

**REPUBLIC OF SOUTH AFRICA**



**IN THE HIGH COURT OF SOUTH AFRICA**

**LIMPOPO DIVISION, POLOKWANE**

**CASE NO: 8421/2023**

- (1) REPORTABLE: YES/NO  
 (2) OF INTEREST TO THE JUDGES: YES/NO  
 (3) REVISED.

DATE: 16/04/2025

SIGNATURE...  .....

In the matter between:

**TJ MACHETE ATTORNEYS INC**

Applicant

And

**BA-PHALABORWA MUNICIPALITY**

First Respondent

**GILBERT MOTEDI ATTORNEYS INC**

Second Respondent

**MAFA AND ASSOCIATES INC**

Third Respondent

**CHIDI ATTORNEYS**

Fourth Respondent

**MODJADJI RAPHESU INC ATTORNEYS**

Fifth Respondent

**MABOKU MANGENA INCORPORATED**

Sixth Respondent

<b>NOKO MAIMELA INCORPORATED</b>	Seventh Respondent
<b>MALOKA SEBOLA INC</b>	Eighth Respondent
<b>BRIGHT RIKHOTSO INCORPORATED</b>	Ninth Respondent
<b>KGOHLISHI ABIE MAMABOLO ATTORNEYS INC</b>	Tenth Respondent
<b>MAKHUVHA E.M. ATTORNEYS</b>	Eleventh Respondent
<b>MOHALE INCORPORATED</b>	Twelfth Respondent
<b>MOHUBA INC</b>	Thirteenth Respondent
<b>LUBISI ATTORNEYS INC</b>	Fourteenth Respondent
<b>MMMG ATTORNETS</b>	Fifteenth Respondent
<b>MB MABUNDA INCORPORATED</b>	Sixteenth Respondent
<b>VERVEEN ATTORNEYS</b>	Seventeenth Respondent

**Delivered:** This judgment is handed down electronically by circulation to the parties through their legal representatives' email addresses. The date for the hand-down is deemed to be **16 April 2025**.

## JUDGMENT

**Makoti AJ**

### Introduction

- [1] TJ Machete Attorneys Incorporated is the applicant. It impugns in this review application the decision of Ba-Phalaborwa Local Municipality (the Municipality), as the respondent, to exclude it from participation in a tender for

legal services. The specific orders sought by the applicant in this matter are that:

- [1.1] the decision taken on 22 August 2023 be reviewed and set aside;
  - [1.2] the decision be remitted to the Municipality for consideration by the Bid Evaluation and Adjudication Committees; and
  - [1.3] costs be awarded against the Municipality.
- [2] There are in all seventeen respondents who are cited in the application. Only the Municipality has filed opposing papers. Some of the respondents have filed notices to abide the decision, while others elected to stay out of the litigation.

### **Grounds for review**

- [3] What gave rise to this application is the applicant's exclusion from participation in the tender. Due to the impugned decision being administrative in nature, the application is predicated on the provisions of the Promotion of Administrative Justice Act, 2000 (Act No. 3 of 2000). The applicant initially contended in its founding affidavit that the impugned decision to exclude it from participation in the tender was arbitrary and capricious.
- [4] The grounds of review that were in the founding affidavit were retained in the applicant's supplementary papers. On any one of those bases, according to the applicant's contention, the decision ought to be reviewed, set aside. Then, if the Court agrees with the applicant's viewpoint, the offending decision

should be remitted to the Municipality's for both the bid evaluation and adjudication committees to consider the tender submitted by the applicant.

- [5] The gravamen of the applicant's case is that its tender was not considered by the Municipality's bid committees. This is the main issue that calls for determination. An additional ground of review was raised in the supplementary affidavit. The following is the argument that is drawn from the applicant's supplementary affidavit:

"9. *I confirm that the applicant's bid was submitted to the respondent on or about 23/09/2022 and therefore had to be considered by the applicant. The failure by the respondent to consider the applicant's bid is patently unfair and contrary to section 217 of the Constitution. The failure also constitutes a failure by the respondent to take into account relevant considerations.*"

- [6] Of course, the Municipality contends otherwise. It asserts that the applicant's bid was considered by its committees. Alongside its merit defenses, the Municipality raised the points in limine of non-joinder of interested parties and the question of non-compliance with section 62 of the Local Government: Municipal Systems Act, 2000<sup>1</sup> (the Systems Act) I will revisit these technical points after setting out the facts.

### Summary of facts

- [7] The case at issue concerns the appointment through tendering of law firms into the Municipality's panel of legal service providers. The areas of service are in public law, town planning and environmental law, building and construction law, labour law, debt collection law, property law, conveyancing and notarial registration. It is common cause that the tender was advertised

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<sup>1</sup> Act No. 32 of 2000.

on 19 August 2022. The applicant's bid was submitted on or about 23 September 2022, and that too is common cause. The submission of bids closed on that date.

