THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case no: 383/24

In the matter between:

MAANO WATER (PTY) LTD **APPELLANT**

and

ESKOM HOLDINGS SOC LIMITED **RESPONDENT**

Neutral citation: *Maano Water (Pty) Ltd v Eskom Holdings SOC Limited* (383/24) [2025] ZASCA 87 (12 June 2025)

Coram: MATOJANE and KEIGHTLEY JJA, and PHATSHOANE AJA

Heard: 20 May 2025

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, published on the Supreme Court of Appeal website, released to SAFLII. The date and time for hand-down is deemed to be 11h00 on 12 June 2025.

Summary: Reviewability of tender cancellation – State owned enterprises – executive action distinguished from administrative action – rationality as ground for review – absence of authority as ground for review - *pactum de contrahendo* – averred 'right to negotiate to deadlock'.

ORDER

On appeal from: Gauteng Division of the High Court, Johannesburg (Malindi J, sitting as a court of first instance):

1 The appeal is dismissed.

2 The appellant is ordered to pay the costs of the appeal.

JUDGMENT

Matojane JA (Keightley JA and Phatsoane AJA concurring):

Introduction

[1] This appeal lies against the judgment of the Gauteng Division of the High Court, Johannesburg (high court) delivered on 12 December 2022, which dismissed an urgent application of the appellant (Maano). In that application Maano sought a mandamus to compel the respondent (Eskom) to resume contract-price-adjustment (CPA) negotiations or, in the alternative, to review and set aside Eskom's decision, communicated to Maano in a letter dated 4 August 2022 and published on the National Treasury E-portal and Eskom tender bulletin platforms, to cancel Tender CORP 5542. Leave to appeal was granted by the high court on 27 March 2024.

[2] The factual matrix is largely common cause. In August 2021 Eskom issued Tender CORP 5542 to procure a five-year contract to supply sulphuric acid to its power stations. Eskom entered into negotiations with the highest ranked bidder (Afro-Zonke) for the conclusion of a contract. A key component of the contract was an agreed model for calculating the CPA. When Eskom commenced negotiations with Afro-Zonke, the global price of sulphur had risen by approximately 250%. The primary cause was the conflict in Ukraine, which commenced in early 2022. The spike in the cost of crude sulphur and shipping had not been foreseen when the tender was issued.

[3] Negotiations between Eskom and Afro-Zonke failed because Afro-Zonke tried to pass its increased costs, arising from the global spike, on to Eskom. Subsequently, Eskom began talks with Maano, the second preferred bidder. On 21 April 2022, Maano proposed a hybrid model for calculating the CPA that was entirely dollar-based. However, on 4 May 2022, Eskom rejected this, stating that a dollar-based model was unacceptable. Its further reasoning was that it created unmanageable exposure due to exchange rate fluctuations and changes in the dollar price of crude sulphur, which they could not hedge against. A meeting held between Maano and Eskom on 10 May 2022, concluded with both parties maintaining these stances. Subsequently, Eskom decided to cancel the entire tender process. Maano now seeks to challenge this cancellation and compel a return to the negotiating table.

[4] A factual dispute exists centred on the meeting between the parties of 10 May 2022. Maano contends that Eskom undertook to consider the hybrid model and either accept it or make a counter-proposal. Eskom disputes this, asserting that it had consistently communicated its rejection of dollar-based CPA models due to the unacceptable transfer of exchange rate and commodity price risk to Eskom.. Eskom contends that negotiations had reached an impasse by 10 May 2022.

[5] After 10 May 2022, Eskom did not revert to Maano. Following some prodding from Maano, Eskom published a notice in August 2022, cancelling the entire tender process. Eskom's stated reasons appear in the Procurement Tender Committee (PTC) extract of minutes of 10 June 2022. The PTC received a report (the feedback report) from the mandated team negotiating with Maano. The feedback report included a request for approval from the PTC to ‘terminate the negotiations held with Maano Water (Pty) Ltd, cancel the tender and re-issue the tender’. The report stated that the initial mandate for the negotiation was based on a value of about R289 million for the 2023 to 2027 financial years. However, the price based on Maano’s CPA model would be significantly higher, at about R529 million. This was substantially above Eskom's desired ‘aspiration base’ of about R246 million.

