OFFICE OF THE CHIEF JUSTICE
REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

(1) REPORTABLE: No
(2) OF INTEREST TO OTHER JUDGES: No
(3) REVISED

21 May 2024
DATE

[redacted]
SIGNATURE

CASE NO: 27752/2017

In the matter between:

CITY OF TSHWANE METROPOLITAN MUNICIPALITY — PLAINTIFF

And

MOIPONE GROUP OF COMPANIES (PTY) LTD — FIRST DEFENDANT

ABSA VEHICLE MANAGEMENT SOLUTIONS (PTY) LTD SECOND DEFENDANT

This judgment is issued by the Judges whose names are reflected herein and is submitted electronically to the parties/their legal representatives by email. The judgment is further uploaded to the electronic file of this matter on CaseLines by the Senior Judge's secretary. The date of this judgment is deemed to be 21 May 2024

JUDGMENT

COLLIS J

INTRODUCTION

1] The Supreme Court of Appeal ("the SCA") has described the review by the state and organs of state of their own decisions as "a novel, but burgeoning, species of judicial review".[1] More recently, the SCA went further and described state self-review cases as:

[1] Altech Radio Holdings (Pty) Ltd and Others v Tshwane City 2021 (3) SA 25 (SCA) at para 1 ("Altech Radio Holdings").

"[A]n ever growing, and frankly disturbing, long line of cases where municipalities and organs of state seek to have their own decisions, upon which contracts with service providers are predicated, reviewed and overturned, for want of legality, more often than not after the contracts have run their course and services have been rendered thereunder."[2]

2] The High Court has found that "the proliferation of late self-review by organs of state is becoming a whimsical trait, fanciful and out of step with commercial and socio-economic realities. It camouflages inefficiencies by hiding under the protective shield of the Constitutionally mandated procurement procedures…[t]his is an impermissible Get Out of Contract Free card to avoid its carefully struck bargain under the [agreed upon contracts]".[3]

3] The Plaintiff seeks to review and set aside its decision to award tender CB54/2013 to the First Defendant and an order that the First defendant be directed to repay the profits earned by it.

4] Initially, motion proceedings were initiated which ultimately resulted in a court ordering trial proceedings.

[2] Govan Mbeki Municipality v New Integrated Credit Solutions (Pty) Ltd [2021] 2 All SA 700 (SCA) at para 1 ("Govan Mbeki Municipality").
[3] Newlyn Investments (Pty) Ltd v Transnet SOC Ltd and Another (11446/21) [2022] (27 January 2022) at para 1 ("Newlyn investments").

PARTIES

5] The plaintiff is the City of Tshwane Metropolitan Municipality, a metropolitan municipality established as such in accordance with the provisions of the Local Government: Municipal Structures Act, 1998 with its principal place of business in Pretoria. It forms part of the local sphere of government as contemplated in the Constitution of the Republic of South Africa Act, 1996 ("the Constitution") and it is an organ of the State. As an organ of State, it is required to procure goods and services in the manner contemplated in section 217 of the Constitution.

6] The first defendant is MOIPONE FLEET (PTY) LTD (previously known as MOIPONE GROUP OF COMPANIES (PTY) LTD), a company duly incorporated in accordance with the company laws of South Africa and having its registered office and principal place of business at 895 Francis Baard Street, Arcadia, Pretoria.

7] The second defendant is ABSA VEHICLE MANAGEMENT SOLUTIONS (PTY) LTD, a company duly incorporated in accordance with the company laws of South Africa and carries on business at Absa Towers North, 161 Main Street, Johannesburg, being a wholly owned subsidiary of Absa Bank Limited.

BACKGROUND

8] On 19 March 2013 the plaintiff ("the CoT") issued tender CB54/2013 for the supply of fleet vehicles and fleet related services ("the tender").

9] On 13 October 2014, the CoT appointed the first defendant ("Moipone") as the preferred bidder to provide fleet vehicles and fleet related services in terms of the tender.

10] On 24 March 2016, the CoT and Moipone concluded two Public-Private Partnership Agreements for Category A and Category C vehicles (in terms of which Moipone would provide the fleet vehicles and related services to the CoT) pursuant to the tender ("the PPP Agreements").

11] The PPP Agreements between the CoT and Moipone were concluded for a period of sixty (60) months commencing from the effective date of the agreements (as defined in the PPP Agreements).

12] On 20 April 2016, the CoT sent a letter to Moipone confirming its appointment in terms of the tender and confirming the conclusion of the PPP Agreements between the parties.

13] Almost three (3) years after Moipone was appointed as the preferred bidder and almost one (1) year after the PPP Agreements were entered into, the CoT on 20 April 2016 instituted the present proceedings to review

and set side its own decision to enter into the PPP Agreements. This is therefore a self-review that this Court was called upon to determine.

COMMON CAUSE FACTS

14] It is common cause between the partes that the CoT was a party to and had knowledge of all the facts relating to the tender and the subsequent conclusion of the PPP Agreements from the time the tender was awarded to Moipone.

15] Knowledge in relation to the tender was either from as early as 13 October 2014 when it appointed Moipone as the preferred bidder for the tender or by the latest from 24 March 2016 when it concluded the PPP Agreements with Moipone.

16] It is further common cause that the CoT brought the review proceedings on 20 April 2017, some 28 (twenty-eight) months after Moipone was appointed as the preferred bidder for the tender and some 13 (thirteen) months after it concluded the PPP Agreements with Moipone.

17] It is also common cause that the CoT has not sought condonation for bringing these proceedings.

PLAINTIFF'S CASE

18] In essence it is the plaintiff's case that in law it is not bound to comply with procurement contracts concluded in contravention of the procurement system or process contemplated in section 217 of the Constitution and other Legislation.

19] Further that in law it is obliged to resist the enforcement of procurement contracts concluded in contravention of the procurement system contemplated in section 217 of the Constitution and other Legislation and to come to Court to set aside such contracts as it now seeks to do.

20] Further that the plaintiff in law is required to conclude public-private partnership agreements only in the manner provided for in sections 33 and 120 of the Local Government: Municipal Finance Management Act, 2003 ("the MFMA") and is in law required to approach the Court to seek an order in terms of which its own conduct which is inconsistent with the law is declared as such and is set aside as it now seeks to do.

21] In support of its case the plaintiff further relies on the provisions of Section 217 of the Constitution which provides that the process preceding the conclusion of public contracts for the procurement of goods and services must be fair, equitable, transparent, competitive and cost-effective.

22] At this juncture it is important to consider the ambit of public-private partnership agreements.

LEGISLATIVE FRAMEWORK

23] As mentioned and pursuant to a public tender process, the plaintiff and the defendant concluded two public-private partnership agreements on 24 March 2016 for what is referred to as Category A and Category C vehicles ("PPP Agreements").

24] The Municipalities power to conclude a public-private partnership agreement is derived from, amongst others, sections 33 and 120 of the MFMA. This power is derived when there is full and proper compliance with these provisions.

25] Section 33 of the MFMA applies to contracts which will impose financial obligations upon the plaintiff beyond the 3 years covered in the annual budget for that financial year. It provides that a municipality may conclude such a contract only if the preconditions for doing so have been satisfied. If the prescribed conditions are not fulfilled, then in that event, the resultant agreement is unlawful and it is unenforceable.

26] Some preconditions for the conclusion of the PPP Agreements exists. They can be listed as follows:

26.1 The draft contract intended to be concluded must be published for public comment together with an information statement summarizing the municipality's obligations. The municipality must further solicit the views of, amongst others, National Treasury; the Provincial Treasury and the National Department responsible for local government. The drafts of the PPP Agreements concluded between the plaintiff and the defendant were not published for comment as required by law and this constitutes a contravention of sections 33 and 120 of the MFMA.

26.2 The municipal council must have taken into account the following:

26.2.1 the municipality's projected financial obligations in terms of the proposed contract for each financial year covered by the contract;

26.2.2 the impact of those financial obligations on the municipality's future municipal tariffs and revenue;

26.2.3 any comments or representations on the proposed contract received from the local community and other interested parties; and

26.2.4 any written views and recommendations on the proposed contract by the National Treasury, the relevant Provincial Treasury, the National Department responsible for local government etc.

27] In relation to the conclusion of PPP Agreements, the municipal council must have adopted a resolution in which:

27.1 it determines that the municipality will secure a significant capital investment or will derive a significant financial economic or financial benefit from the contract;

27.2 it approves the entire contract exactly as it is to be executed; and

27.3 it authorizes the municipal manager to sign the contract on behalf of the municipality.

28] Section 120(1) of the MFMA provides that a municipality may enter into a public-private partnership agreement but only if the municipality can demonstrate that the agreement will:

28.1 provide value for money to the municipality;

28.2 be affordable for the municipality; and

28.3 transfer appropriate technical, operational and financial risk to the private entity, in this case, the defendant is the private party.

29] It is the plaintiff's case that PPP Agreements were concluded in contravention of section 120(1) of the MFMA as they did not provide value for money to the plaintiff and they did not result in the transfer of any technical, operational and financial risk to the defendant.

30] Section 120(4) of the MFMA further provides that before a public-private partnership is concluded, the municipality must conduct a feasibility study that:

30.1 explains the strategic and operational benefits of the public-private partnership for the municipality in terms of its objectives;

30.2 describes in specific terms:

30.2.1 the nature of the private party's role in the public-private partnership;

30.2.2 the extent to which this role can be performed by a private party; and

30.2.3 how the proposed agreement will:

30.2.3.1 provide value for money to the municipality;

30.2.3.2 be affordable for the municipality;

30.2.3.3 transfer appropriate technical, operational and financial risks to the private party; and

30.2.3.4 impact on the municipality's revenue flows and its current and future budgets;

30.2.3.5 takes into account all relevant information; and

30.2.3.6 explains the capacity of the municipality to effectively monitor, manage and enforce the agreement.

