Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case No. 21512/2021

Before: The Hon. Ms Acting Justice Hofmeyr

Date of hearing: 15 August 2023
Date of judgment: 18 October 2023

In the matter between:

AMPCOR KHANYISA (PTY) LTD	Applicant
and	
THE CITY OF CAPE TOWN	First Respondent
THE BID ADJUDICATION COMMITTEE: CITY OF CAPE TOWN	Second Respondent
THE CITY MANAGER: CITY OF CAPE TOWN	Third Respondent
JT MARITZ ELECTRICAL CC	Fourth Respondent
ELEX UMBANE (PTY) KTD	Fifth Respondent
JAKE TRADING CC	Sixth Respondent

JUDGMENT

Judgment handed down electronically by circulation to the parties' legal representatives on email and released on SAFLII

HOFMEYR AJ:

Introduction

1 On 25 September 2020, the City of Cape Town published advertisements calling for bids for a tender to provide construction works for the installation and replacement of certain electrical equipment and infrastructure.

2 The applicant, Ampcor Khanyisa (Pty) Ltd, submitted a bid for the tender.

3 It was, however, disqualified because it was found by the Bid Evaluation Committee, and then confirmed by the Bid Adjudication Committee, to have been non-responsive. The effect of this finding was that the bid did not proceed to the next stage for competitive assessment on price. It has brought review proceedings to impugn the decision to disqualify it.

4 The applicant's disqualification related to a single issue. In all other respects, the bid was responsive.

5 The non-responsiveness related to the supporting documents submitted for one of the semi-skilled workers (handymen) that the applicant said it would have working on the project. According to the City, one of the applicant's handyman, Mr Amon Farmer, did not submit a document showing that he had a minimum of an "ELCONOP 2 or similar electrical construction training/accreditation".

6 It is common cause that Mr Farmer did not have an ELCONOP 2 accreditation. However, he did have another qualification (a single phase testing certificate) that, it is also common cause, was “similar to” and ELCONOP 2 accreditation. So he had the accreditation that the City was looking for but the applicant did not submit that certificate with its tender. It would have been a very simple matter for the necessary document to be provided.

7 The applicant contends that the tender requirements were never clearly enough stated to make it apparent that it needed to supply the City with a single phase testing certificate for Mr Farmer. The applicant says it never understood this to be required because it had, in fact, provided a more recent, superior accreditation for Mr Farmer. It therefore never realised that what was required of it was to submit proof of a different, lesser, accreditation.

8 The City disputes whether Mr Farmer’s other, more recent accreditation was applicable to this tender. It emphasises that the tender had a key construction aspect and Mr Farmer’s more recent accreditation did not have a clear construction training component. The City also says that it is the expert decision-maker and it should be left free to determine what accreditation and training, it regards, as adequate for its purposes. A court should not impugn its decisions based on questions of fact unless those facts are objectively verifiable and uncontentious.

9 The issues for determination in this review are therefore twofold:

9.1 Was there a reviewable irregularity in the City’s decision making processes; and

9.2 If there was, what remedy should this court grant?

Reviewable irregularity

10 By the time that the issues in this case had crystalised for argument, it was clear that the mainstay of the applicant's attack on the impugned decisions relied on the vagueness of the tender requirements and the attendant consequences that this vagueness had for procedural fairness in the process.

11 The applicant appears to have been moved to place this emphasis on its review grounds because of the entirely correct submission from the City that, in the absence of objectively verifiable facts regarding the superiority of Mr Farmer's other qualification and what counts as accreditation/training sufficiently similar to ELECONOP 2, this court ought not to review the City's decisions.