[6] Ultimately, the report detailed the failure of negotiations with Maano and cited reasons for the request to approve the cancellation of the tender altogether. Significantly, the PTC accepted the negotiating team’s explanation that if they were to

commence negotiations with the third-ranked bidder, the probability was high that the same challenges would be experienced as with Maano, in that the third-ranked bidder would also pass on their increase to Eskom. As a result, the PTC approved both recommendations, namely to terminate the negotiations with Maano, and to cancel the current tender and issue a new one.

[7] Maano relies on it having a right, under the terms of the tender documents, to hold Eskom to negotiate until deadlock. Maano asserts further that the sole reason for the cancellation of the tender was the alleged failure of its negotiations with Eskom. It disputes that deadlock had been reached as, it says, had Eskom engaged further, Maano would likely have reverted to its original rand-based CPA model.

[8] Maano launched its urgent application on 25 August 2022, pursuing its primary remedy of a mandamus, in final form, to force Eskom back to the negotiating table. It based its assertion of a clear right on the argument that Eskom was legally obliged, and hence Manno had a corresponding right, to continue negotiations as no deadlock had been reached. Consequently, Eskom had breached Maano's right by unilaterally terminating the tender process after negotiations had commenced, and while the tender validity period – being until 28 September 2022 - had not yet expired.

The core issue: reviewability of the tender cancellation

[9] The high court proceedings focused entirely on the mandamus relief sought by Maano. It dismissed the application on the basis that Maano had failed to establish a clear right to hold Eskom to continue negotiations. The high court found that Eskom was entitled, under clause 1.6.1 of the tender contract, to terminate negotiations where, after good faith engagement, a deadlock was reached. The high court did not address Maano's alternative relief, namely the review and setting aside of the tender. However, when the appeal was argued before this Court, it became clear that, contrary to the approach adopted in the high court, the fundamental issue was that of review. In other words, the antecedent question for Maano to succeed in getting Eskom back to the negotiating table, was whether it could establish that the decision to cancel the tender was unlawful and reviewable. This is because, without a successful challenge to this cancellation, any relief seeking to compel further negotiations would be moot for the simple reason that the tender would no longer exist. Put differently, unless set

aside, the cancellation of the tender effectively terminated any claim by Maano to a right to continue to negotiate.

[10] Unfortunately, Maano's focus on interdictory relief, in the form of a mandamus, as its primary form of relief had the effect that its case for a review of the tender cancellation was not fully ventilated in its founding papers. A related complicating factor is that Maano eschewed any reliance on rule 53 of the Uniform Rules of Court. Consequently, neither the high court nor this Court had access to the record of the decision to cancel the tender process.

[11] Insofar as the grounds of review were addressed in the founding affidavit, Maano contended, first, that the tender cancellation was not an independent administrative act because it was 'designed as a reason for not continuing with the negotiations'. In the alternative, and if the cancellation was considered to be an independent administrative act, Maano argued that it was subject to review and setting aside under 'virtually all of the provisions of s 6(2)' of the Promotion of Administrative Justice Act 2 of 2000 (PAJA). It cited, among other grounds, that Eskom had no power to cancel a procurement process where a tender has been awarded and the details of the contract are being negotiated. It also identified, as additional grounds, bias, procedural unfairness, and irrationality.

[12] A preliminary question is whether the decision to cancel the tender constitutes administrative action, subject to review under PAJA, or an executive action, reviewable under the principle of legality. As I have indicated, Maano's stance was that it was the former.

[13] This Court has consistently held that decisions by organs of state and state owned enterprises not to procure goods or services, particularly prior to the formation of a binding contract, typically fall within the realm of executive action. This Court in *Tshwane City and Others v Nambiti Technologies (Pty) Ltd (Nambiti)*[1] stated that such decisions do not directly affect rights and are therefore not administrative action. This

[1] *Tshwane City and Others v Nambiti Technologies (Pty) Ltd* [2015] ZASCA 167; 2016 (2) SA 494 (SCA); [2016] 1 All SA 332 (SCA).

