

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: A36/2022

DOH: 22 February 2023

1. REPORTABLE: **NO**/YES
2. OF INTEREST TO OTHER JUDGES: **NO**/YES
3. REVISED.

.....**17 July 2023**
SIGNATURE DATE

In the matter of:

MAKABA KHUMALO AND ASSOCIATES CC

Appellant

AND

**THE ACTING DIRECTOR GENERAL
DEPARTMENT OF WATER AFFAIRS**

First Respondent

MINISTER, DEPARTMENT OF WATER
AND SANITISATION

Second Respondent

JUDGMENT

**THIS JUDGMENT HAS BEEN HANDED DOWN REMOTELY AND SHALL BE
CIRCULATED TO THE PARTIES BY E-MAIL. THE DATE AND TIME OF HAND
DOWN IS DEEMED TO BE 17 JULY 2023**

BAM J (TOLMAY J AND MALINDI J Concurring)

A. Introduction

1. This is an appeal against the decision of the court *a quo* of 21 October 2020, (Kubushi J) sitting as court of first instance. Before the court were two applications. The first was the appellant's application for a mandamus that the first respondent issue it with an official order number and sign a service level agreement (SLA) to allow the appellant to implement the contract it had been awarded. The second application was the respondents' counter application for a review. On the appellant's application the court found that, on a preponderance of probabilities, the appellant had not proved its case. The court's reasons for its conclusion are precisely the reasons for upholding the review application. The award of Tender WP11254 was thus set aside.

B. The Parties

2. The appellant, Makaba-Khumalo and Associates CC, is a close corporation duly incorporated in terms of the Close Corporations Act¹, with its registered address

¹ Act 69 of 1984

recorded as 10 Norma Jean Square, 244 Jean Avenue, Centurion, Gauteng. The appellant renders management consultancy services as part of its business. Throughout these proceedings, the appellant has been represented by its sole member, Mr Hlabezulu Khumalo.

3. The first respondent is the Director General of the Department of Water and Sanitation with its offices situated at 10th Floor Sedibeng Building, Francis Baard Street, Pretoria. The second respondent is the Minister of the Department of Water and Sanitation. The Minister was served via the State Attorney at Salu Building, Corner Andries and Schoeman Streets, Pretoria.

C. Background

4. On 14 December 2017 the appellant submitted a bid in response to tender number WP11254 published by the Department of Water and Sanitation. The tender was for the development of a business case and transition to an independent economic regulator; finalisation of the pricing regulations and infrastructure funding model; and strengthening of various regulatory tools, for a period of 36 months. On 6 February 2018 the appellant's bid priced at R 9 181 254.00, excluding VAT, saw it being declared the successful bidder. The Department issued the appellant with an appointment letter which the appellant signed on 7 February 2018 accepting the appointment. The letter advised the appellant that, 'the required services should only be rendered after the issue of an official order and conclusion of a service level agreement'. On 9 February 2018 the Appellant and first respondent held a pre-project

inception engagement meeting and on 15 February the appellant submitted a preliminary revised project budget.

5. On 5 April 2018, the appellant sent back the draft contract it had been asked to review before same could be signed by the Department. It further relayed to the Department that it was in agreement with the terms. The contract had the commencement date of 1 April 2018 with the expected completion date being 30 March 2021. The appellant became concerned when it did not hear from the Department after returning the contract and began writing letters of enquiry to several officials as set out in the record. On 30 May 2018, a Mr. Anil Singh, Deputy Director General: Regulation (DDG Regulation) wrote back and advised that the Supply Chain Unit had received two legal challenges to the tender process and that the matter was being dealt with internally.

6. Three months went by with no communication from the department. On 18 September 2018, the Department advised the appellant that there were suspected irregularities in the process leading up to its appointment. On 20 March 2019, the Department's Internal Audit unit completed its investigation. In a letter dated 12 April 2019, the Department advised the appellant of the administrative irregularities and further proposed a withdrawal of the appointment by mutual agreement. By that time it is not in dispute that the Department had already been served with the appellant's papers for a mandamus on 26 March 2019. The appellant rejected the offer of a mutual withdrawal of its appointment. On 6 September 2019, the Department filed its

answering affidavit which was due on 4 April 2019 simultaneously with a counter application to review and set aside the decisions of the Bid Evaluation Committee (BEC) and Bid Adjudication Committee (BAC), including the letter of appointment.

