



Republic of South Africa

**IN THE HIGH COURT OF SOUTH AFRICA  
[WESTERN CAPE DIVISION, CAPE TOWN]**

**Case No: 13604/16**

In the matter between:

**GRAND LANDSCAPING CC**

**Applicant**

and

**THE CITY OF CAPE TOWN**

**First Respondent**

**PEGASUS LANDSCAPING &  
HORTICULTURAL MAINTENANCE CC**

**Second Respondent**

**SAVE OUR LAND GARDEN &  
CLEANING SERVICES (PTY) LTD**

**Third Respondent**

**TOP N NOS CC**

**Fourth Respondent**

**CA DAVIDS T/A DAVIDS TOOL HIRE  
LAWNMOWER & GARDE CENTRE**

**Fifth Respondent**

**SIDELO SONDLO INVESTMENT  
(PTY) LTD**

**Sixth Respondent**

**CHIDINMA CC**

**Seventh Respondent**

**WOMEN ON BOARD CC**

**Eighth Respondent**

**DIVERSITY STYLE TRADE  
(PTY) LTD**

**Ninth Respondent**

**NGCOKOTO GENERAL TRADING CC**

**Tenth Respondent**

**C ARENDSE T/A CONNIE'S  
ENTERPRISES**

**Eleventh Respondent**

**SIQALO GARDENING & CLEANING  
SERVICES CC**

**Twelfth Respondent**

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**BRADLEY FABIAN MAMPIES T/A  
MAMPIES TREE FALLING AND  
GARDENING SERVICES**

**Thirteenth Respondent**

**CORMA CONSTRUCTION &  
CLEANING CC**

**Fourteenth Respondent**

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**JUDGMENT DELIVERED: 15 JUNE 2017**

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**LE GRANGE, J:**

[1] The Applicant, an unsuccessful bidder, seeks the review and setting aside of Tender Number 206S/2014/15. The tender was for the mowing of public open spaces, road reserves and cemeteries, and was awarded by the First Respondent (the City) to 13 bidders (Second to Fourteenth Respondents).

[2] It is not in dispute that the award of the tender by the City falls within an administrative process prescribed by law and as a result subject to the norms of procedural fairness as contemplated in the Promotion of Administrative Justice Act 3 of 2000 (PAJA”).

[3] The City is the only Respondent that opposes the relief sought.

[4] The Applicant initially relied on a number of review grounds but in these proceedings persisted with only two main grounds for the review and the setting aside of the tender. The first ground is the functionality criteria. According to the Applicant, the functionality criteria in the tender document

was not properly assessed, alternatively it was too vague and not properly explained in the said document. The Applicant also relied upon certain statutory instruments (s 83 of the Systems Act 2000) and the National Treasury Guidelines in support of its contention that the functionality criteria in the present instance was not properly adhered to. The second ground was the apparent improper allocation of points awarded to the various bidders for their Broad-Based Black Economic Empowerment ("B-BBEE") status.

[5] The City did not take issue with the latter ground and conceded that certain mistakes were made as far as the allocation of points for B-BBEE was concerned. The first ground was however opposed. According to the City, in the event that the Applicant's challenge on the first ground was not successful, the outcome of the tender awards should be corrected in order to reflect the correct B-BBEE scores. The relief sought on the second ground was not opposed by the Applicant or any of the other affected Respondents. According to the City, the correction of the B-BBEE scores will however be of no assistance to the Applicant as the correction of the scores will not benefit the Applicant's responsiveness or lack thereof and does not justify the setting aside of the entire evaluation process.

[6] The salient facts underpinning the tender award are largely not in issue and in summary are the following. On 5 December 2014, the City published an invitation to tender and bidders had to submit their bids before the closing date of 27 January 2015. The tender document made provision for a two-

stage evaluation of tenders. In the first stage, referred to as the functionality criteria, the tenderers were scored on functionality. In the second stage, those who have achieved the minimum qualifying score for functionality would then be further evaluated in terms of a prescribed preference point system. The tender document also stipulated that valid tenders will be declared non-responsive and eliminated from further evaluation if the tenderer did not achieve the minimum functionality scoring and or points as stipulated.

[7] The functionality criteria was essentially divided into four categories, namely, (1) the quantity of equipment, vehicles, tools; (2) experience; (3) staff particulars and (4) health and safety. The points awarded for the four categories were as follows: (1) a maximum of 44 points for equipment, vehicles and tools; (2) a maximum of 20 points for years of experience; (3) a maximum of 28 points for the number of staff members; and (4) a maximum of 8 points for the tenderers' identification of health and safety.

[8] A bid will only be regarded as responsive and evaluated further for price and preference points if it obtains a minimum of 70 points or more for functionality.

[9] In order to obtain points for functionality, the tenderers were required to complete Annexure B of the tender document, which essentially required a tenderer to record and state: the equipment available for the utilization of the

tender, including amongst others registration number, make and size; with regard to vehicles the following needed to be recorded model, make, year of registration and present kilometers; and with regard to staff members their names needed to be listed.

[10] If a tenderer did not comply with the specifications of the tender it would then be declared non-responsive and eliminated from further evaluation.

[11] The Supply Chain Management – Bid Evaluation Committee (“the BEC”) compiled a report regarding the evaluation of the tender. The report and its contents were checked by a senior compliance management practitioner, Ms Belinda Karen Kuhn (Kuhn) to ensure the provisions of the City’s Supply Chain Management Policy (“the SCM policy”) were adhered to. As the value of the tender was in excess of R 10 Million an external due diligence report was also compiled in order to assess whether such tender posed a risk to the City. The BEC members recommended that the tender be awarded to 13 bidders and signed the report on 17 March 2016.

[12] This recommendation was accepted by the Bid Adjudication Committee (“the BAC”) and the tender awards were made to the Second to Fourteenth Respondents.

[13] What is apparent from the BEC report was that the City, for purposes of allocating the tender, had divided it into four districts. Each district in turn had been divided into various service areas amounting to 23 in total. In each service area a main contractor and an alternative contractor were appointed. No work was guaranteed for the alternative contractors but should the main contractor not be able to commence work within a period of three working days from the date of the order, then the alternative contractor will be allocated the work. Furthermore, not more than three areas were awarded per contractor.

