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

CASE NO. 1712/2020

In the matter between:

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| **MAXIMUM PROFIT RECOVERY (PTY) LTD** | **Applicant** |

and

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| **INXUBA YETHEMBA LOCAL MUNICIPALITY** | **First Respondent** |
| **K L MULAUDZI** | **Second Respondent** |
| **P K FINANCIAL CONSULTANTS CC** | **Third Respondent** |
| **HG CONSULTANTS (PTY) LTD** | **Fourth Respondent** |
| **DITLOU INVESTMENTS (PTY) LTD** | **Fifth Respondent** |

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**JUDGMENT**

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**Bloem J.**

1. On 7 July 2020 the Inxuba Yethemba Local Municipality, the first respondent, published an invitation for tenderers to submit tenders for the provision of VAT recovery services to it for 36 months. Maximum Profit Recovery (Pty) Ltd, the applicant, PK Financial Consultants CC, the third respondent, HG Consultants (Pty) Ltd, the fourth respondent, and Ditlou Investments (Pty) Ltd, fifth respondent, submitted tenders in response to the invitation. The second respondent was cited in his capacity as the first respondent's acting municipal manager. I shall hereinafter refer to the first respondent as "the municipality".

2. During August 2020 the municipality awarded the tender to the third respondent,

hereinafter referred to as "PK". On 20 August 2020 the applicant launched this application on a semi-urgent basis. In its amended notice of motion it sought an order:

2.1. that the municipality's decision to publish the tender be declared constitutionally invalid, reviewed and set aside;

2.2. that the municipality's decision to award the tender to PK be declared constitutionally invalid, reviewed and set aside;

2.3. that the agreement concluded between the municipality and PK be set aside with immediate effect;

2.4. that the municipality and PK disclose to this court each and every payment made by the municipality to PK pursuant to its appointment;

2.5. that PK disclose to this court each and every invoice submitted by it to the municipality since its appointment;

2.6. that, if the decision to issue and publish the tender not be set aside, the tender be awarded to the applicant, alternatively, that the municipality utilise the applicant's services pending the finalisation of a new tender process on the basis of the applicant's submitted tender;

2.7. that the municipality immediately proceed with a new tender process to appoint a VAT recovery specialist; and

2.8. that the municipality, together with the respondents who oppose the application, pay the costs of the application.

3. The municipality, the second respondent and PK opposed the application. Although

the municipality did not make any concessions in respect of the merits of the applicant's claim, it opposed the application primarily on the basis that, in its view, it was not urgent and the applicant failed to first exhaust the internal remedy available to it before it launched this application. PK opposed the application on the basis firstly, that the applicant delayed in seeking an order that the municipality's decision to publish the tender be set aside; secondly, that the applicant pursued incompetent relief in its amended notice of motion; and thirdly, that this court would find it difficult to grant an equitable order, as required by section 8 of the Promotion of Administrative Justice Act.[1] (PAJA)

Urgency

4. It is undisputed that on 13 August 2020 the applicant was informed by letter dated 6 August 2020 that its "*bid proposal for provision of VAT recovery services for a period of 3 (three) years was unsuccessful*". Although it had not been informed by the municipality as to who the successful tenderer was, it suspected that the tender had been awarded to PK because PK was rendering services to the municipality at that time. On the day before it received the letter, the applicant forwarded to the municipality an application, which had not been issued by the registrar, under cover of a letter wherein the applicant sought an undertaking from the municipality that it would cause the contract for the provision of VAT recovery services not to be executed by whoever was appointed by the municipality pending the outcome of the application which it intended to issue. The unissued application aimed at securing an order that the functionality criteria of the tender be reviewed and set aside. The applicant did not issue that application after receipt of the letter dated 6 August 2020.

[1] Promotion of Administrative Justice Act, 2000 (Act 3 of 2000).

5. The present application was emailed to the municipality on 17 August 2020, issued on 20 August 2020 and served by the sheriff on the municipality on 25 August 2020. In terms of the notice of motion the municipality was required to notify the applicant's attorneys in writing of its intention to oppose the application on or before 24 August 2020; despatch the record of its decision to award the tender to the successful tenderer to the registrar on or before 4 September 2020 and deliver its answering affidavit on or before 23 September 2020. The municipality could obviously not give notice of its intention to oppose the application on 24 August 2020 since the application papers were served on it by the sheriff only on the following day.

6. On 3 September 2020 the municipality's attorneys addressed a letter to the applicant's attorneys informing them that "*the information requested is in custody of different municipal employees, some of whom work from home*" and that it would be impossible to despatch the record by 4 September 2020. The municipality's attorneys requested an indulgence to despatch the record on or before 14 September 2020, to which the applicant agreed. The municipality emailed an incomplete record to the applicant's attorneys on 14 September 2020. That email was placed in a junk email folder and came to the attention of the applicant's attorneys only on 16 September 2020 following a telephonic enquiry on that day. The applicant informed the municipality that the record did not include the tender submitted by PK. The applicant nevertheless delivered an amended notice of motion and supplementary founding affidavit on 25 September 2020. Those documents were based on the incomplete record. The applicant received PK's tender on 6 October 2020.