7. The court *a quo* dismissed the main application and upheld the counter application. In dismissing the main application, the court found that: (i) that the appellant had failed to disclose a conflict of interest between one of its team members, a Ms. Mtetwa, and one Ms. Moshidi, the chairperson of the BEC; (ii) that the appellant was not tax compliant; (iii) the BEC's failure to consider and record that the appellant's bid price excluded VAT constituted a reviewable irregularity; finally, and despite there being a dispute of fact, (iv) that the appellant had failed to sign all the tender documents.

8. The court further concluded that there was a satisfactory explanation for the delay in launching the review application. From reading the judgement, it is not entirely clear whether the court made the remark having concluded that there had not been a delay or that there had been an unreasonable delay, for which an adequate explanation had been provided, and on that basis chose to condone it. It then proceeded to review and set aside the decision of the BEC of 29 January 2018 and that of the BAC of 1 February 2018. The court further declared the letter of appointment null and void. The appellant's application for leave to appeal was turned down by the court *a quo*, on 9 June 2020. The present appeal is with leave of the Supreme Court of Appeal, which was granted on 21 October 2021. Before us, the applicant contested most of the court *quo*'s findings, beginning with the court's conclusion on the issue of delay. The review

had been brought on the basis of the Promotion of Administrative Justice Act² (PAJA) and on the common law principle of legality. Having made up its mind that the correct route to bring a self-review is that of legality, the court recorded that it would ignore all references to (PAJA)³.

(i) Delay

9. Before the court *a quo* and in this court, the appellant made the point that the respondents were grossly out of time in filing the review. Underscoring that the court had erred, the appellant pointed to the following:

(i) The sole basis for the court's finding on the issue of delay was that the documents and evidence pertinent to the merits of the review were available. The appellant submits that whilst this is one of the considerations it is not the only consideration.

(ii) By referring to the period of the delay as being 11 months, the court misdirected itself. The delay was in fact 19 months.

(iii) Finally, whilst the court had correctly accepted that no explicit application for condonation was required in a legality review, it ignored an important injunction of the Constitutional Court that no discretion can be exercised in the air.

10. Before this court, the respondents accepted that their answering affidavit did not address the delay in launching the review at all. Instead, the answering affidavit explained only the reasons the Department did not and could not issue the appellant with an official order for the Tender and sign a service level agreement, as sought in

² Act 3 of 2000

³ CaseLines, 070-22 paragraph 67 of the judgement

the appellant's notice of motion. The court *a quo* confirmed that the clock starts ticking from the date the applicant became aware or ought reasonably to have been aware of the action taken. Disposing of the appellant's challenge of undue delay, the court reasoned:

'I find that the applicant's argument that there has been undue delay in this instance, to not be acceptable. Firstly, it need to be said that this is not a case where the court is faced with a situation where due to the delay, documents and evidence are lost or destroyed thus undermining the court's ability to fully evaluate the allegation of illegality. In this instance the evidence is available and I have been able to evaluate the alleged irregularity and found it to exist.

Secondly, the explanation proffered by the Department as to why the review was done eleven (11) months after the appointment was made, is to me, satisfactory.¹⁴

11. The rule against delay was espoused in *Altech Radio Holdings (Pty) Limited and Others v City of Tshwane Metropolitan Municipality*, where the court said:

'...[I]s a principle that flows directly from the rule of law and its requirement for certainty. The Constitutional Court has held that there is a strong public interest in both certainty and finality.¹⁵

12. In *State Information Technology Agency SOC Limited v Gijima Holdings (Pty) Limited, (SITA)*, prior to concluding that SITA had delayed launching its self-review, it was said:

'The reason for requiring reviews to be instituted without undue delay is thus to ensure certainty and promote legality: time is of utmost importance. In *Merafong Cameron J* said:

⁴ CaseLines 070-25 paragraph 75 of the judgement

⁵ 1104/2019) [2020] ZASCA 122 (5 October 2020), paragraph 16

“The rule against delay in instituting review exists for good reason: to curb the potential prejudice that would ensue if the lawfulness of the decision remains uncertain. Protracted delays could give rise to calamitous effects. Not just for those who rely upon the decision but also for the efficient functioning of the decision-making body itself.”⁶

13. When assessing delay in a legality review, the test, as referred to by the court *a quo*, and extracted from *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd*, involves a two staged enquiry. The first stage is a factual enquiry:

[48]...Firstly, it must be determined whether the delay is unreasonable or undue. This is a factual enquiry upon which a value judgment is made, having regard to the circumstances of the matter. Secondly, if the delay is unreasonable, the question becomes whether the Court’s discretion should nevertheless be exercised to overlook the delay to entertain the application.