[14] The City received a total of 89 tenders of which only 13 were ultimately successful to service the various areas. The scoring system used was apparently heavily weighted in favour of selecting the cheaper service providers. An internal and external due diligence audit was also performed on the successful bidders. With regard to the verification process conducted by a person named D Joubert and his team ("the Joubert Report"), it concluded that overall the winning bidders would be able to execute their obligations successfully in terms of the contract.

[15] The Applicant submitted an appeal against the refusal of its bid in terms of s 62 of the Local Government: Municipal Systems Act 32 of 2000 ("the Systems Act 2000"). In the internal appeal the Applicant raised *inter alia* the issue of points awarded to the bidders on the functionality criteria.

[16] The appeal was dismissed and the decision of the Supply Chain Management - Bid Adjudication Committee was upheld.

[17] On the papers filed of record one of the main reasons, amongst others, the Applicant was unsuccessful, was as a result of its pricing for mowing per square meter which was apparently higher than those of the successful bidders. The other contention by the Applicant that some successful bidders have claimed preferential points for equipment which they did not own or rented was also dismissed. It is apparent from the facts on record that the Applicant has some extensive experience in the landscaping environment and some of the other Respondents are relatively newcomers.

[18] In the Notice of Decision of the appeal, the Appeal Authority, having considered Clause 4.1.2 of the Specifications came to the conclusion that the provision simply contemplates that the contractor will provide his own equipment and that rental of the equipment was not prohibited in this provision. On the papers filed of record the Appeal Authority made the following remarks:

*"[...] tenderers are not required to have the equipment listed "... on the company's Balance Sheet..." or "... in their Fixed Asset Registers..." as the Appellant suggests. The City is not going to supply the necessary equipment for the tenderers to execute the work. The contractors is [sic] expected to provide what is needed in that regard, regardless of how the equipment is obtained.*

*Clause 4.3.1 of the Specifications provides as follows:*

*'EQUIPMENT: 4.3.1 A list of available vehicles, equipment and staff must accompany the tender as requested in Annexure B & C.'*

*In this regard, tenderers had to indicate to Annexure B & C, available equipment, among others.*

*The following note appears on page 69 of the tender document:*

*'NOTE           1. Inspection will be done before the commencement of the contract to verify compliance with quantities as per information in clause 6.6*

*2. The above details will be used as an indicator of the Contractor's ability to execute this contract and therefore will be part of the Tender adjudication.'*

*For equipment listed, tenderers were allocated points for Functionality. In terms of the above note. (sic) It is clear that the verification of the listed equipment is due to be done after the award of the tender but before commencement of the contract. Functionality was therefore based on the listed equipment and was not subject to inspection at the evaluation stage of the tender. Nevertheless, in terms of the departmental representations, an external due diligence was conducted on all successful tenderers to establish their ability to execute the*



*contract, which included the assessment of available equipment. Accordingly, this ground of appeal is without merit.”*

[19] In *casu*, at the heart of the Applicant’s complaint is the interpretation of Clause 4.1.2 which relates to specification and the assessment of the functionality criteria. The Applicant is of the firm view that the City’s interpretation regarding Clause 4.1.2 of the tender document was flawed. According to the Applicant there are valid grounds in terms of s 6 of PAJA to review the evaluation process and the ultimate awarding of the tender by the City and to set it aside.

[20] The main argument advanced by Applicant’s counsel, Mr D van Reenen was that on a proper interpretation of the tender document, the bidders could only record equipment which they owned or rented. In addition the bidders could only list staff already employed. To this end it was contended that the Third, Seventh, Eighth, Ninth, Eleven and Thirteenth Respondents were incorrectly awarded points for fictional staff. The listed employees were apparently not registered for employees’ tax and UIF. It was also argued that the Third, Sixth, Ninth and Twelfth Respondents were incorrectly allocated points for equipment which they did not own or had rented. It was further contended that the purpose of the assessment of functionality is to ensure that bidders have the ability to perform in terms of the contract. The argument advanced as to the City’s stance on the scoring of functionality whereby bidders could list any equipment or any number of staff members

and be awarded points, was clearly flawed. It was contended that such an approach would be irrational and not connected to the purpose of the functionality criteria.

[21] Counsel for the Respondent, Mr J de Waal argued that the Applicant's interpretation of the functionality criteria in the tender document is untenable. According to the argument advanced, the wording in the said document, read in its context, cannot be interpreted that a bidder should have owned and or rented the equipment or vehicles at the time of completing the tender document. It was contended that the requirement for equipment and staff to be listed at the time the tender was submitted was only necessary to the extent that it will be available in some form or another to execute the work within a reasonable time, after being a successful bidder. It was also argued that if it was a requirement to keep equipment, vehicles and staff claimed available from the closing date to the date of inspection it could lead to oppressive and impractical results. It was further contended that the Applicant's reliance on certain statutory instruments and the National Treasury Guidelines relating to functionality are not applicable in the present instance. As it appears, firstly s 83 of the Systems Act 2000 relied upon relates to outsourcing of services and not procurement. Secondly, that the Guidelines issued by National Treasury on 3 September 2010 only applies to National and Provincial Public Entities as listed in Schedule 3A and 3C of the Public Finance Management Act 1 of 1999 ("the PMFA").

[22] With regard to the shortcomings in the allocation of the B-BBEE points, it was argued that all the affected parties are before court and the errors made if corrected will be of no consequence to the Applicant. According to the City, all that apparently was required on the amended allocated B-BBEE points was that the Fourth Respondent would have been appointed over the Six Respondent as the preferred bidder and the latter as the alternative bidder. Moreover, in some areas where bidders scored exactly the same, the functionality scores should have been used as a tie-breaker, and if the amended scores are implemented certain preferred and alternative bidders would be swapped in a few areas which will not prejudice the Applicant or for that matter any of the other affected Respondents.

[23] It is now well established in our law that the main principles to an assessment of the constitutional validity of outcomes under the government procurement process are set out in s 217 of the Constitution which provides as follows:

*"(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.”*

[24] Section 217(1) and the legislation which gives effect thereto, are generally referred to as the “supply chain management” (SCM) aspects of procurement law, whilst s 217(2) and (3) and the legislation which gives effect thereto is referred to as the “preferential procurement” aspects of procurement law.

