IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Not reportable

Case no: 2180/2024

In the matter between:

ROYAL MNDAWE HOLDINGS (PTY) LTD t/a ROMH **FIRST APPLICANT**
(Registration Number 2013/114343/07)

MIMSHACH (PTY) LTD **SECOND APPLICANT**
(THE FIRST AND SECOND APPLICANTS ARE CITED HEREIN IN THEIR CAPACITIES AS PARTNERS IN A JOINT VENTURE UNDER THE NAME AND STYLE OF ROMH JV)

and

MEC: DEPARTMENT OF COMMUNITY SAFETY, ROADS & TRANSPORT, FREE STATE PROVINCE **FIRST RESPONDENT**

HOD: DEPARTMENT OF COMMUNITY SAFETY, ROADS & TRANSPORT, FREE STATE PROVINCE **SECOND RESPONDENT**

TSELA TSWEU CONSULTING ENGINEERS (PTY) LTD **THIRD RESPONDENT**
(Registration Number: 1998/024934/07)

Neutral citation: *ROMH JV v MEC: Department of Community Safety, Roads and Transport Free State Province and Two Others* (2180/2024) [2025] ZAFSHC 320 (14 October 2025)

Coram: Van Zyl et Daffue JJ

Heard: 12 May 2025

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email and released to SAFLII. The date and time for hand-down is deemed to be 11h00 on 14 October 2025.

Summary: Review application – successful tenderer initially and incorrectly disqualified by Bid Evaluation Committee (BEC) – the applicant was recommended by the BEC and Bid Adjudication Committee (BAC) initially accepted this – after comments by Treasury the matter was referred back to BEC who admitted the error in disqualifying the tenderer and recommended it for appointment – the BAC hereafter recommended the tenderer for appointment – Head of Department appointed the successful tenderer – applicant as the unsuccessful tenderer failed to prove procedural unfair administrative action – application dismissed.

ORDER

1 The application for review is dismissed.

2 Each party shall be liable for the payment of their own costs in respect of the review application.

JUDGMENT

Daffue J (Van Zyl J concurring)

Introduction

[1] By means of introduction it is apposite to remember the warning of the Constitutional Court in *Trade Administration Commission v SCAW South Africa (Pty) Ltd.*[1] It cautioned that where the Constitution or valid legislation has entrusted specific powers and functions to a particular branch of government, courts may not simply usurp that power or function by making a decision of their preference as that would frustrate the balance of power implied in the principle of separation of powers. The primary responsibility of the court is not to make decisions reserved for or within the domain of other branches of government, but rather to ensure that these branches exercise their authority within the bounds of the Constitution.

[2] The purpose of review is not the second-guessing of decisions by organs of state. I accept that the review of tenders granted by organs of state is primarily to act as a safeguard against corruption and to prevent the wasteful use of public resources. As Willis JA put it in his minority judgment in *Airports Company South Africa Soc Limited v Airports Bookshops (Pty) Limited t/a Exclusive Books*:[2]

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[1] *International Trade Administration Commission v SCAW South Africa (Pty) Ltd* [2010] ZACC 6; 2012 (4) SA 618 (SCA); 2010 (5) BCLR 457 (CC); 72 SATC 135 para 95.

[2] *Airports Company South Africa Soc Limited v Airports Bookshops (Pty) Limited t/a Exclusive Books* [2016] ZASCA 129; [2016] 4 All SA 665 (SCA); 2017 (3) SA 128 (SCA) para 60.

'The system of review of tenders was not established for disappointed tenderers to participate in commercial 'blood sports' or to act as 'spoilsports'.'

The parties

[3] The two applicants in this application, to wit Royal Mndawe Holdings (Pty) Ltd t/a ROMH and Mimshach (Pty) Ltd, are partners in a joint venture under the name and style of ROMH JV. They instituted the application as the unsuccessful tenderer. Hereinafter I shall refer to them as ROMH JV.

[4] ROMH JV cited both the Member of the Executive Council (MEC) as well as the Head (HOD) of the Department of Community Safety, Roads and Transport, Free State Province (the Department) as first and second respondents respectively. Tsela Tsweu Consulting Engineers (Pty) Ltd (Tsela), the successful tenderer, is cited as third respondent. Tsela does not oppose the application and abides by the decision of the court.

