IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG

Reportable/Not Reportable

Case No: 17686/23P

In the matter between:

MAXIMUM PROFIT RECOVERY (PTY) LTD	**APPLICANT**
(Registration No: 2001/005576/07)	

and

UMLALAZI MUNICIPALITY	**FIRST RESPONDENT**
NN SHANDU	**SECOND RESPONDENT**
BONAKUDE CONSULTING (PTY) LTD	**THIRD RESPONDENT**
(Registration No: 2002/021160/07)	
DYNAMIC DASHING SOLUTIONS (PTY) LTD	**FOURTH RESPONDENT**
(Registration No: 2015/303045/07)	
MORAR INC	**FIFTH RESPONDENT**
(Registration No: 2000/008551/21)	
NTSHIDI AND ASSOCIATES CC	**SIXTH RESPONDENT**
(Registration No: 2007/188775/23)	
PK FINANCIAL CONSULTANTS CC	**SEVENTH RESPONDENT**
(Registration No: 2001/037349/23)	
PROMILEZI (PTY) LTD	**EIGHTH RESPONDENT**
(Registration No: 2017/391751/070	
UMNOTHO BUSINESS CONSULTING-1 CC	**NINTH RESPONDENT**
(Registration No: 2006/126745/23)	
MNTAMBO FINANCIAL CONUSLTING CC	**TENTH RESPONDENT**
(Registration No: 2008/252513/23)	

ORDER

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1. That the decision of the first respondent to issue and publish Tender KZN ULM 05/23/24 for the appointment of a panel for the provision of quality assurance on accounting services for the period of three (3) years ("the Tender") is declared constitutionally invalid.
2. That the decision to award the Tender to the third to tenth respondents, declared constitutionally invalid.
3. That it is declared that the further tender process followed by the first respondent subsequent to the tender award referred to in paragraph 2 above, is declared constitutionally invalid.
4. That the decision of the first respondent to appoint the sixth respondent, for review and recovery of value added tax for a period of twelve (12) months at a percentage of 9.2% in terms of the letter of award dated 14 November 2023 is declared constitutionally invalid.
5. That any agreement concluded between the first respondent and the third to tenth respondents, pursuant to the awarding of the Tender, is set aside.
6. The first and second respondents are ordered to pay the costs jointly and severally, the one paying the other to be absolved, such costs to include the costs of two counsel, on scale C.
7. The sixth respondent is ordered to pay the applicant's costs insofar as they relate to the reply to the sixth respondent's answering affidavit.

JUDGMENT

Marion AJ

Introduction

[1] This is a semi-urgent application launched by the applicant in November 2023. The applicant sought the following relief in its amended notice of motion:

‘1. That this application be heard as an urgent application in terms the provisions of Rule 6(12) of the Uniform Rules of Court and that the necessary condonation be granted to the applicant in respect of the non-compliances with the prescribed time limits, forms and service;
2. That the decision of the first respondent to issue and publish Tender KZN ULM 05/23/24 for the appointment of a panel for the provision of quality assurance on accounting services for the period of three (3) years (“the Tender”) be declared constitutionally invalid, reviewed and set aside;
3. That the decision to award the Tender to the third to tenth respondents, be declared constitutionally invalid, reviewed and set aside;
4. That it be declared that the further tender process followed by the first respondent subsequent to the tender award referred to in paragraph 3 above, be declared constitutionally invalid, reviewed and set aside;
5. That the decision of the first respondent to appoint the sixth respondent, for review and recovery of value added tax for a period of twelve (12) months at a percentage of 9.2% in terms of the letter of award dated 14 November 2023 be declared constitutionally invalid, reviewed and set aside;
6. That any agreement concluded between the first respondent and the third to tenth respondents, pursuant to the awarding of the Tender, be set aside;
7. That the applicant be exempted, insofar as it might be necessary, from any obligation of first exhausting any internal remedy as contemplated in section 7(2)(c) of the Promotion of Administrative Justice Act, 3 of 2000;
8. That the first and second respondents, jointly and severally, be ordered to pay the applicant’s costs, alternatively, and only in the event that the application is also opposed by any of the other respondents, that the first and second respondents, jointly and severally together with such other respondents, be ordered to pay the costs of the application’.

[2] The applicant, Maximum Profit Recovery (Pty) Ltd, is a company duly registered and incorporated in terms of the company laws of South Africa. The first respondent is the uMlalazi Municipality, a municipality established in terms of section 12 of the Local Government: Municipal Structures Act 117 of 1998. The second respondent was cited in his capacity as the first respondent’s municipal manager and accounting officer. The third to tenth respondents submitted tenders in response to the invitation to tender. Arguments in this matter were heard on 22 July 2024 and 29 July 2024.

[3] The sixth and ninth respondents filed a notice to abide the court’s decision. The sixth respondent also filed an affidavit to which the applicant filed a replying affidavit.

The gist of the applicant's argument in their reply was that the sixth respondent made averments to oppose the relief sought by the applicant whilst at the same time submitting that they will abide by the court's decision. I agree with the applicant's argument that this was not 'merely an explanatory affidavit, but an answering affidavit actively opposing the relief sought by the applicant.'[1] The sixth respondent's answering affidavit[2] contains contradictory views and in all fairness to the parties, I will not attach any weight thereto. A supplementary affidavit was filed by the sixth respondent on 29 July 2024 with the consent of the applicant. The sixth respondent's representative was present in court at the first hearing of arguments on 22 July 2024 and sought to file this affidavit to assist the court. The sixth respondent initially assumed that their 'acceptance of the original tender award, being the awards made to the panel of successful tenderers on 23 September 2023 was common cause.'[3] The sixth respondent filed annexure "ZM1" as proof of their acceptance to the panel. The supplementary affidavit is accepted by the court as *prima facie* evidence of the sixth respondent's acceptance of the offer. The seventh respondent withdrew their notice of intention to oppose this application.[4] The application is accordingly opposed by the first and second respondents only. The first and second respondents will be referred to jointly as 'the respondents', unless the context requires otherwise.

