THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case no: 338/2024 & 384/2024

In the matter between:

THE MEC FOR HEALTH:	
GAUTENG PROVINCE	**FIRST APPELLANT**
HEAD OF DEPARTMENT OF HEALTH	
FOR THE GAUTENG PROVINCE	**SECOND APPELLANT**
CHAIRPERSON OF THE BID	
ADJUDICATION COMMITTEE	**THIRD APPELLANT**
CHAIRPERSON OF THE BID	
EVALUATION COMMITTEE	**FOURTH APPELLANT**
TSHENOLO WASTE (PTY) LTD	**FIFTH APPELLANT**
and	
BUHLE WASTE (PTY) LTD	**RESPONDENT**

Neutral citation:	*The MEC for Health: Gauteng Province and Others v Buhle Waste (Pty) Ltd* (338/2024 & 384/2024) [2025] ZASCA 102 (15 July 2025)
Coram:	MBATHA and BAARTMAN JJA and STEYN, TOLMAY and VALLY AJJA
Heard:	21 May 2025

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website and released to SAFLII. The date and time for hand-down of the judgment is deemed to be 11h00 on 15 July 2025.

Summary: Administrative Law – provisions of the Promotion of Administrative Justice Act 3 of 2000 – interdict and in alternative declarator sought under Part A – Part B review application not before court – tender reviewed and set aside in Part A – review most appropriate procedure for setting aside administrative action.

ORDER

On appeal from: Gauteng Division of the High Court, Johannesburg (Cajee AJ sitting as court of first instance)

1 The appeal is upheld with costs including the costs of two counsel where so employed.

2 The order of the high court is set aside and replaced with the following:

'The application is dismissed with costs such to include the costs of two counsel where so employed.'

JUDGMENT

Baartman JA (Mbatha JA and Steyn, Tolmay and Vally AJJA concurring):

Introduction

[1] On 30 November 2023, the Gauteng Division of the High Court, Johannesburg, Cajee AJ (the high court) seized with an initial urgent application in terms of Part A,[1] pending a review in Part B, declared that tender number GT/GDH/060/2022 (the tender)[2] had lapsed on 17 November 2022. It is in issue whether the high court impermissibly set aside administrative action in an application for a declarator and gave equitable relief not applied for. Further

[1] ' . . . Interdicting and suspending the first respondent, the Department of Health, from taking any further steps in respect of the tender of the "Appointment of Service Providers to Render Comprehensive Healthcare Waste Management for the Department of Health Institutions for a Period of Thirty-Six Months with the Request for Proposal (RFP) . . . pending the review application to be heard in Part B of these proceedings….

3. In the alternative to prayer 2, above, and conditionally, declaring that the tender . . .has lapsed or been cancelled whether by effluxion of time or no compliant tenderer being identified by the Department to potentially award the tender or because no valid extension of the tender has occurred, and accordingly that the tender and RFP is of no force and effect . . . .'

[2] For the 'appointment of Service Providers to render Comprehensive Waste Management for the Department of Health Institutions for a period of thirty-six months' (the tender) with Request for proposal number GT/GDH/060/2022'.

whether the application should have proceeded in terms of the provisions of the Promotion of Administrative Justice Act 3 of 2000 (PAJA). The appeal is with leave of the high court.

[2] On 15 July 2022, the first appellant, the MEC for Health: Gauteng Province (the MEC), advertised an invitation to interested parties to tender for the removal of medical waste. The closing date for lodging tenders was 19 August 2022. All bids had to be valid for 90 days. It follows that the bid validity period would expire on 17 November 2022. The respondent, Buhle Waste (Pty) Ltd (Buhle Waste), was among 15 bidders who responded to the invitation. On 17 November 2022, the last day of the tender's validity, the MEC requested an extension of the bid validity period until 15 February 2023. However, that email was only sent on 18 November 2022. This is apparent from an email dated 18 November 2022, signed by the chief financial officer on 17 November 2022, from which the following appear:

'Dear sir/Madam

1. A possibility exists that the tender of which particulars…may not be disposed of before the expiry of the current validity period, and I shall be glad to learn whether you are willing to hold your tender validity IN ALL RESPECT for the further period indicated. To facilitate the matter, the reply hereunder may be completed and returned.

