth Respondent

SEMBCORP UTILITIES (NETHERLANDS) NV

Sixth Respondent

Case CCT 25/25

And in the matter between:

SEMBCORP UTILITIES (NETHERLANDS) NV

Applicant

and

BUHLE WASTE (PTY) LIMITED

First Respondent

**MUNICIPAL MANAGER, CITY OF
MBOMBELA MUNICIPALITY**

Second Respondent

**CHAIRPERSON, COUNCIL OF THE CITY
OF MBOMBELA MUNICIPALITY**

Third Respondent

CITY OF MBOMBELA MUNICIPALITY

Fourth Respondent

**SEMBCORP SILULUMANZI (RF)
(PTY) LIMITED**

Fifth Respondent

**SOUTH AFRICAN WATER WORKS
(PTY) LIMITED**

Sixth Respondent

**SEMBCORP UTILITIES SOUTH AFRICA
(PTY) LIMITED**

Seventh Respondent

BRAIN GEAR INVESTMENTS (PTY) LIMITED

Eighth Respondent

Neutral citation: *Brain Gear Investments (Pty) Ltd v Buhle Waste (Pty) Ltd and Others; Sembcorp Silulumanzi (RF) (Pty) Ltd and Others v Buhle Waste (Pty) Ltd and Others; Sembcorp Utilities (Netherlands) NV v Buhle Waste (Pty) Ltd and Others* [2026] ZACC 41

Coram: Mhlantla ADCJ, Dambuza J, Kollapen J, Nuku AJ, Opperman AJ, Rogers J, Savage J and Tshiqi J

Judgment: Rogers J (unanimous)

Heard on: 10 February 2026

Decided on: 9 October 2026

Summary: Review — Promotion of Administrative Justice Act 3 of 2000 — definition of “administrative action” — Municipality’s decision not taken “in terms of any legislation”

Legality review — contractual power — nevertheless on the facts an exercise of public power

Legality review — unreasonable delay — factors relevant to condonation – delay not overlooked

ORDER

On applications for leave to appeal from the Supreme Court of Appeal (hearing an appeal from the High Court of South Africa, Mpumalanga Division, Mbombela):

1. In Case CCT 25/25, no order is made on the application by Sembcorp Utilities (Netherlands) NV (SUN) for leave to appeal, save in respect of costs as reflected below.
2. Leave to appeal is granted in Cases CCT 11/25 and CCT 12/25.
3. The appeals in Cases CCT 11/25 and CCT 12/25 succeed.
4. The order of the Supreme Court of Appeal is set aside and the following order is substituted in its place:
 - “(a) The appeals succeed.
 - (b) The order of the High Court is set aside and replaced by the following:
 - ‘(i) The application is dismissed.
 - (ii) The first, second and third respondents (the Municipal Manager of the City of Mbombela Municipality, the City of Mbombela Municipality and the Chairperson of the Council of the City of Mbombela Municipality) and the fourth respondent (Sembcorp Silulumanzi (RF) (Pty) Limited) (Silulumanzi) must bear their own costs.
 - (iii) The applicant, Buhle Waste (Pty) Limited (Buhle Waste), must pay the costs of the fifth respondent, Brain Gear Investments (Pty) Limited (Brain Gear), the seventh respondent, South African Water Works (Pty) Limited (SAWW) and the ninth respondent, Sembcorp Utilities South Africa (Pty) Limited (SUSA), including the costs of two counsel where employed.’
 - (c) Silulumanzi and SUN must bear their own costs on appeal.
 - (d) Buhle Waste must pay the costs of Brain Gear, SAWW and SUSA on appeal, including the costs of two counsel where employed.”
5. SUN and Silulumanzi must bear their own costs in this Court.
6. Buhle Waste must pay the costs of Brain Gear, SAWW and SUSA in this Court, including the costs of two counsel where employed.

JUDGMENT

ROGERS J (Mhlantla ADCJ, Dambuza J, Kollapen J, Nuku AJ, Opperman AJ, Savage J and Tshiqi J concurring):

Introduction

[1] The main issue in these three applications for leave to appeal is whether the Municipal Manager of the City of Mbombela Municipality (Municipality) performed an act which is subject to review, either in terms of the Promotion of Administrative Justice Act¹ (PAJA) or the principle of legality. In an application for review brought by Buhle Waste (Pty) Limited (Buhle Waste), the High Court of South Africa, Mpumalanga Division, Mbombela (High Court), answered this question affirmatively, granted the review and set aside the impugned act.² The Supreme Court of Appeal (SCA) upheld this decision, but varied the relief granted by the High Court.³

[2] The parties who opposed the review in the High Court – Sembcorp Silulumanzi (RF) (Pty) Limited (Silulumanzi), South African Water Works (Pty) Limited (SAWW), Sembcorp Utilities South Africa (Pty) Limited (SUSA), Sembcorp Utilities (Netherlands) NV (SUN) and Brain Gear Investments (Pty) Limited (Brain Gear) – now apply to this Court for leave to appeal.

¹ 3 of 2000.

² *Buhle Waste (Pty) Ltd v Municipal Manager City of Mbombela Municipality* [2022] ZAMPMBHC 70 (High Court judgment).

³ *Brain Gear Investments (Pty) Ltd v Buhle Waste (Pty) Ltd* [2024] ZASCA 168 (SCA judgment).

Factual background

[3] In April 1999, and pursuant to a tender process, the Municipality⁴ concluded a concession contract with Silulumanzi⁵ for the supply of water in part of the municipal area (concession contract). The contract expires in October 2029. The contract was concluded in terms of the Water Services Act,⁶ with the Municipality being a “water services authority” and Silulumanzi a “water services provider” as defined in the Water Services Act. Clause 7.4.2 of the contract provides that no shares in Silulumanzi having the effect of a change of control may be transferred without the prior written approval of the Municipality’s Council.

[4] As at February 2018, SUN held 48% of the shares in Silulumanzi and its wholly-owned subsidiary, SUSA, held the other 52%. The Sembcorp group, to which SUN belongs, wished to dispose of its interests in Africa. To this end, on 22 February 2018 SUN, SUSA, SAWW and Silulumanzi concluded a contract in terms of which SAWW bought all of SUN’s direct and indirect shareholding in Silulumanzi for an adjustable price of R650 million (February 2018 agreement). The effective date of the sale was 31 December 2017. In terms of clause 4.1.3, one of the suspensive conditions to which the agreement was subject was the Municipal Council’s unconditional approval of the transaction. This and the other suspensive conditions had to be fulfilled within 180 days from the date of signature.

[5] SAWW and Silulumanzi sought the Municipality’s approval. The Municipality wanted the parties to include a Mbombela-based broad-based black economic empowerment (BEE) entity as a minority shareholder of Silulumanzi. The Municipality received legal advice that it could not insist on this as a condition for granting consent. Nevertheless, pursuant to negotiation, an agreement was reached that a process would be followed to make a 28% shareholding in Silulumanzi available to a local BEE entity.

⁴ Then called the Nelspruit Transitional Local Council.

⁵ Then called Greater Nelspruit Utility Company (Pty) Limited.

⁶ 108 of 1997.

[6] This negotiated arrangement was reflected in a resolution passed by the Council on 28 June 2018 (Council resolution). The Council resolved in relevant part that—

- “(c) conditional consent be granted with the specific suspensive condition that SAWW and Silulumanzi immediately after this Council resolution, commence with the process of obtaining a 28% Mbombela based [BEE] shareholder in Silulumanzi and conclude the process within the prescribed 90 days from the date of the Council resolution;
- (d) the City of Mbombela, represented by the Executive Mayor and the Acting Municipal Manager, oversee the process administered by SAWW and Silulumanzi regarding the 28% [BEE] Mbombela based shareholder;
- (e) SAWW and Silulumanzi to select the final 28% Mbombela based [BEE] shareholder, in consultation with the representatives of the City of Mbombela;
- (f) the Acting Municipal Manager, as Accounting Officer, be mandated to confirm that the requirements above have been met as per the terms of the conditions of the Conditional Consent granted;
- (g) the Accounting Officer be authorised to sign all documents and do all things necessary in order to implement the above;
- (h) should the suspensive conditions stipulated in (c) above not be met within 90 days from the date of the Council resolution and written confirmation not having been issued by the Acting Municipal Manager, confirming that all suspensive conditions for the conditional consent have been met, the conditional consent will automatically lapse and be of no further cause or effect and may not be relied upon by any party.”

[7] Silulumanzi appointed PricewaterhouseCoopers Advisory Services (Pty) Limited (PwC) to assist it in formulating selection criteria and implementing the bid process. The parties established a steering committee comprising representatives from Silulumanzi, SAWW, PwC and the Municipality. The steering committee met seven times over the period 17 July 2018 to 19 September 2018.

[8] On 3 August 2018 Silulumanzi issued a request for information to a closed list of 11 local BEE entities. These included Buhle Waste and Brain Gear. This was followed by a briefing session for interested entities. The closing date for bids was 24 August 2018. Only three entities, including Buhle Waste and Brain Gear, submitted bids on time. PwC undertook an integrity due diligence (IDD) on the three bidders and on 6 September 2018 prepared a ranking report. In terms of that report, Brain Gear outsourced Buhle Waste,⁷ while the third bidder was regarded as non-compliant and in any event scored the lowest of the three. SAWW then engaged directly with Brain Gear and Buhle Waste in order to make its own further assessment on so-called secondary evaluation elements. In that process, Brain Gear again outsourced Buhle Waste.⁸ The scores from the two processes were combined to arrive at final scores.⁹

[9] At the steering committee's final meeting on 19 September 2018, the outcome of this process was discussed, and the Municipality was informed that SAWW had selected Brain Gear. On 28 September 2018 the last day of the 90-day period specified in the Council resolution, an agreement was concluded between SAWW, Silulumanzi and Brain Gear for the latter's purchase of the 28% shareholding in Silulumanzi (September 2018 agreement). The effective date was again 31 December 2017.

[10] Letters written by the Acting Municipal Manager, Mr Neil Diamond, before and after 19 September 2018 reflect that he had concerns about the integrity of the selection process and whether there had been compliance with the Council resolution. He sought internal legal advice. On 17 October 2018 the Legal Services Department responded that, having evaluated the process, it was satisfied that there had been compliance with the resolution.

[11] On 14 November 2018, an agreement was concluded between the Municipality and Silulumanzi (November 2018 agreement). Clause 5 of the preamble stated that

⁷ The scoring was 3.49:3.43.

⁸ The scoring was 1.00:0.25.

⁹ The final scoring was 4.49:3.68 in favour of Brain Gear.

Silulumanzi had, to the Municipality's satisfaction, selected the local BEE shareholder and that the Municipality now confirmed fulfilment of the Council's conditions and wished formally to record this. In clause 3, the Municipality acknowledged that the transfer of shares in Silulumanzi would result in a change of control and the Municipality unconditionally and irrevocably consented to the change in control from the effective date, stated to be 28 September 2018.

[12] It is the conduct of the Municipality and the Municipal Manager, as reflected in the November 2018 agreement, that Buhle Waste subsequently sought to have reviewed and set aside.