[4] The matter was first heard on 30 January 2024 when this court granted an order regulating the exchange of further affidavits. The issue of urgency was accordingly dispensed with. Due to the late filing of a supplementary record by the first respondent, it became necessary for the applicant to file a supplementary affidavit. On 12 February 2024, a day before the first respondent's answering affidavit was due, the first respondent discovered further documents. This once again necessitated the filing of a second supplementary affidavit by the applicant.

[5] At the outset, I would like to thank counsel for their assistance with the filing of comprehensive heads of arguments and oral submissions in this matter. In this regard,

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[1] The papers, vol 6 at 527 para 5.
[2] The papers, vol 6 at 481-488.
[3] Sixth respondent's supplementary affidavit para 4.
[4] The papers, Notices Bundle at 113-119.

Mr Els SC and Mr Louw appeared for the applicant and Ms Nicholson for the first and second respondents. The papers in this matter are voluminous.

Background

[6] On 31 July 2023 the first respondent published an invitation to tender for the 'appointment of a panel for the provision of quality assurance on accounting services for the period of three (3) years' under tender reference KZNULM 05/2023/25 (the tender). The tender contemplated the appointment of a panel to render the following services: general accounting; VAT recovery; actuarial; and internal auditing.

[7] The tender contained one set of functionality criteria that applied to all the different disciplines and the tender did not require tenderers to tender on price. The minimum threshold score that had to be achieved by any participating tenderer to pass the functionality assessment was 75 out of 100 points. The applicant scored 68/100 points in respect of the functionality assessment.

[8] Pursuant to the evaluation of the tenders, the respondents appointed the third to tenth respondents as the panel. The fourth, fifth, sixth,[5] seventh and tenth respondents formally accepted the appointment as part of the panel. After the appointment to the panel, the respondents requested three of the members to submit quotations. (fifth, sixth and seventh respondents) However, only the sixth and seventh respondents submitted quotations. On 14 November 2023, the respondents appointed the sixth respondent to render VAT review services for a period of 12 months at a rate of 9.2% per month.

Issues to be determined

[9] Apart from the review application, with the specific issues set out hereunder, the respondents raised two points *in limine*, where the respondents state that the applicant failed to exhaust two alternative (or internal) remedies; namely,

(a) an appeal in terms of section 62 of the Local Government: Municipal Systems Act 32 of 2000 (MSA), and

[5] Annexure "ZN1" of the sixth respondent's supplementary affidavit.

(b) an appeal to the Municipal Bid Appeals Tribunal as provided in clause 50A of the first respondent's Supply Chain Management Policy (SCMP).

If the respondents are successful on any or both points *in limine*, that will put an end to this application.

[10] However, if the respondents are not successful, the following issues in this application are to be decided:

(a) whether the functionality criteria in the tender document were irrational.

(b) whether it was irregular to include four separate disciplines in one tender.

(c) whether it was irregular that the tender document made no provision for any preference point scoring.

(d) whether it was irregular for the first respondent to request certain members of the panel to submit quotations for individual appointments after the tender process came to an end.

(e) whether the tender process offends the constitutional imperatives of section 217 of the Constitution.

(f) whether the irregularities in the tender process constitute valid grounds of review in terms of the Promotion of Administration to Justice Act 3 of 2000 (PAJA).

(g) whether the appropriate remedy in this matter is to finally set aside the tender award made in favour of sixth respondent.

Did the applicant exhaust their internal remedies?

[11] The first issue that requires determination is the respondents' argument that the applicant should not have brought this application without first exhausting the internal remedies available to them. In terms of section 7(2)*(a)* of PAJA:

'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'.

Section (7)(2)*(c)* of PAJA states that 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.'

[12] The court in *DDP Valuers (Pty) Ltd v Madibeng Local Municipality*[6] stated:

'Generally, the duty to exhaust internal remedies is not in and of itself absolute nor is it automatic. That much is clear from the latitude given to courts in s 7(2)*(c)* of the PAJA, to exempt applicants, in exceptional circumstances and upon application made by the person concerned, from exhausting internal remedies if deemed by the court to be in the interest of justice. Furthermore, "a court will condone a failure to pursue an available remedy where the remedy is illusory or inadequate, or because it is tainted by the alleged illegality". Under the common law, the two "paramount considerations" are (a) whether the domestic remedies are capable of providing effective redress, and (b) whether the alleged unlawfulness undermines the internal remedies themselves.' (footnotes omitted)

[13] The respondents submitted that the applicant had two alternative internal remedies available to it namely, (a) an appeal in terms of section 62 of the MSA which must be exercised within 21 days of notification of the decision and (b) an appeal to the Municipal Bid Appeals Tribunal as provided for in terms of clause 50(A) of the first respondent's Supply Chain Management Policy ('SCMP').[7] The respondents raised the applicant's failure to exhaust these internal remedies as two separate points *in limine*. The respondents argued that[8]

'The applicant wrote correspondence to the first respondent notifying them of the applicant's objections to the functionality criteria in August 2023. However, once the notice of intention to award was published and when the applicant become aware of the award, it took no steps to launch either internal remedy.'

First point in limine: The remedy in terms of section 62 of the MSA

[14] The respondents submitted that the appeal process in terms of section 62 of the MSA was recorded in the tender document and is applicable in this matter.[9] Section 62 of the MSA 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

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[6] *DDP Valuers (Pty) Ltd v Madibeng Local Municipality* [2015] ZASCA 146 (*DDP Valuers*) para 14.
[7] See the papers at 274, regarding the Supply Chain Management Policy ('SCMP').
[8] First and second respondents' heads of argument para 6 at 3.
[9] The papers at 81.

