



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

Case No: 8721/21P

In the matter between:

**MAKHATHINI MEDICAL
WASTE (PTY) LTD
BUHLE WASTE (PTY) LTD**

**FIRST APPLICANT
SECOND APPLICANT**

and

**THE MEC FOR HEALTH,
KWAZULU-NATAL
COMPASS MEDICAL WASTE
SERVICES (PTY) LTD
THE CHAIRMAN, BID APPEALS
TRIBUNAL, KWAZULU-NATAL
MEC FOR FINANCE,
KWAZULU-NATAL**

**FIRST RESPONDENT
SECOND RESPONDENT
THIRD RESPONDENT
FOURTH RESPONDENT**

ORDER

The following order is granted:

1. The review application by the second applicant is dismissed with costs, save that no costs shall be recoverable by the first respondent.
 2. The second applicant is ordered to pay the first applicant's and the first respondent's costs in the intervention application.
 3. The review application by the first applicant is dismissed with costs save that no costs shall be recoverable by the first respondent.
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JUDGMENT

Delivered on: 03 August 23

Poyo Dlwati JP

[1] Makhathini Medical Waste (Pty) Ltd (Makhathini), the first applicant, launched an application to review and set aside the decision of the Member of the Executive Council for Health, KwaZulu-Natal (the first respondent), the Chairman, Bid Appeals Tribunal, KwaZulu-Natal (the Tribunal), the third respondent, and the Member of the Executive Council for Finance, KwaZulu-Natal (the fourth respondent) awarding the tender for the provision of health care risk waste management services to Compass Medical Waste Services (Pty) Ltd (Compass), the second respondent.

[2] The background leading to this application is that the Department of Health (the Department) invited tenders for the rendering of health care risk waste management services for three years in three different areas being:

- (a) Area 1: eThekweni and Ilembe Districts (region 1);
- (b) Area 2: Umgungundlovu, Harry Gwala and Ugu Districts (region 2); and
- (c) Area 3: Umkhanyakude, King Cetshwayo and Zululand Districts (region 3); and Amajuba, Umzinyathi and Uthukela Districts (region 4).

On 7 May 2021, the Department made the award as follows: Makhathini was the successful tenderer for Area 1, Compass for Area 2 and Ecocycle Waste Solutions JV Vikela Africa Waste for Area 3.

[3] The tender document stated that even though tenderers were permitted to submit tenders for all three areas, no bidder would be awarded a tender for more than one area, except where clause 1.2.2.2(d) applied.¹ Makhathini appealed the decision to award Area 2 to Compass to the Tribunal. On 21 August 2021, the Tribunal dismissed Makhathini's appeal. In dismissing the appeal, the Tribunal held that the provisions in clause 1.2.2² of the tender document, namely, that in order to broaden participation in the market, the Department would award the tender to a bidder that did not obtain the highest points, were objective criteria for the purposes of s 2(1)(f) of the Preferential Procurement Policy Framework Act 5 of 2000 (the PPPFA). It found that as tenderers were aware of this term in the tender document, they should have raised this as a basis to challenge the tender document. It further held that the condition that was implicit in the award, was agreed to by Compass within a reasonable time, which signified that it agreed to meet Makhathini's price.

[4] According to Makhathini, Compass was not the successful bidder for Area 2 at a rate of R47.69 per kilogram, as Makhathini tendered at a lowest price of R47.67 per kilogram. Makhathini contended that Compass was not the tenderer with the most points at 99.96, as it (Makhathini) scored 100 points for Area 1 and

¹ Clause 1.2.2.2, which is found in Section K which deals with Special Terms and Condition, reads as follows: 'In the event of one bidder scoring highest points in two or all the Areas, the Department will use the following criteria in application of the principle contemplated in 1.2.2 above:

...

(d) A bidder may be awarded more than one Area, in the event that none of the other bidders are willing to match the price of the highest-ranking bidder.'

² Clause 1.2.2 reads as follows:

'In an attempt to broaden participation in the market as per the Preferential Policy Framework Act section 2(1)(f), objective criteria, the Department shall award the bid to compliant bidders as per the following area. (a) Region 1 referred to as Area 1; (b) Region 2 referred to as Area 2 (c) Region 3 and 4: referred to as Area 3.'

it should follow that it had scored 100 points for Area 2 as well. According to Makhathini, the tender document did not provide any framework which would guide the Department in exercising its discretion to apply the aforementioned criteria, such that the market application of each of the tenderers would be measurable and quantifiable as objective criteria. I identified this as the first flaw in the tender document.