Court explained that when a tender is cancelled, no one loses any rights, as no contract has been formed.[2] Tenderers only have expectations, not rights, at that stage. A decision not to procure services by tender does not have a direct, external legal effect on the tenderers' rights.[3]

[14] Maano sought to distinguish this case from *Nambiti* on the basis that it had been awarded the tender and that, pursuant to that award, the parties were at, what Maano asserted to be, an advanced stage of negotiations. However, Maano's underlying assumption is incorrect. It had not been awarded the tender: after negotiations with the preferred bidder, Afro-Zonke failed, Maano became no more than the first reserve bidder. Had the tender not been cancelled, the failure of negotiations with Maano would have resulted in the third bidder taking Maano's place as the second reserve. The material overlap between this case and *Nambiti* is that in neither case had a contract been concluded before the tender was cancelled. Maano is thus in the substantially same position as the reviewing party in *Nambiti*: the cancellation of the tender may have affected its expectations, but not any rights.

[15] The wording of the tender document in the present case, which explicitly grants Eskom the right to 'cancel the tender process at any time prior to the formation of a contract,'[4] reinforces this position. Even in the absence of such explicit wording, the fundamental reasons animating public procurement – being essentially an executive function – would likely lead to the same conclusion. It follows that the review falls outside of the ambit of PAJA. Is it nonetheless possible to discern from Maano's application a valid basis for review under the broader principle of legality?

[16] As indicated earlier, Maano's case for review was not fully developed in its founding affidavit. A generous reading of the grounds of review identified by Maano

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[2] *Nambiti* para 24 states the general principle as follows: 'Whether the cancellation of a tender before adjudication is administrative action in terms of these requirements depends on whether it involves a decision of an administrative nature and whether it has direct, external legal effect.' See also *Grey's Marine Hout Bay (Pty) Ltd and Others v Minister of Public Works and Others* 2005 (6) SA 313 (SCA) para 21.

[3] *Nambiti* para 32.

[4] Clause 1.6.1 of Eskom's Standard conditions of Tender reads: 'Eskom may accept or reject any variation, deviation or alternative tender and reserves the right to accept the whole or any part of the tender. Eskom may cancel the tender process at any time prior to the formation of a contract and will give written reasons for the cancellation upon written request to do so… .'

presents limited possibilities: absence of authority, and irrationality, with bias or mala fides as sub-categories of the latter.

[17] As to rationality, the question is whether the respondent's decision to cancel the tender was rationally connected to the purpose for which it was taken. Maano contended that the sole reason for the cancellation of the tender was to provide Eskom with a reason to avoid continuing negotiations. According to Maano, Eskom gave no indication that Maano had not complied with any tender requirements: it simply aborted the tender process without explanation, demonstrating bias or mala fides on Eskom's part.

[18] There are obvious difficulties with Maano's submissions in this regard. Most fundamentally, its averment as to the sole reason for the cancellation is patently wrong. Eskom provided clear and consistent reasons for this, as articulated in its answering affidavit and corroborated by contemporaneous documents, including the feedback report and the Procurement Tender Committee resolutions. These reasons fundamentally stem from changed global circumstances pertaining to sulphuric acid prices. The respondent explained that the proposed CPA model, particularly Maano's shift to a dollar-based index, exposed Eskom to an unlimited and unsustainable financial risk. This was not only a sticking point in the negotiations with Maano but, as recorded in the feedback report, and accepted by the PTC, would be equally problematic in negotiations with the second reserve bidder. The core problem was that the tender had been overtaken by broader global events, giving rise to broader policy and economic issues for Eskom, which rendered the original tender no longer fit for purpose.

[19] The evidence demonstrates that Eskom engaged in six meetings with Maano, consistently articulating its position regarding the unacceptability of the proposed pricing model. The decision to cancel was not a capricious one but a considered response to external market volatility and the need to protect public funds. It would, in fact, have been irrational for a public body, entrusted with finite resources, to proceed with a contract that exposed it to such significant and unmanageable financial risk. Realistically, these external factors meant that none of the tenders received were acceptable. This was the reason cited by Eskom in its letter advising Maano of the

cancellation. It was a permissible reason for tender cancellations under regulation 13(1)(*c*) of the 2017 Regulations promulgated under the Preferential Procurement Policy Framework Act 5 of 2000.[5] Any suggestion of irrationality, bias or mala fides on the part of Eskom in these circumstances is without any foundation.