The relief claimed

[5] ROMH JV seeks the review and setting aside of the following tender awarded under bid number: CSR&T/RFP01/2023/24 – Request for proposal from a consulting engineering company for verifying 10% of road network data collected for DORA compliance in the Department for a period of 36 months (the tender).

[6] Consequently, it also seeks an order that the contract between the Department and Tsela be set aside and that the tender be awarded to ROMH JV in terms of s 8 of the Promotion of Administrative Justice Act 3 of 2000 (PAJA), alternatively that the matter be remitted to the Bid Evaluation (BEC) and Bid Adjudication (BAC) Committees of the Department with such directions as the court may deem fit. Costs of the application are sought against the first and second respondents.

The history of the litigation

[7] It is appropriate to provide a brief history of the litigation as it will be relevant in the exercise of a discretion pertaining to the costs to be awarded. Early in 2024, ROMH JV applied for an interdict under application number 1043/2024 to prevent the implementation of the contract entered into between the Department and Tsela. It also sought reasons for the Department's decision to award the tender to Tsela. On

18 April 2024 Chesiwe J dismissed the application due to lack of urgency. Thereafter ROMH JV requested documentation from the Department in terms of the Promotion of Access to Information Act 2 of 2000 (PAIA).

[8] Upon receipt of documentation from the Department, the present application was instituted on 19 April 2024. ROMH JV intended to obtain urgent relief in terms of part A of the notice of motion pending finalisation of the application for review under part B thereof. The Department filed an answering affidavit and consequently, on 8 May 2024 the application was postponed to the opposed roll of 13 May 2024. Mhlambi J eventually dismissed part A on 4 June 2024.

[9] The Department failed to deliver the record of proceedings in terms of rule 53 of the Uniform Rules of Court. This caused ROMH JV to apply for an order to compel. On 1 August 2024 Loubser J granted an order in favour of ROMH JV. The Department ignored the court order. A further application was launched, whereupon Mhlambi J granted yet another order in favour of ROMH JV on 26 September 2024. Notwithstanding correspondence from ROMH JV's attorney to the State Attorney, no responses were received. On 24 October 2024, a month after the latter order, the Department eventually filed the rule 53 record.

[10] ROMH JV filed its supplementary founding affidavit on 7 November 2024. The Department failed to file its answering affidavit in opposition of part B of the notice of motion. On 30 January 2025 ROMH JV requested a date for the review hearing whereupon the application was set down for 12 May 2025. No further documents were filed by the Department prior to the filing of ROMH JV's heads of argument on 14 April 2024.

[11] On 15 April 2025 the Department's answering affidavit in the review application was filed belatedly, whereupon ROMH JV's replying affidavit was filed on 22 April 2025. Hereafter the Department's heads of argument were filed, but also late. ROMH JV filed supplementary heads of argument, bearing in mind that the initial heads of argument were filed prior to the filing of the answering affidavit.

[12] In view of the late filing of the Department's answering affidavit and its heads of

argument, it sought condonation. The applications were not opposed. At the onset of the proceedings on 12 May 2025, condonation was granted and the first and second respondents were ordered to pay the costs of the two condonation applications.

Common cause facts

[13] It is apposite to set out the common cause facts in chronological order. On 4 August 2023 the tender was advertised in terms whereof the Department invited consulting engineering companies to tender.

[14] The tender had to be evaluated according to a three-phase process. The first phase was in respect of an assessment on compliance and mandatory tender requirements, the second phase pertaining to functionality and the third phase pertaining to the preference point system.

[15] Thirteen tenderers tendered. Once the tenders were evaluated by the BEC, only ROMH JV was found to be responsive and therefore recommended for appointment. Tsela was disqualified in phase one insofar as the BEC concluded that it had submitted a non-responsive tender. The report shows that the C1.1 form - the offer and acceptance - was not completed insofar as part C thereof, the schedule of deviations, was not completed and signed. At the bottom of part A of the C1.1 form – the offer portion – the following is stipulated: '[Failure of a tenderer to sign this form WILL invalidate the tender]'. This aspect would eventually be ROMH JV's greatest weapon in its arsenal. More about this later. This report of the BEC was referred to the BAC for adjudication.