[5] The second flaw identified by Makhathini was that the same criteria, namely: price, BBBEE, and market involvement were taken into account twice. The first time was in the points phase, resulting in the ranking of the tenderers, and the second time in deciding whether there were objective criteria to justify the award of the contract to a tenderer with lower points. According to Makhathini, even if price could constitute an objective criterion, Compass's price was higher than Makhathini's and at the time of the award, Compass had not agreed to match Makhathini's price of R47.67 per kilogram.

[6] According to Makhathini, even though Compass's counsel informed the Tribunal that it was willing to match Makhathini's price, this election was too late as the award made on 7 May 2021 could not be justified. In Makhathini's contention, neither the Tribunal nor the fourth respondent had the power to alter the award. It was contended that the fourth respondent erred and acted unlawfully in accepting the Tribunal's recommendation and adding a further condition to the decision. The Department delayed in filing the record as required in terms of rule 53 of the Uniform Rules. As a result, various applications were launched by other parties during the period between the launching of this application and its hearing. The one that is of greatest relevance in this matter is the one that was launched by Buhle Waste (Pty) Ltd (Buhle). Buhle, through an intervention application,

became the second applicant in these proceedings.³ I will revert to its application later on in this judgment.

[7] Ultimately, the Department filed the record in October 2022. After the record was filed, Makhathini filed its supplementary affidavit. It complained that the record was defective in various respects. One of the complaints was that the Department failed to provide proof that it sent extension notices to the tenderers for extending the validity periods of the bids to 9 December 2020, a further extension to 10 April 2021 and later to 9 August 2021. Also, no proof of acceptance of such requests were attached to the record. It did not accept the Department's explanation that the computer which kept that information had crashed. Makhathini requested the Department to make the computer available to its experts so that the information could be retrieved but this was not acceded to by the Department. The further complaint was that Compass's tender was not compliant as it failed to provide prices in annexure D for extraordinary items.

[8] Buhle, pursuant to its application to intervene in these proceedings, was granted leave to intervene in this application and was joined as the second applicant. Buhle sought similar relief to Makhathini. It is important to note that at that time, Buhle was the current service provider to the Department prior to and after the award of the tenders. It did so in terms of a piggy-back arrangement through a contract with the Mpumalanga Health Department. This contract was on a month-to-month basis from April 2019 but expired on 30 November 2022. Buhle only launched its application on 8 February 2022. It contended that it had instructed its attorneys to deliver a notice to the Department on 7 May 2021 to lodge its appeal, and also requested reasons for the award. It turned out that this

³ See *Makhathini Medical Waste (Pty) Ltd v MEC for Health, KwaZulu-Natal and others* [2022] ZAKZPHC 82.

notice was only sent to the Department on 17 May 2021, outside the five-day period allowed for the lodging of an appeal.

[9] According to Buhle, it never received any response to its notice of appeal nor did it receive reasons for the award. The notice of appeal lapsed on 15 June 2021. Even though Buhle in its intervention application sought to challenge the awarding of the tenders for all the areas, it was granted leave to intervene in respect of Area 2, being the same area that was challenged by Makhathini. I must mention that to the extent that Buhle's intervention application would be limited to Area 2, same was not opposed by Makhathini.

[10] In its challenge in the review, Buhle made common cause with Makhathini about the extension of the validity period of the bid. It contended that not all the tenderers, including itself, consented to the extension of the validity period beyond 10 April 2021. For that reason, the tenders had lapsed. Buhle further contended that Compass's tender had lapsed as it was only awarded the tender after the fourth respondent approved the Tribunal's recommendation with a condition that Compass matches Makhathini's price. According to Buhle, Compass relied on the 21 May 2021 award and it only purported to match Makhathini's price at the hearing of the appeal on 11 August 2021. According to Buhle, this was beyond 9 August 2021, the last day to which the validity of the tenders was extended to.

