

SOUTH AFRICA / JUDGMENT

**Maximum Profit Recovery (Pty) Limited v
Rustenburg Local Municipality and Others
(CIV APP FB 22/2023) [2024] ZANWHC 229;
[2025] 1 All SA 441 (NWM) (11 September 2024)
[2024] ZANWHC 229**

COURT

North West High Court, Mafikeng

BEFORE

A H Petersen, R D Hendricks, J T Djaje

CASE / FILE NUMBER

CIV APP FB 22/2023

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FLYNOTES:

ADMINISTRATIVE – Tender – Exhaust
internal remedies –
VAT
recovery services – Delegation and accrual issues are
inextricably linked – Applicant would have been required
to
exercise its internal remedy in terms of section 62 –
Elected to approach court a quo on urgent basis within period
which lodging of appeal was still extant rather than exercise its
internal remedy – Failed to exhaust internal remedy
availed
to it – Court a quo correct in dismissing application –
Appeal dismissed – Local Government: Municipal Systems Act
32 of 2000, s 62(1)
IN
THE HIGH COURT OF SOUTH AFRICA
NORTH WEST DIVISION,
MAHIKENG
CASE
NO.: CIV APP FB 22/2023

Reportable:	YES Circulate to Judges: YES Circulate to Magistrates: YES Circulate to Regional Magistrates: YES In
the matter between:	MAXIMUM PROFIT RECOVERY (PTY) LIMITED Appellant and RUSTENBURG LOCAL MUNICIPALITY 1ST Respondent BAZUZU TRADING AND PROJECTS CC 2ND Respondent MTC TAX CONSULTING (PTY) LTD 3RD Respondent BAZUZU TRADING MTC TAX CONSULTING JV 4TH Respondent VICTOR MAKONA N.O. 5TH Respondent
Delivered:	This judgment was handed down electronically by circulation to the parties' representatives via email. The date and time for hand-down is deemed to be 11 September 2024 at 10H00. ORDER Consequently, the
following order is made:	The appeal is dismissed with costs, which costs shall include the costs of the application for leave to appeal, and the costs of Counsel.

JUDGMENT

PETERSEN J

Introduction

- [1] This appeal against the whole of the judgment of the court a quo, served before the Full Court on 10 May 2024, with leave of the court a quo granted on 16 November 2023.
- [2] The succinct issues in this appeal are: (i) whether the court a quo erred in dismissing the review application of the appellant ('Maximum Profit') by upholding the point in limine of the first and fifth respondents (for ease of reference referred to jointly as 'the Municipality'); that Maximum Profit did not exercise its internal remedy provided in section 62(1) of the Local Government: Municipal Systems Act 32 of 2000 ('the Municipal Systems Act'), in circumstances where a decision had been taken by the Municipality to award a tender to the fourth respondent ('the joint venture') rather than relying on section 7(2)(a) of the Promotion of Administrative Justice Act 3 of 2000 ('PAJA'); and (ii) whether or not alleged irregularities in the tender process amounted to PAJA grounds of review.
- [3] Antecedent to the succinct issues in the appeal, in the event of this Court finding in favour of Maximum Profit, is whether the awarding of the tender by the Municipality to the joint venture should be reviewed and set aside and, in that case, whether Maximum Profit is entitled to a 'substitution order' as prayed for in its Amended Notice of Motion.

Background

- [4] The background facts of the matter are greatly common cause. The Municipality published an invitation to tender on 22 October 2022 for the appointment of a service provider to render Value Added Tax ('VAT') recovery services for a period of thirty-six (36) months under tender reference RLM/BTO/0053/2021/2022 ('the tender').
- [5] The closing date for the tender was extended to 10 January 2022 at 11h00 on which date Maximum Profit submitted its tender. It is common cause that there was no public opening of the tenders. On 11 January 2022 the Municipality uploaded a closing register on its website. The closing register reflects that Maximum Profit tendered at a rate of 5.5% including VAT, whereas the joint venture tendered at a rate of 5%. The tender was subsequently awarded to the joint venture on 4 April 2022.

Litigation history

The court a quo

- [6] Maximum Profit launched an urgent review application in April 2022 to review and set aside the decision of the Municipality in which it awarded a tender for the rendering of VAT recovery services for a period of thirty-six (36) months to the joint venture. In an Amended Notice of Motion, it sought an order reviewing and setting aside the tender and its appointment or substitution as the successful bidder.
- [7] The court a quo in interpreting section 62 of the Municipal Systems Act surmised that section 62(1) has two requirements. First, that the decision appealed against must have affected the rights of Maximum Profit. Second, that the decision affecting such rights must have been taken pursuant to the exercise of a delegated power. In a single line each at paragraphs 31 and 34 of its judgment, the court a quo found that the decision to appoint the joint venture was a delegated power as envisaged in section 62(1) of the Municipal Systems Act and as such Maximum Profit should have lodged an appeal in terms of section 62(1) (sic). The rationale for this finding was not expounded upon.
- [8] The court a quo placed particular emphasis on whether the applicant had satisfied the first requirement of section 62(1) of the Municipal Systems Act. The point in limine was therefore upheld and the application dismissed with costs.