Litigation history

High Court

[13] Buhle Waste's review application, which was launched on 17 July 2019, was based on PAJA, alternatively on the principle of legality. The notice of motion targeted a decision supposedly taken by the Municipality on 14 November 2018 to consent to a transfer of shares by Silulumanzi to Brain Gear.¹⁰ Buhle Waste alleged that the Municipality had, in pre-litigation correspondence, distanced itself from any active role in the selection process. The Municipality's passive role was, according to Buhle Waste, a violation of the Council resolution. Buhle Waste also alleged that the Municipality, as a public entity, was bound by public procurement prescripts. The Municipality, so Buhle Waste alleged, seemed not to have been concerned about the kind of entity with which it contracted. Buhle Waste's founding affidavit also explained why its delay in launching the review application should be condoned.

[14] Following receipt of the rule 53 record, Buhle Waste filed a supplementary founding affidavit in September 2019. Buhle Waste expanded upon its contentions that the Municipality had not properly overseen the process and that the selection of

¹⁰ This was inaccurate. The November 2018 agreement concerned the change of control from SUN to SAWW, not the transfer of a 28% shareholding in Silulumanzi from SAWW to Brain Gear. This was corrected in an amended notice of motion mentioned later in this judgment.

Brain Gear had not occurred “in consultation with” the Municipality as contemplated by the Council resolution. In addition, Buhle Waste alleged that—

- (a) there had been impermissible conflicts of interest between Silulumanzi and Brain Gear by virtue of the dual roles of Professor John Pempela Shongwe (a director of Brain Gear and chair of Silulumanzi’s board) and Mr Eddie Joseph Mabuza (a director of Brain Gear and allegedly Silulumanzi’s Head of Economic Regulations);
- (b) incorrect negative statements had been made about Buhle Waste in the assessment;
- (c) Brain Gear had been wrongly assessed as an existing operator in the water sector with strong technical knowledge and experience, whereas it was a newly incorporated company; and
- (d) a red flag raised by PwC – that Brain Gear had misrepresented its BEE status as contributor level one whereas its status was contributor level two – had been ignored.

[15] The application was opposed by the Municipality, SAWW, Silulumanzi, Brain Gear and SUN.¹¹ The respondents complained that Buhle Waste had unreasonably delayed in bringing the review. They contended that Buhle Waste had failed to exhaust the internal remedy conferred by section 62 of the Local Government: Municipal Systems Act¹² (Systems Act).¹³ They denied that there was any conduct reviewable in terms of PAJA or the principle of legality, contending that the giving of

¹¹ SUN was not initially cited as a respondent. Pursuant to objections of non-joinder, it was later added as a respondent.

¹² 32 of 2000.

¹³ Section 62(1) reads:

“A person whose rights are affected by a decision taken by a political structure, political office bearer, councillor or staff member of a municipality in terms of power or duty delegated or sub-delegated by a delegating authority to the political structure, political office bearer, councillor or staff member, may appeal against that decision by giving written notice of the appeal and reasons to the municipal manager within 21 days of the date of the notification of the decision.”

Section 62(4)(b) provides that where the impugned decision is that of a municipal manager, the appeal authority is the executive committee or executive mayor, or, if the municipality does not have an executive committee or executive mayor, the council of the municipality.

consent to a change of control in terms of the concession contract was a purely private contractual matter, as was the process negotiated between the Municipality, Silulumanzi and SAWW to accommodate a local BEE shareholder.

[16] In regard to conflict of interest, the relevant respondents stated that Mr Mabuza had resigned from Silulumanzi in May 2018 for reasons unrelated to a possible process to accommodate a local BEE shareholder. As to Professor Shongwe, they said that his role in Silulumanzi was as the non-executive chair of the board and that he had played no part in the selection process. In regard to the fact that Brain Gear was a newly incorporated company, it had been made clear – so the relevant respondents said – that the assessed experience and expertise was that of the individuals behind Brain Gear, not the entity itself. They said that it was not unusual in empowerment transactions for a special purpose vehicle to be established to take advantage of the opportunity; this was often required by funders.

[17] There was a hiatus in the litigation from November 2019 to January 2021 while Buhle Waste sought to compel the production of further documents. Having succeeded in its application to compel, Buhle Waste filed a further supplementary founding affidavit in January 2021, setting out what it regarded as revealing facts appearing from the February 2018 agreement to which it had now obtained access. Buhle Waste also stated (and this was not subsequently disputed) that the 28% shareholding was not transferred to Brain Gear itself but to its wholly-owned subsidiary, Brain Gear Investment South Africa (Pty) Limited (BGSA). According to Buhle Waste, it was unlawful for the shares to be transferred to an entity that was not a bidder.

[18] Buhle Waste also filed an amended notice of motion in which it described the impugned conduct of 14 November 2018 as being the Municipality's consent to the transfer of SUN's direct and indirect shareholding in Silulumanzi to SAWW. In addition to setting aside the conduct in question, Buhle Waste sought an order substituting itself in place of Brain Gear as the purchaser of the 28% shareholding for a price of R221 million.

[19] Supplementary answering affidavits and a replying affidavit were filed. The review was enrolled for hearing in May 2022.

[20] On 26 May 2022, the first day of argument, SUN and Buhle Waste reached an agreement in order to obviate the need for SUN to participate further in the case. This was based on SUN's view that the dispute did not relate to the transfer of control of Silulumanzi from SUN to SAWW, but the subsequent proposed transfer of a 28% shareholding in Silulumanzi from SAWW to the local BEE entity. The 28% shareholding would only be available to a BEE entity (including Buhle Waste, the review applicant) if a 100% shareholding in Silulumanzi first passed from SUN to SAWW.

[21] The above agreement was recorded in an order made on the same day (settlement order). The settlement order reads (I substitute the abbreviated names used in this judgment):

- “1. The relief sought by Buhle Waste in this application does not extend to the following:
 - 1.1 the sale of shares agreement concluded on 21 February 2018 between Silulumanzi, SAWW, SUN and SUSA, in terms of which SUN sold:
 - 1.1.1 its shares in SUSA;
 - 1.1.2 its shares in Silulumanzi to SAWW (the Sembcorp Netherlands SPA);
 - 1.2 the Municipality's council resolution passed on 28 June 2018, conditionally approving and consenting to the change of control in Silulumanzi (June 2018 resolution).
2. The Sembcorp Netherlands SPA and June 2018 resolution are valid, enforceable and binding.
3. Each party, as between Buhle Waste and SUN, shall pay its own costs.”

[22] Argument then continued in relation to the other parties, after which judgment was reserved. In its judgment the High Court condoned the delay in bringing the review, reasoning that the conduct of some of the respondents in response to Buhle Waste's request for documentation had contributed to the delay; the delay was less than two months; and the respondents had not claimed any prejudice. The High Court did not deal with Buhle Waste's alleged failure to exhaust the internal remedy.

[23] On the question whether the conduct of 14 November 2018 was susceptible to review, the High Court held that the conclusion of the concession contract arose from the legislative imperative contained in section 19 of the Water Services Act. The contract regulated the delegation of a core function of the Municipality to Silulumanzi. The High Court also referred to the right to sufficient water guaranteed in section 27(1)(b) of the Constitution and the fact that, in terms of section 9(2) of the Constitution, measures may be taken to advance categories of persons disadvantaged by unfair discrimination. In negotiating for the inclusion of a local BEE shareholder, the Municipality had been inspired by the Broad-Based Black Economic Empowerment Act¹⁴ (BEE Act). The Employment Equity Act¹⁵ (Equity Act) was also relevant, in the High Court's opinion. Furthermore, the High Court's view was that the Municipality had throughout acted from a position of superior authority. The need for its consent under the concession contract had given the Municipality the "upper hand", driven by constitutional imperatives, in particular section 9(2). The selection of the local BEE shareholder was thus no private matter, and the Municipality's conduct was reviewable under PAJA.

[24] On the merits, the High Court found that, somewhere along the selection process, the Municipality had abandoned its oversight role. Failure to fulfil the role specified in the Council resolution was fatal to the decision of 14 November 2018. Furthermore, consent to the change of shareholding should never have been granted without due

¹⁴ 53 of 2003.

¹⁵ 55 of 1998.

regard to all relevant facts, including the alleged conflicts of interest and Brain Gear's misrepresentation of its BEE contributor level status. The Municipality had also ignored information showing that Brain Gear did not have experience in the water sector. The Municipality had also failed to interrogate the fact that, according to the February 2018 agreement, the effective change of control had already occurred on 31 December 2017.

[25] The High Court thus made an order setting aside the decision of 14 November 2018 and remitted the request for consent to a change of control to the Municipality for reconsideration, with directions as to the manner of reconsideration. The High Court declared that, pending reconsideration, the suspensive conditions in the Council resolution had not been fulfilled. The respondents, excluding SUN, were ordered to pay Buhle Waste's costs.¹⁶

¹⁶ The High Court's order reads as follows in full (I substitute the abbreviated names used in this judgment):

- “1. The decision taken by the Municipality on 14 November 2018 in terms of which it consented to a change in control of Silulumanzi is declared unlawful and is hereby reviewed and set aside.
2. The request for the consent regarding change in control of Silulumanzi is hereby remitted to the Municipality for reconsideration of its decision of 14 November 2018.
3. In reconsidering its consent to a change in the control of Silulumanzi, the Municipality shall take into account all what has been alluded to in this judgment regarding the process that led to the appointment of [a] 28% [BEE] shareholder, its failure to exercise oversight role as per its resolution of 28 June 2018 regarding the adjudication process, issues of concern raised in this judgment leading to the appointment of Brain Gear as a successful 28% [BEE] shareholder in Silulumanzi including the transfer of shares to another entity after the consent was granted on 14 November 2018 and any other relevant factor and alluded to in this judgment.
4. A decision with regard to the reconsideration of its consent to a change in the control of Silulumanzi should be concluded and delivered by not later than 17 October 2022.
5. Such a decision and the reasons thereof should be filed with the Court Registrar of this Court and by email at [. . .].
6. The appointment of Brain Gear as a successful 28% [BEE] shareholder in Silulumanzi and the effective date of the transfer of 28% [BEE] shareholding in Silulumanzi to either Brain Gear or to BGSA based on the decision of 14 November 2018 is hereby suspended pending the reconsideration of the decision to grant consent for a change in the control of Silulumanzi.
7. It is hereby declared that pending the reconsideration of the municipal decision of 14 November 2014, the suspensive conditions in the resolution of 28 June 2018 have not been fulfilled.
8. The Municipal Manager, the Chairperson of the Council of the City of Mbombela Municipality, the Municipality, Silulumanzi, Brain Gear, SAWW and SUSA are hereby ordered to pay the costs of the application including reserved costs and costs of

Supreme Court of Appeal

[26] On petition the SCA granted leave to appeal, such leave having been refused by the High Court. The Municipality did not prosecute its appeal, but the other High Court respondents did. SUN appealed on the basis that the High Court's review order had undone the settlement order.

[27] The SCA rejected the appellants' contention that Buhle Waste should have been non-suited for failing to pursue an internal remedy. This was for two reasons. First, by 14 November 2018 Brain Gear had acquired rights pursuant to its selection. Therefore, and in terms of section 62(3) of the Systems Act,¹⁷ an internal appeal could not have yielded effective relief. Second, an internal appeal would have been pointless because of the Municipality's stance that the selection of the BEE shareholder was the exercise of a contractual power that had nothing to do with the Municipality. In regard to the delay, the SCA found no reason to interfere with the exercise by the High Court of its discretion to condone it.