7. The parties had a meeting on 8 October 2020 and agreed on the dates for the hearing and the delivery of further supplementary founding, answering and replying affidavits

respectively as well as heads of argument. The applicant delivered its further supplementary affidavit on 14 October 2020, one day later than agreed upon. On 18 November 2020 the applicant's attorneys addressed an email to the municipality's attorneys wherein they placed on record that the municipality had until then not delivered its answering affidavits "*notwithstanding numerous agreements and undertakings* …". In terms of the agreement of 8 October 2020 the municipality should have delivered its answering affidavit on 3 November 2020. It did so only during the afternoon of 18 November 2020, two weeks later than agreed.

8. After the applicant had delivered its replying affidavit, it delivered its heads of argument on 27 November 2020. The municipality delivered its heads of argument on 9 December 2020, a day before the hearing, such delivery taking place without an application for condonation for the late filing thereof.

9. At the hearing Mr Nzuzo, counsel for the municipality and the second respondent, was requested to point out in what way the applicant did not comply with the provisions of rule 6(12) of the Uniform Rules of Court. That subrule requires an applicant seeking urgent relief to set forth in his or her affidavit the circumstances which are alleged to render the matter urgent and the reasons why he or she claims that he or she could not be afforded substantial readdress at a hearing in due course. Save for restating the provisions of the subrule, counsel was unable to show how, factually, the applicant allegedly did not comply with rule 6(12). In my view that is so because the applicant did comply with the provisions of rule 6(12). In the founding affidavit the applicant expressed fear that should the ordinary time periods in the rules be followed (which periods were ultimately followed), the municipality would in effect be allowed to implement, what the applicant considered to be, an unlawful tender.

10. The facts relevant to urgency and the parties' respective conduct leading to the hearing have been set out in detail to highlight the unsustainability of the submission that the application was not urgent. The applicant intended launching an application even before it became aware that the municipality had decided to award the tender. It became aware that a decision had been made to award the tender on 13 August 2020, albeit that at that stage it was unaware to whom it had been awarded. Four ordinary days (two court days) thereafter the applicant emailed its founding application papers in this application to the municipality and the other respondents. The municipality delivered its answering affidavit fourteen weeks after it first received the founding application papers and five weeks after the delivery of the applicant's further supplementary affidavit. The reality is that the municipality had more time to deliver its answering affidavit than for what the rule provides. By the time that the application was heard, the issue of urgency had become moot in view of the fact that the parties had agreed the dates for the delivery of the relevant court documents. The municipality was unable to show in what manner it was prejudiced after the applicant had instituted the application on 25 August 2020. Under those circumstances, it does not lie in the mouth of the municipality to complain about urgency.

11. In my view, the applicant adequately set out the circumstances which rendered this matter urgent. It also explained why it would not be afforded substantial redress at the hearing in due course. For the above reasons, the submission that the application should be dismissed for lack of urgency cannot be sustained. As an aside, if it were found that the application was not urgent, it would have been struck off the roll, not dismissed, as contended for by the municipality.

Exhaustion of internal remedy

12. Mr Nzuzo submitted that the application for the review of the impugned decisions should be dismissed because the applicant did not first exhaust its internal remedy allegedly created by section 62 of the Local Government: Municipal Systems Act[2] (Municipal Systems Act), as it was obliged to do in terms of section 7(2)(b) of PAJA.

13. Section 62 of the Municipal Systems Act reads as follows:

> "*(1) 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 a 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.*
>
> *(2) The municipal manager must promptly submit the appeal to the appropriate appeal authority mentioned in subsection (4).*
>
> *(3) The 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.*
>
> *(4) When the appeal is against a decision taken by-*
> *(a) a staff member other than the municipal manager, the municipal manager is the appeal authority;*
> *(b) the municipal manager, the executive committee or executive mayor is the appeal authority, or, if the municipality does not have an executive committee or executive mayor, the council of the municipality is the appeal authority; or*
> *(c) a political structure or political office bearer, or a councillor-*
> *(i) the municipal council is the appeal authority where the council comprises less than 15 councillors; or*
> *(ii) a committee of councillors who were not involved in the decision and appointed by the municipal council for this purpose is the appeal authority where the council comprises more than 14 councillors.*
>
> *(5) An appeal authority must commence with an appeal within six weeks and decide the appeal within a reasonable period.*
>
> *(6) The provisions of this section do not detract from any appropriate appeal procedure provided for in any other applicable law."*

14. Insofar as it is relevant to this matter section 7 of PAJA reads as follows:

> "*(1) Any proceedings for judicial review in terms of section 6 (1) must be instituted without unreasonable delay and not later than 180 days after the date-*

[2] Local Government: Municipal Systems Act, 2000 (Act 32 of 2000).

> *(a) subject to subsection (2) (c), on which any proceedings instituted in terms of internal remedies as contemplated in subsection (2) (a) have been concluded; or*
> *(b) where no such remedies exist, on which the person concerned was informed of the administrative action, became aware of the action and the reasons for it or might reasonably have been expected to have become aware of the action and the reasons.*
>
> *(2) (a) Subject to paragraph (c), no court or tribunal shall review an administrative action in terms of this Act unless any internal remedy provided for in any other law has first been exhausted.*
> *(b) Subject to paragraph (c), a court or tribunal must, if it is not satisfied that any internal remedy referred to in paragraph (a) has been exhausted, direct that the person concerned must first exhaust such remedy before instituting proceedings in a court or tribunal for judicial review in terms of this Act.*
> *(c) A court or tribunal may, in exceptional circumstances and on application by the person concerned, exempt such person from the obligation to exhaust any internal remedy if the court or tribunal deems it in the interest of justice."*

15. Mr Nzuzo relied on the provisions of section 62 of the Municipal Systems Act for the submission that the applicant had an internal remedy which it should have exhausted before instituting these proceedings and that it failed to exhaust that internal remedy. Since the applicant did not apply to this court to be exempted from the obligation to first exhaust the internal remedy, its application should therefore be dismissed, the submission concluded.