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.'

[15] A decision taken regarding terms or conditions of a tender have been held to constitute administrative action that may be legally challenged under review in terms of PAJA. What administrative action entails, in terms of PAJA, was summarised in *Airports Company South Africa SOC Ltd v Imperial Group Ltd* as follows:[10]

'The definition of "administrative action" in s 1 of PAJA has seven components: (a) there must be a decision of an administrative nature; (b) by an organ of state or a natural or juristic person; (c) exercising a public power or performing a public function; (d) in terms of any legislation or empowering provision; (e) if that decision adversely affects the rights of any person; (f) or has a direct, external legal effect; and (g) does not fall under any of the exclusions listed in that section.' (footnotes omitted)

[10] *Airports Company South Africa SOC Ltd v Imperial Group Ltd and others* [2020] ZASCA 2; [2020] 2 All SA 1 (SCA) (*ACSA*) para 16.

[16] The applicant submits that the first administrative decision taken by the respondents was to publish the tender. They argued that the 'purpose of the inclusion of functionality criteria in a tender is to establish whether or not a tenderer will be able to perform in terms of the work or services contemplated in the tender.'[11] They went on to argue 'that the functionality criteria should be rationally connected to the specific services required.'[12] The applicant submitted that the pre-qualification criteria in the tender that related to the directors of the tendering company being chartered accountants (with specific reference to services for VAT and actuarial work) and requesting for the experience of the 'leading partner' of the tendering company, was erratic and irregular. The applicant argued that it was this administrative decision that it sought to set aside.

[17] The applicant submitted that the 'first respondent had deliberately failed to timeously advise the applicant of the outcome of the tender.'[13] The applicant became aware of the 'Intention to Award Notice' around the 7 November 2023. By that time the notice had already been published for 6 weeks and the period to lodge an appeal had already expired. The respondents argued that they had no obligation to inform the applicant that they were unsuccessful, as this was published on their website.[14] In *Chairman of the State Tender Board v Digital Voice Processing (Pty) Ltd; Chairman of the State Tender Board v Sneller Digital (Pty) Ltd* the court held:[15]

'Generally speaking, whether an administrative action is ripe for challenge depends on its impact and not on whether the decision-maker has formalistically notified the affected party of the decision or even on whether the decision is a preliminary one or the ultimate decision in a layered process. . .. Ultimately, whether a decision is ripe for challenge is a question of fact, not one of dogma.'

In terms of the tender documents, the respondent placed the notice to award the tender on their website on 26 September 2023. In terms of the internal remedy provided in section 62 of the MSA, the applicant would have 21 days from the date when the notice of intention to award was published, to launch this internal remedy. The respondents did not need to formally notify the applicant that they were

[11] Applicant's heads of arguments at 8 para 2.5.
[12] Ibid.
[13] The papers at 42 para 15.11
[14] First and second respondents' heads of argument at 3 para 5.1, specifically footnote 7.
[15] *Chairman, State Tender Board v Digital Voice Processing (Pty) Ltd; Chairman, State Tender Board v Sneller Digital (Pty) Ltd and others* [2011] ZASCA 202; 2012 (2) SA 16 (SCA) para 20.

unsuccessful. The applicant did not elect to utilise this remedy within the required time frame. In any event, the applicant submitted that to first exhaust an internal remedy would have severely prejudiced the applicant who sought an appropriate remedy in terms of section 172(1)*(b)* of the Constitution.

[18] The respondents argued that in terms of section 7 of PAJA that 'an internal remedy must be exhausted prior to judicial review, unless the appellant can show exceptional circumstances to exempt him from this requirement.'[16] *Koyabe v Minister for Home Affairs* specifically states that[17]

'… unless exceptional circumstances are found to exist by a court on application by the affected person, PAJA, which has a broad scope and applies to a wide range of administrative actions, requires that available internal remedies be exhausted prior to judicial review of an administrative action.' (footnote omitted)

[19] The court expanded its explanation of exceptional circumstances further in *Koyabe* and stated that:[18]

'What constitutes exceptional circumstances depends on the facts and circumstances of the case and the nature of the administrative action at issue. Thus, where an internal remedy would not be effective and or where its pursuit would be futile, a court may permit a litigant to approach the court directly. So too where an internal appellate tribunal has developed a rigid policy which renders exhaustion futile.' (footnote omitted)

[20] The respondents were adamant that the applicant had failed to identify any exceptional circumstances to justify being exempt from exhausting its internal remedies. The respondents argued that the internal remedy available to the applicant was provided for in terms of section 62 of the MSA and if the applicant had elected to go this route, a decision by the Municipal Bid Appeals Tribunal would both have been effective and adequate. They went on to argue that due to the lapse of time this remedy was no longer available to the applicant, however, this should not be a justification for the applicant not having timeously pursued it. The applicant argued that the failure of the respondents to notify them timeously that they were unsuccessful as well as the

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[16] See the first and second respondents' heads of argument para 7 at 3. The respondents referred to *Koyabe and others v Minister for Home Affairs and others (Lawyers for Human Rights as amicus curiae)* [2009] ZACC 23; 2010 (4) SA 327 (CC); 2009 (12) BCLR 1192 (CC) (*Koyabe*) para 34.
[17] *Koyabe* para 34.
[18] *Koyabe* para 39.

prejudice to have to first exhaust an internal remedy, were exceptional circumstances as contemplated in section 7(2)*(c)*. Mr Els contended that one cannot get condonation for the 21 days as the period lapses. He referred the court to the case of *Amandla GCF Construction CC v Municipal Manager, Saldanha Bay Municipality*[19] where the court stated the following:

'There is no general power afforded to the Municipality (acting through its officials or office bearers) to extend a statutory time period, except if that power is conferred on it, as allowed in that particular section of the statute. In the end, it comes down to the interpretation of that particular statute. Therefore, if the legislature intended a statute to operate as an absolute bar, the "general power", if there was any, could not trump that intention.'