[25] At the local government level, the SCM aspects of procurement law are largely governed by Part 1 of Chapter 11 of the Local Government: Municipal Finance Management Act 56 of 2003 (“the MFMA”), the Municipal Supply Chain Management Regulations (GN 868 in GG 27636 of 30 May 2005) and

the Municipality's SCM policy, which each municipality must have and implement in order to give effect to the MFMA.

[26] The preferential procurement aspects are governed, for all three spheres of government, by the Preferential Procurement Policy Framework Act 5 of 2000 ("the PPPFA") and its regulations the Preferential Procurement Regulations, 2011 (GN R. 502 in GG 34350 of 8 June 2011). The PPPFA is the national legislation as contemplated in s 217(3) of the Constitution. The PPPFA and its regulations also deal with the issue of the responsiveness of tenders. Section 1 of the PPPFA defines an "acceptable tender" to mean "any tender which, in all respects, complies with the specifications and conditions of tender as set out in the tender document".

[27] In AllPay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer, SASSA 2014 (1) SA 604 (CC), the approach to be adopted in determining the existence of alleged irregularities in a tender process and legal effect thereof if proven was *inter alia* considered by the Constitutional Court. The court held as follows:

*"[28] Under the Constitution there is no reason to conflate procedure and merit. The proper approach is to establish, factually, whether an irregularity occurred. Then the irregularity must be legally evaluated to determine whether it amounts to a ground of review under PAJA. This legal evaluation must, where appropriate, take into account the*

*materiality of any deviance from legal requirements, by linking the question of compliance to the purpose of the provision, before concluding that a review ground under PAJA has been established.*

*[29] Once that is done, the potential practical difficulties that may flow from declaring the administrative action constitutionally invalid must be dealt with under the just and equitable remedies provided for by the Constitution and PAJA. Indeed, it may often be inequitable to require the rerunning of the flawed tender process if it can be confidently predicted that the result will be the same.*

*[30] Assessing the materiality of compliance with legal requirements in our administrative law is, fortunately, an exercise unencumbered by excessive formality. It was not always so. Formal distinctions were drawn between 'mandatory' or 'peremptory' provisions on the one hand and 'directory' ones on the other, the former needing strict compliance on pain of non-validity, and the latter only substantial compliance or even non-compliance. The strict mechanical approach has been discarded. Although a number of factors need to be considered in this kind of enquiry, the central element is to link the question of compliance to the purpose of the provision. In this court O'Regan J succinctly put the question in *ACDP v Electoral Commission* as being 'whether what the applicant did constituted compliance with the statutory provisions viewed in the light of their purpose'. This is not*

*the same as asking whether compliance with the provisions will lead to a different result."*

[28] Returning to the two grounds of review, and having regard to the approach as mentioned above, the question now is whether the evidence on record establishes the factual existence of any irregularities and if so, whether the materiality of the irregularities justifies the legal conclusion that grounds for review under PAJA exists. Consideration must also be given to the fact that the materiality of irregularities will primarily be determined by assessing whether the purpose(s) the tender requirement(s) serve have been substantively achieved. In this regard see AllPay supra at paragraph [57] - [58].

[29] In *casu*, the specification of the tender in Clause 4.1.2 states that:

*"4.1.2 The Contractor shall provide his own labour, plant, materials, transport, tools and equipment necessary for the proper execution of this tender. The Contractor shall have available at all time's sufficient resources to execute the work within a reasonable time frame."*

[30] With regard to the verification requirement, the following was recorded as a note in the tender:

*"1. Inspection will be done before the commencement of the contract to verify compliance with quantities as per information in clause 6.6."*

*2. The above details will be used as an indicator of the Contractor's ability to execute this contract and therefore will be part of the Tender adjudication."*

[31] In the tender document equipment, vehicles and staff were listed as follows under the functionality criteria:

***"B.1 EQUIPMENT:***

*Contractor to state specific typed of equipment which will be available f or the utilization of this tender*

***B.2 VEHICLES***

*Contractor to state specific typed of vehicles which will be available for the utilization of this tender*

***STAFF***

*The contractor is to state the minimum number of staff appointed to the broad categories listed below, which are to be utilized for this contract."*

[32] It is evident on a proper reading of the tender document that the purpose of the assessment of the functionality criteria was to ensure that the successful bidders would be capable and able to perform in terms of the contract. The bidders who failed to achieve the minimum score for



functionality (70 out of 100), were declared non-responsive and eliminated from further evaluation.

[33] In determining whether the tenderers could only obtain points for equipment and staff listed which they already had available at the time, consideration must be given to the wording and “language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in light of all these factors.” In this regard see Novartis SA (Pty) Ltd v Maphil Trading (Pty) Ltd 2016 (1) SA 518 (SCA) at paragraph [26] – [27].

[34] On a plain reading of the tender document, the wording that bidders must list equipment and vehicles “*which will be available for the utilization of this tender*” cannot reasonable be interpreted to mean that bidders can list equipment and staff which they did not have at the time and then afterwards when the Tender had been awarded to them, obtain it. Such an interpretation would negate and undermine the very mandatory and material conditions that should underpin a fair, transparent, equitable, cost-effective and competitive procurement process.

[35] In my view, the most sensible and businesslike meaning that can be attributed to the said wording, having regard to the context of the tender

document as a whole, is that bidders only need to list the equipment and vehicles, including staff that will be available at the time the tender was submitted. This however does not mean the bidders must have owned or rented the equipment and or vehicles at the time of completing the tender document. The same applies to staff. All that was required is the availability of the same in some format or another at the time of completing the tender document.

[36] It is apparent from the tender document that the City was obliged to conduct an inspection pursuant to clause 6.6 of the bid document before the commencement of the contract. On the papers filed of record, it is evident that the City never contemplated that verification would take place during the evaluation process as it was not practically feasible nor regarded as a requirement. According to the City, it accepted the claims made by the bidders and these claims were later verified before the commencement of the contracts. This approach adopted by the City in this instance cannot be faulted.