2. Should you not be willing to hold your tender valid for the further period, it will of course lapse on expiry of the current validity period and will therefore be ignored if the tender is not adjudicated within the period . . . .'

[3] On 18 November 2022, Buhle Waste, per return email, consented to the request. The MEC in its answering affidavit merely noted the above allegations and alleged the following in respect of the extension:

'The submission of the bid was open until 19 August 2022. Before the closing date, 15 bids were received. The tender was valid for 90 days from 20 August 2022 to 17 November 2022. A valid extension was requested for 90 days on or about 16 November 2022 to 15 February

2023. Another valid extension was further requested for 120 days from 16 February 2023 to 15 June 2023, and the third valid extension was also requested for a period of month to month but not exceeding 90 days from 16 June 2023 to 13 September 2023. A further valid extension was requested from 14 September 2023 to 27 September 2023 and all the parties consented.'

[4] At the time of request of the above extensions, Buhle Waste was the incumbent and continued to render services to the relevant medical facilities. It continued to do so while the appointment of a new service provider in terms of the tender was pending. The urgent application was launched by Buhle Waste on 9 October 2023 and at that stage, it was in the dark as to whether the tender had been awarded or not; hence it sought interdictory relief in Part A pending review proceedings in Part B.

[5] However, prior to the hearing of the application before the high court it came to the attention of Buhle Waste that the tender had been awarded to the fifth appellant, Tshenolo Waste (Pty) Ltd (Tshenolo) and one other company. In correspondence, dated 24 October 2023, Tshenolo's attorney enquired from Buhle Waste's attorneys as follows: 'In paragraph 3 of Part A of your client's Notice of Motion, your client seeks final relief in the alternative to the relief sought in paragraph 2 thereof. Please confirm that this alternative relief, which is not interdictory relief, is no longer persisted with. If this relief is persisted with, our [c]lient would be entitled to the record of the decision relevant to that relief if it is capable of being separated from the remainder of the record of the decision sought to be reviewed and set aside'. Buhle Waste did not reply to the correspondence; instead, it proceeded with the relief sought.

[6] At the hearing, the high court proposed that the parties deal with the 17 November 2022 extension upfront as the court indicated that that issue would be dispositive of the entire matter. For its authority, the high court relied on *City*

of Ekurhuleni Metropolitan Municipality v Takubiza Trading & Projects CC and Others[3] where this Court held that once the tender validity had expired, there was nothing to extend. The MEC and other opposing parties were opposed to the proposed cause of action. Hence only the relief sought in Part A was fully argued. The high court did not deal with the interdictory relief but limited itself to the declaratory relief sought in the alternative.

[7] The high court found that Buhle Waste had all the documents necessary to have challenged the 17 November 2022 extension within the period prescribed by PAJA,[4] and that its failure to have instituted review proceedings timeously was probably because, as the current service provider, it benefited financially by serving the Department of Health during the extended period, which was already close to a year.

[8] Despite the aforementioned finding the high court granted the following declaratory relief:

'1. It is declared that the tender for the "appointment of Service Providers to Render Competitive Healthcare Waste Management for the Department of Health Institutions for a thirty-six months" ("the tender") …has lapsed because no valid extension of the tender period occurred after the 17th of November 2022 and accordingly that the tender and RFP are of no force and effect.

2. The award of any tenders to the tenth and fifteenth Respondents and any contracts entered into by them thereafter by or on behalf of the first and second Respondents pursuant to and as a result of the invalid extension of the tender periods are declared invalid and set aside.

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[3] *City of Ekurhuleni Metropolitan Municipality v Takubiza Trading & Projects CC and Others* [2022] ZASCA 82; 2023 (1) SA 44 (SCA).

[4] Section 9 of PAJA provides:

'**Variation of time**

(1) The period of-

(a) 90 days referred to in section 5 may be reduced; or

(b) 90 days or 180 days referred to in sections 5 and 7 may be extended for a fixed period,

by agreement between the parties or, failing such agreement, by a court or tribunal on application by the person or administrator concerned… .'