16. Mr Els, who appeared with Mr Brown for the applicant, submitted that the appeal referred to in section 62 is not available to the applicant. In terms of section 60(a) of the Local Government: Municipal Finance Management Act[3] (Municipal Finance Management Act) the municipal manager of a municipality is the accounting officer of the municipality for purposes of the Municipal Finance Management Act, and, as accounting officer, must exercise the functions and powers assigned to an accounting officer in terms of that Act. In terms of section 1 of the Municipal Finance Management Act that Act includes the regulations made in terms of section 168 or 175

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[3] Local Government: Municipal Finance Management Act, 2003 (Act 56 of 2003).

thereof. The Minister of Finance made regulations in terms of section 168 of the Municipal Finance Management Act.[4]

17. In terms of regulation 29(1)(a)(ii) of the Municipal Supply Chain Management Regulations a bid adjudication committee must, depending on its delegations, make a final award "*or a recommendation to the accounting officer to make the final award*". From the above regulation it is, in my view, clear that the power of a municipal manager to award a tender to a successful tenderer is an original power, which is regulated by the Municipal Finance Management Act and the regulations made in terms thereof.

18. It is common cause that on 5 August 2020 the second respondent, the municipality's accounting officer, decided to make the final award to PK. In the circumstances, the second respondent exercised an original power when he made the final award to PK.

19. In terms of section 62(1) of the Municipal Systems Act an appeal by 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 a 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*".

20. Mr Els submitted that the applicant is not a person whose rights are affected by the second respondent's decision to award the tender to PK. For that submission counsel relied on authorities where, for instance, a landowner applied to a municipality to approve building plans. The Supreme Court of Appeal has held that a neighbour, who is dissatisfied with the municipality's decision relating to a landowner's building plans,

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[4] The Municipal Supply Chain Management Regulations were published under GenN 868 in Government Gazette 27636 of 30 May 2005, as amended.

is not an affected person, as envisaged by section 62(1) of the Municipal Systems Act. Such a neighbour has no right of appeal against the municipality's decision. Only an aggrieved landowner who applied for building plans to be approved, is an affected person and only that landowner is afforded a right to appeal against the municipality's decision. It is accordingly only an aggrieved landowner who must first appeal against a municipality's decision before he or she could institute an application for an order reviewing and setting aside that decision.[5]

21. The cases upon which Mr Els relied in this regard do not assist the applicant. In my view, the applicant cannot be equated with an aggrieved neighbour who played no role in the process culminating in the municipality making a decision for or against the landowner who applied for building plans to be approved. I am of the view that the applicant is a (legal) person whose rights were affected by the second respondent's decision to award the tender to PK. That is so because it, PK and the other unsuccessful tenderers were all involved in the tender process, which culminated in the award of the tender to PK.[6] Does the fact that the applicant was a *"person whose rights [were] affected by*'' the second respondent's decision entitle the applicant to an appeal in terms of section 62?

22. In my view, the applicant would have been entitled (and obliged) to appeal to the municipality in terms of section 62 had the decision to award the tender to PK been taken by the municipality's bid adjudication committee. In such a case, the bid adjudication committee would have taken that decision in terms of a power delegated to it by the municipality's council. The bid adjudication committee would then have

[5] *City of Cape Town v Reader and others* (719/07) [2008] ZASCA 130; 2009 (1) SA 555 (SCA) at para 31 and 32 and the authorities referred to therein.
[6] *Groenewald NO and others v M5 Developments (Cape) (Pty) Ltd* [2010] ZASCA 47; 2010 (5) SA 82 (SCA) at 87E; [2011] 1 All SA 17 (SCA).

taken the decision in accordance with section 62(1), as was the position in *Groenewald*[7] where a decision to award a tender was taken by the municipality's tender (bid) adjudication committee.

23. The situation is different in the present matter. The second respondent exercised an original power, as opposed to a delegated power, when he took the decision to award the tender to PK. It can accordingly not be said that the decision "*was taken by … [the second respondent] in terms of a power or duty delegated or sub-delegated …*" to him. That being the case, I am of the view that the appeal envisaged in section 62 of the Municipal Systems Act was not available to the applicant. The applicant was accordingly not required to appeal to the municipality in terms of section 62 before it instituted the present application, because that section did not provide it with the internal remedy envisaged by section 7(2)(a) of PAJA. In other words, the appeal in section 62 does not constitute an internal remedy for the applicant, as contemplated in section 7(2) of PAJA.

24. Furthermore, in the letter dated 5 August 2020 that the second respondent addressed to PK informing it that it had been the successful tenderer, PK was requested to "*accept our offer within five (5) working days from the date of this letter, failure to do so will assume that our offer has not been accepted by your good selves*". The court was informed from the bar at the hearing that the municipality and PK signed an agreement within five days of the award of the tender to PK.