- [8] Bidders were asked to separate their bids when tendering for different categories. They were told that:

*"N.B. A separate tender document in a separate file must be submitted for each category tendered for clearly marked as such e.g. Tender for a panel of attorneys for three years, Tender number .....: Category: Town Planning and Environmental Law Services etc. Do not, under any circumstances lump everything in one file."*

- [9] Upon the closing of the tender, on 09 November 2022 the Municipality's evaluation committee convened to consider the bids. A report of that committee was produced on 17 November 2022, specifically dealing with bids for the public law and municipal services category. The applicant had been among the 19 bidders which tendered for that category.
- [10] From the 19 bidders, eight bids were recommended for adjudication by the evaluation committee. The evaluation committee recommended the following bidders for the category: Verveen Attorneys, Noko Maimela Incorporated, MB Mabunda Incorporated, Maloka Sebola Incorporated, Maboku Mangena Incorporated, Chidi Attorneys, Gilbert Motedi Attorneys and Modjadji Raphesu Attorneys. All eight recommended bidders were appointed.
- [11] The applicant was neither recommended nor appointed. This is the source of the dispute, in that the applicant contends that its bid was not considered by the evaluation committees.



[12] A multiphase evaluation procedure was adopted in the bid document. At first, bidders were to be evaluated on compliance with the mandatory requirements. Bids that did not satisfy the mandatory requirements were to be rejected. Then, bids which met the mandatory requirements were to be evaluated on functionality to assess their capacity to perform in their chosen categories.

[13] At paragraph 4.1 the bid document reads:

*“Thereafter the ability of bidders will be assessed in terms of functionality in terms of each category of service tendered for. This exercise will assess capacity of the bidder firm and experience of the lead attorneys and key support staff as per Annexure A hereof. Bidders must score at least 70% in this assessment in order to be evaluated further.”*

[14] A list of firms that had submitted their bids was compiled on the closing date on 23 September 2022. Each of the firms were listed in terms of the categories for which they had tendered. For the applicant the list of bidders shows that it had not specified the category in respect of which it had submitted its tender. That information would have appeared from a clearly marked tender, as it was required in clause 2.3 of the bid document.

[15] The applicant and those firms that had not specified the categories in which they had submitted bids did not go far in the tender.

### **Non-joinder point**

[16] I will not spend much time on this issue. The Municipality contends that all successful bidders ought to have been cited in this application. This is a bad point, both in fact and in law. Those eight parties who had succeeded in the category for which the applicant had applied have been cited. Who the other

parties are that ought to be joined and their interest has not been canvassed a great deal. Joinder ought not to be granted when it is not as a matter of necessity.<sup>2</sup> Thus, a joinder of a party having interest in the outcome of a case should only be enforced when such party that has not been joined stands to be affected by the outcome of the case.<sup>3</sup> What the other parties' interests are is unfathomable, regard being had to the fact that the applicant is not asking for the entire tender to be cancelled.

### **Ought applicant have appealed the decision?**

[17] The Municipality raised this issue contending that the applicant was non-suited by its failure to invoke the internal remedies in terms of section 62 of the Systems Act. This statutory provision creates an appeal procedure to be followed by a party that is affected by a decision of the Municipality. In this case the applicant is aggrieved by the decision of the bid evaluation committee to not shortlist it. As I have indicated, the applicant contends that its bid was not considered right from the start, a decision which fell within the purview of the evaluation committee.

[18] It is not only is it a requirement in terms of the Systems Act that an aggrieved person should exhaust internal remedies before heading to the courts, but section 7(2) of PAJA, upon which this review application is predicated, also

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<sup>2</sup> South African Riding for the Disabled Association v Regional Land Claims Commissioner and Others (CCT172/16) [2017] ZACC 4; 2017 (8) BCLR 1053 (CC); 2017 (5) SA 1 (CC) (23 February 2017) paras 9 and 10.

<sup>3</sup> Judicial Services Commission and Another v Cape Bar Council and Another 2012 (11) BCLR 1239 (SCA); 2013 (1) SA 170 (SCA); [2013] 1 All SA 40 (SCA) (14 September 2012) at para [12].



contains similar requirements. In *Koyabe Others v Minister of Home Affairs and Others*<sup>4</sup> the issue was posited thus:

*“Under the common law, the existence of an internal remedy was not in itself sufficient to defer access to judicial review until it had been exhausted. However, PAJA significantly transformed the relationship between internal administrative remedies and the judicial review of administrative decisions. Section 7(2) of PAJA provides:*

- “(a) Subject to paragraph (c), no court or tribunal shall review an administrative action in terms of this Act unless any internal remedy provided for in any other law has first been exhausted.*
- (b) Subject to paragraph (c), a court or tribunal must, if it is not satisfied that any internal remedy referred to in paragraph (a) has been exhausted, direct that the person concerned must first exhaust such remedy before instituting proceedings in a court or tribunal for judicial review in terms of this Act.*
- (c) A court or tribunal may, in exceptional circumstances and on application by the person concerned, exempt such person from the obligation to exhaust any internal remedy if the court or tribunal deems it in the interest of justice.”*

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

[19] The respondent relied on *Evaluations Enhanced Property Appraisals (Pty) Ltd v Buffalo City Metropolitan Municipality and Another*<sup>5</sup> in which it was also held that a party seeking to review a decision of the Municipality must first exhaust

<sup>4</sup> *Koyabe and Others v Minister for Home Affairs and Others* (CCT 53/08) [2009] ZACC 23; 2009 (12) BCLR 1192 (CC) ; 2010 (4) SA 327 (CC) (25 August 2009) at para [34].