[37] The Applicant in support of its contention that the assessment of the functionality criteria was flawed listed the preference points the Third, Seventh, Eighth, Ninth, Eleventh, and Thirteenth Respondent received. According to the Applicant, points were allocated for fictional staff. This allegation by the Applicant is largely premised on the basis that none of the said Respondents were registered for employee's tax or UIF. Furthermore,

according to the Applicant, the Third, Sixth, Ninth and Twelfth Respondents received points for equipment, which they incorrectly listed or did not own.

[38] It is not in dispute that an inspection and verification process was conducted by the City on the premises of the 13 winning bidders. In this regard the Joubert Report was compiled after the quantities of the equipment, vehicles and staff listed in the bidding documents was compared with quantities of the said items as found on the date of inspection on the premises of the winning bidders.

[39] The findings of the Joubert Report were *inter alia* that some of the bidders had less equipment, vehicles and staff available during the inspection than what was stated in their tender submission. A variety of reasons were advanced by the bidders for these differences in quantities, for example that: staff had to be retrenched due to operational requirements; vehicles had to be sold during the normal course of business; less work and income necessitated the retrenchment of staff and the selling of equipment; in certain instances it was claimed that the equipment, vehicles and staff is out on site for the day and therefore were not available for inspection; in instances where it seemed that the bidder made a misrepresentation in the tender submission, the aspect was interrogated and reasons were requested for the discrepancy. According to the Report, reasonable explanations were provided to the officials in those instances and the officials who performed the

verification exercise could not find any good reason to conclude that the successful bidders made a false claim in their bid documents.

[40] With regard to those specific allegations made by the Applicant, the verification process conducted by Joubert and his team recorded the following. In respect of the allegation against the Third and Ninth Respondents that they were incorrectly claiming points for equipment that was not available in South Africa, it was found that the Third Respondent had two 'Ride on Mowers' available. One was at the premises on the day of the inspection and the other was being repaired. The make of the 'Ride on Mowers' was not considered by the verification officials to be material for purposes of the verification exercise.

[41] With regard to the Ninth Respondent it was found that it informed the City at the time when tender submissions was submitted, of its proposed purchase of two Ride on Mowers but erroneously believed that a company Landini, was the manufactures of it. According to the Report, the Ninth Respondent indicated that it made a bona fide mistake and subsequently informed the City that a John Deere Ride on Mower, as well as a Walker Ride on Mower would be available for utilization during the period of the contract. According to the Report, there was no reason to doubt the veracity of the Ninth Respondent's claim and the make of the equipment was not considered to be material.

[42] As far as the Sixth Respondent was concerned in regard to listing equipment that it did not own, the verification exercise revealed that, save for some vehicles that were sold, the rest of the vehicles claimed were on the premises and there was no reason to doubt the Sixth Respondent's claim that the equipment and vehicles would be available for the contract and would be purchased, although according to the City ownership of the equipment and vehicles was not a requirement.

[43] The allegation against the Eleventh Respondent was that incorrect points were allocated to it for staff. The Eleventh Respondent was only entitled to 16 points for its listed staff members but obtained 21 points. According to the City this position was rectified by the internal compliance officer when 5 points was subtracted for functionality. This mistake, according to the City, was of no consequence in the Applicant's case as it had no impact on the outcome of the evaluation and the awards made.

[44] In respect of the Twelfth Respondent's listing of equipment under the heading "Ride on Mowers" without listing the type of equipment, it was found that Ride on Mowers are not vehicles that require roadworthy certificates and accordingly the registration numbers were not required. During the inspection only two tractor attachments were found. However, according to the Report there was no reason to doubt the bidder's claim that the claimed vehicles, equipment and personnel were available for the contract. The Report also

concluded that the Twelfth Respondent was correctly awarded 42 points for its equipment as listed.

[45] The verification process with regard to the other Respondents was not seriously challenged in the Applicant's Replying Affidavit or in argument by the Applicant's Counsel. With regard to the points awarded for employees who were not registered for employees' tax, the City was of the view that it was not a requirement that the bidders had to be registered for employees' tax as non-compliance with those laws would be dealt with by other regulatory authorities. Moreover, the verification process did not uncover any false claims made by the 13 successful bidders in their tender documents.

[46] The underlying purpose of the functionality criteria was to ensure that that the bidders were capable of delivering the service in terms of the tender. To this end, the verification process which largely stands unchallenged was one of the tools used to determine the capacity of the bidders to perform in terms of the contract. Moreover, it could not have been a requirement that bidders keep equipment, vehicles and staff claimed from the closing date of the tender to the date of inspection. From experience, these matters do not get finalized in the shortest period of time as unsuccessful bidders ordinarily take the tender process on appeal. In this case to require bidders to keep these items and staff until inspection could lead to oppressive and impractical results.

[47] It is evident from the Applicant's complaint that the discrepancies or so-called irregularities that may have existed during the bid evaluation process does not amount to material irregularities in the true sense of the word. In this regard the dictum in Aurecon South Africa (Pty) Ltd v Cape Town City 2016 (2) SA 199 (SCA) at paragraph [43] is in my view apposite where the following was held:

*"[...] it is firmly established in our law that administrative action based on formal or procedural defects is not always invalid and that legal validity is concerned not only with technical but also with substantial correctness, which should not always be sacrificed for form."*

[48] With regard to the review grounds as contemplated in s 6 of PAJA, it is now well accepted that the said section gives legislative expression to the fundamental right to administrative action that is lawful, reasonable and procedurally fair under s 33 of the Constitution. In AllPay supra at paragraph [42], it was held that: *'It is a long-held principal of our administrative law that the primary focus in scrutinising administrative action is on the fairness of the process, not the substantive correctness of the outcome.'*

[49] On the conspectus of all the facts and with these stated principles as guidelines the BAC, in my view, did not act unreasonably and or unfairly by accepting the Second to Fourteenth Respondents assessment of functionality.

It follows that the challenge by the Applicant that the tender document was vague and uncertain cannot be sustained.

[50] On the papers filed of record and on the City's own submissions it is evident that errors were made regarding the B-BBEE scoring. The Applicant and the Respondents did not take issue with the fact that the shortcomings as identified by the City in the report compiled by the Compliance Officer, Ms Belinda Karen Kuhn needed to be rectified. The question now is, whether as a remedy, this is one of those exceptional matters as contemplated in s 8(1)(c)(ii)(aa) of PAJA - Remedies in proceedings for judicial review - not to remit the matter to the City as the result and outcome would be a foregone conclusion.