31] It is the plaintiff's case that there was no compliance with section 120(4) of the MFMA before the PPP Agreements were concluded because there was no feasibility study done which demonstrated by evidence that the PPP Agreements will provide value for money to the plaintiff and that they will result in a transfer of appropriate technical, operational and financial risks to the defendant.

32] The PPP Agreements did not in fact provide value for money to the plaintiff and did not result in a transfer of any technical, operational and financial risks to the defendant.

33] The plaintiff further alleges that there was no compliance with the provisions of sections 33 and 120 of the MFMA, and that the plaintiff did not have the necessary powers to conclude the PPP Agreements.

34] In addition Section 116(3) of the MFMA provides that an agreement such as the PPP Agreements "may be amended by the parties, but only after the following requirements have been met:

34.1 the reasons for the proposed amendment have been tabled in the council of the municipality; and

34.2 the local community has been given reasonable notice of the intention to amend the contract and has been invited to submit written representations to the municipality.

35] In this regard the Plaintiff alleges that the provisions of section 116(3) have not been complied with in relation to the amendment to the PPP Agreements resulting in the PPP Agreements being constitutionally invalid and unlawful.

SUCCINTLY THE GROUNDS OF REVIEW THAT THE PLAINTIFF RELIES UPON CAN BE LISTED AS FOLLOWS?

36] The plaintiff seeks to review and set aside its decision to conclude the PPP Agreements and to set aside the PPP Agreements and does so in terms of the principle of legality because the conclusion of the PPP Agreements it asserts was not authorized by law.

Failure to have met the suspensive conditions

37] In this regard it is the plaintiff's case that the PPP Agreements were subject to the following suspensive conditions namely:

37.1 the provision by the defendant of a performance bond referred to in clause 37 of the PPP Agreements (Clause 2.1.1);

37.2 the provision by the plaintiff of documentation "*evidencing that the City has the required power and authority to conclude the Agreement"* (Clause 2.1.2).

38] Clause 2.3 of the PPP Agreements further provided that if the suspensive conditions are not fulfilled within 90 days from the date of signature, "*or within such longer period as the parties may agree in writing" the agreement "shall automatically lapse and be of no force or effect and no party shall have any claim against the other in terms hereof or arising therefrom."*

39] The plaintiff asserts that the suspensive conditions were not fulfilled or lawfully waived timeously. In addition, the PPP Agreements were not lawfully amended to absolve the plaintiff and the defendant from their obligation to fulfil the suspensive conditions in that:

39.1 the plaintiff's council did not pass a resolution to authorise any amendment to the PPP Agreements to waive fulfilment of the suspensive conditions; and

39.2 the amendment procedure provided for in section 116(3) of the MFMA was never invoked and followed in respect of the PPP Agreements, in particular, to amend clause 2 of the PPP Agreements as far as the fulfilment of the suspensive conditions are concerned.

Tender validity period

40] In relation to the tender validity period, it is the plaintiffs' position that the PPP Agreements were concluded pursuant to a public tender process. The public tender process commenced when the plaintiff publicly invited interested parties to submit tenders for the provision of the goods and services which are provided for in the PPP Agreements.

41] The invitation to tender (or request for proposals) was issued on 19 March 2013. The invitation letter provided amongst others for:

41.1 the closing date for the submission of tenders was 19 April 2013, which date was later extended to 13 May 2013;

41.2 the tender validity period would be 180 days from the closing date of 13 May 2013. This means that:

41.2.1 the bids which were submitted to the plaintiff were valid until no later than 10 November 2013;

41.2.2 the plaintiff had to award the tender by no later than 10 November 2013 failing which the bids submitted to it would have lapsed on that date and no longer capable of being accepted after that date;

41.2.3 the defendant did not extend the validity period of its bid before 10 November 2013; and

41.2.4 the tender process came to an unsuccessful end on 10 November 2013 when the plaintiff did not award the tender to the defendant on 10 November 2013.

42] The defendant's tender constituted an offer to provide the goods and services which are contemplated in the PPP Agreements.

43] The defendant's tender was valid for acceptance until 10 November 2013 after which it lapsed.

44] The validity period of the defendant's tender was not extended before 10 November 2013.

45] Failure, to have extended the tender's validity period had the result that the defendant's tender (which constituted an offer) lapsed by no later than 10 November 2013 as the plaintiff did not accept the defendant's tender (offer) before 10 November 2013 and as a consequence such tender was in law no longer in existence and was no longer capable of acceptance after 10 November 2013.

46] Any purported acceptance of the defendant's tender after 10 November 2013 is invalid, unlawful and of no force and effect and the resultant PPP Agreements are invalid and unlawful and liable to be set aside.

Appointment letter of the defendant.

47] In a letter dated 13 October 2014, the plaintiff informed the defendant that its bid had been accepted.

48] In the aforesaid letter, the plaintiff further appointed the defendant as a preferred bidder subject to, amongst others, the following conditions:

48.1 the conclusion of a public-private partnership agreement;

48.2 that the defendant's appointment would lapse if the public-private partnership agreement is not concluded on 31 March 2015.

49] As the PPP Agreements were only concluded in March 2016 after the defendant's appointment had lapsed and when the plaintiff was no longer authorized in law to conclude such agreements, the plaintiff had argued that the PPP Agreements ought to be set aside.

Defendant failed to qualify to be appointed

50] In addition it is the Plaintiff's case that the request for proposals sets out, amongst others, the requirements with which bidders had to comply in order to be awarded the tender. The defendant did not meet all of such requirements and the tender ought not to have been awarded to it.

51] In this regard paragraph 8 of the request for proposals provides that: "Bidders' responses shall not be considered for evaluation, unless they satisfy the following requirements in addition to any other that might have already been mentioned in the other parts of the agreement: -

51.1 Bidders are to submit audited and certified financial statements for the 3 years prior to submission of the proposal response;

51.2 Bidders are to submit a letter of support for their respective Bids from a registered financial institution;

51.3 Bidders are to lodge a bid bond for an amount of R 1 500 000. 00/One and a Half Million Rand within 7 days of a request by the CoT to do so; and

51.4 Bidders are to submit a briefing session attendance certificate together with their Bids."

52] In correspondence addressed to the defendant dated 13 October 2014, the plaintiff informed the defendant of the following:

> "5. Your company is required to give written assurances to the City that all funding arrangements and commitments that were declared as part of your company's proposal remain in place. This should be done by no later than 15 (fifteen) business days from the date of appointment.
>
> "6. We note that your company's funding commitments as outlined in the letters of support from lenders, your company has approached is for R 300 000 000. 00 … each. This funding commitment however

falls short of the combined funding requirements for Categories A and C by R 130 000 000

"*Your company is therefore required to ensure that this shortfall is addressed within 7 (seven) days of receipt of this letter.*

…

"9. Your company is required to provide the City with a bid bond to the value of R 1 500 000. 00."

53] The gist of the above is indicative that the defendant did not qualify to be awarded the tender and ought not to have been appointed and that the PPP Agreements ought not to have been concluded with the defendant.

54] As a result of the fact that the defendant was given an opportunity to "ensure that this shortfall is addressed" after having been appointed, the plaintiff had argued that it follows that it did not satisfy/meet the requirement as on the date on which it submitted its bid and its bid ought to have been disqualified for this reason alone.

55] As a result of the defendant being given an opportunity to satisfy the tender requirements after the closing date of the tenders violated the requirement to act in a manner which is transparent, fair, equitable, cost effective and competitive because tenders must comply with the tender

requirements as at the closing date and other bidders were further not given the same opportunity.

56] In this regard paragraph 8.1 of the request for proposals contains a list of documents which ought to have been submitted with the bid, amongst others, the bid bond. The defendant was given an opportunity to provide the bid bond after it had been appointed. This was unlawful in that the bid bond had to be submitted on the closing date of the tender.

57] In addition the defendant further did not submit certified annual financial statements and its tender ought to have been rejected for this reason alone.

Advertisement of the agreement

58] Section 33 of the MFMA further requires that the agreement must be published for public comment before it is concluded.

59] In addition hereto, the agreement must also be submitted to the National Treasury, the Provincial Treasury and The National Department responsible for local government affairs for their views.

60] The above requirements must be met at least 60 days before the meeting of the municipal council at which the agreement is to be approved.

61] In casu the conclusion of the PPP Agreements were approved by the plaintiff's council on 28 January 2016 without compliance with the above requirements. This renders the PPP Agreements unlawful and liable to be set aside.

Negotiations between the parties

62] In the report on the procurement of fleet and fleet related services dated 25 June 2015, it is recorded that negotiations took place between the plaintiff and the defendant.

63] The aforesaid negotiations were unlawful in that they did not relate to what can be considered to be final terms as contemplated in Regulation 24 of the Municipal Supply Chain Management Regulations and in the plaintiff's own supply chain management policy. This is so due to the fact that the negotiations related to:

63.1 price adjustment from bid submission date;

63.2 residual value for sub-asset/fitment.

64] It is the plaintiffs' case that all of the above are matters which go to the very root of the bids and the fact that they were negotiated after the

closing date of the bids violated the requirement to act in a transparent, fair, and competitive manner because the same opportunity was not given to other bidders and other bidders were not even informed of it.