[21] The respondents argued that the decision to appoint the third to tenth respondents to the panel was made by the first respondent's Bid Adjudication Committee (BAC) at its meeting on 20 September 2023 and not by the municipal manager.[20] This decision was made in terms of delegated and/or sub-delegated power or duty.[21] Mr Els argued that the BAC makes the recommendation but the decision to award is made by the second respondent. He stated further that the second respondent exercised an original power as opposed to a delegated power when appointing the panel. The court was referred to the matter of *Maximum Profit Recovery (Pty) Ltd v Inxubu Yethemba Local Municipality* where Bloem J analyses these issues as follows:[22] '

'[16] . . . In terms of section 60*(a)* of the Local Government: Municipal Finance Management Act (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 thereof. The Minister of Finance made regulations in terms of section 168 of the Municipal Finance Management Act.

[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

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[19] *Amandla GCF Construction CC and another v Municipal Manager, Saldanha Bay Municipality and others* 2018 (6) SA 63 (WCC) para 32.

[20] See the supplementary record at 49 for the Minutes of the Meeting of the Bid Adjudication Committee (BAC) held on 20 September 2023.

[21] Section 62 of the Local Government: Municipal Systems Act 32 of 2000.

[22] *Maximum Profit Recovery (Pty) Ltd v Inxubu Yethemba Local Municipality and others* [2021] ZAECGHC 11 (*Inxubu Yethemba*).

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.'[23] (footnotes omitted)

[22] Mr Els argued that the present matter is far worse than *Inxuba Yethemba* as it involved, not only a publication of the invitation to tender but, also an award of the tender. I agree with Bloem J's reasoning above and in applying it to this matter, I conclude that the second respondent exercised an original power in selecting the panel and awarding the VAT services to the sixth respondent.

[23] The following from *DDP Valuers* is important to note for this matter:[24]

'In this case, the appellant as an unsuccessful tenderer would have been entitled to appeal under section 62. However, the Municipality had already awarded the contract to the second respondent and the parties had already signed an agreement to that effect resulting in the rights accruing to the second respondent. It follows that the appellant could not resort to that procedure in order to comply with s 7(2) of the PAJA.'

I agree that an appeal as contemplated in section 62 is no longer available because the contract has been awarded to the sixth respondent who has accepted the contract and accordingly rights have accrued to them. In light thereof the appeal envisaged in section 62 of the MSA was not available to the applicant and did not constitute an internal remedy for the applicant as explained in section 7(2)*(a)* of PAJA.

Second point in limine: The remedy in terms of clause 50(A) of the first respondent's SCMP

[24] The respondents argued that the second internal remedy that the applicant could have elected to utilise was provided for in clause 50A of the first respondent's SCMP. Clause 50A states the following:

'Municipal Bid Appeals Tribunal

(1) The council shall establish a Municipal Bid Appeals Tribunal for its area of jurisdiction to hear and determine an appeal against the award of a bid or make use of the Tribunal established by Provincial Treasury.

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[23] *Inxubu Yethemba* para 17.
[24] *DDP Valuers* para 25.

(2) The accounting officer of the municipality, in consultation with the Provincial Treasury, shall appoint the Chairperson, Deputy Chairperson and Members of the Municipal Bid Appeals Tribunal.
(3) The powers, duties and functions of the Municipal Bid Appeals Tribunal, and matters incidental thereto, are set out in the Rules which must be appended to this Supply Chain Management Policy.
(4) The administrative and secretarial work involved in the performance of the duties and functions of the Municipal Bid Appeals Tribunal shall be performed by officers of the Provincial Treasury as set out in the Rules referred to in clause 50A.3.
(5) There shall be no further appeal against a decision of the Municipal Bid Appeals Tribunal.'

[25] Regulation 50(7) of the Municipal Supply Chain Management Regulations, 2005, GN 868, *GG* 27636 of 30 May 2005 (Municipal Supply Chain Management Regulations), states that '[t]his regulation must not be read as affecting a person's rights to approach a court at any time.' The ruling in *Maximum Profit Recovery (Pty) Ltd v Bela-Bela Local Municipality* in its discussion of regulation 50, referring to *DDP Valuers*, makes it clear that 'since there is no obligation on a disgruntled tenderer to utilise its provisions, that these procedures do not constitute an internal remedy as is contemplated in Section 7 of PAJA' (footnotes omitted).[25] The applicant cannot be faulted for approaching the court to launch a judicial review of the tender rather than electing to lodge an appeal in terms of clause 50A. In as much as internal remedies may be cost-effective and provide for expeditious results, the applicant ultimately elects what route to follow. Mr Els contended that the remedy sought must be an effective one, especially where rights have accrued. He maintained that the court should consider the authority in *DDP Valuers* in respect of this point. I agree with the reasoning in *DDP Valuers,* as well as the arguments advanced by Mr Els. In the result, the respondents fail with their arguments that the applicant ought to have lodged an appeal to the Municipal Bid Appeal Tribunal as provided in clause 50A of the first respondents SCMP.

Was the applicant required to exhaust its internal remedies?

[25] *Maximum Profit Recovery (Pty) Ltd v Bela-Bela Local Municipality and others* [2023] ZALMPPHC 41 para 30, see *DDP Valuers* paras 22 and 23.

[26] To conclude the issue of whether the applicant should have exhausted its internal remedies, I find that the applicant cannot be faulted for approaching the court to launch a judicial review of the tender rather than electing to lodge an appeal in terms of section 62 of the MSA or clause 50A of the SCMP. The application for review was not brought prematurely. The above two points *in limine* are accordingly dismissed.