[49] The standard to be applied in assessing delay under both PAJA and legality is thus whether the delay was unreasonable. Moreover, in both assessments the proverbial clock starts running from the date that the applicant became aware or reasonably ought to have become aware of the action taken...⁷

14. There are a number of reasons as to why the court’s approach in assessing delay makes it susceptible to attack. To start with, the court’s finding rested solely on the basis that documents and evidence were not lost and that the court’s ability to evaluate the alleged irregularities was not undermined. It is not clear whether the court was satisfied that the delay, although unreasonable, was ameliorated by the explanation and chose to ignore it or that there had not been a delay at all. Owing to the lack of clarity, one cannot be sure whether the court had exercised its discretion at all on the issue. Accordingly, this court is at large to evaluate the issue based on the

⁶ (CCT254/16) [2017] ZACC 40; 2018 (2) BCLR 240 (CC); 2018 (2) SA 23 (CC) (14 November 2017), paragraph 44
⁷ [2019] ZACC 15, paragraphs 48-49

common cause facts. In so doing we are fortified by the observations of the Constitutional Court in *City of Cape Town v Aurecon South Africa (Pty) Ltd* that:

‘...There can be no question of undue interference by the SCA where no discretion to grant condonation has been exercised by the High Court. If anything, the SCA had exercised a narrow discretion in refusing to grant condonation.[43] As was recently held by this Court, “[i]nterference on appeal in a lower court’s exercise of a discretion is possible only if the discretion was not judicially exercised.’⁸

15. The court was obliged to take into account, amongst others, the prejudice the delay would have on the appellant and the fullness of the explanation. Also important to note is that the period of the delay was 19 and not 11 months as calculated by the respondents and the court. In any event, our conclusion is that the court’s conclusions on the question of delay was reached without taking all the facts into account. The Department’s case for the delay in launching this review, or the lack thereof — as it admits that it did not address the issue at all — was wanting and characterised by a singular lack of candidness. Part of that reticence to account fully before the court may be inferred from the extract below in the Department’s answering affidavit:

‘During August 2018, the Department received complaints from two bidders who sought amongst others the review of the adjudication process that led to the appointment of the applicant. The two bidders PwC... and an entity named Exceed Empowerment Services (Pty) Ltd whose bid was excluded. The letters of complaint are attached herewith and marked annexure MT5 and MT6.’

16. The statement that the Department received letters of complaints in August 2018 is not borne out by the record. When the court was dealing with the application for the mandamus, it indirectly accepted that the Department had received the complaints in

8 (CCT21/16) [2017] ZACC 5; 2017 (6) BCLR 730 (CC); 2017 (4) SA 223 (CC) (28 February 2017), paragraph 52

March 2018 and it noted that the letter from PwC is dated 26 March while the one from Webster Attorneys is dated 28 March 2018. In addition, as early as on 30 May 2018, Mr Anil Singh, an official of the Department, no less than DDG: Regulation in rank, had written to the appellant copying several members of the Department advising that the Department's supply chain unit had received challenges to the appellant's appointment. The statement is accordingly undermined by the record.

17. That the letters are both dated March 2018 and the Department never explained to the court whether they were delivered by e-mail or by ordinary post or hand delivered, in which case, a date stamp would be evidence of when the Department received them, is on its own telling. It is most probable, based on Singh's letter, that the PwC letter had been e-mailed to the Department in March 2018 already, if not, in April but certainly not later than 30 May 2018. As for the letter from Webster attorneys, it is not addressed to anyone. It makes no reference to any person in the Department. Apart from not carrying any email address, the letter makes no sense at all. It requests that the implementation of the tender be put on hold and further advises that its company, Exceed Empowerment, does not appear in the Successful Bidder list. When considering that this particular bidder's bid had neither been acknowledged nor evaluated by the Department, it is incomprehensible how the respondents regarded the letter as a legitimate complaint warranting the Department's attention, let alone an investigation. This too was never explained to the court by the respondents.
18. Lastly, if the Department's word is to be accepted that it received the letters of

complaint in August 2018, which on its own invites an answer as to the Department's failure to proceed with the exercise towards implementation for six months since the letter of appointment, the terse statement below does little, if anything, to explain the delay from 7 February and August 2018:

'Thereafter, between the period February to August 2018, a series of pre-contractual engagements took place between the applicant and officials of the Department, including a draft contract which the applicant was requested to review.'