[11] The third ground of review by Buhle was that the Department awarded Compass the tender on the basis of comparative prices, which were only relevant for the purposes of a comparison of the tendered rates for each year. This, according to Buhle, was not the actual tendered price but the cost average price. For all these reasons, Buhle believed that the tender process was riddled with irregularities and fell to be set aside.

[12] The Department and Compass opposed the application. I will start with the opposition by Compass. It contended that Makhathini's reasoning on the absence of an objective criterion was flawed as the criterion that no bidder/service provider would be awarded more than one area, in order to broaden market participation, was objective and did not depend on any subjective assessment or value judgment. It bore a rational connection to the purpose of procurement and therefore the tender. This broadening participation also had the benefit of increasing competition between service providers, and greater participation in the health care risk waste management services. Furthermore, the State would not pay more, as there was a condition of price match in place.

[13] With regard to Makhathini's contention that Compass's election to match Makhathini's price was late, Compass averred that there was no time stated in the tender document or in the award for the acceptance of the condition. It was only required of it to accept the condition within a reasonable time. In any event, the award was in fact conditional. Furthermore, the publication of the results of the tender was separate from the administrative decision to award. This was so because the publication did not incorporate all the terms and conditions of the tender. This much was evident from the minutes of the various committees that evaluated and recommended the award of the tender to Compass.

[14] With regard to the complaint that Compass's tender was non-compliant as it failed to provide a price for extraordinary items, Compass's response was that the price per kilogram was provided for all the items, regardless of whether they were extraordinary items or not. That price was applicable to all the items and was reflected on page 13 of the indexed extract of the record. As those prices were provided, Compass contended that the Bid Evaluation Committee (BEC) and the Bid Adjudication Committee (BAC) of the Department must have used

them to evaluate the bid. Therefore, the contention went, the pricing list for extraordinary items was not separate and distinct from what would have appeared in annexure D of the tender document. In any event, Compass would have had to match Makhathini's price as per the award.

[15] Furthermore, according to Compass, the amount of R47.69 per kilogram was a total comparative price tendered but was never the price at which Compass was tendering to render the service. This in any event, according to Compass, was what was called for in the bid document, namely having prices calculated using the weighted prices of the individual waste streams so that the Department could accurately compare all the bidders. This would be the same scenario with Makhathini's price of R40.18 per kilogram. Also, according to Compass, the issue of the extension of the validity period would affect those bidders that did not extend their offers as these would no longer be open for acceptance. Compass contended that it extended the validity period of its tender until 9 August 2021. The Tribunal merely confirmed that award subsequent to the appeal, hence the administrative decision was lawful at the time that it was made and could not be impugned.

[16] Compass further contended that as the decision to award the tender was an administrative one, Buhle ought to have brought its review in terms of the Promotion of Administrative Justice Act 3 of 2000 (PAJA). Buhle, however, was circumventing the provisions of PAJA as it did not comply with it and was trying to create a separate cause of action outside PAJA. It also failed to prosecute its appeal before the Tribunal, and therefore failed to exhaust the internal remedies as provided for in s 7(2)(a) of PAJA. It also failed to launch its review within the

180 day period prescribed in PAJA⁴ and the delay was unreasonable. Buhle also failed to apply for condonation as required in PAJA.

[17] According to Compass, Buhle's bid scored the second lowest number of points as reflected in the Department's BEC's minutes. It was R80 per kilogram more in comparison to Makhathini's and Compass's bids. It also failed to provide a copy of its tender document in these proceedings and an adverse inference ought to be drawn therefrom.

[18] There was nothing new raised in reply, save to state that Makhathini reaffirmed its contentions made in the founding affidavit and disputed Compass's ones where they differed with its contentions. Makhathini emphasized that the prices on its pricing schedule were not applicable to the extraordinary items reflected in Schedule D. It contended that if Compass rejected Makhathini's methodology for the pricing of extraordinary items, it could not, therefore, have agreed to price match its tender but that this was a clear refusal to price match. It also contended that the Department's failure to provide a complete record meant that the tender expired before it was awarded, this being the only inference to be drawn.