12 The City was correct in this submission because our courts have been at pains to demarcate a limited area for judicial review based on errors of fact. This demarcation is important because, unless a line is maintained between the types of factual errors that will result in a decision being reviewed and set aside by a court, there is a risk that the important distinction between appeals and reviews will be collapsed.[1] The test that has been set for reviewable errors of fact is that they must be objectively verifiable and uncontentious.[2]

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1 Hoexter & Penfold *Administrative Law in South Africa* 3rd edition 137; *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 3 SA 490 (CC) para 46; *Rustenberg Platinum Mines Ltd (Rustenberg Section) v Commissioner for Conciliation, Mediation and Arbitration* 2007 (1) SA 576 (SCA) para 32

2 *Airports Company South Africa v Tswelokgotso Trading Enterprises CC* 2019 (1) SA 204 (GJ) paras 8 to 12

13 This court must therefore respect the expert decision-making of the City. It determined that Mr Farmer's other qualification did not contain a construction component sufficient for the work required on the tender. Whether the City's determination on this issue is correct is hotly contested by the applicant but that makes the answer to the question the antithesis of objectively verifiable. Whether Mr Farmer's other qualification provided sufficient training in construction to be similar enough to the ELCONOP 2 accreditation is not uncontentious in the way required for this court to step in and impugn the City's decision.

14 So, unless the applicant had pivoted away from the question whether Mr Farmer's other qualification was superior or not to the ELCONOP 2 accreditation, it would not have been successful in its review.

15 But it did pivot.

16 The applicant's attack on the City's decision-making shifted to focus on a different aspect of its review. The applicant emphasised that it was never made clear to it during the course of the City's decision-making that what the City required from the applicant was that it submit proof of Mr Farmer's single phase testing accreditation. In order to understand its argument on this score it is necessary to trace some of the stages of the City's decision-making.

The tender requirements

17 The tender itself required bidders to submit proof that its semi-skilled workers (or handymen) had a "ELCONOP 2" qualification "or similar electrical construction/accreditation".

18 This requirement, on its own terms, introduced an evaluative element into the decision-making. The City had indicated that it was willing to accept accreditations different to ELCONOP 2 but it specified that anything else that was submitted would have to be "similar" to ELECONOP 2.

The clarification letter

19 After the bids were submitted, the City sent a letter to the applicant and drew attention to the tender requirement of an ELCONOP 2 or similar accreditation for semi-skilled workers and then said that the applicant had "*failed to submit accompanying documents as proof of competencies*". It then asked the applicant to submit "ELCONOP 2 or similar electrical training/accreditation" for the three semi-skilled workers of which Mr Farmer was one.

20 The applicant did not understand this request to be a request for a single phase testing certificate to be produced for Mr Farmer. On the contrary, the applicant thought that Mr Farmer's higher qualification of an NRS040 certificate was sufficient to qualify him to perform the work covered by an ELCONOP 2 accreditation.

21 But that is not what the City was after. The City had made a determination that there was a special component of construction training that workers, who had received the

ELECONP 2 certificate, would have covered in their course and this was a key element that it was looking for in the suitability of a bidder's handymen.

22 As I have set out above, the City knew what it wanted for this project and it is the expert decision-maker to which deference is owed when it determines what will satisfy it as a qualification similar to ELCONOP 2. However, precisely because this is its domain and it must be granted a measure of deference on the question of what qualifies as an equivalent qualification, it ought to have ensured that its tender requirements and communications with bidders made this clear.

23 As Mr Borgström, who appeared for the applicant with Mr Lubbe, stressed during argument, the Constitutional Court has previously held that that tenders ought not to be designed in such a way that they are awarded only to those bidders who are "clever" enough to decipher an otherwise unclear tender requirement.

24 In *AllPay1*, the Constitutional Court emphasised that vagueness and uncertainty are grounds of review under the Promotion of Administrative Justice Act 3 of 2000 (PAJA).[3] The Court also explained that vagueness can produce an element of procedural unfairness in a process because if the requirements are so unclear that a bidder simply does not know the case it must meet in order to be responsive to a tender, then the process will not have been a fair one.[4]

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3 *AllPay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer, South African Social Security Agency and Others* 2014 (1) SA 604 (CC) para 87

4 *AllPay1* para 88

25 Writing for the Court, Justice Froneman held that "*the purpose of a tender is not to reward bidders who are clever enough to decipher unclear directions*". On the contrary, the purpose is to ensure a process that elicits the best solution through a process that is fair, equitable, transparent, cost-effective and competitive.[5]

26 At the stage that the City sent the letter to the applicant calling for it to submit the ELCONOP 2 or similar training /accreditation for its three semi-skilled workers, the Bid Evaluation Committee of the City had already met and reviewed the documents submitted for Mr Farmer. It had formed the view that his other qualification was not suitable and it knew that it was looking for an accreditation with a particular emphasis on construction training, for which a single phase testing certification would be adequate. But it did not say this in its letter to the applicant. Instead, it simply stated vaguely that the applicant had "*failed to submit accompanying documents as proof of competencies*". It called on the applicant to provide an ELCONOP 2 or similar training/accreditation. But that just repeated the requirement of the tender. It gave no further clarity as to what the City regarded as a qualification sufficiently similar to ELCONOP 2 to be acceptable.