Constitutional validity of the tender

[27] I will now deal with the applicant's grounds to declare the respondents' tender constitutionally invalid, reviewed, and set aside. The applicant submitted that the respondents' pre-qualification criterion for the directors of the tenderers to be chartered accountants (registered with SAICA)[26] was indicative of their obsession with having qualified chartered accountants on the panel at the expense of excluding other general accounting specialists (for example tax specialists or actuarial specialists). If all the directors did not have these qualifications, the tenderer would not be able to pass the minimum threshold and be appointed on the panel. The applicant argued that this functionality criteria was formulated to exclude competition and favour particular tenderers.

[28] On 14 August 2023, the applicant addressed a letter to the first respondent recording its objection to the functionality criteria of the tender. The applicant documented the reasons for their objection and more specifically stated that the functionality criteria in the tender were irrational and inconsistent with section 217 of the Constitution.

[29] The applicant requested an undertaking from the respondent confirming that they would not proceed with the evaluation of the tender or make any award but to cancel the tender and re-advertise. The applicant advised the first respondent that it would proceed to obtain the appropriate relief together with a punitive cost order, if the requested undertaking was not provided. The first respondent's attention was drawn to *Inxuba Yethemba* where on similar facts the court held that the functionality criteria was constitutionally invalid, reviewed and set aside. No response was forthcoming. A follow up letter, reiterating the above, also received no response. The first respondent

[26] SAICA refers to the South African Institute of Chartered Accountants.

then proceeded to award the tender to the successful tenderers. It is not disputed that the applicant was only awarded 68 out of 100 points and was not appointed to the panel. This precipitated the application before me.

[30] Section 217 of the Constitution provides:

'(1) When an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective.

(2) Subsection (1) does not prevent the organs of state or institutions referred to in that subsection from implementing a procurement policy providing for-

(a) categories of preference in the allocation of contracts; and

(b) the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination.

(3) National legislation must prescribe a framework within which the policy referred to in subsection (2) must be implemented.'

[31] In *AllPay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency*[27] the Constitutional Court stated the following with regards to section 217 of the Constitution:

'Compliance with the requirements for a valid tender process, issued in accordance with the constitutional and legislative procurement framework, is thus legally required. These requirements are not merely internal prescripts that . . . may [be] disregard at whim. To hold otherwise would undermine the demands of equal treatment, transparency and efficiency under the Constitution.' (footnotes omitted)

[32] The applicant submitted that the 'first respondent is required to comply with the peremptory provisions of section 217 of the Constitution and ensure that its procurement system is fair, equitable, transparent, competitive and cost effective.'[28] The applicant further drew the court's attention to the relevant legislation with which the first respondent is required to comply with in tender matters. The respondents

[27] *AllPay Consolidated Investment Holdings (Pty) Ltd and others v Chief Executive Officer of the South African Social Security Agency and others* [2013] ZACC 42; 2014 (1) SA 604 (CC); 2014 (1) BCLR 1 (CC) (*AllPay*) para 40.

[28] Applicant's founding affidavit at 20 para 11.2.

where ad idem that the same legislation was applicable in this matter. The courts attention was drawn to the following legislation:

(a) The Preferential Procurement Policy Framework Act 5 of 2000 ('the PPPFA');

(b) The Preferential Procurement Regulations, 2022, GN 2721, *GG* 47452 of 4 November 2022 ('the Procurement Regulations');

(c) The Local Government: Municipal Finance Management Act 56 of 2003 ('the MFMA');

(d) The Municipal Supply Chain Management Regulations (published in terms of section 168 of the MFMA);

(e) The first respondent's approved SCMP; and,

(f) The relevant Treasury Guidelines.

[33] The applicant argued that the first respondent contravened the provisions of the legislation set out hereunder. The relevant parts of section 2 of the PPPFA read as follows:

'(1) An organ of state must determine its preferential procurement policy and implement it within the following framework:

(a) A preference point system must be followed;

. . .

(f) the contract must be awarded to the tenderer who scores the highest points, unless objective criteria in addition to those contemplated in paragraphs *(d)* and *(e)* justify the award to another tenderer'.

[34] Regulations 4(4), 5(4), 6(4) and 7(4) of the Procurement Regulations have exactly the same wording and provide as follows:

'Subject to section 2(1)*(f)* of the Act, the contract must be awarded to the tenderer scoring the highest points.'

[35] Regarding the formulation of the tender, regulation 27(2) of the Municipal Supply Chain Management Regulations provides as follows:

'(2) Specifications-

(a) must be drafted in an unbiased manner to allow all potential suppliers to offer their goods or services;

. . .

(c) where possible, be described in terms of performance required rather than in terms of descriptive characteristics for design;

. . .

(f) must indicate each specific goal for which points may be awarded in terms of the points system set out in the supply chain management policy of the municipality or municipal entity; and

(g) must be approved by the accounting officer prior to publication of the invitation for bids in terms of regulation 22.'

[36] Clause 11(1)*(d)* of the first respondent's SCMP provides as follows:

'(1) The Accounting Officer must establish, through operational procedures, an effective system of acquisition management in order to ensure –

. . .

(d) That bid documentation, evaluation and adjudication criteria, and general conditions of a contract, are in accordance with any applicable legislation'.

[37] Under the summary of the first respondent's 'range of procurement' processes in clause 12(1) of the first respondent's SCMP the following is stated:

'Bid Evaluation Committee to evaluate tenders in terms of functionality criteria, thereafter in terms of PPPFA and price and recommend to Bid Adjudication Committee.'