[51] On a conspectus of all the facts, I am satisfied that justice and equity demands that the matter not be remitted to the City to restart the entire process *ab initio*. All the affected parties are before this court. The changes that need to be made will not have a material effect on the final outcome. The rectification of the errors is not complicated and if corrected this tender award could ultimately be finalized and bring about certainty. It will also benefit the public at large.

[52] With regard to costs. It is trite that costs normally follow the result. In the present instance it was as a result of the Applicant's persistence that the irregularities with the scoring of the B-BBEE status were detected. This



ultimately caused the City to adjust albeit of no consequence to the Applicant the outcome of the tender process. For these stated reasons I am of the view that it would only be just and equitable in the circumstances of this case that each party pays its own costs.

[53] In view of all these stated reasons, the ultimate relief sought by the Applicant in its Notice of Motion cannot succeed.

[54] In the result the following order is made:

1. The decision to award Tender Number 206S/2014/15 for the Mowing of Public Open Spaces, Road Reserves and Cemeteries is hereby reviewed in terms of the Promotion of Administrative Justice Act 3 of 2000, set aside and varied in terms of s 8(1)(c)(ii)(aa) of PAJA as set out in the report as compiled by the City's Ms Belinda Karen Kuhn, annexed hereto marked **"JV1"**.
2. Each party to pay its own costs.



LE GRANGE, J

| Item | Area                        | Suburb Location  | The suburb boundary consists of the 4 outermost main roads according to the directions North, South, East and West. | Tenderer   | Rate per square meter [m <sup>2</sup> excl.Vat] | Comments        | Revised Ranking | Comments with regard to revised ranking |
|------|-----------------------------|--|---|--|---|-----------------|-----------------|---|
| 1    | Northern District           |  |   |  |   |                 |                 |   |
| 1.1  | Service Area 1<br>Killarney | Atlantis, Mamre<br><br>Estimated total<br>m <sup>2</sup> = 600,000   | (N)R315<br>(S)Brakkefontein/<br>Klein Dassenberg<br>Rds<br>(E)N7<br>(W)R27  | Pegasus<br>Landscaping &<br>Horticultural<br>Maintenance CC<br>Save Our Land<br>Garden &<br>Cleaning Services<br>(Pty) Ltd | R0.11   | Main Contractor | No change       | n/a                                     |
| 1.2  | Service Area 3<br>Ndabeni   | Thornton, Pinelands,<br>Ndabeni, Maitland,<br>Kensington,<br>Facitrefon, Langa<br><br>Estimated total<br>m <sup>2</sup> =2,196,358 | (N)<br>Rd/N1<br>(E)Vanguard Drive<br>(W)Black River<br>Parkway<br>(S) Bhunga Drive                                  | Top N Nos CC<br>CA Davids t/a<br>Davids Tool Hire,<br>Lawnmower &<br>Garden Centre   | R0.10   | Main Contractor | No change       | n/a                                     |



"JVI"

| Item  | Area<br>Northern District   | Suburb Location  | The suburb boundary consists of the 4 outermost main roads according to the directions North, South, East and West. | Tenderer  | Rate per square meter [m <sup>2</sup> excl. Vat] | Comments               | Revised Ranking                    | Comments with regard to revised ranking   |
|-------|-----------------------------|--|---|---|--|------------------------|------------------------------------|---|
| 1.3.1 | Service Area 4.1<br>Athlone | Manenberg, Primrose Park, Heideveld, Rylands, Vanguard Estate, Penlyn Estate, Mouniview, Newfields, Hanover Park<br><br>Estimated total m <sup>2</sup> =1,584,786    | (N) Settlers Way<br>(E) Duinefontein Rd<br>(W) Kromboom Parkway<br>(S) Welton, Landsdowne                           | Sidelo Sondlo Investment (Pty) Ltd                        | R0.09  | Main Contractor        | Top N Nos CC                       | Total adjudication points for both was 90. Top and Nos had higher BBBEE therefore they should have been higher ranked |
|       |                             |  |   |   |  | Alternative Contractor | Sidelo Sondlo Investment (Pty) Ltd |   |
|       |                             |  |   | Top N Nos CC  | R0.10  |                        | No change                          | n/a   |
| 1.3.2 | Service Area 4.2<br>Athlone | Sybrand Park, Gleemor, Sunnyside Park, Hazendal, Athlone, Lansdowne, Kenwyn, R/Bosch East, Crawford, Langa Cemetery<br><br>Estimated total m <sup>2</sup> =1,640,399 |   | Top N Nos CC  | R0.10  | Main Contractor        | No change                          | n/a   |
|       |                             |  |   | CA Davids t/a Davids Tool Hire, Lawnmower & Garden Centre |  | Alternative Contractor |                                    |   |



| Item  | Area<br>Northern District     | Suburb Location   | The suburb boundary consists of the 4 outermost main roads according to the directions North, South, East and West. | Tenderer                           | Rate per square meter (m <sup>2</sup> excl.Vat) | Comments               | Revised Ranking                    | Comments with regard to revised ranking   |
|-------|-------------------------------|---|---|------------------------------------|---|------------------------|------------------------------------|---|
| 1.4.1 | Service Area 5.1<br>Cape Town | Oranjezicht, Vredehoek, Observatory, River, Woodstock, Brooklyn, P/Island<br><br>Estimated total m <sup>2</sup> =556,930      | (N) Boundary Rd<br>(E) Black river Parkway<br>(W) Bakoven (Brook St)<br>(S) N2                                      | Sidelo Sandlo Investment (Pty) Ltd | R0.09   | Main Contractor        | Top N Nos CC                       | Total adjudication points for both was 90. Top and Nos had higher BBBEE therefore they should have been higher ranked |
|       |                               |   |   | Top N Nos CC                       | R0.10   | Alternative Contractor | Sidelo Sandlo Investment (Pty) Ltd | n/a   |
|       |                               |   |   | Top N Nos CC                       | R0.10   | Main Contractor        | No change                          | n/a   |
| 1.4.2 | Service Area 5.2<br>Cape Town | CBD, Green Point, Sea Point, Vamps Bay, Tamboerskloof, Scholse Kloof, Freeways<br><br>Estimated total m <sup>2</sup> =796,568 |   | Chidinma CC (Offer 1)              | R0.10   | Alternative Contractor | No change                          | n/a   |