25. Section 62(3) of the Municipal Systems Act compels an appeal authority to consider an appeal submitted to it. After consideration it must either confirm, vary or revoke the decision appealed against, provided that "*no such variation or revocation of a decision*

[7] *Groenewald* above n 6 at 85B and 86G.

*may detract from any rights that may have accrued as a result of the decision*".

26. In my view, legal rights accrued to PK when the municipality awarded the tender to it. Had the municipality's appeal authority, after consideration of an appeal, varied or revoked the second respondent's decision to award the tender to PK, such variation or revocation would have detracted the rights which accrued to PK after the tender was awarded to it. The inability of the municipality's appeal authority to vary or revoke the second respondent's decision to award the tender to PK would have rendered such an appeal nugatory[8] and illusory. Even if it could be said that section 62 of the Municipal Systems Act provides an internal appeal, section 62(3) allows such an appeal only if the outcome of the appeal does not detract from the rights accrued to the successful tenderer. It is accordingly found that, for that reason also, section 62 does not grant a viable appeal to the applicant.[9]

27. Mr Nzuzo relied heavily on *Evaluations Enhanced Property Appraisals (Pty) Ltd v Buffalo City Metropolitan Municipality and others*[10] wherein Alkema J (Griffiths J and Brooks AJ (as he then was) concurring) dealt in detail with firstly, whether the court *a quo* was correct in directing Evaluations Enhanced Property to first proceed with its internal appeal remedy; and secondly, in postponing the review application and not dismissing it for want of compliance with section 7(2) of PAJA. The reliance on *Evaluations Enhanced* was misplaced because the findings relevant to the first issue were *obiter* since Alkema J specifically stated that there was no appeal by Evaluations Enhanced Property against the order of the court *a quo* directing it to first exhaust its appeal remedy. Secondly, *Evaluations Enhanced* is distinguishable from the present

[8] *Loghdey v Advanced Parking Solutions CC and others* (20766/2008) [2009] ZAWCHC 15; 2009 (5) SA 595 (CPD) at par 33.
[9] *DDP Valuers (Pty) Ltd v Madibeng Local Municipality* (233/2015) [2015] ZASCA 146 (1 October 2015) at par 23.
[10] *Evaluations Enhanced Property Appraisals (Pty) Ltd v Buffalo City Metropolitan Municipality and others* (EL 1544/12, ECD 3561/12) [2014] ZAECGHC 55; [2014] (3) All SA 560 (ECG).

matter because Evaluations Enhanced Property acknowledged that ordinarily it would have been obliged to first exhaust its internal appeal but submitted that in that case the obligation "*never arose due to the first and second respondents' deliberate frustration of its rights by failing and refusing to give proper notification of the tender award*; *by failing to give reasons for such award and failing to furnish it with the required documentation relevant to the tender award*."[11] In the present matter, the applicant specifically denied that the appeal envisaged in section 62 of the Municipal Systems Act was available to it. As pointed out above, the applicant was correct in its contention in that regard.

Unreasonable delay

28. It was submitted by Mr Ayayee, counsel for PK, that the applicant unreasonably delayed the institution of these proceedings. That submission was limited only insofar as the applicant sought an order that the decision to publish the tender be reviewed and set aside. The invitation to tender was published on 7 July 2020. The applicant stated that when it considered the tender it realised that one of the functionality requirements, namely that "*at least one company director must be a qualified Chartered Accountant registered with South African Institute of Chartered Accountants (SAICA) for minimum of 36 months for both Company and membership*", appeared to be irrational. It accordingly addressed a letter dated 14 July 2020 to the municipality requesting reasons "*for the functionality assessment/evaluation criteria having such an irrational requirement*". The applicant nevertheless submitted its tender on 15 July 2020 "*under protest and reservation of rights*".

29. PK drew attention to an application that the applicant instituted in the Free State

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[11] *Evaluations Enhanced* above n 10 at par 10.

Division of the High Court[12] during 2019 against a district municipality wherein it sought an order that the award of a similar tender be interdicted pending an application for the review and setting aside of a similar functionality requirement. Jordaan J dismissed the application for an interdict because *inter alia* firstly, the applicant was fully aware of the functionality requirement before it submitted its tender; and secondly, it could have attacked the validity of that requirement before tenders were submitted or even evaluated. With respect, those appear to be sound reasons for the dismissal of the application for an interim interdict. The applicant in the present matter does not seek an order that the implementation of the tender be interdicted. It seeks an order that the municipality's decisions to publish the tender (paragraph 2.1 above) and to award the tender to PK (2.2 above) be reviewed and set aside, with consequential relief.

30. There is merit in the submission that the applicant could have instituted the application for the relief set out in paragraph 2.1 above before the closing of tenders on 21 July 2020. There was certainly a delay on the applicant's part to review and set aside the relief sought in paragraph 2.1 above. Was that delay unreasonable? I am unable to find that the delay was unreasonable.