27 The City's retort to this complaint about a lack of clarity was twofold.

27.1 First, it maintained that the tender requirement was clear so its mere repetition in the clarification letter was adequate. However, as I have already highlighted above, the tender requirements were set in such a way as to introduce an evaluative element. The City is entitled to use its expertise to assess what is suitably equivalent to an ELCONOP 2 qualification to be adequate but precisely

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5 *AllPay1* para 92

because this requires a measure of evaluation, it needs to be clear about what it will regard as a sufficiently similar qualification.

27.2 Second, the City resisted the applicant's complaint that it was incumbent upon it to set out in the clarification letter *why* the City had formed the view that the documents already submitted for Mr Farmer were not sufficiently "similar" to an ELCONOP 2 qualification, by saying that it could not have done so because this would have amounted to giving the applicant "a helping hand of the kind not given to any other bidder". The City was emphatic about this. It said that "the purpose of the clarification letters is not to provide tenderers an unfair chance or to give them an opportunity to enhance an otherwise non-responsive bid".

27.3 But the City erred in a material way in taking this approach. It cannot possibly amount to an unfair advantage to a bidder if the City is simply clear about what it regards as a sufficiently similar qualification to ELCONOP 2 for the requirements of a particular project. Provided this clarity is given to all bidders similarly situated, there can be no unfairness that arises. The City is merely clarifying to bidders what it regards as equivalent training/accreditation.

27.4 The City's approach on this issue appears to have been informed by a genuine concern not to be advantaging one bidder over another in the decision-making process. It should be commended on its efforts to ensure parity of treatment.[6]

27.5 But it erred in doing so because it thought that the way to achieve this was to keep everyone equally in the dark about what it would regard as an equivalent

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6 *AllPay1* para 40; *Premier, Free State, and Others v Firechem Free State (Pty) Ltd* 2000 (4) SA 413 (SCA) para 30; *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 (3) SA 121 (CC) para 50

qualification. It ought, instead, to have been clear to everyone about what it regarded as equivalent. If its position was that it did not regard qualifications without a construction training component as sufficiently similar to ELCONOP 2, then it should have said this, clearly. But simply repeating that a similar qualification must be provided does not give the necessary clarity because those who have submitted higher qualifications will not know what specific element of training the City is looking for.

28 The City's lack of clarity in its own "clarification" letter therefore resulted in a tender that was vague and a process that was unfair because they left the applicant uncertain about what was required of it to meet the tender requirements.

29 This unfairness was not remedied on appeal.

The appeal

30 After the applicant's bid was rejected as non-responsive, it lodged an appeal.

31 At the stage that it did so, it still did not know why the documents it had submitted with its tender and in response to the clarification letter were inadequate. It was told that the reason it had been disqualified was because it had "only submitted some of the accompanying documents". But it was still in the dark about the fact that the City did not regard the qualification that had been submitted for Mr Farmer as sufficiency similar to ELCONOP 2 to meet the requirements of the tender because it did not have an adequate construction training aspect to it.

32 This was *the* reason why the tender had been rejected as non-responsive but *it* was never conveyed to the applicant. It was, however, conveyed to the City Manager during the appeal process.

33 It appears from the record of proceedings that during the appeal process, the City Manager called for input from the BEC in order to understand why it had decided that the documents submitted for Mr Farmer were not adequate. The BEC sent a detailed email to the City Manager setting out precisely why it did not regard Mr Farmer's other NRS040 qualification as sufficiently similar to ELCONOP 2. The BEC explained to the City Manager that the NRS040 qualification did not have the construction training component that the City was after.