19. As a matter of fact, the last communication exchanged between the appellant and the Department towards implementation of the tender was on 5 April 2018, when former returned a contract it was asked to review before signature. Thereafter it all went quiet from the Department's side. So, it is simply not borne out by the record that there were pre-contractual activities from February till August. This was six months — from the date of the letter of appointment to the date of the alleged receipt of complaints — for which the Department provided no explanation.

20. A further consideration is that while the Department was comfortable to inform the court that the investigation was completed on 20 March 2019, it never informed the court when the Department's Internal Audit was actually instructed to conduct the audit. It did not provide a single email communication or internal memorandum, or minute, of when the decision was taken; when it was conveyed to the internal Audit; and when the investigation commenced.

21. The Department provided no explanation why it took seven months — from

August 2018 to 20 March 2019 — to complete an internal investigation, involving only four bidders. Having concluded its internal investigation on 20 March 2019, it would be a further six months before the Department filed its review by way of a counter application. The last six months too was never explained. In total the period that had lapsed since the letter of appointment was issued is 19 months. In *Aurecon South Africa (Pty) Ltd v City of Cape Town*, the SCA, rejecting the City's contentions that it launched the review as soon as it had information that the tender was tainted by irregularities, stated:

'That interpretation would automatically entitle every aggrieved applicant to an unqualified right to institute judicial review only upon gaining knowledge that a decision (and its underlying reasons), of which he or she had been aware all along, was tainted by irregularity, whenever that might be. This result is untenable as it disregards the potential prejudice to the respondent (the appellant here) and the public interest in the finality of administrative decisions and the exercise of administrative functions.'⁹

22. The delay in launching the review was stark and it called for an explanation, which was never provided. But as we know, this is not the end of the enquiry and so, we proceed to evaluate the Department's prospects of success based on the court's findings.

(ii) Conflict of Interest

23. The appellant's case before the court *a quo* and this court is that there was no relationship to disclose and certainly no conflict of interest. The background facts to this finding are: One of the appellant's team members, a Ms Nonhlanhla Johanna

⁹ (20384/2014) [2015] ZASCA 209 (9 December 2015), paragraph 16

Mtetwa had previously worked in the department as part of two consultant companies between December 2011 to March 2014. Her CV says she worked as an administrator. During the period Ms. Mtetwa reported to Ms. Moshidi and had listed the latter as one of her references. The court began its analysis by making reference to SBD4 form, the form dealing with declarations of interest. The opening paragraph to SBD4 reads:

'...In view of possible allegations of favouritism, should the resulting bid or part thereof, be awarded to persons employed by the state, or to persons connected with or related to them, it is required that the bidder or his / her authorised representative declare his /her position in relation to the evaluating/adjudicating authority where-

- the bidder is...
- The legal person on whose behalf the bidding document is signed, has a relationship with persons / a person who are/is involved in the evaluation and or adjudication of the bid (s), or where it is known that such a relationship exists between the person or persons for or on whose behalf the declarant acts and persons who are involved with the evaluation and or adjudication of the bid. (Own underline)

24. Question 2.9 in SBD4, which incidentally is marked 2.10, reads:

'Are you, or any person connected with the bidder aware of any relationship (family, friend, or other) between any other bidder and any persons employed by the state who may be involved with the evaluation and or adjudication of this bid?' (Own underline)

The appellant's answer to the question is, 'No.' The court after its analysis found that:

'By not declaring that the applicant or anyone of its employees know Ms Moshidi, the applicant made a false declaration and its bid ought to have been rejected.'

25. This was the court's first incorrect finding. SBD4 is about relationships not knowledge of a person. To buttress the claim of a relationship, the respondents did no

more than refer to Ms. Mtetwa's being part of a consultant firm that had done work for the Department and the fact that she had listed Ms. Moshidi as a referee in her CV. We will revert to this issue. Next, the court made reference to an enquiry made by the investigation team. A question was asked of Mr. Khumalo, whether he or any member of his team and or associates had a relationship with members of the BEC or were aware of any possible conflict of interest, which Mr. Khumalo denied stating that neither he nor the members of his team knew Ms. Moshidi would be in the BEC.