31. The municipality did not respond to the applicant's letter dated 14 July 2020 wherein it sought reasons for the functionality requirement in question. On receipt of that letter, the municipality must have appreciated that the unlawfulness of any decision it was going to take would be under attack, certainly by the applicant, on at least the basis of the functionality requirement in question. The municipality knew on 12 August 2020, when the applicant emailed the unissued application papers to it, that the applicant

[12] *Maximum Profit Recovery (Pty) Ltd v Fezile Dabi District Municipality and others*, unreported judgment delivered in the Free State Division of the High Court on 13 June 2019 under case number 2051/2019.

would be instituting an application for an order that its decision to publish the tender be reviewed and set aside primarily because of the functionality requirement in question. It turned out that the award had already been made by then.

32. The fact that there was a delay does not mean that the delay was unreasonable or that the applicant should be barred from having the municipality's decision to publish the tender reviewed. That is not the only relief sought in these proceedings. Since this court is called upon to review the decision to award the tender to PK, it can just as well review the decision to publish the tender.

33. I am of the view that the period of about one month between 14 July 2020, when the applicant indicated its view relating to the functionality requirement to the municipality, and 17 August 2020, when it emailed the present application to the municipality cannot, in the circumstances of this case, be said to have constituted an unreasonable delay. The submission that the applicant unreasonably delayed the institution of the application for the relief set out in paragraph 2.1 above cannot be sustained.

34. In his heads of argument Mr Ayayee submitted that, should this court not uphold the points *in limine* raised by the municipality and PK, this court "*would be entitled to set aside the tender processes, based on the improper formulation of the tender advert, leading to the exclusion of potential bidders*". I now examine the applicant's complaints regarding the award of the tender to determine whether counsel's submission has merit.

Functionality

35. In the tender document and its answering affidavit, the municipality stated that the tenderers had to achieve a minimum of 70 points on functionality before price was

considered. Functionality means the ability of a tenderer to provide goods or services in accordance with the specifications as set out in the tender document.[13] The municipality disqualified the applicant because it scored 60 points for functionality. Tenderers were informed in the tender document that functionality would be assessed on the basis of:

35.1. their experience in the execution of projects of this nature: a tenderer with more than 4 years, but less than 7 years' experience would score 5 points; 10 points for a tenderer with more than 7 but less than 10 years' experience; and 15 points for a tenderer with more than 10 years' experience; (functionality criterion 1)

35.2. proof of contracts entered into with local government institutions: a tenderer with more than 1, but less than 11 contracts would score 5 points; 10 points for a tenderer with 11 or more, but less than 21 contracts; 15 points for a tenderer with 21 or more, but less than 25 contracts; and 20 points for a tenderer with more than 25 contracts; (functionality criterion 2)

35.3. proof that they were in good standing with current clients: a tenderer with 2 or less reference letters would score 0 points; a tenderer with between 3 and 5 reference letters scoring 5 points; and a tenderer with more than 5 reference letters scoring 10 points; (functionality criterion 3)

35.4. amounts that they recovered for municipalities: a tenderer who recovered R35 000 000.00 would score 0 points; 5 points for a tenderer who recovered between R35 000 001.00 and R70 000 000.00; 10 points for a tenderer who

[13] Regulation 1 of the Preferential Regulations, 2017.

recovered between R70 000 001.00 and R100 000 000.00; and 15 points for a tenderer who recovered more than R100 000 000.00; (functionality criterion 4)

35.5. having at least one company director who must be a qualified chartered accountant registered with SAICA for a minimum of 36 months for both the company and membership thereof: a tenderer would score 0 points if it did not have such a director and 25 points if it had; (functionality criterion 5)

35.6. providing a detailed analysis of the financial system as evidence of their capability to provide the required services: tenderers would score 10 points if they provided such analysis of their financial system; (functionality criterion 6) and

35.7. providing a plan to transfer skills to municipal officials: tenderers would score 5 points if they had such a plan. (functionality criterion 7)

36. The municipality scored the applicant as follows for functionality: 15 out of 15 for criterion 1; 15 out of 20 for criterion 2; 10 out of 10 for criterion 3; 15 out of 15 for criterion 4; 0 out of 25 for criterion 5; 5 out of 10 for criterion 6; and 0 out of 5 for criterion 7. Except for the allocation of points in respect of criterion 5, the applicant contended that the municipality scored it wrongly in respect of criteria 2, 6 and 7. I shall deal with each of those functionality criteria before dealing separately with criterion 5.

37. The tender document specified that tenderers would score 20 points if they submitted proof that they entered into more than 25 contracts with local government institutions (criterion 2). The municipality gave the applicant a score of 15 in this regard. The applicant attached documents to its tender which show that between 26 June 2003

and 12 June 2020 it entered into no less than 29 contracts with various local government institutions. Most of those contracts were for the provision of VAT recovery services and accordingly relevant to this tender. Although the applicant raised this as a specific issue in its founding affidavits, the municipality did not deal with it in its answering affidavit. The applicant's allegations in that regard are accordingly undisputed. In my view, there was no reason not to have scored the applicant 20 points for criterion 2.

38. The tender document also specified that tenderers were required to give a detailed description of how they proposed to successfully manage and implement the project during the various stages, with milestones clearly indicated. The applicant alleged that it fully complied with criterion 6. Based on the allocation of 5 points for criterion 6, it was the applicant's case that the municipality should have allocated a score of either 0 or 10 points to it as the tender document did not provide for a score of 5 points. I am of the view that when the municipality allocated 5 points to the applicant in respect of criterion 6, it acknowledged that the applicant provided proof of its capabilities to provide the required service and that it provided the municipality with a detailed description of how it would successfully manage and implement the project. The situation called upon the municipality to explain why it did not score the applicant 10 out of 10 in this regard. It failed to furnish an explanation. There is in my view no reason for the municipality allocating a score of only 5 points to the applicant when it fully complied with criterion 6. The municipality should have allocated the score of 10 points to the applicant in respect of criterion 6.