[19] Buhle in its reply contended that its review application was not late as the 180 day period commenced only after the reasons for the award had been disclosed. Alternatively, Buhle instituted its review application within 180 days from 11 August 2021, being the date upon which Compass agreed to match

⁴ Section 7(1) of PAJA provides that:

'Any proceedings for judicial review in terms of section 6(1) must be instituted without unreasonable delay and not later than 180 days after the date—

- (a) subject to subsection (2)(c), on which any proceedings instituted in terms of internal remedies as contemplated in subsection (2)(a) have been concluded; or
- (b) where no such remedies exist, on which the person concerned was informed of the administrative action, became aware of the action and the reasons for it or might reasonably have been expected to have become aware of the action and the reasons.'

Makhathini's price. Furthermore, Compass failed to identify any law that alleged the prescribed internal remedies that Buhle ought to have exhausted before lodging the review. And, in any event, even though the bid document entitled the aggrieved tenderers to appeal, they were not obliged to appeal as that clause did not constitute "law" as envisaged in PAJA. It reiterated that as Compass purported to agree to match Makhathini's price by 11 August 2021, there was no valid tender by then as the tenders expired on 9 August 2021.

[20] Albeit belatedly, the Department also opposed Makhathini's and Buhle's review applications. It explained the reasons for the delay and regretted the inconvenience caused to the court and the parties. The Department disputed that the record it filed was incomplete. It explained that the only documents it could not provide were the extension notices for the validity of the tender to and from the bidders. The cause of this was ascribed to a crashed computer, and despite an information technology technician being instructed to retrieve the information, the data could not be retrieved. The Department confirmed that at least five extension notices were received from the bidders, including Makhathini and Compass. These had been retrieved as they were hard copies.

[21] The Department explained that clause 1.2.2.2(d) of the tender document was intended to broaden market participation in respect to the tender itself and to ensure an equitable allocation in the respective areas. It conceded that Makhathini scored more than Compass in respect of Area 2. However, it did stipulate the objective criteria in the tender document in line with s 2(1)(f) of the PPPFA. This was in addition to paragraphs (d) and (e) of the tender document. According to the Department, no further measurable or quantifiable consideration was required after the ranking of the various tenderers. The objective criteria were only applied after the evaluation of the bids. It denied that its decision to award the tender for Area 2 to Compass was arbitrary.

[22] The Department reiterated that Compass agreed to match Makhathini's price as that was the condition of the award in the first place. According to the Department, Makhathini elected to participate in the tender and it was bound by the conditions of the tender. It conceded that reference to the total comparative price was an error but that in any event, the award would be based on the price of Makhathini being matched. It averred that the absence of a price for the items in Schedule D did not render Compass's bid non-responsive, as the overall price in the bid document was used. It conceded that when the award was published, it did not make reference to a condition but that this would be accommodated in a service level agreement.

[23] According to the Department, all the bidders that we are concerned with in this matter did extend their bid validity periods. As a result, there was no prejudice suffered by any of the bidders. Phuting Medical Waste, being of the tenderers, had been found non-compliant, and it was not necessary to receive its April 2021 extension notice. With regard to Buhle, the Department contended that Buhle's review was brought out of time in contravention of s 7(1) of PAJA. In the absence of an application for condonation, its application ought to fail. It repeated the same grounds of opposition for the other grounds of review as Compass, and those have been dealt with when dealing with Makhathini's review.

[24] The issues for determination therefore are whether:

- (a) The review application by Buhle is out of time;
- (b) The condition stipulated at para 1.2.2 of the tender document justified the award of the tender to Compass;
- (c) There was a failure by the Department to extend the validity period prior to the award being made on 21 May 2021; and
- (d) The award was flawed for any other reason and ought to be set aside.

[25] Buhle explained in its founding affidavit that after the award was published, it wrote to the Department and requested reasons for the award and for its exclusion. It also noted its intention to lodge an appeal. The Department never responded to its letter. What it does not say, is that this letter was filed beyond the five day period allowed for an aggrieved party to register its intention to appeal. Thereafter, Buhle did nothing until it lodged its intervention application in February 2022, six months after the Tribunal's decision, and nine months after the award. It was common cause that Buhle had been providing the requisite services to the Department prior to, and after the award of the tender was made. It must have been aware of the appeal and the subsequent litigation by Makhathini. However, it chose not to do anything as it was benefiting from being the service provider throughout that period.