[38] Clause 19(5)*(b)*(viii) of the first respondent's SCMP provides as follows:

'The Bid Evaluation Committee (in the case of Bids, or Deviations), may negotiate the final terms and conditions, (including price), on Contracts, where it is possible to appoint more than one Contractor, from a Panel of Vendors who responded to the Request for Bid. Such negotiations to be with the sole aim of treating all respondents fairly and equally, with the aim to distribute work as evenly and fairly as possible Such Requests for bids to specify Council's intention to do so at advertising stage. Minutes of such negotiations to be kept for record purposes.

(This clause is to be read in conjunction with clause 24 of this Policy).'

[39] Clause 21(3)(ii) of the first respondent's supply chain management policy provides as follows:

'(3) Documents that have to be present at tender opening which must be countersigned and stamped accordingly are:

…

(ii) The price and all supporting pricing schedules'.

[40] Clause 24(1) of the first respondent's SCMP provides as follows:

'(1) The Accounting Officer may negotiate the final terms of a contract with bidders identified through a competitive bidding process as preferred bidders, provided that such negotiation –

(a) Does not allow any preferred bidder a second or unfair opportunity;

(b) Is not to the detriment of any other bidder; and

(c) Does not lead to a higher price than the bid as submitted.

(2) Minutes of such negotiations must be kept for record purposes'.

[41] Lastly, the bid specifications that are contained in clause 27(2) of the first respondent's SCMP, the relevant part provides as follows:

'(2) Specifications –

(a) Must be drafted by the end user on the approval of the Departmental Director in an unbiased manner to allow all potential suppliers to offer their goods or services'.[29]

[42] Also important to note are the functionality criteria that were listed in the tender, and these read as follows:

'Criteria 1 required of a tenderer (i) to be a firm of chartered accountants;(ii) that all company directors that appear on CK documents to be chartered accountants; the maximum potential score allocated was 10 points. Criterion 2 related to academic qualification and experience of all company directors that appear on CK document; 15 points were allocated to a qualified chartered accountant with at least 15 years and more than experience; 10 points were allocated to a chartered accountant with at least 10 years and more experience; five points were allocated to a qualified chartered accountant with less than 5 years' experience; two points were allocated to a qualified chartered accountant with less than five years' experience. Criterion 3 related to the experience of the leading partner (that appear on CK documents) professional affiliation with SAICA (as CA) and experience; 15 points was allocated if you were a SAICA member and practicing for at least 15 years; 10 points if you became a SAICA member and were practicing for at least 10 years; five points if you were a SAICA member and practicing for at least 5 years; two points if you became a SAICA member and were practicing for less than five years.'[30]

[29] The papers at 21-24 para 11.6 - 11.15 of the applicant's founding affidavit.
[30] The papers at para 2.6 of the applicant's heads of argument.

[43] The applicant argued that the tender provided for four separate types of disciplines namely, services of a general accounting nature; VAT recovery; actuarial services and auditing services. The applicant argued further that the tender ought to have specified different functionality criteria for the different types of disciplines or services. This was premised on the basis that different functionality criteria would apply for each type of service. The crux of the applicant's argument was that a qualification as a chartered accountant would not be relevant for the performance of VAT recovery services and actuarial services. The applicant went on to argue that the requirement for all directors of a tenderer to be chartered accountants was 'irrational'. Mr Els submitted that there was no relationship between the requirement and the purpose of the tender. He stated that not all the services listed in the tender were of an accounting nature and secondly the actual services were rendered by the key personnel of the companies and not by the directors themselves. The alternate argument was that a company could have no directors who are chartered accountants, but they may have employed many chartered accountants who would be equipped to render the services however they would not meet the functionality criteria as required in the tender. The applicant submitted that the requirement that a tenderer's directors should be qualified chartered accountants and registered with SAICA for a period of more than fifteen years is completely irrational.

[44] The applicant's case is that the functionality criteria in respect of 1, 2 and 3 amount to the same requirement. The applicant argued that a tenderer who fails in respect of functionality criteria 1 will have no chance of scoring in respect of 2 or 3. Thus, if a tenderer fails to satisfy a single criterion it stands to lose 40 points. The minimum threshold score in respect of functionality was 75 out of 100. The tenderer who achieved this score in respect of functionality was appointed on the panel. This requirement ultimately resulted in the applicant's disqualification as they scored 68 out of 100.

[45] The applicant further submits that para 7(d) at page seven of the tender provides as follows:

'Tenderers will submit tender prices in accordance with the description, requirements and sections. [No] changes of relevant section in connection with the tender documents will be permitted.'

The applicant contended that the above section was vague.

[46] The applicant further argued that the pricing schedule did not form part of the documents which a tenderer is required to submit as part of its bid. Additionally, there was no provision in the tender for point scoring which clearly shows that the process was not competitive. The tender document, according to the applicant, also does not provide for any process after the appointment of the panel, where there would be any point scoring. Nowhere in the tender document was there any reference made to a two-stage bidding process. It is common cause that certain respondents were appointed after the first part of the process and not in the second part. Unless the tenderer was known as a firm of chartered accountants it will not be eligible to apply for the tender. It is common cause that the third to tenth respondents were appointed to the panel. The first respondent privately requested three of the panellists to provide them with quotations and only the sixth and seventh respondents responded to this request. Mr Els argued that it was unheard of to request quotations after a panel has been appointed. The fact that the respondents gave the sixth respondent 12 months to render VAT review services is administratively incorrect. This process was not part of what was contemplated in the tender and lacked transparency. This appointment was done on 14 November 2023, without any further public tender process.

[47] Mr Els argued that in *AllPay* the Constitutional Court set out how a court should deal with alleged irregularities in a tender process. Firstly, the alleged irregularity should be identified. Secondly the regularity should be legally evaluated to determine whether the irregularity amounts to a PAJA ground of review. Once this has been established, a court is obliged to declare the award invalid, as contemplated in section 172(1)*(a)* of the Constitution. The court has no discretion to conclude differently. The court will thereafter have to consider an appropriate remedy as contemplated in section 172(1)*(b)*.