[28] In regard to SUN's position, the SCA reasoned that the settlement order was unaffected by the High Court's review order. The February 2018 agreement and the Council resolution remained valid and enforceable. That had to be so, said the SCA, otherwise Buhle Waste would have no grounds to challenge the decision of 14 November 2018 on the basis that the Municipality had failed to comply with the conditions.

[29] Substantially for the reasons given by the High Court, the SCA agreed that the decision of 14 November 2018 was "administrative action" reviewable in terms of PAJA. The SCA also found no fault with the High Court's reasoning on the merits of

employment of two counsel for Buhle Waste, such costs to be paid jointly and severally the one paying the other to be absolved."

¹⁷ Section 62(3) provides that "[t]he appeal authority must consider the appeal, and confirm, vary or revoke the decision, but no such variation or revocation of a decision may detract from any rights that may have accrued as a result of the decision".

the review. The SCA concluded that the impugned decision was unreasonable in that “no reasonable person would have approved the sale of shares in Silulumanzi without compliance with the conditions”.

[30] As to remedy, the SCA noted that the parties were in agreement that certain orders made by the High Court were “unnecessary or tautologous”. On this basis, the SCA set aside paragraphs 3 to 7 of the High Court’s order. Save as aforesaid, the appeal was dismissed with costs.

In this Court

[31] In separate applications, Brain Gear (CCT 11/25), Silulumanzi, SAWW and SUSA (CCT 12/25) and SUN (CCT 25/25) seek leave to appeal to this Court. Where necessary, I shall refer to the applicants in CCT 12/25 collectively as the SAWW parties. SUN’s application has been prompted by its understanding of statements made in the other applications for leave to appeal to the effect that the SCA’s order, if left undisturbed, will result in the conditions in the Council resolution being unfulfilled, with the result that the suspensive condition in the February 2018 agreement will not have been timeously fulfilled, causing the lapsing of that agreement. SUN’s application for leave to appeal is conditional upon this Court finding that this is indeed the effect of the SCA’s order.

Issues

[32] The submissions of the parties will be addressed in the context of the issues that arise for determination, which are the following:

- (a) Is this Court’s jurisdiction engaged and should leave to appeal be granted?
- (b) Has the SCA order nullified the result achieved in the settlement order?
- (c) Was any relevant decision taken by the Municipality on 14 November 2018?
- (d) If so, was that decision “administrative action” for purposes of PAJA?
- (e) If not, is that decision reviewable in terms of the principle of legality?

- (f) Are there grounds for interfering with the decision of the High Court, confirmed by the SCA, that delay should be condoned?
- (g) Was the internal appeal in section 62 of the Systems Act still available to Buhle Waste when it learnt of the impugned decision? If so, should the non-exhaustion of that remedy be overlooked? Relatedly, what is the significance of the fact that Buhle Waste did not seek condonation for non-exhaustion?
- (h) If the merits of the review are reached, should this Court interfere with the conclusions reached by the High Court and SCA?
- (i) If the appeal fails on its merits, should this Court interfere with the remedy of remittal?

Issue (a): Jurisdiction and leave to appeal

[33] Issues (d) to (i) are constitutional matters. They concern the scope of PAJA and legality review in a contractual setting as well as matters directly related to the review of administrative action and the exercise of public power: delay, non-exhaustion of internal remedies, whether a public body acted unlawfully and just and equitable relief. Our constitutional jurisdiction is thus engaged.

[34] Issue (b) is a legal one about the interpretation of court orders. Although the question is not of general public importance, it is necessary to answer it, because if it is answered against SUN, the latter has contested the conclusions reached by the High Court and SCA on issues (d) to (i).

[35] Issue (c) is a factual one. However, it is the gateway to the remaining issues. If the High Court and SCA were right to focus on a decision said to have been taken on 14 November 2018, the constitutional questions already identified need to be answered.

[36] It is in the interests of justice to grant leave to appeal. Issues (d) and (e) raise questions of importance in administrative law. As shall appear presently, the applicants have reasonable prospects of success on those issues. If this Court finds against the

applicants on issue (c) or (d), there may be a question as to whether it is in the interests of justice for this Court to revisit the decisions of the courts below on issues (f) to (i), but it will be convenient to defer that question until those issues are reached.

[37] Leave to appeal should thus be granted.

Issue (b): The effect of the SCA order on the settlement order

[38] The intention behind the settlement order was evidently to immunise the February 2018 agreement from indirect attack. The formulation of the settlement order is not a model of clarity. The fact that the Council resolution was not being attacked did not mean that there was not an attack on the fulfilment of the conditions in the Council resolution. If the conditions in the resolution were not fulfilled, the consent in the Council resolution would lapse. Similarly, the fact that there was no attack on the February 2018 agreement did not mean that the agreement was not subject to suspensive conditions, one of which was the obtaining of consent from the Municipality within a specified period.

[39] Accordingly, on a strict construction of the settlement order, a finding that the conditions in the Council resolution were not lawfully fulfilled would lead to a conclusion that the relevant condition in the February 2018 agreement was not fulfilled, with the resultant lapsing of that agreement. This, however, was not the intention of the parties. It would not have been in the interests of any of them to press for a result that could cause the February 2018 agreement to lapse. That agreement was needed in order to vest 100% of the shares in Silulumanzi in SAWW as the source from which a 28% shareholding could be transferred to a local BEE entity. SUN would not have been willing to withdraw from active involvement in the High Court proceedings if there were a risk that success in the review for Buhle Waste could lead to the lapsing of the February 2018 agreement.

[40] In argument before us, none of the parties supported an outcome that might flow from a strict construction of the settlement order. On ordinary principles relating to the

fulfilment of suspensive conditions, there is no doubt that if a successful review resulted in a conclusion that the conditions in the Council resolution were not lawfully fulfilled, the consent in the resolution would lapse, with the result that the relevant condition in the February 2018 agreement would not have been fulfilled. However, just and equitable relief in review proceedings does not have to follow strict legal logic.

[41] The outcome apparently intended by the parties to the settlement order, not contested by anyone in argument before us, was to separate the Council resolution into two distinct components: a consent to the transfer of control from SUN to SAWW; and an obligation on SAWW to transfer a 28% shareholding to a local BEE entity selected in the manner set out in the resolution. The second of these components was thereby changed from a suspensive condition into a separate obligation, such that the granting of consent (the first component) was treated as unconditional, the only question being whether the further obligation (the second component) had been lawfully fulfilled.

[42] Paragraph 7 of the High Court's order was not consistent with this understanding of the consent order. However, that paragraph was among those set aside by the SCA. Paragraphs 1 and 2 of the High Court's order can stand without impairing the intended effect of the settlement order. It follows that the need for SUN to pursue an appeal in this Court falls away.

Issue (c): Was any relevant decision taken on 14 November 2018?

[43] In their opposing papers in the High Court, some of the respondents pointed out that the Municipality had not, on 14 November 2018, taken the decision described in the original notice of motion, namely a decision approving a transfer of shares from Silulumanzi to Brain Gear. That is correct, but the error was corrected in the amended notice of motion, and nothing more need be said about it.

[44] Some of the applicants in this Court argue that confirmation of fulfilment of the conditions in the Council resolution occurred on 19 September 2018, not 14 November 2018. This is based on a signed endorsement at the foot of a letter

addressed by Silulumanzi to the Municipality on 19 September 2018, notifying the latter of the appointment of Brain Gear. The endorsement, pre-typed in the letter, stated that the Municipality confirmed by its signature that Silulumanzi had complied with the terms of the Council resolution and that the consent had thus become unconditional.

[45] Buhle Waste had not seen this letter when it launched its review application in July 2019. It formed part of the rule 53 record. In its first supplementary affidavit in the High Court, Buhle Waste, after criticising the contents of the letter, said that “it appears that it was pursuant to this letter” that the Municipal Manager “appended his signature and granted consent”. In traversing the supplementary affidavit, the Municipality’s deponent, Mr Mojaki Mosala, Senior Manager: Legal Services, responded to this allegation by admitting that on 19 September 2018 the Municipality granted consent. However, earlier in the same affidavit, in setting out the factual matrix, Mr Mosala said that the Municipality gave its approval for the transfer of shares to SAWW on 14 November 2018. The answering affidavit did not contend that Buhle Waste should have been targeting a decision taken on 19 September 2018 rather than 14 November 2018.

[46] None of the other respondents, in their High Court answering affidavits, stated that, if the Municipality had taken any decision susceptible to review, it was taken on 19 September 2018 rather than 14 November 2018. SUN alleged that the Municipality’s operative decision was taken on 28 June 2018, not on 14 November 2018. SUN’s contention was misconceived, because Buhle Waste was not complaining about the resolution but about the subsequent conduct and the eventual confirmation that the conditions in the resolution had been fulfilled.

[47] With reference to delay, Silulumanzi alleged in its answering affidavit that the decision sought to be reviewed was taken on 28 September 2018. This, however, was the date on which the September 2018 agreement between SAWW, Silulumanzi and Brain Gear was concluded; it was not the date of any relevant decision by the Municipality. In the same answering affidavit, Buhle Waste’s allegation in the first

supplementary affidavit – that it appeared that it was pursuant to the letter of 19 September 2018 that the Municipal Manager appended his signature and granted consent – was the subject of a bald denial.

[48] A fair reading of all the affidavits in the High Court leaves me in no doubt that the case was not contested there on the basis that the Municipal Manager’s confirmation of compliance with the conditions in the resolution occurred on 19 September 2018 rather than 14 November 2018. This may explain why the counter-signing of the letter of 19 September 2018 was not the subject of further attention. It was signed “pp” with a signature that appears to be that of the Deputy Municipal Manager, Mr Spetho Mhlongo. This seems to have been overlooked by Buhle Waste’s deponent when he said that the letter appeared to have been countersigned by the Municipal Manager. There is no evidence that Mr Mhlongo had Mr Diamond’s authority to sign on his behalf. Contemporaneous correspondence suggests that as at 19 September 2018 Mr Diamond was not yet satisfied that the conditions in the Council resolution had been fulfilled.

[49] I thus consider that the courts below were correct to approach the case on the footing that the relevant decision was taken on 14 November 2018. In any event, it would not matter that the confirmation had already been given on 19 September 2018. The mis-dating of the decision would not affect any of the grounds of review or defences raised. Although an earlier date would add two months to the delay, this would not have affected the adjudication of the delay defence. By the time Buhle Waste came into possession of the letter of 19 September 2018, it had already launched the review application. The fact that it discovered, after launching the review, that the relevant decision might have been taken earlier than 14 November 2018 could thus have had no bearing on the adequacy of its explanation for the delay.

[50] For the sake of completeness, I agree with the submission made by counsel for SUN that the Council resolution did not require that the Municipal Manager’s confirmation should be given within 90 days from the date of the resolution. What had

to be concluded within 90 days was the process for the selection of the local BEE shareholder. In the High Court, nobody suggested that the Municipal Manager’s confirmation on 14 November 2018 came too late.

Issue (d): Did the decision of 14 November 2018 constitute “administrative action”?