[26] Buhle also knew that it scored the second lowest, and that it had no chance of being awarded the tender. There is no doubt in my mind that it was only after Buhle had been advised by the Department that it would terminate its month-to-month services that it then lodged its intervention, and later the review application. Its review application for the setting aside of the tender award was beyond the 180 day period stipulated in s 7(1) of PAJA. The delayed period is not reasonable in my view, and has not been explained other than that it was waiting for the reasons for the award from the Department. There is no application for condonation for the late filing of the review.

[27] Buhle argued that the 180 day period commences after the date on which the person concerned was informed of the decision and the reasons for it. It argued that it received those reasons for the first time on 24 October 2022, when the Department filed its answering affidavit in the intervention application. This argument is untenable and would water down the requirement for the 180 day

period for a review or even a reasonable period for that. Buhle had other avenues open to it to compel the Department to provide it with the reasons for its decision to award the tenders. It did not do so, and in my view, it was for the reason that it was happy to provide the services under the piggy-back contract it had. It was only when that contract was threatened that it decided to act, which in my view, was hopelessly late.

[28] Whilst I agree with what the Constitutional Court stated in *Cape Town City v Aurecon SA (Pty) Ltd*⁵ that the clock starts to run with reference to the date on which the reasons for the administrative action became known (or ought reasonably to have become known) to an applicant, this cannot apply to Buhle for the simple reason that it did not pursue the Department to provide the reasons for its decision. It did not pursue the Department for the reasons because it was aware that it scored the second lowest and in any event, its letter requesting such reasons was late. There was nothing before me that showed that Buhle would have proceeded with the review even if Makhathini had not proceeded with the review. It was entirely opportunistic.

[29] As was held in *Commissioner, South African Revenue Services v Sasol Chevron Holdings Limited*,⁶ where no application for the extension of the 180 day period in terms of s 9(2) has been made – as in this instance – a court has no authority to enter into the substantive merits of a review application brought outside the 180 day period described in s 7(1). In *Opposition to Urban Tolling Alliance v South African National Roads Agency Limited*⁷ the court held that ‘[w]hether or not the decision was unlawful no longer matters. The decision has

⁵ *Cape Town City v Aurecon SA (Pty) Ltd* [2017] ZACC 5; 2017 (4) SA 223 (CC) para 41.

⁶ *Commissioner, South African Revenue Service v Sasol Chevron Holdings Limited* [2022] ZASCA 56.

⁷ *Opposition to Urban Tolling Alliance v South African National Roads Agency Limited* [2013] ZASCA 148; [2013] 4 All SA 639 (SCA) para 26, referred to in *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd* [2019] ZACC15; 2019 (4) SA 331 (CC) para 49.

been “validated” by the delay’. This, therefore, is the end of Buhle’s review application and it should pay the costs of this application and those of its intervention application.

[30] I now turn to the second issue raised, being whether the Department had established objective criteria in para 1.2.2, of the tender document namely, that ‘in an attempt to broaden participation in the market, no bidder will be awarded more than one area but instead the award will be awarded to the next highest ranking bidder on the proviso that they match the price offered by the highest ranking bidder’.

Makhathini’s argument in this regard was that the aim of broadening market participation was not an objective criterion in terms of s 2(1)(f) of the PPPFA. In its view, clause 1.2.2 was nothing more than a policy of fair distribution of work, as it lacked any sensible and rational criteria that would be applied to determine if awarding the tender to a bidder would broaden market participation.

[31] Makhathini’s argument failed to take into account that the objective criteria were established when the Department stipulated that the tenderers would not be awarded more than one area so as to broaden market participation. It was for this reason that the tender would instead be awarded to the second highest bidder. The ranking of bidders was not a criterion itself as argued by Makhathini but instead the award of more than one area was the criterion used. This was in addition to the price and points allocation to the bidders. I am, therefore, unable to differ with the Tribunal when it referred to the criteria as a ‘commendable and perfectly rationale principle of broadening participation in the market place itself’. There was therefore nothing requiring a subjective assessment when one had to determine whether the criteria had been met or not.