| Item | Area                       | Suburb Location  | The suburb boundary consists of the 4 outermost main roads according to the directions North, South, East and West. | Tenderer                        | Rate per square meter (m <sup>2</sup> excl.Vat) | Comments               | Revised Ranking                       | Comments with regard to revised ranking   |
|------|----------------------------|--|---|---------------------------------|---|------------------------|---------------------------------------|---|
| 2    | Central District           |  |   |                                 |   |                        |                                       |   |
| 2.1  | Service Area 6 Durbanville | Durbanville CBD, Langeberg, Welgemoed, D'Urbanville, Richwarth, Tygervallei, Eversdal<br><br>Estimated total m <sup>2</sup> =3,897,452 | (N) Klipheuwel rd<br>(E) R304<br>(S) N1<br>(W) Tygerberg Nature reserve   | Women on Board CC               | R0.08   | Main Contractor        | No change                             | n/a   |
|      |                            |  |   | Diversity Style Trade (Pty) Ltd | R0.09   | Alternative Contractor | Siqualo Gardening & Cleaning Services | Diversity Style Trade (Pty) Ltd and Siqualo Gardening & Cleaning Services both obtained 26 Total Adjudication Points. Both have the same BBBEE level therefore functionality should have been taken into account. Siqualo had 75 points for functionality and Diversity had 73 points |



| Item | Area  | Suburb Location  | The suburb boundary consists of the 4 outermost main roads according to the directions North, South, East and West.                | Tenderer   | Rate per square meter [m <sup>2</sup> excl.Vat] | Comments               | Revised Ranking | Comments with regard to revised ranking |
|------|---|--|--|--|---|------------------------|-----------------|---|
| 2.2  | Central District                                  | Service Area 7<br>Goodwood/<br>Parow   | Richwood/ Bothaisig/<br>Edgemead/Goodwood/<br>Parow/ Panarama/<br>Parow valley<br><br>Estimated total<br>m <sup>2</sup> =2,986,217 | (N) Morris Shell<br>(S) Voortrekkerweg R102<br>(E) Plattelkloof rd-<br>M14<br>(W) Vanguard- N7 |   |                        | No change       | n/a                                     |
|      |   |  |  | Women on Board CC  | R0.08   | Main Contractor        | No change       | n/a                                     |
|      |   |  |  | Sidelo Sondlo Investment (Pty) Ltd   | R0.08   | Alternative Contractor | No change       | n/a                                     |
| 2.3  | Service Area 8<br>Bellville/Belhar<br>r/<br>Delft | Bellville, Delft,<br>Chrismar, Belhar<br>Kasselsvlei, Industry<br><br>Estimated total<br>m <sup>2</sup> =3,823,489 | (N) N1<br>(E) R300<br>(S) N2<br>(W) Modderdam rd   | Ngcokoto General Trading CC  | R0.10   | Main Contractor        | No change       | n/a                                     |
|      |   |  |  | C Arendse t/a Connie's Enterprises   | R0.10   | Alternative Contractor | No change       | n/a                                     |



| Item | Area  | Suburb location   | The suburb boundary consists of the 4 outermost main roads according to the directions North, South, East and West.   | Tenderer                                      | Rate per square meter [m <sup>2</sup> ] excl. Vat) | Comments                  | Revised Ranking | Comments with regard to revised ranking |
|------|---|---|---|---|--|---------------------------|-----------------|---|
| 2.4  | Central District                                | Service Area 9<br>Kraaifontein/<br>Brackenfell  | Kraaifontein,<br>Sonstraal hoogte,<br>Brackenfell,<br>Wallacedene,<br>Vredeloof,<br>Scotsdene,<br>Bloekombos, Uitsigt<br><br>Estimated total<br>m <sup>2</sup> =3,592,179 | Women on Board<br>CC                          | R0.08  | Main Contractor           | No change       | n/a                                     |
|      |   |   |   | Corma<br>Construction and<br>Cleaning CC      | R0.09  | Alternative<br>Contractor | No change       | n/a                                     |
|      |   |   |   |   |  |                           |                 |   |
| 2.5  | Service Area 10<br>Elsies River/<br>Bonteheuwel | Bonteheuwel,<br>Valhalla, Elsies Rivier,<br>Ravensmead,<br>Ruiterswaght<br><br>Estimated total<br>m <sup>2</sup> =2,548,875 | (N) Voortrekker rd<br>(E) Modderdam rd<br>(S) N2<br>(W) Vanguard rd   | Diversity Style<br>Trade (Pty) Ltd            | R0.08  | Main Contractor           | No change       | n/a                                     |
|      |   |   |   | Sigalo Gardening<br>& Cleaning<br>Services CC | R0.08  | Alternative<br>Contractor | No change       | n/a                                     |

| Item | Area                                | Suburb Location  | The suburb boundary consists of the 4 outermost main roads according to the directions North, South, East and West.                             | Tenderer                                | Rate per square meter [m²] excl. Vat) | Comments               | Revised Ranking                   | Comments with regard to revised ranking   |
|------|-------------------------------------|--|---|---|---------------------------------------|------------------------|-----------------------------------|---|
| 3    | Eastern District                    |  |   |   |                                       |                        |                                   |   |
| 3.1  | Service Area 12 Blue Downs/ Mfuleni | Driftsands, Eerste River, Mfuleni, Brentwood Park, Fountain Village, Penhill, Welmoed, Electric City, Blue Downs CBD<br><br>Estimated total m2=2,044,133 | (N) Van Riebeeck Rd including Penhill Estate, Station Rd and Simons Way<br>(S) N2 Freeway<br>(E) Baden Powell Drive<br>(W) Albert Philander Way | Diversity Style Trade (Pty) Ltd         | R0.09                                 | Main Contractor        | C Arendse t/a Connie's Enterprise | C Arendse t/a Connie's Enterprise and Diversity Style Trade (Pty) Ltd both obtained 98 total Adjudication Points. Both have the same 888EE level therefore functionality should have been taken into account. Connie's scored 81 points (less 5 points = 76) for functionality and Diversity scored 73 points |
| 3.2  | Service Area 13 Khayelitsha         | Mandela Park, Iliitha Park, Nonquebela, Gwayi, etc<br><br>Estimated total m2=631,205   | (N) N2 Freeway<br>(S) Swartkops Rd<br>(E) Baden Powell Drive<br>(W) Mew Way   | C Arendse t/a Connie's Enterprise       | R0.09                                 | Alternative Contractor | No change                         | n/a   |
|      |                                     |  |   | Siqalo Gardening & Cleaning Services CC | R0.09                                 | Main Contractor        | No change                         | n/a   |
|      |                                     |  |   | C Arendse t/a Connie's Enterprise       | R0.10                                 | Alternative Contractor |                                   |   |