39. In respect of criterion 7, the tenderers were required to set out a plan to transfer skills to the municipality's officials. They were required to set out how they would implement

that plan and how the plan would be measured. In its tender documents the applicant stated that it would give training to the municipality's nominated officials at no cost to the municipality. The training was envisaged to be in the form of a workshop covering VAT and SARS e-filing. Specific aspects of those topics were identified. It was envisaged that attendees at the workshop would receive a VAT workshop/training manual and a participation certification thereafter. The applicant also planned to assist employees with the practical application of VAT for the duration of the project, thereby transferring skills to them to perform the full VAT function in future. Once again, although this aspect was specifically raised by the applicant in its supplementary founding affidavit, the municipality failed to explain why it scored the applicant 0 out of 5 in this regard. The applicant's evidence in this regard is accordingly undisputed. I am of the view that the applicant has fully complied with criterion 7 and should have been allocated a score of 5 points.

40. In the circumstances, in addition to the 60 points allocated to the applicant by the municipality in respect of functionality, the municipality should have awarded the applicant an additional 15 points, being 5 points for each of criteria 2, 6 and 7. That being the case, the applicant should have been allocated more than the minimum qualifying score of 70 in respect of functionality. It follows that, because it should have scored 75 points in respect of functionality, the applicant should not have been disqualified. It was unfairly treated insofar as the allocation of points for functionality is concerned. For that reason, the tender was invalid.

Company director who is a chartered accountant

41. Functionality criterion 5 required of a tenderer (i) to be a company; (ii) that the company should have at least one director as a chartered accountant; (iii) that such a

chartered accountant must have been registered as a member of SAICA for a minimum of 36 months; and (iv) that such a chartered accountant must have been a director of the company for a minimum of 36 months. The applicant contended that functionality criterion 5 was unreasonably restrictive and irrational.

42. A rationality review requires an evaluation of the relationship between the means employed to achieve a particular purpose on the one hand, and the purpose or end itself on the other. The question to be answered is whether the means employed are rationally related to the purpose for which the power was conferred.[14]

43. Administrative action which is not rationally connected to the purpose for which it was taken is reviewable.[15] In *Airports Company South Africa SOC Ltd v Imperial Group Ltd and others*[16] the court considered whether the issue and publication of a tender constituted an administrative action that could be challenged on review under PAJA. It found that the tender in that case constituted an administrative action and could therefore be subjected to judicial review. There is no reason why the municipality's decision to publish the tender in the present matter cannot be reviewed in these proceedings at this stage.

44. The purpose of the tender was to secure a tenderer who could provide the municipality with VAT recovery services for 36 months. In terms of the scope of work contained in the tender document, the successful tenderer was required to examine the validity of VAT charged by suppliers of goods and services to the municipality, determine the VAT payable by the municipality and recover VAT due to the municipality. The

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[14] *Zuma v Democratic Alliance and others* (771/2016, 1170/2016) [2017] ZASCA 146; [2017] 4 All SA 726 (SCA); 2018 (1) SA 200 (SCA); 2018 (1) SACR 123 (SCA) at par 82.
[15] See section 6(2)(f)(ii) of PAJA.
[16] *Airports Company South Africa SOC Ltd v Imperial Group Ltd and others* (1306/18) [2020] ZASCA 2; [2020] 2 All SA 1 (SCA); 2020 (4) SA 17 (SCA).

applicant's case was that the requirement of a chartered accountant was unnecessary for a tenderer to perform the functions set out under the scope of work. It contended that a registered tax practitioner, as envisaged in section 240 of the Tax Administration Act,[17] was more than capable to perform all the services set out in the scope of work in the tender document.

45. In view of the fact that the applicant specifically placed the rationality of functionality criterion 5 in issue,[18] one would have expected the municipality to explain why it insisted that a chartered accountant be a director of the successful tenderer. The municipality's response was simply that the applicant had no right to prescribe to it "*a functionality criteria* (sic) *that would be suitable to it as a tenderer*" and that its bid specification committee determined that functionality criterion. That response is unhelpful because it did not attempt to explain why the provision of VAT recovery services required the directorship of a chartered accountant, as opposed to, for example, the employment by the tenderer of a registered tax practitioner.

46. In my view, a registered tax practitioner is more than capable to advise a municipality on the amounts that it must pay in respect of VAT or the amounts that it could claim in respect of VAT and to recover the amounts payable to the municipality. The insistence by the municipality on a chartered accountant has been left unexplained. In my view, there is no relationship between the provision of VAT recovery services for the municipality (the purpose or end), on the one hand, and the recovery through a chartered accountant director of a tenderer (the means to achieve that end), on the other hand. On the evidence adduced, the purpose of the tender could be achieved without the engagement of a chartered accountant. The municipality's decision to

[17] Tax Administration Act, 2011 (Act 28 of 2011).
[18] This issue was framed by PK as the mainstay of the applicant's case.

publish a tender, which makes the directorship of a chartered accountant by the successful tenderer a criterion is, in my view, not rationally connected to the purpose, namely the provision of VAT recovery services. The municipality's decision to publish the tender with criterion 5 in it was accordingly irrational. It is liable to be set aside.