In this Court

- [9] The application was dismissed, as the first ground of appeal attests to, on an interpretation of section 62(1) of the Municipal Systems Act. The genesis of the dispute on the point in limine has its origins in paragraphs 16.1 and 16.2 of the founding affidavit of Maximum Profit, where under the rubric of the grounds for urgency, it states as follows:

“16. THE GROUNDS FOR URGENCY

16.1 The first respondent has awarded the Tender to the joint venture on 24 March 2022. The tender is only for a period of 36 months. If the applicant launches the application in the ordinary course a significant portion of the tender would have lapsed at the hearing of the application.

16.2 The applicant only learned of the outcome of the tender on 4 April 2022 through the website of the first respondent. The applicant immediately instructed its attorney of record to proceed with the launching of this application. Before this application could be launched, it was necessary to compile all the required documents to brief counsel. These documents only finally delivered to the applicant's attorney on 13 April 2022. A consultation was scheduled with counsel for the same day and this application could only be finally settled on Tuesday, 19 April 2022.”

(my underlining)

- [10] The third respondent (‘MTC Tax Consulting’) in opposing the relief sought by Maximum Profit, took the point that Maximum Profit failed to exhaust its internal remedies contrary to the provisions of section 7(2)(a) –(c) of PAJA which provides that:

“(2)(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 proceeding 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.”
- [11] MTC Tax Consulting, in elaboration of the point taken, stated in its answering affidavit that Maximum Profit did not exhaust the known and available internal remedy. As a result, the review application falls squarely within the ambit of the mandatory injunction in section 7(2)(a) of PAJA. Further, that Maximum Profit made no application for exemption in terms of section 7(2)(c) of PAJA, whilst knowing and being fully aware that such an application was necessary.
- [12] The Municipality similarly took the point that MTC Tax Consulting did, but specifically raised it as a point in limine, which ultimately formed the bedrock of the dismissal of the application in the court a quo. The Municipality expounded on its point in limine in its answering affidavit, as follows:

“3.5 The Applicant should have exercised its remedies as provided for in terms of the provisions of: (a) Regulation 49 and 50 of the Supply Chain Management Regulations, 2005 promulgated in terms of the MFMA...as set out in its concomitant provisions contained in the Supply Chain Management Policy of the First Respondent ... being paragraphs 20.3 and 20.4 of the SCMP, (b) the processes and procedures as provided for in terms of the provisions of rule 41A(2) of the Uniform Rules of Court, as well as (c) the appeal process is provided for in the provisions of section 62(1) of the Municipal Systems Act.

3.6 The applicant failed to exhaust their aforestated internal remedies and also failed to formally apply to the Court in terms of provisions of section 7(2)(c) of the PAJA to be exempted from “... the obligation to exhaust any internal remedy(ies).” in terms of its amended notice of motion dated 20 June 2022.”

Submissions

by the appellant

- [13] Adv Els SC for the appellant submits that since the Municipality and the third respondent ('MTC') alleged in their answering affidavits that Maximum Profit failed to exhaust its internal remedy, that it was necessary for these parties to present the relevant factual basis upon which they relied on in their answering affidavits. The allegation, so the submission goes, is analogous to the position where a party raises a special plea and bears the onus to prove the underlying facts in support of its "special plea".
- [14] The statement by MTC in its answering affidavit that: "21. The applicant has not exhausted the known and available internal remedy. As such the present review application falls squarely within the ambit of the mandatory injunction of section 7(2)(a) of PAJA.", is challenged on the basis that no attempt was made by MTC to identify the alleged internal remedy or to provide the factual basis upon which it relied for the existence of an available internal remedy. The Municipality, in turn, is challenged on the basis that it specifically placed reliance on Regulations 49 and 50 of the Municipal Supply Chain Management Regulations ('the Supply Chain Regulations') and on section 62(1) of the Municipal Systems Act. This, in circumstances where Regulations 49 and 50 of the Supply Chain Regulations provide no internal remedy to Maximum Profit.
- [15] Since the court a quo found in favour of the respondents on the basis that section 62 of the Municipal Systems Act provided an internal remedy to Maximum Profit, before it could institute review proceedings, Maximum Profit takes issue with what it submits are two pivotal issues to be considered in this appeal. These two issues predicated on section 62(1) and (3) of the Municipal Systems Act, mindful that an appeal must be submitted within a twenty-one (21) day period, described as "the delegation issue" and "the accrual issue" are formulated as follows by Adv Els SC:

"1.1.1 An appeal can only be submitted if the decision was taken by a "political structure, political office bearer, councillor or staff member of a municipality" in terms of a power or duty delegated or sub-delegated to such "political structure, political office bearer, councillor or staff member". It is clear from a plain reading of section 62(1) that, where the relevant decision-maker acts based on an original authority, no appeal can be submitted ("the delegation issue");

...

1.1.3 Section 62(3) provides, in express terms, that even where an appeal lies, the appeal authority can only "confirm, vary or revoke" the relevant decision if rights have not yet accrued as a result of the relevant decision ("the accrual of rights-issue"). Stated differently, an appeal authority can do nothing if rights have accrued as a result of the decision."