The statutory definitions

[51] The next question is whether the decision of 14 November 2018 was “administrative action” for purposes of PAJA. That expression is defined in section 1 of PAJA as meaning—

“any decision taken, or any failure to take a decision, by—

- (a) an organ of state, when—
 - (i) exercising a power in terms of the Constitution or a provincial constitution; or
 - (ii) exercising a public power or performing a public function in terms of any legislation; or
- (b) a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision,

which adversely affects the rights of any person and which has a direct, external legal effect.”

[52] The word “decision” is defined as meaning—

“any decision of an administrative nature made, proposed to be made or required to be made, as the case may be, under an empowering provision.”

[53] “Empowering provision” is defined as meaning—

“a law, a rule of common law, customary law or an agreement, instrument or other document in terms of which an administrative action was purportedly taken.”

[54] “Organ of state” is defined as having the meaning assigned to it in section 239 of the Constitution, where it is defined as meaning—

- “(a) any department of state or administration in the national, provincial or local sphere of government; or
- (b) any other functionary or institution—
 - (i) exercising a power or performing a function in terms of the Constitution or a provincial constitution; or
 - (ii) exercising a public power or performing a public function in terms of any legislation, but does not include a court or a judicial officer.”

[55] PAJA is the national legislation contemplated in section 33(3) of the Constitution. In terms of the principle of subsidiarity,¹⁸ the question whether conduct is “administrative action”, and thus reviewable in terms of PAJA, depends on the definition of that term in PAJA. In interpreting PAJA, a court must prefer an interpretation that accords with the Constitution,¹⁹ but ultimately it is the meaning of “administrative action” in PAJA rather than in section 33 of the Constitution that is decisive. If PAJA is under-inclusive, the Act must be frontally challenged.

The main cases relied upon in argument

[56] During argument we were referred to most of the leading cases on the often difficult question of deciding whether conduct is “administrative action” for purposes of PAJA, particularly where the immediate source of the power is contractual. The authorities do not provide an altogether coherent and consistent set of principles. Unsurprisingly, therefore, both sides were able to cite cases that appeared to support their positions.

¹⁸ See *Mazibuko v City of Johannesburg* [2009] ZACC 28; 2010 (3) BCLR 239 (CC); 2010 (4) SA 1 (CC) at para 73 and *Esorfranki Pipelines (Pty) Ltd v Mopani District Municipality* [2022] ZACC 41; 2023 (2) SA 31 (CC); 2023 (2) BCLR 149 (CC) at paras 43-6.

¹⁹ *Grey’s Marine Hout Bay (Pty) Ltd v Minister of Public Works* [2005] ZASCA 43; [2005] 3 All SA 33 (SCA); 2005 (6) SA 313 (SCA); 2005 (10) BCLR 931 (SCA) at para 22.

[57] For the applicants, particular emphasis was placed on *Trencon Construction*.²⁰ This Court said that while the decision in that case to award the tender was a matter of public law, ordinarily an issue arising under the subsequent contract, such as a price adjustment subject to negotiation, “ought to fall squarely within the domain of private law”.²¹ Reference was also made to Langa CJ’s minority judgment in *Chirwa*,²² where, after observing that the terms and conditions of service of employees of Transnet were controlled through contracts,²³ he said:

“However, it could be argued that the Legal Succession to the South African Transport Services Act [9 of 1989], the statute founding Transnet, is the source of all powers and functions providing the basis for its operational activities, including those of a contractual nature. This argument cannot hold water. It would render the requirement that the decision be taken ‘in terms of any legislation’ meaningless, as all decisions taken by a body created by statute would meet the requirement. If that is what the legislature intended, one would have expected them to have said as much. Instead they chose to distinguish between powers exercised by the same body, including a body created by legislation, according to the source of the power.”²⁴

[58] Other cases cited in support of the view that in the present matter we are in the realm of private rather than public law included *Metro Inspection Services*,²⁵ *Logbro Properties*²⁶ and *Thabiso Chemicals*.²⁷ In regard to *MTO Forestry*,²⁸ the SAWW parties

²⁰ *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd* [2015] ZACC 22; 2015 (5) SA 245 (CC); 2015 (10) BCLR 1199 (CC).

²¹ *Id* at para 75.

²² *Chirwa v Transnet Ltd* [2007] ZACC 23; [2008] 2 BLLR 97 (CC); 2008 (3) BCLR 251 (CC); 2008 (4) SA 367 (CC); (2008) 29 ILJ 73 (CC). The majority judgment was given by Skweyiya J. Langa CJ’s judgment, concurring in the result, was supported by Mokgoro J and O’Regan J.

²³ *Id* at para 182.

²⁴ *Id* at para 183.

²⁵ *Cape Metropolitan Council v Metro Inspection Services (Western Cape) CC* [2001] ZASCA 56; 2001 (3) SA 1013 (SCA); 2001 (10) BCLR 1026 (SCA).

²⁶ *Logbro Properties CC v Bedderson N.O.* [2002] ZASCA 135; [2003] 1 All SA 424 (SCA); 2003 (2) SA 460 (SCA).

²⁷ *Government of the Republic of South Africa v Thabiso Chemicals (Pty) Ltd* [2008] ZASCA 112; 2009 (1) SA 163 (SCA); [2009] 1 All SA 349 (SCA).

²⁸ *South African National Parks v MTO Forestry (Pty) Ltd* [2018] ZASCA 59; 2018 (5) SA 177 (SCA).

argue that, regardless of whether one follows the approach in the majority judgments or the dissenting judgment, the same conclusion would be reached on the facts of the present case, namely that the Municipal Manager's decision was not "administrative action". Brain Gear distinguished the majority judgments in *MTO Forestry* on the basis that in the present case, unlike that case, the relevant provision of the concession contract does not mirror any statutory power.

[59] For a comparative perspective of review proceedings in a contractual setting, the SAWW parties referred to *De Smith's Judicial Review*.²⁹ They drew particular attention to *R (West)*,³⁰ where the English Court of Appeal confirmed a line of authority in the High Court that Lloyd's of London did not operate in the public sphere, or at any rate did not do so in relation to the types of functions under consideration in those cases, namely the functions performed by the Council of Lloyd's and its committees when exercising regulatory powers in relation to the affairs of members of Lloyd's, members' agents and managing agents of Lloyd's syndicates.

[60] Buhle Waste, for its part, argues that we should find that the present case is covered by public law principles, with particular reliance on *MTO Forestry*. Buhle Waste also refers to the following passage in *Logbro Properties*, where Cameron JA said this with reference to *Metro Inspection Services*:

"The case is . . . not authority for the general proposition that a public authority empowered by statute to contract may exercise its contractual rights without regard to public duties of fairness. On the contrary: the case establishes the proposition that a public authority's invocation of a power of cancellation in a contract concluded on equal terms with the major commercial undertaking, without any element of superiority or authority deriving from its public position, does not amount to an exercise of public power."³¹

²⁹ Hare et al *De Smith's Judicial Review* 9 ed (Sweet & Maxwell, London 2023) at 139-55.

³⁰ *R (West) v Lloyds of London* [2004] EWCA Civ 506; [2004] 3 All ER 233.

³¹ *Logbro Properties* above n 26 at para 10.

A mechanical or clerical act?

[61] Some of the applicants argue that the confirmation of 14 November 2018 was a purely mechanical or clerical act falling outside the scope of “administrative action”. The decision was said not to have adversely affected anyone’s rights or to have had direct, external legal effect. We were referred in that regard to the decision in *Plover’s Nest*.³²

[62] I disagree. The Council delegated to the Municipal Manager the duty to confirm that the conditions had been fulfilled. It was his confirmation that would signal that the Council’s consent had become unconditional. The Council resolution was not self-executing. The Municipal Manager could not lawfully have confirmed compliance when objectively there had not been compliance. Conversely, he could not properly have withheld confirmation if objectively there had been compliance. His function was not discretionary in the true sense. Nevertheless, the assessment of compliance was not mechanical. It involved a consideration of whether there had been adequate oversight and consultation.

[63] The Municipal Manager’s decision on 14 November 2018 rendered the Council’s consent unconditional. At the same time, and by necessary implication, the Municipal Manager confirmed that Brain Gear had been lawfully selected as the local BEE shareholder. For as long as the Municipal Manager’s decision stood, the fact that the consent was unconditional and that Brain Gear had been duly selected could not be impugned.

[64] *Plover’s Nest* is distinguishable. In that case a municipal council granted approval for a consolidation and subdivision subject to six conditions. The municipality’s senior town planner wrote to the property owner to notify it of the council’s resolution. Due to an honest mistake, he mentioned only the first two conditions. The SCA held that the town planner had not engaged in “administrative

³² *Plover’s Nest Investment v De Haan* [2015] ZASCA 193.

action” by writing the letter; his only intention had been to communicate the council’s decision. In the present case, by contrast, the council delegated a distinct power to the Municipal Manager. Once exercised, that power had legal consequences for as long as it stood.

Further requirements for “administrative action”, particularly “in terms of any legislation”

[65] The Municipal Manager, in performing the confirmation function, was acting as an “organ of state” contemplated in paragraph (a) of the definition in section 239 of the Constitution. A municipality acts through its council and officials. In this instance, the Municipal Manager was acting for the Municipality under delegated authority from its Council.

[66] In order to constitute “administrative action”, the conduct must, by virtue of the definition of “decision”, be “of an administrative nature”. I am inclined to think that the Municipal Manager was indeed called upon to make a decision “of an administrative nature”, but in the light of my conclusion on the “in terms of any legislation” requirement, it is not necessary to express a definite opinion; I shall assume that the decision was “of an administrative nature”. The confirmation decision, as I have said, had direct, external legal effect. It rendered the Council’s consent unconditional and confirmed the due selection of Brain Gear as the local BEE partner. This had a direct and external legal effect on SUN, SAWW, Silulumanzi, Brain Gear and Buhle Waste; and the effect on Buhle Waste was adverse.

[67] The critical question, therefore, is whether the Municipal Manager’s decision fell within the scope of paragraph (a) of the definition of “administrative action”. His power to issue the confirmation contemplated by the Council resolution was not a power conferred on him by the Constitution or by a provincial constitution. Was it an exercise of a public power or the performance of a public function in terms of any legislation?³³

³³ Although the expression “empowering provision” is defined in PAJA as including a range of instruments in addition to legislation, that term is found only in paragraph (b) of the definition of “administrative action”. For

For reasons that shall appear presently, I am willing to assume that the Municipal Manager was exercising a public power or performing a public function. But was it “in terms of any legislation”? A meaning must be given to that phrase. To say that everything an organ of state does is done in terms of legislation, because of some distant connection to a legislative source, is to render the requirement “in terms of any legislation” meaningless.

[68] Since the Municipal Manager’s confirmation decision was made pursuant to the Council resolution, it is necessary to enquire, first, whether, in making the decision reflected in the resolution, the Council itself was exercising a power or performing a function “in terms of any legislation”. If the answer is no, it would follow in my view that the Municipal Manager’s subsidiary confirmation decision was likewise not made “in terms of any legislation”.

[69] In the present case, the awarding of the concession contract in 1999 took place in terms of procurement legislation, and Silulumanzi’s function of supplying water was also in terms of legislation, the Water Services Act. But we are not here concerned with either of those functions. Pursuant to the procurement process, a contract was concluded between the Municipality and Silulumanzi. That contract had a clause that required the Council’s consent for a change in control of Silulumanzi. The requirement for such consent is contractual. It is common ground that neither the Water Services Act nor any other legislation required the contract to include a clause forbidding a change of control without the consent of the local authority.

