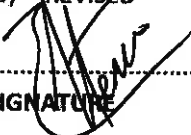


**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

CASE NO: 33009/2022

(1) REPORTABLE: YES/NO	(2) OF INTEREST TO OTHERS JUDGES: YES/NO
(3) REVISED	
	28 November 2022
SIGNATURE	DATE

In the matter between:

APTITUDE TRADING ENTERPRISE (PTY) LTD
(Registration No. 2012/166139/07)

1st Applicant

MDOSENI TRADING & PROJECTS (PTY) LTD

2nd Applicant

LTC HOLDINGS CC

3rd Applicant

and

THE CITY OF TSHWANE METROPOLITAN CITY

1st Respondent

AND 102 OTHERS

2nd to 103rd Respondent

JUDGEMENT

EJ FERREIRA AJ

Introduction

1. This is an application to review and set aside a tender issued by the City of Tshwane Metropolitan City being Tender no HH 01 2021/2022 (*"the tender"*).
2. Central considerations in this review application are Constitutional principles of social justice relating to citizens' entrenched rights in respect of access to water. This includes, amongst others, the achievement of equality, one of the founding values of our Constitutional.¹

Parties

3. The first applicant is Aptitude Trading Enterprises (Pty) Ltd (Registration No. 2012/166139/07), a company duly registered and incorporated in terms of the company laws of the Republic of South Africa with its registered address situated at 1823 Bashele Street, Rockville Mhluzi, Middleburg, Mpumalanga.
4. The second applicant is Mdoseni Trading & Projects (Pty) Ltd (Registration No. 2014/005684/07), a company duly registered and incorporated in terms of the company laws of the Republic of South Africa with its registered address situated at 20 Fuel Street, Coronationville, Gauteng, 2093.
5. The third applicant is LTC Holdings CC (Registration No. 2003/075380/23), a close corporation duly registered and incorporated in terms of the Close Corporations Act, 69 of 1984 with its registered address situated at 381 Osiris Street, Ruimsig County Estate, Mogale City, Gauteng, 1740.
6. The first respondent is the City of Tshwane Metropolitan City (*"the City"*) duly established in terms of the Local Government: Municipal Structures Act, 117

¹ Mazibuko and Others v City of Johannesburg and Others (CCT 39/09) [2009] ZACC 28; 2010 (3) BCLR 239 (CC); 2010 (4) SA 1 (CC) (8 October 2009) at paras 1 – 2.

of 1998, situated in Pretoria.

7. The second to 103rd respondents are beneficiaries of the tender awarded by the City and which is the subject of the present review application.

Background

8. All three applicants duly and timeously submitted documentation to be considered for an award in respect of the tender.
9. The first and second applicants were appointed as part of the panel in respect of the tender.²
10. The third applicant has not received a letter of appointment and has also not been advised of the outcome of the tender.
11. The first applicant owes 86 water trucks that comply with the specifications.³
12. The second applicant owns 9 water trucks that comply with the specifications in the tender. All these vehicles were included in the second applicant's tender.
13. The third applicant owns 13 water trucks that comply with the specifications in the tender. All these were included in the third applicant's tender.
14. All the applicants have rendered similar services to the City and/or the other municipalities.
15. The applicants rely on both section 38(a) and 38(d) for their *locus standi* in the present proceedings.⁴

Issues

² See CaseLines 1 – 79.

³ See CaseLines 1 – 79.

⁴ See CaseLines 1 – 80.