26. The contention which found favour with the court *a quo* was that in its pricing proposal the appellant had listed Ms. Mtetwa as a project administrator, a position said to be just under Mr. Khumalo's. Drawing from the listing, it was argued that it was highly unlikely that the appellant would not have known that Ms. Mtetwa 'was attached' to the Department for three years and that he did not see that her CV had listed a senior official of the Department as reference. Agreeing with the contention the court remarked:

'The contention made, correctly so, is the failure to disclose this fact was simply inexcusable.'

27. The error in the court's reasoning was the failure to recognise that none of what the respondents had placed before it established the existence of a relationship between Ms. Moshidi and Ms. Mtetwa. As we had indicated earlier, SBD4 calls for disclosure of relationships, not just knowing a person. At no point did the respondents place facts before the court to establish the existence of a relationship between the two individuals. Their claim of a relationship pivoted around the word, 'knew' and the phrase 'attached to the department,' whatever the latter may mean, but they failed to prove the

existence of a relationship. Before the court *a quo* and in this court the respondents relied on speculation and conjecture¹⁰, because it is simply not possible to infer a relationship, much less a conflict of interest, from reading a name listed in a CV as a referee. Thousands of young people have former teachers, former headmasters, former supervisors and managers listed as references in their CV. Can it be argued rationally and persuasively that in all those instances there is a relationship? The answer is a 'No'.

28. The nature of the relationship between Ms. Mtetwa and the Department was also incorrectly characterised in the judgement. Ms. Mtetwa was not the consultant to the Department. She had been brought in, at the level of an administrator, by a firm that had been awarded a consultancy contract. As part of the appellant's team, she would have earned about R 201 000.00 over the period of the tender. One must also remember that the respondents were applicants in the counter application and had the opportunity to reply to the appellant's answers as set out in its reply. They never did. Hence the dispute fell to be determined on the basis of the Plascon Evans rule, in favour of the appellant, as the respondent. For all these reasons, the court erred and its finding cannot stand. There was no relationship established by the respondents which called for disclosure on the part of the appellant and certainly, no conflict of interest.

(iii) Tax Compliance

Tax Clearance Certificate (TCC)

29. Despite the claims made by the respondents that the appellant's submission of a

¹⁰ *Knoop and Another NNO v Gupta (No 2)* (Case No 116/2020) [2020] ZASCA 163 (9 December 2020), See footnote 23: 'evidence does not include contention, submission or conjecture.'

copy of the TCC was invalid, the Court *a quo* accepted that the appellant had submitted a valid TCC with its bid. However, it was submitted that when the BEC sat on 26 January 2019, the print drawn by the Department's officials from the Treasury's Central Supplier Database, (CSD) to validate the appellant's tax compliance status, showed that the appellant was non tax compliant. The court concluded that the irregularity complained of had nothing to do with the validity of the appellant's TCC but with the conduct of the respondents' officials in failing to notify the applicant about its non-compliance status and affording it the opportunity to rectify it. As a result, there was no evidence on file that the non-compliance status was ever rectified, hence the TCC considered during the evaluation process was invalid. Before going any further, in many parts of the judgment and the record itself, it is written that the BEC met on 24 January 2019. It is therefore unclear how a printout drawn from the CSD on 26 January would have served before the BEC on 24 January 2019.

30. In their allusion to Note 7¹¹, both in the court *a quo* and in this court, the respondents left out two critical parts. Those parts are produced here-below:

'Paragraph 3.3: Accounting Officers and Accounting Authorities must therefore accept printed or copies of TCC submitted by bidders and verify them on e-Filing...

Application during supply chain management process:

4.1 Designated employee (s) must verify the bidder's tax compliance status prior to the finalisation of the award of the bid or price quotation.

4.2: Where the recommended bidder is not tax compliant, the bidder must be notified of their non-tax compliant status and be granted reasonable timeframe to rectify their tax compliance status with the SARS. The bidder must therefore provide the procuring entity with proof of its tax compliance status which must be verified via CSD or eFiling.'