Tender not opened in public

47. The applicant alleged that the tender process was procedurally unfair because the tenders were not opened in public, as stated in the tender document. The register, in which all the tenders which were received were recorded, was made available to the applicant only on 7 August 2020, after the adjudication of the tender. It was not made available for public inspection, as required by the municipality's Policy. The municipality admitted that the tenders were not opened in public. It stated that it "*could not comply with the requirements relating to public participation due to the hard lockdown that prevailed at the time. To add, the [municipality] was one of the hotspot areas in the country*".

48. Section 217(1) of the Constitution obliges an organ of state, like the municipality, to contract for goods or services in accordance with a system which is fair, equitable, transparent, competitive and cost-effective. Regulation 23 of the Municipal Supply Chain Management Regulations provides the procedure of the handling, opening and recording of tenders. The relevant portion provides that a municipality's supply chain management policy must:

*"(a) stipulate that bids –*

*(i) may be opened only in public; and*

*(ii) must be opened at the same time and as soon as possible after the period for the submission of bids has expired;*

> *(b) confer on any bidder or member of the public the right to request that the names of the bidders who submitted bids in time must be read out and, if practical, also each bidder's total bidding price; and*
>
> *(c) require the accounting officer –*
>
> > *(i) to record in a register all bids received in time;*
> >
> > *(ii) to make the register available for public inspection; and*
> >
> > *(iii) to publish the entries in the register and the bid results on website of the Municipality or municipal entity."*

49. The municipality's council passed its final Supply Chain Management Policy, which became effective from 1 July 2020. Paragraph 23 thereof is a replica of regulation 23, save that it added that tenders received after the closing time should not be considered and returned unopened immediately.

50. The municipality contended that it could not open the tenders publicly "*due to the hard lockdown that prevailed at the time*". It did not state in what manner the alleged hard lockdown prevented it from publicly opening the tenders.

51. On 15 March 2020 the Minister of Co-operative Governance and Traditional Affairs declared a national state of disaster in terms of the Disaster Management Act.[19] Various regulations were thereafter made in terms of the Disaster Management Act. On 28 May 2020 the Minister issued regulations[20] wherein she determined that alert level 3 would apply nationally from 1 June 2020 and declared certain metros and districts hotspots for Covid-19. The Chris Hani District was declared a hotspot. The municipality falls within the Chris Hani District.

52. Regulation 33 of the 28 May 2020 Regulations provided for the movement of persons. In terms of regulation 33(1)(b) a person was allowed to travel to and from work.

[19] Disaster Management Act, 2002 (Act 57 of 2002).

[20] Published in Government Gazette No 43364, Government Notice No 608 of 28 May 2020.

Regulation 33(3) permitted persons to enter public buildings, provided that such persons wore cloth face masks. In terms of regulation 37, all gatherings were prohibited except *inter alia* a gathering at a work place for work purposes. Regulation 37 was amended on 25 June 2020.[21] The amended regulation permitted conferences and meetings, which were subject to (i) a limitation of 50 persons, excluding those who participate through electronic platforms; (ii) restricted to business purposes; and (iii) strict adherence to all health protocols and social distancing measures as provided for in directions that must be issued by the responsible Cabinet member, after consultation with the Minister of Health. Regulation 46(1) allowed businesses and other institutions to operate, except those set out in Table 2 of the Regulations. The rendering of public service was not excluded by Table 2, which provided that persons who were able to work from home must do so. However persons were permitted to do any type of work outside the home, and to travel to and from work and for work purposes under alert level 3, provided that (i) there was strict compliance with health protocol and social distancing measures; (ii) the return to work was phased in in order to put in place measures to make the workplace Covic-19 ready; (iii) the return to work was done in a manner that avoided and reduced the risk of infection; and (iv) the work was not listed under the specific economic exclusions in Table 2.

53. Although a state of disaster had been declared and although the municipality fell within an area which had been declared a hotspot at the relevant time, those declarations did not prevent the municipality from opening the tenders in public. In terms of regulations 33, 37 and 46 it was possible for the municipality to open those tenders in public, provided that there was strict adherence with health protocols and the prescribed social distancing measures. The state of disaster and the declaration of the

[21] The amendment was published in Government Gazette No 43476, Government Notice No 714 of 25 June 2020.

geographical area of the municipality as a hotspot gave the municipality no excuse not to open the tenders in public.