34 At no point in the appeal process was this reasoning from the BEC shared with the applicant. That, too, was a material procedural irregularity in the context of this case. The reason for this is that, by the time of the appeal, the applicant had still not been told in clear terms why Mr Farmer's submitted qualifications were deemed inadequate by the City. During the appeal process, this clarity was provided to the appeal decision-maker – the City Manager – but no opportunity was afforded to the applicant to address it.

35 It would have been the simplest thing to address. As I set out at the beginning of this judgment, Mr Farmer in fact had the necessary certificate that the City was looking for all along. But the City did not make it clear to the applicant that the reason its bid was regarded as non-responsive was because it was looking for a single phase tester certificate and Mr Farmer's later qualification did not have the key element of construction training that the City required.

36 I therefore conclude that the City's decision that the applicant's bid was non-responsive was procedurally unfair.

37 The next question is one of remedy.

Remedy

The amended notice of motion

38 The applicant initially launched this application for relief that would only impact its own rights. It sought to review and set aside the City's decisions (initially and on appeal) that its bid was non-responsive and then to obtain a declarator that its bid was responsive. It also sought relief that would have placed it on the list of approved service providers and allowed the City to evaluate its tender on the basis that it was deemed to be responsive.

39 It cited the three bidders who had been successful in the tender as the fourth to sixth respondents. None of them opposed the application.

40 However, after it had received the record from the City, the applicant filed a supplementary founding affidavit and a substantially amended notice of motion. In the amended notice of motion, the City sought the same review relief and declarator that its bid was responsive. But then the relief went on. It sought:

40.1 further declarators that the successful bidders (the fourth to sixth respondents in the review) had failed to meet the responsiveness requirements of the tender;

40.2 orders setting aside the decisions to award the tender to the fourth to sixth respondents;

40.3 orders reviewing and setting aside all the contracts concluded with the fourth to sixth respondents; and

40.4 a remittal of the matter to the Bid Adjudication Committee to reconsider the applicant's bid.

41 At the hearing of the matter, I was concerned about the extent to which the first notice of motion and the amended notice of motion differed in respects that had a material impact on the rights of the fourth to sixth respondents. I therefore sought confirmation from the applicant's counsel that the amended notice of motion had been served on the fourth to sixth respondents.

42 I was informed that it had been served on the fourth and fifth respondents but not the sixth respondent. I was further informed that, despite receiving the amended notice of motion, the fourth and fifth respondents had not decided to oppose the application. However, the attitude of the sixth respondent to the amended relief is not known to the court.

43 This is an issue of significance because the amended notice of motion differed in material respects from the original notice of motion. The main difference, as far as the fourth to sixth respondents were concerned, is that the first notice of motion sought relief that would not have affected their contracts. Indeed, the founding affidavit that accompanied the original notice of motion said in underlined text: "no relief of substance

is sought [against the fourth to sixth respondents]". But, in the amended notice of motion, those contracts were sought to be set aside.

44 It was therefore incumbent upon the applicant, after amending the relief in such material respects, to ensure proper service on all of the respondents. It did not do so in relation to the sixth respondent. When I raised this concern during the hearing, the applicant did not seek an opportunity to ensure proper service of the amended notice of motion on the sixth respondent.

45 The sixth respondent's decision not to oppose this application was therefore based only on the version of this case that it was presented with when the case was initially launched. That original notice of motion gave it no warning that the applicant was seeking to set aside its own contract.

46 In the absence of proper service of the amended notice of motion on the sixth respondent, I am not satisfied that it has been alerted to the relief sought against it. I do not know its attitude to that relief.

47 The constitutional right of access to court entitles those involved in legal proceedings before a court to a fair determination of disputes that can be resolved by the application of law.