¹¹ Note 7 is the Treasury Instruction Note issued during 2017/2018 financial year, on 24 May 2017

31. Before the court *a quo* and this court, the appellant made submissions explaining what is essentially captured in paragraph 26 of this judgment. It is because of the fluid nature of CSD that taxpayers are afforded the opportunity to rectify their status with SARS should the CSD show a non-compliance tax status. On the respondents' version none of this was done. Before this court, the respondents accept that the appellant had submitted a valid TCC but averred that they had failed to advise and afford the appellant the opportunity to rectify the non-compliance status depicted on CSD. But the respondents were precluded from relying on a ground that they had never pleaded. It is thus for this court to evaluate the ground on the basis of the cases made by the respective parties in their pleadings¹². In *Altech* the court remarked:

'Search hard enough in public procurement cases, such as this and one will surely find compliance failures along the way. There will seldom be a public procurement process entirely without flaw. But, perfection is not demanded and not every flaw is fatal. Nor does every flaw in a tender process amount to an irregularity, much less a material irregularity. Public contracts do not fall to be invalidated for immaterial or inconsequential irregularities. Indeed, as it has been put, '[n]ot every slip in the administration of tenders is necessarily to be visited by judicial sanction'¹³

32. In *AllPay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer South African Social Security Agency*, it was said:

¹² *South African Transport and Allied Workers Union and Another v Garvas and Others* (CCT 112/11) [2012] ZACC 13; 2012 (8) BCLR 840 (CC); [2012] 10 BLLR 959 (CC); (2012) 33 ILJ 1593 (CC); 2013 (1) SA 83 (CC) (13 June 2012), paragraph 114:

'Holding parties to pleadings is not pedantry. It is an integral part of the principle of legal certainty which is an element of the rule of law, one of the values on which our Constitution is founded. Every party contemplating a constitutional challenge should know the requirements it needs to satisfy and every other party likely to be affected by the relief sought must know precisely the case it is expected to meet...'

¹³ note 3 paragraph 54

'...The proper approach is to establish, factually, whether an irregularity occurred. Then the irregularity must be legally evaluated to determine whether it amounts to a ground of review under PAJA. This legal evaluation must, where appropriate, take into account the materiality of any deviance from legal requirements, by linking the question of compliance to the purpose of the provision, before concluding that a review ground under PAJA has been established.'¹⁴

33. The starting point in evaluating this ground is that the appellant had met the requirements of the Tender. It submitted a valid TCC. It was for the respondents to advise the appellant upon learning of its non-compliant status on CSD. On their own version, they did not do so. Having spent 19 months before bringing the review, it never once occurred to the respondents that they had flouted a critical aspect of validating the appellant's tax compliance status in the procurement process. They now plead with this court to throw them a lifeline to undermine a contract they had voluntarily concluded.

We align ourselves with the comments of the court in *SITA*:

"... On the contrary, there is a higher duty on the state to respect the law, to fulfil procedural requirements and to tread respectfully when dealing with rights. Government is not an indigent or bewildered litigant, adrift on a sea of litigious uncertainty, to whom the courts must extend a procedure circumventing lifeline. It is the Constitution's primary agent. It must do right, and it must do it properly."¹⁵

34. It follows that the court erred in upholding this ground and its finding cannot stand.

¹⁴ CCT48/13, [2013] ZACC 42, paragraph 28

¹⁵ Note 6, paragraph 50

Value Added Tax

35. This point is recorded solely to be dismissed as it has no merit. The Court *a quo* found that the BEC had failed to record and consider that the applicant's pricing was VAT exclusive whilst the other bidders' was VAT inclusive. It was submitted by the respondents that the failure to record this distinction shows that there was lack of fairness. It is however, worth recording that the respondents themselves submitted that even if the appellant's bid were to be considered with VAT having been included, it would still have been the lowest price at R10 466, 629, 60, while the closest contestant's bid price, PwC's stood at R 10 518, 162.17, including VAT.

36. The BEC recommendation report is a very short report comprising four pages. In no less than three instances, the appellant's bid price is recorded specifically as VAT exclusive. Firstly, on page 124 is the heading: Consideration of Points (Price and Preference). In a small table, two entities are set out PwC and the appellant. The column dealing with price carries the heading, Bid Price/(VAT exclusive), the appellant's bid price is recorded as excluding VAT at R9 181, 254. 00.¹⁶ while PwC's is recorded as R 10 518 162.17, the latter includes VAT. In the very next page in one short paragraph, the appellant's bid price is again noted as VAT exclusive. Below the paragraph is the final recommendation which sets out the appellant's bid price with a clear note that it excludes VAT. Exactly what the respondents meant with the submission that the BEC had failed to record and consider that the appellant's bid price excludes VAT remains unclear. It is plain from the BEC's report that this was not the case. The point has no merit and the finding of the court in this regard falls to be set aside.