Failure to consider the views and recommendations of other departments

65] In its letter dated 9 November 2015, the Gauteng Provincial Treasury raised its concerns about the tender process. In the said letter it raised the following:

"The feasibility study complies with all the requirements for the project of this nature and size subject to the following view:

65.1 According to the feasibility study the City will still be responsible for fuel and tyre repairs and hence the importance of these additional budgetary commitments must be taken up in the City's budget;

65.2 From the GPT point of view the importance of affordability is measured from the cost differential between what the City has budgeted for in the capital and operation budget and the operational lease payment in the PPP and ensuring that the difference between the two should not be running at a loss for the City. Should there be an affordability gap as identified in the budget, such should be funded from identified savings.

65.3 The GPT also want to raise concerns regarding the tedious and long period taken during the procurement process and need to stress the importance of curbing these delays and managing the escalation of project fees as well as interest rate changes between tendering and the delivery date of the project.

65.4 The GPT take note of the omission on the City's side for not following PPP processes as set out in section 33 of the MFMA and subsequently failing to approach the GPT in time for TVRs. Condoning the City's departure in terms of section 170 of the MFMA, does however, fall outside the GPT's jurisdiction and may only be considered by the National Treasury. We note that the PPP Agreement has been completed and signed and hence the TVRs will follow suit."

66] Apparent from the above, it is clear so it was argued that:

66.1 the tender process was unlawful in many respects;

66.2 there was no proper compliance with the provisions of section 33 of the MFMA.

67] The plaintiff should have cancelled the tender process and should not have concluded the PPP Agreements with the defendant if it had properly

considered and taken into account what is stated above in Gauteng Provincial Treasury's letter.

68] In a further letter dated 26 November 2015, the Department of Cooperative Governance, which is the National Department responsible for local government affairs highlighted the following:

"The department notes that the PPP process has reached an advanced stage, and before providing my department's views and recommendations, it is important to bring to your attention the guidelines on Municipal Service Delivery and PPP.

69] In terms of these guidelines, we note the attached views and recommendations from the National Treasury. However, the city is also required to seek comments from the department as well as the public on the feasibility study of the project and the procurement process followed.

70] The department was not afforded the opportunity to make these comments and as a result; these views and recommendations are limited to fulfilling the requirements of section 33 of the MFMA with regards to contracts in excess of three years as quoted in paragraph 1 of your letter."

71] Premised on what has been alluded to above, counsel had argued that there was no proper compliance with the provisions of section 33 of the

MFMA as stated in the two letters mentioned above. It follows that the plaintiff did not have the necessary authority and powers to conclude the PPP Agreements.

Alleged partnership with Imperial Fleet Management

72] In its letter dated 13 October 2014, the plaintiff made it clear that the defendant's appointment "as a preferred bidder is based on the strength of your partnership with Imperial Fleet Management."

73] This stance adopted was based on an impression created by the first defendant in its tender documents, i.e. that it was in a partnership with Imperial Fleet Management ("IFM") when in fact there was no such partnership.

74] The plaintiff awarded the tender to the defendant on the basis of false information provided to it by the defendant. For this reason, the tender ought not to have been awarded to the defendant and the PPP Agreements ought not to have been concluded with the defendant.

75] In a letter dated 27 January 2015, the plaintiff's previous manager, Mr Jason Ngobeni acted ultra vires and unlawfully. Therein, he advised the defendant that:

"… your proposal to supply fleet vehicles and fleet-related services … to the City of Tshwane under contract number CB54/2013 has been amended as per your request on your negotiation letter dated 18 December 2014.
This means that the condition in your original appointment letter, subjecting your appointment to the strength of your partnership with Imperial Fleet, shall be read as deleted."

76] There exists a blanket prohibition against the amendment of proposals after they had been submitted. In this regard, paragraph 8.2 of the request for proposals provides that:

"*No Bidder shall be allowed to amend a Submission."*

77] In this regard, it follows that Mr Ngobeni had no powers to override the terms and conditions of the request for proposals.

78] Insofar as the defendant was appointed "based on the strength of your partnership with Imperial Fleet Management", which partnership did not exist on the date of appointment, there was no legal basis to change the very basis on which the defendant was appointment and still keep its appointment.

79] Further, insofar as the defendant was appointed on the strength of the alleged partnership, its appointment must have come to an end as soon as its very basis for it was removed.

The proceedings of the Executive Acquisition Committee

80] The plaintiff's Executive Acquisition Committee ("the EAC") considers the reports of the bid evaluation committee and bid adjudication committee and then makes the final decision as to the award of tenders.

81] According to the notice of the EAC's meeting of 20 June 2014, the committee has eight members and its' quorum at least four members.

82] The minutes of the meeting of the EAC held on 20 June 2014 reflect that only three members were present at that meeting. The EAC did not quorate when it took the decision to appoint the defendant.

83] It follows in the absence of a quorum that the EAC was not competent to make the decision to award the tender to the defendant and its decision is therefore unlawful and the resultant PPP Agreements are liable to be set aside.

Fraudulent documents

84] In its tender documents, the defendant fraudulently represented that it had a relationship with IFM and that IFM would provide it with support for purposes of executing the tender in the event that the tender was awarded to it.

85] In support of the above representation, the defendant relied on a letter dated 4 November 2011. In this letter, a false impression is created that IFM and the defendant have "entered into an exclusive joint venture" for the purposes of supplying and maintaining vehicles to provincial and local governments and that the defendant holds 75% of the shareholding in that joint venture.

86] The aforesaid letter purports to have been issued by Philip Michaux, chief executive officer of Imperial Automative Retail. This impression is false.

87] In the letter, Philip Michaux said that:

> "I neither authored nor authorized the issuing of the letter dated 4 November 2011, on an Imperial Group Limited letterhead, addressed to the MGOC. I verified and confirmed this with Mr. Pieter Jacobs, our internal legal counsel, who confirmed no knowledge of the aforementioned letter.

The letter dated 4 November 2011, which purports to have been authored by myself on behalf of the Imperial Group Limited, did not, according to my knowledge, originate from Imperial Group Limited."

88] In another letter submitted by the defendant with its tender documents, which letter purports to come from Hydro Plant (Pty) Ltd ("Hydro Plant") a further false impression is created that Hydro Plant "is pleased to provide preferential support to Imperial Fleet Management … and the Moipone Group, for the City of Tshwane vehicle tender CB54/2003, and confirms its commitment and support in the provision of vehicles, spare parts and related services."

89] In the aforesaid letter, it is stated therein that Hydro Plant will provide, amongst others, the following products and services:

89.1 Vehicles at a maximum discounted rate.

89.2 Spare parts at a discounted rate.

89.3 Prioritization of IFM's orders for stock and spare parts at all times and preferential stock allocation.

89.4 Authorisation of the plaintiff's staff to attend master technician training and provision of the training at a discounted rate.

89.5 Special tools and diagnostic equipment and workshop manuals at very discounted rates.

90] Mr. Jaco Bezuidenhout of Hydro Plant testified that he did not issue the letter and that the signature thereon appears to be forged and that Hydro Plant does not lease or sell vehicles or sell spare parts.

91] The Hydro Plant and the IFM documents referred to above which the defendant submitted to the plaintiff in support of its bid are therefore fraudulent documents and the submission of such documents justifies the relief which the plaintiff seeks in this declaration because the plaintiff's decision to award the tender to the defendant was influenced by amongst others these documents.

There was no unreasonable delay in bringing the review application.

92] The present review proceedings were instituted by way of motion proceedings in April 2017.

93] In April 2019, this Court ordered that the review proceedings be referred to trial and that this process be commenced by the filing of a declaration.

94] The date on which the plaintiff delivered its declaration in 2019 counsel had argued was accordingly not the date on which the present review proceedings were instituted. The proceedings were instituted in April 2017.

95] Furthermore, at all material times before amending its plea in March 2022, the defendant did not object to this Court's jurisdiction to entertain the present review proceedings by virtue of the alleged inordinate delay.

96] The bringing of the present review proceedings was triggered by the false and fraudulent pretences under which the waiver referred to above was procured.

97] The plaintiff only became aware of the fraudulent and false pretences under which the waiver was procured when it received the defendant's urgent application under case number 2017/13874 in February 2017.

99] It is the plaintiffs' case that prior to the aforesaid application being issued that its council did not know that Ngobeni had purportedly waived compliance with the suspensive condition in clause 2.1.1 of the PPP Agreements.

100] Further that the plaintiff's council did not know that Ngobeni purportedly extended the period of 90 days provided for the fulfilment of

the suspensive conditions in clause 2.3 of the PPP Agreements to 180 days and that the plaintiff's council did not authorise Ngobeni to do any of this.

101] It is the plaintiff's case that Ngobeni only had authority to sign the PPP Agreements and nothing more. He became functus officio on the matter after signing and had to obtain further authorisation from the plaintiff's council if he needed to amend the PPP Agreements and even then, after following the prescribed amendment procedure. Ngobeni did not seek and was not given further authorisation.

102] In a letter dated 20 January 2017 the plaintiff's attorneys enquired from the defendant about the fulfilment of the suspensive conditions but the defendant did not respond positively to the aforesaid letter which resulted in the plaintiff remaining unaware as far as the fulfilment of the suspensive condition was concerned.

103] If one has regard to the waiver document, it says that enquiries about it must be directed to Miss Ninette Botha. When Miss Ninette Botha was contacted about the waiver, she advised that she did not know anything about it and that she did not even prepare the waiver document on behalf of Ngobeni.

104] It is the plaintiff's case therefore that Mr. Ngobeni concluded the waiver agreement during his last days in office and did so in a manner which was not transparent.