[32] The further difficulty with this challenge by Makhathini was that the criteria were part of the tender conditions. Even though Makhathini contended

that it tried to object to this condition at the tender briefing session, it did not take any legal steps to correct the document. It waited until the ultimate conclusion and then raised it. This in my view cannot be fair to the Department and the other tenderers who could have submitted bids but were discouraged because of this condition. There is no doubt in my mind that as a prospective tenderer, it would have had the necessary locus standi, by virtue of its participation in the tender, to challenge it immediately after the closing of the bids.⁸

[33] Furthermore, broadening market participation had nothing to do with the past experience of the bidder as Makhathini seemed to suggest. In any event, this latter aspect would have been considered under functionality. Awarding the tender to three different tenderers, in my view, satisfied the requirement of broadening market participation, as the tender was not limited to one tenderer. The criteria was fair, rational and objective in my view⁹. This ground of review must also fail.

[34] However, before I leave this ground, I need to deal with the issue whether Compass's bid was an acceptable tender and whether Compass did match Makhathini's price. It was evident from Compass's supplementary answering affidavit that it did in fact submit a price for all the items including extraordinary ones,¹⁰ albeit that it did not do so separately in annexure D. In my view, as these prices were submitted, this was enough for the tender document and for the Department to determine a price for what was listed. Absence of these prices, which were already accounted for, did not invalidate the tender in my view nor

⁸ See *Giant Concerts CC v Rinaldo Investments (Pty) Ltd and others* [2012] ZACC 28; 2013 (3) BCLR 251 (CC) para 41.

⁹ See *Q Civils (Pty) Ltd v Mangaung Metropolitan Municipality and Other* (A48/2016) [2016] ZAFSHC 159 8 September 2016 para 40.

¹⁰ See Section M at page 12 of Compass's tender document, at page 20 of the record extract.

does it make the award reviewable. In any event, the service would have to be done at Makhathini's price.

[35] Whilst Makhathini further contended that the award to Compass was unconditional, this cannot be correct. Both the BEC and the BAC, whose decisions are the basis upon which the award was made, refer to the fact that the award was subject to Compass matching Makhathini's price. This was in line with clause 1.2.2 of the tender document, as Makhathini was already awarded the tender for Area 1. That the award, when published, did not make reference to the condition is not material in my view. As explained by the Department, Compass was going to be engaged with prior to the implementation of the tender in order to ensure that Compass agreed to match Makhathini's price.

[36] Furthermore, the context upon which the award was made cannot be ignored, this being the minutes of the BEC and BAC. Compass confirmed before the Tribunal that it would match Makhathini's price. In my view, there is nothing wrong with this as it was in line with what was envisaged in the tender document. Such confirmation was within a reasonable time as the tender had not been implemented due to the appeal. In any event, the Tribunal and the fourth respondent were entitled to alter or vary the award in terms of the KwaZulu-Natal Provincial Treasury prescripts.¹¹

¹¹ The Bid Appeals Tribunal was created in terms of the KwaZulu-Natal Supply Chain Management Policy Framework dated 3 February 2006. The powers of the Tribunal are set out in paragraph 22:

'22. Powers of the Bid Appeals Tribunal:

(1) In respect of appeals not determined under paragraph 21 to be frivolous, vexatious or without merit, the Bid Appeals Tribunal –

- (i) must hear and finalize the appeal within fourteen working days of the determination under paragraph 21;
- (ii) must make recommendations to the MEC for Finance to confirm, vary or set aside the decision of a Bid Adjudication Committee, and Accounting officer or his/her delegate; and
- (iii) may make an appropriate order as to costs, which may include the costs to the Province of having the appeal heard.

(2) If the award is set aside, the Bid Appeals Tribunal must make any order it considers appropriate regarding the procedures to be followed to determine the matter.'

(<https://www.kzntreasury.gov.za/ResourceCenter/Guideline%20Documents/kzn-scm-policy-framework.pdf>, accessed 28 July 2023)

[37] This leads me to the last ground of review being whether the tender validity period expired before the award of the tender. The onus in this regard is on Makhathini to show that the validity period was not extended by all the bidders. According to Makhathini, the tender validity period was not extended to 10 April 2021 nor to 9 August 2021. It based this contention on the fact that the Department explained that the proof of such extensions were on Mr Ngubane's computer which had crashed. The Department failed to respond to a notice requesting the inspection of the said computer by Makhathini's technician. Makhathini went to the extent of contacting Mr Ngubane, who provided it with emails between himself and some of the bidders, including Compass, requesting the extensions. According to Mr Ngubane, the request to extend the validity period was sent to all the bidders at all relevant times. However, some bidders agreed to the extension of the validity period before 10 April 2021 whilst some only sent their acceptance after 10 April 2021. This was the same situation with the extension of the validity period to 9 August 2021.