¹⁶ CaseLines 029 -3

Failure to sign documents

37. The court *a quo* found that the appellant's failure to sign paragraph 35 of page 36 of the 'Acceptance of Terms and Special Conditions' form, constituted an irregularity. The attack raised by the appellant is three-fold and, as will be demonstrated, appears to have elicited no real answer from the respondents: It submitted that: (i) There was a factual dispute of fact; (ii) No member of the BEC or BAC, the two committees that had passed the appellant's bid, had confirmed the allegations under oath; (iii) The court *a quo* did not find, at least explicitly, that the defence of the appellant was outlandish, unmeritorious or fictitious and that it fell to be rejected on paper. Both before this court and in the court *a quo*, the respondents simply stated that 'despite this non-compliance by the applicant, the BEC administrative checklist dated 18 January 2018 listed all four bidders to have met the administrative requirements of the Tender as part of Phase 1 compliance'. They then repeated the court's finding that the failure to sign each and every form constituted an irregularity which vitiated the tender process.

38. In *Allpay* the court informs that we must first consider whether there has been an irregularity. Thereafter, we must consider the materiality of the deviation as against the requirements of the statutory provision and its purpose. Nowhere in their papers both before this court and in the court *a quo* do the respondents point to any material deviance from any legislative prescript. Nor do they point to any harm or offence to the purpose of any rule. If anything, this particular point appears to have been a make-weight-point. It, like all the so-called irregularities raised by the respondents were simply

not irregularities at all. If one reads the judgment of the court *a quo*, the fault in all of these so-called irregularities, was placed at the doors of the respondents.

39. The appellant flatly denied that it had left blank spaces in completing any of the forms. Although the court had referred to the Plascon Evans rule it incorrectly applied the rule as the appellant was the respondent in the review. The court also ignored that no member of either the BEC or the BAC had confirmed the findings of the Investigation Committee under oath. Further, the court had not found, explicitly, that the version of the appellant was unmeritorious and fictitious and on those bases fell to be dismissed on paper. It is our conclusion that the court erred in upholding this ground as it lacked merit from the start.

Conclusion

40. It is time to bring this long outstanding matter to an end. Our conclusion is that the respondents had failed to explain the delay in bringing the review. Whether the court had exercised its discretion to ignore the delay, given its pronouncement that the delay had been explained, or had found there had not been a delay, the court erred and its finding falls to be set aside. The finding of the court disregarded the injunction of the court in *SITA*, that:

‘... From this, we see that no discretion can be exercised in the air. If we are to exercise a discretion to overlook the inordinate delay in this matter, there must be a basis for us to do so. That basis may be gleaned from facts placed before us by the parties or objectively available factors. We see no possible basis for the exercise of the discretion here. That should be the end of the matter.’¹⁷

¹⁷ Note 6 paragraphs 43 and 49

41. We have already found that there is no merit to any of the alleged irregularities. Accordingly, the appeal must be upheld. It is noteworthy that the respondents had not alleged anywhere that granting of the order sought by the appellant might be moot either because the services had already been rendered by some other entity or were no longer relevant to the Department's pre-determined objectives. In our view, public interest will be best served by upholding the rule of law and holding the respondents to the contract they had voluntarily concluded with the appellant, from whose services the public will benefit.

G. Order

42. The appeal is upheld.

42.1 The order of the court *a quo* is set aside and is replaced with the following:

- (i) The first and second respondents must issue the appellant with an official order for tender number WP 11254 within 30 days from date of this order;
- (ii) The first and second respondents must sign the service level agreement in respect of tender number WP 11254, within 30 days from date of this order; and
- (iii) The application for review is dismissed with costs.

42.2 The respondents are ordered to pay the appellant's costs of appeal.

NN BAM

JUDGE OF THE HIGH COURT,

PRETORIA

Date of Hearing: 22 February 2023

Date of Judgement: 17 July 2023

Appearances:

For Appellant:

Ms L Mbanjwa

(An Attorney with right of appearance)

Mbanjwa Incorporated

Monument Park, Pretoria

For Respondents:

Adv M.P.D Chabedi

Instructed by:

State Attorney Pretoria