16. The parties have identified the issues for determination by this Court, in their joint practice note dated 29 September 2022⁵ as follows:⁶
- 16.1. Whether or not the City validly extended the tender validity period from 6 December 2021 to 2 June 2022.
 - 16.2. Whether or not the City validly extended the tender validity period from 5 March 2022 to 5 June 2022.
 - 16.3. Whether or not the City failed to evaluate the tender on the mandatory requirements prior to the tender awards.
 - 16.4. Whether or not the panel appointments were made in accordance with the provisions of section 2(1)(f) of the Preferential Procurement Policy Framework Act, 5 of 2000.
 - 16.5. Whether or not the City correctly disqualified the third applicant base on the alleged misrepresentation on the MBD3.14 form.
 - 16.6. Whether or not there was any material irregularity in the tender process that is supported by a ground of review under the Promotion of Administrative Justice Act, 3 of 2000 (“PAJA”).
 - 16.7. Upon finding that the applicants are entitled to an order as contemplated in section 172(1)(a) of the Constitution, the appropriate remedy as contemplated in section 172(1)(b) read together with section 8 of PAJA.
17. As a result of the finding that is made hereunder, it is not necessary to consider any of the other issues beyond paragraph 16.1 hereinabove.

⁵ See CaseLines 000001 – 25 to 000001 – 31.

⁶ See CaseLines 000001 – 28 to 000001 – 29.

The statutory design of the procurement process

18. When an organ of state in the local sphere of Government procures goods or services there is in place a statutory scheme, which the City is required to comply in the form of applicable legislation and regulations.
19. They are the following: The Preferential Procurement Policy Framework Act, 5 of 2000 (*"the PPPFA"*); The Preferential Procurement Regulations, 2017 (*"the Procurement Regulations"*); The Local Government: Municipal Finance Management Act, 56 of 2003; The Municipal Supply Chain Management Regulations (*"the Supply Chain Management Regulations"*); The City's approved Supply Chain Management Policy (*"the Supply Chain Policy"*) and the relevant Treasury guidelines.
20. A further aspect that underpins the fair procurement process requires the Municipal Supply Chain Management Regulations which has to be adopted by a city. In this case, the City of Tshwane formally adopted Municipal Supply Chain Management Regulations that describe in detail how the City, as a City, should procure goods and services. The Supply Chain Management Regulations include a Tender Specification Committee required from the outset, a Bid Evaluation Committee (BEC) and also a Bid Adjudication Committee (BAC).
21. The BEC is a statutory body whose task it is to evaluate the tender for administrative and mandatory requirements. It has to evaluate the functionality of each tenderer and has to score each tender. When the BEC completes its duty, and after the documents are handed to the BAC then the function of the BEC is primarily complete. The applicants submit that the work BEC and the BAC can never take place at the same time as each stage must be completed before the next stage is embarked upon. Each Committee has a discrete function where one committee's function follows upon the other. The Nexus Report shows the continual engagement between the two committees and itself. There should not be a back-and-forth. It is common cause the City proceeded with the implementation of the tender when it had not concluded

the evaluation process which is a further discrete stage in the mandatory stage 1. In addition, the applicants contend that the City is currently allocating work in a random manner.

22. The stages in which the bid evaluation takes place is stage 1, which is the administrative and mandatory requirement, stage 2 which is the functional assessment and stage 3 which is the point scoring exercise.

The tender validity period

23. The tender validity period as was stipulated in the tender, and it formed part of what was compiled by the Bid Specification Committee in terms of Regulation 27(1) of the Municipal Supply Chain Management Regulation. The applicants contend that the tender specification, like the validity period, can only be changed after the publication of the tender if the supply chain policy allows and provides for it or if there is timeous, prior to the date of expiration, consented by all participants in the bidding process.
24. This is what the City's letter dated 29 November 2021 stated:

“

29 November 2021

TENDER NO: HHS01 2021/2022

**TENDER FOR HIRE OF 10 000 LITRES OF MOBILE DRINKING
WATER RANKERS (sic) (TRUCKS) FOR THE SUPPLY IN THE
INFORMAL SETTLEMENT IN THE CITY OF TSHWANE**

Return Form 2

Mpho Lelekela (meholek@tshwane.gov.za)