<sup>5</sup> *Evaluations Enhanced Property Appraisals (Pty) Ltd v Buffalo City Metropolitan Municipality and Another* (EL 1544/12, ECD 3561/12) [2014] ZAECGHC 55; [2014] 3 All SA 560 (ECG) (19 June 2014).



the internal remedies which are regulated by applicable legislation. In that case it was held with reference to PAJA as follows:

*“[60] On the above construction, there is no conflict between sections 7(2)(a) and (b). An affected person may only institute review proceedings once one of two requirements are met: one, all internal remedies have been exhausted; or two, exemption to exhaust has been obtained. On this construction, the institution of review proceedings under sections 7(2)(a) before internal remedies are exhausted is also prohibited.”*

- [20] The above decision are not without company. They are in sync with the judgment of the majority in *Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining and Development Company (Pty) Ltd and Others*<sup>6</sup> which pronounced on the implications of section 7(2)(c) of PAJA with regard to review applications brought on its terms. In this case the court emphasised the need and the importance to not render domestic processes adopted in legislation nugatory by adjudication a PAJA review prematurely.
- [21] As it was held in *Koyabe, supra*, the exemption is granted by a court, on application by the aggrieved party. For an application for an exemption to succeed, the applicant must establish ‘exceptional circumstances.’ Once such circumstances are established, it is within the discretion of the court to grant an exemption. Absent an exemption, the applicant is obliged to exhaust internal remedies before instituting an application for review.
- [22] It seem to me axiomatic, on the above authorities, that a review application that is instituted prior to a party exhausting the legislated internal remedies is considered to be premature. On that score, therefore, the court hearing such application is precluded from reviewing and setting aside the challenged

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<sup>6</sup> 2014 (3) BCLR 265 (CC) at para [116].

administrative action until the domestic stipulated in the applicable legislation remedies have been exhausted or unless the party seeking the review proves the existence of exceptional circumstances, in which case an exemption is granted.

- [23] Differently put, the duty to exhaust internal remedies holds in abeyance the exercise of the court's powers to consider an application to review the impugned decision for such extent of time as the duty is not discharged. This must be the end of the matter, with no success for the applicant.

### **Consideration of costs**

- [24] The application concerned the awarding of a tender, in which the applicant was denied participation on a legal panel of service providers. Failure of the application was on a technical point. Substantively, the Municipality would have had difficulty convincing me of the rationality or lawfulness of the applicant's exclusion. The application was not frivolous by any means, but for the applicant's misstep.
- [25] In *Biowatch Trust v Registrar Genetic Resources and Others*,<sup>7</sup> this apex court cautioned against private parties litigating against the state being mulcted with costs. The point of departure, according to the principle enunciated in that authority is to order a state party that has failed its constitutional or statutory obligation to pay costs. Then, where a private party is not successful, the court

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<sup>7</sup> *Biowatch Trust v Registrar Genetic Resources and Others* 2009 (6) SA 232 (CC) ; 2009 (10) BCLR 1014 (CC) (3 June 2009) at para [91].

held, such party should not be penalised with costs the party was pursuing a genuine constitutional issue.

- [26] The dispute revolved on the question of procurement by the Municipality of services, which engaged as a starting point the provisions of section 217 of the Constitution. Then, the provisions of the Systems and PAJA were equally invoked. Thus, in my view, the principles enunciated in the authority of *Biowatch* apply in favour of the applicant. I do not, as a result, award costs to the Municipality.

### Order

- [27] I make the following order:

- [a] The application is dismissed.
- [b] There is no order as to costs.



**MOKGERWA MAKOTI**  
**ACTING JUDGE OF THE HIGH COURT**  
**LIMPOPO DIVISION, POLOKWANE**

### APPEARANCES

**FOR APPLICANTS**

**:** **ADV V MABUZA**  
**TJ MACHETE ATTORNEYS INC**  
**C/O KOVANI MACHETE ATT. INC**

**POLOKWANE**

**FOR FIRST RESPONDENTS : ADV TM MALATJI  
MALOKA SEBOLA ATTORNEYS INC.  
TZANEEN**

**HEARD ON : 12 SEPTEMBER 2024**

**DELIVERED ON : 16 APRIL 2025**

POLOKWANE HIGH COURT