[16] On 9 November 2023, after considering the BEC's report, the BAC referred the matter to Treasury for audit probity. On 14 November 2023 Treasury picked up a discrepancy with regard to scoring and pointed out that ROMH JV should have scored 28 and not 29 points. This is really immaterial, bearing in mind that 24 points was required to qualify as successful tenderer. The BAC met again on 14 and 15 November 2024. There is a serious dispute as to what really transpired during this meeting of the BAC. More about this later.

[17] Fact of the matter is that the issue was referred back to the BEC. On 5 December 2023 it considered the tenders again and accepted that Tsela had presented a responsive

tender, unlike as previously resolved. Therefore, ROMH JV and Tsela were found to be the only tenderers with responsive tenders. Eventually, the BEC recommended Tsela insofar as it scored higher points than ROMH JV, to wit 95 versus 93.5. For the record, Tsela's tender was for the amount of R44 910 882.38, whilst that of ROMH JV was for R45 642 591.50, a difference of only R731 709.

[18] There is also a dispute as to what transpired during the BAC meeting hereafter as will be discussed later, but the HOD, on her version accepted the BAC's recommendation and appointed Tsela.

[19] ROMH JV relies on an unsigned and undated letter in terms whereof it was 'appointed as the successful tenderer'. More than once in their affidavits and the heads of argument ROMH JV refers to this letter as its official appointment as successful tenderer. More about this later.

Some legal principles pertaining to tenders

[20] Some authorities need to be considered in view of ROMH JV's submission that its application is predicated on the irrational, unlawful and procedurally unfair award of the tender to Tsela. It should be pointed out, unlike as indicated by ROMH JV, that no award has been made by the MEC. The award of tenders falls within the domain of the HOD.

[21] It is trite that organs of state shall contract for goods or services in accordance with a system which is fair, equitable, transparent, competitive and cost-effective.[3] Furthermore, the contract must be awarded to the tenderer who scores the highest points, unless objective criteria justify the award to another tenderer.[4] Section 3(1) of PAJA stipulates that '[a]dministrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair'.

[22] In *Logbro Properties CC v Bedderson NO and Others*[5] *(Logbro)* the Supreme Court of Appeal referred to the 'ever-flexible duty to act fairly' that rested on provincial tender committees, stating that fairness must be decided on the circumstances of each

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[3] Section 217(1) of the Constitution of the Republic of South Africa, 1996.
[4] Section 2(1)*(f)* of the Preferential Procurement Policy of Finance Act 5 of 2000.
[5] *Logbro Properties CC v Bedderson NO and Others* [2002] ZASCA 135; [2003] 1 All SA 424 (SCA); 2003 (2) SA 460 (SCA) paras 5-9.

case. In *Minister of Social Development and Others v Phoenix Cash & Carry Pmb CC*[6] *(Phoenix)* the court dealt with technicalities and stated the following:

'It follows that a public tender process should be so interpreted and applied as to avoid both uncertainty and undue reliance on form, bearing in mind that the public interest is, after giving due weight to preferential points, best served by the selection of the tenderer who is best qualified by price. This is particularly relevant to the activities of a 'technical evaluation committee' which examines the tenders for formal compliance but does not evaluate the merits of the bids. In the present case the bids which survived the technical scrutiny were passed on to the bid committee for evaluation. By then the die was cast against the respondent ('Phoenix') and the bid committee was deprived of the opportunity of considering the merits of its tender.' (Emphasis added.)

[23] In *casu*, the alleged incomplete form C1.1 caused the BEC to initially 'cast the die against Tsela' in the words of Heher JA in *Phoenix*. In *Metro Projects CC and Another v Klerksdorp Local Municipality and Others,*[7] (*Metro Projects*) Conradie JA stated:

'. . . It may in given circumstances be fair to ask a tenderer to explain an ambiguity in its tender; it may be fair to allow a tenderer to correct an obvious mistake; it may, particularly in a complex tender, be fair to ask for clarification or details required for its proper evaluation. Whatever is done may not cause the process to lose the attribute of fairness or, in the local government sphere, the attributes of transparency, competitiveness and cost-effectiveness.'