[20] The remaining question is whether there is any merit in Maano's argument that Eskom had lacked authority to cancel the tender. The fulcrum around which the argument turns is Maano's assertion that it had a 'right to negotiate to deadlock', which it contends Eskom breached. From a review perspective, the gist of Maano's case is that Eskom had no authority to cancel the tender before deadlock was reached in its negotiations with Maano. This alleged right, and hence correlative obligation on Eskom, is purportedly sourced from clause 1.1 in Eskom's Standard Conditions of Tender (the SCTs).

[21] Maano made no reference to the SCTs in its founding papers. They were, in fact, attached to Eskom's answering affidavit, and Maano's reliance on clause 1.1 was only articulated in its submissions to this Court. The clause simply reads that '[t]he Employer [Eskom], the Eskom Representative and each eligible tenderer submitting a tender shall act timeously, ethically and in a manner which is fair, equitable, transparent, competitive and cost effective.' From this provision, Maano sought to infer a restriction on Eskom's power to cancel the tender until a deadlock in negotiations was reached.

[22] The argument has two components: legal and factual. The legal component raises the question of whether Eskom's undertaking in the SCTs to act in a manner which is 'fair, equitable [and] transparent' requires it to remain at the negotiating table, and bars it from exercising its power to cancel the tender, until deadlock. If so, the factual component of the argument is triggered, with the question being whether there was a deadlock in negotiations with Maano.

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[5] Preferential Procurement Regulations, 2017 published under GN R32 in GG 40553 of 20 January 2017, repealed by GN 2721 in GG 47452 of 4 November 2022.

[23] As to the legal component, what Maano effectively argues is that clause 1.1 of the SCTs constitutes a *pactum de contrahendo*, or an 'agreement to agree'. The general principle, as established in cases like *Premier, Free State and others v Firechem Free State (Pty) Ltd* [6] and *Southernport Developments (Pty) Ltd v Transnet Ltd*,[7] is that an agreement to agree is generally too vague to be enforced unless the parties have agreed on the essential terms of the contemplated contract, and there is an objective mechanism or external yardstick by which any outstanding terms can be determined. *Letaba Sawmills (Edms) Bpk v Majovi (Edms) Bpk (Letaba Sawmills*)[8] concerned a lease agreement where the rental amount was to be agreed upon by the parties but, if they failed to agree, the amount would be determined by an arbitrator. The term was held not to be vague and was enforceable because the arbitration clause provided a clear deadlock-breaking mechanism.

[24] The judgment in *Makate v Vodacom (Pty) Ltd*,[9] while not directly addressing 'negotiate to deadlock' clauses, underscored the role of good faith in contracts. It highlighted that less formal agreements can be legally binding if both parties clearly intended to be bound and if there is a way to determine crucial, undefined terms – like 'reasonable remuneration' in that specific instance. The Constitutional Court, in line with the *Letaba Sawmills* principle, reaffirmed that for an 'agreement to agree' to be enforceable, there must be a deadlock-breaking mechanism in place. The court held:

'Agreements to negotiate in good faith are taken as a species of the *pacta de contrahendo* (agreements to agree). Generally they are regarded as a category of contracts whose purpose is to create other contracts in future. But sometimes contracting parties, as was the position here, may be confronted by a situation where they are not able to agree on some of the terms of the

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[6] *Free State & others v Firechem Free State* (*Pty*) *Ltd* 2000 (4) SA 413 (SCA) at 431G–J Schultz JA explained that '[a]n agreement that the parties will negotiate to conclude another agreement is not enforceable, because of the absolute discretion vested in the parties to agree or disagree: *Scheepers v Vermeulen* 1948 (4) SA 884 (O) at 892, *Putco Ltd v TV & Radio Guarantee Co* (*Pty*) *Ltd and other Related Cases* 1985 (4) SA 809 (A) at 828I. Such a discretion was vested in the parties as they were to sign 'a contract' the precise terms of which were not fixed in the letter of acceptance, which, unlike the action committee's recommendation, did not refer to annexure B. As the Tender Board neither awarded a contract for the whole of the Free State nor exactly followed that committee's recommendations as to demarcation, the elusive annexure B, whatever it did contain, could not have served as the contract to be signed. There was, accordingly, room for a breakdown in negotiations before a contract was concluded.'

[7] *Southernport Developments (Pty) Ltd v Transnet Ltd* 2005 (2) SA 202 (SCA).

[8] *Letaba Sawmills (Edms) Bpk v Majovi (Edms) Bpk* 1993 (1) SA 768 (A).