48 In *Stopforth Swanepoel*, the Constitutional Court held that one of the foundational aspects of the right of access to courts is its concern with fairness. Fair procedure is

designed to prevent arbitrariness in decision-making.[7] In *De Lange*, the Constitutional Court explained how fairness in adjudicative processes guards again arbitrary decision-making:

> "(*t)he time-honoured principles that no-one shall be the judge in his or her own matter and that the other side should be heard [audi alteram partem] aim toward eliminating the proscribed arbitrariness in a way that gives content to the rule of law. They reach deep down into the adjudicating process, attempting to remove bias and ignorance from it. . . . Everyone has the right to state his or her own case, not because his or her version is right, and must be accepted, but because, in evaluating the cogency of any argument, the arbiter, still a fallible human being, must be informed about the points of view of both parties in order to stand any real chance of coming up with an objectively justifiable conclusion that is anything more than chance. Absent these central and core notions, any procedure that touches in an enduring and far-reaching manner on a vital human interest . . . points in the direction of a violation*."[8]

49 In *Stopforth Swanepoel*, the Constitutional Court set aside an order of the Supreme Court of Appeal that had been granted against certain conveyancing attorneys who had initially been joined in an action for recovery of monies but against whom the plaintiff had later withdrawn its case. The attorneys played no part in the appeal because, by that stage, the case against them had been withdrawn. Despite this, however, and despite the fact that the Supreme Court of Appeal had therefore not heard from the attorneys in the appeal before it, the Court granted an order that materially affected the attorney's legal rights. They were order to repay certain amounts and interest.

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7 *Stopforth Swanepoel & Brewis Inc v Royal Anthem (Pty) Ltd and Others* 2015 (2) SA 539 (CC) para 19

8 *De Lange v Smuts NO and Others* 1998 (3) SA 785 (CC) para 131 (emphasis added and footnotes omitted)

50 The Constitutional Court upheld an appeal by the attorneys against the order on the basis that their rights of access to courts had been violated because an order had been granted against them without them having been given an opportunity to be heard.[9]

51 Although in the present case there was no withdrawal of the proceedings against the sixth respondent, and in that sense it is still a party to the application, I am still confronted with a situation in which relief is sought against a party who has not been heard and who has not been afforded a proper opportunity to indicate whether it wishes to oppose the relief. Granting relief that would impact on the sixth respondent's rights in circumstances where it does not know that there is pending litigation that would have that effect on its rights is, in my view, the antithesis of fairness. It is akin to granting an order in unopposed court without service having been effected on the respondent. Such an result would infringe the respondent's constitutional right under section 34 of the Constitution.

52 I shall return at the end of the judgment to the significance of this finding for the appropriate remedy in the case. However, before doing so, I shall deal with the relief sought against the fourth and fifth respondents.

The fourth and fifth respondents

53 The fourth and fifth respondents are in a different position to that of the sixth respondent. They were served with the amended notice of motion and decided not to file any answering affidavits. In the circumstances, I must determine the merits of the applicant's

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9 *Stopforth Swanepoel & Brewis Inc v Royal Anthem (Pty) Ltd and Others* 2015 (2) SA 539 (CC) para 26

case for setting aside their contracts and the underlying decision-making that produced them on the applicant's and the City's versions.

54 The applicant advanced two grounds of review for setting aside the awards to the fourth and fifth respondents and then a further ground of review that applied only to the fifth respondent.

55 I deal with each of these in turn below.

First ground of review – pricing

56 The applicant's first ground of review of the fourth and fifth respondents' awards related to the manner in which the City assessed their pricing. However, this critique of the City's processes was misdirected because the relief that the applicant sought, in relation to the City's decisions to award contracts to the fourth and fifth respondent, was to have those decisions set aside because the fourth and fifth respondents' tenders were non-responsive. In other words, it was the non-responsiveness of the fourth and fifth respondents' bids that was to be the legal basis for their contracts being set aside.

57 But pricing evaluation was not a qualifying criteria of the tender process. Price was only assessed for bids that were found to be responsive. So the first ground of review of the fourth and fifth respondents' awards, does not tie up with the basis on which they were sought to be impugned by the applicant.

58 The first ground of review in relation to the fourth and fifth respondents' awards must therefore fail.

Second ground of review – cable jointers

59 The applicant's next attack on the decision to award the tender to the fourth and fifth respondents was that both of them had submitted a tender in which they indicated that they employed the same cable jointers.

60 According to the applicant, this was not compliant with the tender requirements because the tender did not permit the same personnel to be used by different bidders.