Evaluation of the evidence and submissions by the parties

[24] Let it be clear. ROMH JV was never appointed as the successful tenderer by the HOD as alleged and submitted by it. It is unnecessary to speculate who prepared the draft letter and who informed ROMH JV about this. It is thus incorrect to submit that after ROMH JV's appointment as successful tenderer, a re-evaluation process has been embarked upon which culminated in a reversal and the appointment of Tsela.

[25] The C1.1 form has been explained by the HOD. According to her, part C thereof - the schedule of deviations – does not have to be completed and signed when a tender is submitted. It is only done after award of the tender to the successful tenderer. Therefore, Tsela was erroneously disqualified during phase one of the tender process. At best for ROMH JV, there may be uncertainty. The inscription relied upon, *ie* the failure to sign the

[6] *Minister of Social Development and Others v Phoenix Cash & Carry Pmb CC* [2007] ZASCA 26; [2007] 3 All SA 115 (SCA); 2007 (9) BCLR 982 (SCA) para 2.
[7] *Metro Projects CC and Another v Klerksdorp Local Municipality and Others* [2003] ZASCA 91; [2004] 1 All SA 504 (SCA); 2004 (1) SA 16 (SCA) para 13.

form will lead to invalidity of the tender, appears at the bottom of part A, dealing with the tenderer's offer. Part B deals with the acceptance of the tender by the accounting officer and then part C appears on the document. If the Department intended to make the schedule of deviation part and parcel of the tenderer's offer, it would have been included in part A. In such case the tenderer would be duty-bound to complete it. A reading of the terms of part B and part C confirms the correctness of the HOD's version. I refer to just two aspects. In part B, it is stated that 'this Agreement comes into effect on the date when the Tenderer receives one fully completed original copy of this document, including the Schedule of Deviations (if any)'. Such a recording would be totally unnecessary if the schedule of deviations had to form part of the offer, part A. It is also stated in part C that '[a]ny change or addition to the tender documents arising from the above agreement and recorded here shall be incorporated into the final draft of the Contract.' The form then provides for deviations to be listed, but *in casu*, no deviations were listed.

[26] The minutes signed by all BAC members on 15 October 2024 cannot just be ignored. Ms Botes was the chairperson of the BAC at that stage as is evident from these minutes. She did not file a confirmatory affidavit in support of the Department's opposition. The version of Mr Eleftheriou, in support of the Department's opposition of part A of the application must be considered. On his version, as a result of the scoring discrepancy pointed out by Treasury on 14 November 2023, the BAC decided to refer the matter back to the BEC for re-evaluation before any recommendation could be made to the HOD as accounting officer. He, as well as Mr RJ Molisana, the chairperson of the BEC, also deposed to affidavits to confirm the HOD's version in her answering affidavit in respect of the review application. Although there is no indication in the minutes that the BAC 'emphasized to the chairperson of the Bid Evaluation Committee that all the bids should be re-evaluated', Mr Eleftheriou made this clear in his initial affidavit. He continued to state that the reason advanced for emphasising such was that 'it might happen that there might be discrepancies that could have happened in respect of the other bids as well'. He further indicated the following: 'The recording in the minutes does not mean or should not be interpreted that the Bid Evaluation Committee should only amend its report in terms of the appointment of the Applicants'. I cannot find that the Department's version is far-fetched and untenable. It should be accepted based on the *Plascon Evans* principles.

[27] Two different minutes of the BAC meeting appear from the record. The first document is attached as annexure FA9 to the founding affidavit. In paragraph 4.2 thereof the BAC members reviewed the feedback received from Treasury on 14 November 2023. They confirmed, contrary as indicated by Treasury, that it was not necessary for ROMH JV to attach a contract of employment as this was not a tender specification. Furthermore, the difference in one point pertaining to scoring could not change the recommendation. Therefore, the BAC recommended that the 'BEC report be amended with changes before final approval by the Accounting Officer that ROMH JV Consulting' be appointed. As strange as it may sound, these minutes were signed by Mr Eleftheriou as chairperson of the BAC and Ms M Coangae, as secretariat of the BAC, on 29 November 2023 only.