3. The orders in paragraph 1 and 2 above are suspended for six months to allow for the re-advertisement of the tender and for the appointment of suitable service providers to render comprehensive healthcare waste management for the Department of Health Institutions.
4. No order as to costs is made.'

[9] The following two issues arise in the appeal. First, whether the high court followed the correct procedure in setting aside the administrative action. Second, whether the high court granted relief that was not sought by Buhle Waste.

[10] The question on whether the high court followed the correct procedure in setting aside the administrative action, if found to be correct, would be dispositive of this appeal. I turn to that enquiry. This Court in *Millennium Waste Management (Pty) Ltd v Chairperson of the Tender Board: Limpopo Province and Others* held that administrative action should ordinarily be dealt with through the provisions of PAJA.[5] Buhle Waste avoided reliance on the provisions of PAJA by seeking declaratory relief in circumstances where it could have timeously sought a review of the 17 November 2022 decision to extend the bid validity period and obtain interdictory, alternatively declaratory and just and equitable relief.[6] It did so, opportunistically, so as to continue servicing the relevant institutions during the extended period. In seeking the declaratory relief, Buhle Waste did not have to comply with the timeframes as required in terms of PAJA.[7] It is apparent that the respondent would have had to bring a condonation application if it had proceeded in terms of PAJA. In *Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others (Treatment Action Campaign and Another as amici curiae),* the Constitutional Court held as follows:

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[5] *Millennium Waste Management (Pty) Ltd v Chairperson of the Tender Board: Limpopo Province and Others* [2007] ZASCA 165; [2007] SCA 165 (RSA); [2008] 2 All SA 145; 2008 (2) SA 481; 2008 (5) BCLR 508; 2008 (2) SA 481 (SCA).
[6] Section 8 of PAJA.
[7] Sections 7(1) and 9 of PAJA.

'A litigant cannot avoid the provisions of PAJA by going behind it, and seeking to rely on s 33(1) of the Constitution or the common law. That would defeat the purpose of the Constitution in requiring the rights contained in s 33 to be given effect to by means of national legislation.'[8]

[11] The facts of this matter underscore the danger of avoiding the provisions of PAJA. Tshenolo timeously indicated that it intended to exercise its rights in terms of PAJA. It awaited the delivery of the record in terms of Rule 53 before filing a comprehensive answer to the review application.[9] It was denied that right. Counsel for the fifth appellant submitted that:

'Buhle Waste's pleaded case was that the bid validity survived past the year 2022 and was extended from time to time until October 2023. Buhle Waste did not rely on the validity period having lapsed on 17 November 2022. Despite this, the High Court granted an order declaring that the tender validity period lapsed "because no valid extension of the tender period occurred after the 17th of November 2022". *This is not the case which the appellants were called upon to answer and could not have answered it without the benefit of that portion of the record of the tender process relevant to the extension of the tender validity period*.' (My emphasis.)

[12] In addition, I find that Buhle Waste avoided seeking condonation for bringing the review application in terms of PAJA, which prejudiced the other parties to the application. It compromised the public interest in the finality of administrative action and trampled on the rights of the other parties affected by the tender award. This was impermissible. The PAJA was enacted in response to s 33 of the Constitution as the mechanism to guarantee administrative action that is lawful, reasonable and procedurally fair. After the hearing, in correspondence dated 5 June 2025, Buhle Waste filed further documents before this Court.

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[8] *Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others (Treatment Action Campaign and Another as amici curiae)* 2006 (2) SA 311 (CC); 2006 (1) BCLR 1 (CC) para 96.

[9] *Mamadi and Another v Premier of Limpopo Province and Others* [2022] ZACC 26; 2023 (6) BCLR 733 (CC); 2024 (1) SA 1 (CC) para 39.

'. . . The advantages to an applicant are that once the record and the reasons are obtained, the applicant may supplement their founding affidavit, and the respondent is in a position to file a comprehensive answer. . .'.