105] As mentioned, the plaintiff was also not aware of the amendment to the PPP Agreements dated 22 May 2016. This was also procured by Ngobeni in a manner which was not transparent, and which was not authorised by the plaintiff's council.

106] At the time when the plaintiff's council authorised the conclusion of the PPP Agreements, it was made to believe that the tender process was valid and lawful when in fact it was not so. Had council been made aware of the true position, it would not have authorised the conclusion of the PPP Agreement if it knew the truth.

107] It is so that the council learnt the true position about the unlawfulness of the award of the tender and the conclusion of the PPP Agreements at a much later stage. This late knowledge of its unlawfulness does not justify the refusal of the relief which it seeks in this matter.

108] For this reason, counsel for the plaintiff had argued that the Court should look at the interests of the plaintiff as an organ of the State and of the public for whose benefit public procurement contracts are concluded.

109] Counsel, had further argued that the Court should not punish the plaintiff and the public for whose benefit public procurement contracts are concluded simply on the basis that people who were employed by the plaintiff committed the conduct which is complained of in the present review proceedings. Doing so would result in organs of the State not being given the relief to which they are lawfully entitled in circumstances where public procurement contracts were deliberately concluded in contravention of applicable laws and the unlawful conduct of its officials hidden away from those who have the necessary powers to take decisions to institute proceedings such as the present.

110] When the interests of the plaintiff and the public for whose benefit the PPP Agreements were concluded are taken into account, the Court cannot then punish the plaintiff by refusing to grant it relief in circumstances where the true facts were simply hidden from the plaintiff's council and the plaintiff's council was clearly given false information by its officials.

111] As the defendant was a party to the issues complained of it should not benefit by having these proceedings dismissed due to the alleged delay in instituting it, as allowing the defendant to benefit from a dismissal of the present review application would create a wrong impression that the defendant had no role to play in the irregularities complained of and that it is permissible for private parties such as the defendant to be involved in

the irregularities complained of and later, when challenged, be allowed to rely on the alleged delay in instituting proceedings such as the present.

112] This would result in organs of the State being reluctant to approach the Court to resist the enforcement of public procurement contracts which were concluded in contravention of applicable laws simply because they became aware thereof long after they had been concluded and after their implementation had commenced despite the financial prejudice to the public purse and the fact that the other contracting party participated in the irregularities complained of.

113] It is for these reasons that counsel had argued that there was no unreasonable delay in instituting the present review proceedings and that the fraudulent conduct and documents justifies the Court overlooking any delay which may be alleged in bringing these proceedings. In addition, the plaintiff has made out a strong case for the relief which it seeks which justifies overlooking any delay which may be relied upon by the defendant.

114] In the event that it is found that the plaintiff delayed the institution of the review proceedings, then in that event, the plaintiff pleads that the delay be overlooked taking into account what is stated above and the following factors:

114.1 The award of the tender which gave birth to the conclusion of the PPP Agreements was induced by fraudulent misrepresentations and this ought not to be rewarded by refusing to entertain this application.

114.2 The true facts on the basis of which the plaintiff now seeks the relief which it seeks were deliberately hidden from the plaintiff's council and the plaintiff's council would not have authorised the award of the tender to the defendant and the conclusion of the PPP Agreements.

114.3 The plaintiff has provided a full and reasonable explanation for the delay.

114.4 The defendant has not been prejudiced by the delay and will still not be prejudiced if the delay is overlooked.

114.5 The award of the tender and the conclusion of the PPP Agreements in issue was induced by fraud and misrepresentation by the defendant in its tender documents and it ought not to benefit from this by having this review application dismissed due to the alleged inordinate delay in instituting it.

114.6 The defendant ought not to be allowed to benefit from an unlawful award tainted by irregularities and fraud to which it was a party.

114.7 The plaintiff has reasonable prospects of success in obtaining the relief which it seeks.

114.8 The defendant has been aware of the fact that the plaintiff seeks to set aside the PPP Agreements even before the present review application was instituted and cannot rely on the finality of the decision sought to be reviewed and set aside in circumstances where it knew that the plaintiff sought to set it aside but persisted on enforcing the PPP Agreements.

114.9 It is in the interests of justice that the delay be overlooked in the light of the above and due to the fact that the law does not recognise contracts the conclusion of which was induced by fraud.

114.10 Refusing to overlook the delay will only serve to discourage organs of the State from discharging their constitutional duty of setting aside unlawful conduct due to the fact that fraud and other irregularities are only discovered long after the relevant decisions have been taken and implemented.

Just and equitable remedy

115] In addition to the above grounds the plaintiff further contends that it would also be just and equitable to grant all the relief which the plaintiff seeks for the following reasons:

115.1 The defendant itself was a participant in the unlawful activities referred to above.

115.2 The defendant knew that:

115.2.1 it did not qualify to be awarded the tender;

115.2.2 the suspensive conditions in clause 2 of the PPP Agreements were not fulfilled and they were not lawfully waived;

115.2.3 it did not submit all the prescribed returnable documents;

115.2.4 it did not in fact have a partnership with IMF and Hydro Plant;

115.2.5 the plaintiff would rely on the aforesaid fraudulent documents and it wanted the plaintiff to rely thereupon in arriving at the decision to award the tender to it;

115.2.6 the tender was awarded outside its validity period;

115.2.7 it did not extend the validity period of its bid;

115.2.8 it was not entitled to amend its bid long after the closing date for the submission of bids;

115.2.9 its appointment lapsed long before the PPP Agreements were concluded and that it was no longer entitled to conclude such agreements.

116] Section 172 of the Constitution provides that:

"(1) When deciding a constitutional matter within its power, a Court –

(a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and

(b) may make any order that is just and equitable, including –

(i) an order limiting the retrospective effect of the declaration of invalidity; and

(ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect."

117] The "order that is just and equitable" contemplated in section 172 of the Constitution can only be granted after the order of constitutional invalidity has been granted.

118] In the present case, the plaintiff seeks an order directing the defendant to repay the profits which it has earned in terms of the PPP Agreements as such order it argued will be just and equitable in the circumstances of this case because:

118.1 the agreements were concluded pursuant to an unlawful and unconstitutional process;

118.2 the defendant did not qualify to be awarded the PPP Agreements;

118.3 the tender process was tainted by fraud and was in contravention of the Constitution and the MFMA;

118.4 the defendant does not have a right in law to benefit from an unlawful contract and to keep the profits which it has earned in terms of the PPP Agreements the award and conclusion of which is unlawful and unconstitutional.

119] It is on this basis that counsel for the plaintiff had argued that the review relief, and the setting aside of the PPP Agreements would be of

academic interest only if it is not accompanied by an order directing the payment to the plaintiff of all the profits made in terms of the PPP Agreements. In fact, the review relief and the setting aside of the PPP Agreements will be of no practical and meaningful effect if the defendant remains in the same position as if nothing has happened.

120] To allow the defendant to retain all the profits it earned in terms of the PPP Agreements would defeat the whole purpose of judicial review and setting aside of decisions to award procurement contracts because such reviews would not bring any meaningful remedies to organs of the State such as the plaintiff in proceedings such as the present.

121] The award of the PPP Agreements to the defendant was, amongst others, intended to save the plaintiff costs, this is not what has happened and the defendant financially benefitted from this situation. For this reason, counsel had argued that the defendant cannot be entitled to retain the profits which it earned from agreements which did not achieve their intended purposes.

122] To date the defendant has now been paid in excess of an amount of R 850 million purportedly in terms of the PPP Agreements in circumstances where the combined value of the PPP Agreements does not even exceed R 700 million.

The position of Absa Vehicle Management Solutions (Pty) Ltd

123] It is common cause that after the conclusion of the PPP Agreements, the defendant entered into the following agreements with Absa Vehicle Management Solutions (Pty) Ltd ("AVMS") in terms of which it procured vehicle finance to enable it to comply with its obligations in terms the PPP Agreements ("the finance agreements") namely:

123.1 Operating Rental Master Agreement with Full Maintenance concluded on 23 August 2016 in respect of Category A Vehicles as defined in the PPP Agreement for Category A Vehicles concluded between the plaintiff and the defendant;

123.2 Operating Rental Master Agreement with Full Maintenance concluded on 23 August 2016 in respect of Category C Vehicles as defined in the PPP Agreement for Category C Vehicles concluded between the plaintiff and the defendant;

123.3 Cession Agreement concluded on 23 August 2016 in respect of Category A Vehicles as defined in the PPP Agreement for Category A Vehicles;

123.4 Cession Agreement concluded on 23 August 2016 in respect of Category C Vehicles as defined in the PPP Agreement for Category C Vehicles.

124] In terms of the finance agreements, AVMS acquired rights which were concluded to give effect to the PPP Agreements which are sought to be set aside in these proceedings.

125] As AVMS was not a party to the tender process pursuant to which the PPP Agreements were concluded between the plaintiff and the defendant and did not participate in the irregularities and fraudulent activities upon which the plaintiff relies for the relief which it seeks in these proceedings, it would not be just and equitable for AVMS to be deprived of the rights vested upon it in terms of the finance agreements if those agreements were set aside or if the setting aside of the PPP Agreements were to result in it losing the rights vested upon it in terms of those agreements.

126] For the above reasons counsel had argued that in the event that the relief which the plaintiff seeks is granted, then in that event, the rights vested upon AVMS in terms of the finance agreements ought to be preserved to enable AVMS to enforce such rights against the defendant. To the extent that AVMS also acquired any rights in terms of the PPP Agreements by virtue of it having provided vehicle finance to the defendant

in terms of the finance agreements, such rights, if any, also ought to be preserved in the event of the PPP Agreements being set aside.