[48] He referred the court to specific paragraphs in *AllPay*, namely:

‘[22] This judgment holds that:

(a) The suggestion that “inconsequential irregularities” are of no moment conflates the test for irregularities and their import; hence an assessment of the fairness and lawfulness of the procurement process must be independent of the outcome of the tender process.

(b) The materiality of compliance with legal requirements depends on the extent to which the purpose of the requirements is attained.
(c) The constitutional and legislative procurement framework entails supply chain management prescripts that are legally binding.
(d) The fairness and lawfulness of the procurement process must be assessed in terms of the provisions of the Promotion of Administrative Justice Act (PAJA).
(e) Black economic empowerment generally requires substantive participation in the management and running of any enterprise.
(f) The remedy stage is where appropriate consideration must be given to the public interest in the consequences of setting the procurement process aside.
. . .
[43] The legislative framework for procurement policy under s 217 of the Constitution does not seek to give exclusive content to that section, nor does it grant jurisdictional competence to decide matters under it to a specialist institution. The framework thus provides the context within which judicial review of state procurement decisions under PAJA review grounds must be assessed. The requirements of a constitutionally fair, equitable, transparent, competitive and cost-effective procurement system will thus inform, enrich and give particular content to the applicable grounds of review under PAJA in a given case. The facts of each case will determine what any shortfall in the requirements of the procurement system — unfairness, inequity, lack of transparency, lack of competitiveness or cost-inefficiency — may lead to: procedural unfairness, irrationality, unreasonableness or any other review ground under PAJA.
. . .
[58] The materiality of irregularities is determined primarily by assessing whether the purposes the tender requirements serve have been substantively achieved.'

[49] Mr Els further stated that to have a set of functionality criteria that sets the bar too high, will result in a tender process that is not truly competitive and, consequently, will offend the constitutional imperative of competitiveness. He went on to argue, that an irrational set of functionality criteria will not achieve the purpose of establishing whether tenderers can, in fact, render the required services. The applicant submitted that section 240 of the Tax Administration Act 28 of 2011 is a statutory requirement that requires persons who render VAT review or recovery services, to be duly registered tax practitioners. Nowhere in the tender was there a requirement for a single employee to be registered as a tax practitioner.

[50] The respondents denied that the functionality criteria were irrational or formulated to exclude competition and favour particular tenderers. The respondents argued that the criteria were rational, regular and in accordance with the provisions of section 2 of the PPPFA, read with the provisions of regulation 3 of the Procurement Regulations. Ms Nicholson argued that 'it was for the municipality [i.e. the first respondent], and not the court, to decide what should be a prerequisite for a valid tender.'[31] She went on to state that the decision on what to include as criteria is an administrative decision,[32] which falls within the prerogative of the first respondent. The first respondent chose to request a tender for a wide scope of services, which included different disciplines within the accounting field.

[51] The respondents' further argument was that the applicant has no grounds to set aside the tender as a two-stage bidding process was adopted. Ms Nicholson referred the court to *Maximum Profit Recovery (Pty) Ltd v Naledi Local Municipality*[33] where a two-stage bidding process was adopted, and the applicant was appointed onto the tender. In that matter the applicant took no issue with the two-stage bidding process but merely sought to set aside the award to one of the panellists. The respondents argued that a two-stage process is not per se irregular.

[52] The two-stage bidding process is provided for in the Municipal Supply Chain Regulations. Regulation 25 of Municipal Supply Chain Regulations provides as follows:

'Two-stage bidding process

(6) A supply chain management policy may allow a two-stage bidding process for-

(a) large complex projects;

(b) projects where it may be undesirable to prepare complete detailed technical specifications; or

(c) long term projects with a duration period exceeding three years.

(7) In the first stage technical proposals on conceptual design or performance specifications should be invited, subject to technical as well as commercial clarifications and adjustments.

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[31] *Dr JS Moroka Municipality and others v Betram (Pty) Ltd and another* [2013] ZASCA 186; [2014] 1 All SA 545 (SCA) para 10.

[32] *ACSA.*

[33] *Maximum Profit Recovery (Pty) Ltd v Naledi Local Municipality* [2023] ZANWHC 167.

(8) In the second stage final technical proposals and priced bids should be invited.'

[53] The respondents stated that the applicant could not fault the second stage of the bidding process for an awardee of VAT recovery and review services. The respondents averred that there was nothing irregular about the appointment of the sixth respondent. In fact, three of the panellists were invited to quote, and this process was transparent. Tenders, they submitted are evaluated not only on price, but also on BBBEE[34] scores.

[54] The applicant contended that the second stage of the process was 'behind closed door' which excluded the public and therefore lacked transparency.

[55] The respondents argued that the purpose for requesting the prerequisite to the tender was 'to ensure that qualified and reliable firms were placed on the panel to whom the specific services could be farmed out in the second competitive bidding process.'[35] Ms Nicholson argued that the first respondent was seeking a panel of professionals to ensure the highest standard of quality assurance. The request for a chartered accountant at the helm of the company was for purposes of an oversight role. She went on to state that the first respondent's tender was neither irrational, nor constitutionally invalid. The purpose of the functionality criteria was to ensure the strictest standards of financial accountability for the first respondent.