DATE TO WHICH TENDER WILL EXPIRE (sic): 06 DECEMBER 2021
EXTENDED DATE TO WHICH TENDER WILL BE VALID:
5 MARCH 2022

1. *A possibility exists that the tender of which particulars appear above, may not be adjudicated before expiry of the current validity period, and I shall be glad to learn whether you are willing to hold your tender valid **IN ALL RESPECTS** for the further period indicated. To facilitate the matter the reply form hereunder **MUST** be completed and returned within seven (7) days from date of the letter.*
2. *Should you not be willing to hold your tender valid for the further period, it will of course lapse on expiry of the current validity period and will therefore be ignored if the tender are not adjudicated within this period.*
3. *If you are willing to hold your tender valid for the further period, but subject to amendment in any respect, the reason for and the nature of the amendment must be clearly indicated in a separate letter, but in that event and should the tender not be adjudicated during the current validity period, the right is reserved to ignore your qualified extension of validity, particularly if the amendment has the effect of increasing or decreasing the tender price.”*

25. The applicants submit that the right to extend the tender validity period was

not provided for in the tender specification.

26. In my view therefore the bid validity period cannot be validly extended without the consent or rejection of the parties *prior* to the lapse of the validity period. To do so would amount to “*a licence to contend for meanings unmoored in the text and its structure.*” The purpose of the tender validity period is a rule laid down in the bid itself and is clear. The process of the bid validity extension must be complete before the bid evaluation period lapses if it is indeed allowed at all. If the extension is not agreed to before the lapse of the validity period, then that is the end of the tender.
27. I was referred to a number of cases in relation to the extension of the bid validity period where the wording or facts were different. An expired tender cannot be resuscitated was made clear by Southwood J in *Telkom SA v Merid Training (Pty) Ltd and others; Bihati Solutions (Pty) Ltd v Telkom SA and others*.⁷

“The question to be decided is whether the procedure followed by the applicant and the six respondents after 12 April 2008 (when the validity period of the proposal expired) was in compliance with section 217 of the Constitution. In my view it was not. As soon as the validity period of the proposals had expired without the applicant awarding a tender the tender process was complete – albeit unsuccessfully – and the applicant was no longer free to negotiate with the respondents as if they were simply attempting to enter into a contract. The process was no longer transparent, equitable or competitive. All the tenderers were entitled to expect the applicant to apply its own procedure and either award or not award a tender within the validity period of the proposals. If it failed to award a tender within the validity period of the proposals it received it had to offer all interested parties a further opportunity to tender. Negotiations with some tenderers to extend the period of validity lacked transparency and was not equitable or competitive. In my view the first

⁷ (27974/2010, 25945/2010) [2011] ZAGPPHC 1 (7 January 2011).

*and fifth respondents' reliance only on rules of contract is misplaced.*⁸

28. In *Defensor* the full bench per Daffue JP and Mhlambi J stated as follows:

*"I therefore also agree with applicant's counsel that in the absence of the required proof, there was after the expiry date no longer any valid tender process. The tender award has to be set aside for this reason alone".*⁹

29. Procurement by an organ of state is in the realm of administrative law that requires a fair and transparent approach. The applicants point out that in this case, prior to the expiry of the tender validity period none of the bidders had consented to the extension. The applicants submit that it cannot remedy the situation because such consent cannot revive a lapsed tender.

30. It is trite that in application proceedings the affidavits contain both the pleadings and the evidence. Upon the applicants' challenge to the City that the tender period was not validly extended the City provided the Court, through a witness and deponent whose personal knowledge thereof is by no means clear, only the following evidence:¹⁰

"37. The closing date for the impugned tender was set 7 September 2021 and the validity period was for a period of 90 days and therefore the tender would lapse on 6 December 2021.

38. On 29 November 2021, the first respondent issued out a letter stating that the tender will expire on 6 December 2021 and that the tender will be extended and be valid until 5 March 2022."

31. No evidence of consent by participants to the bidding process is presented by the City. The City does not contend that such timeous consent was received.

⁸ [2011] ZAGPPHC 1 at para 14

⁹ *Defensor Electronic Security (Pty) Ltd v Centrllec SOC Limited* - unreported No 3372/2021 ZAFSHC.