The delegation issue

- [16] On the delegation issue the submission is that since the decision to award the tender was made by the Municipal Manager, same was based on original authority and not on any power or duty sub-delegated to the Municipal Manager. In this regard, Maximum Profit contends that Regulation 29(1)(b)(i) or where applicable, Regulation 29(5)(b)(i) of the Supply

Chain Regulations finds applicability. This is in addition to section 62(1) of the Municipal Systems Act which provides that an appeal can be submitted to, for example a Municipal Manager only in terms of a power or original authority, and not a delegated authority.

- [17] The submission therefore goes that when the Bid Adjudication Committee ('the BAC') makes a recommendation to a Municipal Manager to award a tender, the Municipal Manager acts on an original authority, derived from Regulation 29(1)(b)(i), if the Municipal Manager proceeds to make the tender award. In the absence of a recommendation from the BAC, the Municipal Manager has no authority to make an award in a competitive bidding process. In the present appeal, Maximum Profit contends that the Municipal Manager did in fact make the tender award pursuant to the recommendation of the BAC. Therefore, the contention is that Maximum Profit could not submit an appeal in terms of section 62(1) of the Municipal Systems Act. Reliance is placed on the decisions in *Maximum Profit Recovery (Pty) Ltd v Inxubu Yethemba Local Municipality and others* [2021] ZAECHC 11 (16 February 2021) at paragraphs 17, 23, 25 and 26; *Maximum Profit Recovery (Pty) Ltd v Bela-Bela Local Municipality and others* [2023] ZALMPPHC 41 (11 April 2023) at paragraphs 33, 36 and 37; *Tekoa Consulting Engineers (Pty) Ltd v Alfred Nzo District Municipality and others* [2022] 3 ALL SA 892 (ECG) at paragraphs 40 to 42. Further reliance is placed on an article by Professor Phoebe Bolton: *Municipal Tender Awards and Internal Appeals by Unsuccessful Tenderers* (PER 2010 Volume 13 No 3).

The accrual issue

- [18] Adv Els SC submits that when the Municipality made "the final and unconditional award in favour of the joint venture rights accrued to the joint venture." Any possible appeal in terms of section 62 he therefore contends "was completely neutralised, based on the express provisions of section 62(3)." The parties have all referenced the decision in *DDP Valuers (Pty) Ltd v Madibeng Local Municipality* 2015 JDR 2093 (SCA), to justify their respective arguments on the effect of section 62. Adv Els SC relies on paragraphs 23, 25 and 26. Further reliance is placed on the decision in *Maximum Profit Recovery (Pty) Ltd v Edumbe Local Municipality* (unreported case number 6408/22P) at paragraph 36.

Submissions

by the respondents

The first, third and fifth respondents

The delegation issue

- [19] Adv Laubscher for the Municipality and the Municipal Manager, submits that Regulation 29 of the Supply Chain Regulations relied on by Maximum Profit in respect of its argument on the delegation issue, in fact does not deal with delegations which are specifically dealt with in Regulation 5.
- [20] Adv Manala for MTC submits that the competence to procure services or goods resides with the Municipality and no one else. To that end, a Municipal Manager is not an organ of State, but a position established in terms of section 54A of the Municipal Systems Act. The Municipal Manager exercises the powers conferred in section 55 of the Municipal Systems Act, which powers do not refer to or give authority to the Municipal Manager to appoint service providers. Regulation 4 of the Supply Chain Regulations, contends Adv Manala, authorises the Municipal Council to delegate powers and duties to the Municipal Manager to ensure the discharge of the supply chain management responsibilities and/or obligations of the Municipality. A Municipal Manager therefore exercises delegated powers when appointing service providers and does not act on original authority.

The accrual issue

- [21] Adv Laubscher submits that Maximum Profit mistakenly departs from the premise that on 24 March 2022 (which should be 23 March 2022), the date on which the Municipality addressed the appointment letter to the joint venture and before Maximum Profit became aware of the appointment on 4 April 2022, the rights had already accrued to the joint venture, and that an appeal was no longer possible. Adv Manala elaborates that the period for lodging an appeal was to expire within twenty-one (21) days and no later than 13 April 2022. Since Maximum Profit became aware of the appointment of the joint venture on 4 April 2022, it had nine (9) days to lodge an appeal in

terms of section 62 of the Municipal Systems Act.

- [22] The submission further goes that during the period 24 March 2022 to 20 April 2022, the latter being the date on which Maximum Profit launched the review application in terms of section 6 of PAJA, no rights had accrued to the joint venture. As a result, the internal remedy (appeal process) in terms of section 62 of the Municipal Systems Act was available to Maximum Profit. Further, the contents of the appointment letter to the joint venture, expressly stated that the appointment was subject to the signing of a Service Level Agreement ("SLA") between the Municipality and the joint venture. The SLA was only signed on 20 April 2022, thus no rights had accrued between 24 March 2022 and 20 April 2022.
- [23] Adv Laubscher and Adv Manala in respect of the reliance by Maximum Profit on DDP Valuers (Pty) Ltd v Madibeng Local Municipality contend that the facts in that matter differs materially from the facts in the present matter. In that matter, unlike the present matter, rights had already accrued.