DEFENDANTS CASE

Inordinate delay

127] The defendants before this court, has raised various defences. The most crucial being that there has been an unreasonable delay by the plaintiff in bring the present review proceedings in addition to the lack of evidence to support its cause of action.

128] On behalf of the first defendant it was contended that the City has delayed unreasonably in bringing its review proceedings. In addition, thereto the defendant had argued that the City has also failed to provide a full explanation for such delay.

129] Counsel for the defendant had further argued that the City was at all material times aware of the impugned decisions as and when such decisions were made i.e. on 29 September 2014 when Moipone was appointed as a preferred bidder[4] and on 24 March 2016 when it concluded the PPP Agreements with Moipone.

[4] September 2014 Appointment letter, page 016-1572 – 016-1573

130] Further that the City at all material times was aware of the alleged irregularities which it seeks to rely upon in these proceedings. By way of illustration:

130.1 This first ground of review advanced is based on the City's failure to award the tender before 10 November 2013 which is alleged to be the latest date by which the tender could lawfully have been awarded.[5]

130.2 From the statement of common cause facts and the evidence of Sithole,[6] it is clear that the City was aware of the relevant facts in regard to this ground of review by 11 November 2013 which was 3 years and five months before the launch of review application preceding the present action.

130.3 A further ground of review advanced is based on alleged defects in the composition of the Executive Acquisition Committee which took the decision to appoint Moipone on 20 June 2014.[7]

130.4 From the statement of common cause facts and the evidence of Sithole,[8] it is clear that the City was aware of the relevant facts in regard

[5] Amended Declaration, page 001-13 to 001-1, paras 4.7 to 4.8
[6] Statement of Common Cause facts 020-3 para 10; Sithole oral evidence 20 April 2023.
[7] Amended Declaration, page 001-22 to 001-23, paras 4.36 to 4.38
[8] Statement of Common Cause facts 020-3 para 10; Sithole oral evidence 20 April 2023.

to this ground of review by 20 June 2014 which was 2 years and ten months before the launch of review application preceding the present action.

130.5 Another ground of review advanced is based on the City's failure to conclude the PPP with Moipone by 31 March 2015 which is alleged to be the latest date by which the PPP could lawfully have been concluded.[9]

130.6 From the statement of common cause facts and the evidence of Sithole,[10] it is clear that the City was aware of the relevant facts in regard to this ground of review by 1 April 2015 which was more than 2 years before the launch of review application preceding the present action.

130.7 On behalf of the defendant it was therefore argued that the City did not provide a full and frank explanation for its delay. In its witness statements, it simply ignored its entire culpable delay prior to December 2016 / January 2017 when it first started trying to escape the PPP by unlawfully purporting to terminate the agreement. When pushed in cross examination, Mr Sithole was unable to provide any explanation for the City's failure to act years earlier than December 2016 on alleged irregularities in respect of which its responsible officials were fully aware of all facts.[11]

[9] Amended Declaration, page 001-15, paras 4.9 to 4.12
[10] Statement of Common Cause facts 020-3 para 10; Sithole oral evidence 20 April 2023.
[11] Oral evidence of Mr Sithole 20 April 2023.

130.8 The defendant also argued that Mr Sithole's attempts to blame the delay on the departure of City officials after August 2016 also rings hollow. In addition, the defendants had argued that the Supreme Court of Appeal has already criticised the City in this regard in a related case where it similarly sought to rely on the departure of these officials to justify an egregious delay in launching review proceedings.[12] In the circumstances, one might have expected the City not to advance the same spurious explanation again. It remains spurious for obvious reasons:

130.8.1. Firstly, most of the alleged irregularities upon which the City relies, took place long before August 2016, which was the earliest date on which any of the officials departed;

130.8.2 Secondly the City, made no attempt to contact these ex-officials to obtain relevant information from them when it finally realised in November /December 2016 that it wanted information about the procurement process, and did not offer any explanation for its failure to do so.

131] In respect of its delay, Mr Sithole and Mr Khumalo on behalf the CoT both testified that:[13]

[12] Altech Radio Holdings (Pty) Ltd and Others v Tshwane City 2021 (3) SA 25 (SCA) at para 23
[13] Oral evidence of Mr van der Schyff; Witness statement of Mr van der Schyff p 021-328

131.1 The City launched its review application in April 2017 but made no attempt to have the application referred to oral evidence or trial before July 2019, and

131.2 following the referral of the matter to trial in July 2019, the City launched its action on 1 October 2019, but it made no attempt to join ABSA as a defendant before ABSA applied to intervene in July 2022.

132] The manner by which the City thus prosecuted its review, Counsel had argued it was responsible for more than five years of further delays between April 2017 when it launched the review application and July 2022 when ABSA first was joined as a party in the proceedings. As the plaintiff also asserts alleged fraud in the granting of the tender, it was self-evident that motion proceedings were not to be the preferred choice of proceedings to embark upon.

133] Its delay in prosecuting its review after it launched proceedings is clearly a relevant factor that must be taken into account in the assessment of the delay. This was recently confirmed in Colvic Marketing and Engineering (Pty) Ltd v Minister of Public Works and Infrastructure and others, where it was held that:

133.1 The applicant did not launch a condonation application simultaneously with the review application. It was only filed much later.

133.2 Although the initial delay in launching the review application is not that excessive, this delay was significantly worsened by a further unreasonable delay in filing the replying affidavit.

133.3 Once the applicant was notified that its application was filed out of time, it ought to apply for condonation at that stage.

133.4 By the time the applicant decided to apply for condonation, a period of one and a half years of a three-year contract had already lapsed.

133.5 By the time the review application served before court on 22 April 2022, at best for the applicant, 5 months are left until the contract comes at an end by effluxion of time.[14]

134] In the Colvic decision so quoted, the court then noted the prejudice which emanated from the overall delay and held that:

"The prejudice that BSE and the Department will suffer in general as a result of all of these delays (the late filing of the review application and the substantial delay in filing a replying affidavit) is certainly not negligible, especially if regard is had to the time period that is left on the contract before it expires. Also, it is evident from the facts that approximately 14

[14] Colvic Marketing and Engineering (Pty) Ltd v Minister of Public Works and Infrastructure and others (21819/2020) [2022] ZAGPPHC 375 (9 June 2022) para 20 – 24 and 28

bridges have already been manufactured. But, apart from this, there is a need for finality in administrative acts…"[15]

135] The delay in launching this review proceedings also holds prejudice for Moipone. The prejudice for Moipone lies therein, that it is common cause that the PPP agreement was signed on 24 March 2016 and[16] that the PPP became unconditional on 10 August 2016 when the City Manager waived compliance with the last remaining suspensive condition in the PPP.[17]

136] In terms of clause 1.24 of the PPP, 11 August 2016 thus became the effective date of the PPP [18] and in terms of clauses 1.35 and 9.4 of the PPP, Moipone was given a three-month interim phase during which it was entitled to put in place systems to comply with the SLA and would not be expected to meet the service levels stipulated under the agreements.[19]

137] Under clause 1.54 of the PPPs, the service commencement date under the PPPs was also structured so as to allow a 3-month period between the initial vehicle orders under the agreement and the commencement of Moipone's services under the agreement.[20]

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[15] Colvic Marketing and Engineering (Pty) Ltd v Minister of Public Works and Infrastructure and others para 31
[16] Amended declaration p 001-8 para 3.1; Plea p 001-43 para A8(e)
[17] Letter of City Manager to Moipone 10 August 2016 pp 002-1319 – 1320. Oral evidence of Mr Sithole 20 April 2023.
[18] PPP p 002-72.
[19] PPP p 002-73 and p 002-83.
[20] PPP p 002-75.

138] Moipone therefore had to use those 3 months from 11 August 2016 to 10 November 2016 to roll out the procurement and systems necessary to deliver on a multi-billion, rand value PPP involving the provision and management of a fleet of over a thousand vehicles for the City over five years. This self-evidently involved expenditure and commitments running into hundreds of millions of rands. Therefore, at the time when the review application was ultimately brought in April 2017, Moipone had already bound itself to commitments necessary to roll out the vehicle fleet the PPP required it to provide to the City.

139] The delays by the City in launching this review, accordingly caused substantial prejudice to Moipone.

140] Mr van der Schyff, in addition confirmed the correctness of two spreadsheets that show that by the time of the launch of the review application, Moipone had already incurred vehicle finance commitments with outstanding amounts in excess of R331 million for vehicles necessary to perform the agreement;[21] and that Moipone had already invested approximately R90 million in systems and infrastructure necessary to perform the PPP agreements.[22]

[21] Oral evidence of Mr van der Schyff; Witness statement of Mr van der Schyff p 021-225 paras 13 and 14 read with Annexure JVDS2 p 021-328.
[22] Oral evidence of Mr van der Schyff; Witness read with Annexure AA54 pp 002-1321 to 002-1323.

141] When Mr Sithole testified, he rightly conceded in his oral evidence of 20 April 2023, that had the City acted promptly in bringing review proceedings on the basis of any one of a range of the grounds of review that it now alleges, it would have instituted those proceedings years before and Moipone would not have incurred any of that expenditure and those commitments it had incurred.

142] Mr Khumalo, however was unable to provide any admissible evidence in relation to the causes of action advanced by the City because, on his own admission, he has no personal knowledge of any of the facts relevant to these causes of action.

143] The same disability applies to the evidence of Mr Sithole – he bears no personal knowledge relevant to any of the causes of action advanced by the City.