[9] *Makate v Vodacom (Pty) Ltd* [2016] ZACC 13; 2016 (4) SA 121 (CC).

contract. To resolve the problem, they may arrange to negotiate and agree on the outstanding terms on a future date. The arrangement may form part of the concluded agreement. A dispute may arise, if one of the contracting parties, as was the case here, refuses to negotiate the outstanding term so that the parties' agreement may be executed. When this occurs, the question that arises sharply is whether the term to negotiate is enforceable at the instance of the innocent party.'[10]

[25] The contractual clause relied upon by Maano is too vague to give rise to an enforceable right to negotiate to deadlock, and hence a limitation on Eskom's power to cancel the tender. At best, it records an undertaking by both parties as to how they will be guided in their conduct. It is not directed specifically at contract negotiations. Even if it could be interpreted more favourably for Maano, clause 1.1 provides no mechanism for resolving an impasse, which is a crucial element for such an agreement to be enforceable. Finally on this score, Maano's preferred interpretation is untenable given the express power provided to Eskom in clause 1.6.1 of the SCTs to 'cancel the tender process at any time prior to the formation of a contract.'

[26] Although it is not strictly necessary to do so, for completeness's sake, it is worth recording that Maano's argument fails also at the factual level. It claims that on 10 May Eskom committed to review its hybrid model and respond with either an acceptance or a counter-offer. Eskom, however, refutes this, stating it consistently rejected the dollar-based hybrid CPA model due to the inherent financial risks, specifically exposure to rand-dollar exchange rate fluctuations and volatile global sulphur prices. Eskom maintains that by 10 May 2022, a clear deadlock had been reached. This was because Maano continued to push for the dollar-based model despite Eskom's persistent objections. Eskom further argues that its delay in informing Maano of the cancellation until 4 August 2022, was not in bad faith, as it intended to provide reasons if Maano requested them.

[27] Applying the *Plascon-Evans* rule for factual disputes in motion proceedings, where final relief is sought, the Court must accept the facts averred by Eskom that are not denied by Maano, and Maano's facts admitted by Eskom, unless Eskom's version

[10] Ibid para 95.

is so far-fetched or clearly untenable that the Court is justified in rejecting it merely on the papers.[11]

[28] Eskom's consistent position throughout the negotiations, articulated in meetings and correspondence, was that dollar-based CPA models were unacceptable due to the transfer of risk against which it could not hedge. Maano's repeated insistence on dollar-based models, even after Eskom articulated its objections, lends credence to Eskom's assertion that negotiations had reached a dead end on this specific point. While Maano's replying affidavit belatedly suggested it 'would probably have reverted' to its original rand-based model, this was not conveyed to Eskom during the negotiations, nor does it override Eskom's consistent rejection of the proposed dollar-based models. Furthermore, Maano's prior statements indicating the unsustainability of its original rand-based model under changed market conditions (due to a 250% increase in raw material costs) weaken the credibility of its late assertion that it would have reverted.

[29] Therefore, on the facts, Eskom's version prevails. By 10 May 2022, Eskom had genuinely concluded that further negotiation on Maano's proposed CPA models would be fruitless due to Maano's persistence in a model Eskom found unacceptable and unmanageable. The notion that Eskom made an abrupt about-turn and undertook to consider the hybrid model again, or to make an entirely new counter-proposal, is not supported by the consistent narrative of the negotiations.

Conclusion and order

[30] Maano has not made out a case for the review and setting aside of the cancellation of the tender. The decision to cancel was an executive action, rationally taken in response to significant and unavoidable changes in market conditions. In addition, there is no merit in Maano's contention that Eskom lacked authority to cancel the tender. Clause 1.1 of the SCTs did not limit the express power of Eskom to cancel the tender process. The high court was correct to dismiss Maano's application.

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

Order

[31] In the premises, the following order is made:

1. The appeal is dismissed.

2. The appellant is ordered to pay the costs of the appeal.

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K E MATOJANE

JUDGE OF APPEAL

Appearances

For the appellant:	P F Louw SC and J W Steyn
Instructed by:	Van Der Vyver Inc, Midrand
	EG Cooper Majiedt Inc, Bloemfontein.
For the respondent:	A Stein SC and M Augustine
Instructed by:	Cheadle Thompson & Haysom Inc, Johannesburg
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