¹⁰ See CaseLines 11 – 15.

32. The City argues that it had an enormous task to evaluate some 253 bids that were lodged and therefore it was justified in seeking the extension and it sufficed if the request was made prior to the expiration.
33. I conclude that in order to ensure a fair tender process in accordance with section 217 of the Constitution all the necessary administrative steps requesting an extension must be taken before the lapse of the tender validity period. Variations, additions, and the like are impermissible once the tender validity period has come to an end and there has been no consent or rejection by the bidders to the extension.

Evaluation

34. The City also contends that there were no irregularities of any moment that require the tender to be set aside. In this case, the deviations are material and therefore go to the heart of the fairness of this tender process.
35. I conclude that in order to ensure a fair tender process in accordance with section 217 of the Constitution all the necessary administrative steps requesting an extension must be taken before the lapse of the tender validity period. Variations, additions, and the like are impermissible once the tender validity period has come to an end and there has been no consent or rejection by the bidders to the extension.

Conclusion and remedy

36. The request for an extension of the tender validity period was done just before the expiration of the tender validity period and the responses should have been in before the procurement process expired.
37. In summary, therefore, I find that the tender should be set aside. This is public law procurement, and it must be assessed through the prism of the Constitution. It must be based on fairness and transparency. I find that the process was skewed from the time that there was a request for an extension

of the tender validity period. Irregularities took place to. For these reasons, the tender is hereby reviewed and set aside.

38. In able argument, Mr Laka SC for the City, implored on the Court to consider and decide the matter bearing in mind the overriding preamble to our constitution demanding social justice. Mr Laka SC was quick to assist the Court, and quite rightly so in my view, upon questioning to indicate that the demand for social justice ought to be aimed at the citizens in need of water supply and not at the beneficiaries of the tender sought to be set aside.

39. An appropriate remedy is an important consideration. In terms of section 172(1)(b) of the Constitution a Court:

“(b) may make any order that is just and equitable, including–

(i) an order limiting the retrospective effect of the declaration of invalidity; and

(ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.”

40. Section 8 of PAJA also provides that, concerning an appropriate remedy, a Court may grant any order that is just and equitable, including the following orders:

“(a) directing the administrator–

(i) to give reasons; or

(ii) to act in the manner the court or tribunal requires;

(b) prohibiting the administrator from acting in a particular manner;

(c) setting aside the administrative action and–

- (i) *remitting the matter for reconsideration by the administrator, with or without directions; or*
- (ii) *in exceptional cases—*
 - (aa) *substituting or varying the administrative action or correcting a defect resulting from the administrative action; or*
 - (bb) *directing the administrator or any other party to the proceedings to pay compensation;*
- (d) *declaring the rights of the parties in respect of any matter to which the administrative action relates;*
- (e) *granting a temporary interdict or other temporary relief; or*
- (f) *as to costs.”*

41. In *Steenkamp NO v National Tender Board of the Eastern Cape*¹¹ the appropriate principles are set out clearly. The remedy must fit the injury, the remedy must be fair to those affected by it and yet vindicate effectively the right violated, the remedy must be just and equitable in light of the facts, the implicated constitutional principles, if any, and the controlling law.
42. Ultimately the purpose of a public remedy is to afford the prejudiced party administrative justice, to advance efficient and effective public administration compelled by constitutional precepts and at a broader level, to entrench the rule of law.
43. An appropriate remedy requires that I take into account the nature of the tender, namely the provision of water to communities in need must continue

¹¹ 2007 (3) SA 121 (CC) at para 29.

in a proper manner which this order must take into account.