[38] Mr Ngubane did not say which of the tenderers provided their acceptance to the extension and which did not. What is clear is that Makhathini and Compass did agree to the extension of the validity period before the award was made. In this regard, Makhathini's contention was that Compass's extension letter was not dated and it did not form part of the record furnished by the Department, meaning that the Department could not have received it timeously. Compass, however disputed this and contended that it sent its acceptance of the extension timeously. As these are motion proceedings, it is undesirable to venture into probabilities.¹²

¹² See *National Director of Public Prosecutions v Zuma* [2009] ZASCA 1; 2009 (2) SA 277 (SCA).

Instead one has to apply the *Plascon Evans*¹³ principle and accept Compass's version.

[39] It must be noted that the affidavit that was obtained by Buhle from Phuting Medical Waste states that it did not receive the request for the extension of the validity period to 10 April 2021. As explained by the Department, this was so because Phuting Medical Waste had been considered as non-responsive at that time. As was held in *Aurecon South Africa (Pty) Ltd v Cape Town City*,¹⁴ in circumstances where tenderers, who were found to be ineligible, were not asked to extend their tenders, it would be a waste of time and resources to request an extension from them.

[40] The important factor here, and quite distinguishable from other matters, is that Mr Ngubane stated in his affidavit that he sent a request to all tenderers for the extension of the validity period prior to the expiry of the validity period, which was three days prior to the expiry in both instances. I must accept his version, especially because it was tendered by Makhathini. I must also accept, as explained by Mr Ngubane in his affidavit, that his computer crashed hence no further evidence could be tendered. One has to bear in mind the purpose of such an exercise, which is to preserve the tendered price by the respective bidder. Those tenderers that cared to respond, including Makhathini and Compass responded before the expiry of the validity. *Ekurhuleni Metro*¹⁵ that I was referred to is distinguishable on the facts from this matter and does not find application. This ground of review must therefore fail.

¹³ *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A).

¹⁴ *Aurecon South Africa (Pty) Ltd v Cape Town City* [2015] ZASCA 209; 2016 (2) SA 199 (SCA) para 23.

¹⁵ *Ekurhuleni Metro Municipality v Takubiza Trading & Projects CC and others* [2022] ZASCA 82; 2023 (1) SA 44 (SCA).

[41] In my view, there is no basis for contending that the award was flawed on any basis. I am unable to set it aside for any reason. The only issue outstanding is that of costs. I do not see a reason why the costs should not follow the result except for two factors. The first is that the Department, namely the first respondent, has been dilatory throughout these proceedings and should not be entitled to any costs. The second issue is the costs relating to Buhle's intervention application. Makhathini had indicated that it would not oppose that intervention application if it was limited to Area 2. However, Buhle persisted with seeking to intervene in all three Areas and it was not successful. It must then pay Makhathini's and the first respondent's costs in the intervention application.

[42] I therefore make the following order:

1. The review application by the second applicant is dismissed with costs, save that no costs shall be recoverable by the first respondent.
2. The second applicant is ordered to pay the first applicant's and first respondent's costs in the intervention application.
3. The review application by the first applicant is dismissed with costs save that no costs shall be recoverable by the first respondent.



Poyo Dlwati JP

APPEARANCES

Date of hearing:	28 February 2023
Date of judgment:	3 August 2023
Counsel for first applicant:	Adv Singh SC
Instructed by:	PR Maharaj & Company c/o AK Essack Morgan Naidoo & co.
Counsel for second applicant:	Adv Wasserman SC
Instructed by:	Fairbridges Wertheim Becker c/o Stowell
Counsel for first respondent:	Adv Naidoo SC
Instructed by:	The State Attorney
Counsel for second respondent:	Adv Voormolen SC
Instructed by:	Shepstone & Wylie