| Item | Area                                    | Suburb Location   | The suburb boundary consists of the 4 outermost main roads according to the directions North, South, East and West. | Tenderer   | Rate per square meter [m <sup>2</sup> excl.Vat) | Comments               | Revised Ranking                         | Comments with regard to revised ranking   |
|------|---|---|---|--|---|------------------------|---|---|
| 3.3  | Service Area 14 Somerset West/ Macassar | Croydon, Macassar, Heidervue, Firgrove, Somerset Ridge, S/West CBD, Bizweni, Rome Glen, Chris Nissan Park, SLP ass village, Heritage Park, Business Park, Garden Village<br><br>Estimated total m <sup>2</sup> =1,696,527 | (N) N2 Freeway<br>(S) Beach Road<br>(E) Faure Marine Drive<br>(W) Broadway Boulevard                                | Diversity Style Trade (Pty) Ltd                    | R0.09   | Main Contractor        | Siqalo Gardening & Cleaning Services CC | Diversity Style Trade (Pty) Ltd and Siqalo Gardening & Cleaning Services both obtained 98 Total Adjudication Points. Both have the same BBBEE level therefore functionality should have been taken into account. Siqalo had 75 points for functionality and Diversity had 73 points |
|      |   |   |   | Siqalo Gardening & Cleaning Services CC            | R0.09   | Alternative Contractor | Diversity Style Trade (Pty) Ltd         |   |
|      |   |   |   | Pegasus Landscaping & Horticultural Maintenance CC |   |                        | No change                               | n/a   |
| 3.4  | Service Area 15 Strand                  | Nomzamo, Lwandle, G/Bay, Gustrow, Strand CBD, Onverwacht, etc<br><br>Estimated total m <sup>2</sup> =679,291  | (N) Vergelegen Rd<br>(S) Macassar Rd<br>(E) Sir Lowry Rd<br>(W) Bayden Powell Drive                                 | Chidima CC (Offer 1)                               | R0.11   | Main Contractor        | No change                               | n/a   |
|      |   |   |   |  |   | Alternative Contractor |   |   |



| Item | Area                                 | Suburb Location   | The suburb boundary consists of the 4 outermost main roads according to the directions North, South, East and West. | Tenderer                                | Rate per square meter [m <sup>2</sup> excl.Vat) | Comments               | Revised Ranking | Comments with regard to revised ranking  |
|------|--------------------------------------|---|---|---|---|------------------------|-----------------|--|
| 4    | <b>Southern District</b>             |   |   |   |   |                        |                 |  |
| 4.1  | Service Area 16 Weltevreden, M/Plain | Westridge, Woodlands, Lenteguur, Portlands Sirandfontein, Rocklands Eastridge, Tafelsig<br>Estimated total m2=1,082,280 | Dagbreek Avenue, Mitchells avenue, Silversands ave, Merrydale Ave, Morgenster Rd, Park Ave, Hazeldene               | Siqalo Gardening & Cleaning Services CC | R0.09   | Main Contractor        | No change       | n/a  |
|      |                                      |   |   | Top N Nos CC                            | R0.10   | Alternative Contractor | No change       | n/a  |
| 4.2  | Service Area 17 Merrydale, M/Plain   | Phillipi, Crossroads, Browns farm, Samora, M, Plain<br>Estimated total m2=1,205,066                                     | (N) Lansdowne & Klipfontein Rd.<br>(S) Highlands Drive<br>(E) Swartklip Rd.<br>(W) Old Weltevreden Rd.              | Siqalo Gardening & Cleaning Services CC | R0.09   | Main Contractor        | No change       | n/a  |
|      |                                      |   |   | Sidelo Sondlo Investment (Pty) Ltd      | R0.09   | Alternative Contractor | Top N Nos CC    | Sidelo and Top N Nos both had 90 total adjudication points. Top N Nos had higher BBBEE so should have been ranked higher than Sidelo |



| Item  | Area Southern District    | Suburb Location   | The suburb boundary consists of the 4 outermost main roads according to the directions North, South, East and West. | Tenderer                           | Rate per square meter [m <sup>2</sup> excl.Vat) | Comments               | Revised Ranking                         | Comments with regard to revised ranking   |
|-------|---------------------------|---|---|------------------------------------|---|------------------------|---|---|
| 4.3.1 | Service Area 18.1 Wynberg | Wynberg, Plumstead, Diep River, Bergvliet, Meadowridge, Southfield west of M5<br><br>Estimated total m2=2,400,000 | (N) Welton Road, Main Rd, Constanlia Rd<br>(W) M3<br>(S) Retreat Rd, Zeekoevlei, Baden Powell<br>(E) Weltevreden Rd | Sidelo Sondlo Investment (Pty) Ltd | R0.08   | Main Contractor        | No change                               | n/a   |
|       |                           |   |   | Diversity Style Trade (Pty) Ltd    | R0.09   | Alternative Contractor | Sigalo Gardening & Cleaning Services CC | Diversity Style Trade (Pty) Ltd and Sigalo Gardening & Cleaning Services both obtained 87 Total Adjudication Points. Both have the same BBBEE level therefore functionality should have been taken into account. Sigalo had 75 points for functionality and Diversity had 73 points |