144] It is only Mr Bezuidenhout who can shed some light on how the tender was awarded but his evidence is irrelevant to the tender award actually made by the City, because the services of Hydroplant do not relate to the Category A and Category C services in respect of which the City awarded the tender to Moipone. Moreover, Mr Bezuidenhout was at pains to emphasize that he did not allege that Mr Lebakeng or Moipone was responsible for the fraudulent Hydroplant letter about which he testified to.

145] Returning to the delay, the CoT relies entirely on statements made by Mr Lebakeng in his affidavit in the original review application and its proposition that the documents in the Rule 53 Record "speak for themselves".

146] As mentioned the City further delayed over four years in bringing its review proceedings, and there is no evidence before this Court providing any basis for the unreasonable delay by the City to be condoned.

147] The delays of the City in bringing the review proceedings have been compounded by its delays of another five years in prosecuting its review. So, as the matter now stands, the PPP Agreements are only a month away of having run their course in full and the City is effectively asking this Court to undo a contract that has been completed and in respect to which the City has been benefiting from Moipone's performance for over six years. In effect, the City is asking this Court to unscramble an egg that would have been years away from even being laid, but for its unreasonable delays.

148] On behalf of the second defendant it was argued that the CoT had numerous opportunities where it could have brought review proceedings before AVMS granted facilities to Moipone for the tender.

149] It is common cause that the CoT was aware of the alleged irregularities with the tender process from as early as 13 October 2014 when the CoT appointed Moipone as the preferred bidder for the tender.[23] However despite this knowledge, the CoT did nothing. This is when the delay period should be calculated from, i.e. October 2014.[24]

150] Further, when AVMS came on board as Moipone's financier, the CoT did not alert AVMS about the alleged irregularities of which it had known since it took the decision to appoint Moipone in October 2014, alternatively, at best for the CoT, when it concluded the PPP Agreements in early 2016.[25]

151] Instead, the CoT sat idly by and allowed AVMS to expose itself financially after it had given AVMS unequivocal assurances that it had complied with all its legal obligations in concluding the PPP Agreements.[26]

152] As a result of this, AVMS granted the facilities to Moipone. By this time, the CoT knew of the alleged irregularities. The CoT knew that AVMS was acting in consequence of the assurances it gave to AVMS.

[23] Caselines p020-3, statement of common cause facts (as agreed to between the parties), paras 10 – 10.2.
[24]See Buffalo City at para 49; and Cape Town City v Aurecon SA (Pty) Ltd 2017 (4) SA 223 (CC) at paras 41- 43.
[25] Caselines p020-3, statement of common cause facts (as agreed to between the parties), paras 10 – 10.2.
[26] Caselines pp020-184 – 020-193, annexures SF6 and SF7.

153] As a result of the CoT's silence and assurances given, AVMS continued to fulfil its funding obligations but has not received payment from the CoT since about January 2021. Instead of forewarning AVMS or dissuading AVMS from making any financial commitments, the CoT sat back and only instituted review proceedings (on 20 April 2017), almost three years after the decision in question was taken and almost 13 months after it concluded the PPP Agreements with Moipone.

154] The resultant effect of the CoT's inaction has left AVMS financially exposed and as a consequence of that, AVMS may lose a significant amount of money if the CoT succeeds with its relief. This potential loss could have been avoided had the CoT informed AVMS of its concerns regarding the alleged irregularities with the tender process and the conclusion of the PPP Agreements during 2016 when AVMS started negotiating the terms of the Vehicle Lease Agreements and the Initial Cession Agreements.

155] This would have allowed AVMS an opportunity to mitigate any potential adverse consequences of the possible review and setting aside of the PPP Agreements.[27] But instead, on 10 August 2016, the CoT allowed Moipone to provide AVMS with its acceptance letters regarding the validity of the PPP Agreement, and it said nothing to AVMS. It did not make any attempt to alert AVMS to any potential irregularities.

[27] See Altech Holdings at para 45.

156] Accordingly, counsel for the second defendant had argued that the CoT had ample opportunity to have brought its review application sooner. It did not do this. Instead, it unreasonably delayed in bringing these proceedings without a proper and reasonable explanation and it does not seek condonation for its unreasonable delay in bringing these proceedings as required in a legality review of this nature.[28]

157] In support of this stance adopted by the second defendant it paced reliance on the decision in Altech Holdings. In that case:

157.1 The Lenders (Absa and the Development Bank of Southern Africa (DBSA)) financed a broadband project for the City of Tshwane ("the City") following the award of a tender to Altech Holdings. The tender was published in 2014 and was awarded to Altech Holdings in 2015. Altech Holdings submitted its bid submissions on behalf of Thobela, a special purpose vehicle created solely for purposes of bidding for the tender and providing for the broadband project.

157.2 The Lenders were approached by Altech Holdings to provide funding to Thobela for the project. The Lenders were not involved in the tender process. They were, as in this case, innocent third parties.

[28] See for example Altech Radio Holdings (Pty) Ltd and Others v Tshwane City 2021 (3) SA 25 (SCA); Buffalo City Metropolitan Municipality v ASLA Construction (Pty) Ltd 2019 (6) BCLR 661 (CC); Notyawa v Makana Municipality and Others 2020 (2) BCLR 136 (CC); and State Information Technology Agency SOC Limited v Gijima Holdings (Pty) Limited 2018 (2) SA 23 (CC).

157.3 Before the City awarded the tender to Altech Holdings, it received a draft probity report, which identified concerns with the tender process. Despite this, the City proceeded with the tender process and awarded the tender to Altech Holdings.

157.4 In May 2016, the City concluded an agreement with Altech Holdings. This resulted in Altech Holdings and the Lenders concluding finance agreements for the broadband project. In August 2016, the City raised several irregularities with the tender process and the award of the tender. However, it did not say anything to the other parties including the Lenders about its concerns. The City did not give an indication to any of the parties that it intended on acting on its concerns by reviewing and setting aside the tender process and cancelling the agreements it concluded as a result.

157.5 The Lenders first learned of the City's concerns and intention to review and set aside the tender through media reports. When the Lenders enquired with the City about this, the City assured them that the tender process was valid and that the City had complied with all relevant legal requirements relating to the tender. The City went as far as providing the Lenders with an opinion to this effect. As a direct result of this, the Lenders advanced funds to Thobela for the broadband project.

157.6 Following this and without any warning to the Lenders, in August 2017, the City instituted review proceedings to review and set aside the award of the tender and all subsequent agreements that were concluded as a result.

157.7 The City was aware of the irregularities as far back as 2014, but it only launched review proceedings three years after it became aware of the irregularities. The City did not disclose its concerns to the Lenders before launching the review application. The SCA held that:

"The high court failed entirely to have regard to the position of the lenders. The lenders had no involvement until the award of the tender. They only became involved after Altech's appointment. There then followed extensive negotiations, before the Tripartite agreement was concluded. At no stage did the City disclose any concerns to the lenders. The City's failure to communicate with the lenders is important because in the event of a material adverse effect event, including the threatened cancellation of the tender or BOT agreement by the City, the lenders would have been entitled to refuse to extend further financing to Thobela. The City was aware of these terms affording the lenders protection but did nothing to alert them that it entertained concerns and was contemplating challenging the BOT agreement. The City thereby denied the lenders the opportunity to mitigate

the potential adverse consequences of the cancellation of the BOT or Tripartite agreements."[29]

158] The City did not have a proper explanation for the delay. The SCA found that the City had unreasonably delayed and had no proper explanation for its delay. The SCA held that:

"There appears to be no acceptable explanation for the City's excessive delay, as well as inconsistent and vacillating conduct, which has caused extensive hardship to the appellants and other interested parties. On the City's own version, the facts relevant to some of the grounds of review were known to the City and its new political masters long before the BOT agreement was even signed. The facts relevant to most of the other grounds of review were known to them before the rollout of funds on the project commenced in December 2016. It is not correct that a bright line can simply be drawn between what happened before the municipal elections and what happened thereafter."[30]

158.1 The SCA went on to find that:

"Given the excessive delay, the absence of a reasonable and satisfactory explanation for the delay, the unconscionable and highly prejudicial conduct

[29] Altech Holdings at para 42.
[30] Altech Holdings at para 50.

of the City and the lack of merit in the review the court below ought not to have condoned the delay."[31]

158.2 As a result, the SCA upheld the appellants' (Altech Holdings, Thobela and Absa's) appeal. The City later sought leave to appeal to the Constitutional Court but that application was dismissed.

159] In Newlyn Investments,[32] another case that involved Absa as an innocent third party that financed the transaction between Transnet and Newlyn Investments,[33] the High Court, per Victor J, found that Transnet's delay of three years before instituting review proceedings was excessive. The court found that Transnet did not provide 'a full and honest explanation for the delay' and that 'there is an inadequate explanation on the part of Transnet detailing on a point-by-point basis why the delay was not unreasonable'. [34] Despite being aware of the irregularities that plagued the transaction to which Transnet complained of in Newlyn Investments, Transnet allowed Absa to fund the transaction. 'Absa proceeded with the funding as it sought and obtained an unequivocal assurance from Transnet that the transactions were lawful.'[35]

[31] Altech Holdings at para 72.
[32] Newlyn Investments (Pty) Ltd v Transnet SOC Ltd and Another (11446/21) [2022] (27 January 2022).
[33] Newlyn Investments at paras 62.
[34] Newlyn Investments at para 70.
[35] Newlyn Investments at para 74.