61 But that is not what the tender said. The tender said that bidders were required to have cable jointers in their employment at the close of the tenders and for the duration of the contract. As the City pointed out in its answer, it is possible for individuals to be employed by more than one employer at a time. The tender did not stipulate that cable jointers had to be in the *sole* employ of the bidder who listed them as employees.

62 I therefore find that there is no merit in this review ground.

Third ground of review – jack hammers

63 The applicant also sought to impugn the award of the tender to the fifth respondent on the ground that the technical specifications of the tender required each bidder to declare that it owned or had entered into contracts of hire for three jack hammers but the fifth respondent's bid specified that it had only two jack hammers.

64 However, as the City pointed out in answer, the fifth respondent's own tender documents were not clear about whether it had two or four jackhammers. This confusion arose

because of the way in which it had described the jack hammers in two different ways in its bid. At one point, it described the two jack hammers as “jackhammers complete with compressions”, whereas elsewhere it had described the two as “PETROL JACK HAMMERS”. This left the City unclear as to whether this was two ways of describing the same two jackhammers or a description of four jackhammers.

65 It therefore sought clarification from the fifth respondent on whether it had declared two or four jackhammers in its bid. The fifth respondent’s answer was that it had declared four jackhammers. So it met the technical specification of no less than three jackhammers.

66 Despite this clarification from the fifth respondent, the applicant still maintained that it ought to have been disqualified. Its reason for saying so is, however, ironic in the face of its own main ground of review in this application. According to the applicant, the City was not permitted to ask the fifth respondent whether it had declared two or four jackhammers because to do so meant that it would be providing the fifth respondent “an unfair opportunity” to “transform its non-responsive bid into a responsive one”.

67 This critique alone gives some further insight into how difficult the City’s decision making is in these processes. It has to tread a very careful line between seeking clarifications from bidders when these are required, on the one hand, but knowing, on the other hand, that the moment it does so, a disgruntled bidder is likely in due course to criticise it for affording an unfair advantage to one of the bidders.

68 In this particular case, the applicant’s criticism of the City is unfortunate because the applicant’s whole case to review and set aside the City’s decision that its bid was non-

responsive is premised on the fact that it ought to have been given a proper opportunity to place before the City the single phase tester certificate for Mr Farmer. It says it deserved to be properly informed by the City that this is what it was looking for. But then, in the same breath, it criticises the City for seeking to clarify from another bidder whether it had declared two or four jackhammers in its bid.

69 If the applicant is correct (as I have found that it is) that the City ought to have given it an opportunity to submit Mr Farmer's single phase tester certificate in order to ensure compliance with the qualifying criteria of the tender, the City was certainly within its rights to have given an opportunity to another bidder to clarify whether it had declared two or four jackhammers in its bid.

70 I therefore find that there is no merit in this review ground.

Conclusion on the fourth to sixth respondents

71 I have found that none of the grounds of review in terms of which the fourth and fifth respondents' awards have been challenged is sustainable. However, according to the applicant, the fact that the review of the awards to the fourth and fifth respondents may fail, should not prevent the court from granting it the relief it seeks of having the whole matter remitted to the City to be determined afresh.

72 The applicant makes this submission on the basis that, even if the awards to the fourth to sixth respondents were valid, the only way in which to ensure that its right to have participated in a fair tender adjudication process is vindicated, would be to remit the whole tender process to the City. In order to ameliorate the harsh consequences of this

relief on the fourth to sixth respondents, the applicant proposes suspending the setting aside of their contracts until the remittal process is completed.

73 At the hearing of the matter, it became clear that the proper ventilation of these aspects of the remedy had not been canvassed in the papers. So I invited the parties to provide me with supplementary submissions on the length of time it would likely take for the City to run a remitted tender process in the event that I was inclined to grant the remedy of remittal.

74 The further submissions I received reveal a disagreement between the parties about precisely how long the City needs to run a new adjudication process. The City says it will require 5 months; the applicant says it can be completed in a maximum of 6 weeks. The current tender only runs until 3 September 2024. So the question of the utility of running the tender process afresh becomes a very real issue in the light of the limited remaining life of the tender.