- [24] Adv Laubscher contends that at most the decision in DDP Valuers (Pty) Ltd v Madibeng Local Municipality deals with an important point of law relevant to this appeal, that “...the appellant as an unsuccessful tenderer would have been entitled to appeal under s 62.” Maximum Profit, he contends, therefore had an internal remedy in terms of section 62 of the Municipal Systems Act.

The section 7(2)(c) of PAJA issue

- [25] Adv Laubscher and Adv Manala take issue with the fact that Maximum Profit, enjoined with an internal remedy, failed to bring an application in terms of section 7(2)(c) of PAJA to be exempted from exhausting the internal remedy. This submission was made against the assertion by Maximum Profit in its replying affidavit that section 62 of the Municipal Systems Act did not provide an “...effective alternative remedy...”. Maximum Profit should have applied to the court a quo to be exempted in terms of section 7(2)(c) of PAJA from “...the obligation to exhaust any internal remedy(ies)...”. Reliance is placed on, inter alia, Mapholisa NO v Phetoe NO and Others 2023 (3) SA 149 (SCA) at paragraph 16; Koyabe and Others v Minister for Home Affairs and Others 2009 (12) BCLR 1192 (CC) at paragraph 47; and Basson v Hugo and Others [2018] 1 All SA 621 (SCA) at paragraph 12 where the Supreme Court of Appeal stated that:

“It is settled that the impugned decision constitutes administrative action as defined in PAJA (SA Veterinary Council and another v Veterinary Defence Force Association [2003] ZASCA 27; 2003 (4) SA 546 (SCA) paragraph 34. Therefore, an internal remedy must be exhausted prior to judicial review, unless the appellant can show exceptional circumstances to exempt him from this requirement (Koyabe and others v Minister for Home Affairs and others (Lawyers for Human Rights as amicus curiae)

- [2009] ZASCA 23; 2010 (4) SA 327 (CC) paragraph 34 [also reported at 2009 (12) BCLR 1192 (CC) – Ed]; Nichol and another v Registrar of Pension Funds and others [2005] ZASCA 97; 2008 (1) 383 (SCA) paragraph 15. What constitutes exceptional circumstances depends on the facts and circumstances of the case and the nature of the administrative action in issue (Koyabe (supra) paragraph 39). Factors taken into account in deciding whether exceptional circumstances exist are whether the internal remedy is effective, available and adequate. An internal remedy is effective if it offers a prospect of success, and can be “objectively implemented, taking into account relevant principles and values of administrative justice present in the Constitution and our law”; and available if it can be pursued “without any obstruction, whether systemic or arising from unwarranted administrative conduct” (Koyabe (supra) paragraph 44). An internal remedy is adequate if it is capable of redressing the complaint (Koyabe (supra) paragraphs 42, 43 and 45).”

Discussion

- [26] If the appeal on the issues adumbrated above are dismissed, that would be dispositive of the appeal. The court a quo, for obvious reasons, did not deal with the merits of the review application. This Court is implored to consider the merits of the review application, whether that is prudent or not, in the event of Maximum Profit being successful in its appeal on the points in limine.
- [27] Whilst the delegation issue and accrual issue have been dealt with separately by Maximum Profit, it will be demonstrated that the two issues are inextricably linked within the purview of section 62 of the Municipal Systems Act. Simply put, if the Municipal Manager awarded the final tender to the joint venture on delegated authority, the accrual issue is rendered nugatory, and Maximum Profit would have been required to exercise its internal remedy in terms of section 62. The arguments on section 7(2)(c) of PAJA will consequently also be negated as Maximum Profit at no stage sought such relief.
- [28] In my view, the most prudent starting point would be the delegation issue. The article by Professor Bolton alluded to supra succinctly asserts that the system of delegations of a Municipality determines whether it is the Bid Adjudication Committee ('BAC')

or the Municipal Manager of the Municipality who makes the final award. Two distinct scenarios are postulated. For present purposes,

the first scenario is applicable. In the first scenario, Professor Bolton postulates that where the bid adjudication committee

recommends a bidder, "...the BAC after considering the report and recommendations of the BEC, may be required to make a recommendation to the municipal manager for the award of the tender. Once the municipal manager receives a recommendation, he/she may do one of three things. Agreement with the recommendation of the BAC would usually mean that the municipal manager makes the final award. If, on the other hand, the municipal manager does not agree with the recommendation, he/she could refer the recommendation back to the BAC for reconsideration. Alternatively, the municipal manager could reject the BAC's recommendation and award the tender to another bidder. If the municipal manager awards the tender to a bidder other than the one recommended, he/she must in writing, within ten working days, notify the Auditor-General, the relevant provincial treasury and the National Treasury, and in the case of a municipal entity also the parent municipality, of the reasons for deviating from the decision of the BAC. The municipal manager has, however, no duty to report if he/she rejects the recommendation of the BAC in order to rectify an irregularity in the process."