[70] Accordingly, when in June 2018 the Council gave its consent to the change in control, albeit conditionally, it was not taking a decision “in terms of any legislation”. It was exercising a power reserved to it by a contract.

purposes of paragraph (a) of the definition, the power or function must be exercised or performed in terms of legislation. Paragraph (b) is not relevant to decisions of municipalities. The fact that a contract or a council resolution might fall within the definition of “empowering provision” is thus not relevant in the present case.

[71] The provisions in the resolution for the selection of a local BEE shareholder were a facet of the exercise by the Council of its contractual power. It is once again common cause that there was no legislative requirement that a sale of shares to a new controller be accompanied by an allocation of shares to a local BEE entity. The Municipality acknowledged that it could not have made this a condition of granting its consent. The inclusion of the condition was a matter of negotiation, not legal imposition. It may be that the Municipality was inspired to request this component by the transformational goals served by section 9(2) of the Constitution and by the BEE Act and Equity Act, but the Constitution and those Acts did not make it a legal requirement that a local BEE shareholder be accommodated.

[72] I may add, in that regard, although I do not think it matters, that SAWW is itself a BEE entity. The Municipality's purpose was not to give the new controller a BEE character; this it already had. The Municipality's purpose, it appears, was to act on its political mandate by advancing local interests through the retention of some of the profits from the concession contract within the Mbombela economy.

[73] This being the character of the Council resolution, confirmation of compliance with the conditions in the resolution cannot be regarded as a function performed in terms of legislation. It follows in my view that the High Court and SCA erred in finding that the impugned decision was reviewable in terms of PAJA.

Issue (e): Is the confirmation decision reviewable in terms of the principle of legality?

[74] The exercise of public power must at a minimum conform with the principle of legality. This entails, among other things, that functionaries should do nothing beyond the powers conferred on them by the law³⁴ and that their decisions should not be

³⁴ *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* [1998] ZACC 17; 1998 (12) BCLR 1458 (CC); 1999 (1) SA 374 (CC) at paras 56-9.

arbitrary – their decisions must be rationally related to the purpose for which the power was given.³⁵

[75] Was the Municipal Manager exercising a public power in November 2018? There are no bright lines to distinguish private powers from public powers, especially where some of the parties involved discharge public functions, but decisions of this Court hold that the following factors are among those to be considered:

- (a) the relationship of coercion or power that the actor has in its capacity as a public institution;
- (b) the impact of the decision on the public;
- (c) the source of the power;
- (d) the nature and subject-matter of the power; and
- (e) whether there is a need for the decision to be exercised in the public interest.³⁶

[76] Once again, it is convenient to ask, first, whether the Council was exercising a public power when it passed its resolution on 28 June 2018. If the answer to that question is yes, it would follow inexorably that the Municipal Manager's confirmation decision was also an exercise of public power, because it was that decision which gave finality to the Council resolution.

[77] Although the fact that the actor in June 2018 was a municipal council is not decisive, the statutory nature of the actor is also not without significance. As to the source of its power, the Council was exercising its contractual right to grant or withhold consent to a transfer of control of Silulumanzi. Although this was a contractual power, it was a power created in a contract concluded pursuant to a public procurement process.

³⁵ *Pharmaceutical Manufacturers Association of South Africa: In re Ex Parte President of the Republic of South Africa* [2000] ZACC 1; 2000 (2) SA 674 (CC); 2000 (3) BCLR 241 (CC) at para 85.

³⁶ *AMCU v Chamber of Mines of South Africa* [2017] ZACC 3; 2017 (3) SA 242 (CC); 2017 (6) BCLR 700 (CC); [2017] 7 BLLR 641 (CC); (2017) 38 ILJ 831 (CC) at paras 74-5, quoting from *Chirwa* above n 22 at para 186 (judgment of Langa CJ).

[78] Importantly, the concession contract is a contract contemplated by the Water Services Act and involves the performance by Silulumanzi of an important public function. This leads naturally to the question why it was made a term of the contract that there could not be a change in control of Silulumanzi without the Council's consent. Silulumanzi's initial members were listed in an annexure to the concession contract and there were provisions regulating the allocation of further shares to third parties approved by the Council. These provisions, and the clause requiring the Council's consent for a change in control, show that the identity of Silulumanzi's shareholders was a matter in which the Municipality had an interest.

[79] We have no direct evidence on why, in 1999, the Municipality should have been concerned about the shareholding in and control of Silulumanzi, but there is only one possible explanation: a belief that the identity and character of Silulumanzi's controller could have a beneficial or adverse effect on Silulumanzi and thus on the performance of its water supply functions. We know that SUN, which acquired control of Silulumanzi some time after the conclusion of the concession contract in 1999, was a global organisation with expertise in water supply. When, in February 2018, Silulumanzi sought the Municipality's consent to a change of control, it set out the benefits which Silulumanzi would reap from having SAWW as its new controller. This included sophistication, knowledge and capacity to meet any unusual or additional capital requirements Silulumanzi would have to see the concession contract to term. SAWW would enhance its technical capabilities by selecting Arup as a technical strategic partner. Moreover, in the bid process for selecting a local BEE entity, the expertise and track record of bidders were important criteria.

[80] This, to my mind, shows that the power to grant or withhold consent to a change in control was insisted upon by the Municipality to safeguard the proper performance by Silulumanzi of the concession contract. A delinquent controller could lead to a delinquent concessionaire. This is undoubtedly a public purpose, directly connected with the function of a water services provider in terms of the Water Services Act.

[81] We do not know whether the clause in the concession contract requiring the Council's consent for a change in control was negotiated specifically with Silulumanzi or was a provision in the standard contract which the successful bidder in 1999 would have to conclude. If it were part of a standard contract, one could say that this clause was imposed on the successful bidder by the Municipality from a position of superiority. Even if it were individually negotiated with Silulumanzi, the position subsequent to the conclusion of the contract was that the Municipality had a power to grant or withhold consent to a change in control. The clause did not say that consent to a change in control could not be unreasonably withheld.³⁷ There was thus a distinct element of superiority vested in the Municipality when, in February 2018, Silulumanzi asked the Municipality to consent to the change of control. They were, to a significant extent, at the mercy of the Municipality as to whether their transaction could go ahead.

[82] This window of power that opened for the Municipality in the first half of 2018 may explain, at least in part, how the Municipality was able to get the other parties to accept an arrangement by which a 28% shareholding would be made available to a local BEE entity. It might well be so that the Municipality did not think it could stipulate this as a condition for consenting to the change in control. But if the Municipality's proposal were not accepted, the other parties could not be certain that the Council would then give its unconditional consent. Although a withholding of consent could perhaps have been challenged in court, this would have come at a cost: legal expense, delay and the uncertainties of litigation.

[83] Finally, in pressing for a 28% shareholding for a local BEE entity, the Municipality was seeking to achieve a benefit for the economy in its municipal area, while at the same time serving transformation objectives.

³⁷ For the limiting effect of a clause stipulating that consent may not be unreasonably withheld, see paragraphs 73-4 of Rogers AJA's dissenting judgment in *MTO Forestry* above n 28 and the cases collected in footnote 25 of that judgment. (It is not necessary, for purposes of the present case, to express any opinion on the correctness of the differing judgments in that case.)

[84] These various circumstances in their totality justify a conclusion that, in adopting the resolution of 28 June 2018, the Council was exercising a public power. It follows, as I have said, that the completion of that act through the Municipal Manager's confirmation of compliance was likewise the exercise of a public power. The confirmation decision was thus susceptible to review in terms of the legality principle.

Issue (f): Condoning delay

The High Court and SCA's reasoning

[85] The High Court dealt with delay on the basis that the case was governed by PAJA.³⁸ The review was launched slightly less than two months after the expiry of the 180-day period specified in section 7(1) of PAJA. The High Court condoned the delay. The High Court held that the Municipality and other parties had not played open cards with Buhle Waste, which had contributed to the delay. Buhle Waste had obtained certain information during June-July 2019 and did some research on Brain Gear. According to Buhle Waste, it was only at that time that it could give its legal team the relevant information. The Municipality had been aware in September 2018 that Buhle Waste was disgruntled, and even then there was a threat of litigation. According to the High Court, none of the respondents in that Court claimed any prejudice in consequence of the two-month delay.

[86] The SCA, which likewise approached the case as a PAJA review, held that the appellants in that Court had failed to make out a case that the High Court did not exercise its discretion judicially.³⁹ In the SCA, the appellants also submitted that Buhle Waste's poor prospects on the merits should be taken into account. Since the SCA ultimately found for Buhle Waste on the merits, this contention did not impress that Court.

³⁸ High Court judgment above n 2 at paras 107-9.

³⁹ SCA judgment above n 3 at paras 29-30.

The parties' submissions on delay

[87] The submissions were made on the assumption that PAJA was applicable. The applicants submitted that, in terms of section 9(1) of PAJA, Buhle Waste had been required to make a formal application for condonation, which it had not done. The explanation for the delay was said to have been unreasonable and did not cover the entire period of the delay. Reference was made in that regard to this Court's judgments in *Unitas Hospital*⁴⁰ and *Ingonyama Trust*.⁴¹

[88] The SAWW parties submit that the high watermark of Buhle Waste's explanation is that it was awaiting certain information from the Municipality. It would be inimical to the purpose of the 180-day requirement if a litigant were permitted to delay launching proceedings "until it ambulated its way through a PAIA⁴² application process before the proverbial clock commenced ticking". They submit that as early as 25 September 2018, when Buhle Waste's attorneys wrote to the Municipality, Buhle Waste was alive to the grounds of review and had the essential facts necessary to launch it. To similar effect, Brain Gear argues that Buhle Waste was not entitled to wait until it had all available facts.

[89] The applicants also place emphasis on the prejudice they have suffered on account of the delay (more on this later). They criticise the High Court for finding that they had not alleged prejudice.

[90] Buhle Waste submits, without further explanation, that delay is a "red herring". It argues that in any event it sought and obtained condonation from the High Court, a decision subsequently confirmed by the SCA.

⁴⁰ *Van Wyk v Unitas Hospital* [2007] ZACC 24; 2008 (2) SA 472 (CC); 2008 (4) BCLR 442 (CC) at paras 20 and 22.

⁴¹ *eThekweni Municipality v Ingonyama Trust* [2013] ZACC 7; 2013 (5) BCLR 497 (CC); 2014 (3) SA 240 (CC) at para 28.

⁴² PAIA is the acronym for the Promotion of Access to Information Act 2 of 2000.