Included therein are the respondent's Practice Note, dated 19 October 2023, the respondent's amended Practice Note, dated 19 October 2023, the parties' Joint Practice Note dated 14 November 2023, and the respondent's Practice Note in the Application for Leave to Appeal, dated 19 October 2023. The purpose for supplementing its papers was to convey to this Court that in Part A, it had also sought alternative relief in the form of a declaratory order. This occurred despite Tshenolo having placed on record that it would not file an answering affidavit without being furnished with a Rule 53 record. Furthermore, Tshenolo emphasised, in its correspondence of 24 October 2023 to Buhle Waste that the only issue set down for hearing before the high court would be in relation to the interdictory relief.

[13] Despite the assurance given to Tshenolo that it would be afforded an opportunity to respond to Part B once the Rule 53 record became available, the matter was disposed of before that eventuality. This was impermissible for three reasons: First, Buhle Waste did not allege that the tender had expired on 17 November 2022; instead, its pleaded case was that it had timeously extended its tender 'as required' but was unaware whether 'each tender extension was done lawfully and/or competently'. It therefore, reserved its right to challenge any extension 'where the Rule 53 record demonstrates' that an extension was not validly done. Second, this was not the case the appellants were called upon to meet in terms of Part A of the relief sought. They had also pointed out that in the event that the high court proceeded with the declaratory relief, they would suffer prejudice. Third, the letter from the Department calling for bidders to grant the extension cautioned as follows: 'Should you not be willing to hold your tender valid for the further period, it will of course lapse on expiry of the current validity period and will therefore be ignored if the tender is not adjudicated within the period….'

[14] This Court in *Aventino Ecotroopers Joint Venture and Others v The MEC for the Department of Roads and Transport, Gauteng Province and Others*[10] held that 'the exclusionary stipulation' permitted the relevant Department to exclude bids of bidders who either fail to respond or refuse to hold their bids valid for the requested extended period, and that whoever was unhappy with that condition, could have taken the department on review. The validity of the extensions arose only in Part B of the application and not in the interdictory relief. It is common cause that the record was not available at the time of the hearing, therefore Part B of the application was not ripe for the hearing.

[15] A court is limited to the case it is called upon to determine. It was impermissible for the high court to raise the 17 November 2022 extension and to pronounce on it in circumstances where the issue had not been fully canvassed.[11] In this matter, it caused prejudice to all the appellants who were denied the opportunity to plead their version as amplified by the Rule 53 record. In support of this finding, I reiterate what this Court stated in *Fisher and Another v Ramahlele and Others* (*Ramahlele*):[12]

'Turning then to the nature of civil litigation in our adversarial system, it is for the parties, either in the pleadings or affidavits (which serve the function of both pleadings and evidence), to set out and define the nature of their dispute, and it is for the court to adjudicate upon those issues. That is so even where the dispute involves an issue pertaining to basic human rights guaranteed by our Constitution, for "it is impermissible for a party to rely on a constitutional complaint that was not pleaded". There are cases where the parties may expand those issues by the way in which they conduct the proceedings. There may also be instances where the court may *mero motu* raise a question of law that emerges fully from the evidence and is necessary

[10] *Aventino Ecotroopers Joint Venture and Others v The MEC for the Department of Roads and Transport, Gauteng Province and Others* [2025] ZASCA 32 paras 11-14.
[11] *Minister of Safety and Security v Slabbert* [2009] *ZASCA* 163; [2010] 2 All SA 474 (SCA) para 11: 'The purpose of the pleadings is to define the issues for the other party and the court. A party has a duty to allege in the pleadings the material facts upon which it relies. It is impermissible for a plaintiff to plead a particular case and seek to establish a different case at the trial. It is equally not permissible for the trial court to have recourse to issues falling outside the pleadings when deciding a case.'
[12] *Fisher and Another v Ramahlele and Others* [2014] ZASCA 88; 2014 (4) SA 614 (SCA); [2014] 3 All SA 395 (SCA) (*Ramahlele*) paras 13-14.

for the decision of the case. That is subject to the proviso that no prejudice will be caused to any party by its being decided. Beyond that it is for the parties to identify the dispute and for the court to determine that dispute and that dispute alone.'