- [29] Item 12.13 of Supply Chain Management Policy of the Rustenburg Local Municipality provides, inter alia, that the BAC must consider the report of the bid evaluation committee and depending on its delegations, make a final award or make a recommendation to the Municipal Manager regarding the making of a final award. In the present matter, the BAC on 23 March 2022 made a recommendation to the Municipal Manager to appoint the joint venture. It is common cause that the final award was made by the Municipal Manager. The contentious issue, as is evident in this matter, is whether that final award was made by the

Municipal Manager by virtue of original or delegated authority.

- [30] At the outset it must be emphasized that the Supply Chain Regulations can never be determinative of the issue of original or delegated authority, as it deals only with objections and complaints and provides a fourteen (14) day period for such process. On the contrary, section 62 of the Municipal Systems Act pertinently provides a general appeal right, the internal remedy, and a twenty-one (21) day period. Professor Bolton captures the position very succinctly, in that “...section 62 further qualifies as an internal remedy for the purposes of Section 7(2) of PAJA, whereas the applicable Regulations do not give rise to an internal remedy as referred to in Section 7(2) of PAJA.”
- [31] Section 62 of the Municipal Systems Act cannot, in my view, be read in isolation, but must be read with sections 53, 55 and 59 of the Municipal Systems Act and the Supply Chain Management Policy of the Rustenburg Local Municipality to determine the issue of delegations.
- [32] A preliminary observation is made that a Municipal Manager executes his duties or functions subject to the directions of a Municipal Council. In *Manana v King Sabata Dalindyebo Municipality* [2011] 3 All SA 140 (SCA) at paragraphs 16 and 17 Nugent JA held that:

“[16] A municipal council is not capable in practice of exercising its executive authority by running the day-to-day affairs of the municipality and it employs staff to do that on its behalf. In the past it was common for municipal councils to confer the appropriate authority upon their staff by delegation of all or some of its executive powers. Such a delegation of power does not ordinarily divest the delegator of the power to perform the particular function itself. As the authors of De Smith’s Judicial Review (6 ed by The Rt Hon The Lord Woolf, Jeffrey Jowell QC, Andrew Le Sueur, assisted by Catherine M. Donnelly para 5-146. See too, Administrator,

Cape v Associated Buildings Ltd 1957

- (2) SA 317 (A) at 323G-H: *SA Freight Consolidators (Pty) Ltd v Chairman, National Transport Commission* 1987
- (4) SA 155 (W), relying on the extensive treatment of the subject by Marinus Wiechers: *Administrative Law* pp 51-56) express it:

‘[I]t has sometimes been stated that delegation implies a denudation of authority.... This cannot be accepted as an accurate general proposition. On the contrary, the general rule is that an authority which delegates its powers does not divest itself of them’

- [17] In my view s 55(1) is no more than a statutory means of conferring such power upon municipal managers to attend to the affairs of the municipality on behalf of the municipal council. There is no basis for construing the section as simultaneously divesting the municipal council of any of its executive powers. Indeed, as I have already pointed out, the Constitution vests all executive authority – which includes the authority to appoint staff – in

the municipal council and legislation is not capable of lawfully divesting it of that power. To the extent that there might be any ambiguity in the statute in that respect it must be construed to avoid that result.”

[33] Section 53 of the Municipal Systems Act, in relevant part, provides:

“53 Roles and responsibilities

- (1) A municipality must, within the framework of and in accordance with relevant provisions of the Municipal Structures Act, this Act and other applicable legislation, define the specific role and area of responsibility of each political structure and political office bearer of the municipality and of the municipal manager.
- (2) The respective roles and areas of responsibility of each political structure and political office bearer and of the municipal manager must-
 - (a) be defined in precise terms by way of separate terms of reference, in writing, for each political structure or political office bearer and the municipal manager; and
 - (b) be acknowledged and given effect to in the rules, procedures, instructions, policy statements and other written instruments of the municipality.
- (3) Instruments defining, acknowledging or giving effect to the roles and areas of responsibility of these political structures and political office bearers and the municipal manager must be appropriate to the category and type in which the municipality falls.
- (4) Terms of reference mentioned in subsection (2) (a) may include the delegation of powers and duties to the relevant political structure or political office bearer or the municipal manager in terms of section 59....”

(my emphasis)

[34] In terms of section 55 of the Municipal Systems Act, also in relevant part, provides that:

“55 Municipal managers

- (1) As head of administration the municipal manager of a municipality is, subject to the policy directions of the municipal council, responsible and accountable for –
- (m) the exercise of any powers and the performance of any duties delegated by the municipal council, or sub-delegated by other delegating authorities of the municipality, to the municipal manager in terms of section 59;...”