Delay in legality reviews

[91] I have concluded that PAJA is inapplicable. Delay remains relevant, however, in legality reviews. The analysis is done by answering two questions: (a) whether the delay was unreasonable, a factual enquiry in which a value judgment is made in light of all relevant circumstances; (b) if the delay was unreasonable, whether the court's discretion should be exercised to overlook the delay.⁴³

[92] There are some similarities, but also some differences, in the approach to delay in terms of PAJA and the legality principle. These differences were traced in *Buffalo City*.⁴⁴ For present purposes, the first three principles applicable to delay in the context of a legality review, as explained in that case, can be summarised thus:

- (a) First, whereas section 7(1) of PAJA specifies a period of 180 days, a legality review is not subject to a fixed period. The question whether a delay is unreasonable “involves the exercise of a broader discretion” than in the case of section 7 of PAJA. No explicit condonation application is required in order for a court to undertake this analysis.
- (b) Second, the reasonableness of the delay must be assessed with reference, among other things, to the explanation offered. If the delay is explained and justified, and the explanation covers the whole period, the delay is not unreasonable. An unexplained delay, conversely, will necessarily be unreasonable.
- (c) Third, even if the delay is unreasonable, the court may overlook it, but there must be a basis for the court to exercise its discretion. The basis must be gleaned from the facts made available and/or objectively available factors. The approach to overlooking delay is flexible – a “factual, multi-factor and context-sensitive framework”. Matters to be considered include (i) potential prejudice to affected parties; (ii) the

⁴³ *Khumalo v MEC for Education, KwaZulu-Natal* [2013] ZACC 49; 2014 (3) BCLR 333 (CC); 2014 (5) SA 579 (CC); (2014) 35 ILJ 613 (CC) at para 49 and *Department of Transport v Tasima (Pty) Ltd* [2016] ZACC 39; 2017 (1) BCLR 1 (CC); 2017 (2) SA 622 (CC) at para 152.

⁴⁴ *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd* [2019] ZACC 15; 2019 (4) SA 331 (CC); 2019 (6) BCLR 661 (CC) at paras 44-71.

possible consequences of setting aside the impugned decision; (iii) whether prejudicial consequences can be ameliorated through a just and equitable remedy; (iv) the nature of the impugned decision, including the extent and nature of the alleged illegality and the merits of the review; and (v) the conduct of the applicant and whether it has acted in good faith, bearing in mind that state actors are subject to a higher duty to respect the law.

[93] Since the High Court and SCA did not undertake the delay analysis within the legality framework, this Court is at large to reassess the delay defence. Furthermore, and contrary to the SCA's finding, the High Court in my view committed several material misdirections, which I shall identify later.

Was eight months prima facie unreasonable?

[94] In assessing whether a delay is unreasonable, and in addition to the matters mentioned in *Buffalo City*, the nature of the decision and the likelihood of prejudice occurring if the decision is implemented in the absence of a timely challenge must be taken into account. What might be a reasonable period to obtain legal advice and prepare papers in one case might be unreasonable in another case.

[95] The decision here was one which called for a prompt challenge. As an unsuccessful bidder, Buhle Waste knew that Brain Gear would be concluding a contract to buy a 28% shareholding in Silulumanzi for a price of some R221 million. Buhle Waste would have foreseen that Brain Gear, like Buhle Waste itself, would be obtaining finance to fund the share purchase. Having acquired the shares, Brain Gear would likely receive dividends from Silulumanzi, and these would be used to repay debt. The longer such a transaction remained unchallenged, the greater the potential prejudice to Brain Gear and its funders, and the greater the difficulty in "unscrambling the egg", if and when a review succeeded.

[96] In addition, a successful challenge to the impugned decision had the potential to unravel the February 2018 agreement between SUN and SAWW. I have already explained why that is so. This outcome was averted only by the settlement order of May 2022. If the Municipal Manager's confirmation remained unchallenged for any significant length of time, a very large sum of money would in the meanwhile have been paid by SAWW to SUN (prior to potential adjustments, the basic price was R650 million), and dividends would have begun to accrue to SAWW as from the effective date, 31 December 2017.

[97] According to Buhle Waste, it learnt of the impugned decision on 28 November 2018. It launched the review on 19 July 2019, just under eight months later. Given the nature of the impugned decision and the underlying transactions which were likely to be affected, eight months would on the face of it be an unreasonable delay in the absence of a proper explanation.

The explanation for the delay

[98] Buhle Waste's initial founding affidavit gave scant detail to explain the delay. Its deponent said that, after learning of the impugned decision, Buhle Waste sought legal advice and further information from the Municipality in terms of PAIA. The Municipality, according to the deponent, was slow in giving the information and did not furnish all of it. Throughout the process, he said, Buhle Waste tried to engage with the Municipality to reach an amicable resolution to avoid review proceedings.

[99] Although Buhle Waste's attempt to get information from the Municipality was again mentioned in the first and second supplementary founding affidavits, Buhle Waste's deponent did not give dates as to when information was requested and furnished. It appears, however, from other documents in the record that the PAIA request was made on 17 October 2018. On 25 October 2018, the Municipality's Mr Mosala wrote to Buhle Waste's attorneys stating that it was making the requested documents available. The attorneys were asked to contact Mr Mosala to make arrangements for collection. There is evidence that at least one document in response

to that request – PwC’s IDD report – was given to Buhle Waste on 1 November 2018. All of this was before the impugned decision was even taken. There is no evidence of requests for information made or responses given, or of interactions aimed at an amicable resolution, during the period 28 November 2018 to 17 July 2019 – in other words, during the period of just under eight months which Buhle Waste took to institute the review.

[100] It was in its second supplementary founding affidavit that Buhle Waste’s deponent made the statement mentioned by the High Court, namely that “[d]uring June and July 2019 Buhle Waste had obtained some of the information and carried out some of the research on Brain Gear” to enable it to brief counsel. No further details were given. The nature of the research on Brain Gear was not explained. In its first and second supplementary affidavits, Buhle Waste attached company search reports in respect of Brain Gear and BGSA, but the earliest of those is dated 5 September 2019, more than a month after the review was launched.⁴⁵

[101] In its replying affidavit, Buhle Waste said that the respondents’ delay defence was an attempt to escape scrutiny. Even if the respondents were correct about delay, the circumstances of the case demonstrated that it was in the interests of justice to entertain the review and to condone the delay. The Court, according to the deponent, had the power to fashion an appropriate remedy.

Overlooking delay

[102] In my view, the delay was unreasonable. It is thus necessary to consider whether the Court should nevertheless overlook the delay.

Prejudice to other parties

[103] In its initial answering affidavit, SAWW said that it was prejudiced by the delay. Since 28 September 2018 Silulumanzi – and “effectively [SAWW] and Brain Gear” –

⁴⁵ The report in question was attached to Buhle Waste's first supplementary affidavit filed on 26 September 2019.

had been executing their contractual obligations under the concession contract. Setting aside the impugned decision at such a late stage would prejudice not only SAWW and Brain Gear, which had arranged their business affairs in line with the concession contract, but also the many residents of the concession area. In its initial answering affidavit, Silulumanzi said that prejudice was clear, without further elaboration.

[104] Brain Gear, in its initial answering affidavit, said that it had already incurred substantial costs in preparing to close the September 2018 agreement with SAWW, with closing anticipated to be completed within a few weeks. It had already paid a deposit of R6 million pursuant to its selection as the preferred bidder and had paid advisers and consultants about R1 million (lent to it by its shareholders) in preparing for the closure of the agreement. The money would be lost if its selection as the preferred bidder were set aside. Brain Gear, its deponent said, had conducted itself on the basis that Buhle Waste had chosen not to challenge the Municipality's decision. Buhle Waste had not sought an interdict pending the review.

[105] Brain Gear pointed out that as early as 25 September 2018, about 10 months before the review was launched, Buhle Waste's attorneys had written to the Municipality about its non-selection, threatening litigation if the Municipality granted its approval. From that letter, according to Brain Gear, it was apparent that Buhle Waste was already alive to the grounds which formed the basis of its review application.

[106] In response to the allegations in support of condonation contained in the second supplementary founding affidavit, SAWW, SUSA and Silulumanzi, in a joint supplementary answering affidavit, denied the absence of prejudice. They submitted that the impugned decision had been implemented and the prejudice would be enormous to all the respondents.

[107] It appears from this affidavit that the transaction between SUN and SAWW was closed out on 21 December 2018 at an adjusted price of R689 070 644 and that, with effect from that date, Silulumanzi's directorship changed in line with the change of

control. The deponent stated that it had been the intention that the September 2018 agreement between SAWW and Brain Gear would be closed out at the same time. By mid-December 2018 the parties were ready to do so; Brain Gear had paid its equity contribution and had finalised its negotiations with the Public Investment Corporation (PIC) to fund a portion of the price. At the last moment, however, the PIC refused to sign the funding agreements, delaying closure. Brain Gear's acquisition of the 28% shareholding had only been closed out on 12 December 2019.

[108] Brain Gear, in its further affidavit, said that Buhle Waste was simply ignoring the steps already taken by Brain Gear to give effect to the transaction. By the time that this affidavit was filed (January 2022), so the deponent pointed out, more than two years had passed since Brain Gear reached closure on the transaction. In anticipation of closure (which was initially expected to occur in the latter part of December 2018, but only occurred in December 2019), Brain Gear had dedicated resources to the Silulumanzi board, assisted with operational matters and closed out various finance agreements to fund the purchase price. Substantial costs had been incurred, such as travelling for board and other meetings. It had repaid R48 million of the loan funding and received dividends of about R51 million.

[109] It is thus apparent that even as at July 2019, when the review was launched, SUN, SAWW and Brain Gear had incurred costs, received benefits and stood to be prejudiced by any relief granted pursuant to the review. The prejudice deepened afterwards. I am alive to the fact that some of the costs alleged by Brain Gear may have been incurred after July 2019. However, SAWW and Brain Gear could not have been expected at that late stage to put matters on hold, and contractually Brain Gear would not have been entitled to do so unilaterally.

[110] I have previously mentioned that there was a hiatus in the litigation between November 2019 and January 2021, during which time Buhle Waste was seeking access to a copy of the February 2018 agreement. This led to Buhle Waste's second supplementary founding affidavit, filed on 28 January 2021. Although Buhle Waste in

that affidavit made much of the February 2018 agreement to which it had recently obtained access, its additional points were misconceived. Contrary to its assertion, the fact that the agreement had an effective date of 31 December 2017 did not mean that control of Silulumanzi had passed to SAWW before the Council passed its June 2018 resolution. The effective date was simply part of a pricing mechanism. It would only become relevant if and when the agreement became unconditional.⁴⁶ Similarly, Buhle Waste's claim that the accommodation of Brain Gear as a local BEE entity was a sham had no factual foundation.

[111] Perhaps the relevant respondents in the High Court would have been better served by promptly furnishing Buhle Waste with a copy of the February 2018 agreement. In the event, however, the delay which Buhle Waste brought about by insisting on its production yielded nothing of any moment.

Nature of the impugned decision

[112] Turning to the nature of the impugned decision, it is of some significance that the Municipality's decision did not give rise to any transaction to which the Municipality was a party. The Municipal Manager's decision merely confirmed that a consent to change in control had become unconditional. The real effect of confirmation was on transactions between SUN and SAWW, and between SAWW and Brain Gear, in other words on private parties. It was not within the power of the Municipality to delay implementation of the agreements after receipt of the review application. The contracts between SUN and SAWW and between SAWW and Brain Gear had contractual force. Absent an interdict, which Buhle Waste never sought, the parties to those contracts had to fulfil their obligations.

[113] As to the nature and extent of the alleged illegality, I would not characterise it as egregious. One must bear in mind that the review was directed at the conduct of the

⁴⁶ Buhle Waste should have known this, because the agreement which the local BEE entity would have to sign, and on which bidders were invited to comment, also had an effective date of 31 December 2017.