160] Placing reliance on the above decisions, counsel had therefore argued that the CoT's conduct and delay in this matter is no different from that of the City in Altech Holdings and that of Transnet in Newlyn Investments. This Court is in agreement with this argument being advanced, i.e. that the delay has been excessive and unreasonable and the delay has not been adequately explained. Furthermore, albeit that the CoT was aware of certain alleged irregularities, it did nothing to forewarn the defendants to mitigate their potential losses and as things now stands the PPP Agreements has just about run its full terms.

161] This Court on the conspectus of evidence presented before it therefore concludes, that the CoT's only instituted review proceedings in April 2017, three years after the decision in question had been taken and thirteen months after the conclusion of the PPP Agreements. This delay has been unreasonable.

162] An organ of state that has further unreasonably delayed instituting review proceedings must provide a full explanation for that delay that covers the entire period of the delay.[36] The "clock" so to speak starts running from the date the applicant became aware or reasonably ought to

[36] See also Tasima 1 at para 153 and Gijima at para 45.

have become aware of the action taken".[37] If the explanation for the delay is reasonable, the court can overlook the delay.[38]

163] Herein, the CoT contends that its delay in bringing these proceedings is not unreasonable. This contention is plainly wrong, and this Court cannot agree with this stance adopted.

164] In addition, the CoT does not have a reasonable explanation that covers the entire period of the delay. The decision to award the tender to Moipone as the preferred bidder was taken in 2014, almost three years before the CoT brought its review. The CoT's explanation for the delay should start from the period, i.e. the date it became aware of the decision taken. Its explanation for this period starting from 2014 is woefully inadequate. In fact, there is no explanation at all. There are whole passages of time during which absolutely nothing was done with regard to the impugned tender and for which there has been no explanation provided.

165] It matters not that the CoT at some point had argued that the changes in the political administration within the CoT, from the African National

[37] Buffalo City at para 49.
[38] See also Wolgroeirs Afslaers (Edms) Bpk v Munisipaliteit van Kaapstad 1978 (1) SA 13 (A) at 39C – D and Gqwetha v Transkei Development Corporation Ltd 2006 (2) SA 603 (SCA), para 31. Contrast with Notyawa v Makana Municipality and Others 2020 (2) BCLR 136 (CC) at para 51 where the delay was not overlooked despite the explanation.

Congress to the Democratic Alliance during August 2016 explain the delay (if any) on its part.[39]

166] In fact, this argument about a change in political governance within the CoT is unsustainable both at the level of fact and at the level of law and was successfully rejected in Aurecon[40] wherein the Constitutional Court rejected a similar explanation that was advanced by the City of Cape Town. The Constitutional Court there held that:

"The City's application was nearly a year late. The City was questioned during the hearing specifically on the seven-month delay from 17 January 2012 to 29 August 2012. The former was the date on which Aurecon was informed that a pending appeal against the award of the tender had been resolved. The latter was the date on which the City tabled the award for consideration in terms of section 33 of the MFMA. Its counsel could not offer any reason for the delay other than ascribing it to bureaucratic governmental processes. Suffice to say, this explanation is unsatisfactory."[41]

[39] In its absolution heads of argument, the CoT relied on the judgment of this Court in City of Tshwane Metropolitan Municipality and Others v New GX Enviro Solutions and Logistics [2021] ZAGPPHC 390 of 21 June 2021 para 22 to bolster its contention (Caselines, CoT' absolution heads, pp023-145 – 023-146, para 3.7.)
[40] Cape Town City v Aurecon SA (Pty) Ltd 2017 (4) SA 223 (CC).
[41] Aurecon, para 48.

167] In Altech the SCA rejected the same argument about political changes in administration at the City that the City advanced in that matter. The SCA found that:

"[25] I cannot agree with the learned judge. At the level of law, a change in political control of an organ of state, such as the City, is irrelevant. The City is a single juristic entity. It accepts that the change in political administration did not make it a different juristic entity. In any event, at the level of fact, as I shall show, in this case much of the evidence relied on was known (or ought to have been known) to the DA well before it assumed control of the City."

168] For the above reasons, counsel had argued that there is no real explanation for the CoT's excessive and unreasonable delay, which has the potential of causing extensive hardship to AVMS.[42] I agree with this.

The Legal Principles

169] It is trite that a review must be brought without undue delay and that, if a review is brought after unreasonable delay, the review will be dismissed

[42] See Altech Radio Holdings at para 50. See also Valor IT v Premier, North West Province and Others [2020] 3 All SA 397 (SCA) at para 30.

on that ground alone unless the plaintiff or applicant persuades the Court to condone the unreasonable delay.[43]

170] In exercising this discretion to condone an unreasonable delay, prejudice to the respondent is an important consideration.[44]

171] It is a plaintiff / or applicant in a review who carries the onus not only in respect of proving that its delay was reasonable, but also in respect of proving facts which would justify condonation of an unreasonable delay.[45]

172] In relation to the *onus* of proving that there has not been an unreasonable delay, applicants/plaintiffs must show that they did not take an indifferent attitude but rather took all reasonable steps available to them to investigate the reviewability of administrative decisions adversely affecting them as soon as they became aware of the decisions.[46]

173] So the delay is measured from the point at which the applicant/plaintiff could reasonably have established the facts giving rise to

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[43] Altech Radio Holdings (Pty) Limited and Others v City of Tshwane Metropolitan Municipality para 18.
[44] Wolgroeiers Afslaers (Edms) Bpk v Munisipaliteit van Kaapstad 1978 (1) SA 13 (A) at 39E- 41D. Yuen v Minister of Home Affairs 1998 (1) SA 958 (C) at 968H-J. Radebe v Government of the Republic of South Africa and Others 1995 (3) SA 787 (N) at 802H-803D. Schoultz v Voorsitter, Personeel-Advieskomitee van die Munisipale Raad van George 1983.
(4) SA 689 (C) at 703A-C.
[45] Gqwetha v Transkei Dev Corp Ltd 2006 (2) SA 603 (SCA) at para 14.
[46] Associated Institutions Pension Fund v Van Zyl 2005 (2) SA 302 (SCA) para 51.

the reviewability of the decision, and not only when it became aware that the decision was reviewable.[47]

174] Thus even if the Court concludes that the applicant/plaintiff would have a case for review on the merits, the Court may refuse to condone the unreasonable delay.[48]

175] In Khumalo and Another v Member of the Executive Council for Education: KwaZulu Natal the rational for the delay rule is best explained as follows:

"This requirement is based on sound judicial policy that includes an understanding of the strong public interest in both certainty and finality, as people may base their actions on the assumption of the lawfulness of a particular decision, whereas the undoing of the decision threatens a myriad of consequent actions.

In addition, it is important to understand that the passage of a considerable length of time may weaken the ability of a court to assess an instance of unlawfulness on the facts. The clarity and accuracy of decision-makers' memories are bound to decline with time. Documents and evidence may be lost, or destroyed when no longer required to be kept in archives. Thus, the

[47] CCT v Aurecon SA (Pty) Ltd 2017 (4) SA 223 (CC) at paras 41 to 43.
[48] Madikizela-Mandela v Executors, Estate Late Mandela and Others 2018 (4) SA 86 (SCA) at paras 26 to 30.

very purpose of a court undertaking the review is potentially undermined where, at the cause of a lengthy delay, its ability to evaluate fully an allegation of illegality is impaired"[49]

176] The delay rule is further designed to ensure certainty and to promote legality. As it was put in Gijima:[50]

"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:

'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 on the decision but also for the efficient functioning of the decision-making body itself'."[51]

177] The rule of law is a foundational value of the Constitution. One of the central attributes of the rule of law is predictability and certainty.[52]

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[49] Khumalo and Another v Member of the Executive Council for Education: KwaZulu Natal 2014 (5) SA 579 (CC) para 46 – 48.
[50] State Information Technology Agency SOC Limited v Gijima Holdings (Pty) Ltd 2018 (2) SA 23 (CC).
[51] Gijima at para 44.
[52] Mighty Solutions t/a Orlando Service Station v Engen Petroleum Ltd and another 2016 (1) SA 621 (CC) at para 38; and Oudekraal Estates (Pty) Ltd v City of Cape Town and others 2004 (6) SA 222 (SCA) at para 37.

178] In the present matter, there is no indication that the CoT made any attempt at instituting review proceedings with the required speed in order to ensure that any alleged irregularities relating to the tender and the conclusion of the PPP Agreements are resolved immediately to ensure certainty and finality. On the contrary, the CoT took its time before it brought these review proceedings.

179] Finally, when it comes to condonation of the unreasonable delay of an organ of state that seeks to review its own decisions, the Courts will be less inclined to grant condonation because an organ of state has a higher duty to comply with legal requirements for review proceedings and, unlike individual litigants, will have the information and resources to enable it to comply with its obligations to ensure that a "self-review" is brought without unreasonable delay.[53]

180] Having regard to the legal principles applicable, this Court is not persuaded that it can overlook the CoT's inordinate delay in instituting the review proceedings. The CoT has not offered a good explanation as to why it delayed given the number of opportunities it had at launching review proceedings before 20 April 2017. Its failure in taking steps earlier to review

[53] Altech Radio Holdings (Pty) Ltd v Tshwane City 2021 (3) SA 25 (SCA) at para 71.

the irregularities has simply not been adequately explained and for this reason this Court cannot come to its assistance.

181] In addition, this Court further concludes that there are also no compelling reasons for this Court to exercise its discretion in the CoT's favour. The excessive delay and the absence of a reasonable and satisfactory explanation for the delay is a ground for this Court to also consider dismissing the CoT's review.[54]

182] The refusal by this Court to condone the unreasonable delay to my mind is dispositive of the entire review, save for the following few paragraphs which needs mentioning in respect of the lack of evidence.