[35] The powers and duties assigned to the Municipal Manager in section 53 may under Chapter 3: Delegation System, include the delegation of powers and duties to the municipal manager in terms of section 59 of the Municipal Systems Act. Section 59 of the Municipal Systems Act, to this end, provides that:

“59 Delegations

-
- (1) A municipal council must develop a system of delegation that will maximise administrative and operational efficiency and provide for adequate checks and balances, and, in accordance with that system, may-
- (a) delegate appropriate powers, excluding a power mentioned in section 160 (2) of the Constitution and the power to set tariffs, to decide to enter into a service delivery agreement in terms of section 76 (b) and to approve or amend the municipality's integrated development plan, to any of the municipality's other political structures, political office bearers, councillors, or staff members;
 - (b) instruct any such political structure, political office bearer, councillor, or staff member to perform any of the municipality's duties; and
 - (c) withdraw any delegation or instruction.
- (2) A delegation or instruction in terms of subsection (1)-
- (a) must not conflict with the Constitution, this Act or the Municipal Structures Act;
 - (b) must be in writing;
 - (c) is subject to any limitations, conditions and directions the municipal council may impose;
 - (d) may include the power to sub-delegate a delegated power;
 - (e) does not divest the council of the responsibility concerning the exercise of the power or the performance of the duty; and
 - (f) must be reviewed when a new council is elected or, if it is a district council, elected and appointed.
- (3) The municipal council-
- (a) in accordance with procedures in its rules and orders, may, or at the request in writing of at least one quarter of the councillors, must, review any decision taken by such a political structure, political office bearer, councillor or staff member in consequence of a delegation or instruction, and either confirm, vary or revoke the decision subject to any rights that may have accrued to a person; and
 - (b) may require its executive committee or executive mayor to review any decision taken by such a political structure, political office bearer, councillor or staff member in consequence of a delegation or instruction.
- (4) Any delegation or sub-delegation to a staff member of a power conferred on a municipal manager must be approved by the municipal council in accordance with the system of delegation referred to in subsection (1)."
-

(my emphasis)

[36] Section 62(1), (3) and (4) of the Municipal Systems Act, provides as follows:

“62 Appeals

- (1) A person whose rights are affected by a decision taken by a political structure, political office bearer, councillor or staff member of a municipality in terms of a power or duty delegated or sub-delegated by a delegating authority to the political structure, political office bearer, councillor or staff member, may appeal against that decision by giving written notice of the appeal and reasons to the municipal manager within 21 days of the date of the notification of the decision.
- (3) The appeal authority must consider the appeal, and confirm, vary or revoke the decision, but no such variation or revocation of a decision may detract from any rights that may have accrued as a result of the decision.
- (4) When the appeal is against a decision taken by-
 - (a) a staff member other than the municipal manager, the municipal manager is the appeal authority;
 - (b) the municipal manager, the executive committee or executive mayor is the appeal authority, or, if the municipality does not have an executive committee or executive mayor, the council of the municipality is the appeal authority; or
 - (c) a political structure or political office bearer, or a councillor-
 - (i) the municipal council is the appeal authority where the council comprises less than 15 councillors; or
 - (ii) a committee of councillors who were not involved in the decision and appointed by the municipal council for this purpose is the appeal authority where the council comprises more than 14 councillors.”

[37] The Municipal Systems Act defines a delegating authority and delegation and delegate as follows:

“‘delegating authority’-

- (a) in relation to a delegation of a power or duty by a municipal council, means the municipal council; or
- (b) in relation to a sub-delegation of a power or duty by another political structure, or by a political office bearer, councillor or staff member of a municipality, means that political structure, political office bearer, councillor or staff member; ‘delegation’, in relation to a duty, includes an instruction to perform the duty, and ‘delegate’ has a corresponding meaning;...”

[38] The appointment of a Municipal Manager in terms of section 54A of the Municipal Systems Act is the responsibility of the Municipality. A system of delegations must be developed by the Municipality. The Municipal Manager derives his duties and delegations from sections 53 and 59, as determined by the Municipality. Section 55 does not determine the powers of a Municipal Manager and is clear that: “(1) As head of administration the municipal manager of a municipality is, subject to the policy directions of the municipal council,

responsible and accountable for-...”. The Municipal Systems Act is therefore silent on any original powers which vest in a Municipal Manager, aside from the duties and delegations which derive from sections 53 and 59 and any instruments which are to be developed to give effect thereto.

[39] That a Municipal Manager may be an appeal authority in terms of section 62(4)(a) is only derived from a sub-delegation of powers. The sub-delegation derives from the Municipality where the original authority vests. Section 62(4)(b) is further clear that where a decision is taken by a Municipal Manager, that the Executive Committee or Executive Mayor may be the appeal authority. Section 62(4)(b) therefore militates against any argument that a Municipal Manager acts on original authority. If that were the case, section 62(4)(b) would be mere surplusage in the Municipal Systems Act, with no relevance.

[40] I respectfully differ with the decisions relied on by Maximum Profit, where reliance is placed solely on the Supply Chain Regulations and the Local Government: Municipal Finance Management Act 56 of 2003 (‘the Local Government Finance Management Act’) and the Regulations promulgated in terms thereof. Notably Adv Els SC appeared for Maximum Profit in all these cases. They include Maximum Profit Recovery (Pty) Ltd v Inxubu Yethemba Local Municipality and others [2021] ZAECGHC 11 (16 February 2021); Maximum Profit Recovery (Pty) Ltd v Bela-Bela Local Municipality and others [2023] ZALMPPHC 41 (11 April 2023); and Maximum Profit Recovery (Pty) Ltd v eDumbe Local Municipality (10 May 2023).