75 There is a great deal to be said for the applicant's contention that the proper vindication of its right to a fair tender process requires that this matter be remitted for redetermination by the City. A substantial amount of time has, however, passed since the original award of the tender in 2021. There are now less then eleven months to run. Nonetheless, provided that a remittal could still have resulted in the award of fresh contracts with some meaningful time still to be implemented, I would have been inclined to grant that relief in all the circumstances of the case. But there is an obstacle standing in the way of that remedy. It is the applicant's own failure to ensure that the amended notice of motion was properly served on the sixth respondent.

76 I have already explained that, in the absence of proper service, this court does not know the sixth respondent's attitude to the amended relief and it is relief that has a material bearing on it legal rights. Ordinarily, such a default in proper service could be cured by a postponement of the matter in order to afford a period of time for the sixth respondent to be served with the papers and for it to oppose and file an answering affidavit if it so wished. However, the applicant did not seek any such postponement when the issue of service on the sixth respondent was raised at the hearing of the matter.

77 In the absence of the sixth respondent's attitude to a remedy that may result in its contract being set aside, I have found that I cannot grant such relief.

78 But that then begs the question whether I can set aside only two of the three contracts and require the City to run a fresh tender process with one contract remaining in place. There are at least two problems with granting relief of this nature. The first is that the applicant did not seek this relief. It came to court to have all three contracts set aside and the matter remitted to the City for fresh determination on a clean slate. Our highest courts have consistently emphasised that it is for the parties to define the nature of their dispute and it is for the court to adjudicate upon those issues.[10]

79 The second problem is that because the applicant did not seek this as alternative relief, I do not have before me any evidence about whether it is feasible for the City to keep in place one of the contracts but run a tender process for the remainder. Because this relief was not sought, I have not received the City's submissions on its appropriateness.

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[10] This has been recently restated by the Supreme Court of Appeal in *Mucavele and Another v MEC for Health, Mpumalanga Province* (899/2022) [2023] ZASCA 129 (11 October 2023) para 15

80 It is, therefore, as a result of the applicant's own failure to ensure proper service on the sixth respondent that I am not in a position to grant it all the relief that it seeks.

81 Nonetheless, the applicant has succeeded in establishing that the decision to disqualify it because its bid was non-responsive was unfairly made. I shall therefore declare the decision invalid. However, because of the problem of non-service on the sixth respondent, I cannot grant further relief that will impact on its contract and because I do not have the parties' submissions on the appropriateness of setting aside only two of the three contracts and running a tender process afresh, I have decided that remittal is not an appropriate remedy. I shall therefore suspend the order of invalidity to allow the fourth to sixth respondents' contracts to run to their expiry on 3 September 2024.

82 In so far as costs are concerned, the applicant has achieved success in showing that the impugned decision was reviewable but ultimately not succeeded in achieving the outcome it desired. This tends to indicate a measure of success for the City because it is not going to be ordered to rerun the tender process afresh. However, that "success" is mostly a product of the applicant's own failure to have served the amended notice of motion on the sixth respondent. It is therefore not correct, in my view, to regard the court's decision on remedy as a "success" for the City. The result is that the applicant has been substantially successful and is therefore entitled to its costs.

Order

83 I therefore make the following order:

(a) The decision of the second respondent taken on or about 5 June 2021, finding that the applicant's bid in tender number 82Q/2020/21 was non-responsive and excluded from further consideration is declared to be invalid;

(b) The decision of the third respondent taken on or about 1 September 2021 dismissing the applicant's internal appeal against the BAC's responsiveness decision and confirming the BAC's responsiveness decision is declared to be invalid;

(c) The declarations of invalidity in a) and b) above are suspended until 4 September 2024.

(d) The first to third respondents are to pay the applicant's costs, including the costs of two counsel.

K HOFMEYR

ACTING JUDGE OF THE HIGH COURT

APPEARANCES

Applicant's counsel:	Adv D Borgström and Adv D Lubbe
Applicant's attorneys:	Dirk Kotze Attorneys
First to Third Respondents' counsel:	Adv N de Jager and Adv M Tsele
First to Third Respondents' attorneys:	Van der Spuy Attorneys