| Item  | Area Southern District     | Suburb Location  | The suburb boundary consists of the 4 outermost main roads according to the directions North, South, East and West. | Tenderer   | Rate per square meter [m²] excl. Vat) | Comments               | Revised Ranking       | Comments with regard to revised ranking   |
|-------|----------------------------|--|---|--|---------------------------------------|------------------------|-----------------------|---|
| 4.3.2 | Service Area 18.2 Wynberg  | Retreat, Ottery, Grassy Park, Lotus River, Pelican Park east of M5<br>Estimated total m2=2,258,453 |   | Bradley Fabian Mampies t/a Mampies Tree Felling and Gardening Services | R0.10                                 | Main Contractor        | No change             | n/a   |
|       |                            |  |   | Save Our Land Garden & Cleaning Services (Pty) Ltd                     | R0.10                                 | Alternative Contractor | No change             | n/a   |
| 4.4.1 | Service Area 19.1 Newlands | Hout Bay, Ilundudno, Constantia, Wynberg<br>Estimated total m2= 1,937,579                          | N) Victoria Road (int Ilundudno)<br>S) Harbour Rd / Princess Street<br>E) Hout Bay Main Rd<br>W) Victoria Ave       | Bradley Fabian Mampies t/a Mampies Tree Felling and Gardening Services | R0.10                                 | Main Contractor        | No change             | n/a   |
|       |                            |  |   | Chidinma CC (Offer 1)  | R0.10                                 | Alternative Contractor | Chidinma CC (Offer 2) | Same company but different offer so essentially there would not be a change. Offer 2 scored higher functionality points |



| Item  | Area<br>Southern<br>District     | Suburb Location  | The suburb boundary<br>consists of the 4<br>outermost main roads<br>according to the<br>directions North,<br>South, East and West. | Tenderer   | Rate per<br>square meter<br>[m <sup>2</sup> ]<br>excl. Vat) | Comments               | Revised<br>Ranking  | Comments with<br>regard to revised<br>ranking  |
|-------|----------------------------------|--|--|--|---|------------------------|---|--|
| 4.4.2 | Service<br>Area 19.2<br>Newlands | Bishops court,<br>Fernwood,<br>Kenilworth<br>(including<br>Access Park),<br>Claremont,<br>Newlands,<br>Rondebosch,<br>Rosebank,<br>University Estate,<br>Mowbray<br>(part of)<br><br>Estimated total<br>m <sup>2</sup> = 874,415 | N) N2<br>S) Firgrove Rd<br>E) M5<br>W) M3  | Save Our Land<br>Garden &<br>Cleaning<br>Services (Pty)<br>Ltd | R0.10   | Main Contractor        | Chidinma<br>CC (Offer 2)  | Both Save Our<br>Land and Chidinma<br>scored a total of 88<br>adjudication points<br>and have the<br>same BBEE levels.<br>Chidinma (offer 2)<br>scored 87 points for<br>functionality.<br>Chidinma (Offer 1)<br>scored 86 points<br>and Save our Land<br>71 points.<br>Chidinma cannot<br>be the alternative<br>contractor as well,<br>hence Save Our<br>Land should be the<br>alternative |
|       |                                  |  |  | Chidinma CC<br>(Offer 1)                                       |   |                        | Save Our<br>Land<br>Garden &<br>Cleaning<br>Services<br>(Pty) Ltd |  |
|       |                                  |  |  |  | R0.10   | Alternative Contractor |   |  |

| Item  | Area Southern District                | Suburb Location  | The suburb boundary consists of the 4 outermost main roads according to the directions North, South, East and West. | Tenderer   | Rate per square meter [m <sup>2</sup> excl. Vat) | Comments               | Revised Ranking                                    | Comments with regard to revised ranking  |
|-------|---------------------------------------|--|---|--|--|------------------------|--|--|
| 4.5.1 | Service Area 20.1 Muizenberg          | Lakeside, Marina da Gama, Lavender Hill, Steenberg, Reireat, Bergvliet, Heathfield, Kirstenhof, Tokai, Muizenberg<br><br>Estimated total m <sup>2</sup> =2,630,750 | (N) Firgrove Rd<br>Constantia<br>(E) Prince George Drive<br>(W) Boyes Drive<br>(S) Clairvaux Rd                     | Bradley Fabian Mampies Tree Felling and Gardening Services | R0.10  | Main Contractor        | No change  | n/a  |
|       |                                       |  |   | Save Our Land Garden & Cleaning Services (Pty) Ltd         | R0.10  | Alternative Contractor | Chidima CC (Offer 2)                               | Both Save Our Land and Chidima scored a total of 88 adjudication points and both have the same BBBEE levels. Chidima (offer 2) scored 87 points for functionality. Chidima (Offer 1) 86 points and Save our Land 71 points   |
|       |                                       |  |   | Save Our Land Garden & Cleaning Services (Pty) Ltd         | R0.10  | Main Contractor        | Chidima CC (Offer 2)                               | Both Save Our Land and Chidima scored a total of 88 adjudication points and both have the same BBBEE levels. Chidima (offer 2) scored 87 points for functionality. Chidima (Offer 1) 86 points and Save our Land 71 points.  |
| 4.5.2 | Service Area 20.2 Muizenberg District | Simons Town, Fish hoek, Noordhoek, Glencalrn, Ocean View, Sun Valley, Kalk Bay, Clovelly, Kommetjie<br><br>Estimated total m <sup>2</sup> = 750,663                | N) Ou Kaapse Weg<br>(E) Main Road<br>(W) Plateau rd<br>(S) Mullers Point  | Pegasus Landscaping & Horticultural Maintenance CC         | R0.10  | Alternative Contractor | Save Our Land Garden & Cleaning Services (Pty) Ltd | Both Save Our Land and Chidima scored a total of 88 adjudication points and both have the same BBBEE levels. Chidima (offer 2) scored 87 points for functionality. Chidima (Offer 1) 86 points and Save our Land 71 points. Chidima cannot be the alternative contractor as well, hence Save Our |



| Land should be the alternative |  |  |  |  |  |  |  |  |  |
|--------------------------------|--|--|--|--|--|--|--|--|--|
|                                |  |  |  |  |  |  |  |  |  |