[41] The judgments in the two latter cases essentially follows the reasoning in the former case of Maximum Profit Recovery (Pty) Ltd v Inxubu Yethemba Local Municipality and others where Bloem J found that in the peculiar circumstances of that matter, that the Municipal Manager exercised original power when awarding the tender. Bloem J held in this regard, that:

“[17] In terms of Regulation 29(1)(a)(ii) of the Municipal Supply Chain Management Regulations the Bid Adjudication Committee must, depending on its delegations, make a final award ‘or a recommendation to the accounting officer to make the final award’. From the above regulation it is, in my view, clear that the power of a municipal manager to award a tender to a successful tenderer is an original power, which is regulated by the Municipal Finance Management Act and the Supply Chain Regulations made in terms

thereof.

- [23] The situation is different in the present matter. The second respondent exercised an original power, as opposed to a delegated power, when he took the decision to award the tender to PK. It can accordingly not be said that the ‘decision was taken by ... [the second respondent] in terms of a power or duty delegated or sub-delegated ...’ to him. That being the case, I am of the view that the appeal envisaged in section 62 of the Municipal Systems Act was not available to the applicant. The applicant was accordingly not required to appeal to the municipality in terms of section 62 before it instituted the present application, because that section did not provide it with the internal remedy envisaged by section 7(2)(a) of PAJA. In other words, the appeal in section 62 does not constitute an internal remedy for the applicant, as contemplated in section 7(2) of PAJA.
- [25] Section 62(3) of the Municipal Systems Act compels an appeal authority to consider an appeal submitted to it. After consideration it must either confirm, vary or revoke the decision appealed against, provided that ‘no such variation or revocation of a decision may detract from any rights that may have accrued as a result of the decision.’
- [26] In my view, legal rights accrued to PK when the municipality awarded the tender to it. Had the municipality’s appeal authority, after consideration of an appeal, varied or revoked the second respondent’s decision to award the tender to PK, such variation or revocation would have detracted the rights which accrued to PK after the tender was awarded to it. The inability of the municipality’s appeal authority to vary or revoke the second respondent’s decision to award the tender to PK would have rendered such an appeal negatory and illusory. Even if it could be said that section 62 of the Municipal Systems Act provides an internal appeal, section 62(3) allows such an appeal only if the outcome of the appeal does not detract from the rights accrued to the successful tenderer. It is accordingly found that, for that reason and also, section 62 does not grant a viable appeal to the applicant.”
- [42] The issue of delegations relevant to the awarding of a tender resorts under the Municipal Systems Act and Supply Chain Regulations

which gives life to the Supply Chain Management Policy of a Municipality. The Municipal Finance and Management Act, on the contrary, at most delineates the responsibilities of a Municipal Manager as the accounting officer of a Municipality. It does not deal with authority or delegations but elaborates on the Municipal Systems Act and Supply Chain Framework as a whole. Also, the Supply Chain Management procedure and management of contracts adumbrated in the Municipal Finance Management Act does not deal with delegations or authority. Aside from this observation, there is a more abiding reality relevant to the Supply Chain Management Policy of the Rustenburg Local Municipality. It is to this policy that I now turn.

- [43] The Supply Chain Management Policy of the Rustenburg Local Municipality, which derives its existence from section 53(2)(b) of the Municipal Systems Act, in my view, should be dispositive of the delegation issue. Item 6 of the Rustenburg Local Municipality Supply Chain Management Policy provides as follows:

“6. DELEGATED AUTHORITY OF SUPPLY CHAIN MANAGEMENT POWERS AND DUTIES

- (1) The Council has, in terms of its delegation of powers and functions in terms of the provisions of section 59 of the MSA, delegated such additional powers and duties to the Municipal Manager to enable the Municipal Manager:
 - (a) to discharge the supply chain management responsibilities conferred to the Municipal Manager in terms of:
 - (i) Chapter 8 and Chapter 10 of the MFMA; and
 - (ii) This policy,
 - (b) To maximise administrative and operational efficiency in the implementation of the Supply Chain Management System;
 - (c) To enforce reasonable cost-effective measures for the prevention of fraud, corruption, favouritism and unfair and irregular practices in the implementation of the Supply Chain Management System, and
 - (d) To comply with his/her responsibilities in terms of section 115 and other applicable provisions of the MFMA.
2. Section 79 and 106 of the MFMA applies to the sub-delegation of powers and duties to the Municipal Manager in terms of sub-paragraph

- (1) above.

6.1 Sub-delegations

- (1) The Municipal Manager may, in terms of the provisions of section 79 or 106 of the MFMA sub-delegate any supply chain management powers and duties, including those delegated to the Municipal Manager in terms of sub-paragraph 6(1) above, but any such sub-delegation must be consistent with the provisions of the MSA, the MFMA, the system of delegations adopted by the Municipality and this policy.

6.2 Oversight of the role of the Municipality

- (1) The Council must maintain oversight over the implementation of this policy by the Municipal Manager.
- (2) For the purposes of such oversight the Municipality Manager must:
 - (i) within 30 days of the end of each financial year, submit a report on the implementation of the supply chain management policy of the municipality and of any municipal entity under its sole or shared control, to the council of the municipality;
 - (ii) whenever there are serious and material non-compliance, problems or deviations in the implementation of this policy, immediately submit a report on such matters to the Council.