Municipality, not the conduct of SAWW, Silulumanzi and Brain Gear. This distinction was not always kept clearly in view by the High Court and SCA in their reasoning on the merits of the review. The decision under review was not SAWW's decision to select Brain Gear as the local BEE entity. The only legitimate target of a review against the Municipality was that the Municipal Manager should not have confirmed compliance with the Council resolution because, as a fact, there was not adequate municipal oversight in the selection process or consultation with the Municipality on the final selection. No corruption or dishonesty was alleged against the Municipality. The allegations of bias and nepotism were directed at SAWW and Silulumanzi, not the Municipality. In essence, the complaint against the Municipality was that its officials were too passive in the bid process.

Merits of the review

[114] In regard to the merits of the review (as a factor relevant to overlooking delay), they are not as clear-cut as the judgments of the High Court and SCA suggest. Those Courts saw the Municipality as having a more decisive role than is justified by the terms of the Council resolution. The relevant municipal officials were required by the resolution to “oversee” a process that was to be “administered” by SAWW and Silulumanzi. It was not the function of the Municipality to determine what the process would be or to implement it, though it could, of course, make proposals if it thought the process inadequate. In truth, the process itself does not appear to have been the subject of any serious criticism. It has not been said that the selection criteria and the rules imposed on bidders fell short. The access given to municipal officials to the virtual data room, the presence of its officials at the seven meetings of the steering committee and the contributions they made at those meetings favour the conclusion that the Municipality did indeed “oversee” the process.

[115] The other relevant aspect of the Council resolution was that SAWW and Silulumanzi were to select the local BEE entity “in consultation” with the municipal officials. Now it is important to note that this condition imposed an obligation on SAWW and Silulumanzi, not on the municipal officials. Where one party must consult

with another before making a decision, it is usually that other party who complains if no or inadequate consultation occurred. In the present case, the Municipality has not complained that SAWW and Silulumanzi failed to consult with it on the selection of Brain Gear.

[116] Where the exercise of a power is subject to a condition that the decision-maker first consult with another, the other party must be given a reasonable opportunity to state their views.⁴⁷ The other party is not compelled to offer any views,⁴⁸ but if it does so the decision-maker must consider them in good faith. The decision-maker is not, however, obliged to act in accordance with the consulted person's views.⁴⁹

[117] The events relevant to consultation are those that happened in September 2018. Mr Diamond and Mr Mosala from the Municipality were present at the second last meeting of the steering committee on 7 September 2018. PwC presented its ranking report as a slide presentation, showing that Brain Gear had outscored Buhle Waste. Mr Diamond said that he would like more information than was provided in the slides, and he sought clarity on certain matters. PwC replied that further information would be shared. SAWW's representative asked PwC to share its full IDD report with the Municipality. PwC had reservations about this, but proposed sharing an abridged version. In regard to the final selection, Mr Diamond confirmed that it was important for the successful bidder to be "clean" and to have a bona fide business with a good track record. The same courtesies should be extended to Brain Gear and Buhle Waste. He added, however, that it was not the intention of the Municipality "to participate in the finalisation of the process".

⁴⁷ See *Maqoma v Sebe N.O.* 1987 (1) SA 483 (CK); [1987] 3 All SA 414 (CK) at 489J-493B and *Hayes v Minister of Housing, Planning and Administration, Western Cape* 1999 (1) SA 1229 (C) at 1240B-3B.

⁴⁸ *Port Louis Corporation v Attorney General of Mauritius* [1965] AC 1111 (PC) at 1124D-E and *Minister of Home Affairs v Scalabrini Centre* [2013] ZASCA 134; [2013] 4 All SA 571 (SCA); 2013 (6) SA 421 (SCA) at paras 43-4.

⁴⁹ *Tlouamma v Mbethe, Speaker of the National Assembly of the Parliament of the Republic of South Africa* [2015] ZAWCHC 140; [2016] 1 All SA 235 (WCC); 2016 (1) SA 534 (WCC); 2016 (2) BCLR 242 (WCC) at paras 91-2.

[118] On the same day, PwC wrote to the Municipality to say that it was willing to furnish a copy of its ranking report to the Municipality, provided the latter acknowledged that it was receiving the report for information purposes only and subject to certain other qualifications stated in the letter. For the rest, we do not know what information was furnished to Mr Diamond pursuant to the matters raised at this meeting. There is no complaint from the Municipality that it requested further information which was not forthcoming.

[119] At the last steering committee meeting on 19 September 2018, the Municipality was represented by Mr Mhlongo, the Deputy Municipal Manager, and Mr Mosala. PwC made a slide presentation about the final selection. In response to a question from Mr Mhlongo, PwC confirmed that Brain Gear's relevant experience was that of the individuals, not the company. SAWW's representative, Mr van Wyk, said that SAWW had selected Brain Gear as their final preferred participant. Mr Mhlongo said he would like to see "the composition of the preferred bidder". Mr van Wyk confirmed that the PwC evaluation report had been circulated in full. Mr Mosala asked that the PwC presentation be made to Mr Diamond in order for him to be able to give his consent. Mr van Wyk replied that he had consulted with Mr Diamond in order to convey who the chosen participant was. SAWW's attorney added that Mr Diamond had confirmed at the second steering committee meeting that the process would not be delayed due to his absence from meetings. The meeting ended with Mr Mhlongo conveying his thanks to everyone involved for a process "professionally done".

[120] Once again, we do not know whether information about the "composition of the preferred bidder" was shared pursuant to Mr Mhlongo's request. We do not have details of Mr van Wyk's consultation with Mr Diamond prior to the meeting. But once again, we do not have any complaint from the Municipality that information was not given or that consultation did not occur.

[121] In the period between the last two meetings of the steering committee, Mr Diamond, in correspondence, raised concerns about the integrity and neutrality of

the selection process. On 12 September 2018, he asked Silulumanzi and Mergence Investment Managers (Pty) Limited (Mergence) (the fund manager for SAWW's main shareholder) to confirm that they had given no special favours to any bidder and to disclose any possible unfair advantage, undue benefit or conflict of interest.

[122] Mergence sent its reply on 17 September 2018, stating that it was not directly involved in the process but confirming that none of its employees had preferred any participant in the bidding process.

[123] It appears from a chasing letter that Mr Diamond wrote on 16 September 2018 that SAWW furnished a response earlier that day. SAWW's letter is not, however, in the record. Mr Diamond's concerns were apparently not fully assuaged by SAWW's response, because on 17 September 2018 he addressed a further letter to SAWW. The further letter is not in the record, but something of its content can be gleaned from SAWW's reply dated 19 September 2018:

- (a) Mr Diamond was apparently of the view that SAWW had "not kept to the timeframes set by the steering committee" in finalising the process. In reply, SAWW said it was unsure what Mr Diamond was referring to. According to SAWW, it had been agreed at the previous steering committee meeting that SAWW and Silulumanzi would present the final selection at the meeting scheduled to take place that same day, 19 September 2018. The selection would in any event be made prior to 28 September 2018, the deadline set by the Council resolution.
- (b) Mr Diamond had also expressed "serious concerns on the process", which he hoped SAWW would convey to Silulumanzi and Mergence. SAWW's response was to ask Mr Diamond to articulate his exact concerns about the process so that they could respond in more precise terms.

[124] SAWW's letter stated that Silulumanzi had replied or would reply separately. Silulumanzi's reply to Mr Diamond's concerns is not in the record. There has been no

complaint from the Municipality that Silulumanzi did not furnish a reply. Mergence, we know, did reply.

[125] Whether Mr Diamond clarified his concerns in response to SAWW's request is unknown. SAWW's request was not unreasonable. What is apparent is that, in addition to the two steering committee meetings in September 2018, there was correspondence between Mr Diamond and the other role players, not all of which has been placed before us. Although SAWW had chosen Brain Gear as its preferred bidder by 19 September 2018, the process only had to be finalised by 28 September 2018. There was, thus, still slightly more than a week for further engagement to occur pursuant to Mr Diamond's correspondence with SAWW and Silulumanzi.

[126] It is true that, as late as 11 October 2018, Mr Diamond was seeking in-house legal advice because he believed there had not been full compliance with the conditions in the Council resolution, "in particular, the element of consultation". On 17 October 2018, he received advice that the process had complied with the Council resolution. It is unsatisfactory that the Municipality in its affidavits did not provide further information about Mr Diamond's concerns. Mr Diamond himself did not make an affidavit. We do not know in what respects he was concerned about the element of consultation. None of the parties has provided evidence that, in the period up to 28 September 2018, the Municipality provided input calling into question the selection of Brain Gear.

[127] All of this places Buhle Waste at a distinct disadvantage in claiming an absence of consultation. Usually, as I have said, complaints about an absence of consultation are made by the person who should have been consulted. Here, the complaint is made by an outsider to the process, one with no inside knowledge of what actually happened, in circumstances where the Municipality itself has not ultimately contended that there was inadequate consultation. Buhle Waste's case, based on an absence of consultation, must therefore be regarded as marginal at best.

Buhle Waste's objections to Brain Gear's selection

[128] Much emphasis was placed by Buhle Waste, and by the High Court and the SCA, on the conflict of interest involving Professor Shongwe and Mr Mabuza; Brain Gear's alleged lack of experience and track record; the red flag raised by Brain Gear's alleged misrepresentation of its BEE contributor level status; and the fact that the 28% shareholding was transferred not to Brain Gear but its subsidiary BGSA.

[129] If the Municipality had been vested with the power to select the local BEE entity, these criticisms could potentially have been raised as grounds to review its decision to select Brain Gear. As a fact, however, the power did not vest in the Municipality and it did not make the selection. These potential objections are, in truth, criticisms of the decision made by SAWW and Silulumanzi to select Brain Gear. The review, however, was not directed at any decisions made by SAWW and Silulumanzi.

[130] Insofar as the review of the Municipality's conduct is concerned, the above matters have a more tangential relevance. If these were matters that should have caused SAWW not to select Brain Gear, one might say that a failure by the Municipality to raise them with SAWW points to a lack of adequate oversight and consultation. To some extent, this requires an assessment of how material these various criticisms are. I make the following brief observations in that regard.

[131] The alleged conflict of interest arose from the dual association of Professor Shongwe and Mr Mabuza with Brain Gear and Silulumanzi. These associations were fully disclosed in Brain Gear's bid. According to SAWW's answering affidavit in the High Court, the Municipality was well aware of the dual associations. The evidence in the High Court was, furthermore, that Mr Mabuza resigned from Silulumanzi on 15 May 2018 with effect from 15 June 2018 for reasons unrelated to any proposed sale of shares to a local BEE entity. He was thus no longer at Silulumanzi by the time the selection process got underway.

[132] There is certainly discomfort at the fact that Professor Shongwe was associated with one of the bidders while also being the chair of Silulumanzi's board. On the other hand, Silulumanzi was not the sole decision-maker in selecting the BEE entity. Indeed, SAWW was the party that would be selling the 28% shareholding to the successful bidder. The evidence in the High Court was that Professor Shongwe's role at Silulumanzi was non-executive and that he played no part in the selection of the bidder. The evidence does not enable one to conclude that the Municipality was unaware of his dual role or that information about it was hidden from the Municipality. This might have been one of the concerns behind the letters Mr Diamond wrote in September 2018. What he made of it we do not know, save that in the end he was willing to sign an agreement confirming compliance with the Council's conditions.