[16] Furthermore, in *Ramahlele* this Court, stated that there is an exception to the general rule. It stated as follows: 'A court may sometimes suggest a line of argument or an approach to a case that has not previously occurred to the parties. However, it is then for the parties to determine whether they wish to adopt the new point. They may choose not to do so because of its implications for the further conduct of the proceedings, such as an adjournment or the need to amend pleadings or call additional evidence. They may feel that their case is sufficiently strong as it stands to require no supplementation. They may simply wish the issues already identified to be determined because they are relevant to future matters and the relationship between the parties. *That is for them to decide and not the court. If they wish to stand by the issues they have formulated, the court may not raise new ones or compel them to deal with matters other than those they have formulated in the pleadings or affidavits*.'[13] (footnotes omitted.) (Own emphasis.)

[17] The high court also misdirected itself by going beyond the requirements for a declaratory order, if met, by setting aside the award of the tender. When the court makes a declaratory order, it acts in terms of s 21(1)*(c)* of the Superior Courts Act.[14] The jurisdictional facts for the declaratory order to be established are whether the applicant has an interest in an existing, future or contingent right or obligation. In *United Manganese of Kalahari (Pty) Ltd v The Commissioner of the South African Revenue Service and four other cases*,[15] the Constitutional Court confirmed that a court exercises a discretion when it grants or refuses declaratory relief.

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[13] Ibid para 14.
[14] The Superior Courts Act 10 of 2013.
[15] *United Manganese of Kalahari (Pty) Ltd v The Commissioner of the South African Revenue Services and four other cases* [2025] ZACC2; 2025 (5) BCLR 530 (CC) para 37.

[18] In the exercise of its discretion, the high court should have considered the importance of the Rule 53 record. In *Turnball-Jackson v Hibiscus Coast Municipality and Others*, the Constitutional Court held as follows:

'Undeniably, a rule 53 record is an invaluable tool in the review process. It may help: shed light on what happened and why; give a lie to unfounded *ex post facto* (after the fact) justification of the decision under review; in the substantiation of as yet not fully substantiated grounds of review; in giving support to the decision-maker's stance; and in the performance of the reviewing court's function….'[16]

[19] Buhle Waste could forgo its right to rely on the Rule 53 record but could not make that decision for the other parties to the litigation. The high court failed in the exercise of its discretion to have regard to the importance of the Rule 53 record and Tshenolo's right of access to the relevant part of the record before it was required to file its answering affidavit. As the issues relevant to the decision involved disputed factual issues and legal questions, declaratory relief was inappropriate.

[20] In the circumstances of this matter, I find that the high court erred in setting aside administrative action through a declarator. It was the wrong procedure, and that is dispositive of this matter. It is therefore unnecessary to deal with the second issue referred to above. The relief granted by the high court exceeded that which was prayed for and affected Tshenolo and other parties directly by depriving them of the opportunity to file comprehensive answering affidavits to the review application.

[21] In the result, I grant the following order:

1 The appeal is upheld with costs including the costs of two counsel where so employed.

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[16] *Turnball-Jackson v Hibiscus Coast Municipality and Others* [2014] ZACC 24; 2014; 2014 (6) SA 592 (CC); 2014 (11) BCLR 1310 (CC) para 37.

2 The order of the high court is set aside and replaced with the following:

‘The application is dismissed with costs such to include the costs of two counsel where so employed.’

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E BAARTMAN

JUDGE OF APPEAL

Appearances:

For the first to fourth appellants:	W M Mokhare SC with M H Mhambi
Instructed by:	Motsoeneng Bill Attorneys Inc, Sandton
	Honey Attorneys, Bloemfontein
For the fifth appellant:	K Tsatsawane SC
Instructed by:	Weavind & Weavind Attorneys, Pretoria
	MM Hattingh Attorneys Inc, Bloemfontein
For the respondent:	K Premhid with C Juries and P Vabaza
Instructed by:	Fairbridges Wertheim Becker Attorneys, Sandton
	Phatshoane Henney Attorneys, Bloemfontein.