- (3) The Municipal Manager must, within 10 (ten) days of the end of each quarter, submit a report on the implementation of this policy to the Executive Mayor of the Municipality.
- (4) The Executive Mayor must provide general political guidance over the fiscal and financial affairs of the municipality and may monitor and oversee the exercise of responsibilities assigned to the Municipal Manager and Chief Financial Officer in terms of the MFMA. This role of the Executive Mayor is an oversight role only, and specifically excludes any interference or influence in or over a decision to award procurement contracts.
- (5) The reports of the municipality must be made public in accordance with Section 21A of the Municipal Systems Act. The reports of a municipal entity must be made public in a similar way.”
- [44] The Supply Chain Management Policy of the Rustenburg Local Municipality as part of the broader Supply Chain Framework which incorporates the Municipal Systems Act and the Municipal Framework and Management Act, makes it clear that the Municipal Manager in making the final award did so on delegated authority.
- [45] The next contentious issue is predicated on an interpretation of section 62(1) of the Municipal Systems Act, which in relevant part, provides that “A person whose rights are affected by a decision taken... in terms of a power or duty delegated or sub-delegated by a delegating authority ... may appeal against that decision by giving written notice of the appeal and reasons to the Municipal Manager within 21 days of the date of the notification of the decision.”
- [46] The tender advert in the present matter makes no reference to the way the decision of the award of the tender to a successful bidder should be made. In this regard, the Municipality would do well to revisit this aspect in the Supply Chain Regulations to accord with section 62(1) of the Municipal Systems Act. That notwithstanding, it is common cause that the award of the tender to the joint venture came to the knowledge of Maximum Profit when it came upon such information on the website of the Municipality on 4 April 2022. For all intents and purposes, with the shortcoming as aforesaid on the part of the Municipality, a purposive interpretation of section 62(1) in the context of the peculiar circumstances of this matter, means that decision was “notified” to Maximum Profit on 4 April 2022, when it gained effective knowledge of the decision.
- [47] Maximum Profit would therefore, on the uncontradicted evidence that it gained such knowledge on 4 April 2022, have been placed in position where it would have had 21 days from 4 April 2022 to lodge an internal appeal which period would have ended on 25 April 2022. This in circumstances where it is accepted that whilst the tender may have been awarded to the joint venture on 23 March 2022, no rights had yet accrued to the joint venture. Such rights only accrued on 22 April 2022. An internal appeal would have put paid to the date on which the rights accrued to the joint venture on 22 April 2022. The argument by the respondents that Maximum Profit only had nine (9) days to exercise its internal remedy,

which it failed to do, does not accord with the purport of section 62(1) of the Municipal Systems Act.

- [48] Rather than exercise its internal remedy, Maximum Profit within the period in which it could lodge an appeal (whether on the 9 day' argument or 21 days from date it gained knowledge of the award of the tender), rather elected to approach the court a quo on an urgent basis within the period which the lodging of an appeal was still extant.
- [49] Maximum Profit had to exhaust the internal remedy availed to it in section 62 of the Municipal Systems Act. Having failed to do so, the proverbial horse had bolted and the ultimate finding of the court a quo, albeit reached on a different basis, was correct in dismissing the application.
- [50] Having reached this conclusion, this should signal the end of the matter. In passing, however, Maximum Profit as indicated above, in the event of being successful with its appeal on the point in limine, which it has not, implored this Court to step into the shoes of the Municipality and to substitute it as the successful bidder. This, in circumstances where the tender has nearly run its course. That the tender process in casu is suspect, notwithstanding vehement argument to the contrary, is beyond the pale. It is indefensible. This Court needs not venture into the details thereof, save to make an observation similar to that stated by the Supreme Court of Appeal in *Millenium Waste Management (Pty) Ltd v Chairperson of the Tender Board: Limpopo Province and Others*

[2008] 2 All SA 145; 2008 (2) SA 481 (SCA) at paragraph 34:

"In conclusion there is one further matter that needs to be mentioned. It appears that in some cases applicants for review approach the high court promptly for relief but their cases are not expeditiously heard and as a result by the time the matter is finally determined, practical problems militating against the setting aside of the challenged decision would have arisen. Consequently the scope of granting an effective relief to vindicate the infringed rights become drastically reduced. It may help if the high court, to the extent possible, gives priority to these matters."

- [51] I may hasten to add, following on the aforesaid observation by the Supreme Court of Appeal, that in this Division matters of the present nature abound and in the face of constraints on judicial resources in a small Division which undoubtedly requires more judicial officers, giving priority to such matters is a challenge. The best endeavours are however made to accommodate such matters as expeditiously as possible.
- [52] For all the reasons aforesaid, the appeal stands to be dismissed with costs, which costs shall include the costs of the application for leave to appeal, and the costs of Counsel.

Order

- [53] Consequently, the following order is made:

A H PETERSEN

JUDGE OF THE HIGH COURT,
NORTH WEST DIVISION, MAHIKENG

I agree.

R D HENDRICKS

JUDGE PRESIDENT OF THE HIGH COURT,
J T DJAJE

DEPUTY JUDGE PRESIDENT OF THE HIGH COURT,

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Prepared on 14 October 2026 · Esheria