[133] As to the objection that Brain Gear was a newly incorporated entity without a track record or expertise, this fact was made clear in Brain Gear's bid document. It was clarified at the final meeting of the steering committee that the relevant experience in relation to Brain Gear was that of the individuals and key personnel, not the company itself. The Municipality thus knew the facts, and I am far from satisfied that it was bound to resist Brain Gear's selection for this reason.

[134] Brain Gear's alleged misrepresentation of its BEE contributor level status was explained in the answering papers as follows. At the time it submitted its bid, Brain Gear did not consult a BEE rating agency. This was because the relevant Codes of Good Practice stated that any enterprise with an annual turnover of R10 million or less qualified as an "exempted micro-enterprise" and that any such enterprise which was 100% black-owned qualified as a level one contributor. Because all of Brain Gear's shareholders were black persons, Brain Gear assumed that this was its status. It transpired, however, that because one of the shareholders had been born in Malawi, this person did not qualify as a "black person" for purposes of contributor level status, despite the fact that he was a South African permanent resident. Brain Gear approached a rating agency which issued a certificate stating that it was a level two contributor. On the material before the High Court, there appears to have been no basis for thinking that

Brain Gear had deliberately misrepresented its status, and the correct status was known by the time the selection was made.

[135] Finally, I doubt that anything turns on the fact that the 28% shareholding was transferred to BGSA rather than to Brain Gear. The explanation was that Brain Gear's funders wished to have a special-purpose vehicle. BGSA was a wholly-owned subsidiary of Brain Gear. At any rate, no finger can be pointed at the Municipality. It was told that Brain Gear had been selected. The transfer of the shares to BGSA occurred subsequent to the impugned decision of 14 November 2018.

Ameliorating the effects of delay with a just and equitable order?

[136] Crafting a meaningful remedy that would ameliorate the effects of delay is not possible. Even if the delay were overlooked and the merits were decided in favour of Buhle Waste, this might be one of those rare cases where a court could do no more than declare the Municipality's conduct unlawful, without setting anything aside or remitting anything for further consideration.

[137] Not all of the difficulties in this regard are attributable to the eight-month delay in launching the review application. But the fact is that, by December 2019, both the February 2018 and September 2018 agreements had been fully implemented. SAWW and Brain Gear have now been involved as shareholders in Silulumanzi for more than six years. Dividends have been received, funders repaid. It strikes me as practically impossible to wind back the clock.

[138] Importantly, the only point of setting aside the Municipal Manager's confirmation would be to allow some further process of selection to take place. But practically, how would this be done? It must be remembered that the Municipality was not running a process to sell a 28% shareholding in Silulumanzi to the highest bidder. The Municipality itself has never had any shares to sell. The idea, in June 2018, was for SAWW to make a 28% shareholding in Silulumanzi available to a local BEE entity.

That was eventually done, and Brain Gear has owned the 28% shareholding for more than six years.

[139] In the 2018 process, it was SAWW that set the price of R221 million for the 28% shareholding. This made sense, because SAWW would be selling the 28% shareholding to the successful local BEE entity. The price of R221 million was linked, even though not with mathematical precision, to the price SAWW had to pay SUN for a 100% shareholding in Silulumanzi. The February and September 2018 agreements had an effective date of 31 December 2017. Although we do not have evidence as to how the price was arrived at, Silulumanzi was required by clause 6.3 of the concession contract to have no other business than the supply of water under that particular contract. The price for a 100% shareholding and for a 28% shareholding, in transactions with an effective date of 31 December 2017, must have been based on the remaining term of the concession contract, that is, 11 years and 10 months.⁵⁰

[140] If the confirmation were set aside and the matter remitted to enable a local BEE shareholder to be selected afresh, what would the price for the 28% shareholding be? It was no part of the function of the Municipality in 2018 to set the price, and it would be no part of the function of the Municipality in 2026 to set the price. To require a successful bidder to pay the 2018 price – R221 million – would make no sense, because by the time a fresh selection process is finalised the concession contract is likely to have no more than three years to run. To substitute a successful bidder as the 28% shareholder with effect from 31 December 2017 would be entirely unrealistic. In the intervening period of more than eight years, Brain Gear has been receiving dividends, repaying funders, contributing to the management of Silulumanzi and incurring related costs. It is most unlikely that Brain Gear would be able to pay over to a successful bidder all dividends received from Silulumanzi with effect from 31 December 2017, even if it were just to make it do so.

⁵⁰ January 2018 to October 2029.

Conclusion on delay

[141] In my opinion, this is not a case in which the unreasonable delay should be overlooked. It is a case where a challenge had to be brought promptly and pursued as a matter of urgency; this it was not.

[142] As I have already said, this Court is entitled to consider the delay defence afresh, since it must be assessed within the framework applicable to a legality review rather than PAJA. I have also said that the High Court committed material misdirections in granting condonation under PAJA, and these would in any event have justified intervention. Briefly, these were the misdirections:

- (a) The High Court stated that the Municipality “and other parties” provided “scant information” to Buhle Waste “before the alleged delay”, and there was unwillingness to play open cards regarding requested information. This was said to have contributed to the delay.
- (b) However, there were no allegations by Buhle Waste – even vague ones – about requests for information from any parties other than the Municipality prior to the launching of the review in July 2019. In fact, there is nothing to show that any of the parties who stood to suffer commercial prejudice knew anything of the review before it was instituted on 19 July 2019.
- (c) The High Court did not ask itself whether any relevant requests for information were made to the Municipality after 28 November 2018, the date on which, according to Buhle Waste, it learnt of the impugned decision. As I have said, there is no evidence that any such requests were made. The only evidence of a PAIA request is the one made in October 2018.
- (d) If, in its reference to parties other than the Municipality, the High Court had in mind the period between November 2019 and January 2021 during which Buhle Waste was pressing for a copy of the February 2018 agreement, this was of no relevance in explaining the initial eight-month delay.

- (e) The High Court repeated Buhle Waste’s statement in the second supplementary affidavit that it was only during June-July 2019 that “it obtained some information and carried out some research on Brain Gear”. This vague statement, unsupported by any detail or documentary corroboration, is worthless as an explanation.
- (f) The High Court stated that none of the respondents claimed prejudice occasioned by the delay of less than two months. That is a statement made on the premise that a delay of 180 days or less would be reasonable. Even in relation to PAJA, that proposition is unsound. Section 7(1) requires a review to be instituted “without unreasonable delay and not later than 180 days after” the relevant date. A delay longer than 180 days is presumptively unreasonable and requires condonation. It does not follow that a delay of under 180 days is presumptively reasonable.⁵¹ Moreover, the High Court did not refer to any of the evidence of prejudice put up by the respondents in that Court.

Conclusion

[143] In the light of the above conclusions, it is unnecessary to consider the question of non-exhaustion of internal remedies or to reach a definite conclusion on the merits or about just and equitable relief. The appeal must succeed on the basis that Buhle Waste was not entitled to bring a PAJA review and that its legality review should have been dismissed because of unreasonable delay.

[144] As to costs, Buhle Waste is entitled to *Biowatch* protection⁵² as against the Municipality.⁵³ In other words, the Municipality must bear its own costs in the High

⁵¹ *Opposition to Urban Tolling Alliance v South African National Roads Agency Limited* [2013] ZASCA 148; [2013] 4 All SA 639 (SCA) at para 26, approved by this Court in *Buffalo City* above n 44 at para 49.

⁵² *Biowatch Trust v Registrar, Genetic Resources* [2009] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC).

⁵³ This flows from the fact that a review application is ordinarily a constitutional matter: *Nu Africa Duty Free Shops (Pty) Ltd v Minister of Finance* [2023] ZACC 31; 2023 (12) BCLR 1419 (CC); 2024 (1) SA 567 (CC) at para 149 (majority judgment) and paras 279-84 (minority judgment, where the authorities are reviewed).

Court.⁵⁴ The same should apply in my view to Silulumanzi. It performs a public function in terms of the concession contract. Silulumanzi must, thus, bear its own costs in the High Court, the SCA and in this Court.

[145] No costs order was made by the High Court against SUN. To the extent that SUN needed appellate intervention in the SCA, this was not because of any action by Buhle Waste. SUN did not need appellate intervention in this Court, nor did Buhle Waste argue for a position adverse to SUN. SUN should thus bear its own costs in the SCA and this Court.

[146] There is no basis, however, for costs not to follow the result as between Buhle Waste on the one hand, and SUSA and Brain Gear on the other, they being private parties.

Order

[147] The following composite orders are made in Cases CCT 11/25, CCT 12/25 and CCT 25/25:

1. In Case CCT 25/25, no order is made on the application by Sembcorp Utilities (Netherlands) NV (SUN) for leave to appeal, save in respect of costs as reflected below.
2. Leave to appeal is granted in Cases CCT 11/25 and CCT 12/25.
3. The appeals in Cases CCT 11/25 and CCT 12/25 succeed.
4. The order of the Supreme Court of Appeal is set aside and the following order is substituted in its place:
 - “(a) The appeals succeed.
 - (b) The order of the High Court is set aside and replaced by the following:
 - ‘(i) The application is dismissed.

⁵⁴ The Municipality did not participate in the SCA appeal or in this Court.

- (ii) The first, second and third respondents (the Municipal Manager of the City of Mbombela Municipality, the City of Mbombela Municipality, and the Chairperson of the Council of the City of Mbombela Municipality) and the fourth respondent (Sembcorp Silulumanzi (RF) (Pty) Limited) (Silulumanzi) must bear their own costs.
 - (iii) The applicant, Buhle Waste (Pty) Limited (Buhle Waste), must pay the costs of the fifth respondent, Brain Gear Investments (Pty) Limited (Brain Gear), the seventh respondent, South African Water Works (Pty) Limited (SAWW) and the ninth respondent, Sembcorp Utilities South Africa (Pty) Limited (SUSA), including the costs of two counsel where employed.’
 - (c) Silulumanzi and SUN must bear their own costs on appeal.
 - (d) Buhle Waste must pay the costs of Brain Gear, SAWW and SUSA on appeal, including the costs of two counsel where employed.”
- 5. SUN and Silulumanzi must bear their own costs in this Court.
 - 6. Buhle Waste must pay the costs of Brain Gear, SAWW and SUSA in this Court, including the costs of two counsel where employed.

For the Applicant in CCT 11/25, Fifth Respondent in CCT 12/25 and Eighth Respondent in CCT 25/25:

J Whitaker and Z Sing instructed by Van Der Schyff and Associates Incorporated

For the First Respondent in CCT 11/25, CCT 12/25 and CCT 25/25:

J G Wasserman SC and S Tshikila instructed by Malatji and Co Attorneys

For the Fifth, Sixth and Seventh Respondents in CCT 11/25 and CCT 25/25 and the Applicants in CCT 12/25:

G Marcus SC and S Pudifin-Jones instructed by Garlicke and Bousfield Incorporated

For the Eighth Respondent in CCT 11/25, Sixth Respondent in CCT 12/25 and Applicant in CCT 25/25:

K Hofmeyr SC and M Salukazana instructed by Deneys Reitz Incorporated t/a Deneys