[28] In direct conflict with the aforesaid minutes, the BAC, according to the minutes attached as annexure SA4 to ROMH JV's supplementary founding affidavit, recommended that ROMH JV be appointed. This document, compiled by the same Ms Coangae as secretariat, is dated 15 November 2023. It contains not only her signature, but also the signatures of all members of the BAC, including that of Mr Eleftheriou (as a member only) and its chairperson, Ms A Botes. The date, 15/11/2023 written in pen, appears beneath each signature. The HOD did not sign the document in the space provided to approve the recommendation. Attached to annexure SA4 is an unsigned carbon copy of the minutes of the BAC dated 15 November 2023, but instead of ROMH JV's name, Tsela is cited as the recommended bidder at the tender amount of R44 910 882.38. In the answering affidavit in respect of part B, the HOD, as strange as it may sound, stated that the chairperson of the BAC committee, Mr Eleftheriou, did not recall signing any document wherein ROMH JV was recommended by the BAC, but emphasised that he could recall vividly that the BAC referred the tender back to the BEC for re-evaluation. Therefore, the authenticity of annexure SA4 is challenged. As mentioned above, Mr Eleftheriou and Mr Molisana, the chairperson of the BEC, confirmed the HOD's version under oath.

[29] The different and even contradictory documents are a cause of concern. It appears as if the Department's documentation is not in order. I cannot find that the Department wilfully and fraudulently reproduced documents to bolster their opposition. It is possible that a mistake has crept in. The Department's version is not so far-fetched and untenable that it should be rejected, bearing in mind the *Plascon Evans* principles applicable in

opposed motion procedure, which applies to review proceedings as well.

[30] I have to accept that the BAC referred the matter back to the BEC. It is common cause that the BEC at the second instance reconsidered its position and found that Tsela had indeed submitted a responsive tender. The BEC rectified its error and it was justified in doing so. Having reconsidered the two responsive tenders, the BEC recommended Tsela for appointment on 5 December 2023. No criticism was and can be levelled against the calculation relied upon in favour of Tsela, once it is accepted that it submitted a responsive tender. Prior to this recommendation, the HOD as accounting officer had not acted in accordance with any recommendations by the BAC, contrary to the submissions of ROMH JV. I am satisfied that the BEC's recommendation was considered by the BAC and that it recommended Tsela's appointment to the HOD who then made the appointment.

Conclusion

[31] I repeat what I stated in paragraph 2 above: the purpose of review is not the second-guessing of decisions by organs of state. I am satisfied that what has transpired here, *ie* the referral of the matter back to the BEC for re-evaluation and that committee to accept that it initially made a mistake to disqualify Tsela, does not cause the process to be unlawful and procedurally unfair. The judgments in *Logbro* and *Metro Projects*[8] are relied upon in concluding that in the circumstances of this case, a fair administrative process was followed. The review application cannot succeed in the circumstances.

[32] The first and second respondents as the successful parties should ordinarily be entitled to their costs. However, bearing in mind the litigation history indicated above and the confusion created in the documents, some contained in the record of proceedings and others not even contained therein but made available to ROMH JV, is such that the successful parties shall not be entitled to costs in accordance with the general rule applicable. I am of the view that in the circumstances, it would be just and equitable to order each party to pay their own costs in respect of the review application.

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[8] Footnotes 5 and 7 respectively.

Order

1 The application for review is dismissed.

2 Each party shall be liable for the payment of their own costs in respect of the review application.

[redacted]

J P DAFFUE

JUDGE OF THE HIGH COURT

I concur.

[redacted]

C VAN ZYL

JUDGE OF THE HIGH COURT

Appearances

For the Applicants:	S Grobler SC
Instructed by:	York Attorneys Inc, Bloemfontein
For the first and second Respondents:	BS Mene SC and RB Mofokeng
Instructed by:	State Attorney, Bloemfontein.