[56] In *Pharmaceutical Manufacturers Association of SA: In re ex parte President of the Republic of South Africa*[36] the Constitutional Court held the following in relation to the exercise of public power by an organ of state:

'It is a requirement of the rule of law that the exercise of public power by the Executive and other functionaries should not be arbitrary. Decisions must be rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary and inconsistent with this requirement. It follows that in order to pass constitutional scrutiny the exercise of public power by the Executive and other functionaries must, at least, comply with this requirement. If it does

[34] BBBEE means broad-based black economic empowerment.
[35] First and second respondent's head of argument para 22.
[36] *Pharmaceutical Manufacturers Association of SA and another: In re ex parte President of the Republic of South Africa and others* 2000 (2) SA 674 (CC) para 85.

not, it falls short of the standards demanded by our Constitution for such action.' (footnote omitted)

[57] The Constitutional Court in *Democratic Alliance v President of South Africa*[37] sets out the meaning of rationality and reasonableness:

'[29] It must be emphasised that it is useful to keep the reasonableness test and that of rationality conceptually distinct. Reasonableness is generally concerned with the decision itself. In the constitutional era reasonableness in the administrative law context has been authoritatively stated in *Bato Star*:

> "In determining the proper meaning of s 6(2)*(h)* of PAJA in the light of the overall constitutional obligation upon administrative decision-makers to act reasonably, the approach of Lord Cooke provides sound guidance. Even if it maybe thought that the language of s 6(2)*(h)*, if taken literally, might set a standard such that a decision would rarely if ever be found unreasonable, that is not the proper constitutional meaning which should be attached to the subsection. The subsection must be construed consistently with the Constitution and in particular section 33 which requires administrative action to be reasonable. Section 6(2)*(h)* should then be understood to require a simple test, namely that an administrative decision will be reviewable if, in Lord Cooke's words, it is one that a reasonable decision-maker could not reach."

[30] While there may be some overlap between the reasonableness and rationality evaluations, these tools are best understood as being conceptually different. As was said in *Albutt*:

> "The Executive has a wide discretion in selecting the means to achieve its constitutionally permissible objectives. Courts may not interfere with the means selected simply because they do not like them, or because there are other more appropriate means that could have been selected. But, where the decision is challenged on the grounds of rationality, courts are obliged to examine the means selected to determine whether they are rationally related to the objective sought to be achieved. What must be stressed is that the purpose of the enquiry is to determine not whether there are other means that could have been used, but whether the means selected are rationally related to the objective sought to be achieved. And if, objectively speaking, they are not, they fall short of the standard demanded by the Constitution"'

(footnotes omitted)

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[37] *Democratic Alliance v President of the Republic of South Africa and others* [2012] ZACC 24; 2013 (1) SA 248 (CC); 2012 (12) BCLR 1297 (CC).

[58] In *AllPay* the Constitutional Court stated the following in respect of review applications:

'In challenging the validity of administrative action an aggrieved party may rely on any number of alleged irregularities in the administrative process. These alleged irregularities are presented as evidence to establish that any one or more of the grounds of review under PAJA may exist. The judicial task is to assess whether this evidence justifies the conclusion that any one or more of the review grounds do in fact exist.'[38]

[59] In assessing the evidence before me I am of the view that the functionality criteria in the tender document was irrational in respect of the actuarial and VAT recovery services. Although the disciplines in the tender related to accounting services it was clear that there were four separate disciplines in one tender. The tender made no provision for equity because the preferential point scoring system was not used. The prequalification in the tender for chartered accountants as directors deliberately excluded tenderers like the applicant. The process lacked transparency as the second stage of requesting quotations from three members of the panel was not made public. I agree with the applicant's argument that the appointment of the sixth respondent for a period of 12 months could never be described as cost effective since there was no true competition amongst members of the public. The appointment of the sixth respondent for that period is clearly contrary to regulations 25(1)*(a)* and 25(1)*(c)* of the Municipal Supply Chain Regulations. Accordingly, a tender process that culminates in the appointment of a panel, without any pricing, conflicts with the constitutional imperatives in section 217 of the Constitution. Furthermore, the 'two- stage process' adopted by the respondents was not advertised in the original tender.

[60] The respondents have deviated materially from the prescribed tender process more specifically in respect of the irrational formulation of the functionality criteria. I agree with the applicant that the respondents have failed to make out a case that justifies the irrational functional criteria, more specifically in testing the ability of a tenderer to render VAT review services. Nowhere in the tender document was there any reference to a two-stage bidding process. Considering the above, the appointment of the sixth respondent is found to be irregular. The applicant has met the threshold

[38] *AllPay* para 44.

for reviewing the tender and setting it aside which the court finds is just and equitable in the circumstances to do.

Costs

[61] The applicant has succeeded in its review application and there is no reason why the costs should not follow the result.

Order

[62] In the result, the applicant has made out a case for the relief sought and I grant an order as follows:

1. That the decision of the first respondent to issue and publish Tender KZN ULM 05/23/24 for the appointment of a panel for the provision of quality assurance on accounting services for the period of three (3) years ("the Tender") is declared constitutionally invalid.
2. That the decision to award the Tender to the third to tenth respondents, is declared constitutionally invalid.
3. That it be declared that the further tender process followed by the first respondent subsequent to the tender award referred to in paragraph 2 above, is declared constitutionally invalid.
4. That the decision of the first respondent to appoint the sixth respondent, for review and recovery of value added tax for a period of twelve (12) months at a percentage of 9.2% in terms of the letter of award dated 14 November 2023 is declared constitutionally invalid.
5. That any agreement concluded between the first respondent and the third to tenth respondents, pursuant to the awarding of the Tender, is set aside.
6. The first and second respondents are ordered to pay the costs jointly and severally, the one paying the other to be absolved and such costs will include the costs of two counsel, on scale C.
7. The sixth respondent is ordered to pay the applicant's costs in so far as they relate to the reply to the sixth respondent's answering affidavit.

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APPEARANCES

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For the first and second respondents:	Ms J Nicholson
Instructed by:	Shepstone & Wylie Attorneys Pietermaritzburg
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