54. The requirement that tenders must be opened only in public is to ensure compliance with the constitutional requirement of transparency. The municipality's Policy gave tenderers and members of the public the right to request that the names of tenderers who submitted their tenders in time and the total tender price of each tenderer be read out to ensure a procurement system which is transparent, competitive and cost-effective. The process prior to the adjudication of the tender lacked transparency because the tenders were not opened in public. Between the advertisement of the tender and the adjudication thereof, the tender was not subject to public scrutiny. The tenderers, the applicant being one who specifically requested compliance with the Policy in that regard, and members of the public were accordingly denied the opportunity to observe that the process was conducted fairly.[22]

Cost-effectiveness and competition

55. Parliament passed the Preferential Procurement Policy Framework Act[23] (PPPFA) to give effect to section 217(3) of the Constitution. The PPPFA provides a framework for the implementation of the procurement policy contemplated in section 217(2) of the Constitution. Section 2 of the PPPFA provides a framework for the implementation of preferential procurement policy. Section 2(1) obliges an organ of state, like the municipality, to determine its preferential procurement policy. Section 2(1)(f) obliges an organ of state to implement its policy within a framework that obliges it to award a contract to the tenderer who scores the highest points, unless objective criteria justify

[22] *South African National Roads Agency Ltd v The Toll Collect Consortium and another* [2013] ZASCA 102; [2013] 4 All SA 393 (SCA); 2013 (6) SA 356 (SCA) at par 18.
[23] Preferential Procurement Policy Framework Act, 2000 (Act 5 of 2000).

the award to another tenderer. Regulation 11 of the Preferential Procurement Regulations, 2017[24] provides for the award of contracts to tenderers who did not score the highest points. Regulation 11(2) provides that an organ of state which intends to apply objective criteria to justify the award of a tender to a tenderer who did not score the highest points, must stipulate the objective criteria in the tender documents. The municipality admitted that the tender documents did not stipulate the objective criteria that might have justified an award to a tenderer that did not score the highest points. In terms of paragraph 2 of the municipality's Policy, its officials and other role players in the municipality's supply chain management system must implement the municipality's Policy in a way that gives effect to section 217 of the Constitution. In the circumstances and absent the stipulation of objective criteria in the tender documents to justify the tender to a tenderer other than the one that scored the highest points, the municipality was obliged by section 217(1) of the Constitution, section 2(1)(f) of the PPPFA and paragraph 2(1) of its Policy to award the tender to the tenderer who scored the highest points.

56. The parties tendered to charge the following commission on VAT recovered for the municipality for the entire period of the tender: the applicant 5%, PK 15%, the fourth respondent 10% and the fifth respondent 14.95%. The above comparison shows that the applicant was the cheapest while PK was the most expensive.

57. The municipality did not explain why it awarded the tender to PK, which would have charged thrice the percentage that the applicant would have charged had it been the successful tenderer. In the absence of any justification therefor, the tender was neither cost-effective nor competitive.

[24] Published under Government Notice R32 in Government Gazette 40553 of 20 January 2017.

Invoices and payments

58. Mr Els submitted that the applicant sought an order that the municipality and PK disclose the invoices and payments received by the respective parties subsequent to PK's appointment as the successful tenderer "*as part of an appropriate remedy*" because "*the tender envisaged further possible ad hoc services to be rendered*" by PK to the municipality. That submission cannot be sustained. In view of the outcome of this application, neither the municipality nor PK can act in terms of the tender. Secondly, the applicant can use the provisions of the Promotion of Access to Information Act[25] to secure the production of or access to the documents and information sought. The relief sought in that regard must accordingly be refused.

Relief

59. The tender and the process of awarding it to PK were inconsistent with the provisions of section 217 of the Constitution as the tender and the process of its award lacked the attributes of fairness, transparency, competitiveness and cost-effectiveness. Conduct that is inconsistent with the Constitution is invalid. In my view, because of the nature of the irregularities, a just and equitable remedy would be to set aside the tender.

Costs

60. PK opposed the application primarily because, in its amended notice of motion, the applicant sought an order that the award of the tender to PK be set aside and substituted therefor an order that it be awarded to the applicant. PK also contended that the applicant delayed to seek an order that the municipality's decision to issue and publish the tender be reviewed and set aside; that the further relief sought in the

[25] Promotion of Access to Information Act, 2000 (Act 2 of 2000).

amended notice of motion was incompetent; and that the relief sought by the applicant was not equitable.

61. The applicant wisely did not persist with its quest to obtain an order that it should be substituted for PK as the successful tenderer. Such relief is granted only in exceptional cases. This court has also refused to order the municipality and PK to disclose invoices submitted by PK to the municipality and proof of payments made by the municipality to PK since the latter's appointment as service provider. PK has had some success in its opposition in this application. It would accordingly be unfair to make a costs order against it. The same cannot be said about the municipality which did not contest the substantive part of the application, but persisted with the points *in limine* raised in its answering affidavit, both of which had been dismissed. In the circumstances, it would be appropriate to order the municipality to pay the applicant's costs of the application.

Order

62. In the result, it is ordered that:

62.1. the tender (BID No IYM 02/07/2020T) that the first respondent published on 7 July 2020 for the provision of VAT recovery services for 36 months be and is hereby set aside; and

62.2. the first respondent shall pay the applicant's costs of the application, such costs to include the costs of the employment of two counsel.

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G H BLOEM
Judge of the High Court

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| For the applicant: | Mr A P J Els and Mr G Brown, instructed by Albert Hibbert Attorneys, Pretoria and de Jager Lordan Attorneys, Grahamstown. |
| For the first and second respondents: | Mr S Nzuzo, instructed by Zepe & Company Attorneys, Queenstown and Yokwana Attorneys, Grahamstown. |
| For the third respondent: | Mr A E Ayayee, instructed by Ncube Inc. Attorneys, Parktown and Wheeldon Rushmere and Cole Inc, Grahamstown. |
| Date heard: | 11 December 2020. |
| Date of delivery of the judgment: | 16 February 2021. |