Lack of Evidence

183] The plaintiff, bears the *onus* of proving the merits of its causes of action.

184] In relation to the *onus* carried by the City on the merits, the City bears an additional burden of the evidentiary presumption created by the maxim

[54] See Altech Radio Holdings at para 72 where the SCA held:
"Given the excessive delay, the absence of a reasonable and satisfactory explanation for the delay, the unconscionable and highly prejudicial conduct of the City and the lack of merit in the review the court below ought not to have condoned the delay."

omnia praesumuntur rite esse.[55] This presumption operates to require a Court to presume the validity of any administrative act (in our case the award of the tender, and the extension and waiver of the suspensive conditions) unless the party challenging that validity has discharged the *onus* of showing that the administrative acts were invalid.

185] In discharging its *onus*, the plaintiff relied amongst others on the evidence of Mr Tshepo Sithole ("Mr Sithole"), one of the CoT's Legal Advisors and Mr Musa Khumalo ("Mr Khumalo"), the CoT's Group Head: Shared Services, who both conceded,[56] the matter is now being heard in circumstances where:

185.1 The PPP contract which the City seeks to have set aside, has effectively run its full course and will be completely finalised shortly;

185.2 The City is now bound by an order issued by this Court on 24 January 2023 to pay into escrow all amounts due and payable in respect of services furnished by Moipone pending finalisation of a parallel dispute between Moipone and the Second Defendant ("ABSA") over who is entitled to the proceeds of such payments;

[55] ACSA Ltd v Airport Bookshops (Pty) Ltd t/a Exclusive Books 2017 (3) SA 128 (SCA) at para 58 (Caselines 023-327).
[56] Oral evidence of Mr Khumalo on 19 April 2023 and Mr Sithole on 20 April 2023.

185.3 Within a month's time or so, the PPP will have run its course completely and the City will have paid into escrow all amounts invoiced by Moipone and due under the PPP to whichever of ABSA and Moipone is entitled to those amounts.

186] The witnesses further testified,[57] that over the last six years, the City has received the services provided by Moipone under the PPP, that in this period, it has not once instituted any notice of breach to Moipone, but from January 2021, it stopped paying Moipone any amounts in respect of the services that Moipone continued to provide it dutifully under the PPP.

187] They further testified, that even after this Court issued an order directing it to pay into escrow all amounts outstanding in respect of Moipone invoices (including an admitted figure of R111 500 000),[58] it failed to do so until April this year, after Moipone attached its bank account in execution of the order.

188] It is important to note that, evidence in trial proceedings must be led "in the ordinary way" i.e. through viva voce evidence and by persons who have knowledge of the facts to which they are testifying to. [59]

[57] Oral evidence of Mr Khumalo on 19 April 2023 and Mr Sithole on 20 April 2023.
[58] Court order p 011-6 para 5.1.
[59] Lekup Prop Co No 4 (Pty) Ltd v Wright 2012 (5) SA 246 (SCA) at para 32.

189] In addition, testimony that is based on documents that are not authored by the witnesses and to which they have no personal knowledge amounts to hearsay evidence, unless the author of such documents is either called or same is handed in by agreement between the parties.

190] A matter once referred to trial such as the present matter, further means "there is no longer an application before the court.[60] The process of discovery and leading of evidence must then accord with action proceedings.

191] To the present matter at hand, there was an agreement that witness statements filed in the present proceedings will stand as evidence in chief. However, there was no agreement as to the admissibility of affidavits filed in the review application by persons other than the witnesses who subject themselves to cross examination at the present trial. Absent such an agreement, those affidavits, accordingly remain hearsay and are inadmissible save to the limited extent that hearsay evidence may be admissible (eg. hearsay admissions are admissible against the party making the admission).

192] In *casu*, there was also an agreement that documents discovered by the parties or attached to witness statements or to the statement of agreed facts between the City and ABSA defendant are what they purport to be.

[60] Geeco Investments (Pty) Ltd v Gourmet Cape Distributors (Pty) Ltd para 14.

This agreement merely provides for prima facie authentication of the documents. It expressly does not allow those documents to be used as proof of their contents.

193] Before this Court it is common cause further that the Rule 53 record in the present case does not include a complete record of all the documents considered or generated by the City in the course of taking the decisions brought under review in the present proceedings.

194] Mr Sithole and Mr Khumalo had no personal knowledge relevant to the causes of action for review advanced by the City. By their own admission, Mr Khumalo and Mr Sithole have no personal knowledge of facts relevant to the procurement process or to the decisions of the City to award the tender for category A and C vehicles to Moipone and to conclude the PPP agreements.

195] Absent such personal knowledge, it means that the City cannot, for the purposes of its review cause of action, rely either on the truth of the contents of any of the documents to which Mr Khumalo or Mr Sithole refer, or on the proposition that the absence of other documents in the record of these proceedings mean that no such other documents currently exist or did exist at the time of the relevant acts.

196] In his witness statement, Mr Sithole states, inter alia, that:

196.1 he had been assigned to deal with this matter since disputes between the CoT and Moipone arose in 2016;[61] and

196.2 the evidenced contained in his witness statement 'deals with the timing of these proceedings i.e., the fact that there was no unreasonable delay in the instituting these proceedings.'[62]

196.3 Throughout his cross-examination by counsel for Moipone, when asked about the various periods of when the CoT could have brought these proceedings before April 2017, Mr Sithole made contrived attempts at rationalising why the CoT was unable to bring the proceedings much earlier because, so he contends, the officials in charge were not aware of the irregularities at the time when they occurred.

197] One of the grounds of review that the CoT relies on is that the CoT failed to award the tender to Moipone no later than 10 November 2013 before the tender the validity period had lapsed.[63]

198] When counsel for Moipone probed Mr Sithole about this during cross examination, asking if the CoT was aware of this irregularity on 10

[61] Caselines 018-5, para 1.1.
[62] Caselines 019-6, para 1.3.
[63] Caselines pp016-53 – 016-54, CoT's amended declaration, paras 4.6 – 4.8.6.

November 2013 but awarded the tender to Moipone nonetheless, Mr Sithole conceded this aspect.

199] In addition to this, counsel for Moipone asked Mr Sithole whether, if the CoT had brought review proceedings at this time, it would have resulted in Moipone not incurring the costs of supplying the vehicles to the CoT and AVMS would have not concluded the Vehicle Lease Agreements with Moipone in order to finance the transaction. This too Mr Sithole conceded this aspect under cross examination.

200] This is a fatal concession by the CoT, and demonstrates that the CoT did in fact delay in bringing these proceedings and that it could have brought these review proceedings from as early as November 2013. However, the CoT did not do this, it waited until April 2017, almost four years since it became aware of the irregularities in the tender process, to initiate these proceedings.

201] In addition to the above concession, Mr Sithole also made a further fatal concession during cross examination in that Moipone delivered the vehicles to the CoT pursuant to the PPP Agreements and after concluding the Vehicle Lease Agreement and Cession Agreements with AVMS for AVMS to finance the transaction.

202] From his testimony it is evident that since January 2021, the CoT has not made any payment to Moipone in relation to the vehicles Moipone delivered to the CoT.

203] From January 2021 to date, the CoT has continued to benefit from the vehicles delivered by Moipone without making any payments to Moipone. This was done at the detriment of Moipone (and AVMS as the party that financed the transaction).

204] Ultimately, Mr Sithole effectively conceded that the CoT unreasonably delayed in bringing these proceedings and that had the CoT brought these proceedings sooner, none of the expenses that have been incurred by Moipone and AVMS would have been incurred. The bulk of the expenditure could have been avoided.[64]

205] The plaintiff further, despite having had the opportunity to subpoena any of its former employees with direct personal knowledge of the facts relevant to the tender award, elected not to do so. It closed its case without any evidence from a witness other than Mr Bezuidenhout with direct personal knowledge relevant to any of the issues on the merits.

[64] See Altech Radio Holdings (Pty) Ltd and Others v Tshwane City 2021 (3) SA 25 (SCA) at paras 51 – 52.

206] In circumstances where the City elected not to lead any evidence of witnesses with direct personal knowledge of facts relevant to the pleaded issues on the merits, there was no obligation on Moipone to do so and the latter elected not to call Mr Lebakeng in light of the parallel litigation which is pending at the close of the plaintiff's case.

207] The plaintiff's lack of evidence as to the merits of its causes of action is further proof of its failure to have discharged its *onus*.

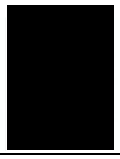
Absolution from the instance

208] At the close of the plaintiff's case the first defendant applied for absolution from the instance. This Court refused the application and informed the parties that it will deal with its reasons in this judgment. Given the reasons alluded to above and the conclusion reached in this judgment, it is unnecessary to allude to the reasons for the refusal of the absolution application.

ORDER

209] In the result, the CoT's action is dismissed with costs, including the costs of the review application which preceded it; such costs to include the costs of three counsel in respect of the first defendant and the costs of two counsel in respect of the second defendant.

210] The rights acquired by the second defendant in terms of the Public-Private Partnership Agreements concluded between the plaintiff and the first defendant on 24 March 2016 and the Operating Rental Master Agreements with Full Maintenance and Cession Agreements concluded between the defendants on 23 August 2016 are preserved and are not set aside.



C COLLIS J

JUDGE OF THE HIGH COURT

GAUTENG DIVISION

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Dates of Hearing:	17-21 April 2023
	24- 28 April 2023
Date of Judgment:	21 May 2024