44. A suspension of the declaration of invalidity should only last as long as it will take the City to finalise a new and legitimate process. This period should be as short as possible, to ensure that the invalid awards are continued with for the shortest possible periods.
45. *Stare decisis* refer to a doctrine¹² that must be borne in mind by every court when rendering a decision involving a legal principle, both as to common law and as to statutory law. The object of the doctrine is to avoid uncertainty and confusion,¹³ to protect vested rights and legitimate expectations as well as to uphold the dignity of the court. Therefore, when a decision on a legal principle has been delivered by a superior court it should, in general, as far as possible be followed by all courts of equal and inferior status, until such time as that judgment has been overruled or modified by a higher court or by legislative authority. In general, it can be stated that a court is bound by the ratio of a decision of a higher court to a fuller court¹⁴ on its own level unless the decision was rendered *per incuriam*. A court will follow its own previous decision, unless it is satisfied that it is wrong. In the present case this Court is bound by the decisions and principles set out in amongst others *JL Excavators (Pty) Ltd v City of Tshwane Metropolitan Municipality* (27907/2018) [2018] ZAGPHHC 584 (11 June 2018); *JL Excavators (Pty) Ltd v City of Tshwane Metropolitan Municipality* 46698/2021 and 46727/2021 (18 March 2022); *Allpay Consolidated Investment Holdings (Pty) Ltd and others v Chief Executive Officer, south African Social Security Agency and others* 2014 (1) SA 604 (CC); *City of Ekurhuleni Metropolitan Municipality v Takubiza Trading and Projects CC and others* 2022 JDR 1544 (SCA).

46. In consequence I make the following order:

46.1. The decision of the City to award tender HH 01 2021/2022 to the 2nd

¹² The historical development of this doctrine is traced by Kahn 1967 SALJ 43 175 308.


¹³ *Commissioner for Inland Revenue v Estate Crewe* 1943 AD 656 680; Kahn 52.

¹⁴ *Pretorius v Glas* 1923 TPD 156 160 161; *Germiston Town Council v Union Government* 1931 TPD 396 405; *Le Marchand v Creeke* 1953 1 SA 186 (N).

to 103rd respondents is declared constitutionally invalid, reviewed and set aside.

- 46.2. The agreements concluded between the City and such respondents pursuant to the award of the tender are set aside.
- 46.3. The orders in paragraphs 1 and 2 are suspended until 28 February 2023.
- 46.4. The City is ordered to commence with the new tender process for the procurement of the same services as contemplated in the tender within seven days after granting of this order.
- 46.5. The City is ordered to inform the 2nd to 103rd respondents of this order by no later than 15 December 2022.
- 46.6. The City is ordered to:
 - 46.6.1. Inform the Auditor General's office of this order by no later than 15 December 2022;
 - 46.6.2. Inform the Public Protector's office of this order by no later than 15 December 2022;
 - 46.6.3. Provide the Auditor General's office of a comprehensive reconciliation of all amounts paid to the 2nd to 103rd respondents up to 30 November 2022 by no later than 15 January 2023;
 - 46.6.4. Provide the Public Protector's office of a comprehensive reconciliation of all amounts paid to the 2nd to 103rd respondents up to 30 November 2022 by no later than 15 January 2023;

- 46.6.5. Provide the Auditor General's office of a comprehensive reconciliation of all amounts paid to the 2nd to 103rd respondents for the period 1 December 2022 to 28 February 2023 by no later than 30 March 2023;
- 46.6.6. Provide the Public Protector's office of a comprehensive reconciliation of all amounts paid to the 2nd to 103rd respondents for the period 1 December 2022 to 28 February 2023 by no later than 30 March 2023.
- 46.7. The City is ordered to pay the applicants' costs.


EJ FERREIRA, AJ
ACTING JUDGE OF THE HIGH COURT

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 26 November 2022.

HEARD ON 07 NOVEMBER 2022

JUDGMENT DELIVERED ON 26 NOVEMBER 2022.

Appearances

Counsel for Applicants:	Adv APJ Els
Attorney for Applicant:	Albert Hibbert Attorneys
Counsel for 1 st and 2 nd Respondents	Adv A Laka SC Adv TM Makola
Attorney for the 1 st and 2 nd Respondents:	Kutumela Sithole Attorneys Inc.